STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

FLAGSTAR BANK, FSB,
Plaintiff,

v. **Case No. 14-142546-CK**
Hon. James M. Alexander

PATRIOT MORTGAGE CORPORATION,
Defendant.
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OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Plaintiff's motion for summary disposition. Defendant is a mortgage broker that presented several mortgage loans to Plaintiff for funding. In August 2003, the parties executed a "Wholesale Lending Broker Agreement" that required Defendant, in relevant part, to reimburse Plaintiff for losses on loans it funded when there was a defect in the loan's origination (regardless of cause).

Additionally, if Plaintiff sold the loan to a secondary market investor (such as Fannie Mae) then Defendant was required to reimburse if Plaintiff was required to repurchase the loan from Fannie Mae due to any defect. Defendant also warranted that all of the information submitted as part of the loan origination package was true and accurate and met Fannie Mae's requirements and specifications.

As it pertains to the current dispute, Defendant submitted two loan packages – the Hernandez loan and the Massey loan – to Plaintiff for funding. The October 2005 Hernandez loan was originally for $278,000, and the September 2007 Massey loan was for $300,000. After the closings,

Plaintiff sold and assigned these loans to Fannie Mae. Thereafter, each of these borrowers defaulted by failing to meet their repayment obligations. Fannie Mae then conducted a review, which revealed that both loans failed to meet its guidelines.

Specifically, the Hernandez loan package was submitted without disclosing that the borrower obtained two additional mortgages totaling $325,000 less than two months before the Flagstar loan closed. Similarly, the Massey loan was submitted without disclosing that the borrowers obtained two additional loans totaling $897,400 in the two months before the Flagstar loan closed. The Massey loan package also failed to disclose that the property was an investment property – rather than owner occupied as represented.

Fannie Mae then required that Plaintiff reimburse its losses on the loans. Plaintiff then demanded that Defendant, in turn, reimburse it as agreed, which led to the current lawsuit. Plaintiff seeks $142,161.05[1] on the Hernandez loan and $148,095.59[2] on the Massey loan. In total, Plaintiff seeks a judgment for $298,535.36 in damages, which includes attorney fees of $7,143.75 and costs of $1,134.97.

To that end, Plaintiff now moves for summary disposition under MCR 2.116(C)(10), which tests the factual support for its claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Under (C)(10), "the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

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1 Representing $142,083.21 paid to Fannie Mae and $77.84 in broker fees paid to Defendant.
2 Representing $139,451.64 paid to Fannie Mae, a miscellaneous credit of $356.05, and $9,000 in broker fees paid

Plaintiff claims that it entered into two Wholesale Lending Broker Agreements with Defendant, dated August 2003 and October 2006 respectively. But, in response, Defendant's Principal claims that he never signed the 2006 Agreement. As a result, the Court will only apply the provisions of the 2003 Agreement, which Defendant acknowledges.

Under section 3.1(a) of said Agreement, Defendant warranted that:

> all Mortgage Loan Documents submitted by [Defendant] for each Mortgage Loan are in every respect valid and genuine, being what they support (sic) to be and all information submitted in each Mortgage Loan Document is true and accurate.

Similarly, under section 3.1(a), Defendant warranted that: "Mortgage Loan Document is true and accurate."

Further, under section 3.1(j), Defendant warranted that:

> [It] understands Flagstar intends to sell the Mortgage Loans to investors in the secondary market. [Defendant] represents, covenants, and warrants that in submitting Mortgage Loans to Flagstar that it is in full compliance with all pertinent requirements of Fannie Mae . . . .

Finally, under section 3.1(*l*), Defendant warranted that:

> All Mortgage Loan Documents . . . are genuine, accurate, and complete and meet the requirements and specifications established by Fannie Mae/Freddie Mac and product descriptions and underwriting guidelines listed in the Guide.

If Defendant breached any of the above provisions, then under section 4.1(a), it agreed to:

> indemnify and hold harmless Flagstar . . . from any and all losses, liabilities, claims, damages, or costs of any nature, including without limitation attorneys' fees and costs, and actions suffered or incurred by Flagstar which arise out of, result from, or relate to . . . [t]he breach by [Defendant] of any covenant, condition, term, obligation, representation or warranty contained in this Agreement, the Guide, or in any written statement, certificate, or Mortgage Loan Document furnished by [Defendant] pursuant to this Agreement . . . .

In response to Plaintiff's motion, Defendant argues that: (1) Plaintiff committed the first

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to Defendant.

material breach of the Broker Agreement; (2) the Indemnification Clause does not apply; and (3) Plaintiff's alleged damages were not caused by Defendant.

The Court initially rejects Defendant's first argument – that Plaintiff was the first to materially breach the Broker Agreement when it failed to discover the undisclosed loans and false occupancy representation before purchasing the loans. Defendant's argument on this issue rests on a provision found at section 2.4(c), which provides that Plaintiff is responsible for conducting a post-closing review before purchasing any loans.

But Defendant's argument ignores that it must have **first** submitted the loan package to Plaintiff **before** any review took place. And said loan packages already contained the false information – despite Defendant's warranty otherwise. As a result, if the submitted loan packages contained false information contrary to Defendant's warranties otherwise, then necessarily Defendant breached the agreement **before** Plaintiff had any obligation to review the same, and Plaintiff could not have been the party to first materially breach the Agreement.

Defendant's next arguments are that the indemnification clause does not apply because it did nothing wrong, and Plaintiff's own conduct caused its damages. These arguments miss the mark. Defendant cannot shift the blame to Plaintiff based on an alleged failure to catch the misrepresentations contained in the loan packages that Defendant submitted. This is so because Defendant first warranted that said loan packages were true and accurate, and Defendant contracted to assume the risk in the event that the information was not.

As this Court previously stated:

> The parties entered into contracts. As a part of each contract, Defendant not only warranted that the loan documents would be "in every respect valid and genuine," it also warranted that the loan documents would meet Fannie Mae's or Freddie Mac's guidelines. For the above reasons, Fannie Mae and Freddie Mac determined that

> each loan did not. This wasn't even Plaintiff's decision to make. Defendant contracted to assume this risk in such an event, and now it wants to avoid that responsibility. The Court will not so allow.
> *Flagstar Bank, FSB v K&B Equity Group, Inc*, Opinion and Order re: Summary Disposition, issued February 12, 2014 (Oakland County Circuit Court, Case No. 2013-134793-CK)

For all of the above reasons and viewing all evidence in the light most favorable to Defendant, the Court concludes that there are no material facts in dispute and Plaintiff is entitled to judgment as a matter of law. Defendant breached the parties' agreement when it submitted loan packages that did not meet Fannie Mae's guidelines. Because Plaintiff was required to make Fannie Mae whole, it suffered damages. Under the parties' agreements, Defendant is required to reimburse Plaintiff for its damages.

As a result, the Court GRANTS Plaintiff's motion for summary disposition and enters judgment against Defendant in the amount of $298,535.36.[3]

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED

May 13, 2015 /s/ James M. Alexander
Date Hon. James M. Alexander, Circuit Court Judge

3 In its Response, Defendant does not dispute Plaintiff's claimed damages.