Great American Mortg. Corp. v. TMA Government Securities, Ltd.
1988 WL 26375
S.D.Fla.,1988.
March 25, 1988.

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United States District Court, S.D. Florida.
GREAT AMERICAN MORTGAGE CORPORATION, Plaintiff,
v.
TMA GOVERNMENT SECURITIES, LTD., et al., Defendants.
TMA GOVERNMENT SECURITIES, LTD., Counter-Plaintiff,
v.
GREAT AMERICAN MORTGAGE CORPORATION, et al., Counter-Defendants.
No. 86-6369-CIV-NESBITT.
March 25, 1988.

ORDER

NESBITT, District Judge.
***1** This cause is before the Court upon Plaintiff Great American Mortgage Corporation's Motion for Partial Summary Final Judgment as to Count II and Defendant TMA Government Securities, Ltd.'s Cross-Motion for Summary Judgment on Count II of the Amended Complaint.
Count II of the Amended Complaint charges Defendant TMA Government Securities, Ltd. ("TMA") with a violation of Rule 10b-16 of the Securities and Exchange Commission Rules: performing credit transactions with Great American Mortgage Corporation ("Great American") without disclosing its credit requirements under Rule 10b-16. *See* 17 C.F.R. section 240.10b-16.
It is uncontested that the transactions in question were retail repurchase agreements or "repos." The question before this Court is solely one of law: whether rule 10b-16 is applicable to repo transactions. [FN1] Great American contends that these transactions are a form of a secured loan and thus must be subject to rule 10b-16 which requires disclosure of credit terms. *Citing Securities and Exchange Commission v. Miller,* 495 F.Supp. 465, 467 (S.D.N.Y.1980) ("[A] repo is essentially a short-term collateralized loan, and the parties to these transactions tend to perceive them as such."). Defendant TMA argues, however, that these transactions are purchases and sales and thus are not subject to the disclosure requirements of rule 10b-16.
While it is clear that *economically* repos are loan transactions, Miller, 495 F.Supp. at 467; *In the Matter of Bevill, Bresler & Schulman Asset Management Corporation* [1985-1986 Transfer Binder] Fed.Sec.L.Rep. (CCH) para. 92,966 (D.N.J.1986), the *legal* character of repos, under the federal securities laws, is generally described as a purchase and sale. *Bevill,* [1985-1986] Fed.Sec.L.Rep. (CCH) para. 92,966, at 94,733; *City of Harrisburg v. Bradford Trust Co.,* 621 F.Supp. 463, 469-70 (M.D.Pa.1985) ("In that case [*Gomes*], which also involved repurchase agreements entered into by E.S.M., the court held that the repos were securities within the meaning of the antifraud provisions."); *Securities and Exchange Commission v. Gomez* [1984-1985 Transfer Binder] Fed.Sec.L.Rep. (CCH) para. 92,013, at 91,019 (S.D.Fla.1985) ("For purposes of this Motion, the Court finds that the repurchase agreements that formed the basis for E.S.M. transactions are securities entitled to protection under the antifraud provision of the 1933 and 1934 Acts."); *Miller,* 495 F.Supp. 465; The Issuance of "Retail Repurchase Agreements" by Banks and Savings

and Loan Associations, Exchange Act Release No. 33-6351 [current Transfer Binder] Fed.Sec.L.Rep. (CCH) para. 2024 (Sept. 25, 1981 ("The economic realities of traditional repurchase agreements suggest that such agreements are not themselves separate securities. For purposes of the federal securities laws, however, they are deemed to involve the purchase and sale of the U.S. government securities to which they relate."). *See Securities and Exchange Commission v. Drysdale Securities Corporation,* 785 F.2d 38 (2d Cir.1986).

These cases, however, do not squarely answer the question before this Court: they hold that a repo is a purchase and sale of a security and is therefore regulated by the antifraud provisions of the securities laws, particularly rule 10b-5. *Cf. Abeles v. Oppenheimer & Co., Inc.,* 662 F.Supp. 290, 293 (N.D.Ill.1986), *aff'd,* 834 F.2d 123 (7th Cir.1987).

***2** Repurchase agreements are comprised of two transactions, agreed upon simultaneously, but performed at different times. First, the seller agrees to sell, and the buyer agrees to buy, upon immediate payment and delivery, specified securities at a specified price; second, the parties agree that the original seller will repurchase the securities: payment and delivery at a specified future date at the same price plus an agreed upon amount of interest. *Miller,* 495 F.Supp. at 467; *Bevill* para. 92,966 at 94,712.

TMA's duty to make a credit disclosure under 10b-16 depends on the relationship between TMA and Great American between the purchase and repurchase dates. *See Abeles v. Oppenheimer & Co. Inc.,* 834 F.2d at 125 ("Defendants' duty to make this disclosure turns on whether Oppenheimer actually extended credit to the Abeleses between the trade date and the settlement date.... The essential determination here is *not whether a purchase and sale of a security occurred, but when a debt arose.*" (emphasis added)). The Court in *Abeles* stated:

Plaintiffs confuse the concepts of an obligation to pay and a debt which is due and owing. While it is true that plaintiffs were obligated to carry out the transaction, the payment of the purchase price and exchange of the certificates would not occur until the settlement date. On the trade date there was an obligation to defendants to purchase at a later date, not a debt due and owing to the defendants. Plaintiffs' transaction, therefore, constitutes an executory contract, not a margin transaction in which Oppenheimer loaned them money.

Abeles, 834 F.2d at 125. The transaction in *Abeles* is analogous to the Great American Transaction inasmuch as there was no *debt* between the time of the purchase and the repurchase; rather there was a *contractual duty* on the part of Great American to repurchase the securities on the named date at the named price. There was no obligation to pay the purchase price until the set date arrived. Accordingly, this Court finds that rule 10b-16 is inapplicable to the repo transactions entered into between the parties to this action. It is therefore,

ORDERED AND ADJUDGED that Plaintiff GREAT AMERICAN's Motion for Partial Summary Judgment is DENIED. Defendant TMA GOVERNMENT SECURITIES LTD.'s Motion for Summary Judgment on Count II of the Amended Complaint is GRANTED.

cc: Michael R. Casey, Esq.
Robert W. Pearce, Esq.
Emmet, Marvin & Martin
Kirkpatrick & Lockhart

FN1. Rule 10(b)(16), 17 C.F.R. § 240.10b-16, provides in pertinent part: (a) It shall be unlawful for any broker or dealer to extend credit, directly or indirectly, to any customer in connection with any securities transaction unless such broker or dealer has established procedures to assure that each customer

(1) is given or sent at the time of opening the account, a written statement ...

disclosing (i) the conditions under which an interest charge will be imposed; (ii) the annual rate or rates of interest that can be imposed (iii) the method of computing interest; (iv) if rates of interest are subject to change without prior notice, the specific conditions under which they can be changed.
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