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

PRESENT: MELVIN L. SCHWEITZER PART 45

Justice

NOMURA ASSET CAPITAL CORPORATION et al

INDEX NO. 116147/06

MOTION DATE

- v -

CADWALADER, WICKERSHAM + TAFT

MOTION SEQ. NO. 005

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion by defendant for summary judgment is DENIED per the attached Decision + Order.

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

Dated: January 11, 2012

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: COMMERCIAL DIVISION PART 45

NOMURA ASSET CAPITAL CORPORATION and ASSET SECURITIZATION CORPORATION,	
Plaintiffs,	Index No. 116147/06
–against–	DECISION AND ORDER
CADWALADER, WICKERSHAM & TAFT LLP,	Motion Sequence 005
Defendant.	

MELVIN L. SCHWEITZER, J.:

Defendant Cadwalader, Wickersham & Taft LLP (Cadwalader) moves, pursuant to CPLR 3212, for summary judgment dismissing the first cause of action of the complaint. This remaining claim in this legal malpractice action is that Cadwalader failed to properly advise and represent Nomura Asset Capital Corporation (NACC) and Asset Securitization Corporation (ASC) (together, Nomura) in connection with the securitization of a pool of commercial mortgages and the issuance of a legal opinion stating that the resulting trust would qualify for treatment for federal income tax purposes as a real estate mortgage investment conduit (REMIC). Specifically at issue is a $50 million loan made to the Doctor's Hospital of Hyde Park, Chicago (the DHL) that Nomura included in its Series 1997-D5 securitization (D5 Securitization). When the hospital subsequently went into bankruptcy and Nomura was sued by the trustee to force a repurchase of the loan, Nomura claims it was forced to settle the trustee's lawsuit for millions of dollars and alleges that it would not have suffered these damages but for Cadwalader's legal malpractice.

Background

Under the Internal Revenue Code, substantially all of the assets of a REMIC must consist of "qualified mortgages and permitted investments." 26 USC § 860D(a)(4); Ex. 1157, ¶ 15. As the term is applicable here, a qualified mortgage must be "principally secured by an interest in real property." 26 USC § 860G(a)(3)(A). One means of meeting the principally secured requirement is for the "fair market value of the interest in real property" securing the mortgage to be at least equal to 80% of the adjusted issue price of the mortgage loan, either on the date it is originated or at the time that the REMIC sponsor contributes it to the REMIC (the 80% Test). 26 CFR § 1.860G-2(a)(1)(i), (a)(5). REMIC real property is defined as "land or improvements thereon, such as buildings or other inherently permanent structures . . . ." 26 CFR § 1.856-3(d).

The REMIC regulations also include a "safe harbor" where a loan is "deemed" to be "principally secured by an interest in real property" if the sponsor of the REMIC "reasonably believes" that the loan is so secured at the time the sponsor contributes the loan to the REMIC. 26 CFR § 1.860G-2(a)(3)(i). If, however, notwithstanding the sponsor's "reasonable belief," it is discovered that the loan is not principally secured by an interest in real property, "the obligation is a defective obligation" (26 CFR § 1.860G-2[a][3][iii]) and the trust has 90 days to cure the breach or dispose of the loan or the REMIC tax status of the trust will be in jeopardy. 26 CFR § 1.860G-2(f)(2).

Cadwalader was hired in 1993 by Perry Gershon, then the head of Nomura's securitization group, to advise Nomura on the legal and tax aspects of its commercial mortgage-backed securities (CMBS) transactions. Gershon III Tr. at 8, 246;[1] Ex. 907. Nomura alleges that

[1]Referring to the deposition of Perry Gershon taken on April 27, 2010.

Cadwalader was engaged to: (i) advise Nomura on how to originate the mortgage loans in order to comply with the REMIC regulations; (ii) draft the Pooling Service Agreement (PSA) and Mortgage Loan Purchase and Sale Agreement (MLPSA); and (iii) render a legal opinion to NACC that the D5 Securitization trust was REMIC-qualified. Complaint, ¶ 11.

It is undisputed that Cadwalader drafted both the PSA and the MLPSA. Section 2 of the MLPSA is entitled "Representations and Warranties." In Section 2(b)(xxxi), NACC gave a "Qualified Mortgage Warranty," warranting that:

> "Each Mortgage Loan constitutes a "qualified mortgage" within the meaning of Section 860G(a)(3) of the Code (but without regard to the rule in Treasury Regulations 1.860 G-2(f)(2) that treats a defective obligation as a qualified mortgage, or any substantially similar successor provision). . . ."

Ex. 2, § 2(b)(xxxi). In Section 2(b)(xxix), NACC separately warranted that:

> "(1) The Mortgage Loan is directly secured by a Mortgage on a commercial property or multifamily residential property, and (2) the fair market value of such real property as evidenced by an MAI appraisal conducted within 12 months of the origination of the Mortgage Loan, was at least equal to 80% of the principal amount of the Mortgage Loan (a) at origination . . . or (b) at the Closing Date. . . ."

Id., § 2(b)(xxix) (the 80% Warranty).

The complaint alleges that Cadwalader advised Nomura that it would be necessary to obtain an appraisal of the Doctor's Hospital property and the other properties securing the mortgage loans in the D5 Securitization pool by an MAI-certified appraiser showing that the value of the property was sufficient under REMIC regulations. Complaint, ¶ 18. The Doctor's Hospital appraisal, dated August 28, 1997 (the Appraisal), estimated the value of the "going-concern" at $68 million. Exs. 46 and 154. The appraiser, Eric Dost of Valuations Counselors, used three valuation approaches: (1) a "cost approach" which estimated the hospital's value at

$40.6 million; (2) a "sales comparison" approach, which placed the hospital's value at $64 million; and (3) an "income capitalization approach," which determined the hospital's value to be $68 million. The Appraisal concluded that the income capitalization approach offered "the best indicator of value" for the Doctor's Hospital property. Ex. 46, at 93. Dost set forth the following summary of his $68 million valuation:

"Allocation of Value

Land	$ 3,000,000
Building and Site Improvements	27,960,000
Equipment	9,640,000*
Intangibles	27,400,000
Total	$68,000,000

*A detailed inventory of equipment was not conducted. Equipment values can vary significantly for hospitals. The equipment allocation is based on a typical figure for similar acute care hospitals."

Ex. 154, at 2.

Based on a $68 million value, the overall loan to value (LTV) for the DHL was calculated to be 73%.[2] *See* Ex. 992 at Annex A (A-1 to A-2).

Cadwalader issued an opinion letter on October 24, 1997, addressed to Nomura Securities International Inc. (the First Opinion Letter) (Ex. 125), stating that the D5 Securitization was REMIC-qualified for federal income tax purposes. Complaint, ¶ 19. The third paragraph of the First Opinion Letter states that, in rendering the opinion, Cadwalader has examined and relied upon, among other documents, the PSA and MLPSA, the Prospectus and two supplements thereto, the Preliminary Prospectus Supplement dated October 9, 1997 and the Prospectus Supplement dated October 24, 1997. The First Opinion Letter also states: "As to any facts

[2]The 80% Test measures value to loan (VTL) and is the equivalent of 125% LTV. Gershon III Tr. at 41.

material to such opinions [that] were not known to us, we have relied upon statements, certificates and representations of officers and other representatives of [Nomura]. . . ." Ex. 125, at 2. Paragraph 5 of the First Opinion Letter states, in pertinent part: "the Upper Tier REMIC and Lower-Tier REMIC will each qualify for treatment for federal income tax purposes as a real estate mortgage investment conduit, as defined in Section 860D of the Code. . . ." *Id.*, at 4. It is undisputed, however, that Charles Adelman, a Cadwalader tax partner and REMIC expert, did not review the Appraisal for the DHL prior to signing off on the First Opinion Letter.

The Doctor's Hospital filed for bankruptcy on April 17, 2000 and was in default of the loan by June 2000. Later on, the Bankruptcy Court concluded that "Doctor's Hospital was insolvent at all times from August 28, 1997 [the date the Appraisal done by Mr. Dost had estimated the value of this going concern at $68 million] through April 17, 2000." Ex. 44, at 91. On June 1, 2000, LaSalle Bank National Association (LaSalle), the D5 Securitization trustee, gave written notice to ASC that it was in breach of the contractual representations and warranties in the PSA with respect to the DHL, contending that the DHL was not a qualified mortgage loan, because it failed the 80% Test. *See* Ex. 52.[3] ASC responded by letters dated June 8 and 16, 2000, stating, among other things, that: it was not in default; LaSalle had misinterpreted the Appraisal because the $27,400,000 allocated to intangibles was not meant to refer to personal property and that some portion would qualify as REMIC real property; and ASC would provide factual support for its position shortly. Ex. 53.

[3]The letter actually was sent by Lend Lease Asset Management, L.P., the Special Servicer under the PSA on behalf of LaSalle.

By letter dated June 26, 2000, LaSalle responded stating that, based on the Appraisal itself and the inventory of equipment performed in connection with the bankruptcy, it was difficult for LaSalle to understand how anything in the intangibles and equipment categories of the Appraisal could qualify as REMIC real property, and that without these numbers, the DHL represents *162%* of the value of the hospital's real property. Ex. 55, at 2. LaSalle requested that ASC provide the factual support for its position in the form of a legal opinion that the DHL is a qualified mortgage. *Id.*, at 3.

By letter dated June 30, 2000 (Ex. 77), ASC provided LaSalle with another legal opinion from Cadwalader (the Second Opinion Letter) (Ex. 57) and a letter dated June 29, 2000 from the original appraiser of the Doctor's Hospital property (the Appraisal Supplement), stating that $45,080,000 of the hospital's overall market value was subject to the REMIC definition of "real property" as follows:

"Land	$ 3,000,000
Building and Site Improvements	$27,960,000
Fixtures (i.e. structural components)	$ 4,000,000
Value increase in building from Certificate of Need	$ 4,820,000
Stabilized Real Estate Contribution (i.e. occupied vs. "dark" value attributed to improvements)	$ 5,300,000
Total Real Property Components	$45,080,000"

Ex. 56.

LaSalle, however, rejected the Second Opinion Letter and the Appraisal Supplement by letter dated July 25, 2000, and reiterated its demand that ASC repurchase the DHL. Ex. 58. LaSalle claimed that the Appraisal Supplement contained "no analyses, data or other documentation whatsoever in support of the Appraisal Explanation's reallocation of values

between 'real estate' and 'non-real estate' categories." *Id.*, ¶ 2. In addition to detailing other alleged problems with the Appraisal Supplement, LaSalle claimed that it had obtained a third party appraisal commissioned by the borrower for an appeal of the hospital's 1997 tax assessment, which appraisal valued the hospital's real property as of January 1, 1997 at only *$2,675,000. Id.*, ¶ 5. ASC responded to this letter on August 4, 2000. Ex. 60. ASC refused to repurchase the DHL, contending that it is accepted practice to appraise property for REMIC transactions by relying on an "as-is or occupied value rather than the dark or 'bricks and mortar' value.'" *Id.*, at 1.

On November 14, 2000, in an action entitled *LaSalle Bank Natl. Assn. v Nomura Asset Capital Corp. & Asset Securitization Corp.*, 00 Civ 8720 (NRB) (the Federal Action), LaSalle sued Nomura in the United States District Court for the Southern District of New York for breach of the representations and warranties contained in the MLPSA and the PSA in connection with the DHL, and demanded that Nomura repurchase the defaulted loan. Ex. 62.

In an opinion dated September 14, 2004, the District Court (Buchwald, J.) granted summary judgment in favor of Nomura, finding that they reasonably believed that the mortgage was 80% secured by qualifying real property based on their good faith reliance on the advice of their counsel. *LaSalle Bank Natl. Assn. v Nomura Asset Capital Corp., et al.*, No. 00 Civ. 8720, 2004 WL 2072501, 2004 US Dist LEXIS 18599 (SD NY Sept. 14, 2004). This "reasonable belief" entitled Nomura to invoke the REMIC safe harbor provisions. The District Court further concluded that, even if Nomura were not protected by the REMIC safe harbor provisions, Nomura cured the defect by providing LaSalle with the Second Opinion Letter from Cadwalader to the effect that the DHL was a REMIC-qualified mortgage loan. LaSalle's contention that the

80% Warranty was independently breached was rejected, because the District Court ruled that the 80% Warranty had no greater effect than the Qualified Mortgage Warranty. Finally, the District Court rejected LaSalle's contention that Nomura breached a separate warranty that the DHL was originated and/or underwritten in accordance with customary industry standards.

On appeal, however, the Second Circuit disagreed. *See LaSalle Bank Natl. Assn. v Nomura Asset Capital Corp.*, 424 F3d 195 (2d Cir 2005). In an opinion dated September 14, 2005, the Second Circuit concluded that, because the Qualified Mortgage and the 80% Warranties were set forth in the MLPSA in two separate provisions, basic tenets of contract law required that each provision be given separate effect. *Id.* at 206-207. The Second Circuit also ruled that the Qualified Mortgage Warranty carved out the safe harbor provisions, and thus, they were not applicable. *Id.* at 209-210. The Second Court disagreed that Nomura cured any breach of the 80% Warranty by virtue of Cadwalader's Second Opinion Letter and the Appraisal Supplement, and concluded that there could have been a breach if the fair market value of the real property securing the DHL was less than 80% of the principal amount of the loan. The action was remanded back to the District Court in order to determine if that was so, suggesting that this was a question of fact appropriately reserved for trial upon remand. *Id.* at 208-210.

Nomura settled the Federal Action in July 2006, prior to trial, for approximately $67.5 million claiming that it had no other viable alternative. Complaint, ¶ 29; *see also* Ex. 113. This legal malpractice action then was commenced on October 27, 2006.

Nomura's complaint asserted three causes of action. The first cause of action, discussed in more detail below, asserts a claim against Cadwalader for legal malpractice in connection with the DHL. The second cause of action was dismissed by this court on Cadwalader's pre-answer

motion to dismiss. Nomura has withdrawn the third cause action alleging malpractice with respect to the "Best Western Loan" (*see* Complaint, ¶ 56). Pls. Opp. Memo. of Law, at 1, n 1. Nomura has also withdrawn its claim that Cadwalader committed legal malpractice by including the 80% Warranty separate and apart from the Qualified Mortgage Warranty in the MLPSA. *Id.*[4]

The remaining allegations of Nomura's complaint alleges that Cadwalader committed legal malpractice by failing to advise plaintiffs that appraisals of the collateral securing the mortgage loans included in the D5 Securitization had to separately value the "real property" as defined in the REMIC regulations, and by failing to do the necessary due diligence prior to the issuance of the First Opinion Letter. Complaint, ¶ 34. As a result, Nomura contends that the Appraisal of the Doctor's Hospital property showed a qualifying valuation of only $30,960,000 - approximately $10 million less than the $40 million needed for the loan to be 80% secured by the fair market value of the real property as defined under REMIC. *Id.*, ¶ 27.

Discussion

A. Standards for Summary Judgment

In order to obtain summary judgment, a defendant must establish its defense sufficiently to warrant a court's directing judgment in its favor as a matter of law. *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 (1988); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). In order to defeat the motion, the defending party must establish the existence of a factual issue requiring a trial, through the production of admissible evidence. *Gilbert Frank*

[4]This claim would have been dismissed by the court had it not been withdrawn by Nomura for two reasons. First, the undisputed evidence is that nearly all significant issuers of CMBS securities have included a separate 80% Warranty in their deal documents. Second, the Second Circuit's opinion is clear that the Qualified Mortgage Warranty needed to be satisfied without regard to the REMIC safe harbor provisions. 424 F3d at 209-210.

Corp. v Federal Ins. Co., 70 NY2d at 967. The motion papers must be scrutinized in a light most favorable to Nomura (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]), and the motion denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Sillman v Twentieth Century–Fox Film Corp.*, 3 NY2d 395, 404 (1957).

The first issue which affects the summary judgment standard here and must be addressed is whether the court can consider the testimony given by various witnesses at depositions conducted in the Federal Action, which Nomura has offered in opposing Cadwalader's motion,[5] Cadwalader contends that none of this testimony may be considered by the court, because Cadwalader was not a party to that lawsuit and did not have an opportunity to cross-examine the witnesses there.

To be sure, the deposition testimony from the Federal Action would be inadmissible at a trial here (CPLR 3117[a][3]; *Bigelow v Acands, Inc.*, 196 AD2d 436, 439 [1st Dept 1993]; *Allen v La Van Allen,* 225 App Div 873 [2d Dept 1929]); nor may it be used by Cadwalader, as the moving party, to support its motion for summary judgment. *State of New York v Metz*, 171 Misc 2d 525 (Sup Ct, NY County 1997). So Cadwalader thus argues that this testimony also cannot be used by Nomura to oppose this motion for summary judgment, citing *Weinberg v City of New York* (3 AD3d 489 [2d Dept 2004]). In *Weinberg*, a personal injury plaintiff testified at a General

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[5]Referring to the depositions of: Charles M. Adelman held on June 4, 2003 (Adelman I Tr.) and on August 7, 2003 (Adelman II Tr.); Raymond Anthony held on February 13, 2003 (Anthony Tr.); Peter S. Brooks held on January 22, 2004 (Brooks Tr.); Eric Dost held on August 16, 2002 (Dost Tr.); David Findlay held on July 18, 2003 (Findlay I Tr.); Barry Funt held on June 18, 2003 (Funt I Tr.); Perry Gershon held on July 15, 2003 (Gershon I Tr.) and August 5, 2003 (Gershon II Tr.); Anna Glick held on March 13, 2003 (Glick I Tr.); Mathew C. Howley held on January 21, 2004 (Howley Tr.); Marlyn A. Marincas held on July 8, 2003 (Marincas I Tr.); Ethan Penner held on July 10, 2003 (Penner I Tr.); Lisa Post on June 19, 2003 (Post I Tr.); and Christopher Tierney held on June 3, 2003 (Tierney Tr.).

Municipal Law § 50-h hearing prior to her death, and the court ruled that her testimony was inadmissible hearsay that could not be used to support the allegations of the complaint to oppose a motion for summary judgment by the non-municipal defendants who were not present at the 50-h hearing. But in *DiGiantomasso v City of New York* (55 AD3d 502 [1st Dept 2008]), the First Department held that a personal injury plaintiff's testimony at a 50-h hearing could be used to defeat summary judgment, because the defendant had the opportunity to cross-examine the plaintiff about her section 50-h testimony at her *later* deposition. *Id.* at 503. And the court noted that "'evidence otherwise excludable at trial may be considered in opposition to a motion for summary judgment as long as it does not become the sole basis for the court's determination.'" *Id.*, quoting Matter of New York City Asbestos Litig., 7 AD3d 285, 285 (1st Dept 2004); *see also Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 2011 NY Slip Op 08288, *3 (1st Dept 2011); *Navedo v 250 Willis Ave. Supermarket*, 290 AD2d 246, 247 (1st Dept 2002). Accordingly, the court has considered the testimony of all the witnesses who were subsequently deposed in this action (i.e, Charles Adelman, David Findlay, Perry Gershon, Anna Glick, Ethan Penner, and Lisa Post). As for the other witnesses, the court will consider and rely on their testimony if it is not the sole basis for the court's determination of any of the discrete issues raised by this motion. The court has not considered the affidavits of Marlyn Marincas and Ray Anthony, offered by Cadwalder for the first time as part of its reply papers, in deciding this motion. *See* August 16, 2011 So-Ordered Stipulation.

B. Legal Malpractice

"To sustain a cause of action for legal malpractice, . . . a party must show that an attorney failed to exercise the reasonable skill and knowledge commonly possessed by a member of the

legal profession." *Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303-304 (2001); *see also Barbara King Family Trust v Voluto Ventures LLC*, 46 AD3d 423, 424 (1st Dept 2007).

> "The tripartite test governing the establishment of a prima facie case for legal malpractice includes sufficient allegations that the attorneys were negligent, that their negligence was the proximate cause of the plaintiff's damages, and that the plaintiff suffered actual damages as a direct result of the attorneys' actions."

Plentino Realty v Gitomer, 216 AD2d 87, 88 (1st Dept 1995) (internal quotation marks and citation omitted); *see also Levine v Lacher & Lovell-Taylor*, 256 AD2d 147, 149 (1st Dept 1998).

Cadwalader contends that summary judgment is appropriate, because (i) Nomura's claims that it acted negligently in two respects -- its advice regarding appraisals and its due diligence for the First Opinion Letter -- are belied by the documentary and testimonial evidence and (ii) Nomura cannot show that Cadwalader's alleged negligence was the proximate cause of the loss Nomura sustained in settling the Federal Action. For the following reasons, this court disagrees with Cadwalader and finds that Nomura, indeed, has raised triable issues of fact with respect to both issues, i.e., Cadwalder's negligence and proximate cause.

1. Negligence

(i) Cadwalader's Advice to Nomura Regarding Appraisals

The complaint alleges that Cadwalader never advised Nomura's securitization group on á basic principle of the REMIC rules, i.e., that appraisals of the collateral securing the mortgage loans included in the D5 Securitization had to *separately* value the real property as defined in the REMIC regulations. Complaint, ¶ 34. Cadwalader moves for summary judgment dismissing this

claim, relying primarily on the deposition testimony of Perry Gershon and Cadwalder attorneys, Anna Glick and Charles Adelman, each of whom testified that the relevant advice was given.

Nomura admits it is not claiming that Cadwalader failed to advise it of the existence of the 80% Test. Rather, Nomura is claiming that Cadwalader's general REMIC advice was woefully insufficient, because Cadwalader failed to advise Nomura that an appraisal's bottom line number may include value that is not REMIC real property; failed to advise Nomura to obtain appraisals that separately valued the REMIC real property; and failed to advise Nomura of the particular issues posed by "going concerns." Cadwalader allegedly advised Nomura that the REMIC regulations would not be a problem so long as Nomura originated loans in accordance with its own underwriting guidelines of requiring LTVs of 80% or less. Nomura claims that the testimony of several Nomura employees shows an understanding that the appraisal's bottom line number covered only real property, and thus, it used that number for securitizations.

It is true that Mr. Gershon has testified that the relevant advice was thoroughly given to him. He testified at his deposition in the Federal Action that he knew that a REMIC loan needed to be secured by real property and must comply with a LTV of 125% or less. Gershon I Tr. at 85-89. At the deposition he gave in this action, Mr. Gershon was shown a one-page document drafted by Cadwalader's attorneys entitled "Cadwalader Advice to Nomura" (Ex. 1126), and was asked if the advice listed therein was given to Nomura. He testified that all of the advice was given to Nomura at various points in time prior to the D5 Securitization. Gershon III Tr. at 20-30. Specifically, Mr. Gershon agreed that Cadwalader had advised Nomura that the 80% Test is best proved by an independent third-party appraisal and should measure real property separately. *Id.* at 25-26. In stating that a review of LTV ratios provides guidance on whether a

loan is REMIC-eligible, however, Mr. Gershon agreed that the ratio is not a substitute for the due diligence required to ensure that a loan is secured by real property equal to 80% of the principal amount of the loan. *Id.* at 29-30. Mr. Gershon acknowledged being advised that if Nomura had any questions regarding whether a property contained sufficient real property collateral under the REMIC regulations, then Nomura needed to consult with outside counsel prior to making the loan. *Id.* at 25. He also testified, however, that Cadwalader was not asked to advise Nomura on the form of the appraisals for the D5 Securitization. *Id.* at 30-31. According to Mr. Gershon, it was Nomura's origination outside counsel, the law firm of Dechert Price & Rhoads (Dechert), that was expected to work with Nomura employees to ensure that the DHL was REMIC-eligible before origination. *Id.* at 17-18. Ray Anthony, the banker in charge of originating the DHL loan, had the responsibility for ensuring that it was REMIC-eligible and that it satisfied the 80% Test. *Id.* at 13, 18, 179-180. Mr. Gershon said it was his assumption that the bankers read the appraisals. *Id.* at 19.

Mr. Adelman also testified that Cadwalader advised Nomura as to each and every item on "Cadwalader's Advice to Nomura," Ex. 1126. Adelman III Tr. at 259. Anna Glick, the Cadwalader billing partner responsible for Nomura's business, testified that she and Mr. Adelman advised Nomura regarding tax- and REMIC-related requirements. Glick III Tr. at 39, 43-47. Ms. Glick testified: "Over the course of the ten years or so that I did work for Nomura, we had numerous discussions about REMIC requirements, the 80 percent requirement, about what satisfied the 80% requirement." *Id.* at 47-48. Specifically, she said she had discussions with Mr. Gershon, Marlyn Marincas, and "senior bankers." *Id.* at 48-49. In support of this motion, Ms. Glick submits an affidavit averring that a piece of the REMIC advice

conveyed to Nomura was a "rule of thumb . . . that the value of what was plainly real property (such as land and structural improvements, or 'stick and bricks') should be added up by Nomura to see if it amounted to at least 80% of the loan amount." Ex. 1202: Glick 2/28/11 Aff., ¶ 8.

The testimony by Perry Gershon appears at first blush to be compelling, and if undisputed and unchallenged, could result in a summary dismissal of Nomura's negligent advice claim. *See Stolmeier v Fields*, 280 AD2d 342, 343 (1st Dept 2001) (rejecting client's failure to advise claim as belied by overwhelming evidence, including the client's own deposition testimony, that client was aware of licensing requirement). Here, however, Nomura contends that Mr. Gershon is a biased witness, because, while in charge of Nomura's securitization group, he obtained an associate position for his wife, Lisa Post, in Cadwalader's capital markets group where she worked on all of NACC's transactions, including the D5 Securitization focusing primarily on due diligence. Gershon I Tr. at 71; Post II Tr. at 21-26, 39-40. There also is evidence that, after Mr. Gershon left Nomura in late 1998, he continued to use Cadwalader as securitization counsel, and portions of his wife's bonuses from Cadwalader have been attributed to this continuous stream of business from Mr. Gershon. Gershon III Tr. at 71, 75.

In addition to his alleged bias, Mr. Gershon has given inconsistent testimony regarding Cadwalader's advice and his understanding of the REMIC 80% Test which raises further issues of credibility that cannot be resolved on this motion for summary judgment. *See DiGiantomasso v City of New York*, 55 AD3d at 503 ("To the extent that plaintiff's deposition testimony . . . was vague or inconsistent with her [prior] testimony, a credibility issue is raised to be decided by the jury, not the court on a motion for summary judgment."); *Yaziciyan v Blancato*, 267 AD2d 152,

152 (lst Dept 1999) (summary judgment denied because "deponent's arguably inconsistent testimony . . . presents a credibility issue properly left for the trier of fact").

Mr. Gershon testified, for example, that 100% of the loans in Annex A to the Prospectus Supplement had 100% LTV's or less, "which in and of itself meant they were all in compliance" with REMIC requirements. Gershon III Tr. at 41-42. He claimed it was his understanding that "the appraised values were the real property values." *Id.* at 92-93. Mr. Gershon also testified that, although appraisers take multiple approaches to determine value, Nomura primarily relied on the income capitalization approach, an approach he believed only looks at the real property value. *Id.* at 116-117. "It is the income approach as opposed to the cost approach that's generally indicative of the value of an asset, particularly for REMIC purposes," he said. *Id.* at 103-104. Mr. Gershon's belief appears to be at odds with Ms. Glick's testimony that she directed Nomura to focus on the property's "sticks and bricks" to determine REMIC-eligibility. Ex. 1202: Glick 2/28/11 Aff., ¶ 8. And since the Appraisal did, in fact, value the land and buildings of the hospital using a dark or "bricks and mortar" value (*see* Adelman I Tr. at 252-253) and came up with a value of only $30,960,000 (Ex. 154, at 2), it appears that Nomura was not following Ms. Glick's alleged advice that it needed to inquire further to determine whether the 80% Test was met for the DHL. A reasonable inference has been raised that Cadwalader's REMIC advice was either not sufficient at least with respect to the DHL.

Nomura contends that an income capitalization appraisal of a going concern like a hospital necessarily includes non-real property assets like good will and equipment that does not meet the REMIC real property requirements and thus Nomura was proceeding under a faulty premise. It is noteworthy that Cadwalader's expert from Merrill Lynch, David M. Rodgers,

testified that his people were instructed to review the appraisals both at origination and securitization to see if the cost approach value exceeded the 80% Test in order to determine REMIC compliance. *See* Rodgers Tr. at 121-122. The Merrill Lynch protocol was to order appraisals that included the cost approach, the income approach and the market approach. *Id.* at 132. Mr. Rodgers testified that "[w]e knew REMIC was more than just the cost approach, but if it met that standard, then we needed to go no further." *Id.* at 121. Mr. Rodgers also admitted that he would not rely solely on the income capitalization approach to make a REMIC determination. *Id.* at 122. This testimony by Cadwalader's own expert raises questions about whether Nomura was properly instructed by Cadwalader on how to value loan collateral to ensure compliance with the 80% Warranty.

Nomura points to other testimony by Marlyn Marincas and Christopher Tokarski, members of Mr. Gershon's securitization team, that Nomura did not concern itself with the REMIC 80% Test. Ms. Marincas testified in the Federal Action that she understood that for a loan to be REMIC-qualified, the LTV must be 125% and the loan must be primarily secured by real estate assets -- such as a building, not an automobile or clothes. Marincas Tr. at 21-22. Even though the focus of her job was "on the legal structural stuff," including "the reps and warranties that would be required to be in the loan documents" (*id.* at 40), she was not concerned about meeting the 80% Test (*id.* at 47). "All of those loans were originated to have LTVs lower than 80 percent. So we were never up against the 125. And the principally secured by real estate, that's what we made: Loans on real estate." *Id.* Ms. Marincas further testified that "[t]he banking team would be responsible for assessing loan-to-value from a credit underwriting perspective. I don't know if members of the banking team would have any idea what REMIC

eligibility was. . . . They had responsibility for making sure the loans met Nomura's requirements, which were property specific." *Id.* at 51-52. Later on, she testified that no property in the D5 Securitization pool had an LTV of 125%, because NACC did not originate loans with LTVs in that range. *Id.* at 220.

It is unclear from the record who at Nomura read the Appraisal and was responsible for assigning a $68 million value for DHL.[6] The person who appears most likely to have had this role is Christopher Tokarski; however, his testimony showed a marked ignorance of REMIC. Mr. Tokarski testified that it was his job to help people fill in the numbers on the prospectus, that he "collected all the data. I took all those Asset Summaries, summarized them into a database, and looked at the loan to values on each property." Tokarski Tr. at 220-221. Nevertheless, Mr. Tokarski testified that he never heard of the 80% Test (*id.* at 109), and that there was never any analysis done at Nomura to see what portion of the value of the collateral was attributable to real property (*id.*, at 112). He also testified that he did *not* know that there is a real property component and personal property component that goes into the appraisals, and did not know whether equipment was considered real property. *Id.* at 222-23. Ms. Glick admitted that Nomura's chart (presumably referring to Annex A to the Prospectus Supplement) only provided an overall LTV, not a REMIC LTV. Glick II Tr. at 190-92.

As stated above, contrary to Mr. Gershon's testimony, Ms. Marincas testified that the banking team would have no idea what REMIC-eligibility was. Marincas Tr. at 51-52. Ray Anthony, the banker who originated the DHL, was deposed in the Federal Action. He testified

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[6]The Appraisal was addressed to a "Mr. Geoff Smith, Analyst, Nomura Commercial Real Estate Finance." Ex. 46.

that the purpose of getting a third-party appraisal was to make sure the loan did not go above a certain LTV. Anthony Tr. at 81-82. The pages of his deposition transcript provided to the court make no mention of REMIC standards.

Especially worthy of note is Mr. Gershon's testimony about the role of Dechert in the origination of the DHL. His testimony is contradicted by an affidavit submitted by Joseph B. Heil, Esq., the partner at Dechert responsible for closing the DHL loan. Mr. Heil avers that Dechert was *not* asked to nor expected to provide any REMIC advice to Nomura. Heil 4/8/10 Aff., ¶ 3. To the contrary, Dechert was given a draft of the representations and warranties for the D5 Securitization and the firm wrote "N" next to the Qualified Mortgage and 80% Warranties, which Mr. Heil avers meant "Nomura only knows." *Id.*, ¶ 6 & Exh. A thereto: DH0657985. Interestingly, on this point, the testimony of Cadwalader's tax partner, Mr. Adelman, is consistent with Dechert's Mr. Heil. Mr. Adelman testified during the Federal Action that REMIC-eligibility questions were not specifically addressed until the pool of mortgages were identified, and that it was no one's responsibility *at origination* to determine if a loan was REMIC-qualified. Adelman I Tr. at 171-172, 174.

Nomura also cites to the deposition testimony of Barry Funt, who was chief legal counsel at NACC. Mr. Funt testified during the Federal Action that his understanding of the 80% Test, gleaned from general discussions with Anna Glick and Cadwalader about the REMIC rules, was that every loan was REMIC-qualified due to Nomura's typical underwriting practices. Funt I Tr. at 34-36. He testified that he never had any discussions with Cadwalader about a particular loan being REMIC-qualified, because it "really was never an issue" due to the fact that Nomura's business was to make loans in the 70-80% LTV range, which was "so far south" of REMIC's

125% test. *Id.* at 100-104, 114, 119-21. Mr. Funt testified in this action that neither he nor Nomura's bankers were aware, in 1997, "of the issue with respect to real property potentially having a value for REMIC purposes different than might be stated in an appraisal," and the value was "the basic value that you would see at the very beginning of the appraisal." Funt II Tr. at 207-208. Ethan Penner, Nomura's president in 1997, and the person responsible for the commercial real estate finance business at NACC from 1993 to 1998, avers in an affidavit submitted in opposition to this motion, that it was his understanding that all of the loans that Nomura originated satisfied the REMIC requirements and he did not know that the total value of the appraisal could not be used. Penner 6/19/10 Aff., ¶¶ 2, 5-6.

Cadwalader challenges both Messrs. Funt and Penner's testimony on the ground that neither gentleman was part of the core group of people that Cadwalader interacted with on REMIC issues, i.e., Mr. Gershon, Ms. Marincas or Mr. Anthony. Cadwalader also points out that neither Mr. Funt nor Mr. Penner was responsible for determining whether any loans met the 80% Test (*see e.g.* Funt I Tr. at 101-102) and neither had any role with respect to the D5 Securitization. *See e.g.* Penner II Tr. at 22, 45-46. These, of course, are relevant factors for weighing the importance of their testimony, but such an exercise is within the province of the jury, not a court determining a summary judgment motion.

Cadwalader also claims that the legal advice Nomura claims never was given is detailed in documents provided by Cadwalader to Nomura, and Nomura's understanding of that advice is undisputedly reflected in loan documents that Nomura drafted independently of Cadwalader. *See Beattie v Brown & Wood*, 243 AD2d 395, 395 (1st Dept 1997) (affirming dismissal of

failure-to-advise claim where agreement executed by the plaintiff flatly contradicted the allegation that the relevant advice was not given).

Cadwalader relies on: (1) the 80% Warranty itself (Ex. 2, § 2(b)(xxix)); (2) a section in the Prospectus Supplement entitled "Federal Income Tax Consequences: *Qualification as a REMIC*," which advises that a qualified mortgage is "any obligation that is principally secured by an interest in real property" and includes mortgage loans provided that the "fair market value of the real property security (including buildings and structural components thereof) is at least 80% of the principal balance of the related Mortgage Loan . . ." (Ex. 40, at 59); (3) a commitment letter to the borrower drafted by Nomura's in-house counsel stating that the loan could never exceed "125% of the REMIC value of the Property" (Ex. 190, at DH0140788); and (4) a representation by the borrower in the Loan Agreement for the DHL that the $50 million loan amount did not exceed the "Tax Fair Market Value" (TFMV) of the property securing the loan, and TFMV is defined in the Loan Agreement as excluding "the value of any personal property or other property that is not an interest in real property" under the REMIC regulations. Ex. 80, at 33, 73.

None of this evidence, however, establishes, as a matter of law, that Cadwalader properly advised its client about the REMIC rules. It is undisputed that Cadwalader drafted the MLPSA, the Prospectus Supplement (*see* Ex. 1202: Glick 2/28/11 Aff., ¶ 6; Funt III Tr. at 366), and was involved in drafting the loan origination documents for conduit loans such as the D5 Securitization (*see* Glick II Tr. at 39-41, 45-46). Nor is any of this documentary evidence conclusive regarding how to read appraisals for REMIC eligibility and there is evidence that

members of Nomura's banking and securitization teams did not understand the meaning of the 80% Warranty, at least as it applied to a going concern such as a hospital.

It certainly is the case that Nomura was no novice when it came to securitizations, and that the D5 Securitization itself involved at least six loans where the collateral was going concerns. Ex. 990.[7] Although Cadwalader thus has presented what may be characterized as a fairly compelling case for dismissal of Nomura's negligent advice claim, it is a case that is unsuited for dismissal as a matter of law. This is because Cadwalader relies heavily on deposition testimony of key witnesses, some of whom may be biased and whose credibility can be attacked on cross examination, as the court has previously observed. The trial court's limited role on a summary judgment motion is to find whether triable issues of fact exist and does not extend to evaluating witness credibility. *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974); *Powell v HIS Contrs., Inc.*, 75 AD3d 463, 465 (1st Dept 2010); *Creighton v Milbauer*, 191 AD2d 162, 166 (1st Dept 1993).

(ii) Due Diligence For the First Opinion Letter

Nomura alleges that Cadwalader failed to do due diligence prior to the issuance of the First Opinion Letter. Complaint ¶ 34(iii). At oral argument of the motion to dismiss, counsel clarified that Cadwalader failed to review the appraisals of the mortgage loans included in the D5 Securitization to verify that the 156 loans in the D5 Securitization pool were REMIC-compliant. Ex. 1200, at 4.

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[7]At oral argument of the motion, counsel for Cadwalader represented to the court and presented documentary evidence that Nomura had securitized a $10.6 million hospital loan in February of 1996. 9/21/11 Tr. at 52; *see also* Tierney Tr. at 57-58. The court considered this evidence after Nomura's counsel was given an opportunity to comment, and did so by letter to the court dated December 19, 2011.

In moving to dismiss this claim on summary judgment, Cadwalader offers the testimony of Mr. Gershon that he did not want Cadwalader to review the appraisals and specifically instructed Cadwalader not to do so. Gershon III Tr. at 26, 27, 33, 35, 244-45. When asked if Nomura ever directed Cadwalader not to review the appraisals, Mr. Adelman testified that "their direction was specific enough that we did not view it as part of our normal process to have appraisals sent to us for review." Adelman III Tr. at 265. Mr. Funt also testified that Cadwalader was not retained to determine the appraised value of a property (Funt I Tr. at 119), and that he never directed outside securitization counsel to review the appraisals for REMIC purposes (Funt III Tr. at 295). Ms. Marincas testified that the appraisals were reviewed by the originating banker and then by members of Mr. Gershon's team, and that it was the banking group's responsibility to check the LTV's to make sure they met Nomura's underwriting standards. Marincas Tr. at 52-54.

Cadwalader argues it was not required or asked to review the Appraisal for the DHL, or to repeat Nomura's own due diligence -- nor did the firm do so -- and that in issuing the First Opinion Letter it was entitled to rely on Nomura's representations in the MLPSA that the loans all met the 80% Test. However, there is conflicting testimony as to just what Cadwalader's role was with respect to REMIC due dilligence. Nomura's witnesses, namely Mr. Funt, Mr. Penner and Ms. Marincas, all testified that Cadwalader was responsible for identifying any loan that potentially ran afoul of the 80% Test. Mr. Funt testified that "the final arbiter was actually Cadwalader, not origination counsel" (Funt I Tr. at 117), and that, while he did not expressly expect Cadwalader to review appraisals, he did expect them to review *whatever they needed* in order to issue the REMIC opinion. Funt II Tr. at 126-127. Even Mr. Gershon admitted that he expected Cadwalader "*would do whatever they deemed necessary to do in connection with*

issuing that opinion" (emphasis added) (Gershon III Tr. at 211-212), and if Cadwalader had asked to see an appraisal for REMIC purposes, Nomura would have provided it. *Id.* at 129, 197-198; *see also* Adelman I Tr. at 126. Mr. Penner testified that Nomura paid Cadwalader a tremendous amount of money to make sure that Nomura was compliant with the REMIC guidelines. Penner I Tr. at 92-93; *see also* Penner 6/19/10 Aff., ¶ 6. And while Ms. Marincas testified it was the banking team that reviewed the appraisals and set up the Excel spreadsheets attached to the Prospectus Supplement, she also testified that the banking team was only responsible for assessing the LTV from a credit underwriting perspective and would have no idea what REMIC eligibility was. Marincas Tr. at 48-51.

Cadwalader argues that the First Opinion Letter does not purport to backstop Nomura's representations in the MLPSA. However, Mr. Adelman himself acknowledged during his testimony in the Federal Action that he did not just rely on his client's representations and that he performed an *independent check* by reviewing the Prospectus Supplement and the tables annexed thereto (i.e., Annex A and Annex B) to determine if a further inquiry was necessary. Adelman I Tr. at 88-93, 125-127, 132-134, 144. When asked about the meaning of paragraph 5 of the First Opinion Letter, Mr. Adelman testified:

> Q. Which, among other things, means that the opinion being expressed is that each of the loans satisfy the 80 percent value to loan test?
>
> A. That's correct.

Id. at 188-189. Both the District Court and the Second Circuit Court of Appeals construed Mr. Adelman's testimony as his having reached the conclusion with respect to each of the loans in the D5 Securitization pool that it was REMIC-qualified. 2004 WL 2072501, at *2; 424 F3d at 201.

Mr. Adelman also admitted that reviewing the Appraisal would have been appropriate if any type of "red flag" was raised by the client or if he himself saw something which would cause him to doubt the truth of the client's 80% Warranty. Adelman I Tr. at 124-126. He admitted that Annex B identified the property type of the DHL as a "hospital" (*id.* at 133; Adelman III Tr. at 178, 187). Although this chart did not give any numbers for the real property value for the DHL loan (*id.* at 135-136; Adelman III Tr. at 176), based on his experience, he testified that "no red flag was raised that this loan might have had an unusual amount of personal property, so that no red flag was raised that caused me to inquire further." *Id.* at 91; *see also* Adelman III Tr. at 178. Mr. Adelman thought the value of the real property would be worth at least $40 million, because of the overall value of $68 million (*id.* at 87-88), but that he might have asked to see an appraisal if the LTV had approached 90% or more for properties with high personal property components (*id.* at 127, 146). He testified that the general ratio of personal property in a hotel loan is about 10%, and that nursing homes and hospitals have a "somewhat higher ratio of personal property to real property." *Id.* at 128.

In addition to Annex A and B to the Prospectus Supplement, Cadwalader was provided with additional information about the DHL prior to the issuance of its First Opinion Letter. A document describing the "Deal Highlights" of the DHL was faxed by Steve Gerstung of Nomura to Lisa Post, then an associate at Cadwalader, on September 30, 1997.[8] This document arrives at an overall LTV of 73.5% based on the Appraisal, although it lists the three different values the appraiser arrived at using the different valuation approaches, including the cost approach's $40.6

[8]This document (Bates-stamped as CWT NOMURA D-5 007979 - 008017) was presented to the court after briefing of the motion by Nomura's counsel. *See* 12/2/11 letter from Manianna Stovall, Esq. The court gave Cadwalader an opportunity to respond to its relevance or lack thereof, and Cadwalader did so by letters dated December 19 and 23, 2011.

million value. Ex. 330, at DH0218840. It also includes information regarding the property taxes and assessments for the hospital for 1995 and 1996. *Id.*, at DH0218838. According to the local taxing authorities, the assessed and market value of the hospital in 1996 was $2,132,211 and $1,003,724, respectively, using an equalization factor of 2.1243. *Id.* As noted by LaSalle in its June 26, 2000 letter, "the fact that the appraisal reflects a value that is *25 times greater* than the assessed value seems significantly more divergent than would normally be anticipated (emphasis added)." Ex. 55. The Deal Highlights also states that a weakness of the loan is the "relatively older physical plant and equipment." Ex. 330, at DH0218835.

It is not clear from the record whether anyone at Cadwalader read this document. Ms. Post testified that she "focused on collateral," meaning the real estate assets that go into the deal, working on gathering information for the representations and warranties and the Prospectus Supplement, particularly the section on significant loans. Post I Tr. at 25-26. Ms. Post testified that Cadwalader "tried to collect all of the asset summaries," but did not read every one of them. Post II Tr. at 8-9. She further testified that it was not her job to determine whether or not a loan was REMIC-qualified (Post I Tr. at 136), and that although she was aware of the 80% Test, she did not know whose job it was, Nomura's or Cadwalader's, to determine if that test had been met. *Id.*, at 137-140.

Many of the witnesses testified that the DHL was a large and unusual loan for Nomura. *See e.g.* Gershon III Tr. at 440-441; Adelman I Tr. at 34-38, 210; Tierney Tr. at 55. Yet, curiously, the DHL was *not* highlighted in the significant loans section of the Prospectus Supplement, which described nine loans ranging in value from $147 million to $45 million (*see* Ex. 43, at S-60 to S-71), a circumstance LaSalle complained about in its July 25, 2000 letter

rejecting the Second Opinion Letter and Appraisal Supplement. *See* Ex. 58, at 3. Given that the Doctor's Hospital had been purchased out of bankruptcy five years earlier for only $2.4 million by a doctor who had, throughout the 1990's, been under investigation by state and federal authorities for billing improprieties and the subject of a June 1993 broadcast of ABC's "Primetime Live" program (*see* Ex. 330, at DH0218846-49), as well as the marital relationship between Nomura's Perry Gershon and Cadwalader's Lisa Post (and their respective roles with Nomura's securitization business), it would not be unreasonable were a jury to infer something untoward in the decision to omit the DHL from the Prospectus Supplement's section on significant loans. At the very least, if the DHL had been highlighted in this section as one of the significant loans in the pool, it might have engendered closer scrutiny of this loan by Mr. Adelman as part of the REMIC due diligence he admittedly performed.

From a REMIC standpoint, Cadwalder had in its files a document that contained certain information about the DHL, particularly the $40.6 million cost-based value which brought the loan perilously close to the 80% Test, and which indeed could be viewed as a "red flag" that this loan needed to be further scrutinized for REMIC-eligibility. On the other hand, a jury might conclude that Cadwalader properly exercised its professional judgment by relying on the business expertise and factual representations of its client, and Mr. Adelman's conclusion that a $50 million hospital loan with an overall LTV of 73% was not likely to have real property worth less than $40 million. And the law is clear that an alleged error of judgment is insufficient to establish a claim of malpractice. *Rosner v Paley*, 65 NY2d 736, 738 (1985); *Hand v Silberman*, 15 AD3d 167, 167-168 (1st Dept 2005).

Cadwalader argues that it is the "universal practice" of securitization attorneys to rely on client valuations and not to undertake an independent review of the appraisals when issuing an opinion that a CMBS trust will qualify for REMIC tax treatment. *See* Defs. Mem. of Law, at 35. It proffers the opinions of four purported CMBS experts (Thomas J. Lyden, Esq., James M. Peaslee, Esq., Michael Weinberger, Esq. and David M. Rodgers), each of whom have opined that, by not reviewing the Appraisal and instead relying on Nomura's representation that the 80% Test was met, Cadwalader followed the "common," "customary" and "standard" practice of the CMBS attorneys who issue REMIC opinions. *See* Weinberger 6/18/10 Aff., ¶ 39; Lyden 6/18/10 Aff., ¶ 7; Peaslee 6/18/10 Aff., ¶ 167. Cadwalader further argues that summary judgment in its favor is warranted, because Nomura's due diligence claim is unsupported by competent expert testimony delineating the appropriate standard of care to which Cadwalader was required to adhere in issuing the First Opinion Letter.

Although Cadwalader purports to describe a "universal practice" by securitization attorneys, Mr. Adelman testified that "relatively few" tax lawyers were doing this type of work in 1997. Adelman III Tr. at 20-21. The sparse number of lawyers engaged in this field hardly warrants Cadwalader's characterization of a "universal practice" in establishing an appropriate standard of care in this field. Indeed, when Mr. Peaslee was asked what steps he would undertake to ensure that the 80% Test was met prior to issuing a REMIC tax opinion, he testified that what he did specifically "varied from deal to deal depending on the circumstances," one of which was the extent of the client's experience and knowledge. Peaslee Tr. at 30-31. This testimony is at odds with the contention in his report that there is a "standard practice" amongst securitization counsel not to review the appraisals. *See* Peaslee 6/18/10 Aff., ¶ 167. Messrs.

Lyden and Peaslee each aver that Cadwalder only had to conclude that Nomura reasonably believed that the DHL satisfied the 80% Test (*see* Lyden 6/18/10 Aff., ¶ 20; Peaslee 6/18/10 Aff., ¶¶ 11(c), 158), while Mr. Adelman himself testified that, in issuing the First Opinion Letter, he was *not* relying on the REMIC safe harbor. Adelman III Tr. at 161-162. Most importantly, all of Cadwalader's experts accepted Mr. Gershon's testimony about Nomura's responsibility for REMIC compliance without reservation and ignore other testimony that Nomura's bankers, origination counsel and even members of the securitization team were not focused on the REMIC value of the collateral. *See* Lyden 6/18/10 Aff., ¶¶ 22(6), (7); Peaslee 6/18/10 Aff., ¶¶ 11(c), 165; Weinberger 6/18/10 Aff., ¶ 33; Rodgers 6/18/10 Aff., ¶ 31. Thus, if the jury were to find in Nomura's favor on this issue, they may also be disinclined to give credence to these expert opinions.

Furthermore, while each of Cadwalader's experts opines that Mr. Adelman was not required to look beyond his client's representations when rendering the First Opinion Letter, Mr. Peaslee admitted that this was the case unless Cadwalader saw something inconsistent with the 80% Warranty in the Prospectus and the Prospectus Supplement. Peaslee Tr. at 304-305. As stated above, a triable issue of fact exists regarding whether the documents in Cadwalader's files raised a red flag about the DHL. Mr. Glazer, too, in his treatise on legal opinions, states that the lawyer is entitled to rely on factual information given by an appropriate source if the information does not appear to be irregular on its face and the lawyer does not know of circumstances that make reliance unwarranted. *See* Ex. 980: Glazer and FitzGibbon on Legal Opinions, § 4.2.3 at 131-132 (3d ed.).

The requirement that a legal malpractice plaintiff come forward with expert evidence on the lawyer's duty of care may be dispensed with where "'ordinary experience of the fact finder provides sufficient basis for judging the adequacy of the professional service.'" *Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 259 AD2d 282, 283-284 (1st Dept 1999), quoting *S & D Petroleum Co. v Tamsett*, 144 AD2d 849, 850 (3d Dept 1988). Cadwalder clearly has established that reviewing the appraisals for each loan in a CMBS trust was not warranted nor the common practice of the several securitization attorneys issuing REMIC tax opinions in 1997 and not part of the normal scope of Cadwalader's duties. Nevertheless, whether any red flag was raised with respect to the DHL by Cadwalader's knowledge of Nomura's underwriting practices, knowledge that the borrower was an acute care hospital, or review of or failure to review the "Deal Highlights" document for one of the ten largest loans in the D5 Securitization pool, is not an assessment that depends upon "professional or scientific knowledge or skill not within the range of ordinary training or intelligence." *Kulak v Nationwide Mut. Ins. Co.*, 40 NY2d 140, 148 (1976).

Cadwalder and its experts contend the firm was entitled to rely on the representations and warranties given by Nomura in the MLPSA and the three-paragraph Officer's Certificate signed by Boyd Fellows, a Managing Director of NACC (Ex. 87). However, Nomura's expert, Arthur Norman Field, Esq., contends that the Qualified Mortgage Warranty and the 80% Warranty were conclusory representations, contained no facts, and whether the DHL was a qualified mortgage and met the 80% Test were really "ultimate facts" that are tantamount to a legal opinion. Field 5/19/10 Report, at 7-8. Thomas J. Biafore, Esq., another expert retained by Nomura, contends that determining whether the DHL satisfied the 80% Test required knowledge of technical legal

issues (Biafore 5/19/10 Report, at 12), and Nomura also points to the fact that Mr. Adelman testified in the Federal Action that whether a loan is a qualified mortgage is a legal representation (Adelman I Tr. at 115) and that, in reviewing Annex A to the Prospectus Supplement, he was doing "legal tax work." *Id.* at 142-143.

Cadwalader's experts contend that whether a property has sufficient real property is a factual question, well within any sophisticated lender client's capabilities. *See* Peaslee 6/18/10 Aff., ¶ 152. Mr. Peaslee admits, however, that, "at the margins . . . determining whether the 80% Test has been met may require technical knowledge . . ." *Id.* ¶ 153; *see also* Adelman III Tr. at 133-134 (testifying that the issue of what is REMIC real property is "in substantial part a factual issue," but might be a legal issue "at the margins," i.e, the distinction between fixtures and equipment). Mr. Peaslee contends that Nomura was advised by Cadwalader to seek its legal advice if they had any doubts about whether the 80% Test was satisfied by any particular loan, and that this was the practice the parties followed. *Id.*; *see also* Glick II Tr. at 200-201. But, as pointed out by Nomura's expert, the evidence suggests that Nomura had a "one-size fits all program for underwriting that focused on LTV without regard to the components that made up the 'value' in the LTV" and this does not satisfy REMIC where the property involved presents unusual issues such as a hospital. Biafore 7/2/10 Report, at 5-6. Mr. Biafore also opines that whether the DHL met the 80% Test was not a factual issue within the capabilities of most lender clients, and that most lawyers with extensive REMIC tax expertise would be challenged by the analysis of the DHL loan, which he describes as the "oddest of odd cases." *Id.*, at 7.

So, when all of this evidence is viewed in the light most favorable to Nomura, there is no doubt that triable issues of fact have been raised requiring that a jury view all of this and come to its own conclusion.

Cadwalader's final argument in support of summary dismissal of Nomura's due diligence claim is that reliance on the First Opinion Letter is expressly limited to its addressee, Nomura Securities International, Inc.,[9] or other parties that obtained Cadwalader's written consent, neither of which are NACC or ASC. However, Cadwalader admits that the First Opinion Letter was issued on ASC's behalf and ASC was Cadwalader's client and when a client asks a lawyer to provide a legal opinion to a party to a transaction in which the lawyers represent the client, the lawyer cannot absolve himself of the ordinary duty to the client to perform his work competently. Even Cadwalader's expert, Donald W. Glazer, Esq., states in his treatise on legal opinions, that:

> "Lawyers are not supposed to be independent of their clients but are expected to further their clients' interests by providing diligent representation. Delivery of a closing opinion is part of that representation."

Ex. 980: Glazer and FitzGibbon on Legal Opinions, § 2.5.5 at 81. Also, LaSalle, who admittedly was entitled to rely on the First Opinion Letter, sued Nomura and Nomura claims that it would not have made the representation sued upon if Cadwalader had done its job properly and advised Nomura that the DHL was not REMIC-qualified.

2. Proximate Cause

Proximate cause requires a showing that "but for" Cadwalader's negligence, Nomura either would have been successful in the Federal Action or would not have sustained any ascertainable damages. *AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 (2007);

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[9]Cadwalader does not explain the relationship of this entity to NACC or ASC.

Barbara King Family Trust v Voluto Ventures LLC, 46 AD3d at 424. Cadwalder argues that proximate cause is missing in this case for three reasons: (i) because Nomura breached an independent representation that it made for the benefit of the D5 Securitization investors, Nomura had an obligation to repurchase the DHL loan independent of the repurchase obligations that Cadwalader purportedly triggered; (ii) the DHL was, in fact, REMIC-qualified; and (iii) even if Cadwalader stopped Nomura from securitizing the DHL, then Nomura still would have owned the DHL and suffered the losses from its default.

(i) Breach of Representation 24

In section 2(b)(xxiv) of the MLPSA, Nomura represented that "[t]here is no default, breach, violation or event of acceleration existing under the related Mortgage or the related Note and, to the Seller's knowledge, no event which, with the passage of time or with notice and the expiration of any grace or cure period, would and does constitute a default, breach, violation or event of acceleration" (Representation 24). Ex. 2, at ASC04211. Nomura allegedly breached Representation 24 because, by the D5 Securitization's closing, the DHL loan agreement had already been breached by the borrower. According to Cadwalader's expert, Michael Weinberger, Esq., the borrower breached its representation that the $50 million loan balance of the DHL did not exceed the "Tax Fair Market Value" of the "Facility," which is defined as the collateral securing the DHL. *See* Weinberger 6/18/10 Aff., ¶¶ 42-43, citing Ex. 80, at 13. "Tax Fair Market Value" is defined in the loan agreement as excluding "the value of any personal property or other property that is not an interest in real property" under the REMIC regulations. Ex. 80, at 33. Since no appraisal exists showing that the real property was worth at least $50 million,

Cadwalader's expert concludes that the borrower was in breach, and thus, Nomura breached Representation 24 prior to executing the MLPSA. Weinberger 6/18/10 Aff., ¶ 44.

Cadwalader hypothesizes that Nomura cannot establish causation, because the breach of Representation 24 would have caused it "to repurchase the DHL in any event." Def. Mem. at 38-40. In order to support this hypothesis, Cadwalader must demonstrate that Nomura would have had to repurchase the DHL regardless of whether the DHL met the 80% Test. *See National Enters. Corp. v Dechert Price & Rhoads*, 246 AD2d 481, 482 (1st Dept 1998) ("While the class plaintiffs in the securities fraud action had alleged other fraudulent nondisclosures, the law firm failed to carry its burden of showing that such action would have been brought even without the accounting nondisclosures.").

The problem with Cadwalader's argument is that LaSalle never gave NACC notice of a breach of Representation 24, nor did it demand that NACC repurchase the DHL for this reason pursuant to the notice and repurchase provisions of the PSA and MLPSA. *See* Ex. 3, §§ 2.03(d) and (e); Ex. 2, §§ 3(a), (b); *see also* Exs. 52, 55 and 58. Notice of a breach of this particular representation was required by Section 3(a) of the MLPSA. Ex. 2, § 3(a). Even the report of Cadwalader's expert who makes this claim states that the obligation to repurchase would have been triggered "upon receiving notice of the breach." Weinberger 6/18/10 Aff., ¶ 45; *see also* Weinberger Tr. at 161. While LaSalle sought leave in October of 2003 to further amend its complaint to assert a cause of action for breach of Representation 24, the District Court denied the request by reason of LaSalle's "undue delay and the undue prejudice that would flow to defendants if this Court were to permit the proposed amendments." Ex. 985: Docket Entries 43 and 56. Cadwalader's argument that LaSalle's request for leave of court to further amend the

complaint was sufficient notice and triggered Nomura's repurchase obligations ignores the District Court's adverse ruling and ignores the purpose of a contract requirement for notice of a breach.

(ii) The DHL Was a Qualified Mortgage

Cadwalader maintains that Nomura's malpractice claims are premised on the fact that the DHL was not secured by $40 million of real property, but contends that Nomura cannot adduce any evidence that the DHL was secured by anything less than $40 million of real property. This argument is unpersuasive for several reasons.

First, while it is true that the only appraisal firm that Nomura ever hired appraised the real property of the hospital in excess of $40 million (*see* Exs. 46, 56), Nomura has identified numerous problems with both the Appraisal and the Appraisal Supplement. Notably, in the Appraisal, the "real estate, building, and site improvements" were valued under a "Cost Approach" at $30,960,000 (*see* Ex. 46, at 3, 57). Mr. Adelman initially conceded during his testimony in the Federal Action that the Appraisal, on its face, evidenced real property of only $30,960,000 (Adelman I Tr. 83-84), then, after the lunch break, changed his testimony to state that the Appraisal did not contain enough information to determine what the value of the real property was (*id.*, at 95-101, 277, 291). Mr. Gershon likewise testified that "it was not clear what component of [the values given for equipment and intangibles in the Appraisal] relates to real property." Gershon I Tr. at 98. Mr. Tierney admitted that the Appraisal, on its face, did not show real property worth at least $40 million. Tierney Tr. at 208. Thus, it was not even possible to conclude from the Appraisal whether the DHL satisfied the 80% Test. The court is further troubled by the fact that no inventory of equipment was undertaken and, even though Dr. Desnick

had only owned the hospital for five years (he purchased it out of bankruptcy for $2.4 million in 1992 [Ex. 152, at OCM 00030]), in the Appraisal's "Ownership and History" section the appraiser either could not or did not find this information and merely reported that the hospital had not been sold in the last three years. Ex. 46, at 5.

The Appraisal Supplement raises even more questions. NACC, with the assistance of Cadwalader, asked Mr. Dost to supplement the Appraisal by allocating the intangibles and the equipment more precisely. *See* Exs. 56 and 986; Adelman I Tr. at 302-303; Adelman II Tr. at 356-362, 377. Mr. Dost allocated $4.8 million of the $27.4 million of intangibles to a category entitled "Certificate of Need." *See* Ex. 56, at 2. While David Findlay for Nomura testified that Cadwalader drafted this language (Findlay I Tr. at 333-335; Findlay II Tr. at 68-69, 71), Mr. Adelman denied ever doing so. Adelman II Tr. at 356-362. In the Federal Action, LaSalle argued that a Certificate of Need was no more than a construction permit obtained prior to the construction of a hospital or a major renovation. Ex. 987, at 7. Because the last major building addition for Doctor's Hospital had occurred in 1983, LaSalle contended that there was no existing Certificate of Need. Even assuming that such a certificate existed, there is an unresolved question as to whether it would be considered REMIC real property. According to Nomura's expert, intangible property rights must be "inextricably linked to the real property" to constitute REMIC real property. Biafore 7/2/10 Report, at 9-10. In the court's view, Mr. Adelman's testimony in the Federal Action regarding the Certificate of Need is both inconsistent and unpersuasive. On the one hand, he admitted that "a certificate of need, to the extent it's a license or something granted by the State, is itself an item of personal property," while at the same time,

he insisted that "the real property was more valuable because the certificate of need was in existence." Adelman I Tr. at 369-370.

With respect to fixtures, Mr. Dost originally valued the hospital's equipment at $9,640,000, but never inspected or inventoried any of this equipment. Ex. 46, at 3. When Mr. Dost was deposed in the Federal Action, he testified that he did not get a list of the hospital's equipment for the original appraisal and did not know that his firm had a list of the equipment from an earlier time in its files. Dost Tr. at 89. In 2000, without doing any further research, he attributed $4 million of this amount to "Fixtures (i.e., structural components)" in the Appraisal Supplement. Ex. 56. When deposed, Mr. Dost could come up with only two examples of fixtures -- autoclaves and surgical lights (Dost Tr. at 368), although the REMIC regulations exclude "assets which are accessory to the operation of a business, such as machinery, printing press, . . . refrigerators, individual air-conditioning units, . . ., even though such items may be termed fixtures under local law." 26 CFR § 1.856-3(d). Although wiring, plumbing, and central heating and air conditioning systems, are considered real property (*id.*), these types of items appear to have been included in Mr. Dost's original $27,960,000 valuation of the building and site improvements. Ex. 46, at 34-36. Finally, although Mr. Dost knew, from the hospital's financial statements, that some of the hospital's equipment was leased, he assumed that all of it was owned. Dost Tr. at 124-125.

The Second Circuit ruled that an issue of fact had been presented as to whether, at the time the loan was originated and securitized, the DHL was a qualified mortgage because it was secured by at least $40 million in real property. 424 F3d at 210. This court is of the same opinion. This is yet another factual issue for a jury. Nomura's representations to both the

District Court and the Second Circuit that the DHL met the 80% Test constitute informal judicial admissions. However, such statements are not conclusive, but are "merely evidence of the fact or facts admitted, the circumstances of which may be explained at trial." *Baje Realty Corp. v Cutler*, 32 AD3d 307, 310 (1st Dept 2006) (citations omitted); *see also TMB Communications v Preefer*, 61 AD3d 450, 450 (1st Dept 2009) ("an informal judicial admission may be explained at trial"). Since Nomura was proceeding on an advice of counsel defense, this may serve as an adequate explanation. Finally, as the Second Circuit noted, the fact that the D5 Securitization trust never was disqualified by the IRS is not dispositive, because there is no evidence that IRS ever audited the trust and there is no indication that it would have any reason to question the trust's status. 424 F3d at 210, n 14.

(iii) Nomura Would Have Owned the DHL If It Had Not Been Securitized.

Cadwalader's third and final causation argument is that Cadwalader's alleged negligence came after the critical moment when Nomura's bankers funded the DHL. In defending against dismissal of the complaint, counsel for Nomura represented to the court that: "[O]ur witnesses will testify[,] documents would demonstrate Nomura would have disposed of that loan in 1997 had they properly been advised at that time that that loan was not REMIC-qualified . . . ." Ex. 1200, at 20. In moving for summary judgment, Cadwalader contends that Perry Gershon and Ethan Penner have testified to the contrary.

When Mr. Penner was asked what happened with loans that could not be securitized, he testified that unsecuritizable loans would be "held" on Nomura's balance sheet. Penner II Tr. at 37. Cadwalader contends that even when Nomura's counsel pressed Mr. Penner to say merely that Nomura would have eventually sold some of its unsecuritizable loans, Mr. Penner refused to

endorse that position. However, his actual testimony is that it was conceivable that Nomura could have sold some of the loans in the whole loan market, but that he did not remember if they ever did or not. *Id.*

Mr. Gershon also testified that the DHL loan would have remained on Nomura's balance sheet. Gershon III Tr. at 265-266. But on cross-examination, he testified:

> Q. Were loans that were not included in securitizations sold on the whole loan market?
>
> A. When banks had kick out loans that they were unable to securitize they would try, if at first, you don't succeed to try, try again. They keep trying until eventually they would give up then sell them in the whole loan market, generally at a big discount.
>
> Q. If Cadwalader had advised Nomura that there was a problem with the Doctor's Hospital appraisal such that the loan could not be included in the D5 transaction, wouldn't Nomura have just commissioned a new appraisal?
>
> A. Yes.

Gershon III Tr. at 268. Mr. Gershon also admitted that if the new appraisal met the 80% Test, Nomura would have tried to put the loan into a subsequent securitization such as the D6 or the D7, and that such an event was "possible." *Id.* at 269-270.

The deposition testimony of Messrs. Penner and Gershon does not conclusively establish that Nomura would have owned the DHL in 2000 when the hospital declared bankruptcy and defaulted on the loan. The evidence in the record is that Nomura was not a "balance sheet lender," but was in the business of originating loans for securitization and its business model was to get loans off Nomura's balance sheet. *See* Penner II Tr. at 37-39 (other than mezzanine loans that were converted into preferred equity investments or short-term construction loans, Nomura's objective was to securitize the loans that it originated); Gershon I Tr. at 216 ("Nomura was not in

the business of making loans to hold . . . and warehouse on the balance sheet indefinitely. The purpose of making a loan to Nomura was to sell it."); *see also* Glick I Tr. at 229-230; Funt I Tr. at 34.

In opposition to this motion, Nomura offers an affidavit from Mr. Penner in which he clarifies his answer on this issue.[10] Mr. Penner avers that if a loan could not be included in a securitization due to a REMIC-related problem with an appraisal, NACC's first course of action would have been to order a new appraisal and try to include it in the next securitization. Penner Aff., ¶¶ 8-9. If the new appraisal failed to remedy the problem, NACC would potentially have restructured the DHL, splitting it into a securitized senior loan and a junior mezzanine loan to be converted to preferred equity prior to securitization. *Id.*, ¶ 8.[11] Finally, Mr. Penner states that if either of these two options were not available, Nomura could potentially have sold the loan in the whole loan market. *Id.* Nomura offers an opinion from Bruce Kenneth Hounsell, a purported expert in the secondary whole loan market, who opines that the state of that market between October 24, 1997 and March 30, 1998 was "very liquid" and that Nomura could have sold the DHL for a price between 90% and 97% of the outstanding principal balance. Hounsell 5/19/10 Report, at 4, 7.

[10]Although a party's affidavit that contradicts prior sworn testimony is insufficient to defeat a properly supported summary judgment motion (*see Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 383 [1st Dept 2007]), Mr. Penner's affidavit has been considered by this court since his prior testimony is not conclusive on the issue of what would have happened to the DHL if it had not been included in the D5 Securitization.

[11]Two of Cadwalader's experts admit that this was an option by which NACC could have removed the DHL from its balance sheet long before the loan defaulted. *See* Weinberger Tr. at 175-176; Rodgers Tr. at 218. Mr. Weinberger also testified that he worked on several loans that were originated in 1995 and 1996, but were not REMIC-compliant and thus not securitized, and that he worked with the client to negotiate trade-offs with the borrowers to modify the loans, so that they could be and eventually were securitized. Weinberger Tr. at 169-170.

Nomura's response to Cadwalader's proximate cause defense is challenged as hypothetical, based only on what "might" or "could" have happened had the DHL not been included in the D5 Securitization, and thus speculative and insufficient to raise a triable issue of fact. However, Nomura also submits an affidavit from David Findlay, the Chief Legal Officer of Nomura Holdings America, Inc., who states that, in the Fall of 1998, Nomura decided to exit the business of originating and securitizing commercial mortgage loans, and undertook to dispose of all loans held on its balance sheet. Findlay 4/14/11 Aff., ¶ 7.

> "All of the existing loans were either sold as whole loans, or I, and my team, worked with borrowers to renegotiate their loan terms to permit the borrowers to secure different financing. All of the existing loans were disposed of, even where disposition required Nomura to accept less than the full cost of the loan."

Id. Mr. Findlay further avers that if the DHL had been on Nomura's books in 1998, he would have sought to dispose of it using one of the foregoing means. *Id.*, ¶ 8. Although Mr. Findlay does not say when all these loans were disposed of, and he himself did not join the Nomura family of companies until sometime in 1999 (*id.*, ¶ 2; Findlay II Tr. at 36-37), his affidavit sufficiently challenges Cadwalader's claim that Nomura would have owned the DHL and suffered the losses from its default in May of 2000 such that the issue of proximate cause must be decided by a jury.

Conclusion and Order

For the foregoing reasons, the court finds that issues of fact abound in this case regarding whether Cadwalader's REMIC advice was negligent, whether the First Opinion Letter was issued after performing sufficient due diligence, and whether Cadwalader's legal representation of

Nomura in the D5 Securitization proximately caused Nomura compensable damages. Summary judgment dismissing the first cause of action is, therefore, denied.

Accordingly, it is

ORDERED that the motion (seq. no. 005) by defendant Cadwalader, Wickersham & Taft LLP for summary judgment dismissing the first cause of action is denied; and it is further

ORDERED that the parties are directed to appear for a status conference on February 7, 2012 at 26 Broadway, 10th Floor at 11 a.m.

Dated: January 11, 2012

ENTER:

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.