

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

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WILMINGTON, DE 19801
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July 14, 2009

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Liquidating Trustee of the
Mortgage Lenders Network
Liquidating Trust, successor
as estate representative to
Plaintiff Mortgage Lenders
Network USA, Inc.

**Re: Mortgage Lenders Network USA, Inc. v. Goldman Sachs Mortgage
Company and Goldman, Sachs & Co.
Adv. Proc. No. 09-50106**

Dear Counsel:

This is with respect to Goldman Sachs Mortgage Company
and Goldman, Sachs & Co.'s motion to dismiss. (Doc. # 12.)

As Defendants point out in their brief in support of the
motion, the Complaint centers on two transactions: (1) the
liquidation of an investment account Mortgage Lenders Network USA,
Inc. ("MLN") had with Goldman, Sachs & Co. ("Goldman"), and (2) the

sale of loans from MLN to Goldman Sachs Mortgage Company ("GSMC"). The first transaction is the subject of Counts I, II and III and the second transaction is the subject of Count IV. For the reasons briefly set forth below, I will deny the motion as to Counts I, II and III, and grant it provisionally as to Count IV.

With respect to the first transaction, the Complaint asserts that MLN had an "Investment Account" with Goldman which as of January 22, 2007 had a balance of \$502,480.47. Count I alleges that Goldman improperly converted those funds to itself. Count II alleges that GSMC improperly converted those funds to itself. Count III alleges that by converting the funds to itself, GSMC effected a preferential transfer.

In their brief in support of the motion, Defendants assert that the "Investment Account" was subject to an "Investment Account Agreement" that entitled Goldman to liquidate the account as a set-off for other obligations owed by MLN to Goldman. The Investment Account Agreement is attached to the motion as Exhibit G.

In its motion to strike (Doc. # 18), MLN points out that the Investment Account Agreement "is nothing more than a general form of an application and agreement *unexecuted by anybody*, let alone Goldman Sachs or MLN." (Doc. # 18, p. 2.) With respect to the alleged converted \$502,480.47 deposit, the Complaint only refers to it as an "Investment Account" and refers to the

conversion as an "Investment Account Transfer". Exhibit G is not identified or otherwise referenced in the Complaint. In the context of a motion to dismiss, I cannot conclude, or even infer, that the "Investment Account" and the "Investment Account Transfer" are governed by Exhibit G as offered by Defendants. In considering a motion to dismiss under Rule 12(b)(6), a court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief. Phillips v. County of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008). Nevertheless, "a defendant may supplement the complaint by adding exhibits such as public records and other indisputably authentic documents underlying the plaintiff's claims." Sentinel Trust Co. v. Universal Bonding Ins. Co., 316 F.3d 213, 216 (3d Cir. 2003). Exhibit G is not a public record and, as an unexecuted form agreement, I have no basis to deem it an "indisputably authentic document."

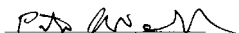
In its reply, Defendants assert that "[t]he Court should not allow MLN to avoid the consequences of its failure to attach the document to either the Complaint or the Answering Brief. Because the Investment Account Agreement is the subject of Count I of the Complaint and is also related to Counts II and III, the Court should consider the terms of the agreement for purposes of the motion to dismiss." (Doc. 22, pp. 4-5.) Based on the

deficiencies of Exhibit G, this I decline to do. For purpose of Rule 12(b)(6), I must accept the Complaint's allegation in a light most favorable to the plaintiff. There is not even a hint in the Complaint that the "Investment Account" and the "Investment Account Transfer" are governed by or related to Exhibit G. As Defendants' motion to dismiss Counts I, II and III is premised on provisions in a document that does not meet the requirements of Rule 12(b)(6) as to supplemental material, and that is not acknowledged by the Complaint or MLN's opposition brief, I will deny the motion as to Counts I, II and III.

With respect to Count IV, I agree with Defendants that the Count should be dismissed for failure to satisfy Rule 9(b). However, I will give MLN 30 days to file an amended complaint that complies with the requirements of Rule 9(b).

It seems to me that some limited discovery activity in this case could lead to factual clarification and possible disposition short of a trial.

Very truly yours,



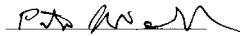
PJW:ipm

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
MORTGAGE LENDERS NETWORK USA, INC.,)	Case No. 07-10146 (PJW)
)	
Debtor.)	
<hr/>		
)	
MORTGAGE LENDERS NETWORK USA, INC.,)	
)	
Plaintiff,)	
)	
v.)	Adv. Proc. No. 09-50106 (PJW)
)	
GOLDMAN SACHS MORTGAGE COMPANY, a New York limited partnership, and GOLDMAN, SACHS & Co., a New York limited partnership,)	
)	
Defendants.)	

ORDER

For the reasons set forth in the Court's letter ruling of this date, Defendants' motion (Doc. # 12) to dismiss is partly denied and partly granted as set forth in the letter ruling.



Peter J. Walsh
United States Bankruptcy Judge

Dated: July 14, 2009

