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

FINANCIAL GUARANTY INSURANCE COMPANY,	Mot. Seq. 001
Plaintiff,	Index No. 652853/2014
- against -	Justice Friedman
MORGAN STANLEY ABS CAPITAL I INC. and MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS LLC, as successor to MORGAN STANLEY MORTGAGE CAPITAL INC.,	Part 60
Defendants.	ORAL ARGUMENT REQUESTED

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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PRELIMINARY STATEMENT

Through this litigation, FGIC seeks to unwind an insurance agreement that it entered into in 2007 to insure the riskiest portion of 48 underlying mortgage-backed securitizations, fewer than half of which have any connection to Morgan Stanley. FGIC's opposition brief fails to overcome the conclusion mandated by the caselaw and the parties' agreement, which is that FGIC cannot seek recovery now for future payments that it has not yet made and may never make. In addition, by basing its claim on allegedly false owner occupancy and CLTV statistics in the offering materials for the underlying securitizations, FGIC is effectively seeking to rewrite the parties' agreement. The offering materials disclosed that they were reporting the occupancy information provided by borrowers, and the CLTV Ratios that were derived mathematically from appraisals, and there is no allegation that they failed to do so accurately. Nonetheless, FGIC seeks to hold Morgan Stanley accountable for allegedly false information provided by borrowers, and allegedly inflated appraisal values, even though Morgan Stanley never warrantied the accuracy of that information. Finally, FGIC fails to allege how any of the purported misrepresentations materially increased FGIC's risk of loss—a particularly glaring omission in the context of a NIM securitization transaction that, as FGIC knew when it insured it, was highly risky by its very nature and highly susceptible to loss based on any change in home prices or default rates.

For these reasons, and those set forth in Morgan Stanley's opening brief, the Court should grant Morgan Stanley's motion to dismiss.[1]

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[1] Abbreviations and defined terms not otherwise defined herein shall have the same meaning as in defendants' memorandum of law in support of its motion to dismiss, dated November 24, 2014 ("Mem.").

ARGUMENT

I. Plaintiff Cannot Recover for Insurance Payments It Has Not Made

A. FGIC's Request for Future Damages Is a Request for Rescissory Damages, No Matter How FGIC Characterizes Such Damages

FGIC argues that its request for damages for insurance payments that it has not yet made, but may make in the future, is not a request for rescissory damages. However, requests by a monoline insurer for "damages in the amount of all payments [it] has made and will make pursuant to the [insurance p]olicy," are considered "the economic equivalent of rescission." *Assured Guar. Mun. Corp. v. RBS Sec., Inc.*, No. 13 Civ. 2019, 2014 WL 1855766, at *2 (S.D.N.Y. May 8, 2014) (internal quotation marks omitted) ("*RBS*").

As the First Department held in *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 105 A.D.3d 412 (1st Dep't 2013) ("*Countrywide II*"), where, as here, plaintiff "voluntarily gave up the right to seek rescission—*under any circumstances*," it should "not be permitted to utilize [the] very rarely used equitable tool" of rescissory damages "to reclaim a right it voluntarily contracted away." *Id.* at 413 (emphasis in original).

Plaintiff's argument that *Countrywide II* allows it, pursuant to N.Y. Ins. Law §§ 3105 and 3106, to recover "payments *made* pursuant to an insurance policy," is unavailing. The question is not whether plaintiff can recover insurance payments already made, but whether it can recover payments it has *not made* and will not have made as of any final judgment. The latter, no matter how denominated, are rescissory damages, which *Countywide II* precludes. *RBS*, 2014 WL 1855766, at *2 ("Plaintiff's claim in this case includes damages for payments that the plaintiff 'will make' in the future, and such language makes it even clearer that the damages sought are

indeed forward-looking rescissory damages. The plaintiff cannot escape the language of its pleadings by labeling the rescissory damages it seeks as 'compensatory damages.'").

FGIC mischaracterizes Morgan Stanley's arguments and cases that have allowed monoline insurers to recover insurance payments. FGIC suggests that *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, No. 602825/2008, 2013 WL 1845588 (Sup. Ct. N.Y. Cnty. Apr. 29, 2013) ("*Countrywide III*"), and *Assured Guar. Mut. Corp. v. Flagstar Bank, FSB*, No. 11 Civ. 2375, 2013 WL 1620567 (S.D.N.Y. Apr. 15, 2013) ("*Flagstar*"), allowed monoline insurers to recover future damages. (Opp. at 13-14.) But that is not the case. In *Flagstar*, the court allowed the insurer to recover payments the insurer had *already made*. *See Flagstar*, 2013 WL 1620567, at *1 (allowing "an updated award of damages to cover those claim payments *made* between September 25, 2012 . . . and February 25, 2013" (emphasis added)). Similarly, in *Countrywide III*, the court ruled, following the First Department's holding, that while the monoline insurer could not seek rescissory damages, it could seek recovery for "payments *made*." *Countrywide III*, 2013 WL 1845588, at *9 (emphasis added). The court did not suggest that the insurer could recover for payments not yet made. As *RBS* held, such a demand would amount to a demand for rescissory damages, which are unavailable.[2]

FGIC also incorrectly contends that *RBS* "did not take issue with Justice Bransten's decision [in *Countrywide III*] after remand in *MBIA v. Countrywide* that future damages may be

[2] *Ins. Co. of N. Am. v. Kaplun*, 274 A.D.2d 293, 298 (2d Dep't 2000), cited by FGIC (Opp. at 13 n.6), likewise referred to insurance payments that had been made, not payments that might be made in the future. *Syncora Guarantee Inc. v. EMC*, 874 F. Supp. 2d 328, 340 (S.D.N.Y. 2012), also cited by FGIC (Opp. at 14), is unavailing. Insofar as the federal court in that case held open the possibility of rescissory damages, such a possibility has now been foreclosed by the First Department in *Countrywide II*.

sought on claims 'for breaches of representations and warranties,'" and that the *RBS* decision is limited to fraud claims. (Opp. at 14.) *RBS* nowhere says that *Countrywide III* held that potential *future* claim payments are recoverable for breaches of representations and warranties, which is unsurprising since *Countrywide III* said no such thing. Further, although *RBS* addressed the question of rescissory damages in the context of fraud claims, its conclusion that plaintiff could not recover all current and future claim payments was founded on the principle articulated in *Countrywide II* that where a plaintiff has "contracted away any right to rescission, does not seek rescission, and has not shown that rescission was impracticable . . . rescissory damages are legally unavailable"—a principle that is applicable to breach of contract claims, and was applied by the First Department in *Countrywide II* to plaintiff's breach of contract claim. *See RBS*, 2014 WL 1855766, at *2 (citing *Countrywide II*, 963 N.Y.S.2d at 22).

Unable to dispute that the caselaw precludes FGIC from seeking recovery now for insurance payments it may or may not have to make in the future, FGIC suggests that it would be "commercially unreasonable" to allow FGIC to recover insurance payments only after it has actually made them. (Opp. at 11 n.5.) But there is nothing inherently so "commercially unreasonable" about limiting recovery on insurance payments to those actually made, such that controlling New York law on rescissory damages may be disregarded, and FGIC cites no case that has so concluded. Indeed, limiting recovery on insurance payments to those actually made is not "commercially unreasonable" at all, particularly where, as here, actions relating to many of the underlying securitizations have been brought by trustees for those trusts, the result of which

may be to reduce the insurance payments to the trusts that FGIC ultimately has to make. (*See* Point I.B., *infra*; Mem. at 11.)[3]

B. FGIC's Request for Future Damages Is Precluded by New York Law as Unduly Speculative

FGIC's argument that future profits "have been permitted" in New York, and that personal injury plaintiffs may be granted awards for future expenses and lost earnings capacity, fails to address the particular issues associated with this case and FGIC's position as a monoline insurer. Losses to FGIC can only arise to the extent that the trusts underlying the NIM securities experience losses, which in turn causes claims to be made under FGIC's insurance policy. Where, as here, the more directly injured party has brought an action of its own against defendants to recover its alleged losses, (Mem. at 10-11), the indirectly injured party's future damages "are speculative and unprovable" because it "is impossible to determine the award that would make" the plaintiff whole, in light of the fact that any recovery in the directly injured party's action will necessarily "reduce [the plaintiff's] compensable injury correspondingly." *Jackson Nat'l Life Ins. Co. v. Ligator*, 949 F. Supp. 200, 207 (S.D.N.Y. 1996) (applying New York law).[4]

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[3] Finally, while FGIC argues in passing that damages determinations do not need to be made at the pleading stage (Opp. at 10), New York courts routinely dismiss, at the pleading stage, categories of damages claims that are unavailable as a matter of law. *See, e.g.*, *U.S. Bank Nat'l Ass'n. v. DLJ Mortg. Cap., Inc.*, No. 652699/2013, 2015 WL 298642, at *2-3 (Sup. Ct. N.Y. Cnty. Jan. 16, 2015); *Morgan Stanley Mortg. Loan Trust 2007-2AX v. Morgan Stanley Mortg. Cap. Holdings, LLC*, No. 650339/2013, 2014 WL 6669698, at *1 (Sup. Ct. N.Y. Cnty. Nov. 24, 2014); *Ace Sec. Corp. Home Equity Loan Trust, Series 2007-WM1 v. DB Structured Prods., Inc.*, No. 650312/2013, 2014 WL 5243511, at *1-2 (Sup. Ct. N.Y. Cnty. Sept. 25, 2014); *see also Pope v. N.Y. Prop. Ins. Underwriting Ass'n*, 112 A.D.2d 984, 985 (2d Dep't 1985), *aff'd*, 66 N.Y.2d 857 (1995) (ruling that while the complaint "adequately set[] forth a cause of action to recover damages for breach of contract as to the policy amount plus interest . . . to the extent that the first cause of action seeks punitive and other damages beyond the policy limit plus interest, plaintiffs have failed to state a basis for such relief").

[4] The court's holding in *Assured Guar. Mun. Corp. v. Flagstar Bank, FSB*, 892 F. Supp. 2d 596 (S.D.N.Y. 2012) is not, as FGIC asserts (Opp. at 16), to the contrary. In *Assured v. Flagstar*, the court rejected defendant's (…continued)

C. FGIC's Request for Future Damages Is Also Precluded by the Insurance Agreement

In addition to being precluded by New York law, FGIC's attempt to recover for insurance payments it has not yet made and may never make is also precluded by the terms of the I&I itself, which limits FGIC's damages claims to "amounts, if any, then due." (Mem. at 7.) FGIC argues that this language would include amounts "owed" by defendants under any of the Operative Documents (Opp. at 12), but cites no support for the proposition that amounts would be "owed" to FGIC in respect of claim payments before it was clear that FGIC would have to pay them. Nor does FGIC cite any support for the proposition that the phrase "amounts, if any, then due" should be deemed to apply to future events, which would be contrary to the plain meaning of "then due." *See In re Citigroup, Inc. Capital Accumulation Plan Litig.*, 652 F.3d 88, 91 (1st Cir. 2011) (interpreting a statute that required employers to pay discharged employees "the amount then due under the terms of employment" to not include stock shares that vested after the employee resigned because "the stock was not 'then due'").

Moreover, to the extent that FGIC argues that Morgan Stanley "owes" the Repurchase Price for any loans allegedly required to be repurchased under the repurchase protocol in the Morgan Stanley securitizations, that is an amount, if any, that would be owed to the *Trusts*, not damages to be paid to *FGIC*. *See Assured Guar. Mun. Corp. v. Flagstar Bank, FSB*, 920 F. Supp. 2d 475, 513-14 (S.D.N.Y. 2013) ("Assured is not entitled to direct payment of the amounts

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(continued…)

argument that, in light of the defendant's residual interest, the monoline plaintiff might be paid back for the claim payments it had *already made*, and that therefore the insurer's damages associated with such payments were too speculative. *Id.* at 605-06. Morgan Stanley is not asserting that any damages associated with payments that FGIC *has already made* are too speculative.

Flagstar should have paid for a repurchase, but rather to reimbursement of the claims it has paid to the bondholders to the extent that the amounts Flagstar should have paid into the Trust would be sufficient to cover Assured's claim payments."). For the same reason, to the extent that the repurchase protocol is captured by the specific performance portion of I&I § 5.02(a)(iii)—referring to "enforc[ing] performance and observance of any obligation" of defendants—that does not support any damages claim by *FGIC*, much less a claim based on *future payments* that it has not yet made.

Finally, FGIC's argument that I&I § 5.02(b) makes available other remedies "existing at law or equity" fails because, as set forth above and in defendants' opening brief, under New York principles of law and equity, FGIC is not entitled to damages for claim payments it has not yet made and may never make.

II. Plaintiff's Allegations Do Not Establish that Morgan Stanley Breached Any Representation or Warranty

As explained in Morgan Stanley's opening brief, FGIC has failed to allege that any statement in the Underlying Securitization Documents concerning owner occupancy or CLTV Ratios was false. In response, FGIC contends that its allegations should survive a motion to dismiss even if nothing in the Underlying Securitization Documents was false because the statements were "misleading." But simply by repeating the word "misleading" rather than "false," FGIC is not able to convert conclusory allegations that mischaracterize the warranties made by Morgan Stanley into something more.

A. FGIC Fails to Plead that Morgan Stanley Made Any Misleading Representation with Respect to Owner Occupancy or CLTV Ratios

FGIC fails to plead any misstatements relating to owner occupancy because the Underlying Securitization Documents expressly indicated that the owner occupancy statistics were derived from information provided by borrowers, and there is no allegation that they were not accurately reported as represented. (Mem. at 12-13.) Similarly, FGIC fails to plead any misstatement relating to CLTV Ratios because the Underlying Securitization Documents expressly defined such ratios as a mathematical formula derived from the appraisals, and there is no allegation that they were not accurately reported as represented. (*Id.* at 14-15.) FGIC asserts that Morgan Stanley "ignores the burden it assumed through its warranties as to the accuracy of the Offering documents, assuring that the *statements themselves* were not false or misleading." (Opp. at 20 (emphasis in original).) However, FGIC does not point to any statement by which Morgan Stanley represented that the owner occupancy data was anything other than the data provided by borrowers, or any statement by which it represented that the underlying appraisals in the 48 different securitizations were accurate estimates of the value of the properties. Accordingly, the "statements themselves" in the offering materials were *not* false or misleading by their own terms.

FGIC relies on *HSH Nordbank AG v. Barclays Bank PLC*, No. 652678/2011, 42 Misc.3d 1231(A), 2014 WL 841289, at *19 (Sup. Ct. N.Y. Cnty. Mar. 3, 2014), but makes no attempt to address Morgan Stanley's argument that *HSH* distinguished itself from *In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 932 F. Supp. 2d 1095, 1114 (C.D. Cal. 2013). (Mem. at 13.) As in *In re Countrywide*, no fraud has been alleged in this case. *In re Countrywide* explained that to state a claim on analogous owner occupancy allegations, a plaintiff would need to allege

specific knowledge of individual untrue statements, rejecting "the assertion that this information was actionable when the defendants report, as they did here, that the occupancy data was based upon representations of the related borrowers at the time of origination." *In re Countrywide*, 932 F. Supp. 2d at 1114 (internal quotation marks and alterations omitted). Here too, FGIC does not, and cannot, allege that Morgan Stanley knew of any specific misstatement concerning owner occupancy or CLTV Ratios, including in securitizations in which Morgan Stanley had no involvement. FGIC only alleges that Morgan Stanley was aware generally that borrowers may have been misrepresenting their occupancy status, and that appraisers may have been inflating their value estimates, but this does not amount to an allegation of any specific knowledge that any statement in any of the 48 underlying securitizations was false or misleading. Indeed, to the extent that FGIC is relying on purported industrywide phenomena, it presumably would have been equally aware of such phenomena, given that its very business was to insure mortgage-backed securitizations. In effect, FGIC asks the Court to make Morgan Stanley the guarantor not only of the representations it actually made, but of the actions of all players in the market that both FGIC and Morgan Stanley participated in.

B. FGIC's Allegations of "Other Misrepresentations" Fail to State a Claim

FGIC also argues in a single paragraph of its opposition brief that, in addition to its allegations concerning owner occupancy and CLTV Ratios, it has alleged that there were other misrepresentations in the Underlying Securitization Documents—namely, representations concerning loan compliance with underwriting guidelines and, with respect to the Morgan Stanley securitizations, general representations that Morgan Stanley conducted due diligence. (Opp. at 17 (citing Compl. ¶¶ 36, 37 & Ex. C).)

However, the only analysis alleged to have been conducted by FGIC to support the allegations in the complaint were analyses of data relating to owner occupancy and CLTV Ratios. (*See* Compl. ¶¶ 10, 72-90.) FGIC has not alleged any facts that would render false any representation concerning Morgan Stanley's due diligence (which, as reflected in paragraph 37 of the complaint, were very general representations that Morgan Stanley conducted due diligence on loan sellers and on loans). Nor has FGIC purported to conduct any analysis relating to loan compliance with underwriting guidelines in the 48 underlying securitizations at issue. FGIC cites various government investigations and press reports to allege "a pervasive, industry-wide abandonment of underwriting standards in home mortgage loan origination in 2005-2007" (Compl. ¶ 104)—which, if true, is something that FGIC, as a leading insurer of RMBS, should and would have been well aware of—but these blunderbuss allegations about "industrywide" phenomena, based on government investigations and press reports that are not tied to the particular securitizations at issue, cannot support a claim that the Underlying Securitization Documents for these securitizations contained misrepresentations. *See, e.g.*, *CIFG Assur. N. Am., Inc. v. Bank of America*, No. 654028/2012, 41 Misc.3d 1203(A), 2013 WL 5380385, *4 (Sup. Ct. N.Y. Cnty. Sept. 23, 2013) (disregarding allegations "taken from another complaint filed in the Southern District of New York, confidential witness statements, reports of government investigations and media reports," where plaintiff did "not allege that any of the loans at issue in these statements, reports and articles are related to the RMBS at issue in this action [and there was no] suggestion that counsel in this action spoke with the confidential witnesses"); *In re CRM Holdings, Ltd. Sec. Litig.*, No. 10 Civ. 975, 2012 WL 1646888, at *26 (S.D.N.Y. May 10, 2012) (concluding that "plaintiffs' citation to 'unproven allegations' made in

[other] complaints do not constitute factual allegations"); *Footbridge Ltd. v. Countrywide Home Loans, Inc.*, No. 09 Civ. 4050, 2010 WL 3790810, at *5 (S.D.N.Y. Sept. 28, 2010) (striking allegations "based on pleadings, settlements, and government investigations in other cases"); *RSM Prod. Corp. v. Fridman*, 643 F. Supp. 2d 382, 403 (S.D.N.Y. 2009) (striking paragraphs of complaint based on complaints filed in other actions).

Finally, even if FGIC had sufficiently alleged "other misrepresentations" besides statements relating to owner occupancy or CLTV Ratios, the Court can, and should, dismiss the claims relating to owner occupancy and CLTV Ratios for the reasons described above. *See Nomura Asset Acceptance Corp. Alternative Loan Trust v. Nomura Credit & Capital, Inc.*, No. 653390/2012, 2014 WL 2890341, at *16-18 (Sup. Ct. N.Y. Cnty. June 26, 2014) (granting motion to dismiss with respect to certain allegations that were based on specific representations while sustaining claims based upon others); *accord In re Countrywide*, 932 F. Supp. 2d at 1122-23 (granting motion to dismiss as to allegations related to owner occupancy).

III. The Complaint Fails to Make Non-Conclusory Allegations that the Purported Breaches Materially Increased FGIC's Risk of Loss

FGIC's complaint must also be dismissed because it fails to allege *facts*—as opposed to conclusions—that would tie its allegations to any injury suffered by FGIC.

A. The Complaint Fails to Make Non-Conclusory Allegations that the Purported Misstatements in the Underlying Securitization Documents Materially Increased FGIC's Risk of Loss

New York Insurance Law § 3106, relied upon by FGIC, requires that FGIC allege that any purported misstatement "materially increase[d] the risk of loss, damage or injury within the coverage of the contract." N.Y. Ins. Law § 3106(b). FGIC has failed to make non-conclusory

allegations that support such a conclusion.[5] Instead, FGIC merely refers to conclusory assertions in its complaint that the owner occupancy status and CLTV Ratios of the underlying loans was "material" to the cashflows generated and the risk of loss associated with the NIM securities. (Opp. at 23-25.) Simply restating the legal standard and asserting, in conclusory fashion, that it was met, without supporting *factual* allegations, is insufficient. *See, e.g.*, *Dominski v. Frank Williams & Son, LLC*, 46 A.D.3d 1443, 1444 (4th Dep't 2007) ("While it is axiomatic that a court must assume the truth of the complaint's allegations, such an assumption must fail where there are conclusory allegations lacking factual support." (internal quotation marks omitted)); *All the Way E. Fourth St. Block Ass'n v. Ryan-NENA Comm'y Health Ctr.*, 30 A.D.3d 182, 182 (1st Dep't 2006) ("Dismissal of the complaint on the grounds of vague, conclusory and unsubstantiated allegations was warranted."); *Island Surgical Supply Co. v. Allstate Ins. Co.*, 32 A.D.3d 824, 824 (2d Dep't 2006) ("The complaint was properly dismissed . . . because the allegations were vague, conclusory, and indefinite as to the alleged breach of numerous contracts by the defendant . . . ."); *Stoller v. Factor*, 272 A.D.2d 83, 83 (1st Dep't 2000) ("Although the court on a motion to dismiss for failure to state a cause of action must accept all pleaded facts as true, plaintiff's bare and conclusory allegations . . . were insufficient to state a cause of action . . . ."); *Dillon v. City of New York*, 261 A.D.2d 34, 39-40 (1st Dep't 1999) (dismissing claim supported by only "vague and conclusory" allegations); *Stoianoff v. Gahona*, 248 A.D.2d

[5] FGIC argues that Justice Bransten's statement in *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 34 Misc.3d 895, 906 (Sup. Ct. N.Y. Cnty. Jan 3, 2012), *aff'd in part, rev'd in part on other grounds*, 105 A.D.3d 412 (1st Dep't 2013), that a monoline plaintiff must establish that it "was damaged as a direct result of the material misrepresentations" refers to its proof at trial, rather than at the pleading stage, but that is irrelevant, because FGIC does not and cannot dispute that it must allege facts supporting the conclusion that the purported misrepresentations "materially increase[d] the risk of loss, damage or injury within the coverage of the contract," N.Y. Ins. Law § 3106(b), which FGIC has failed to do.

525, 526 (2d Dep't 1998) ("Although on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the narrow question is whether the complaint states a cognizable cause of action, the allegations in the complaint cannot be vague and conclusory."); *Residents for a More Beautiful Port Washington, Inc. v. Town of N. Hempstead*, 153 A.D.2d 727, 727 (2d Dep't 1989) ("[A]llegations that private meetings 'must have' taken place . . . are merely conclusory and speculative in nature and not supported by any specific facts. . . . In view thereof, the plaintiffs' complaint failed to state a valid cause of action . . . ."); *Loudin v. Mohawk Airlines, Inc.*, 24 A.D.2d 447, 447 (1st Dep't 1965) ("The allegations fail to state any evidentiary facts to support plaintiff's contention and merely set forth conclusory statements and the seventh cause of action is, therefore, insufficient.").

The complaint is all the more deficient in light of the very nature of the NIM securities that FGIC chose to insure—namely, NIM securities are comprised of the riskiest, "residual" portion of the underlying mortgage-backed securitizations, and are therefore extremely sensitive to any losses on the underlying loans. (Mem. at 3-4, 18.) In this context, it is particularly important that FGIC allege facts to support a claim that the alleged misrepresentations materially increased its risk of loss, which was already extremely high if loans defaulted *for any reason*. FGIC's argument that the riskiness of the NIM securities makes it *easier* to allege that the purported misrepresentations about owner occupancy and CLTV Ratios materially increased its risk of loss (Opp. at 24), has it exactly backwards. Given that these securities were, by their very nature, so sensitive to loan defaults, FGIC must plead facts that would support a conclusion that the extremely high risks it was already assuming were made "materially" greater based on

purported misstatements about owner occupancy and CLTV Ratios (which were not misstatements at all, *see* Point II, *supra*). FGIC has failed to do so.

B. The Complaint Fails to Make Non-Conclusory Allegations that the Purported Failure to Provide Notice of Defaulted Loans in the Underlying Securitizations Resulted in Injury to FGIC

FGIC's third cause of action, for alleged breaches of Morgan Stanley's duty to notify FGIC of defaults in the underlying securitizations, also fails. FGIC argues that its claim "is not subject to any requirement to allege increased risk of loss, much less causation." (Opp. at 25.) This unsupported assertion is incorrect as a matter of law. In fact, a "complaint is fatally deficient [when] it does not demonstrate how the defendant's alleged breach . . . caused plaintiffs any injury." *Gordon v. Dino De Laurentiis Corp.*, 141 A.D.2d 435, 436 (1st Dep't 1988); *see also Harmit Realties LLC v. 835 Ave. of Americas, L.P.*, No. 651931/2013, 44 Misc.3d 1226(A), 2014 WL 4376128, at *4 (Sup. Ct. N.Y. Cnty. Sept. 3, 2014) (dismissing breach of contract claim for failure to plead non-conclusory allegations showing how defendants' breach caused injury).

The complaint does not contain any factual allegations that would support the conclusion that FGIC was injured as a result of a purported failure to inform FGIC that loans in the underlying securitizations were experiencing defaults (a phenomenon that FGIC, as a leading RMBS monoline insurer, must surely have been aware of). The only allegations in the complaint that FGIC can point to are that "[t]he effect of Morgan Stanley's failure to provide such notice was to conceal the fact that there were breaches of Morgan Stanley's representations and warranties about the Underlying Securitizations" (Compl. ¶ 71), and that FGIC has "suffered and will continue to suffer damages" as a result (*id.* ¶ 256; *see* Opp. at 25.) In addition to being

conclusory, an allegation that failure to provide notice of defaults in the underlying loans "concealed" breaches of representations and warranties in the Underlying Securitization Documents does not translate into an allegation of how FGIC supposedly suffered any *damages* resulting from this alleged "concealment." "In the absence of any allegations of fact showing damage, mere allegations of breach of contract are not sufficient to sustain a complaint, and the pleadings must set forth facts showing the damage upon which the action is based." *Gordon*, 141 A.D.2d at 436; *see also Edelman v. Emigrant Bank Fine Art Fin., LLC*, 89 A.D.3d 632, 633 (1st Dep't 2011) (dismissing a breach of contract claim because "the complaint's conclusory allegation of damages is insufficient to sustain the cause of action").

CONCLUSION

For the reasons stated above, defendants respectfully request that this Court grant defendants' motion to dismiss.

Dated: New York, New York
February 27, 2015

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