

**UBS Ams. Inc. v Impac Funding Corp.**

2024 NY Slip Op 33827(U)

October 13, 2024

Supreme Court, New York County

Docket Number: Index No. 657043/2021

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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UBS AMERICAS INC., UBS REAL ESTATE SECURITIES  
INC., UBS SECURITIES, LLC, and MORTGAGE ASSET  
SECURITIZATION TRANSACTIONS, INC.

Plaintiffs,

- v -

IMPAC FUNDING CORPORATION, IMPAC MORTGAGE  
HOLDINGS, INC., and NOVELLE FINANCIAL SERVICES,  
INC.,

Defendants.

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INDEX NO. 657043/2021  
MOTION DATE --  
MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33, 34, 41, 43

were read on this motion to/for DISMISS.

This action arises from alleged misrepresentations made in connection with the sale of mortgage loans by defendants Impac Funding Corporation (Impac Funding) and Novelle Financial Services Inc. (Novelle) to plaintiffs UBS Americas Inc. (UBS Americas), UBS Real Estate Securities Inc. (UBS Real Estate), UBS Securities, LLC (UBS Securities), and Mortgage Asset Securitization Transactions, Inc. (MAST; all defendants collectively, UBS).

In motion sequence 001, Impac Funding moves to dismiss the complaint pursuant to CPLR 3211 (a) (1), (7) and (8).<sup>1</sup>

<sup>1</sup> The notice of motion identifies CPLR 3211 (a) (8) (lack of jurisdiction) as a ground of dismissal (see NYSCEF 5, Notice of Motion [seq. 001]); however, after review of its moving brief, Impac Funding is clearly moving to dismiss on statute of limitations grounds (CPLR 3211 [a] [5]) in addition to failure to state a claim (CPLR 3211 [a] [7]) and documentary evidence (CPLR 3211 [a] [1]). In its opposition, UBS addresses the statute of limitations defense.

## Background

The following facts are drawn from the complaint unless otherwise noted and are assumed to be true for purposes of this motion. (*See CBS, Inc. v Ziff-Davis Publ. Co.*, 75 NY2d 496, 499 [1990].)

UBS was in the business of selling residential mortgage-backed securities (RMBS). (NYSCEF Doc. No. [NYSCEF] 3, Complaint ¶ 13.) “In a typical transaction, UBS would acquire mortgage loans from originators. It then transferred those loans to a trust ... and the trust would issue certificates to investors backed by the loans in the trust.” (*Id.*)

UBS Real Estate purchased mortgage loans from Novelle and Impac Funding pursuant to two agreements - a January 1, 2005 Master Seller’s Purchase, Warranties and Interim Servicing Agreement with Novelle (Novelle Agreement)<sup>2</sup> and an October 1, 2005 Master Seller’s Purchase, Warranties and Interim Servicing Agreement with Impac Funding (Impac Funding Agreement). (*Id.* ¶ 16.) UBS then structured the mortgage loans into securities that it then issued to investors. (*Id.* ¶ 2.) Specifically, UBS securitized certain Impac mortgage loans in RMBS transactions, including MASTR Alternative Loan Trust 2005-6 (MALT 2005-6), MASTR Alternative Loan Trust 2006-2 (MALT 2006-2), and MASTR Asset Backed Securities Trust 2006-HE1 (MABS 2006-HE1).<sup>3</sup> (*Id.* ¶ 17.) For each of these RMBS transactions, UBS Real Estate was the sponsor, MAST was the depositor, and UBS Securities was the lead underwriter. (*Id.*)

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<sup>2</sup> The Novelle Agreement is not at issue in this motion as Novelle is not a movant.

<sup>3</sup> In its opposition brief, UBS clarifies that MABS 2006-HE1 involved mortgage loans originated by Novelle only. (NYSCEF 16, Opp MOL at 17, n 10.) Accordingly, the court will not consider UBS’s claims insofar as they are related to MABS 2006-HE1.

In the Impac Funding Agreement, Impac Funding made certain representations and warranties (*id.* ¶ 18) and agreed, in relevant part,

“to indemnify [UBS Real Estate] and hold it harmless against any and all claims, losses, damages, penalties, fines, forfeitures, legal fees and related costs, judgments, and any other costs, fees and expenses that [UBS Real Estate] may sustain ... as a result of the breach of a representation or warranty set forth in Sections 3.01 or 3.02 of this Agreement.” (*id.* ¶ 19; *see also* NYSCEF 9 Impac Funding Agreement at 47 [§5.01].)

Additionally, with respect to MALT 2005-6, Impac Funding, UBS Real Estate and MAST entered into the November 23, 2005 Indemnification Agreement pursuant to which:

“Impac ... agrees to indemnify and hold harmless [MAST], [UBS Real Estate] and UBS Securities LLC [(collectively, ‘UBS’)], its officers and directors and each person, if any, who controls [UBS] within the meaning of Section 15 of the Securities Act of 1933, as amended (the ‘Act’), or Section 20 of the Securities Exchange Act of 1934, as amended (the ‘Exchange Act’), from and against any and all losses, claims, expenses, damages or liabilities to which [UBS], its respective officers or directors and any such controlling person may become subject under the Act or otherwise, as and when such losses, claims, expenses, damages or liabilities are incurred, insofar as such losses, claims, expenses, damages or liabilities (or actions in respect thereof) arise out of or are based upon (i) any material misstatement contained in the computer data file for the Impac Mortgage Loans provided to UBSRES by Impac, a copy of which is attached hereto as Exhibit A, and (ii) any untrue statement of any material fact contained in the Prospectus Supplement or arise out of, or are based upon, the omission to state therein any material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they were made, not misleading, and will reimburse [UBS], its respective officers and directors and any such controlling person for any legal or other expenses reasonably incurred by it or any of them in connection with investigating or defending any such loss, claim, expense, damage, liability or action, as and when incurred; provided, however, that Impac shall be liable only insofar as such untrue statement or omission relates solely to the information in the Prospectus Supplement furnished to [UBS] by or on behalf of Impac specifically for inclusion in the Prospectus Supplement.” (*id.* ¶ 20; *see also* NYSCEF 10, MALT 2005-6 Indemnification Agreement at 1.)

“The Indemnification Agreement further states:

[i]f recovery is not available under the foregoing indemnification provisions for any reason other than as specified therein, each indemnified party shall be entitled to contribution to liabilities and expenses, except to the extent that contribution is not permitted under Section 11(f) of the Act. In determining the amount of such contribution, there shall be considered the parties' relative knowledge and access to information concerning the matter with respect to which the claim was asserted, the opportunity to correct and prevent any misstatement or omission, the relative fault of the parties, and any other equitable considerations appropriate under the circumstances.” (NYSCEF 3, Complaint ¶ 21; see *a/so* NYSCEF 10, MALT 2005-6 Indemnification Agreement at 1.)

Some RMBS investors sued UBS “alleging that information contained in the offering materials for securities that included Impac loans was inaccurate.” (NYSCEF 3, Complaint ¶ 3.) In two California state court actions,<sup>4</sup> Federal Home Loan Bank of San Francisco (FHLB-SF) alleged that offering materials pertaining to MALT 2005-6 and MALT 2006-2 contained misrepresentations regarding the characteristics of the underlying mortgage loans. (*Id.* ¶ 22.) The allegedly false information was “the information Impac provided to UBS and represented was true and correct.” (*Id.*)

On November 15, 2012, UBS notified Impac of one of the California actions and demanded that Impac fulfill its indemnification obligation. (*Id.* ¶ 23.) Impac did not respond. (*Id.* ¶ 24.) UBS litigated the California actions, which were ultimately settled in March 2016 “for a reasonable amount.” (*Id.* ¶¶ 25-26.)

UBS alleges that litigation and settlement costs and expenses are covered by the indemnification and contribution provisions of the Impac Funding Agreement and/or the MALT 2005-6 Indemnification Agreement. (*Id.* ¶ 30.) UBS alleges claims for breach of contract (indemnification) and contribution. (*Id.* ¶¶ 31-39.)

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<sup>4</sup> The California actions are *Federal Home Loan Bank of San Francisco v Credit Suisse Securities (USA) LLC*, No. CGC-10-497840 (Cal. Super. Ct.) and *Federal Home Loan Bank of San Francisco v. Deutsche Bank Securities Inc.*, No. CGC-10-497839 (Cal. Super. Ct.).

## Legal Standard

On a CPLR 3211 (a) (1) motion to dismiss, the movant has the “burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and citation omitted].) “A cause of action may be dismissed under CPLR 3211(a)(1) only where the documentary evidence utterly refutes [the] plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [internal quotation marks and citation omitted].)

On a motion to dismiss based on the statute of limitations defense of CPLR 3211(a)(5),<sup>5</sup> defendant must establish a prima facie case that plaintiff’s time to commence an action has expired; then the burden shifts to plaintiff to raise a question of fact as to whether it commenced the action within the applicable limitations period or whether an exception or tolling applies. (*Williams v City of Yonkers*, 160 AD3d 1017, 1019 [2d Dept 2018].)

On a CPLR 3211(a)(7) motion to dismiss, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted].) “[B]are legal conclusions as well as factual claims which are either inherently incredible or flatly

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<sup>5</sup> CPLR 3211(a)(5) is the provision applicable to dismissal on statute of limitations grounds. (See *supra*, n 1.)

contradicted by documentary evidence” cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].)

## Discussion

### Statute of Limitations

Impac Funding argues that the indemnification claim pursuant to the Impac Funding Agreement is time-barred.<sup>6</sup>

First, Impac Funding argues that UBS’s claim accrued on November 15, 2012, when UBS allegedly notified Impac Funding of one of the California actions and demanded indemnification. Impac Funding relies on Section 3.03 of the Impac Funding Agreement, entitled “Repurchase; Substitution,” which states,

“[a]ny cause of action against [Impac Funding] relating to or arising out of the breach of any representations and warranties made in Sections 3.01 and 3.02 shall accrue as to any Mortgage Loan upon (i) the earlier of discovery of such breach by [Impac Funding] or notice thereof by [UBS Real Estate] to [Impac Funding], (ii) failure by the [Impac Funding] to cure such breach or repurchase such Mortgage Loan as specified above, and (iii) demand upon the [Impac Funding] by the [UBS Real Estate] for compliance with this Agreement.” (NYSCEF 9, Impac Funding Agreement at 41 [§ 3.03].)

However, if this provision was interpreted to apply to an indemnification claim, such a claim could accrue even before any underlying claim. For instance, if UBS

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<sup>6</sup> Impac Funding proffers no arguments on the issue of whether the claims are timely to the extent they are premised on the MALT 2005-6 Indemnification Agreement. The court also notes UBS asserts a claim for contractual contribution, alleging that the Impac Funding Agreement and/or the MALT 2005-6 Indemnification Agreement entitle them to contribution. (NYSCEF 3, Complaint ¶¶ 38.) However, the Impac Funding Agreement makes no mention of contribution. (See NYSCEF 9, Impac Funding Agreement.) The MALT 2005-6 Indemnification Agreement provides that “If recovery is not available under the foregoing indemnification provisions for any reason other than as specified therein, each indemnified party shall be entitled to contribution to liabilities and expenses, except to the extent that contribution is not permitted under Section 11(f) of the [Securities] Act [of 1933].” (NYSCEF 10, MALT 2005-6 Indemnification Agreement at 3.)

learned of a representations and warranties breach, and remaining requirements of Section 3.03 were satisfied, i.e., Impac Funding did not cure or repurchase and UBS demanded compliance, an indemnification claim would start accruing despite the fact that UBS would have not incurred an indemnifiable liability or loss yet.<sup>7</sup> Indeed, the provision does not condition accrual on a failure to indemnify, but instead conditions accrual on a failure to cure a breach or repurchase a mortgage loan. (*Id.*) “A contract should not be interpreted to produce a result that is absurd ... commercially unreasonable ... or contrary to the reasonable expectations of the parties” (*Lipper Holdings, LLC v Trident Holdings, LLC*, 1 AD3d 170, 171 [1st Dept 2003] [citations omitted], *lv denied* 2004 NY App Div LEXIS 1625 [1st Dept, Feb. 10, 2004, No. M-5811, M-5917]), and Impac Funding’s interpretation would lead to an absurd result.

Section 3.03 governs the procedure that UBS must follow when there is a breach of the representations and warranties contained in the previous two sections as well as the remedies available to UBS for such a breach by Impac Funding. The accrual provision contained in this section clearly applies to UBS’s claims regarding breaches of the representations and warranties and not for any claim UBS might have for indemnification for third-party claims against Impac Funding. Section 5.01, which governs indemnification and third-party claims, only requires UBS to “immediately notify” Impac Funding of any third-party claim. Section 5.01 is tellingly silent as to an accrual period for claims for indemnification as there is none.

Second, Impac Funding argues that, even if the accrual provision does not apply, UBS’s claims based on the Impac Funding Agreement are still untimely because UBS

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<sup>7</sup> The court will not determine whether the provision is for liability or loss indemnification.  
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did not assert such claims until more than six years from the settlements of the underlying actions.

The six-year statute of limitations applies to UBS's claim for indemnification. (See CPLR 213 [2]; *Bunker v Bunker*, 80 AD2d 817, 817 [1st Dept 1981] ["the applicable period of limitations is six years since the [indemnification] action is based upon an agreement either express or implied in law" (citation omitted)].) Although the parties disagree as to the applicable accrual event,<sup>8</sup> both parties set March 2016 as the accrual date for the indemnification claim, resulting in the expiration of the statute of limitations in March 2022. The parties, however, dispute when the indemnification claim was interposed. Impac Funding argues that the claim was interposed on June 2, 2022, when the complaint was filed. UBS argues that the indemnification claim was interposed when the summons with notice was filed on December 17, 2021.

"An action is commenced by filing a summons and complaint or summons with notice." (CPLR 304 [a].) "If the complaint is not served with the summons, the summons shall contain or have attached thereto a notice stating the nature of the action and the relief sought...." (CPLR 305 [b].) A claim relates back to "the original pleading [if the original pleading gives] notice of the transactions, occurrences ... to be proved pursuant to the amended pleading." (CPLR 203 [f].) "A 'new' claim would not be barred if the claim relates-back to the transactions specified in the summons with notice under

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<sup>8</sup> Impac Funding insists that the indemnification claim accrued upon the March 2016 settlement. UBS argues that the indemnification claim accrued at the time of actual payment which at the earliest was in March 2016. (See *Pfizer, Inc. v Stryker Corp.*, 348 F Supp 2d 131, 150-51 [SD NY 2004] [discussing accrual rules for claims seeking indemnity against liability and loss], *rearg denied* 2005 US Dist LEXIS 250, 2005 WL 44383 [SD NY, Jan. 10, 2005, No. 02 Civ 8613 [LAK].)

CPLR 203(f).” (*Castellicci v Centone*, 2017 NY Slip Op 32894[U], \*3 [Sup Ct, Westchester County 2017] [citation omitted].)

Here, the allegations in the summons with notice give notice of the indemnification claim based on the Impac Funding Agreement. Specifically, in the summons with notice UBS alleges that “Impac sold mortgage loans to UBS Real Estate pursuant to certain purchase and servicing agreements, including without limitation” the Novelle Agreement (NYSCEF 1, Summons with Notice ¶ 2), and that in these agreements “Impac made representations and warranties regarding the characteristics of the mortgage loans” and “agreed to indemnify UBS for losses stemming from claims that Impac’s loans did not comply with Impac’s representations and warranties regarding the mortgage loans.” (*Id.* ¶ 3.) UBS also alleges that “[f]or some Relevant Transactions, including without limitation MALT 2005-6, Impac entered into indemnification agreements with UBS Real Estate and MASTR in which Impac agreed to indemnify UBS for losses relating to information Impac provided to UBS for purposes of the Offering Materials.” (*Id.* ¶ 4.) UBS further alleges that the California actions settlement and related expenses “are covered by the indemnity provisions of the purchase agreements and/or indemnification agreements entered into between UBS and Impac, and UBS is entitled to indemnification from Impac.” (*Id.* ¶¶ 5-6, 9.) Thus, the summons with notice is sufficient to put Impac Funding on notice of the indemnification claim under Impac Funding Agreement and MALT 2005-6 Indemnification Agreement.

### Sufficiency of Indemnification Claim

Impac Funding next argues that UBS fails to allege that Impac Funding breached the Impac Funding Agreement or made any material misstatements or omissions which are required to state a claim under the relevant indemnification clauses.

“A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances.” (*Drzewinski v Atl. Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [internal quotation marks and citations omitted].)

“When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed.” (*Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989] [citation omitted].) “Words in [a contractual indemnification provision] are to be construed to achieve the apparent purpose of the parties. The language of an indemnity provision should be construed so as to encompass only that loss and damage which reasonably appear to have been within the intent of the parties.” (*Village of Dobbs Ferry v Landing on the Water at Dobbs Ferry Homeowners Assn., Inc.*, 198 AD3d 838, 839 [2d Dept 2021] [internal quotation marks and citations omitted].)

#### *Impac Funding Agreement § 5.01*

As previous stated, Section 5.01 provides, in relevant part, that

“[Impac Funding] agrees to indemnify [UBS Real Estate] and hold it harmless against any and all claims, losses, damages, penalties, fines, forfeitures, legal fees and related costs, judgments, and any other costs, fees and expenses that [UBS Real Estate] may sustain in any way ... as a result of the breach of a representation or warranty set forth in Sections 3.01 or 3.02 of this Agreement.” (NYSCEF 9, Impac Funding Agreement at 47.)

The language of this provision provides for indemnification for any and all claims and losses as a result of a breach of a representation or warranty set forth in Sections 3.01 and 3.02. “Result” is defined as “to proceed or arise as a consequence, effect, or conclusion.” (Merriam-Webster.com Dictionary, result [<https://www.merriam-webster.com/dictionary/result>].) Thus, while UBS asserts a claim for breach of this indemnification provision and not for any breach of a representation or warranty, UBS still must allege that the underlying claim by a third-party was a result of a breach of a representation or warranty, as this is what triggers this provision. “The indemnification provision’s ‘as a result of’ language necessarily implies a cause.” (*Delgaudio v Townhouse Co. LLC*, 2019 NY Slip Op 32505[U], \*10 [Sup Ct, NY County 2019] [citation omitted].) The triggering event is not just that there was a claim by a third-party but rather a claim caused by a breach of a representation or warranty.

Here, UBS alleges Impac Funding

“made representations and warranties regarding the characteristics of the mortgage loans, including without limitation that the mortgage loans were underwritten in accordance with Impac’s underwriting guidelines and that certain data regarding the mortgage loans (e.g., loan-to-value ratio, occupancy status) were true and correct. For example, in the Impac Purchase Agreement, Impac warranted that “[t]he information set forth in the related Mortgage Loan Schedule, including any diskette or other related data tapes sent to the Purchaser, is complete, true and correct in all material respects” and that each “Loan complies with all the terms, conditions and requirements of [Impac’s] Underwriting Standards in effect at the time of origination of such Mortgage Loan.” (NYSCEF 3, Complaint ¶ 18.)

UBS further alleges that the plaintiff in the California action, in which they seek indemnification,

“alleged that the Offering Materials for MALT 2005-6 and MALT 2006-2 contained misrepresentations concerning the characteristics of mortgage loans underlying those Relevant Transactions. The information that

FHLB-SF alleged was false is the information Impac provided to UBS and represented was true and correct.” (*Id.* ¶ 22.)

Thus, UBS sufficiently alleges that the claim that it is seeking indemnity for is a third-party claim caused by Impac Funding providing UBS with information that it represented was true and correct but was not, which if true is a result of a breach of representation or warranty. Despite Impac Funding’s urging, UBS does not have to specifically allege that Impac Funding actually breached Sections 3.01 or 3.02, how and what such breach of Section 3.01 or 3.02 occurred, or explain how a breach of Sections 3.01 or 3.02 caused the loss. This is a breach of contract claim. There is no heightened specificity of pleading, as there is for fraud. (See CPLR 3016[b].) At this pleading stage, USB’s allegations are sufficient as to their claim based on Section 5.01.

#### *MALT 2005-6 Indemnification Agreement*

The MALT 2005-6 Indemnification Agreement provides, in relevant part,

“Impac ... agrees to indemnify and hold harmless [MAST], [UBS Real Estate] and UBS Securities LLC [(collectively, ‘UBS’)], ... from and against any and all losses, claims, expenses, damages or liabilities to which [UBS], ... as and when such losses, claims, expenses, damages or liabilities are incurred, insofar as such losses, claims, expenses, damages or liabilities (or actions in respect thereof) arise out of or are based upon (i) any material misstatement contained in the computer data file for the Impac Mortgage Loans provided to UBSRES by Impac, a copy of which is attached hereto as Exhibit A, and (ii) any untrue statement of any material fact contained in the Prospectus Supplement or arise out of, or are based upon, the omission to state therein any material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they were made, not misleading, and will reimburse [UBS], its respective officers and directors and any such controlling person for any legal or other expenses reasonably incurred by it or any of them in connection with investigating or defending any such loss, claim, expense, damage, liability or action, as and when incurred; provided, however, that Impac shall be liable only insofar as such untrue statement or omission relates solely to the information in the Prospectus Supplement furnished to [UBS] by or on behalf

of Impac specifically for inclusion in the Prospectus Supplement.” (*Id.* ¶ 20; see also NYSCEF 10, MALT 2005-6 Indemnification Agreement at 1.)

To trigger indemnification pursuant to this Agreement, the claim or loss must have incurred and arise out of or be based on misrepresentations in two specific places – the computer data file and the Prospectus Supplement - or arise out of or be based on an omission. The court notes that UBS does not allege any omissions in the complaint. “The phrase ‘arising out of’ has been interpreted by [the Court of Appeals] to mean originating from, incident to, or having connection with.” (*Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 415 [2008] internal quotation marks and citations omitted.)

The triggering sentence merely requires UBS to allege that they incurred a loss from a claim arising out of misrepresentations in a computer data file and Prospectus Supplement. UBS alleges that the Offering Materials<sup>9</sup> for MALT 2005-6 contained misrepresentations and they suffered a loss, i.e. settlement payment and cost. At this stage, these allegations are sufficient to support a claim for breach of the MALT 2005-6 Indemnification Agreement as UBS sufficient alleges that the claim arises out of misrepresentations in the Offering Materials.

### *Settlement Allegations*

Impac Funding asserts that UBS fails to allege facts regarding the reasonableness of the settlement of the underlying actions. In support of this assertion, Impac Funding relies on *Alberto v Nassau Sling Co.*, 11 AD3d 571 (2d Dept 2004) and

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<sup>9</sup> Offering Materials is defined as “filed prospectuses, prospectus supplements and other offering materials with the Securities & Exchange Commission.” (NYSCEF 3, Complaint ¶ 17.)

*Jemal v Lucky Ins. Co.*, 260 AD.2d 352 (2d Dept 1999) wherein the Second Department held, on summary judgment motions, that in order to recover on an indemnity claim, a party who voluntarily settles the underlying claim must demonstrate that the settlement amount was reasonable. Impac Funding is moving to dismiss the complaint, where the inquiry is whether a plaintiff has sufficiently stated a claim; plaintiff is not required to demonstrate anything at this stage. “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.” (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005].) Here, UBS alleges that the underlying actions at issue were settled for a reasonable amount. (NYSCEF 3, Complaint ¶¶ 26.) This is sufficient.

#### *Liability in Underlying Actions*

“[U]nder New York law that, where an indemnitor does not receive notice of an action settled by the indemnitee, in order to recover reimbursement [for the settlement], [the indemnitee] must establish that [it] would have been liable and that there was no good defense to the liability. Where the indemnitor does receive notice of the claim against the indemnitee, however, the general rule is that the indemnitor will be bound by any reasonable good faith settlement the indemnitee might thereafter make.” (*Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 74 AD3d 32, 39 [1st Dept 2010] [internal quotation marks and citations omitted].)

Notice does not have to be given by the indemnitee. (*Id.* at 42, quoting *Oceanic Steam Nav. Co. v Campania Transatlantica Espanola*, 144 NY 663, 665 [1895] [“It is sufficient that the party against whom ultimate liability is claimed is fully and fairly informed of that claim and that the action is pending with full opportunity to defend or to participate in the defense”].)

It is undisputed that, as to the underlying action *Federal Home Loan Bank of San Francisco v. Credit Suisse Securities (USA) LLC et al.*, UBS alleges notice. (NYSCEF 3, Complaint ¶ 23.) As to the remaining underlying action at issue, *Federal Home Loan Bank of San Francisco v Deutsche Bank Securities Inc. et al.*, counsel for UBS states that “Impac’s written underwriting guidelines were produced in the FHLB litigations. These documents were Bates stamped with an “IFC” prefix, indicating that Impac itself produced them.” (NYSCEF 17, Scheef aff ¶ 9.) While “[a] court may consider affidavits submitted by a party opposing a motion to dismiss pursuant to CPLR 3211 to remedy any defects in a complaint” (*Moises-Ortiz v FDB Acquisition LLC*, 221 AD3d 540, 542 [1st Dept 2023] [citation omitted]), it must be from a person with knowledge. It is not clear if Scheef was personally involved in the underlying actions and had actual knowledge of the discovery exchanged. In fact, Scheef’s statement is that the Bates stamp only “indicates” it came from Impac Funding. In addition to failing to allege notice of the *Deutsche Bank Securities* action, in which MALT 2006-2 is the subject (see NYSCEF 20, *Deutsche Bank Securities* Action Complaint at 50 [Schedule 24 to Amended Complaint]), UBS also fails to allege the alternative that they would have been liable and they did not have a good defense.

Thus, Impac Funding’s motion to dismiss UBS’s claim for indemnification is granted, in part, to the extent that UBS seeks indemnification for the claim/loss regarding the *Deutsche Bank Securities* Action. However, UBS has leave to replead this portion of its indemnification claim.

### *Group Pleading*

“Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.” (CPLR 3013.) Here, the complaint sufficiently gives notice to Impact Funding and Novelle of the claims against them despite referring to them collectively as “Impac.”

### UBS Americas

“It is a general principle that only the parties to a contract are bound by its terms .... A non-signatory may be bound by a contract under certain limited circumstances, including as a third-party beneficiary.” (*Highland Crusader Offshore Partners, L.P. v Targeted Delivery Tech. Holdings, Ltd.*, 184 AD3d 116, 121-22 [1st Dept 2020] [citations omitted].)

There are no allegations that UBS Americas was a party to any indemnification agreement with Impac Funding. Instead, UBS alleges that UBS Americas is “an indemnitee under certain of the relevant agreements” (NYSCEF 3, Complaint ¶ 5), that is, a third-party beneficiary. In its opposition brief, UBS argues that UBS Americas is an indemnitee under the MALT 2005-6 Indemnification Agreement because it is a “person who controls [UBS].” (NYSCEF 10, MALT 2005-6 Indemnification Agreement at 1 [“Impac ... agrees to indemnify and hold harmless ... [inter alia] each person, if any, who controls [UBS] within the meaning of Section 15 of the Securities Act of 1933 ... or Section 20 of the Securities Exchange Act of 1934”].) UBS, however, alleges no facts demonstrating that UBS Americas was such a “person.” (See *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [“In the context of a third-party beneficiary claim,

the plaintiff must establish ... [inter alia] that the contract was intended for [its] benefit” (internal quotation marks and citation omitted); *Superior Ice Rink, Inc. v Nescon Contr. Corp.*, 40 AD3d 963, 965 [2d Dept 2007] [breach of contract claim was insufficiently pleaded where plaintiff “failed to set forth sufficient allegations in support of its position that it was an intended third-party beneficiary of the contract”].) UBS Americas’s indemnification claim is dismissed without prejudice.

#### Sufficiency of Contribution Claim

UBS alleges that they are entitled to contribution against Impac Funding pursuant to the Impact Funding Agreement and/or the MALT 2005-6 Indemnification Agreement. As previously stated, the Impact Funding Agreement makes no mention of contribution. (See *supra*, n 7; see also NYSCEF 9, Impact Funding Agreement.) Thus, there is no contractual contribution claim pursuant to the Impact Funding Agreement. However, the MALT 2005-6 Indemnification Agreement provides,

[i]f recovery is not available under the foregoing indemnification provisions for any reason other than as specified therein, each indemnified party shall be entitled to contribution to liabilities and expenses, except to the extent that contribution is not permitted under Section 11(f) of the Act. In determining the amount of such contribution, there shall be considered the parties’ relative knowledge and access to information concerning the matter with respect to which the claim was asserted, the opportunity to correct and prevent any misstatement or omission, the relative fault of the parties, and any other equitable considerations appropriate under the circumstances.” (NYSCEF 3, Complaint ¶ 21; see also NYSCEF 10, MALT 2005-6 Indemnification Agreement at 1.)

Impac Funding fails to assert why this contractual contribution claim should be dismissed. Its first argument regarding economic damages is inapplicable because a claim for common-law contribution is not available when the underlying claim seeks purely economic damages (*Children’s Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 323 [1st Dept 2009]), not contractual contribution claim as is alleged

here. Its second argument that the Impac Funding Agreement prohibits a common-law contribution claim also does not warrant dismissal as the parties entered into MALT 2005-6 Indemnification Agreement which provides for contribution as an alternative remedy under that Agreement if indemnification is not available.

### Service on Novelle

Impac Funding moves to dismiss Novelle pursuant to CPLR 306-b. UBS proffers two affidavits of service for service on Novelle in California and New York on April 18, 2022. (NYSCEF 4, Affs of Service at 3-4.) “[T]he process server’s sworn affidavits of service constitute[s] prima facie evidence of proper service.” (*Bevilacqua v Bloomberg, L.P.*, 70 AD3d 411, 412 [1st Dept 2010].) Parties’ proffered evidence, however, raise an issue of fact as to whether Novelle was properly served. Although the court cannot make a determination on the service issue, Novelle shall be dismissed.

If Novelle was properly served, it defaulted by not answering the complaint by May 8, 2022. (See CPLR 3012 [a].) Novelle has not otherwise appeared. UBS failed to move for default within one year of default, and thus dismissal is warranted. (See CPLR 3215 [c] [“If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed”].)

If Novelle was not served, dismissal is warranted for failure to effectuate service by April 16, 2022, that is, within 120 days of the commencement of the action. (See CPLR 306-b [“If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that

defendant, or upon good cause shown or in the interest of justice, extend the time for service”]; see *Diaz v Perez*, 113 AD3d 421, 421 [1st Dept 2014] [affirming sua sponte dismissal of complaint against defendant who was never served].)

### Impac Mortgage

The complaint includes no allegations regarding defendant Impac Mortgage Holdings, Inc. (Impac Mortgage), other than that Novelle was its wholly owned subsidiary. (NYSCEF 3, Complaint ¶ 10.) Thus, UBS fails to state any claim against Impac Mortgage. Impac Mortgage is dismissed.<sup>10</sup>

The court has considered the balance of the parties’ arguments and finds that they do not affect the outcome.

Accordingly, it is

ORDERED that the action is dismissed in its entirety without costs as against Novelle Financial Services, Inc. and Impac Mortgage Holdings, Inc.; and it is further

ORDERED that defendant Impac Funding Corporation’s motion to dismiss is granted, in part, with respect to the first cause of action to the extent that UBS seeks indemnification for the claim/loss regarding the *Deutsche Bank Securities* Action and is otherwise denied; and it is further

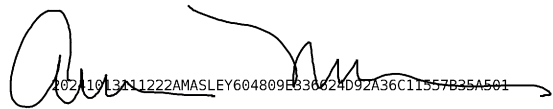
ORDERED that UBS is granted leave to serve and file an amended complaint in accordance with this decision; and it is further

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<sup>10</sup> UBS does not appear to object to dismissal. Indeed, with no explanation, UBS states in its opposition brief that Impac Mortgage is no longer a defendant. (NYSCEF 16, Opp MOL at 7 n 5.)

ORDERED that the amended complaint shall be served and filed within 20 days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that plaintiff fails to serve and file an amended complaint in conformity with the deadline set forth herein, leave to replead shall be deemed denied and the first cause of action shall be dismissed, in part, to the extent that UBS seeks indemnification for the claim/loss regarding the *Deutsche Bank Securities* Action.



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10/13/2024  
DATE

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ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE