SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JENNIFER G. SCHECTER** **PART** IAS MOTION 54EFM

Justice

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MBIA INSURANCE CORPORATION,

Plaintiff,

- v -

CREDIT SUISSE SECURITIES LLC, DLJ MORTGAGE CAPITAL INC, SELECT PORTFOLIO SERVICING INC,

Defendants.

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INDEX NO. 603751/2009

POST-TRIAL DECISION

This case involves mortgage loans that contributed to a crippling financial crisis over a decade ago after banks securitized residential mortgages that never should have been issued in the first place. Plaintiff MBIA Insurance Corporation (MBIA) is a monoline insurer[1] that, consistent with its obligations, indemnified residential mortgage backed securities (RMBS) investors for hundreds of millions of dollars of losses that they otherwise would have incurred after thousands upon thousands of recklessly-issued mortgages failed. In seeking to avoid its obligations, Credit Suisse, the bank that sponsored the transaction, offered hollow interpretations of applicable warranties that would render them valueless. In the face of incontrovertible evidence to the contrary, defendants' witnesses insisted that there was nothing wrong with the trust they securitized and that the staggering losses were simply due to an inherently risky investment based on second-lien

[1] Insurers such as MBIA are known as "monolines" because they only insure one line of business.

OTHER ORDER – NON-MOTION

loans. Thorough examination of the evidence, including hundreds of the securitized mortgage loans, proves defendants wrong.

Based on the parties' contract, MBIA is only entitled to "put-back" damages for breaches of warranties that had a material and adverse effect on its risk of loss. It convincingly proved a breach rate of 51.5%, establishing that more than half of the securitized loans were materially non-conforming. MBIA will be awarded compensation for those losses because, in insuring the RMBS, it did not assume the risk of loss that they posed. Otherwise, however, the damages it sustained stemmed from the very risk it agreed to bear and are not compensable.

Background

RMBS are bonds backed by pools of mortgages. The mortgages are originated or acquired by a structuring bank, which then sells them to a trust funded by certificateholders, who become debt holders of that trust. Certificateholders make money on the investment from payments of the underlying mortgages, assuming they are paid, or from an insurance company's payments. The trust is ordinarily managed by an independent trustee that, by virtue of a no-action clause, generally has the sole authority to assert claims for harm to the trust. But where, as here, some of the certificates are insured, the insurer is also given the right to pursue claims because, by paying out, it is equally harmed by the securitization of defective loans that did not conform to the trust's requirements.

MBIA is a financial guarantee insurance company. It issued irrevocable insurance policies that unconditionally guaranteed payment of principal and interest to certificateholders of the RMBS transactions. Insured certificateholders are entitled to be paid in full regardless of the performance of the RMBS. If the revenues are insufficient

MBIA must make up the shortfall. Insured certificateholders are thus indifferent to the ultimate performance of the RMBS and only assume credit risk on the insurer.

In virtually every RMBS transaction, the sponsor makes representations and warranties about the transaction itself and about the loans being sold to the trust.[2] Defendant DLJ Mortgage Capital, Inc. (DLJ), an affiliate of defendant Credit Suisse Securities (USA) LLC (CSS; collectively, Credit Suisse), was the sponsor of the RMBS trust at issue here--the Home Equity Mortgage Trust 2007-2 (the Transaction).

The Transaction, which closed on April 30, 2007, originally contained 15,615 closed-end second-lien residential mortgage loans with an aggregate outstanding balance of nearly $900 million. All but approximately 2,200 loans were originated in 2006, with the rest originated in 2007. And all but approximately 2,000 loans were originated by financial institutions other than Credit Suisse – that is, Credit Suisse purchased the loans from other originators to securitize them. CSS was the Transaction's underwriter.[3] Another Credit Suisse affiliate was the servicer.

The loans were securitized pursuant to a Pooling and Servicing Agreement dated as of April 1, 2007 (Dkt. 1862 [the PSA]). The PSA contains DLJ's representations and warranties about the loans and provides recourse to the trustee upon breach. The PSA also

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[2] Other parties, such as originators, also make representations. Here, the originators breached some of the representations that they made to Credit Suisse, which Credit Suisse invoked when it required them to repurchase those loans. Yet, despite being paid for those defective loans, Credit Suisse still kept them and still placed them in the trust. Remarkably, on some of the very loans that Credit Suisse itself claimed were defective (sometimes based on almost identical warranties), here, it takes the position that the loans are conforming.

[3] Another Credit Suisse affiliate was the depositor – an intermediary entity that acquires the mortgage pool and sells it to the trust.

provides that the warranties are for MBIA's benefit and that MBIA, as an intended-third-party beneficiary to the agreement, has the right to enforce them (*see id.* at 194).

After the 2008 financial crisis, loans representing 51% of the original loan balance in the trust defaulted and MBIA paid hundreds of millions of dollars in claims payments to the certificateholders (165 AD3d 108, 111 [1st Dept 2018]).

In July 2009, MBIA sent DLJ the first of 48 repurchase demand letters. DLJ refused to repurchase the loans. Months later, in December 2009, MBIA commenced this action alleging, among other things, that DLJ breached representations and warranties contained in the PSA. The four warranties at issue are: (1) the Mortgage-Loan-Schedule (MLS) Warranty; (2) the No-Default Warranty; (3) the Guideline Warranty; and (4) the Prudent-Underwriting Warranty.

The parties moved for summary judgment related to the meaning of the MLS and No-Default warranties. The Appellate Division held that neither party was entitled to judgment as a matter of law and that the "better course" was "to hold a trial to inquire into and develop the facts to clarify the relevant legal principles and their application to the representations and warranties" (*id.* at 115).

Trial

Almost all the direct testimony was presented through pre-trial affidavits.[4] A two-week bench trial was held (*see* Dkts. 2099-2108 [Tr.]). The parties filed post-trial (Dkts. 1855, 1856) and rebuttal briefs (Dkts. 2109, 2110).

[4] The parties and counsel are commended for submission of thorough affidavits, which greatly streamlined the trial for everyone. This procedure eliminated days, if not weeks, of testimony and it sometimes became clear that cross-examination of some witnesses would be unnecessary.

For MBIA to recover and "put back" a loan to the bank,[5] it must first show that it provided notice of the alleged breaches or that DLJ had knowledge of them. Next, it must not only establish that one of the four warranties was breached; it must additionally prove that the breach had a "material and adverse effect" on its interests in the loans (Dkt. 1862 at 87). The parties vigorously dispute proper notice, the meaning of the warranties, whether they were breached, the implications of the material-and-adverse-effect requirement and whether it has been satisfied. They don't disagree, however, on the method for calculation of damages pursuant to the PSA's repurchase protocol if MBIA prevails.

In this post-trial decision,[6] first, the court discusses notice. Next, it addresses the meaning of the warranties and the material-and-adverse-effect requirement. The court then individually analyzes the hundreds of allegedly breaching loans in the submitted sample. After reviewing the loans, the court rejects defendants' challenges to sampling and their regression analysis. Finally, the court rejects MBIA's attempts to recover damages that are not directly attributable to the materially non-conforming loans.

Notice

Under the PSA's protocol, a loan does not have to be repurchased absent notice to the bank or its independent discovery of the breach. Here, MBIA's July 30, 2009 breach notice stated:

> the claims made pursuant to this notice and request are without prejudice to any additional claims or demands with respect to any breaches of representations or warranties, any breaches of other provisions of the PSA or any other Transaction documents, or otherwise, that MBIA or any other party

[5] The bank would be required to reimburse MBIA for the present value of past and future payments based on a "Repurchase Price" formula.

[6] For the avoidance of doubt, given the volume of the record, any unaddressed evidence or argument was either irrelevant or unavailing.

> may make with respect to the Transaction. MBIA is continuing its investigation of the Transaction, including of the Mortgage Loans set forth on Appendix A, and will communicate additional issues or concerns as it considers appropriate (Dkt. 1869 at 2).[7]

That demand "well in advance of any lawsuit, informed defendant that a substantial number of identified loans were in breach, and that the pool of loans remained under scrutiny, with the possibility that additional nonconforming loans might be identified. The notice complied with the contractual condition precedent of notifying defendant of its default, such that subsequently identified loans, including [those] identified by plaintiff's expert during discovery, related back to the time of the initial notice" (*U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 176 AD3d 466, 466-467 [1st Dept 2019]).

Individualized more specific notice is not required and would not have mattered.[8] DLJ, despite having notice of them for years, still has not repurchased breaching loans that it does not dispute were materially defective. Its protests about alleged lack of notice were clearly "fashioned for the sake of advocacy" (*Deutsche Bank Nat. Trust Co. v WMC Mtge., LLC*, 2014 WL 1289234, at *10 [D Conn Mar. 31, 2014] [grief professed "over a lost opportunity to evaluate and cure the (non-specifically noticed) loans is not genuinely felt: rather, that purported lost opportunity is a fiction"]). DLJ did not reunderwrite the mere

[7] MBIA gave individualized written notice for thousands of loans, beginning with the July 30, 2009 demand and continuing before and after it commenced this action.

[8] Such notice would be inconsistent with the rationale underlying sampling because it would require a reunderwiting of each and every single loan, not just those in the sample.

hundreds of loans at issue in this trial. It strains credulity that it would have really taken a look at more than 8,000 of them.[9]

Meaning of the Warranties and the Material-and-Adverse-Effect Requirement

Ultimately, at trial, there was no probative evidence of the parties' mutual understanding of the warranties at the time of contracting. There was no evidence that they specifically negotiated any particular language in the disputed warranties or that they had any communications about their scope or meaning. The parties' witnesses' self-serving testimony of how everyone in the industry "invariably" understood the warranties, which had no objective support, was not helpful. It appears that the language in the warranties was standard and no one presented any evidence to the contrary. Thus, each of these provisions must be analyzed carefully in their business context to ascertain the most compelling and commercially reasonable interpretation.

MLS Warranty

The MLS Warranty provides: "The information set forth in the Mortgage Loan Schedule, attached to the (PSA) as Schedule I, is complete**, true** and correct in all material respects as of the Cut-off Date" (Dkt. 1863 at 127 [emphasis added]). This language

[9] Indeed, even before the Appellate Division's determination on the sufficiency of notice in RMBS cases, it was settled that failure to strictly comply with a notice requirement should not defeat a claim if the manner in which notice was provided, while technically incorrect, did not prejudice the defendant (*Fortune Limousine Serv., Inc. v Nextel Communications*, 35 AD3d 350, 353 [1st Dept 2006] ["strict compliance with contractual notice provisions need not be enforced where the adversary party does not claim the absence of actual notice or prejudice by the deviation"] [collecting cases]; *see U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 33 NY3d 72, 79 [2019] [pre-suit notice requirement not a "substantive condition precedent"]; *see also U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.*, 147 AD3d 79, 86 [1st Dept 2016] ["The Court of Appeals held that the breach notice and cure period required in *ACE*, which is substantially identical to the breach notice and cure period required here, was a **procedural prerequisite** to suit"] [emphasis added]).

warrants the veracity of the loan information contained on the MLS[10] and not simply transcription of information from one place to the other (*Bank of N.Y. Mellon v WMC Mtge., LLC* [*WMC*], 136 AD3d 1 [1st Dept 2015], *affd* 28 NY3d 1039 [2016]).

In *WMC*, the Appellate Division held that the issuer of an MLS warranty "**was warranting the veracity of information** that, by definition, could not change after the origination date" (136 AD3d at 8 [emphasis added]). That controlling authority rejected the MLS Warranty as simply guaranteeing proper transcription. And that holding was affirmed by the Court of Appeals (28 NY3d 1039).[11]

Significantly, a different interpretation would not give meaning to the important representation that the information on the MLS is "true." If the intention was just to warrant transcription, the warranty could have easily and simply said so, though the utility of a transcription warranty is questionable especially when breaches must have a material and adverse effect as a prerequisite to any remedy (*see MARM*, 205 F Supp 3d at 428-29).

Contrary to DLJ's argument, information on the MLS can be untrue for stated-income loans even though the debt-to-income ratio (DTI) is based solely on the borrower's

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[10] The MLS "is a listing of the loans transferred to the Trusts pursuant to the PSA, together with key data about the loans, including the amount of the loan, whether the property is owner-occupied, whether it is a single family dwelling, the Loan-to-Value (LTV) ratio, the Debt-to-Income (DTI) ratio and the borrower's credit (or FICO) score. It is the principal source of information regarding the loans provided by [the sponsor bank] to the Trust and its investors" (*U.S. Bank, N.A. v UBS Real Estate Secs. Inc.* [*MARM*], 205 F Supp 3d 386, 427 [SDNY 2016]).

[11] *WMC* involved arguments based on the temporal and gap nature of the MLS Warranty (*see* 2014 WL 3738083 at *1-2). That does not render the holding about the meaning of the warranty to be dicta. Interpretation of the MLS Warranty was a necessary premise to the ultimate holding (*see* 136 AD3d at 8 ["the warranty was not merely a bring-down or gap warranty" because "JPMMAC was warranting the veracity of information that, by definition, could not change after the origination date"]). The Appellate Division recognized that, as "written," the bank "warrants the truth of the information" in the MLS (*see id.* at 7). That holding is undeniably essential to its ultimate conclusion and is binding precedent affirmed by the highest court of this state.

representation of earnings (*see id.* [applying unqualified MLS Warranty to stated-income loans]). Inclusion of DTI on the MLS for stated-income loans evinces that it is a relevant consideration; otherwise, it would not have been required. Though it is likely that there is a higher inaccuracy rate for income on these loans compared to those with full documentation, that should not mean that faith in the stated income was so low that the DTI was altogether worthless. Banks must have had sufficient confidence in the underwriting of stated-income loans because they agreed to warrant the truth of the DTI on the MLS. They easily could have modified the warranties or the MLS for stated-income-loans to disclaim the reliability of or eliminate that metric. They did neither.

Issuance of a loan based on stated income, moreover, does not relieve the underwriter of due-diligence obligations to ensure that there is reason to believe that the stated income is at least reasonable. To the contrary, a prudent underwriter must affirmatively take steps to verify the stated income's reasonableness because an eager borrower cannot blindly be taken at its word, especially when there are red flags indicating that the stated income may be inflated. To be sure, this warranty is not about borrower fraud; but rather, an assurance that the underwriter did its job. The income may not be right to precision but, if it is reasonable, it is unlikely to have a material and adverse effect anyway.[12]

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[12] *See also MARM*, 205 F Supp 3d at 429 ("It is true that the MLS Warranty imposes a form of strict or absolute liability for a materially untrue or incorrect statement on the MLS. While at first blush this may appear harsh because a breach may be premised upon a post-origination but pre-Closing change in a borrower's circumstance, e.g. FICO score, income, debt, that was unknown and, in some cases, unknowable to the Originator or UBS. But there is some symmetry between the absolute nature of the warranty and the limited nature of the remedies in the event of breach. UBS conducted due diligence on only 25% of the loans it bought from Originators and otherwise used equivalent data tapes from the Originators to price its bid. If the information UBS, in turn,

Defendants warranted the truth of all the information on the MLS. They will be held to their bargain.[13] Whenever a fact on the MLS, such as DTI, is not true because, for instance, the stated income was inaccurate, the MLS Warranty is breached.

No-Default Warranty

The No-Default Warranty provides:

> There is no **material monetary default** existing under any Mortgage or the related Mortgage Note **and there is no material event** that, with the passage of time or with notice and the expiration of any grace or cure period, would constitute a default, breach, violation or event of acceleration under the Mortgage or the related Mortgage Note (Dkt. 1863 at 134 [emphasis added]).

After trial, the court is convinced that this warranty assures that there is neither a material monetary default nor a "material event" that would constitute a default that cannot be cured with proper notice within a grace period if notice and a time to cure apply. Defendants' arguments to the contrary have no evidentiary support, would read important words out of the provision and would not make the most commercial sense.

Most compelling is that the warranty states that there is no "monetary default" and separately that there is no "material event." If those terms were synonymous, they would

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provided to the Trusts was wrong, it was only exposed to the possibility of cure, replacement or repurchase. For misstatements based upon pre-origination events, UBS also could protect itself with remedies against the Originator. For post-origination, pre-Closing changes, UBS simply assumed the economic risk. Symmetrical or not, harsh or not, this is the bargain to which UBS, a sophisticated financial institution, agreed").

[13] That the parties explicitly agreed there would be no separate fraud warranty does not compel a different result. The court is mindful that in certain respects the MLS Warranty is even broader than a no-fraud representation because untrue statements alone support a breach. That does not change what the MLS Warranty assures—true information. The MLS Warranty, moreover, only applies to items listed on the MLS. Finally, it took this much litigation and this many years for MBIA to obtain relief based on the MLS Warranty. Perhaps, it would have had a faster path to recovery through a no-fraud representation, which it was unable to secure.

be redundant. The words "and there is no material event" could have been omitted entirely if defendants' interpretation were correct. The warranty would have read:

> There is no material monetary default existing under any Mortgage or the related Mortgage Note ~~and there is no material event~~ that, with the passage of time or with notice and the expiration of any grace or cure period, would constitute a default, breach, violation or event of acceleration under the Mortgage or the related Mortgage Note.

That, however, is not what the warranty provides. The words "and there is no material event" must have been used to add something different or they wouldn't have been used at all. The narrowest plausible interpretation is that only material events that are curable but were not cured constitute defaults covered by this warranty. So, for instance, the failure to procure insurance could be a curable breach in this category.

Certain material misrepresentations, in contrast, cannot be cured after they are made. A post-closing corrective disclosure of a material misrepresentation generally does not make the loan less risky. For example, non-primary-residence loans are considered materially riskier because a borrower is far less likely to permit foreclosure on a primary residence. Informing the originator after the loan has closed that the property was not intended as a primary residence does nothing to alleviate the loan's higher risk.[14] The critical question is whether the No-Default Warranty covers incurable defaults. Based on a careful reading of the warranty and examination of its context, the answer is yes.

By excising the "with the passage of time or with notice and the expiration of any grace or cure period" language, the warranty reads:

> There is no material monetary default existing under any Mortgage or the related Mortgage Note **and there is no material event that would**

[14] The parties do not dispute that a borrower misrepresenting occupancy is a default under the mortgage notes.

constitute a default, breach, violation or event of acceleration under the Mortgage or the related Mortgage Note.

The bolded portion, read on its own, unambiguously means that all defaults, including, incurable misrepresentations, are covered.[15] The question is whether the caveat surrounded by commas--"with the passage of time or with notice and the expiration of any grace or cure period"--is intended to limit the scope of the warranty to mean that only curable defaults are covered or whether the caveat simply makes clear that while any default is subject to an opportunity to cure, it cannot be the basis of a breach. The more persuasive interpretation based on the nature of the Transaction is that the warranty promised there were no defaults--monetary or otherwise--that were not susceptible to cure and, if there were defaults that could not be cured, regardless of whether they were ever curable, then the warranty would be breached.

In other words, the "with the passage of time" language merely means that just because there technically was a default that was later cured does not mean that the No-Default Warranty is triggered. Rather, there is only a breach with respect to a curable default if the cure period lapsed without a cure. If the default could still theoretically be cured, it would be premature to assert a claim for breach of the No-Default Warranty. However, if the default is incurable, a claim for breach of the No-Default Warranty is immediately ripe. It would make no commercial sense in the context of this transaction for uncured-once-curable-defaults to be covered but not incurable ones.

[15] As with the MLS Warranty, Credit Suisse's argument that such an interpretation is simply a repackaged version of a no-fraud rep is unavailing. The warranty says what it does and applies when it does. It may well have had some overlap with the rejected no-fraud warranty but that does not make the No-Default warranty any less valid. Many of the warranties overlap to some extent.

Had the parties wished to clearly limit the warranty to monetary or curable breaches, they could have easily and expressly done so. They did not. This interpretation also gives effect to every word of the provision and leaves no surplusage (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). It best harmonizes the agreement by finding that the warranty imposes obligations on DLJ consistent with those it assumed under other warranties, namely, to be responsible for material facts about the borrower and the property. And this makes sense in the scheme of this arrangement because Credit Suisse did due diligence on a sample of the loans before securitization while the trustee and MBIA, as usual, did not (*see CBS Inc. v Ziff-Davis Publ. Co.*, 75 NY2d 496, 503-04 [1990] [a warranty is "an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended precisely to relieve the promisee of any duty to ascertain the fact for himself; it amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue, for obviously the promisor cannot control what is already in the past"]). It is consistent with the parties' intent that the warranties are a risk-allocation mechanism. As explained in a similar case involving DLJ:

> the only parties to the subject transaction who took direct market risk (as opposed to indirect market risk via counterparty credit risk) were uninsured investors and [the monoline], who had exposure to conforming loan losses. **Though Credit Suisse had nominal non-conformance liability to [the monoline], its net non-conformance exposure was substantially minimized by its put-back rights to originators under MLPAs** (*Assured Guar. Mun. Corp. v DB Structured Prods., Inc.*, 44 Misc 3d 1206[A], at *5 n 13 [Sup Ct, NY County 2014] [emphasis added]).

Here too, DLJ not only had the right to put back non-conforming loans to the originators (and it did), but the scope of its put-back rights, by its own admission, was broader than MBIA's (*see* Dkt. 2110 at 13). Holding a sponsor like DLJ liable under the repurchase

protocol for defaults including borrower misrepresentations does not actually mean that it will be stuck with the loss. It just means that DLJ is assuming greater originator credit risk. Credit Suisse, not MBIA, was in the best position to determine that risk as it, and not MBIA, decided from which companies it would purchase the loans. By dealing with less prudent originators, Credit Suisse was assuming the risk that if something went wrong that had a material and adverse effect on the risk of loss, it would have to repurchase the loan.

Based on the evidence, language and commercial context, MBIA's interpretation of the No-Default Warranty is most persuasive.[16]

Guideline and Prudent-Underwriting Warranties

The Guideline Warranty provides:

> 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, which in all material respects are in accordance with **customary and prudent** underwriting guidelines used by originators of closed-end second lien mortgage loans (Dkt. 1863 at 127 [emphasis added]).

It is breached if, at origination, a loan did not comply with an applicable guideline that in all material respects was consistent with what is customary and prudent for originators of closed-end, second-lien loans.[17]

The Prudent-Underwriting Warranty provides:

> "The origination, underwriting, servicing and collection practices with respect to each Mortgage Loan have been in all respects legal, proper, prudent **and** customary in the mortgage lending and servicing business, as conducted by **prudent** lending institutions which service mortgage loans of

[16] Many of the loans are affected by multiple breaches. Only approximately 10 loans are affected solely by a material No-Default Warranty breach.

[17] There are only three loans whose applicable guidelines are missing that are not affected by other material breaches.

> the same type in the jurisdiction in which the Mortgaged Property is located" (Dkt. 1863 at 134 [emphasis added])

The words prudent and customary have different meanings just as the words legal and proper do. Each term was used deliberately and must be given its own import. Holding otherwise would render them mere surplusage (*Matter of Viking Pump, Inc.*, 27 NY3d 244, 257 [2016]; *see MBIA*, 165 AD3d at 112).

Prudent is a qualitative indicator while customary is quantitative. Prudent is about what objectively is the right practice; customary is about the norm--what everyone else is doing. In 2006, for example, banks on a large scale underwrote loans that resulted in unprecedented default rates. Though such practices may have been customary, they certainly were not prudent. Under the Prudent-Underwriting Warranty, it is no defense, as DLJ's expert suggests, to argue that there is no breach because the problems with a loan's underwriting were typical of the industry at the time. Rather, what matters is whether, objectively, the underwriting was prudent.

A significant percentage of the loans were imprudently underwritten. This, once again, has little to do with borrower fraud or strict liability for inaccurate DTI and more to do with ensuring that the process by which loans were underwritten was sound so that the trust would not be filled with loans that, had the underwriters reasonably done their jobs, would never have been made.[18]

[18] Courts have been wary of issuing RMBS holdings that "would create a perverse incentive for a sponsor to fill the trust with junk mortgages that would expeditiously default so that they could be released, charged off, or liquidated before a repurchase claim is made" (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 133 AD3d 96, 106 [1st Dept 2015], *mod. on other grounds*, 30 NY3d 572 [2017]).

Material & Adverse Effect

The meaning of "material and adverse effect" has been hotly contested in RMBS cases, trustees and insurance companies arguing that a breach simply had to materially increase the risk of loss on loans and sponsor banks urging that a breach had to actually have caused a default. The law is now settled. Plaintiff is entitled to recover for any breach that significantly increases a loan's risk of loss (*Home Equity Mtge. Trust Series 2006-1 v DLJ Mtge. Capital, Inc.* [*HEMT*], 175 AD3d 1175, 1177 [1st Dept 2019] [breaches "need only have significantly increased a loan's risk of loss"]; *see also Wilmington Trust v MC-Five Mile Commercial Mtge. Fin. LLC*, 171 AD3d 591, 592 [1st Dept 2019] [plaintiff "established that the breach had the requisite material and adverse effect by increasing the risk of loss"]). That risk of loss must be examined on a loan-by-loan basis (*see HEMT,* 175 AD3d at 1177).[19]

Expert Evidence: Breach Reports, Testimony and Loan-by-Loan Analysis

Assessing whether a loan is affected by a material-and-adverse warranty breach is fact intensive and requires loan-by-loan analysis.[20] Close examination--effectively a reunderwriting--of more than 15,000 loans is incomprehensible and would reward the breaching party by making it virtually impossible for an aggrieved party to pursue a remedy. The obstacles would be insurmountable. Indeed, the Appellate Division recently

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[19] As will become evident, loan-by-loan assessment within a sample makes perfect sense. It became clear through reviewing hundreds of loans that the very same issues recurred. Aside from the mathematical reasons for trusting a representative sample, experience suggests that, regardless of whether another 100 or 1,000 or 10,000 loans were reviewed, the same issues would keep coming up at about the same rate.

[20] First, a breach must be ascertained and then whether it is "material and adverse." Though there may be a breach, a borrower's sound finances sometimes precluded finding a significantly increased risk of loss.

held that RMBS plaintiffs "are entitled to introduce sampling-related evidence to prove liability and damages in connection with repurchase claims" (*Ambac Assurance Corp. v Countrywide Home Loans Inc.*, 179 AD3d 518, 521 [1st Dept 2020]).

In this case, there was a 400-loan sample, allegedly containing over 300 breaching loans. In the interests of efficiency, at trial, the parties used exemplars--samples within the sample--to illustrate their points. They also supplied detailed dueling breach reports addressing each individual loan within the sample.

Based on competing expert reports and the opportunity at trial to assess the credibility of the experts who authored them, the court credits most of the breach findings by Steven Butler, MBIA's underwriting expert and generally finds him to be qualified and credible.[21] He opined that 77.25% of the loans in the sample (309 loans)[22] breached at least one warranty that had a material and adverse effect on MBIA's risk of loss. Despite the fact that DLJ's underwriting expert, Christopher Gething, was often unconvincing--and consequently unreliable; though undeniably he had a significant banking career, his testimony was at times so shocking and his demeanor so tentative that his testimony actually undercut confidence in his reports and it was impossible to give significant weight

[21] Butler was highly credible and has sufficient experience and expertise to render his expert opinions, including on stated-income loans. That he obtained stated-income loan experience while serving as a litigation consultant (as opposed to during his vast professional experience underwriting other loans) does not undermine his credibility. The same core skills are involved, including knowing how to assess whether the borrower presents red flags and how to vet them. Butler is equally capable of assessing materiality of stated-income loan breaches and, in any event, common sense dictates that a DTI 10% above the limit significantly increases the risk of loss. Overall, Butler's analysis was compelling and convincing.

[22] Butler originally found 311 materially breaching loans but later retracted his findings about two of them after reviewing Gething's rebuttal and finding they contained no material breaches. For completeness, the two withdrawn loans are included in the loan-by-loan review section.

to his opinion and analysis--when close to a billion dollars is at stake based on over 15,000 loans, close and careful analysis is mandated as a safeguard. In the end, Butler's opinion was persuasive as to 206 of the loans; thus, the evidence established a breach rate of 51.5%.

The court's approach was generally as follows. First, for each of the 311 allegedly breaching loans, Butler's opening report (*see* PX-3001-PX-3311) was examined to see if it persuasively demonstrates either: (1) an inaccurate metric on the MLS; (2) a misrepresentation implicating the No-Default Warranty; (3) that the loan's underwriting did not conform to an applicable guideline; or (4) that the loan was imprudently underwritten.[23] If so, the court reviewed whether the breaches are material and adverse. For instance, if the DTI was only 1% above the limit,[24] that breach alone was unlikely to significantly increase the risk of loss. If there appeared to be a material breach, then Gething's reports (Dkts. 2065, 2066; *see* DX-108)[25] were reviewed to see whose opinion

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[23] *See, e.g.*, Dkt. 2122 (example of Butler's opening breach analysis). Usually, and quite usefully, the third (or fourth if the itemized breaches on page 2 are voluminous) page sets forth the material metrics about the loan and the borrower (*see id.* at 3).

[24] Unless otherwise indicated, the applicable DTI limit was 50%.

[25] Gething did not independently reunderwrite all 400 loans (*see* Dkt. 2066 at 3 ["I did not evaluate the 89 loans that Mr. Butler concluded did not have a significant defect that violated Credit Suisse's Representations and Warranties. Nor did I review the 14 loans in the sample that had already been repurchased by Credit Suisse"]). For each loan he reviewed, Gething either disagreed or did not rebut Butler's findings (*id.* at 5). Indeed, as Butler persuasively testified, Gething did not really reunderwrite any of the loans in a manner that a professional underwriter would in the ordinary course of business. Instead, Gething simply addressed Butler's specific findings. While there is nothing inherently wrong with Gething's approach since DLJ does not bear the burden of proof, it is less compelling as it only looks for errors as a hired gun rather than purporting to independently assess the breach rate. The approach also resulted in a major limitation related to regression analysis because there is no evidence demonstrating that the 91 loans for which Butler did not find a material breach are actually conforming. As Butler explained, he employed a conservative approach in which he overlooked various defects to maximize confidence in his breach findings. For instance, he set conservative limits for materiality of income misrepresentations that would still need to be corroborated by a secondary source before deeming a loan in material breach.

was more believable. For those loans specifically addressed at trial, the experts' trial testimony was also considered. If Gething cast doubt on Butler's findings, Butler's rebuttal report[26] was reviewed and the court then decided which evidence was most convincing.[27]

Gething's Categorical Objections

For the most part, Gething did not address Butler's fact specific opinions about particular loans. Instead, he focused on categorical objections to Butler's methodology, which are unpersuasive. Gething objects to Butler's reliance on post-closing documents, materials that were unavailable to the underwriter at the time of origination. The objection distorts Butler's use of these documents and their utility. As the *MARM* court explained:

> A post-origination document showing, for example, that a borrower was reporting $30,000 per year income for the period 2007-10 may cast serious doubt on the same borrower's claim in 2006 that he was paid $100,000 per year for the same type of work with the same employer. Also, a post-origination document could reveal information about the borrower's income during an earlier period.
>
> Of course, proving by whatever means that a borrower falsely stated his income on a loan application does not prove that the loan was underwritten in violation of the Originator's underwriting guidelines. For a stated-income loan, the amount of salary claimed, e.g. $100,000, may have been an outright lie but it is an entirely separate question whether the stated income raised red flags for the underwriter. The analysis under the Guideline Warranty has a different focus than a breach of the MLS Warranty relating to DTI ratio. A MLS-Warranty breach may be established by proving the income information was untrue as of the Closing Date, regardless of whether the Originator's underwriter or [the sponsor] knew or should have known the untruth at that time. A Guideline-Warranty breach, however, requires proof of the actions and inactions of the underwriter at the time the loan "was underwritten."

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[26] Butler's rebuttal reports itemize each alleged breach, Gething's response, and Butler's reply, making them extremely useful in assessing the issues raised on each loan (*see* PX-3312-PX-3622; *see, e.g.*, Dkt. 2144).

[27] The preponderance-of-the-evidence standard applies because MBIA's claim is for breach of contract (*see BDC Fin. LLC v Barclays Bank PLC*, 176 AD3d 454, 455 [1st Dept 2019]).

> The Court concludes that post-origination documents are not per se inadmissible or immaterial and may have some relevance to satisfying part of the Trust's burden. But proving that the borrower's income was inaccurately or falsely stated does not prove that the underwriter violated any guideline in failing to detect the inaccuracy or falsity. That is a separate inquiry on which a document that did not exist at the time of the origination is likely to be of little use (*MARM*, 205 F Supp 3d at 456).

Obviously, an underwriter cannot be faulted or characterized as imprudent for failing to consider documents unavailable at the time of origination. Butler does not suggest to the contrary. The post-closing information from reliable sources used in the industry, however, bears on the truth of information contained on the MLS and whether a borrower made a material misrepresentation that constituted a default and there is no reason why Butler could not rely on the information for those purposes.

Defendants' objections to these sources of information, including bankruptcy petitions, The Work Number, verifications of employment, LexisNexis, MERS and RealQuest, have been rejected by other courts and are rejected by this one too (Dkt. 1855 at 60 [collecting cases]; *see MARM*, 205 F Supp 3d at 441-45 [findings MERS, LexisNexis, BLS, and the Work Number reliable and admissible]).[28] Indeed, Credit Suisse relied on those very same sources in the ordinary course of its business, including when it demanded repurchase from originators. Gething acknowledged that, depending on the nature of the warranty, the sources were used in the industry "to determine whether or not a loan would be put back" (Dkt. 2107 [Tr. at 1265]). Credit Suisse's experts' testimony to the contrary

[28] Some of the sources are reliable for certain purposes or when considered along with other relevant materials "as part of the total mix of information that goes toward a borrower's income" (*MARM*, 205 F Supp 3d at 446 [explaining that statements in bankruptcy petitions, where there is an incentive to understate income, do not trump all other available data and per se prove a misstatement but when consistent with other records can be useful]). Defendants did not convince the court that any of the bankruptcy filings Butler cited were unreliable when considered in the context of the other available information.

was wholly unpersuasive (*see* Dkt. 1855 at 61 n 30). Its contention that the sources are considered unreliable despite its use of them in the ordinary course of its own business for the very same purpose shows that defendants only believe that to be true in the courtroom and not in practice. The only other way to test the truth of the mortgage-loan representations would be intrusive borrower discovery to which Credit Suisse, like most RMBS defendants, strenuously objected. Credit Suisse cannot have it both ways and impede the truth from ever seeing the light of day.

Gething's opinion that income data from years prior to or post closing cannot be used to prove income at the time of closing is also rejected. Based on Gething's own testimony, common sense and the way of the world, people tend to make more money over time, especially when they stay in the same job. They do not usually see significant pay cuts for the same amount and type of work. So, if someone made $80,000 in 2008, the court can confidently rule out that borrower made $150,000 in 2006 in the very same job (*see MARM*, 205 F Supp 3d at 456).

Loan-By-Loan Review

It all comes down to the loans. The outcome turns on how many loans had warranty breaches that materially increased the loan's risk of loss. Each loan has a heading identifying the last four digits of the loan number and the exhibit number for Butler's opening breach report related to that loan.[29] Headings in bold indicate a finding of a material breach. Initially, analysis is more comprehensive and some loans are out of order

[29] In Butler's reports the warranties are identified by their number in the PSA: MLS Warranty is (v); the No-Default Warranty is (xlv); the Guideline Warranty is (iv); and the Prudent-Underwriting Warranty is (xliv). The court also often cites the exhibit number of Butler's reply report.

because they presented recurring issues best explained at the outset. As review of the loans continues and continues and continues, the discussion will be significantly more brief because there comes a point when not much new can be said about hundreds of mortgage loans riddled with the very same types of problems.

Loan 7070, PX-3009 (Material Breach)

Butler asserts a Guideline-Warranty breach based on an unreasonable stated income. He opines:

> On the mortgage loan application dated 8/15/2006, the borrower stated a monthly income of $7,350 as a Service Technician for Stage Equipment and Lighting for the previous five years. Based on my experience and research, this income was not reasonable for the borrower's employment, and the underwriter did not establish that the borrower had the ability to pay for the loan. Research conducted through the Bureau of Labor Statistics (BLS) Metropolitan and Non-Metropolitan database reflected an Audio and Video Equipment Technician in the Miami area earning in the 90th percentile would earn $44,040 annually, or $3,670 per month. Utilizing this income suggests that the total debt to income ratio was at least 80.21%, which exceeded the guideline maximum of 50% allowed by Opteum Five Star Seconds matrix.
>
> The following characteristics of the borrower's profile were not consistent with the borrower's stated income:
>
> • The borrower was a first-time homebuyer with no prior mortgage history. The combined loan amount, from the subject loan transaction, was $249,900. According to the credit report, the borrower did not have a history of sustaining this size of mortgage.
>
> • Only $8,506.24 of cash assets were verified. Based on the borrower's stated monthly income of $7,350, this represented less than two months of earnings.
>
> The borrower's profile did not support the stated income. The stated income was, therefore, not reasonable.
>
> In addition, income documentation, provided by the borrower during the loss mitigation servicing, shows the borrower's monthly income, in 2009, was $4,160, which, on a monthly basis was 56.60% of the income reported on the loan application. The borrower's 2006 income was not provided; however, the borrower retained the same employment in 2009, as stated at origination.

> Utilizing the 2009 monthly income of $4,160, the (DTI) ratio increased to 70.76% (PX-3320 at 1).

While Gething did not rebut these findings (*see id.* at 2), the court must still assess materiality. That the DTI was 20-30% above the limit is material.[30]

Having thousands of dollars less in monthly pre-tax income available to pay a mortgage significantly increases the likelihood of default and thus makes the loans significantly more likely to result in MBIA suffering a loss. For this reason, and contrary to DLJ's protestations, MBIA's materiality claims do not fail for lack of an expert report showing the correlation between certain loan metrics deviating from their represented value and marginal increase in default rates. Given the extreme nature of the breaches, a qualitative assessment of an increase in risk of loss suffices to prove materiality.[31] Based on Butler's credibility, his robust professional experience, and the quality of his written work product, it is clear that he can reliably assesses when a breach is so severe that a reasonable underwriter would not have approved the loan if aware of the truth or that the terms of the loan would have been materially different (e.g., a lower amount to compensate for a lower income). Additionally, many of the breaches are so obviously significant that any finder of fact can reasonably conclude the borrower would be much more likely to default. Again, while misstating annual income by $1,000 surely does not make someone much more likely to default, misstating monthly income by more than $2,000 on a $250,000 loan surely does.

Loan 8220, PX-3019 (Material Breach)

Butler claims this loan has nine breaches (PX-3330). The court only addresses the Guideline-Warranty breach based on an unreasonable stated income because Gething does not dispute that breach (*id.* at 13-14). Butler claims that the borrower's stated income was not reasonable for his profession, which is a guideline violation (*id.*). What is worth noting about this breach is how Butler looks to a borrower's verified assets and debts as a

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[30] Generally, 10% above the DTI limit is the threshold beyond which materiality cannot reasonably be contested. Likewise, DTI less than 5% above the limit cannot be viewed as material. The few loans with DTIs that are 5-10% above the limit are assessed on a case-by-case basis. A substantial portion of the DTI limit breaches are at least 20% above the limit (and often much higher), so even if reasonable minds could disagree on exactly where to draw the line on DTI materiality, the court's breach rate would not be materially affected. A materially understated DTI that is still below the limit is not a material breach. The baseline risk MBIA agreed to assume was DTI up to the limit. In the end, understated yet guideline-compliant DTI does not materially increase the risk of loss.

[31] *See MARM*, 205 F Supp 3d at 405, citing *Assured*, 920 F Supp 2d at 505 ("the absence of mechanical standards for defining all the circumstances that might create a material breach of Flagstar's representations and warranties with respect to any given loan reflects not a failure of methodology, but a candid recognition of the multi-variable nature of the inquiry. … Inevitably, this means that the opinion of any expert testifying on this issue involves a degree of subjectivity. But this is not a basis for rejecting such an opinion on the ground that the methodology is 'unreliable'").

secondary check on whether the stated income was reasonable. Here, not only does Butler rely on the stated monthly income of over $8,000 being well above the 90th percentile income of $5,700, but that it is implausible that a borrower earning that much money would have just over $10,000 in cash and a credit limit of only $400 (*id.*). Unsurprisingly, therefore, Gething did not rebut Butler's finding that this borrower's stated income was unreasonable. That the underwriter took no issue with the borrower's application speaks volumes about the quality of underwriting in 2006.

Loan 7318, PX-3015 (Material Breach)

Butler asserts a Guideline-Warranty breach based on the loan file missing sufficient employment documentation. He opines:

> The final loan application, dated 8/29/2006, reported that the borrower had been self-employed as Owner/Upholster of [REDACTED] Upholstery, for two years.
>
> The Opteum Five Star Seconds Guidelines required the lender to obtain a Certified Public Accountant (CPA) letter or business licenses verifying self-employment for a minimum of two years. (OPT Five Star Seconds Guidelines, 5/1/2006, at 7, CS_M0000011755). The lender failed to obtain sufficient verification of the borrower's self-employment.
>
> The lender obtained a copy of the City of San Diego, California, Certificate of Payment of Business Tax for [REDACTED] Upholstery, which verified the borrower was a business owner as of 1/24/2005 but did not reflect self-employment for a period of 2 years. Furthermore, the verbal verification of employment completed at the time of origination only sought to confirm employment with another employee of [REDACTED] Upholstery rather than the borrower's CPA. That verbal VOE, which is already insufficient under the guidelines, also lists a co-owner of the business that is not listed as a co-owner on the Certificate of Payment of Business Tax to the City of San Diego.
>
> The telephone number used for the VVOE was [REDACTED] and belonged to [REDACTED] Upholstery (PX-3326 at 3).

While Gething does not dispute that the verification is not currently in the loan file, he speculates that it may have gone missing since origination (*id.* at 3-4). Butler responds that "it was standard practice in the industry for all documents supporting approval of the loan to be placed in the loan file and stored electronically"; that "it would be contrary to standard practices, as well as common sense, for the underwriter to obtain the required self-employment verification and not place it in the file"; and that in his "experience, it is uncommon for documents that were properly obtained and stored to be removed or lost from a loan file" (*id.* at 4).

It is possible that documents were lost over time. Indeed, certain underwriting guidelines, which also presumably would have been stored electronically, could not be located. Given the shoddiness of how so many of the subject loans were underwritten, it seems more likely than not, however, that many of the documents currently missing from the loan file were missing at origination (*see MARM*, 205 F Supp 3d at 453).

Nonetheless, the court does not agree that a missing document, on its own, necessarily significantly increases the risk of loss on a loan. Borrowers tend to default due to lack of funds, for instance, due to insufficient income. While a borrower seeking to deceive an underwriter about income may well have an incentive to withhold critical documents that would reveal lack of income, the cause of the increased risk is the lack of income, not the lack of documents. It will become apparent that there are missing key documents in loan files of seemingly financially sound borrowers, making it difficult to conclude that the loan was really riskier than MBIA bargained for. Yet, as will be discussed on this and many other loans, that missing documents cannot independently support a put-back claim does not mean that MBIA will not recover on such loans. On the contrary, as we are about to see, many loans are otherwise affected by material breaches.

But before reaching the material issues with this loan, the court conceptually agrees with Butler that there are certain types of documents, which if missing, in and of itself, increases the risk of loss. For instance, if a loan file is missing a document necessary to foreclose, MBIA faces a risk of loss due to its inability to recover the value of the collateral – a risk having nothing to do with risk of default. This missing documents on this loan, however, pose no such risk.[32] Nor has Butler identified any loan where a missing document could impair foreclosure (or that foreclosure was ever actually impaired).

Butler claims that there is a Guideline-Warranty breach here based on an unreasonable stated income (*see id.* at 5-6). Gething does not rebut Butler's finding. The borrower's stated income was inconsistent with many factors, which both individually and collectively[33] suggest that a reasonable underwriter should have not accepted the stated income and instead sought to verify its accuracy. The factors listed by Butler raise

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[32] Going forward, in the interests of efficiency and brevity, where the court finds a material breach on a loan, it will often ignore immaterial breaches. The parties should assume that all breach claims not addressed, regardless of whether Gething challenged their materiality, have been denied.

[33] Butler, to be conservative, "did not rely on 'layered risk' (the concept that multiple minor defects, taken together, may significantly increase a loan's risk of loss") (Dkt. 1855 at 51). For the most part, neither does the court. The only time the court relies on layered risk is when materiality is a close call and there are many issues that impel the court to find the problem material (*see MARM*, 205 F Supp 3d at 469 ["The Court finds that the concept of layered risk is accepted in the guidelines and was accepted in the underwriting industry. It should be applied in assessing whether the material and adverse standard has been met"]). In fact, the court often employs an inverse version of layered risk that benefits Credit Suisse – namely, finding that a clear breach is not plausibly material given the multiple a metrics suggesting the loan was not really risky. This will become a significant theme in the court's loan-by-loan findings.

substantial questions about whether the borrower was a significant default risk; thus, the breach is material. Notably, while Gething claimed that the missing-document breach was immaterial (*see id.* at 3), he did not dispute Butler's materiality finding with respect to the guideline violation (*see id.* at 6).

Loan 7068, PX-3001

This loan was not a stated-income loan but was missing documentation about the borrower's income (PX-3001 at 1-2). Butler explains that

> Gething does not dispute that the loan file does not contain either the 2004 W-2 and 2005 W-2. Instead, Mr. Gething takes issue only with the fact that Credit Suisse did not provide MBIA with the applicable guidelines to underwrite this loan, and as a result concludes that no defects on this loan can be established. In so doing, Mr. Gething fails to designate or locate an alternative set of guidelines applicable to this loan. Moreover, Mr. Gething does not dispute that the Credit Suisse guideline cited embodies prudent underwriting standards related to this defect at the time of origination. It was standard practice in the industry for all documents supporting approval of the loan to be placed in the loan file and stored electronically. It would be contrary to standard practices, as well as common sense, for the underwriter to obtain the required verification of housing history and not place it in the file. I maintain this defect finding (PX-3312 at 2).

The court agrees with Gething. While the applicable guideline is missing, the loan file indicated that the missing W-2 forms were permitted because, as noted by the underwriter, they were not required since the lender provided first lien approval (PX-3312 at 1). It is more likely than not that the contemporaneous underwriter notes about the guideline requirements is a more reliable indicator of those requirements than Butler's speculation that Credit's Suisse guidelines were the same as the originator's guidelines. Butler's contention that the loan was not prudently underwritten merely due to the missing documents is rejected because the underwriter specifically explains why the loan was nonetheless approved and Butler does not explain why following this particular guideline was imprudent. Moreover, since Butler does not claim the borrower's actual income was insufficient, the court has no basis to infer a significant increase in the risk of loss.[34]

[34] Omissions by Butler are telling. Butler is not shy about telling the court when income was unreasonable and actually overstated. When, as here, Butler does not cite sources such as The Work Number to show that income was actually overstated, there is no evidence that it was. Thus, when Butler only cites ticky-tacky breaches without claiming, for instance, that the borrower's DTI was 20% above the limit due to overstated income or undisclosed debt, the breach is immaterial.

Loan 1489, PX-3002 (Material Breach)

This is one of the Unrebutted Loans. Breach of the Prudent-Underwriting Warranty is material because the loan file was not simply missing a single document, but rather countless essential documents (PX-3002 at 2). Without these documents a reasonable underwriter would not have been able to reasonably assess whether to make the loan, posing a significantly increased risk of loss.[35]

Loan 0159, PX-3003 (Material Breach)

Butler alleges five breaches on this loan. Two are dispositive. First, Butler claims an MLS-Warranty breach due to an inaccurate DTI (PX-3003 at 1). The MLS indicated a DTI of 42% (*id.* at 2). Butler's research determined that the borrower's actual income was much lower, and the actual DTI incorporating the true income is 63.59% (*id.*). While Gething proffers numerous responses, he does not rebut Butler's income finding, making this akin to an unrebutted loan (PX-3314 at 1-2). Misstating DTI by more than 20% is obviously material, especially when the real DTI is more than 13% above the guideline's 50% limit. Materiality of the MLS-Warranty breach, moreover, is often evident when there is an accompanying breach of the Guideline or Prudent-Underwriting Warranties. When the borrower should never have been issued a loan and the reasons are on the MLS, the MLS-Warranty breach is more likely to be material.

It is therefore unsurprising that Butler also found that this loan was imprudently underwritten (PX-3314 at 5-6). While Gething proffers reasons why he disagrees (*id.* at 6-7), his analysis is not compelling. For instance, Gething makes much of the fact that this borrower has savings equal to 5.4 months of his income (*id.* at 6). Butler persuasively responds that such money is not indicative of the borrower's ability to make mortgage payments since that cash is held as non-liquid retirement funds (*id.* at 7). There is no need to address Butler's other conclusions, which the court credits, because of the MLS-Warranty breach on this loan.

Butler points out that "Credit Suisse used BLS data and other salary search engines for that very purpose, and even cited to BLS data in its own repurchase requests" (*id.* at 8). Butler's reliance on BLS data was reasonable because it "was a standard practice both in the industry, and at Credit Suisse, at the time of origination to use salary tools like BLS in assessing the reasonableness of the borrower's stated income" (*id.*).

Loan 4143, PX-3004 (Material Breach)

This loan has the trifecta – MLS, Guideline, and Prudent-Underwriting Warranty breaches (PX-3004 at 1-2). The borrower's stated month income was $7,800 but was really less than $5,700 (*id.* at 2). It was unreasonable since it was more than $2,500 per month

[35] When Gething does not dispute that missing documents permit a finding of imprudent underwriting, the breach has been unrebutted.

more than what similarly employed people earned (*id.*). Among other red flags, the borrower had debts exceeding $100,000 (*id.*). Butler's reliance on The Work Number, which he explains was widely used in the industry at the time of origination – including by Credit Suisse (PX-3315 at 2-3), is not problematic in the least. While it may not have been unreasonable for the underwriter not to use it in this instance, that does not mean it is an unreliable source to determine actual income, which is relevant to an MLS-Warranty breach regardless of whether there are additional Guideline and Prudent-Underwriting breaches. Each of the three warranties were materially breached here.

Loan 4301, PX-3005

The borrower overstated his income, making the DTI inaccurate. The stated DTI was 38% while the true DTI is 46.62% (PX-3316 at 1). MBIA, however, cannot recover its losses on this loan. While the breach might initially appear material, as Butler recognizes, the applicable guideline set a DTI limit of 45% (*id.* at 2). The court does not find it plausible that exceeding DTI by less than 2% significantly increased the risk of loss. Likewise, even if this loan violated guidelines or was impudently underwritten, those breaches were immaterial. Not all guideline violations are per se material. That standard would create strict liability for guideline breaches and would effectively write the material-and-adverse-effect requirement out of the PSA.

Loan 4321, PX-3006

Butler claims the loan was imprudently underwritten because the purchase contract is missing from the loan file. A missing purchase contract is a sign that the loan may not have been prudently underwritten because, as Gething does not seem to dispute, a prudent underwriter must review the contract before approving the loan. Nonetheless, this breach is immaterial. Butler did not provide evidence that the missing contract increased the risk of loss. There is no basis to conclude that risk of loss was significantly increased.

Loan 7014, PX-3007 (Material Breach)

Gething does not dispute that this loan suffered from multiple guideline breaches (PX-3318 at 3-4). These violations were material. Additionally, Butler demonstrated that the borrower significantly misstated monthly income (*id.* at 2), which materially altered the DTI from 42% to over 92%. This is a perfect example of a 2006 loan that should never have been issued. A waitress claimed to make double what she really made to get a mortgage and then, unsurprisingly, filed for bankruptcy less than two years later (*id.*). The debtor's bankruptcy disclosures are used as a data point considered along with others. Here, there is an undisputed guideline breach and another red flag is the borrower's low credit limit (*id.* at 4). This loan was thus materially riskier than permitted.

Loan 7019, PX-3008 (Material Breach)

This loan, too, suffers from an egregiously inaccurate DTI. At the time of origination in 2006, the borrower claimed to earn $5,600 per month from a business she owned (PX-3319 at 2). But when she filed for bankruptcy the following year, she claimed her income was only $128 (*id.*). While Gething protests that an underwriter would obviously be unaware of a post-closing bankruptcy filing, he does not provide evidence that the borrower really made anywhere close to $5,600 per month. Indeed, the DTI was over 1,500% (that is not a typo) instead of the represented 35% (*id.* at 1). This is the epitome of a material breach. Missing proof of hazard insurance is academic.

Loan 7113, PX-3010 (Material Breach)

The only challenges Gething asserts to Butler's material-breach evidence are the rejected categorical ones. Here, the Work Number indicates that the borrower overstated his income by more than $1,700, meaning the DTI exceeded 68% (PX-3321 at 1-3). Having already rejected Gething's challenges to the information Butler relied on, MBIA proved material MLS and Guideline-Warranty breaches.

Loan 7118, PX-3011

It is undisputed the self-employment verification is missing from the loan file (PX-3322 at 2). However, there is insufficient evidence that this breach made the loan significantly riskier. This file contains a clear explanation of the borrower's company, and there is no proof that the borrower did not own the company or of any income misrepresentation or evidence that the borrower was otherwise financially incapable repaying the loan (*id.* at 1-2).

Loan 7143, PX-3012

It is undisputed that the borrower failed to disclose $1,400 of monthly debts (PX-3323 at 1-2). Butler, however, only claims this is a No-Default Warranty breach (PX-3012). He does not claim that, as a result of the undisclosed debts, the borrower's DTI violated the applicable guideline (because this loan was a no-ratio loan) or was imprudently underwritten. This, it seems, is an implied admission that the breach is immaterial and there is insufficient evidence that the breach significantly increased the risk of loss.

Loan 7218, PX-3013 (Material Breach)

Butler found that the DTI was really over 75% (PX-3324 at 1). That is because the borrower overstated monthly income by nearly $4,000 (*id.* at 3). This is clearly a material MLS-Warranty breach.

Loan 7235, PX-3014 (Material Breach)

Butler, on this loan, found that the DTI was over 288% (PX-3325 at 1). That is because, as reflected in the borrower's tax returns, he overstated his monthly income by over $8,000 (*id.* at 2). This is a material breach.

Loan 7323, PX-3016

While a copy of the title insurance policy is not currently in the loan file, the file, a contemporaneous business record, indicates that a policy was obtained (PX-3327). MBIA, which bears the burden of proof, could have sought discovery related to the title policy (e.g., though a subpoena to the carrier) and shown, one way or another, whether a policy was in place. While this might have been burdensome if MBIA was reunderwriting the entire trust, a major point of sampling is to make the discovery more reasonable. Where, as here, MBIA could have easily proven a fact through discovery but the record is devoid of that proof, the court will find that MBIA has not carried its burden.

Loan 7384, PX-3017 (Material Breach)

It is undisputed that the borrower failed to disclose significant debt – two separate mortgages totaling over $875,000, which likely required monthly payments of nearly $5,000 (PX-3328 at 1-2). Taking these debts into account, the actual DTI was over 89% (*id.*). Gething takes issue with this breach violating the No-Default Warranty and proffers other challenges to the reliability of Butler's information that have been rejected. This loan has a clear MLS-Warranty breach, and 39% above the DTI limit is undoubtedly material.

Loan 7389, PX-3018

The loan file is missing a certification form required when, for instance, the appraisal is subject to subsequent construction (PX-3329 at 1). The file indicates that the lender did indeed provide such certification (*id.*). Butler, in effect, asks the court to infer that the underwriter committed fraud by lying about having the certification. There is no basis for inferring an underwriter misrepresentation simply because the substantiating document is now missing. Additionally, it is too great a leap, without more of an evidentiary showing, that such a missing document presented a significant risk of loss on the loan.

Loan 8225, PX-3020

While it appears that applicable guidelines were breached because the borrower did not substantiate having the full amount needed to close and substantiation of sufficient reserves was too old, neither breach is material (PX-3331 at 1-2). The borrower was only about $500 short of the closing amount. Butler does not suggest the borrower lacked the actual ability to close (and the loan must have closed because it was securitized). Though the pension statement was not supposed to be more than 120 days old, Butler does not

suggest that the value of the borrower's pension was materially lower at the time of closing. There is no basis to conclude that the borrower's assets were in fact materially lower than the guidelines required, so there is no basis to conclude this loan presented a significantly increased risk of loss.

Loan 8264, PX-3021 (Material Breach)

This borrower overstated monthly income by approximately $1,800 so the DTI was over 72% (PX-3332 at 1-4).

Loan 8295, PX-3022 (Material Breach)

The borrower overstated monthly income by over $1,100 so the DTI was over 76% (PX-3333 at 3).

Loan 6101, PX-3023 (Material Breach)

Gething does not dispute the property was located in an ineligible state, so the loan should never have been issued (PX-3334 at 1-2). This is clearly a material Guideline-Warranty breach. The borrower, moreover, failed to disclose significant debts, resulting in a DTI over 83%, which is a material MLS-Warranty breach (*id.* at 2-3).

Loan 6157, PX-3024 (Material Breach)

The borrower misrepresented making nearly $8,200 per month working as a field manager when, in fact, she really earned less than $700 monthly as a self-employed home health aide (PX-3335 at 2-3). The true DTI was nearly 425% (*id.* at 3). Gething also does not dispute the property was ineligible for the loan (*id.* at 4). This is the quintessential example of a material breach, as the definition of materiality looks to whether a reasonable underwriter with knowledge of the breach would have issued the loan. The answer, for loans secured by ineligible properties, is obviously no.

Loan 6180, PX-3025 (Material Breach)

Gething does not dispute that this loan should not have been issued as the property was ineligible (PX-3336).

Loan 7232, PX-3026

The borrower failed to disclose $180,000 of debt (PX-3337 at 2). The effect on DTI, however, was not as extreme as in other cases, as it was only 52.1% when the limit was 50% (*id.*). Indeed, Butler does not claim a material MLS-Warranty breach, nor does he claim the loan was imprudently underwritten based on the borrower's disclosures. Instead, the basis for his Prudent-Underwriting-Warranty breach is a missing HUD-1 form (*id.* at 1). This loan is one of the closer calls. MBIA bears the burden of proof and the

court is not sufficiently convinced that the breaches are material. This loan simply does not have the extreme indicia of increased riskiness.

Loan 5266, PX-3027 (Material Breach)

Butler claims this loan was ineligible because it was a cash-out refinancing (*see* PX-3338 at 1). Gething concedes the loan would violate the guidelines unless an exception was made (*see id.* at 2). While Gething speculates that an exception must have been made, there is nothing in the loan file to suggest that was the case (*see MARM*, 205 F Supp 3d at 451 ["an unexpressed and undocumented guideline exception is not an 'exception ... exercised in a reasonable manner'" and "in order for an exception to guidelines to be 'exercised in a reasonable manner,' there must be evidence of a contemporaneous expression of an intent to exercise an exception and documentation that an exception was exercised"]). Gething implies that an underwriter would not have approved the loan without determining that an exception was warranted. Gething, conveniently, again relies on his speculation that the exception documentation must have gone missing. Gething, moreover, does not persuasively dispute Butler's contention that if the loan was ineligible it was significantly riskier. He simply states, without explanation, that the loan's risk profile would be the same. There was unrefuted proof of breach and materiality and only pure speculation about an exception. More likely than not, based on the evidence, this loan was ineligible and the breach was material.

Loan 9567, PX-3028 (Material Breach)

Butler finds that this loan has a Guideline-Warranty breach based on an unreasonable stated income, which appears material given the stated discrepancies (PX-3339 at 1). Gething does not dispute this breach or materiality (*id.* at 2).

Loan 9584, PX-3029 (Material Breach)

Butler claims the HUD-1 form was missing so the underwriter could not have been in position to assess critical information, making it impossible to prudently underwrite the loan (PX-3340). Unlike many other instances of a missing HUD-1, Gething does not dispute the breach or its materiality (*id.*).

Loan 4578, PX-3030 (Material Breach)

This was a full documentation loan (PX-3030 at 1). Gething did not dispute the guideline violation based on the underwriter's failure to verify the borrower's assets (PX-3341 at 1). The underwriter also violated the guidelines by not properly verifying the borrower's income (*id.* at 3). Gething observes, however, that the loan file contains some of the required documentation, most notably the borrower's 2005 W-2 (*id.* at 4). Since the loan was issued in 2006, the court does not believe a missing 2004 W-2 materially changes the risk profile if the underwriter has the more recent one from 2005. Butler, tellingly, does not claim the disclosed income was insufficient. Butler also claims the loan should

not have been issued since the borrower, in violation of the guidelines, did not prove a prior debt of nearly $5,000 was paid off, when the maximum the borrower could carry was $1,500 (*see id.* at 2). This loan had too many red flags to have been prudently issued. While the missing 2004 W-2, on its own, could be overlooked, the failure to verify assets and the satisfaction of debts suggests a sloppily issued loan, not a prudently issued one.

Loan 4582, PX-3031 (Material Breach)

Butler demonstrated that the borrower misrepresented that he occupied the property based on his phone records (PX-3342 at 1). While Gething claims that the underwriter was not required to check LexisNexis to verify this information, the source Butler relied on is reliable. Borrowers who misrepresent their intent to occupy the property present a greater default risk and a significantly increased risk of loss.

Loan 4677, PX-3032

The experts dispute the precise closing requirements but, at bottom, Butler complains that the borrower did not verify she had the $1,263.35 needed to close (PX-3343 at 2). Clearly, she had the money since the loan was made and securitized. In the absence of any other basis to believe the borrower presented risk, the court cannot find a material breach on this loan.

Loan 4695, PX-3033

The loan file is missing the purchase contract (PX-3344). Butler does not explain why this was a material breach. The purchase presumably occurred, and Butler does not identify any financially questionable aspects of the loan, such as insufficient income.

Loan 4727, PX-3034 (Material Breach)

The experts agree the underwriter was required to verify the borrower's assets and that there is no indication in the loan file such verification occurred (PX-3345). Gething's speculation that the underwriter did its job is rejected. Even when some documents are missing, sometimes there is proof of verification in the file. Here, however, there is no evidence of any verification. Failure to verify assets is a material breach because the underwriter could not have known if the borrower presented a significantly higher default risk. That ignorance inherently makes the loan riskier.[36]

[36] Not all missing documents matter equally. A missing asset verification goes to the heart of whether the borrower was sufficiently vetted, while a missing insurance policy, especially if there are indications in the file that a policy was actually procured, does not raise concerns of equal magnitude.

Loan 4807, PX-3035 (Material Breach)

Gething does not dispute that the co-borrower's employment was not sufficiently verified or that this guidelines violation was material (PX-3346).

Loan 4875, PX-3036 (Material Breach)

The borrower's represented 2006 monthly income was more than $1,000 more than her monthly income, in the same job, in 2008 (*see* PX-3347 at 2). It is more likely than not that the borrower's income, based on doing the same job, did not go down with two additional years of experience. Using borrower's 2008 income, which may well have been greater than her 2006 income, and accounting for the underwriter's failure to include the first-lien loan payment (which Gething does not dispute), the DTI is over 61% (*id.* at 1-2). While Butler also demonstrated that the borrower's stated income was unreasonable, that is academic but further suggests that her 2006 income was overstated.

Loan 4894, PX-3037 (Material Breach)

Butler demonstrated that the borrower misrepresented occupying the property (PX-3348). Gething's objection to the reliability of Butler's sources is rejected.

Loan 4936, PX-3038 (Material Breach)

It is undisputed that the borrower had a low credit score and the underwriter was required to verify, among other things, sufficient assets to qualify for the loan. Nothing in the loan file suggests that the underwriter did so (*see* PX-3349 at 1-2). When there is some indication in the loan file that the underwriter did the job but the source documents are not there, the court finds no breach. But where, as here, nothing in the loan file suggests the job was done, it more likely than not wasn't. Failure to verify that a borrower with a low credit score has sufficient assets significantly increases the risk of loss. Thus, there is a material breach.

Loan 4943, PX-3039 (Material Breach)

The borrower misrepresented monthly income by over $2,200 so the DTI is over 84% (PX-3350 at 1-2).

Loan 5106, PX-3040 (Material Breach)

This loan is rife with problems. The borrower substantially overstated income and the actual DTI was over 67% (PX-3351 at 3). This material MLS-Warranty breach renders academic the other breaches (unreasonable income and undisclosed debts, the latter of which takes the DTI over 170%).

Loan 5198, PX-3041 (Material Breach)

Butler demonstrated that the borrower misrepresented occupancy (PX-3352).

Loan 5222, PX-3042

The loan file is missing a copy of the hazard-insurance policy, but the file indicates, in multiple places, that a policy was procured. No proven breach here.

Loan 5228, PX-3043

Even accounting for the borrower's overstated income, the DTI is only 56.64%, which is not materially above the 50% limit (PX-3354 at 2). While the court agrees with MBIA that providing a regression to prove how much of a deviation from the maximum DTI is not necessary to prove materiality on all MLS-Warranty breaches, the court has not been provided any reliable basis to conclude that a deviation under 7% significantly increases the risk of loss. This does not affect most of the breaches, which often are well above the 50% limit. But for this sort of close call with nothing else wrong with the loan, MBIA has not satisfied its burden of persuasion.

Loan 7237, PX-3044 (Material Breach)

The loan file is missing a verification that the co-borrower was legally permitted to work in the United States (PX-3355). If the borrower was not permitted to legally work, there is a material risk that the borrower will be unable to repay the loan and will default. MBIA proved a material breach.

Loan 4482, PX-3045 (Material Breach)

Butler demonstrated an occupancy misrepresentation and that the borrower failed to disclose more than $700,000 of debt (PX-3356). While there is no DTI since this is a no-ratio loan, the higher amount of debt is material because it is more than double the total loan amount. In any event, the occupancy misrepresentation itself is material.

Loan 6882, PX-3046

Butler alleges a guideline violation based on Credit Suisse's guidelines because he did not have the applicable guideline (PX-3357). MBIA did not prove a breach under these circumstances.[37]

[37] Nothing persuades the court that the missing guidelines, under the circumstances, justify a finding adverse to defendants. This impacts very few sample loans.

Loan 6942, PX-3047 (Material Breach)

The borrower failed to disclose more than $275,000 of debt (PX-3358), which is a material breach.

Loan 7035, PX-3048 (Material Breach)

Butler proved that the loan was imprudently underwritten since it is highly unlikely the borrower would have made enough money to be able to repay the loan (PX-3359). Gething's response that Butler was missing the applicable guideline is inapposite. That would only matter if Butler alleged a Guideline-Warranty breach. Because Butler alleges a Prudent-Underwriting-Warranty breach, the missing guideline is irrelevant.

Loan 7062, PX-3049

Butler alleges a guideline violation but does not have the applicable guideline. His opening report states that warranty (xliv) was breached, but his analysis does not show that the loan was imprudently underwritten. The court will not independently make a finding of imprudence absent expert evidence.

Loan 7108, PX-3050 (Material Breach)

Though the applicable guidelines are missing, Butler opines that the loan was imprudently underwritten because the borrower would need an annual income of over $145,000 to repay the loan and the borrower's profile was not consistent with someone who earns that much money (PX-3361). Gething does not contest this assertion, which is persuasive for a variety of reasons, including that the borrower's credit limit was only $3,600.

Loan 7120, PX-3051 (Material Breach)

To review this breach report is to understand the severity of the mortgage crisis. Gething does not dispute serious problems with this loan, including hundreds of thousands in undisclosed mortgages and clear indications that this borrower lacks the means to repay this loan (PX-3362). This loan not only presented an increased risk of loss, it was destined to fail.

Loan 7174, PX-3052 (Material Breach)

This loan presents the important and recurring question of whether it was prudent to make a loan without verifying income when the borrower could easily have provided a W-2 but, inexplicably, the underwriter did not require it. Regardless of the applicable guidelines (which are missing for this loan), it is objectively unreasonable to provide a loan to someone who can easily prove income without requiring any proof. It is a massive red flag. That many 2006 originators did it anyway does not make it prudent. Blind reliance

on stated income that is easily verifiable and can be confirmed in a convincing way is reckless, not prudent and materially increases the risk of loss. This rationale applies to numerous loans that follow where borrowers with non-complex income were issued reduced-documentation loans for which there is no evidence they qualified.

Loan 7182, PX-3053 (Material Breach)

The borrower did not have a complex income; yet, income verification was not performed (PX-3364 at 3). While the underwriter may have confirmed the borrower's employment, neither Butler nor Gething claims that income (as opposed to employment) was verified to ensure it was sufficient to pay off the loan.

Loan 9982, PX-3054 (Material Breach)

Butler established a guideline violation since the borrower did not have her own credit accounts (PX-3365 at 1-2). The borrower, moreover, is a nurse and could easily have verified income with a W-2, so it was unreasonable to issue a stated-income loan. Gething's objection that income may have been complex is baseless. There is no evidence from which to infer that this nurse received tips or bonuses.

Loan 5075, PX-3055 (Material Breach)

This is another loan with multiple serious problems. Someone put money in the borrower's account before closing and there is nothing in the loan file indicating a guideline exception was made to excuse an excessive combined loan to value ration (CLTV), which, in turn, makes the CLTV on the MLS inaccurate (PX-3366 at 1-3). Making matters worse, the DTI was nearly 98% because the borrower overstated her income by nearly $9,000 (*id.* at 6). This loan was highly imprudent and presented substantially increased risk.

Loan 5110, PX-3056 (Material Breach)

The borrower overstated her job title and income, falsely claiming to be a manager. Gething does not dispute that the underwriter's acceptance of these representations was unreasonable (PX-3367 at 1-2). The court rejects Gething's contention that this was immaterial. While the borrower's actual income might not have itself materially exceeded guidelines, misrepresentation about the job and lack of any significant savings suggests an extremely risky borrower. That the underwriter did not catch this is evidence of another highly imprudent loan. While materiality is often assessed with objective metrics, assessing risk of loss can be qualitative. On this loan, the court agrees with Butler, a highly experienced underwriter, that the loan presented a significantly increased risk of loss.

Loan 5220, PX-3057 (Material Breach)

Gething did not dispute Butler's findings that the borrower materially overstated income and that the stated income was not reasonable (PX-3368).

Loan 3845, PX-3058 (Material Breach)

This is yet another loan with multiple problems. As Butler persuasively demonstrates, when accounting for the co-borrower's actual income and all debts, the DTI was really over 80% (PX-3369 at 4). While other issues with this loan are academic, they reinforce why this loan presented a significantly increased risk of loss.

Loan 3882, PX-3059 (Material Breach)

Butler demonstrated that the borrower inflated his job title and materially overstated income such that the actual DTI was over 105% (PX-3370 at 2-4).

Loan 3886, PX-3060 (Material Breach)

Butler opines that it was imprudent to issue this loan because the borrower failed to verify rental history. Butler explains that rental history is key to assessing creditworthiness since this is a No-Income-No-Asset (NINA) loan (PX-3371 at 2). The court agrees. A loan file that provides no indication that a material factor in assessing creditworthiness was assessed indicates that the loan presented a significantly increased risk of loss.

Loan 3932, PX-3061 (Material Breach)

Butler demonstrated both that the borrower materially overstated income, resulting in a DTI over 86%, and that the stated income was not reasonable (PX-3372 at 1-5).

Loan 3989, PX-3062 (Material Breach)

This is a stated-income loan made to a non-complex-income wage earner, which is impudent; it is material since the borrower had less than $4,300 in assets after closing (*see* PX-3062 at 3).

Loan 4008, PX-3063 (Material Breach)

Among other issues, the borrower failed to disclose debts in excess of $500,000, which in addition to being obviously material, resulted in a DTI of nearly 65% (PX-3374 at 3).

Loan 4141, PX-3064 (Material Breach)

This was a full-documentation loan. Gething concedes that some of the required documentation was missing (PX-3375). He speculates, yet again, that it went missing over time but was likely there at origination. That is not plausible for this loan. Since all of the documents were scanned, it makes no sense that some of the W-2 forms would be in the file, but others somehow went missing. It is far more likely that they were never provided to the underwriter in the first place. The guideline violation was material since the reason

it is important to have data from multiple years is to be capable of confidently projecting the borrower's financial situation based on a meaningful time to ensure a short-term uptick in financial condition does not falsely imply the ability to pay back the loan. Because W-2 forms are so easy to provide to the underwriter, the failure to do is a serious red flag. Moreover, more than 25% of the money the borrower was relying on to repay the loan was not from salary but from other government benefits. The guidelines require proof that such income will continue for at least three years. That information also was not in the loan file. Without it, the underwriter lacked any basis to conclude the borrower would continue to make enough money to pay back the loan. Collectively, these issues suggest this borrower presented a significantly increased risk of loss.

Loan 4260, PX-3065

Similarly, this full documentation loan also was missing some pay stubs (PX-3376). The underwriter, however, used The Work Number, in the ordinary course of business, two days before closing to verify the borrower's employment (*id.* at 2).[38] That the information was not verified with the missing documents does not suggest a significant risk of loss.

Loan 5361, PX-3066 (Material Breach)

Required asset verifications are missing from the loan file (PX-3377 at 1-3). The underwriter's notes admit that not all of the assets were verified. The court rejects Gething's speculation that the underwriter later verified the rest of the assets yet did not place the corroborating documents in the file or at least note performing verification. Making the loan without verification was a guideline violation and certainly imprudent.

Loan 5522, PX-3067 (Material Breach)

This is another loan rife with problems. The borrower's assets were not verified and income was overstated by nearly $5,000, resulting in a DTI of nearly 100% (PX-3378). Butler's other observations about the loan's imprudent underwriting, while material, are academic.

Loan 7379, PX-3068 (Material Breach)

The applicable guideline required two appraisals since the purchase price was above $1 million. The reason for this requirement is obvious – it is harder to get two bogus appraisals than one, which is, understandably, a more significant concern for bigger loans. If the collateral is not worth enough to satisfy the debt, the lender is faced with an increased risk of loss, particularly in California, where this property is located, since deficiency judgements are not permitted on non-judicial foreclosures (*see McNair v Maxwell & Morgan PC*, 893 F3d 680, 683 [9th Cir 2018]). Because the loan file is missing a second appraisal and nothing suggests that one was procured, issuing the loan violated the

[38] If The Work Number were not reliable, then MBIA would have prevailed on this loan.

guidelines. The court credits that the two-appraisal guideline was based on serious concerns about the risk of insufficient collateral and Butler's opinion that the loan was imprudent. Risk of loss includes insufficient collateral and not just risk of default. Thus, this breach is material.

Loan 5295, PX-3069 (Material Breach)

This loan presents one of the more extensive disputes between the experts about whether it was prudently underwritten (PX-3380). Butler was more convincing (though Gething's analysis was uncharacteristically detailed). There are red flags, such as the borrower's redaction of income on the W-2 provided to the underwriter, employment with the current employer for only one month, and having four employers in the previous two years who supposedly paid the borrower the exact same amount (*id.* at 4). As demonstrated by bankruptcy information from less than two years after the loan was issued, the borrower's income was more than $100,000 less than represented so it is no wonder that income was overtly hidden (*id.* at 4-5).

Loan 5350, PX-3070

Nothing convinces the court that a missing HUD-1, on its own, significantly increases the risk of loss. The information in Butler's initial report suggests this was a relativity safe borrower (PX-3070 at 3). No material breach here.

Loan 5361, PX-3071

This loan presents the identical issues as the previous one (PX-3382).

Loan 5429, PX-3072

This loan presents the same issue as the last two–a missing HUD-1–but with the added observation by Butler that the file indicates that the borrower needed to pay off debts prior to closing or else the DTI would be 6.73% over the limit (PX-3383). The HUD-1 would have confirmed this occurred. This is not a material breach since the borrower's total debts were under $2,800 (PX-3072 at 3). The loan was only for $49,000 (*id.* at 1). While the debts may have been repaid, even if they were not, it seems unlikely that having less than $3,000 in additional debts would significantly increase the likelihood of default.

Loan 5446, PX-3073 (Material Breach)

This loan had a DTI over 400% because the borrower mispresented employment status and overstated monthly income by more than $10,000 (PX-3384 at 1-3). This overwhelmingly material breach obviates the need to probe other issues Butler raised.

Loan 5498, PX-3074 (Material Breach)

Leaving aside the missing HUD-1, Butler demonstrated that the underwriter unreasonably accepted the borrower's representation that he intended to occupy the property based on various red flags, such as insufficient insurance coverage (PX-3385 at 4-5). Indeed, there is substantial evidence that the borrower never occupied it (*id.* at 2-3). The imprudent underwriting resulted in a significant increase in the risk of loss because non-primary residences present materially greater default risk. That is why the guidelines prohibit them.

Loan 6509, PX-3075

The underwriter failed to verify the borrower's income, which is particularly problematic as the borrower listed conflicting monthly incomes on the application that differed by nearly $3,000 (PX-3386). Gething, however, explains that the lower stated income was used to determine the borrower's eligibility, and Butler does not assert that the income was unreasonable or inaccurate. While somewhat imprudent, the breach here did not significantly increase the risk of loss.

Loan 6688, PX-3076 (Material Breach)

The borrower overstated monthly income by nearly $6,000, resulting in a DTI over 277% (PX-3387 at 4). Butler also demonstrated that the stated income was not reasonable, and Gething did not rebut that finding (*id.* at 5).

Loan 6709, PX-3077 (Material Breach)

The underwriter accepted a bank statement with redacted items that would have shown payroll deposits and would have verified borrower's income (PX-3388 at 1-2). Butler explains that prudent underwriting standards prohibited acceptance of redacted documents (*id.* at 8). He opines that the income here was unreasonable and that this borrower's reasonable income would have resulted in a DTI over 62% (*id.* at 1-2). Thus, the breach is material.

Loan 3454, PX-3078 (Material Breach)

The borrower overstated monthly income by more than $10,000, resulting in a DTI over 170% (PX-3389).

Loan 3806, PX-3079

Butler again claims a guideline violation without the applicable guideline (PX-3390). While he also claims imprudent underwriting, he does not explain why the alleged violation is inherently imprudent.

Loan 4025, PX-3080 (Material Breach)

The borrower overstated monthly income by more than $5,000 (PX-3391 at 1-2). Butler demonstrated a litany of other issues, which resulted in a DTI of at least 86% and possibly over 100%, well above the 45% limit (*id.* at 3-9).

Loan 4046, PX-3081 (Material Breach)

Butler identified inconsistencies in the loan application, raising questions of whether the borrower intended to occupy the property (PX-3392 at 2-3). He persuasively opines that it was imprudent for the underwriter not to attempt to address and resolve the discrepancies before issuing the loan, thereby significantly increasing the risk of loss. The court finds this issue to be material since Butler also demonstrated that the borrower did not end up living at the property (*id.* at 1).

Loan 4266, PX-3082

The loan file reflects that a title policy was obtained even though it was not there (PX-3393); therefore, there is no material breach.

Loan 4450, PX-3083 (Material Breach)

The borrower overstated monthly income by more than $6,000, resulting in a DTI of nearly 80% (PX-3394 at 1-2). This stated-income loan was also imprudently given to a W-2 wage earner (*id.* at 3-4). The stated income, moreover, also was unreasonable, which Gething does not deny (*id.* at 5).

Loan 4795, PX-3084 (Material Breach)

This loan was imprudent. It had an excessive CLTV and insufficient proof of residency, not to mention that the borrower overstated income (PX-3395). Imprudence alone is the basis for the breach-that-significantly-increased-the-risk-of-loss finding.

Loan 0111, PX-3085 (Material Breach)

The underwriter did not verify the borrower's employment, housing history, or residence (PX-3396). Butler persuasively proved that it was highly imprudent for the underwriter to fail to take all of these steps, thereby significantly increasing the risk of loss. The missing guidelines are irrelevant to this material-breach finding.

Loan 0150, PX-3086

Even though the borrower did not disclose certain debt, the DTI was still only 0.24% over the limit (PX-3397). This is immaterial.

Loan 0169, PX-3087

The title-insurance policy is not in the loan file; yet, there is no proven material breach because the file reflects that a policy was obtained (PX-3398).

Loan 0240, PX-3088

The loan file indicates that closing was conditioned on an updated appraisal. Though an updated appraisal is not actually in the loan file, the underwriter noted that it had been obtained and there is no convincing proof of a material breach.

Loan 0240, PX-3089

This loan presents the same issue as the last one.

Loan 0338, PX-3090 (Material Breach)

This loan file is not just missing the HUD-1, it is also missing evidence that the first-lien loan was conforming and missing the borrower's rental history (PX-3401 at 1-4). Butler convinced the court based on these omissions collectively that the loan was issued imprudently and that the risk of loss was significantly increased.

Loan 0362, PX-3091 (Material Breach)

If the alleged breach was only the undisclosed debt resulting in a DTI of just over 58%, the court likely would not have found the breach material (PX-3402 at 1-2). But given the other ways in which the loan was imprudently underwritten, including the failure to verify a suspicious income derived from work for a family business, the court is persuaded by Butler that this loan presented a significantly increased risk of loss (*id.* at 4).

Loan 0433, PX-3092

This loan could have been more prudently underwritten, but the breach here did not significantly increase the risk of loss on the $34,000 loan. The borrower's stated monthly income was $65,000 generated from owning his own business. Whether he actually owned the business went unverified (PX-3403). Butler, however, does not dispute the accuracy of that stated income. His observations about the borrower's many other mortgage debts do not suggest a material breach since even accounting for them the DTI is still well below the 50% limit. To a reasonable underwriter, this borrower would have appeared to be capable of repaying the loan.

Loan 0459, PX-3093 (Material Breach)

By contrast, the imprudent underwriting on this loan presents a significantly increased risk of loss (PX-3404). The red flags about the borrower's employment and

intent to occupy the property should not have been ignored. That the applicable guidelines are missing do not matter given the loan's clear imprudence.

Loan 0471, PX-3094 (Material Breach)

This loan materially breached the Prudent-Underwriting Warranty. Gething does not dispute that the loan file was missing countless essential documents or that the missing documents present a significantly increased risk of loss (PX-3405). Even he does not claim it is plausible that all of these documents somehow went missing.

Loan 0514, PX-3095 (Material Breach)

Gething does not dispute that this loan was an impermissible cash-out on a non-owner-occupied property or that this breach is material (PX-3406).

Loan 1174, PX-3096 (Material Breach)

Butler persuasively explains why it was highly imprudent to make this loan (PX-3407). While Gething proffers reasons why there are supposedly mitigating factors and that some of the issues raised by Butler are immaterial, Butler is more credible and more persuasive. Not only are his reports more detailed and persuasive, but after observing Gething's live testimony, Gething's opinion cannot be credited on close calls.

Loan 1206, PX-3097

The borrower's credit report is not in the loan file (PX-3408). While Gething notes that certain credit data points are reflected by the underwriter, Butler replies that many others, which would only have been available from the credit report, are missing. The failure to fully vet the borrower's credit is not only a guideline violation but also imprudent. Given how shoddy so many of the loans were underwritten, it is no leap to conclude that the underwriter failed to fully vet the borrower's credit and thus assumed a significantly increased risk of loss. Given how easy it is to obtain and place the credit report in the file, the failure to do so suggests a desire to rush a loan approval an indifference to the actual risk of loss. Nonetheless, there is no basis to conclude that, on this particular loan, the breach materially increased the risk of loss. This loan was backed by strong financial metrics, including a DTI 20% below the limit and a monthly income of $16,000 (PX-3097 at 3). Butler does not dispute that these figures are accurate.

Loan 1209, PX-3098 (Material Breach)

This borrower had a non-complex income but was given a stated-income loan (PX-3409). Nothing suggests income could not have been easily verified. That the borrower had less than $300 of assets after closing (PX-3098 at 3) makes income verification particularly important; thus, the imprudence created a significantly increased the risk of loss.

Loan 0115, PX-3099

While the note and title insurance policy are not in the file, the file indicates that both existed (PX-3410).

Loan 0307, PX-3100 (Material Breach)

This loan is both imprudent and is affected by MLS and Guideline-Warranty breaches (PX-3410). The borrower mispresented the purpose of the loan, his assets were not verified, and he recently missed a housing payment. These breaches, as pointed out by Butler, present a significantly increased risk of loss.

Loan 2504, PX-3101 (Material Breach)

Butler established an MLS-Warranty breach by demonstrating that the borrower's stated reason for the loan was materially false (PX-3412). The loan proceeds were used to pay off consumer debt, presenting a material increased risk of loss, which is the reason the applicable guideline prohibits it (*id.* at 2).

Loan 2695, PX-3102 (Material Breach)

The borrower lacked sufficiently "seasoned" assets due to a suspiciously large deposit made into his account prior to verification (PX-3413 at 1). While Gething claims this did not violate the applicable guideline, Butler persuasively contends that prudent-underwriting standards prohibit this because a person with insufficient assets could have a friend or family member put money in their account to make it appear the borrower has more money than in reality. A borrower with $200 in his bank account presents much more of a default risk on a $30,000 loan than one with nearly $8,000. This borrower, moreover, substantially overstated income, resulting in a DTI of nearly 85% (*id.* at 3).

Loan 2720, PX-3103

The guideline breach, an insufficiently high credit line, is immaterial because the DTI of only 28.5% suggests this was not a particularly risky loan (PX-3414).

Loan 2775, PX-3104

The loan file is missing canceled checks of the co-borrower, which Butler claims is a guideline breach and imprudent (PX-3415). While the DTI was below the 55% limit, Butler speculates that the canceled checks might have exceeded the limit. The court has no basis to come to such a conclusion, especially since Butler does not claim that either of co-borrowers presented any other red flag suggesting a significantly increased risk of loss.

Loan 2791, PX-3105 (Material Breach)

The borrower made an occupancy misrepresentation (PX-3416).

Loan 3081, PX-3106 (Material Breach)

The underwriter did not obtain a second appraisal which, as discussed earlier, is a material breach (PX-3417).

Loan 3092, PX-3107 (Material Breach)

The true DTI was nearly 70% because the borrower failed to disclose another mortgage over $600,000 (PX-3418 at 2).

Loan 3093, PX-3108

This loan presents the same issue as Loan 2775 (PX-3419).

Loan 7079, PX-3109 (Material Breach)

The borrower had a DTI over 76% because she overstated her monthly income by more than $2,500 (PX-3420 at 2).

Loan 7084, PX-3110 (Material Breach)

While Gething disputes the alleged MLS-Warranty breach based on the borrower overstating income, he does not dispute that the loan was imprudently underwritten because the stated income was not reasonable or that the breach was material (PX-3421).

Loan 7148, PX-3111 (Material Breach)

This loan was imprudent and violated applicable guidelines. One month before closing, the borrower had a negative balance in her bank account (PX-3422). Gething claims this was immaterial since prior bank statements show a balance of nearly $60,000. The court disagrees. A borrower whose balance fluctuates so much and has literally no money in the bank shorty before closing presents a significantly increased risk of loss.

Loan 7161, PX-3112

This is one of the two loans for which Butler withdrew his breach claims (PX-3423).

Loan 7315, PX-3113

This is the other loan for which Butler withdrew his claims (PX-3424).

Loan 7336, PX-3114 (Material Breach)

Gething did not dispute Butler's finding that the borrower's stated income was unreasonable, that the loan was imprudently underwritten, and that these breaches presented a significantly increased risk of loss (PX-3425).

Loan 7411, PX-3115 (Material Breach)

The DTI would be over 88% after accounting for the borrower overstating monthly income by over $6,000 (PX-3426 at 2). The DTI was actually over 158% factoring in another debt (*id.*). The stated income here was unreasonable as Butler opined (*id.* at 3). This loan clearly presented a significantly increased risk of loss.

Loan 6417, PX-3116 (Material Breach)

Gething does not dispute the underwriter miscalculated the DTI, which was really 68.91% (PX-3427 at 2).

Loan 6525, PX-3117

The alleged breaches are immaterial because the DTI is only 50.01% (PX-3428).

Loan 6712, PX-3118 (Material Breach)

Among other issues, Gething does not dispute that the borrower's stated income was not reasonable (PX-3429 at 6). In fact, using the borrower's true income results in a DTI over 106%. This loan clearly presented a significant risk of loss.

Loan 7146, PX-3119

The alleged breaches are immaterial because the DTI was below 46%.

Loan 7222, PX-3120

Butler claims that the underwriter failed to sufficiently verify the borrower's self-employment. While the verifications do not appear to be materially deficient, in any event, Butler does not contend that the borrower was actually a real financial risk since, for instance, he does not claim the stated income was unreasonable or false (PX-3431).

Loan 7386, PX-312

The alleged breaches are immaterial. While the credit report for one of the co-borrowers is not in the loan file, the credit score is noted which suggests the underwriter had it (PX-3432 at 1). And while sufficient employment documentation required by the

guidelines is also not in the file, Butler does not claim the stated employment was false or that the borrower's income was inaccurate.

Loan 7428, PX-3122

Again, Butler claims the underwriter failed to sufficiency verify the borrower's employment but does not claim the stated employment was false or that the borrower actually presented a financial risk (PX-3433).

Loan 7473, PX-3123 (Material Breach)

The DTI was over 250% because the borrower substantially overstated income (PX-3434 at 3). Gething also does not dispute the stated income was unreasonable (*id.* at 5). This was clearly a highly imprudent loan.

Loan 7714, PX-3124 (Material Breach)

Gething does not dispute the stated income was unreasonable (PX-3435 at 3-4). The court agrees that this breach was material.

Loan 7726, PX-3125 (Material Breach)

The borrower made an occupancy misrepresentation (PX-3436).

Loan 7811, PX-3126

While the loan file is missing a lot of documents, it clearly indicates that the underwriter actually had many of the documents or otherwise obtained the relevant information. Even if the underwriter did not review some of the source documents, there was no significantly increased risk of loss on this loan. Butler does not dispute that the borrower made more than $15,000 per month or that the true DTI was approximately 8% below the limit (PX-3126 at 4). Thus, the alleged breaches are not material.

Loan 7817, PX-3127

The missing written housing history verification does not suggest a significantly increased risk of loss given the borrower's financial situation (PX-3127 at 3).

Loan 7915, PX-3128 (Material Breach)

Among other issues, the DTI was nearly 125% because the borrower failed to disclose over $550,000 of debt (PX-3439 at 5).

Loan 8003, PX-3129 (Material Breach)

The DTI was nearly 60% due to overstated income (PX-3440 at 3). While single digit percentage deviations above the DTI limit may not be material, this nearly 10% percentage deviation, which is the product of an overstated monthly income of nearly $2,200, is a sufficient basis upon which to conclude that there was a significantly increased risk of loss. Indeed, Gething does not dispute that the stated income was not reasonable (*id.* at 5).

Loan 8257, PX-3130

A missing insurance policy that the HUD-1 indicates was procured is not proof of a breach (PX-3441).

Loan 8267, PX-3131 (Material Breach)

Gething did not rebut Butler's finding that the loan file was missing countless critical documents. Unlike many other instances, Gething does not suggest the documents were present at origination or that their absence was immaterial (PX-3442).

Loan 8270, PX-3132

The loan file is missing verification of the $4,700 required to close (PX-3443). This is immaterial. The DTI was 30% and Butler does not dispute that the borrower's monthly income, earned at the same job for more than a decade, made the borrower a safe bet (PX-3132 at 3). Though it may have been imprudently underwritten, there is no evidence of a significantly increased risk of loss if the borrowers' core financial metrics are sound.

Loan 8309, PX-3133 (Material Breach)

The DTI was over 68% due to an overstated income (PX-3444 at 2).

Loan 8513, PX-3134

A missing credit report when the credit score is known, considered with a DTI under 40%, warrants a conclusion that the breach is immaterial. This borrower has no material debts and a monthly income of nearly $5,000 from a job held for nearly 20 years (PX-3134 at 3).

Loan 8584, PX-3135 (Material Breach)

The DTI was nearly 150% due to the borrower substantially overstating income (PX-3446 at 2).

Loan 8668, PX-3136 (Material Breach)

Gething does not dispute that the number of properties the borrower owned rendered the borrower ineligible for the loan (PX-3447 at 6), and the DTI was nearly 67% due to the borrower failing to disclose multiple mortgages on such properties (*id.* at 7). This loan clearly presented a significantly increased risk of loss.

Loan 8678, PX-3137

As discussed, merely missing a HUD-1 is not proof of a material breach.

Loan 8813, PX-3138 (Material Breach)

Among other issues, the DTI was nearly 230% due to the borrower substantially overstating monthly income by $8,000 (PX-3449 at 2). Unsurprisingly, Gething does not dispute that the stated income was not reasonable (*see id.* at 8).

Loan 8878, PX-3139 (Material Breach)

Likewise, among other issues, such as the stated income not being reasonable, the DTI was over 80% due to the borrower substantially overstating monthly income (PX-3450 at 3).

Loan 9059, PX-3140 (Material Breach)

The DTI was well over the limit due to an overstated income, which was not reasonable (PX-3451).

Loan 9103, PX-3141

Missing housing history alone does not suggest a significantly increased risk of loss (PX-3141 at 3).

Loan 9208, PX-3142 (Material Breach)

The DTI was well over the limit due to an overstated income, which was not reasonable (PX-3453 at 4).

Loan 9391, PX-3143 (Material Breach)

While it is undisputed that the DTI is based on an erroneously low monthly debt payment, the experts disagree on how to compute the borrower's 2006 income (PX-3454). After selling his stake in the company, the borrower, as disclosed in this full-documentation loan, only earned W-2 income from that company. Gething speculates that the borrower earned more income from profit sharing after the sale but there is no support whatsoever

for that assumption. Butler's argument is more persuasive (*id.* at 5) and the resulting DTI of nearly 84% constitutes a material breach (*id.* at 1).

Loan 9418, PX-3144 (Material Breach)

What should have been a loan with a 2% DTI was really over 100% after accounting for overstated income and undisclosed debt, which Gething did not dispute (PX-3455 at 2).

Loan 9481, PX-3145 (Material Breach)

Excluding atypical deposits, which Gething claims are the result of fluctuating large commissions earned by the borrower, the DTI is nearly 70% (PX-3456 at 2). Gething does not dispute that the borrower owned too many properties and thus did not qualify for the loan (*id.* at 6).

Loan 9524, PX-3146 (Material Breach)

Gething does not dispute that the actual DTI was over 60% (PX-3457 at 3).

Loan 9606, PX-3147 (Material Breach)

Gething does not dispute that the stated income was unreasonable (PX-3458 at 4).

Loan 9610, PX-3148 (Material Breach)

Gething does not dispute that it was unreasonable to assume the borrower would occupy the property (PX-3459 at 1). The other breach is academic.

Loan 9793, PX-3149 (Material Breach)

Gething does not dispute that the stated income was unreasonable (PX-3460 at 3).

Loan 9913, PX-3150

The overstated income was immaterial because the DTI was still only 52.27% (PX-3461 at 1). That the stated income was not reasonable does not make this breach material given the effect of the true income on the DTI.

Loan 0014, PX-3151

Though the experts dispute whether various missteps by the underwriter were imprudent, the issue is academic as the DTI was still below the limit (PX-3462 at 4) and the borrower otherwise appears financially sound (PX-3151 at 4).

Loan 0202, PX-3152 (Material Breach)

Though the DTI was below the limit, the borrower made only $5,000 per month in a job begun only months before and had only worked for two years total (PX-3152 at 3). Thus, confirming that the borrower had a sufficient financial cushion was essential. While the underwriter was supposed to verify that the borrower had more than $15,000, the loan file only verified $1,000 (PX-3463 at 1). Butler established that the verification failure presented a significantly increased risk of loss here (*id.* at 2-3).

Loan 0208, PX-3153

A DTI 0.04% above the limit immaterial (PX-3464).

Loan 0322, PX-3154 (Material Breach)

Among other issues, the required second appraisal was not procured (PX-3465 at 3-4). The loan was imprudently approved (*id.* at 5-7).

Loan 0433, PX-3155

That the file was missing the first-lien note is immaterial, especially given the borrower's financial information (PX-3155 at 2-3).

Loan 0438, PX-3156 (Material Breach)

The borrower did not occupy the property, which significantly increased the risk of loss (PX-3467).

Loan 0453, PX-3157

The missing HUD-1 and first-lien note are immaterial given the borrower's financials and the amount of the second-lien loan (PX-3157 at 3).

Loan 0528, PX-3158 (Material Breach)

Gething does not dispute that the stated income was not reasonable (PX-3469 at 5-6). The borrower misrepresented owning a business and that he would occupy the property (*id.* at 3-4).

Loan 0535, PX-3159 (Material Breach)

Among other issues, the DTI was over 72% because the borrower overstated his income (PX-3470 at 2-3). Gething also does not dispute that the stated income was unreasonable and that the underwriting was imprudent (*id.* at 5-7).

Loan 8282, PX-3160

There was no material and adverse effect here as the loan file indicates the missing documents were available to the underwriter and the DTI was less than 1% above the limit (PX-3471).

Loan 8323, PX-3161 (Material Breach)

Gething does not dispute that the stated income was unreasonable (PX-3472 at 3).

Loan 8607, PX-3162 (Material Breach)

Among other issues, the DTI was over 72% because the borrower did not disclose more than $200,000 of debt (PX-3473 at 4).

Loan 8612, PX-3163 (Material Breach)

Among other issues, the DTI was over 86% because the borrower did not disclose substantial debts (PX-3474 at 8).

Loan 8625, PX-3164 (Material Breach)

Gething does not dispute that the loan file is materially incomplete (PX-3475).

Loan 8645, PX-3165

This loan was imprudently underwritten for a variety of reasons (PX-3476); however, the DTI is still below the limit and the borrowers' substantial income and assets suggest this loan was still not that risky (PX-3165 at 5).

Loan 9016, PX-3166

The court is not convinced that the underwriter was actually missing all of the documents, such as the credit report (PX-3477). Regardless, the verified assets significantly exceeded the amount of the second lien, no-ratio loan, so any imprudence did not significantly increase the risk of loss here (PX-3166 at 3).

Loan 9033, PX-3167 (Material Breach)

In addition to imprudent underwriting, the borrower also misrepresented occupancy (PX-3478).

Loan 9182, PX-3168 (Material Breach)

In addition to numerous instances of imprudent underwriting, the DTI was over 61% because the borrower did not disclose substantial debts (PX-3479 at 7).

Loan 9183, PX-3169

The breaches are immaterial since the DTI was below the limit, the borrower appears financially stable and had assets exceeding the second-lien loan balance (PX-3169 at 3).

Loan 9264, PX-3170

The overstated income resulted in a DTI less than 5% above the limit, which is immaterial (PX-3481 at 7).

Loan 3698, PX-3171 (Material Breach)

The file lacked any indication that a post-necessary-work certification was procured, which is imprudent and a guideline violation that significantly increases the risk of loss because nothing attests to the actual property value (PX-3482).

Loan 4966, PX-3172 (Material Breach)

The loan was imprudently underwritten and this borrower presented a significantly increased risk of loss (PX-3483). No reasonable underwriter should have accepted the representation that a Burger King cashier turned Romano's Macaroni Grill assistant chef was making anything close to $128,000.

Loan 4973, PX-3173 (Material Breach)

The number of undisclosed debts is astonishing (PX-3484). Gething does not dispute this breach (*id.* at 2). Credit Suisse, unsurprisingly, put this loan back to the originator, so there is no disputing materiality (*id.*). It is unfathomable how Credit Suisse permitted this loan to be securitized.

Loan 9221, PX-3174

Though the borrower's green card is missing, the loan file reflects that the underwriter had it (PX-3485).

Loan 9261, PX-3175

The loan file is missing critical documents but the underwriter indicated having them (PX-3486).

Loan 7592, PX-3176

The missing employment verification is immaterial given the uncontested financial situation of the borrower, which does not seem to present a significantly increased risk of loss (PX-3176 at 3).

Loan 1668, PX-3177

The missing HUD-1 is immaterial (PX-3177 at 3).

Loan 0968, PX-3178 (Material Breach)

This loan was imprudently underwritten as there were red flags about occupancy which, it turns out, were on point since the borrower did not occupy the property (PX-3489). This presents a significantly increased risk of loss because a borrower is more likely to default on a non-primary residence.

Loan 0970, PX-3179

The missing verification was likely in the file (PX-3490) and, in any event, this does not appear to be a risky loan (PX-3179 at 3).

Loan 1025, PX-3180 (Material Breach)

Among other issues, Gething did not dispute that the stated income was not reasonable (PX-3491 at 5).

Loan 7107, PX-3181 (Material Breach)

Gething does not dispute that the borrower's income was not verified and, in any event, she was not eligible for a stated-income loan (PX-3492).

Loan 7139, PX-3182 (Material Breach)

The DTI was over 200% because the borrower significantly overstated income and did not disclose significant debt (PX-3493 at 1-3). Gething does not dispute the loan was imprudently underwritten (*id.* at 5).

Loan 7202, PX-3183

Breach findings are credited but the DTI was still below the limit of 55% (PX-3494 at 5).

Loan 7260, PX-3184 (Material Breach)

Among other issues, Gething does not dispute that the borrower had a negative bank balance and that the underwriter did not properly verify income (PX-3495 at 1).

Loan 7370, PX-3185 (Material Breach)

The DTI was incorrect because the borrower lost her job. Obviously, without income, the DTI was not within the limit and the borrower lacked the income to repay the loan (PX-3496).

Loan 7393, PX-3186 (Material Breach)

The stated income was not reasonable and a reasonable income would have resulted in a DTI over 100% (PX-3497).

Loan 7402, PX-3187

The loan file is missing the deed (PX-3498). Though Butler contends this is material because the deed is required for foreclosure, a deed is a matter of public record and can be obtained even if missing from the file. There is insufficient evidence of a material and adverse effect here.

Loan 7713, PX-3188 (Material Breach)

The loan file does not contain proof that the borrower is legally permitted to live and work in the United States (PX-3499). Unlike in other loan files, there was no indication that the borrower actually had a green card despite the document being missing. This presents a significant risk of loss as borrower's deportation or inability to be employed would likely result in a default.

Loan 6333, PX-3189

This loan is merely missing the HUD-1.

Loan 3671, PX-3190 (Material Breach)

Among other issues, the borrower failed to disclose a $250,000 debt (PX-3501 at 4-5).

Loan 9867, PX-3191 (Material Breach)

The borrower made an occupancy misrepresentation (PX-3502).

Loan 9884, PX-3192 (Material Breach)

Among other issues, the underwriter was required to verify two years of employment but only verified 0.42 years (PX-3503 at 3-4). This loan was imprudently underwritten and presented a significantly increased risk of loss.

Loan 1480, PX-3193 (Material Breach)

Among other issues, the DTI was over 71% (the limit was 55%) because the borrower overstated his income (PX-3504 at 3).

Loan 1891, PX-3194 (Material Breach)

Among other issues, Gething does not dispute the occupancy representation was unreasonable (PX-3505 at 5).[39]

Loan 1961, PX-3195

The borrower had about $2,700 less than required (PX-3506). Even if Gething is incorrect that compensating factors exist, this shortfall is immaterial relative to the size of the loan and the borrower's monthly income.

Loan 4003, PX-3196

The title policy appears to have been obtained and whether the judgments were not in fact satisfied should be a matter of public record (PX-3507). Butler did not prove a breach.

Loan 7945, PX-3197 (Material Breach)

While the DTI of 57.83% based on overstated income would, on its own, be one of the closer materiality calls, that this non-complex borrower received a stated-income loan is imprudent enough to support the conclusion that it presented a significantly increased risk of loss, particularly since the DTI was nearly 17% higher than stated on the MLS (PX-3508).

Loan 6578, PX-3198

The court is not convinced the missing documents were actually unavailable to the underwriter and, in any event, does not believe this loan presented a significantly increased risk of loss (PX-3198 at 3).

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[39] Though an occupancy misrepresentation itself is alleged to be a No-Default-Warranty breach, unreasonably accepting an occupancy representation is also a violation of the Prudent-Underwriting Warranty.

Loan 9462, PX-3199 (Material Breach)

Among other issues, the stated income was unreasonable and the DTI was nearly 100% because the borrower did not disclose over $1.5 million of debt (PX-3199).

Loan 0410, PX-3200 (Material Breach)

This non-complex-income borrower received a no-ratio loan and, in any event, this loan was imprudently underwritten even as a no-ratio loan because, as Butler explains, a reasonable underwriter could not have concluded that this borrower would be capable of repaying the loan (PX-3511).

Loan 9024, PX-3201 (Material Breach)

Unlike previous loans with a missing credit report, there are no mitigating circumstances (e.g., an indication in the file of the credit score), demonstrating prudent underwriting. Indeed, this is a no-ratio loan, so the underwriter would have no basis to prudently assess creditworthiness since there is not even a stated income. The borrower had only been working for two years so his income was not likely substantial. The only relevant data point in the file is that after closing, the borrower would have approximately $50,000 in net assets (accounting for other debt) to repay the total loan amount of about $150,000 (PX-3201 at 3). Without the credit report, it is possible that there was, as seen on countless occasions, substantial undisclosed debt. The underwriting of this loan was therefore imprudent and the risk of loss was significantly increased.

Loan 1978, PX-3202

The missing documents do not suggest a significantly increased risk of loss because the DTI was well below the limit and Butler does not claim it is inaccurate (PX-3202 at 4).

Loan 3183, PX-3203

The missing documents are immaterial since this loan appears prudent (PX-3203 at 3).

Loan 3704, PX-3204

For the same reasons, this loan also appears prudent (PX-3204 at 3).

Loan 9827, PX-3205

The DTI is only 57.65% (PX-3204 at 3). The court is not convinced that the co-borrower's income is necessarily non-complex such that it was unreasonable to make a stated-income loan (she was a housekeeper who likely earned tips). The borrowers also appear to be at the beginning of their careers, which means their incomes may well

increase. And the total loan amount was less than $300,000. Under the circumstances, the court cannot conclude that the imprudent way this loan was underwritten significantly increased the risk of loss.

Loan 2419, PX-3206

The DTI is only 53.2% so the income misrepresentation is immaterial (PX-3517).

Loan 2802, PX-3207

The missing HUD-1 is immaterial (PX-3207 at 3).

Loan 4856, PX-3208

The undisclosed debts are immaterial as the DTI was still nearly 20% below the limit (PX-3208 at 3).

Loan 4941, PX-3209

The missing documents are immaterial and this loan appears prudent (PX-3209 at 3).

Loan 5922, PX-3210

For the same reasons, this loan also appears prudent (PX-3210 at 3).

Loan 5922, PX-3211

Even assuming breaches, this loan does not appear particularly risky (PX-3211 at 3).

Loan 7194, PX-3212 (Material Breach)

This borrower with a non-complex income was imprudently issued a stated-income loan (PX-3409). Nothing suggests that income could not have been easily verified.

Loan 8811, PX-3213 (Material Breach)

Among other issues, this non-complex-income borrower was imprudently given a stated-income loan (PX-3524).

Loan 8935, PX-3214

The missing documents are immaterial as this loan appears prudent (PX-3214 at 3).

Loan 0115, PX-3215 (Material Breach)

Among other issues, this non-complex-income borrower was imprudently given a stated-income loan (PX-3526 at 7-8).

Loan 0752, PX-3216 (Material Breach)

The non-complex income borrower misstated the loan's purpose and was imprudently given a stated-income loan (PX-3527).

Loan 1649, PX-3217

The missing documents are immaterial as this loan appears prudent (PX-3217 at 3).

Loan 5981, PX-3218

Again, the missing documents are immaterial as the loan is prudent (PX-3218 at 3).

Loan 6111, PX-3219 (Material Breach)

Among other issues, this non-complex-income borrower was imprudently given a stated-income loan (PX-3530).

Loan 7296, PX-3220 (Material Breach)

This non-complex-income borrower was imprudently given a stated-income loan (PX-3531).

Loan 9227, PX-3221 (Material Breach)

This non-complex-income borrower also was imprudently given a stated-income loan and the DTI was over 60% due to undisclosed debt (PX-3532).

Loan 0250, PX-3222 (Material Breach)

This non-complex-income borrower also was imprudently given a stated-income loan and, most significantly, the DTI was over 300% due to overstated income (PX-3533). The loan exemplifies that W-2 workers with simple income present a significantly increased risk of loss by getting stated-income loans.

Loan 1113, PX-3223 (Material Breach)

The DTI was over 75% due to overstated undisclosed debt (PX-3534).

Loan 1549, PX-3224 (Material Breach)

The DTI was nearly 130% due to overstated income (PX-3535 at 1-3). Gething also does not dispute that the stated income was not reasonable (*id.* at 4-5).

Loan 1631, PX-3225

The employment verification is missing but Butler does not contend the borrower actually misrepresented employment or income and the DTI is under 40% (PX-3225 at 1-3).

Loan 2088, PX-3226 (Material Breach)

The DTI was over 71% due to overstated income, the stated income was unreasonable, and the non-complex-income borrower received a stated-income loan (PX-3537).

Loan 2127, PX-3227 (Material Breach)

This non-complex-income borrower was imprudently issued a stated-income loan (PX-3538 at 3-4).

Loan 4748, PX-3228 (Material Breach)

Among many other issues, Gething does not dispute that the borrower's stated income was unreasonable (PX-3539 at 3-4). The DTI was also over 180% (*id.* at 1)

Loan 5525, PX-3229

The alleged breach is immaterial as Butler does not dispute the co-borrower's employment. A missing verbal verification did not significantly increase the risk of loss (PX-3540).

Loan 6749, PX-3230

The borrower may have earned tips as a restaurant manager; thus, a stated-income loan was not necessarily imprudent. Though stated income was not reasonable, the DTI accounting for a reasonable income is still only 55.28% (PX-3541 at 5). The breaches are immaterial here.

Loan 6873, PX-3231

Even if the borrower's assets were not verified the loan does not appear to be particularly risky (PX-3231 at 3).

Loan 7499, PX-3232 (Material Breach)

The court agrees with Butler that the borrower's stated income was not reasonable and that the DTI would have been over 68% (PX-3543).

Loan 8253, PX-3233 (Material Breach)

While the undisclosed debt does not result in a DTI over the limit, based on the simplicity of the borrower's income and lack of significant assets after closing (less than $5,000), a stated-income loan was imprudent (PX-3544).

Loan 9908, PX-3234 (Material Breach)

This borrower should not have been given a stated-income loan given the simplicity of his income and a prudent underwriter would not have concluded this borrower could repay the loan (PX-3545).

Loan 0468, PX-3235 (Material Breach)

The DTI was over 5,000% due to overstated income and this non-complex-income borrower received a stated-income loan (PX-3546).

Loan 1192, PX-3236 (Material Breach)

While this employee may have received commissions that might justify a no-ratio loan (it is unclear whether a salesperson at Sam's Club gets commissions), a prudent underwriter would not have concluded this borrower could repay the loan (PX-3547).

Loan 1430, PX-3237

Butler's breach findings are immaterial as the DTI would still be well below the limit (PX-3237 at 3).

Loan 2613, PX-3238 (Material Breach)

The DTI was nearly 120% due to overstated income and undisclosed debt (PX-3549).

Loan 4339, PX-3239

Any imprudent underwriting is immaterial given the financial situation of the borrower, who is a doctor with an indisputably large income (PX-3239 at 3).

Loan 7567, PX-3240 (Material Breach)

Gething did not dispute the alleged guideline violation or that it was imprudent to make a no-ratio loan to this borrower (PX-3551).

Loan 8727, PX-3241 (Material Breach)

The DTI was over 65% due to overstated income and this non-complex-income borrower received a stated-income loan (PX-3552).

Loan 9249, PX-3242

The missing document appears to have been in the file at the time of closing and, in any event, this was an extremely risky NINA loan (PX-3553).

Loan 9439, PX-3243

The missing loan approval document did not significantly increase the risk of loss on this NINA loan (PX-3554).

Loan 0157, PX-3244 (Material Breach)

Among other issues, the DTI was over 335% due to overstated income and undisclosed debt (PX-3555).

Loan 0387, PX-3245 (Material Breach)

Among other issues, the DTI was over 100% due to overstated income (PX-3556).

Loan 1193, PX-3246 (Material Breach)

Gething concedes that the stated income was not reasonable and that the actual DTI was nearly 125% (PX-3557).

Loan 1229, PX-3247

This loan was addressed at trial. Though the stated income was not reasonable, Butler's audited DTI is still below 40% so the breach is immaterial (PX-3247 at 3).

Loan 1253, PX-3248

Even accounting for the undisclosed debt, the DTI is still only 42.13% (PX-3559).

Loan 1259, PX-3249 (Material Breach)

Among other issues, the DTI was nearly 100% due to overstated income and undisclosed debt (PX-3560).

Loan 3566, PX-3250 (Material Breach)

Among other issues, Gething concedes that the stated income was not reasonable (PX-3561 at 5).

Loan 3618, PX-3251 (Material Breach)

Among other issues, the DTI was over 85% due to overstated income and this non-complex-income borrower received a stated-income loan (PX-3562).

Loan 5331, PX-3252

While the borrower's assets should have been properly verified, the breach is immaterial because the DTI was only 44.18% and this business owner does not appear to be a financially risky borrower (PX-3252 at 3).

Loan 5868, PX-3253 (Material Breach)

Among other issues, this non-complex-income borrower was imprudently issued a stated-income loan (PX-3564 at 3-4). This borrower, who had negative assets after closing and only approximately $6,600 beforehand, with a payment shock of nearly 500%, is a good example of the risks presented by giving a stated-income loan to a borrower whose income could so easily be verified with a W-2 (PX-3253 at 3). That employment was verified is not sufficiently prudent due diligence. And simply knowing the average annual salary for a profession that pays by the hour does not tell you how much the borrower actually made since you don't know how much they actually worked. A W-2 would quickly remove all doubt. That is why Butler persuasively testified that while it might be prudent to provide stated-income loans to borrowers whose incomes are difficult to substantiate there was no prudent reason not to verify income on a W-2 earner other than expedience and indifference to whether the stated income was accurate. Indeed, the record substantiates the unsurprising truth that many borrowers were willing to materially overstate their income. The frequency with which loans were approved without all underwriting guidelines being satisfied suggests that originators were quite willing to keep their heads in the sand, perhaps motivated to earn fees and thinking they would not be on the hook since the loans were being sold to banks for securitization.

Loan 8545, PX-3254 (Material Breach)

The DTI was nearly 160% due to overstated income and, in any event, Gething concedes that the stated income was not reasonable (PX-3565).

Loan 9385, PX-3255

The missing documents are not material. This is not a risky loan given the DTI, CLTV and the borrower's assets (PX-3255 at 3).

Loan 5508, PX-3256 (Material Breach)

The court credit's Butler's opinion that a prudent underwriter could not have concluded that this borrower could repay the loan (PX-3567).

Loan 5890, PX-3257 (Material Breach)

Among other issues, the DTI was over 185% due to overstated income (PX-3568).

Loan 8539, PX-3258 (Material Breach)

Gething does not rebut that this non-complex-income borrower did not qualify for this stated-income, reduced-documentation loan and that there was a significantly increased risk of loss (PX-3569).

Loan 8852, PX-3259

The missing loan approval document did not significantly increase the risk of loss on this no-ratio loan (PX-3570).

Loan 9053, PX-3260 (Material Breach)

Among other issues, the stated income was not reasonable and, in fact, the DTI was nearly 84% due to overstated income (PX-3571).

Loan 9617, PX-3261 (Material Breach)

Gething does not dispute that the stated income was not reasonable (PX-3572).

Loan 0897, PX-3262 (Material Breach)

Butler persuaded the court that a prudent underwriter could not have concluded that this borrower could repay the loan. Moreover, this this non-complex-income borrower should not have received a stated-income loan (PX-3573).

Loan 2256, PX-3263

The missing documents did not significantly increase the risk of loss (PX-3263 at 3).

Loan 1796, PX-3264 (Material Breach)

This non-complex-income borrower should not have received a stated-income loan (PX-3575).

Loan 7067, PX-3265 (Material Breach)

This non-complex-income nurse borrower should not have received a stated-income loan (PX-3576).

Loan 0737, PX-3266 (Material Breach)

The court agrees with Butler that a prudent underwriter could not have concluded that this borrower could repay the loan. Moreover, this this non-complex-income borrower should not have received a stated-income loan (PX-3577).

Loan 8979, PX-3267

Even accounting for the undisclosed debt, the DTI is still only 34.02% (PX-3567 at 3).

Loan 8766, PX-3268 (Material Breach)

The DTI was over 58% due to overstated income, which is material as this non-complex-income borrower should not have received a stated-income loan (PX-3579).

Loan 2103, PX-3269

The overstated income is immaterial as the DTI was under 52% (PX-3580).

Loan 8838, PX-3270

The missing document did not significantly increase the risk of loss (PX-3270 at 3).

Loan 1397, PX-3271 (Material Breach)

Gething does not dispute that the stated income was not reasonable (PX-3582).

Loan 1580, PX-3272 (Material Breach)

Among other issues, this non-complex-income borrower should not have received a stated-income loan (PX-3583).

Loan 2543, PX-3273 (Material Breach)

The court agrees with Butler that a prudent underwriter could not have concluded that this borrower could repay the loan (PX-3584).

Loan 2633, PX-3274 (Material Breach)

The DTI was over 110% due to undisclosed debt (PX-3585).

Loan 0157, PX-3275 (Material Breach)

This non-complex-income borrower should not have been issued a stated-income loan (PX-3586).

Loan 7195, PX-3276

The missing document did not significantly increase the risk of loss (PX-3276 at 3).

Loan 8308, PX-3277 (Material Breach)

The DTI was nearly 95% due to overstated income and undisclosed debt (PX-3588).

Loan 9927, PX-3278

The undisclosed debt is immaterial as the DTI was still below 30% (PX-3278 at 3).

Loan 4340, PX-3279 (Material Breach)

Gething does not dispute that this non-complex-income borrower should not have received a stated-income loan or that the borrower's rental history was not verified (PX-3590).

Loan 4656, PX-3280 (Material Breach)

Among other issues, the DTI was nearly 100% due to undisclosed debt (*see* PX-3560).

Loan 5164, PX-3281 (Material Breach)

The court agrees with Butler that the borrower materially mispresented income because her employer indicated that she did not generate any income during the four years before closing (PX-3592 at 3-4). While it is impossible to calculate the DTI, the stated DTI is clearly wrong, and it is reasonable to infer that having no income significantly increases the risk of loss.

Loan 9047, PX-3282

The underwriter verified the borrower's employment and this borrower does not present a significantly increased risk of loss (PX-3593).

Loan 0822, PX-3283

The missing document did not significantly increase the risk of loss on this loan (PX-3283 at 3).

Loan 0973, PX-3284 (Material Breach)

Among other issues (e.g., this non-complex-income borrower should not have received a stated-income loan), Gething does not dispute that the borrower's assets were not verified (PX-3595).

Loan 4882, PX-3285 (Material Breach)

Among other issues (e.g., the DTI was nearly 84% due to overstated income and this non-complex-income borrower should not have received a stated-income loan), Gething does not dispute that the property was ineligible for the loan (PX-3596).

Loan 6544, PX-3286

The missing document did not significantly increase the risk of loss (PX-3286 at 3).

Loan 6644, PX-3287 (Material Breach)

Gething does not dispute any of the five breaches Butler found, which among other issues, resulted in a DTI of nearly 800% (PX-3598).

Loan 2127, PX-3288 (Material Breach)

Among other issues, the DTI was nearly 185% due to overstated income and undisclosed debt (PX-3599).

Loan 2587, PX-3289

The missing document did not significantly increase the risk of loss (PX-3289 at 3).

Loan 3269, PX-3290 (Material Breach)

This non-complex-income borrower should not have received a stated-income loan (PX-3601).

Loan 9633, PX-3291 (Material Breach)

The borrower did not disclose more than $1 million of debt (PX-3602).

Loan 9641, PX-3292

The undisclosed debt is immaterial as the DTI was still below 50% (PX-3292 at 3).

Loan 0189, PX-3293 (Material Breach)

Among other issues, this non-complex-income borrower should not have been issued a stated-income loan (PX-3604).

Loan 2332, PX-3294 (Material Breach)

Gething does not dispute any of the breaches Butler found, including failure to verify the borrower's assets (PX-3605).

Loan 5504, PX-3295

The DTI is 55.5% due to overstated income (PX-3606). After review of the borrower's overall financial situation and given that the stated DTI was 48%, this breach was immaterial (PX-3295 at 3).

Loan 8196, PX-3296 (Material Breach)

Among other issues, the DTI was over 62% due to undisclosed debt (PX-3607).

Loan 9552, PX-3297 (Material Breach)

The borrower did not disclose nearly $400,000 of debt (PX-3608 at 2).

Loan 9726, PX-3298 (Material Breach)

Among other issues, the DTI was nearly 155% due to overstated income (PX-3609).

Loan 9889, PX-3299 (Material Breach)

Among other issues, the DTI was nearly 100% due to undisclosed debt (PX-3610).

Loan 2414, PX-3300 (Material Breach)

This improperly verified loan--the file contained an unresolved employment discrepancy--was imprudently underwritten and there was significant undisclosed debt. The breaches significantly increased the risk of loss (PX-3611).

Loan 3589, PX-3301 (Material Breach)

Gething does not dispute the DTI was over 400% due to undisclosed debt (PX-3612).

Loan 3627, PX-3302 (Material Breach)

The borrower did not disclose more than $175,000 of debt, which is material because it is greater than the loan amount (PX-3613).

Loan 3695, PX-3303 (Material Breach)

This non-complex-income borrower should not have been issued a stated-income loan (PX-3614).

Loan 4699, PX-3304 (Material Breach)

This non-complex-income borrower should not have been issued a stated-income loan (PX-3615).

Loan 7925, PX-3305 (Material Breach)

Among other issues, including a DTI of nearly 200% due to overstated income, and Gething does not dispute that the stated income was unreasonable (PX-3616).

Loan 9223, PX-3306 (Material Breach)

Among other issues, including a DTI of nearly 60% due to undisclosed debt, Gething does not dispute that the stated income was unreasonable (PX-3617).

Loan 2472, PX-3307 (Material Breach)

Based on problems including unresolved income discrepancies and other features demonstrating an inability to repay, the court agrees with Butler that this loan was imprudently underwritten and that the breach was material (PX-3618).

Loan 5096, PX-3308 (Material Breach)

Among other issues, the DTI was nearly 63% due to overstated income and this non-complex-income borrower should not have been given a stated-income loan (PX-3619).

Loan 7919, PX-3309 (Material Breach)

This non-complex-income borrower should not have been issued a stated-income loan (PX-3620).

Loan 9447, PX-3310 (Material Breach)

Gething does not dispute that the DTI was over 62% due to overstated income (PX-3621).

Finally, Loan 0884, PX-3311 (Material Breach)

This non-complex-income borrower should not have been issued a stated-income loan (PX-3622).

Sampling

The Appellate Division recently made clear that "despite the language of the repurchase protocol, RMBS plaintiffs . . . are entitled to introduce sampling-related evidence to prove liability and damages in connection with repurchase claims" (*Ambac,* 179 AD3d at 521; *see HEMT*, 175 AD3d at 1176 [refusing to preclude statistical sampling after parties proceeded through extensive expert discovery without appealing order that authorized it]). In permitting sampling, the court referenced federal post-trial cases that used the procedure, including one upholding an "806 million RMBS judgment following a bench trial in which statistical sampling featured prominently" (*see Ambac*, 179 AD3d at 521).[40] The Appellate Division's authorization of sampling for damages calculation further supports use of MBIA's damages model, with which (other than opposing sampling itself)

[40] *MARM*, which was decided before the First Department's binding determinations in *Ambac* and *HEMT*, did not use sampling. This action required examination of more than 300 loans in a 400-loan sample and confirmed that the same issues recurred based on the general quality of the loans in the trust. Proceedings requiring 50 times the work through discovery and trial only to arrive at the same conclusion would be a needless drain of resources for all.

DLJ does not disagree. Any other method would unnecessarily cripple RMBS plaintiffs and add years of costly litigation to no end.

The only viable basis to challenge sampling here is by showing that there is something wrong with the sample that MBIA used (*see HEMT*, 175 AD3d at 1177). Credit Suisse failed to do so (*see* Dkt. 1856 at 88-90). Credit Suisse makes two arguments: (1) "MBIA did not draw the sample from the relevant population - it drew from the entire loan pool, rather than the smaller set of loans for which MBIA provided notice"; and (2) "extrapolation does not satisfy the repurchase protocol because it does not identify specific breaches, with specific material and adverse effects, in specific loans" (*id.* at 88).[41] The first argument fails because MBIA provided sufficient notice for all of the loans. The second argument was foreclosed by the Appellate Division's decision in *Ambac*.[42]

Regression Analysis

Credit Suisse's argument that MBIA should not recover because the non-conforming loans did not default at a higher rate or perform any differently than the conforming ones is rejected because it is based on a flawed regression analysis. As MBIA explains:

> [Dr. Steven Grenadier, Credit Suisse's expert] claimed to be comparing defective loans against non-defective loans but, did not. Grenadier's conclusions are based on treating as non-defective, i.e., fully compliant with warranties, the 91 sample loans where Butler did not cite a Significant Defect. However, Butler never concluded that any of those loans complied with warranties, and he even found defects in certain loans that he did not

[41] Credit Suisse's brief devotes just two sentences to the issues and merely restates the same arguments (*see* Dkt. 2110 at 58).

[42] Because Credit Suisse's limited objections to the sample are rejected as a matter of law, there is no need to assess the methodology employed by Dr. Charles Cowan, who was qualified and credible (*see generally* Dkt. 1855 at 88-89). If his analysis were flawed, Credit Suisse surely would have said so.

> ultimately identify as Significantly Defective. Gething never reviewed those loans and admitted that, if he had done so, he might have found significant defects. Against this backdrop, Grenadier conceded that . . . he "did not take any steps to ensure . . . that [he] had a set of loans to compare the significant[ly] defective loans against that was actually free of defects" (Dkt. 1855 at 74-75 [citations omitted]).

In other words, the premise underlying Grenadier's analysis--that the 91 loans are conforming while the rest of the sample was not--is faulty. There was no actual evidence that the 91 loans conformed with the PSA's warranties and that there were no material breaches among them. Butler's conservative approach may have overlooked breaches and Gething never evaluated those loans at all.[43] Thus, there is no basis to conclude that the 91 loans are a representative and reliable sample of conforming loans such that they can be meaningfully compared to the breaching loans (*see FHFA v Nomura Holding Am., Inc.*, 104 F Supp 3d 441, 541 [SDNY 2015] [expert "claimed to be comparing defective loans against non-defective loans, but did not. He admitted at trial that he took no steps to ensure he actually had a 'clean' set of loans for his comparison"], *affd* 873 F3d 85 [2d Cir 2017]).

Additionally, Grenadier's analysis does not hold up because it rests on another incorrect premise--that 309 loans were materially nonconforming. After review, that has been proven wrong as to 103 loans; thus, at best, he compared a set of conforming loans with another set where more than a third did not materially breach. Because there can be no confidence in the comparisons here, the statistical conclusion is not persuasive in the least.

[43] The two loans conceded by Butler do not materially remedy the problem or alter the analysis.

Additional Damages Unrecoverable

MBIA is not entitled to any additional damages for breach of a transaction-level warranty or for defendants' alleged gross negligence (*see Ambac Assurance Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 581 [2018] [rescissory damages unavailable; compensatory damages must be measured "only by reference to claims payments made based on nonconforming loans"]). Any damages it would be entitled to are duplicative of those already awarded.

Accuracy-of-Information Warranty

MBIA argues that Credit Suisse breached the insurance agreement's Accuracy-of-Information Warranty by providing false information about Credit Suisse's operations, controls and measures taken to ensure that the securitization was sound (*see* Dkt. 1855 at 91).[44] This breach, which is supported by compelling evidence, cannot possibly give rise to more or different recovery. Any damages would be duplicative of those being awarded. This is no different from MBIA's fraud claim that was dismissed (165 AD3d at 114 ["an insurer is not entitled to damages amounting to all claims payments it made or will make under the policies, inasmuch as such damages are rescissory damages to which the insurer is not entitled"]). Once again, the only harm MBIA could have suffered is paying out on materially non-conforming loans and it is being compensated for those very losses. After all, MBIA is recovering for loans that should not have been securitized in the first place. Its other losses arise from the very risk that MBIA agreed to assume: the risk that sometimes, for one reason or another, loans expected to be repaid defaulted.

[44] The insurance agreement governing issuance of MBIA's policy is a separate contract dated as of April 30, 2007 (Dkt. 1864).

The whole point of the loan-level warranties was to ensure that the Transaction only included sufficiently secure loans to meet MBIA's acceptable risk requirements. The only harm that could befall MBIA due to the alleged transaction-level breaches, in turn, is that very same harm: inclusion of non-conforming loans for which MBIA did not accept the risk of loss. MBIA is thus limited to the damages awarded and cannot recover any more for the transaction-level breach (*see Ambac*, 31 NY3d at 581-83; *cf. Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 585-86 [2017]).

Gross Negligence

Likewise, MBIA is not entitled to any additional or different damages even if there was gross negligence. MBIA is being compensated for the losses it incurred because it had to pay investors when nonconforming loans that meaningfully increased its risk of loss failed. That is the very wrong and those are the very damages allegedly caused by defendants' gross negligence here.

Though gross negligence may relieve MBIA from the requirements of the repurchase protocol (*Matter of Part 60 Put-Back Litig.*, 169 AD3d 217 [1st Dept 2019]),[45] where, as here, punitive damages are not at issue, it is not an escape route around the generally-applicable requirement that damages be proximately caused by the harm (*see Demetriades v Royal Abstract Deferred, LLC*, 159 AD3d 501, 503 [1st Dept 2018] [dismissing breach of contract claim "in the absence of … allegations that are the proximate

[45] For example, gross negligence would be meaningful to recovery if the notice requirements of the repurchase protocol had not been satisfied. Regardless of the repurchase protocol, however, MBIA would still have to show that its damages stemmed from the wrong. Any harm that did not significantly increase MBIA's risk of loss would not be compensable anyway.

cause of the damages sought"]; *Onetti v Gatsby Condominium*, 111 AD3d 496, 497 [1st Dept 2013] ["Although there is no dispute that plaintiffs failed to obtain the required insurance, Gatsby has failed to allege any damages proximately caused by plaintiffs' breach"]).

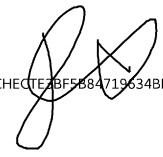
Defendants have not been insulated from damages caused by any allegedly grossly negligent conduct. To the contrary, by virtue of the material warranty breaches, they now must account for all of the losses that MBIA proved they caused regardless of how the claims against them have been denominated. Defendants' alleged gross negligence, however, is not a means for MBIA to escape its own contractual responsibilities by allowing it to recover for the losses that it agreed to pay out--those related to materially conforming loans.

Accordingly,

it is ORDERED that by December 21, 2020, MBIA shall e-file and email the court a letter not exceeding five pages explaining the amount of its damages based on the breach rate of 51.5% along with a proposed order directing entry of judgment, and MBIA shall also discuss any other issues that must be addressed before entry of judgment; and it is further

ORDERED that by January 11, 2021, Credit Suisse shall respond to MBIA's letter and submit a proposed counter-order along with a redline, and then the parties shall meet and confer in good faith to address any disputes raised by their letters and proposed orders; and it is further

ORDERED that a telephone conference will be held on January 25, 2021 at 3:00 p.m. (the parties shall circulate a dial-in number 30 minutes beforehand), at which the time the parties shall be prepared to discuss any further proceedings.



DATE: 11/30/2020

JENNIFER G. SCHECTER, JSC