HSBC Bank USA, N.A. v
Nomura Credit & Capital, Inc.

2023 NY Slip Op 33252(U)

September 19, 2023

Supreme Court, New York County

Docket Number: Index No. 650337/2013

Judge: Melissa Crane

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

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INDEX NO. 650337/2013

MOTION DATE 09/30/2022

MOTION SEQ. NO. 022

HSBC BANK USA, NATIONAL ASSOCIATION, IN ITS CAPACITY AS TRUSTEE OF NOMURA HOME EQUITY LOAN, INC.,ASSET BACKED CERTIFICATES, SERIES 2007-2,

Plaintiff,

- v -

NOMURA CREDIT & CAPITAL, INC.,

Defendant.

DECISION + ORDER ON MOTION

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NOMURA CREDIT & CAPITAL, INC.

Plaintiff,

-against-

WELLS FARGO BANK, N.A., OCWEN LOAN SERVICING, LLC

Defendant.

Third-Party
Index No. 595359/2014

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The following e-filed documents, listed by NYSCEF document number (Motion 022) 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 1522, 1523, 1524, 1525, 1526, 1527, 1528, 1529, 1530, 1531, 1532, 1533, 1534, 1535, 1536, 1537, 1538, 1539, 1540, 1541, 1542, 1543, 1544, 1545, 1546, 1547, 1548, 1549, 1550, 1551, 1552, 1553, 1554, 1555, 1556, 1557, 1558, 1559, 1560, 1561, 1562, 1563, 1564, 1565, 1566, 1567, 1568, 1569, 1570, 1571, 1572, 1573, 1574, 1575, 1576, 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, 1588, 1589, 1590, 1591, 1592, 1593, 1594, 1595, 1596, 1597, 1598, 1599, 1600, 1601, 1602, 1603, 1604, 1605, 1606, 1607, 1608, 1609, 1610, 1611, 1612, 1613, 1614, 1615, 1616, 1617, 1618, 1619, 1620, 1621, 1622, 1623, 1624, 1625, 1626, 1627, 1628, 1629, 1630, 1631, 1632, 1633, 1634, 1635, 1636, 1637, 1638, 1639, 1640, 1641, 1642, 1643, 1644, 1645, 1646, 1667, 1683, 1684, 1685, 1686, 1687, 1688, 1689, 1690, 1691, 1692, 1693, 1694, 1695, 1696, 1697, 1698, 1699, 1700, 1701, 1702, 1703, 1723, 1724, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187,

2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2744, 2745, 2746, 2747, 2748, 2749, 2750, 2751, 2752, 2753, 2754, 2755, 2756, 2757, 2758, 2759, 2760, 2761, 2762, 2763, 2764, 2765, 2766, 2767, 2768, 2769, 2770, 2771, 2772, 2773, 2774, 2775, 2776, 2777, 2778, 2779, 2780, 2781, 2782, 2783, 2784, 2785, 2786, 2787, 2788, 2789, 2790, 2791, 2792, 2793, 2794, 2795, 2796, 2797, 2798, 2799, 2800, 2801, 2802, 2803, 2804, 2805, 2806, 2807, 2808, 2809, 2810, 2811, 2812

were read on this motion to/for JUDGMENT - SUMMARY.

This decision relates to one matter amongst many in a decade-plus behemoth litigation related to residential mortgage-backed securities ("RMBS") Defendant/Third-Party Plaintiff Nomura Credit & Capital, Inc. ("Nomura") sponsored. These cases involve allegations that certain parties violated representations and warranties that they made related to the securities. In this particular third-party action, Third-Party Defendant Ocwen Loan Servicing, LLC ("Ocwen") has moved for summary judgment dismissing the causes of action that Nomura plead against it related to: (1) Ocwen's alleged failure to notify Nomura of purported breaches of representations and warranties; and (2) Ocwen's alleged servicing misconduct related to the relevant loans. For the following reasons, the court grants in part and denies in part Ocwen's motion for summary judgment.

FACTUAL AND PROCEDURAL HISTORY

The court need not recite the entire history of this particular 2013 action, nor the several other actions involving Nomura RMBS before the court. However, the court provides limited factual and procedural background for context.

Trustee HSBC Bank USA, National Association ("HSBC") filed the underlying action and other related actions against Nomura in connection with several Nomura RMBS securitizations that it sponsored in the years prior to the 2008 financial crisis. HSBC claims Nomura breached representations and warranties in violation of the relevant mortgage loan purchase agreements ("MLPAs") and pooling and servicing agreements ("PSAs"). Nomura had acted as the sponsor for

the securitization of over 5,000 mortgage loans that comprised the Series 2007-2 trust at issue in this action, selecting the particular loans for the securitization (Complaint, NYSCEF Doc. No. 1, ¶ 1).

Ocwen was one of the servicers of the mortgage loans at issue (Third-Party Complaint, NYSCEF Doc. No. 64, ¶ 2), along with Wells Fargo Bank, N.A. ("Wells Fargo").[1] The rights and obligations of the parties to the securitizations, including Nomura, Ocwen, HSBC, and Wells Fargo, are set forth in the MLPAs and PSAs. The PSAs include the following:

- July 1, 2006 PSA – Series 2006-S3 (Ex. 15 to Affirmation of Stan Chelney ["Chelney Aff."], NYSCEF Doc. No. 835)
- September 1, 2006 PSA – Series 2006-S4 (Ex. 14 to Chelney Aff., NYSCEF Doc. No. 834)
- October 1, 2006 PSA – Series 2006-FM2 (Ex. 13 to Chelney Aff., NYSCEF Doc. No. 833)
- January 1, 2007 PSA – Series 2007-2 (Excerpts available at Ex. 12 to Chelney Aff., NYSCEF Doc. No. 832; *see also* January 1, 2007 PSA in full at NYSCEF Doc. No. 2)
- April 1, 2007 PSA – Series 2007-3 (Ex. 11 to Chelney Aff., NYSCEF Doc. No. 831)

This particular action involves the January 1, 2007 PSA for the Series 2007-2 certificates. Under Section 2.03(e) of the January 1, 2007 PSA, "[u]pon discovery by any of the parties hereto of a breach of a representation or warranty . . . that materially and adversely affects the interests of the Certificateholders in any Mortgage Loan, the party discovering such breach shall give prompt written notice thereof to the other parties" (January 1, 2007 PSA, § 2.03[e]). The PSA further provides that "within (90) days of the discovery of a breach . . . [Nomura] shall cure such breach in all material respects and, if such breach is not so cured . . . remove such Mortgage Loan . . . or [] repurchase the affected Mortgage Loan" (*id.*). The PSA additionally creates insurance obligations for the servicers with respect to the underlying mortgages, including by prohibiting the

[1] The court notes that while Wells Fargo previously was a third-party defendant, Nomura discontinued the third-party action against Wells Fargo, and the court denied Wells Fargo's motion for summary judgment (MS 23) as moot (*see* April 7, 2022 Decision and Order, NYSCEF Doc. No. 1655).

servicers from "tak[ing] any action that would result in noncoverage under any applicable Insurance Policy of any loss which, but for the actions of such Servicer would have been covered thereunder" (*see id.*, § 3.07). Each servicer is also required to "use its best efforts to keep in force and effect (to the extent that the related Mortgage Loan requires the Mortgagor to maintain such insurance), any applicable Insurance Policy" and shall not "cancel or refuse to renew any Insurance Policy that is in effect at the date of the initial issuance of a Mortgage Note and is required to be kept in force hereunder" (*id.*).

Further, the PSA contains specific guidelines for servicers such as Ocwen relating to foreclosure of underlying mortgage loans. Section 3.09(a) of the January 1, 2007 PSA states that "[e]ach Servicer shall use reasonable efforts to foreclose upon or otherwise comparably convert the ownership of properties securing such of the related Mortgage Loans as come into and continue in default and as to which no satisfactory arrangements can be made for collection of delinquent payments" (*id.*, § 3.09[a]). However, the same section states that "[i]f a Servicer reasonably believes that Liquidation Proceeds with respect to any such Mortgage Loan would not be increased as a result of such foreclosure or other action, such Mortgage Loan will be charged-off and will become a Liquidated Loan" and that the "decision of a Servicer to foreclose on a defaulted Mortgage Loan shall be subject to a determination by such Servicer that the proceeds of such foreclosure would exceed the costs and expenses of bringing such a proceeding" (*id.*).

The PSA further provides that a servicer:

> "shall not be required to expend its own funds in connection with any foreclosure or towards the restoration of any property unless it shall determine (i) that such restoration and/or foreclosure will increase the proceeds of liquidation of the related Mortgage Loan after reimbursement to itself of such expenses and (ii) that such expenses will be recoverable to it through Liquidation Proceeds"

(*id.*).

Section 7.04(a) of January 1, 2007 PSA states that:

> "[n]either the Depositor, the Securities Administrator, the Master Servicer, the Servicers nor any of the directors, officers, employees or agents of the Depositor, the Securities Administrator, the Master Servicer and the Servicers shall be under any liability to the Indemnified Persons,[2] the Trust Fund or the Certificateholders for taking any action or for refraining from taking any action in good faith pursuant to this Agreement, or for errors in judgment; provided, however, that this provision shall not protect . . . the Servicers . . . against any breach of warranties, representations or covenants made herein or against any specific liability imposed . . . by reason of such Person's **willful misfeasance, bad faith or gross negligence** in the performance of duties or by reason of reckless disregard of obligations and duties hereunder"

(*id.*, § 7.04[a] [emphasis added]).

The underlying complaint in this action alleges that a "massive number" of the mortgage loans breached Nomura's representations and warranties (Complaint, ¶ 2) and that Nomura has failed to repurchase the affected mortgage loans as the PSA requires (*id.*, ¶¶ 2, 11; January 1, 2007 PSA, § 2.03[e]). The underlying complaint alleges causes of action for breach of contract and recission and also seeks specific performance of the repurchase of the mortgage loans as well as a declaratory judgment that Nomura must reimburse HSBC for its expenses incurred in connection with enforcing remedies for the alleged breaches. The court granted in part Nomura's motion to dismiss, dismissing the recission cause of action (July 18, 2014 Decision and Order, NYSCEF Doc. No. 53).

Subsequently, Nomura filed a third-party complaint on August 27, 2014 against the servicers, Wells Fargo and Ocwen (Third-Party Complaint). The third-party complaint alleges that the party "principally responsible for delinquent Mortgage Loans is the Servicer, Ocwen" (Third-Party Complaint, ¶ 2) and that, to the extent Nomura is liable to HSBC with respect to the mortgage

[2] "Indemnified Persons" is defined in the PSA as "The Trustee, any Servicer (including any successor to any Servicer), the Master Servicer, the Securities Administrator, the Custodian, the Trust Fund and their officers, directors, agents and employees and, with respect to the Trustee, any separate co-trustee and its officers, directors, agents and employees" (January 1, 2007 PSA, § 1.01).

loans, Wells Fargo and Ocwen have breached their own obligations pursuant to the PSA (*id.*, ¶ 8). In particular, Nomura alleges: (1) that under the PSA, if **any** party to the PSA discovered a breach of the representations and warranties, they would be required to notify all other parties, and that Ocwen did not do so (Third-Party Complaint, ¶¶ 21, 29); and that (2) Ocwen failed to adhere to accepted servicing practices (*id.*, ¶ 51). The third-party complaint alleges two causes of action for breach of contract against Ocwen based on these allegations.

What followed was a decade-long slog through motion practice and discovery. In particular, Ocwen moved to dismiss the third-party complaint. On May 14, 2018, the court granted the motion to dismiss solely to the extent that the third-party complaint purported to plead a claim for successor liability against Ocwen based on actions of a prior servicer, Equity One, Inc., but otherwise denied the motion (May 14, 2018 Order, NYSCEF Doc. No. 327). On August 3, 2018, Ocwen answered the third-party complaint, asserting a counterclaim against Nomura for breach of contract, and seeking a declaration that Nomura is "barred from obtaining the relief sought from Ocwen to the extent of Nomura's failure to provide Ocwen with notice as provided for by the PSA" (Ocwen Answer to Third-Party Complaint, NYSCEF Doc. No. 418, pp. 19-20). In addition to fact discovery, the parties exchanged multiple and voluminous expert reports and conducted expert depositions that they have appended to their motion papers.

May 31, 2019 Lendez Amended Expert Report [Nomura]

Among these expert reports is the May 31, 2019 amended expert report of Anthony M. Lendez, Nomura's servicing expert (Lendez Amended Expert Report, NYSCEF Doc. No. 856). The Lendez report generally describes that the servicers failed to provide notice of breaches as the PSA required. In particular, the report states that "[b]ased on [his] Team's analysis, the Servicers

failed to provide prompt written notice with respect to [] 689 of the 708 Claim Loans (97%)" (*id.*, p. 50). According to the report,

> "[i]f prompt written notice of the potential breach of representations and warranties had been provided to Nomura prior to the deemed prompt written notice date for the 689 Claim Loans, Nomura would have had the opportunity to repurchase or cure these loans, or, substitute the Claim Loans had Nomura received notice prior to the second anniversary of the securitization"

(*id.*, p. 51).

The Lendez report also describes purported deficiencies with the servicing of mortgage loans, stating that his team found evidence that the servicers:

> "(i) failed to make sound decisions on defaulted Mortgage Loans;
> (ii) allowed excessive servicing advances, expenses, and fees;
> (iii) failed to achieve market value when marketing and selling REOs [real estate owned properties];
> (iv) failed to process foreclosures in a timely matter [sic];
> (v) improperly imposed overpriced force-placed insurance ('FPI') which resulted in profits for Ocwen and its affiliates but also resulted in unpaid amounts that were eventually passed to certificateholders as a component of Realized Losses on properties;
> (vi) improperly forced borrowers to list their properties on the auction website, Hubzu, and incur the unnecessary, associated fees; and
> [vii] improperly hired affiliated brokerage firm, RealHome, that used brokers to sell properties who did not perform at least certain of the traditional brokerage services"

(*id.*, p. 30).

Particularly with respect to Ocwen, the Lendez report documents how Ocwen made excessive advances to borrowers to the detriment of the trust. The report evaluates advances that Ocwen made for 42 claim loans and extrapolates based on those loans that Ocwen advanced a total of $27,826,164 on a total unpaid principal balance of $169,156,013 and total realized losses of $100,099,931 (*id.*, pp. 35-36). Thus, according to the Lendez report, the advances that Ocwen made "represent 27.8% of the total Realized Losses of the Trust" (*id.*, p. 36). The Lendez report describes how, under the PSA, a servicer should stop making advances once the servicer

determines that it will not be able to recover the advances, but the PSA nevertheless allows the servicer to recover advances from the trust even when the servicer cannot recover from the borrower (*id.*, p. 34). Thus, the servicer "causes avoidable losses to be passed on to the Trust" (*id.*) The Lendez report also cites an Ocwen pitch book presentation's representation that "Servicing advances generally represent less than 10% of the [unpaid principal balance]" and describes how here they represent 16.45% (*id.*, p. 36). Thus, according to the Lendez report, Ocwen made "excessive advances," and if Ocwen "had advanced only 10% of [the unpaid principal balance] on the Claim Loans, it would have avoided an additional $10,910,563 in losses" (*id.*).

Further, the Lendez report evaluates the servicers' sale of real-estate owned properties. The Lendez report explains how the team evaluated 22 "quick flip" claim loans—meaning loans for properties that Ocwen sold and that the buyers then re-sold within six months without any indication of substantial home improvements in the interim (*id.*, pp. 39-40). According to the report, the resale prices "were on average $66,443 (47%) greater than the original [real-estate owned] sales prices Ocwen obtained for the properties" (*id.*, p. 40). Thus, Ocwen "failed to obtain fair market value on the [real-estate owned] homes sold, resulting in higher losses to the Trust" (*id.*).

Additionally, the Lendez report describes Ocwen's alleged conduct relating to borrower insurance. The report describes how borrowers are "required to have hazard insurance and when they fail to have such insurance or have insufficient hazard insurance, pooling and servicing agreements usually provide for what is commonly known as [force-placed insurance]," the cost of which the servicers advance and then seek reimbursement from the trust (*id.*, p. 43). The report references a past class action lawsuit involving a claim that Ocwen "artificially inflat[ed] the cost of force-placed insurance in exchange for kickbacks" as well as state investigations of Ocwen's

use of force-placed insurance (*id.*, p. 44). In particular, the report refers to a New York State Department of Financial Services investigation that found that Ocwen's force-placed insurance arrangements were "designed 'to funnel as much as $65 million in fees annually' to Altisource Portfolio Solutions, S.A., an **Ocwen-related entity**" (*id.* [emphasis added]). The Lendez report ultimately concludes that "Ocwen imposed [force-placed insurance] on at least 134 of the Claim Loans, totaling $1,224,845 in [force-placed insurance] premiums that were passed through to the Certificateholders" (*id.*, p. 45). According to the report, the force-placed insurance premiums were significantly higher than the policy premiums borrowers paid at the time of origination, and inflated premiums "can be contributing factors in a borrower's propensity to default" (*id.*).

The Lendez report also concludes that Ocwen's requirement that borrowers use an "Altisource-affiliated company [Hubzu] . . . [that] is not truly independent of Ocwen" for auctions allowed Ocwen to pay "excessive [] fees to Ocwen affiliated companies" (*id.*, pp. 46-48). Indeed, the New York State Department of Financial Services shares that concern. An April 21, 2014 letter from the Department of Financial Services to Ocwen general counsel Timothy Hayes notes that the Department's "review has raised concerns surrounding conflicted business relationships between Ocwen and Altisource Portfolio" (April 21, 2014 NYSDFS Letter, NYSCEF Doc. No. 2174). Specifically, the letter describes the "particularly troubling issue" of the relationship between Ocwen and Hubzu, Altisource's subsidiary (*id.*). Hubzu, according to the Department of Financial Services, charges Ocwen-serviced properties "auction fees" that are "up to three times the fees charged to non-Ocwen customers" (*id.*). The letter states that the relationship between Ocwen, Altisource, and Hubzu—and particularly the individual equity ownership stakes that key Ocwen personnel have in Altisourse—raises "questions about whether those companies are

charging inflated fees through conflicted business relationships, and thereby negatively impacting homeowners and mortgage investors" (*id.*).

Lastly, the Lendez report refers to Ocwen's use of "[a]nother Altisource-affiliated company," REALHome Services and Solutions, Inc. ("RealHome"), a property management and real estate brokerage agency (*id.*, p. 49). The report concludes that RealHome brokers "did not provide the same services traditional brokers provided" (*id.*). Therefore, the report asserts that the brokers are not "entitled to the traditional brokerage fees of 6% for a sale and 3% for a co-brokered sale" (*id.*).

The parties filed motions and cross-motions for summary judgment across the multiple matters, and the court held oral argument on the motions. Subsequently, the parties vacated the note of issue as to a number of the first-party actions. However, the parties did not vacate the note of issue as to this action, in which this motion and Nomura's motion for summary judgment dismissing Ocwen's counterclaims (MS 26) are pending. For the following reasons, the court grants in part and denies in part Ocwen's motion for summary judgment.

DISCUSSION

Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212[b]; *Aguilar v City of New York*, 162 AD3d 601, 601 [1st Dept 2018]; *AGFA Photo USA Corp. v Chromazone, Inc.*, 82 AD3d 402, 403 [1st Dept 2011]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form (*see Olan v Farrell Lines*, 64 NY2d 1092, 1093 [1985]; *AGFA Photo USA Corp.*, 82 AD3d at 403; *Branda v MV Public Transp., Inc.*, 139 AD3d 636, 637 [1st Dept 2016]). If the party seeking summary judgment fails to meet their burden, the court must

deny summary judgment "regardless of the sufficiency of the opposition papers" (*O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]).

Both of the causes of action in the third-party complaint against Ocwen are for breach of contract based on Ocwen's alleged breach of the PSA. The third-party complaint's second cause of action is for breach of contract based on Ocwen's failure to notify Nomura of breaches of the representations and warranties (*see e.g.*, Third-Party Complaint, ¶¶ 44-46). The third-party complaint's third cause of action is for breach of contract based on Ocwen's failure to comply with accepted servicing practices (*see e.g.*, *id.*, ¶ 50).

In order to establish a cause of action for breach of contract, a plaintiff must demonstrate "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Belle Lighting LLC v Artisan Construction Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019] [granting summary judgment to plaintiff on breach of contract claim]; *see also Lebedev v Blavatnik*, 193 AD3d 175, 182-83 [1st Dept 2021] [holding that issues of fact as to consideration precluded summary judgment on breach of contract cause of action]; *Alloy Advisory, LLC v 503 West 33rd Street Associates, Inc.*, 195 AD3d 436, 436-37 [1st Dept 2021] [granting in part the plaintiffs' motion for summary judgment but finding that issues of fact remained as to damages]).

A. Failure to Notify Claim

Nomura's claim based on failure to notify relies on the theory that Ocwen breached PSA § 2.03 through failing to notify Nomura of breaches of the representations and warranties. The parties argued at length in their papers and at oral argument about whether Ocwen had actual knowledge of alleged breaches of representations and warranties, was willfully blind to those breaches, or had any obligation to notify Nomura of the breaches. However, the court need not

decide those issues, because Ocwen has established that it is entitled to summary judgment on this cause of action. This is because, even if Ocwen had knowledge and provided the notice Nomura is claiming was required, Nomura would never have exercised its repurchase option. Thus, Ocwen has established that Nomura is unable to show damages.

In the underlying actions, HSBC is suing Nomura, in part, for Nomura's failure to execute the repurchase remedy for loans that allegedly breached the representations and warranties (*see e.g.*, Complaint, ¶ 2). In the underlying actions, Nomura has denied that it was under any repurchase obligation because HSBC has failed to establish breaches that "materially and adversely affect the interests of the certificateholders" (*see e.g.*, Memo of Law in Support of Nomura Summary Judgment Motion, NYSCEF Doc. No. 1116, p. 48). Yet, in the third-party action, Nomura argues that if the court were to find that the loans were in breach, the servicers are liable because if "the Servicers provided Nomura with prompt notice sooner . . . Nomura would have had the opportunity to address such notices . . . and engage in a dialogue with the Servicers to determine if repurchase was warranted" (Memo of Law in Opposition to Wells Fargo's Summary Judgment Motion, NYSCEF Doc. No. 2619, p. 26; *see also* Opposition Memo, NYSCEF Doc. No. 2084, pp. 4-5 [incorporating the arguments Nomura made regarding failure to notify in opposition to the Wells Fargo motion]).

The evidence in the record shows that Nomura would not have repurchased the loans in any event. In particular, Ocwen has shown that HSBC provided a number of unheeded pre-litigation notices of breach to Nomura related to loans at issue here (*see* Ocwen Rule 19-a Statement, NYSCEF Doc. No. 2744, ¶ 214 [citing Warren Report 2007-2]). Samuel Warren's expert report that Ocwen submitted with their motion related to the 2007-2 certificates describes the "assumption that, if Ocwen had provided notice of the breaches to Nomura, Nomura would

have repurchased the loans" as "not justified" because HSBC previously provided repurchase demands for 336 of the 479 loans factored into Nomura's damages calculations for failure to notify, none of which Nomura repurchased (Warren Report 2007-2, NYSCEF Doc. No. 876, ¶¶ 148-49). The Warren report further describes how Nomura "again received notice of potential breaches of its representations and warranties once the Trust's litigation was filed on January 30, 2013" but has "continued to refuse to repurchase the Claim Loans despite having had the opportunity to thoroughly evaluate whether it materially breached its representations and warranties" (Warren Report 2007-2, ¶¶ 150-51). As a further example, Ocwen refers to the deposition testimony of Nancy Prahofer, Nomura's own witness, who admitted that Nomura refused to repurchase a loan even after Ocwen alerted Nomura that the loan was "defective" and attached an affidavit of the purported borrower attesting that their identify had been stolen and that they did not purchase a home (Ocwen Rule 19-a Statement, ¶¶ 208-13; Prahofer Deposition, NYSCEF Doc. No. 836, pp. 417-29).

Nomura's response to the compelling and undisputed evidence that Nomura has refused to exercise the repurchase remedy for the loans at issue—and continues to refuse to do so to this day—is essentially that HSBC provided notice of the alleged breaching loans en masse and far too close to the expiration of the statute of limitations, and that if Ocwen had provided notices of breach piecemeal, in the ordinary course of business, maybe Nomura would have repurchased (*see* Opposition Memo., pp. 4-5 [incorporating arguments made in Opposition to Wells Fargo's Summary Judgment Motion]; *see* Opposition to Wells Fargo's Summary Judgment Motion, p. 26 ["In making these arguments, the Servicers fail to recognize the fundamental distinction between omnibus repurchase notices encompassing thousands of loans issued as part of a litigation strategy

orchestrated by certain hedge funds on the eve of the expiration of the statute of limitations and individual repurchase demands made during the ordinary course of servicing."]).

The argument is far-fetched. Nomura has presented no evidence to suggest that it would have repurchased any loans at issue[3] if it had been provided with the repurchase demands "during the ordinary course of servicing." On the contrary, Ocwen refers again to the deposition of Prahofer, who testified definitively that Nomura **would not** repurchase loans if it disagreed as to whether or not there was a breach absent a court ruling to do so:

> "Q. Is it true that had Nomura been made aware of breaches with material adverse effects that were caused by the breach it would have honored repurchase requests?
> . . .
> A. That depends.
> Q. On what?
> A. Well, whether we agreed that it was a material breach and whether there was a loan to repurchase at the time.
> . . .
> A: Again, we would – before the Court ruling, we would not have volunteered to pay for not getting an asset"

(Prahofer Deposition, NYSCEF Doc. No. 840, pp. 221-24).

Thus, according to Prahofer, whether or not Nomura would repurchase the loans at issue depends on how the court rules in this litigation, and it "would not have volunteered to give money for nothing" (*id.*, p. 222). Further, contrary to Nomura's claim that it may have exercised the repurchase protocol if it had received notice in the ordinary course of business, Prahofer testified that the determination of whether or not a loan breached the representations and warranties would be the same regardless of when the determination was made:

> "Q. Would it be fair to say that if Nomura's expert concludes in the litigation that there is no breach based upon the totality of that information, that Nomura, as a

[3] In its opposition to Wells Fargo's summary judgment motion, Nomura cited an email chain referring to Nomura repurchasing four loans from the 2007-2 trust (Opposition to Wells Fargo's Summary Judgment Motion, pp. 26-27 n. 29 [citing Stoval Ex. 86, NYSCEF Doc. No. 1608]). However, Nomura's willingness to repurchase this small group of loans does not suggest that Nomura would have repurchased the loans at issue in this case, where it fundamentally disagrees about whether the loans breached the representations and warranties.

> matter of its ordinary business operation, would have reached the same conclusion had the same information been provided to it at an earlier date?
> A. Yes"

(*id.*, pp. 251-52).

Because Nomura has failed to rebut Ocwen's prima facie showing that Nomura would never have repurchased the relevant loans and has no damages, the court grants summary judgment to Ocwen on the second cause of action in the third-party complaint for breach of contract based on failure to notify. Whether or not Ocwen had knowledge of or failed to notify Nomura of any potential breaches of the representations and warranties in accordance with the PSA does not matter. The unrefuted evidence shows Nomura's decision not to repurchase would have remained either way.

B. Improper Servicing

However, the court denies Ocwen's motion for summary judgment dismissing the third-party complaint's third cause of action for breach of contract based on improper servicing. Nomura has provided evidence that Ocwen engaged in a pattern of servicing misconduct, violating provisions of the PSA. In particular, Nomura refers to PSA § 3.01, which requires that "[e]ach servicer shall service and administer the related Mortgage Loans on behalf of the Trust Fund and in the best interest of and for the benefit of the Certificateholders." However, notwithstanding this obligation, the PSA also expressly limits liability for the servicers such as Ocwen. For servicer liability, the PSA requires a showing of gross negligence, willful misfeasance, or bad faith:

> "Neither the Depositor, the Securities Administrator, the Master Servicer, the Servicers nor any of the directors, officers, employees or agents of the Depositor, the Securities Administrator, the Master Servicer and the Servicers shall be under any liability to the Indemnified Persons, the Trust Fund or the Certificateholders for taking any action or for refraining from taking any action in good faith pursuant to this Agreement, or for errors in judgment; provided, however, that this provision shall not protect . . . the Servicers . . . against any breach of warranties, representations or covenants . . . or against any liability which would otherwise be

> imposed by reason of such Person's **willful misfeasance, bad faith or gross negligence** in the performance of duties or by reason of reckless disregard of obligations and duties hereunder"

(PSA, § 7.04[a] [emphasis added]).

As an initial matter, the court rejects Ocwen's argument that the claims Mr. Lendez's report supports are too far afield from the allegations in the third-party complaint. The third-party complaint's allegations regarding improper servicing are broad enough to encompass the findings in Mr. Lendez's report. The third-party complaint alleges that Ocwen "failed to comply with Accepted Servicing Practices by, **among other things** . . ." followed by a list of specific examples of alleged misconduct (Third-Party Complaint, ¶ 51 [emphasis added]). The third-party complaint further alleges that Ocwen breached its "obligations to service and administer the Mortgage Loans:

> (i) in the same manner in which it services and administers similar Mortgage Loans for its own portfolio, giving due consideration to customary and usual standards of practice of prudent institutional mortgage lenders servicing similar loans; (ii) with a view to maximizing the recoveries with respect to such Mortgage Loans on a net present value basis; and (iii) without regard to, among other things, the right of Ocwen and Wells Fargo to receive compensation or other fees for its services under the PSA or its obligation to making servicing advances under the PSA"

(Third-Party Complaint, ¶ 64).

These broad allegations of servicing misconduct fairly encompass the more precise misconduct the Lendez report describes, including making excessive advances, failure to achieve market value in the sale of property, purchasing expensive force-placed insurance, and forcing borrowers to use an auctioneer with a clear connection to Ocwen.

Even if the third-party complaint's allegations were not broad enough, Nomura would be entitled to conform the pleadings to the proof pursuant to CPLR 3025(c) (*see ED&F Man Sugar Inc., etc. v ZZY Distributors, Inc., et al.*, 181 AD3d 463, 463 [1st Dept 2020]). To the extent that findings in the Lendez report are distinct from what the third-party complaint alleges, Ocwen is

not prejudiced. Much of the subject matter—while heavily disputed—was raised during discovery (*see e.g.*, September 30, 2022 Oral Argument Transcript, pp. 45-46 [discussing how the special master ordered Ocwen to produce force-placed insurance information]; *id.*, p. 31 [discussing how Nomura sought discovery related to charge offs and advances but Ocwen refused]; *see also Briarpatch Ltd., L.P. v Briarpatch Film Corp.*, 60 AD3d 585 [1st Dept 2009] [affirming order granting motion to amend to conform pleadings to proof where there was no showing of prejudice and where the opposing parties' discovery responses "sufficiently demonstrated the merits for purposes of amending the complaint to assert new claims"]).

Further, Nomura has established substantively that there are issues of fact as to whether Ocwen acted with gross negligence, in bad faith, or with willful misfeasance pursuant to PSA § 7.04(a). In order to establish gross negligence, a plaintiff must show conduct which "evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing" (*Stuart Rudnick, Inc. v Jewelers Protection Services, Ltd.*, 194 AD2d 317, 317 [1st Dept 1993] [internal citations and quotation marks omitted]; *S.A. De Obras y Servicios, COPASA v Bank of Nova Scotia*, 170 AD3d 468, 473 [1st Dept 2019] [denying summary judgment, finding that plaintiffs sufficiently alleged "that defendants' conduct evinced a reckless disregard for plaintiff's rights insofar as it failed to comply with, or actively disregarded its own policies" through failing to detect a modeling error leading to an inaccurate bid] [internal quotation marks and citations omitted]). Ordinarily, "the question of gross negligence is a matter to be determined by the trier of fact" (*Lubell v Samson Moving & Storage, Inc.*, 307 AD2d 215, 216 [1st Dept 2003]).

The evidence in the record meets the standard for gross negligence. For example, Ocwen may have engaged in servicing misconduct through requiring the use of the Ocwen-affiliated auction website [Hubzu] (*see* April 21, 2014 NYSDFS Letter, NYSCEF Doc. No. 2174 [finding a

"number of key Ocwen personnel have individual equity ownership stakes in Altisource Portfolio" and that the "relationship between Ocwen, Altisource Portfolio, and Hubzu raises significant concerns regarding self-dealing"]). The Department of Financial Services letter additionally states that Hubzu charges Ocwen higher auction fees than it does on the open market which "ultimately get passed on to the investors and struggling borrowers" (*id.*). Further, the Lendez report provides detail specific to the 2007-2 trust of excessive fees being paid to Hubzu, referring to a loan for which Hubzu charged Ocwen a $1,170 "Buyer's Premium Fee" and a $299 "Web Technology Fee" (Lendez Amended Expert Report, p. 48).

The record also supports that Ocwen purchased high-premium force-placed insurance in exchange for kickbacks. In particular, the Lendez report references a class action lawsuit accusing Ocwen of "artificially inflating the cost of force-placed insurance in exchange for kickbacks from Assurant [a force-placed insurance provider]" (Lendez Amended Expert Report, p. 44). The Lendez report also describes how the New York State Department of Financial Services found that Ocwen's force-placed insurance arrangements were "designed to funnel as much as $65 million in fees annually to Altisource Portfolio Solutions, S.A., an Ocwen-related entity" (*id.* [citing August 4, 2014 Letter from NYSDFS to Ocwen's General Counsel] [internal quotation marks omitted]). After analyzing the average premiums across a number of loans, the Lendez report determines that the "Servicer inflated premiums by approximately $665,555 as compared to the origination policy premiums" (Lendez Amended Expert Report, p. 45).

The court rejects Ocwen's argument that regulatory proceedings related to force-placed insurance are irrelevant because of a lack of proof that the loans at issue here were encompassed within those investigations. Nomura provides testimonial evidence that Ocwen's force-placed

insurance practices did not differ across the portfolios. Andria Harris, Ocwen's servicing expert, testified as follows:

> "Q: Do you know if Ocwen force-placed insurance on loans in the Nomura trusts that are before us in a manner that was at all different than how it force-placed insurance on loans that were not in the Nomura trusts?
> A: I believe they – their practices regarding force-placed insurance – lender-placed insurance would have been consistent across all portfolios"

(Harris Deposition, NYSCEF Doc. No. 1567, pp. 450-51).

Similarly, Peter Ross, Wells Fargo's servicing expert, testified the following:

> "Q: Do you have any basis for believing that Ocwen had different forced placed insurance arrangements for the loans in these trusts for which it imposed that forced placed insurance and the loans that are being referenced by the New York DFS in its letter?
> . . .
> A: The answer to your question is I have no reason to believe that they're different, but I don't affirmatively know that this is the only forced place mechanism that Ocwen had"

(Ross Deposition, NYSCEF Doc. No. 1590, p. 402).

This evidence of improper servicing goes beyond simple negligence. Rather, the evidence raises questions of fact as to whether Ocwen exhibited gross negligence or willful misfeasance (1) by channeling borrowers to Hubzu and (2) through the unnecessary use of expensive force-placed insurance (*see Banc of America Securities LLC v Solow Bldg. Co. II, L.L.C.*, 47 AD3d 239, 244-45 [1st Dept 2007] [stating that "[e]nforcement of [a limitation of liability] provision is precluded when the misconduct for which it would grant immunity smacks of intentional wrongdoing" and finding that issues of fact as to whether the defendant acted "maliciously or in bad faith preclude[d] summary disposition"] [internal citations and quotation marks omitted]).

Nevertheless, the court dismisses the improper servicing claim to the extent that it relates to loans that were liquidated more than six years prior to the date Nomura filed the third-party complaint. The statute of limitations for a breach of contract cause of action is six years (CPLR

213[2]). A cause of action for breach of contract "generally accrues at the time of the breach" (*Rose Group Park Avenue LLC v Third Church Christ, Scientist, of New York City*, 198 AD3d 506, 507 [1st Dept 2021] [internal citation and quotation marks omitted]). This court already held at the motion to dismiss stage with respect to the 2006-S4 trust, "Nomura will not be permitted to recover for breaches of contract by the Servicers that occurred more than six years before Nomura's claims against the Servicers were asserted" (*HSBC Bank USA, N.A. v Nomura Credit & Capital, Inc.*, 2018 WL 2197830, *15 [Sup Ct, NY County May 14, 2018]). As Ocwen argued in its briefing and at oral argument, a liquidated loan, by definition, requires no further servicing (Memo of Law in Support of Ocwen's Summary Judgment Motion, NYSCEF Doc. No. 818, p. 58 n. 7). As a result, no further breaches of contract could have occurred based on these loans and the six-year clock would have begun running. Therefore, the court dismisses the improper servicing claim to the extent that the relevant loans were liquidated on or before August 27, 2008.

The court has considered the parties' remaining contentions and finds them unavailing. Accordingly, it is

ORDERED that the third-party complaint's second cause of action for breach of contract based on failure to notify is dismissed against Ocwen; and it is further

ORDERED that the third-party complaint's third cause of action for breach of contract based on allegedly improper servicing is dismissed against Ocwen only to the extent that the cause of action is based on loans that were liquidated on or before August 27, 2008; and it is further

ORDERED that Ocwen's motion for summary judgment dismissing the third cause of action in the third-party complaint is otherwise denied; and it is further

ORDERED that the parties appear before the court for a pre-trial conference via Microsoft Teams on **October 31, 2023**, at **10:00 AM**.

09/19/2023
DATE

MELISSA CRANE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION	
		GRANTED	DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	REFERENCE