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

MBIA INSURANCE CORPORATION,

Plaintiff,

v.

COUNTRYWIDE HOME LOANS, INC., COUNTRYWIDE SECURITIES CORP., COUNTRYWIDE FINANCIAL CORP., COUNTRYWIDE HOME LOANS SERVICING, L.P. and BANK OF AMERICA CORP.,

Defendants.

Index No. 602825/08
IAS Part 3

Hon. Eileen Bransten

Motion Sequence No. 57

COUNTRYWIDE'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Attorneys for Defendants Countrywide Home Loans, Inc., Countrywide Securities Corp., Countrywide Financial Corp., and Bank of America, N.A., solely in its capacity as successor by July 2, 2011 de jure *merger to BAC Home Loans Servicing, L.P. (f/k/a Countrywide Home Loans Servicing, L.P.)*

November 8, 2012

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PRELIMINARY STATEMENT[1]

In its effort to withstand summary judgment, MBIA's Opposition seeks to rewrite long-settled law, ignores the parties' contracts, and disregards the undisputed facts. Putting aside MBIA's rhetoric, MBIA does not and cannot dispute the following core facts, which mandate summary judgment in Countrywide's favor:

- From 2004 to 2007, MBIA insured 15 Securitizations of nearly 390,000 loans—with an original unpaid principal balance of *$21 billion*—without looking at a single loan file.
- MBIA could have reviewed the loan files before choosing to insure the Securitizations. MBIA had conducted loan file diligence before 2004, and other monoline insurers continued to do so between 2004 and 2007.
- MBIA knew that Countrywide's loan underwriting guidelines were expanding, and MBIA's senior-most officers repeatedly expressed concerns about the loans and the level of business MBIA was conducting with Countrywide.
- For each of the Securitizations at issue, Countrywide provided MBIA with the results of third-party due diligence it had commissioned indicating that, on average, more than 20% of the sampled loans had potential underwriting defects, or otherwise might not comply with contractual representations and warranties ("R&Ws").
- MBIA knew that, based on these due diligence findings, Countrywide removed, on average, more than 6% of the sampled loans from the Securitizations.
- Despite this knowledge, MBIA insured the Securitizations and accepted—and continues to accept to this day—tens of millions of dollars in insurance premiums.
- MBIA's litigation reunderwriting expert, Steven Butler, asserts that at least 96.8% of the loans in the Securitizations violate contractual R&Ws; if Mr. Butler's conclusions had any merit, MBIA would have learned of these purported issues had it examined even a small fraction of the loans before insuring the Securitizations.

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[1] Except as noted below, all capitalized terms and abbreviations have the same meaning as in Countrywide's prior summary judgment submissions. "Countrywide Mem." means Countrywide's Memorandum of Law in Support of Its Motion for Summary Judgment, filed on September 19, 2012. "MBIA Opp." means MBIA's Memorandum of Law in Opposition to Countrywide's Motion for Summary Judgment, filed on October 19, 2012. "MBIA Opp. Stmt." means MBIA's Responses to Countrywide's Rule 19-a Statement of Undisputed Facts in Support of Its Motion for Summary Judgment. "Sheth Opp. Aff." means the Affirmation of Manisha M. Sheth in Support of MBIA's Opposition to Countrywide's Motion for Summary Judgment. "MBIA PSJ Mem." means MBIA's Motion for Partial Summary Judgment and Motion to Strike Defenses, filed on May 25, 2011. "Countrywide PSJ Opp." means Countrywide's Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment and Motion to Strike Defenses, filed on July 15, 2011.

In the face of these undisputed facts—establishing that MBIA could not have justifiably relied on the accuracy of the R&Ws in electing to insure the Securitizations—MBIA makes two principal arguments: (i) New York Insurance Law exempts MBIA from having to prove justifiable reliance on its claim for fraud, and (ii) MBIA's justifiable reliance may be presumed simply because it received contractual R&Ws. But New York law does not protect insurers from the risks they insure, or exempt them from proving all of the elements of a traditional common law fraud claim for damages—including justifiable reliance. New York law also does not permit insurance companies to blindly rely on an insured's R&Ws. Rather, where, as here, there are circumstances that would prompt a reasonable insurer to inquire further, the insurer must do so. If the insurer does not—and MBIA indisputably did not—then it cannot later be heard to cry fraud.

Similarly, Countrywide is entitled to at least partial summary judgment on each of MBIA's contract-based claims:

Breach of R&Ws (Sole Remedy): In an effort to evade the contracts' express "sole remedy" provisions (which dictate that MBIA's "sole remedy" for any material breach of R&Ws is the contractual loan-by-loan repurchase process), MBIA argues that Countrywide's "sole remedy" argument is "foreclosed" by this Court's decision on MBIA's prior motion for partial summary judgment. But MBIA's prior motion—and the Court's decision on that motion—did not address, let alone foreclose, Countrywide's contractual "sole remedy" argument. MBIA also improperly asserts that the "sole remedy" provisions—along with the rest of the contracts—are void *ab initio* as a result of Countrywide's alleged fraud. But because MBIA has repeatedly acknowledged that its guarantees are *irrevocable* and may not be voided—and it is not seeking to avoid them in this case—it is MBIA's argument that is foreclosed. Finally, MBIA selectively points to and misreads bits and pieces of the parties' contracts in an effort to prove that the "sole remedy" provisions are intended to be "multiple remedy" provisions. But the plain language of the contracts says otherwise.

Repurchase Breach (Notice and Cure): MBIA concedes that it has not provided the contractually-required notice and opportunity to cure, which is necessary to trigger its sole remedy of repurchase, for 95% of the loans in the Securitizations. To get around this undisputed fact, MBIA first claims that this Court's December 22, 2010 Sampling Order read the notice requirements out of the parties' contracts. But that order does not even mention the contractual repurchase provisions—or the corresponding notice requirements—and, instead, expressly affirms that MBIA must prove each element of its claims (which, for its repurchase breach claim, includes proof that MBIA complied with the contractual notice provisions). MBIA further argues that particularized notice should not be required, because Countrywide has purportedly repudiated the repurchase remedy. But there is no evidence that Countrywide has failed to repurchase any loan it was contractually obligated to repurchase. That Countrywide has not acceded to many of MBIA's repurchase requests does not mean it has abandoned its contractual obligations; it means that there are disputes as to which loans must be repurchased under the contracts, and that a trial is necessary to resolve these disputes, but *only* these disputes. For the remaining 95% of the loans, as to which MBIA has not even attempted to avail itself of the contractual "sole remedy" of repurchase, Countrywide is entitled to summary judgment.

Indemnification: MBIA does not contest Countrywide's motion for summary judgment on MBIA's indemnification claim, insofar as that claim is based on the "Indemnification" provision of the contracts. Indeed, MBIA agrees that the indemnification provision does not obligate Countrywide to indemnify MBIA for claims between the parties relating to the loans in the Securitizations. MBIA argues, however, that it is entitled to recover its litigation fees and expenses under a *different* provision of the Insurance Agreements—Section 3.03. But, even if this provision were applicable, which it is not, New York courts may not order cost shifting between parties to a contract unless required to do so by a contractual provision that "exclusively or unequivocally" applies to claims by one contracting party against another. Section 3.03 does not pass this test.

Breach of R&Ws (Servicing): Countrywide's motion for summary judgment on MBIA's servicing claim is based on the undisputed fact that MBIA's servicing expert, Steven Butler, ignored the plain language of the parties' contracts and critical servicing records, rendering his opinions inadmissible. MBIA argues that "Countrywide's argument goes at most to the weight, not the admissibility, of Mr. Butler's testimony." MBIA Opp. at 3. But opinions that are undercut by empirical information in ignored documents are baseless and inadmissible. They are not "evidence" for purposes of withstanding a summary judgment motion. And MBIA offers no other admissible evidence on this claim.

Finally, MBIA's prayer for punitive damages must be dismissed because the conduct alleged here occurred in the context of a private commercial transaction between sophisticated parties, and MBIA points to no admissible evidence of the type of egregious, morally reprehensible conduct, aimed at the public generally and ratified by superior officers, for which an award of punitive damages is permissible under New York law.

ARGUMENT

I. MBIA'S OPPOSITION DOES NOT DEFEAT COUNTRYWIDE'S MOTION FOR SUMMARY JUDGMENT ON MBIA'S FRAUD CLAIM.

Countrywide is entitled to summary judgment on MBIA's fraud claim, because the undisputed evidence proves that MBIA did not justifiably rely on any alleged misrepresentation by Countrywide. Contrary to MBIA's contentions, neither New York law nor the undisputed facts insulate MBIA from the consequence of its own decision to insure $21 billion of risk, in 15 separate Securitizations over the course of some four years, without looking at a single loan file.

A. Section 3105 Does Not Exempt MBIA from Proving Justifiable Reliance.

MBIA first argues that it is not required to prove justifiable reliance because insurer-plaintiffs are exempt from such a requirement under New York Insurance Law Section 3105. *See* MBIA Opp. at 18-20. But, on its face, Section 3105 does not override—or even address—any of the elements of a common law fraud claim, including justifiable reliance. Instead, by its plain terms, the statute addresses the circumstances under which an insurer may "avoid" a policy

procured through "material" misrepresentations. Because MBIA is not seeking to avoid its insurance policies, but to obtain *damages* on a common law fraud claim, it cannot escape proof of justifiable reliance by citing to Section 3105.[2]

Moreover, even in the avoidance context, Section 3105 expressly requires an insurer to prove reliance: Section 3105 allows an insurer to avoid a policy where "knowledge by the insurer of the facts misrepresented *would have led to a refusal by the insurer to make such contract*."[3] If an insurer does not rely on the allegedly false representations in deciding to issue its policy, then knowledge of the truth necessarily cannot impact its decision to insure. Accordingly, as this Court explained, "to show materiality [under Section 3105], MBIA must show that it relied on Countrywide's alleged misrepresentations...." Jan. 3 Order at 14.

Section 3105's legislative history (and that of its substantively identical precursor, Section 149) confirms that, to avoid a policy, an insurer's reliance also must be *justifiable*.[4] At the time of Section 149's enactment, New York common law explicitly required insurer-plaintiffs seeking to avoid a policy to prove that an alleged misrepresentation was material, in that it could have influenced a *reasonable* insurer's decision-making. As the Court of Appeals explained in *Geer v. Union Mut. Life Ins. Co.*, 273 N.Y. 261 (1937):

> [A] misrepresentation cannot defeat or seriously affect the insurance company's right to reject the application where a disclosure of all the facts could not '*reasonably*' affect the choice of the insurer.... [M]ateriality is a matter of degree and a misrepresentation ... is material where it appears that a reasonable insurer would be induced by the misrepresentation to take action which he might not have taken if the truth had been disclosed.

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[2] This Court previously indicated that Section 3105—as well as the common law—may "inform[]" whether or not MBIA can recover an equitable remedy of "rescissory damages," Jan. 3 Order at 13, but the Court did not hold that the elements of MBIA's claims are altered by that provision. Rather, the Court specified that "MBIA must prove all elements of its claims," and cited *Small v. Lorillard Tobacco Co.*, 94 N.Y. 2d 43, 57 (1999), in which the Court of Appeals set forth all of the elements of a common law claim for fraud, including reliance. *Id.* at 14.

[3] N.Y. INS. LAW. § 3105(b)(1) (McKinney 2011) (emphasis added).

[4] In 1984, Section 149 was reenacted without change as Section 3105. *Compare, e.g.*, N.Y. INS. LAW. § 149(2), *with id.* § 3105(b).

Id. at 271 (emphasis added).

Two years after *Geer*, the legislature enacted Section 149 to *protect insureds* by clarifying that insurers cannot avoid insurance policies on the basis of immaterial representations.[5] The legislative history makes clear that Section 149 was not intended to expand insurers' rights at common law but, rather, to codify existing "common law principles long established in the field of insurance," as expressed in *Geer*.[6] In particular, the drafters understood a "material" fact, as used in the common law, to mean any fact that "would affect the mind of a *rational* underwriter, governing himself by the principles on which underwriters in practice act."[7] In other words, the drafters intended that Section 149 (and later Section 3105) embody the common law's reasonable (or justifiable) reliance requirement for recovering damages for fraud.[8] In light of this legislative history, it is not surprising that the plain language of Section 149 (and, later, Section 3105) did nothing to eliminate the long-established common law requirement that fraud plaintiffs prove justifiable reliance. And because "[t]he common law is never abrogated by implication," the absence of such an express legislative override is fatal to MBIA's argument.[9]

Further, MBIA's claim that "[n]umerous courts interpreting Section 3105" have not

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5 *See* Report of the Joint Legislative Comm. on Revision of Insurance Laws, 1938 N.Y. Legis. Doc. No. 77 at 14; Ins. Dep't of N.Y., Insurance Law Revision of the State of New York (Tentative Draft) § 63 cmt., at 143-44 (1937).

6 Abraham Kaplan & George I. Gross, COMMENTARIES ON THE REVISED INSURANCE LAW OF NEW YORK at 338 (1940).

7 Kaplan & Gross, COMMENTARIES at 340 (citing *Cox v. C.G. Blake Co.*, 100 Misc. 135, 140 (Sup. Ct. N.Y. Cnty. May 1917)) (emphasis added).

8 *See, e.g.*, *Schumaker v. Mather*, 133 N.Y. 590, 596 (1892) ("[I]f the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations."); *Ward v. Forrest*, 20 How. Pr. 465 (N.Y. Gen. Term 1859) ("[t]o constitute a fraud," there must exist "a representation, express or implied, false within the knowledge of the party making it, *reasonably relied on by the other party*, and constituting a material inducement to his contract ...") (emphasis added).

9 N.Y. STAT. LAW § 301(b) (McKinney 2012); *see also Gottlieb v. Kenneth D. Laub & Co.*, 82 N.Y.2d 457, 465 (1993) (the common law "must be held no further changed than the clear import of the language used in a statute absolutely requires") (quotation marks omitted).

required proof of justifiable reliance is baseless. MBIA Opp. at 18. MBIA cites just two decisions, neither of which is from a New York state court, and neither of which supports MBIA's claim. The first case, *N. Am. Philips Corp. v. Aetna Cas. & Sur., Co., C.A.*, No. 88C-JA-155, 1995 WL 626044 (Del. Super. Ct. Apr. 10, 1995), is a Delaware state court action that erroneously declares—in *dicta* and without citation—that "New York courts have not engrafted an element of justifiable reliance as a precondition to re[s]ci[s]sion of an insurance contract." *Id.* at 3 n.3. But, as discussed above, Section 3105 codified long-standing common law principles, including the requirement of justifiable reliance. The Delaware court's contrary *dicta* is unsupported and incorrect. The second case MBIA cites, *Evanston Ins. Co. v. Biomed. Tissue Servs., Ltd.*, No. CV-06-1107, 2007 WL 4180653 (E.D.N.Y. Oct. 22, 2007), is a decision by a federal magistrate judge interpreting *New Jersey* law, in which the court expressly observed that, *unlike* New Jersey law, New York law requires an insurer to prove "reliance on material misrepresentations" to avoid an insurance contract. *Id.* at *5-6.

In short, MBIA has pointed this Court to nothing in the language of Section 3105, its legislative history, or relevant precedent that allows MBIA to escape well-established New York law requiring proof of justifiable reliance for its common law fraud claim. As this Court has previously held, "MBIA must prove all elements of its claims." Jan. 3 Order at 14. That includes the element of justifiable reliance.

B. MBIA's Blind Reliance on Countrywide's R&Ws Was Not Justifiable.

MBIA next argues that, even if it is required to prove justifiable reliance, "reasonable jurors would find that MBIA justifiably relied" on Countrywide's R&Ws. MBIA Opp. at 20. But New York law does not allow highly sophisticated insurers, such as MBIA, to escape the risks they knowingly insured by blindly relying on R&Ws. Rather, as the Court of Appeals recently explained, where, as here, a sophisticated plaintiff

> has the means available to him of knowing ... the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations.

Centro Empresarial Cempresa S.A. v. América Móvil, S.A.B. de C.V., 17 N.Y.3d 269, 278-279 (2011) (quoting *DDJ Mgmt., LLC v. Rhone Grp., L.L.C.*, 15 N.Y.3d 147, 154 (2010)). And the undisputed facts establish that MBIA did not "make use of" "the means available to [it]" to learn the "real quality" of the loans it agreed to insure. *Id.*

MBIA first argues that it should not be held responsible for the risks it agreed to insure, because it "lacked access to the information necessary to discern the falsity of Countrywide's representations and warranties." MBIA Opp. at 25. MBIA cites no facts to support this assertion, nor could it. Rather, the facts—which MBIA does not dispute (*see* MBIA Opp. at 14-16)—show that:

- Prior to 2004, MBIA conducted loan file reviews before agreeing to insure RMBS, including Countrywide RMBS.
- Following its decision to stop conducting loan file reviews, MBIA did not ask Countrywide for a single loan file and did not look at a single file.
- When other monoline insurers asked Countrywide for loan files pre-closing, Countrywide accommodated their requests.
- There is no evidence of any monoline insurance company ever asking for access to a loan file only to have the request denied by Countrywide.
- If MBIA was not satisfied with the information it had received about the loans, it was free to withdraw its bid at any point pre-closing.
- MBIA had an unequivocal contractual right to access loan files post-closing.

See Countrywide Mem. at 8-15; CSUF at ¶¶ 58-60, 87, 103-106.[10]

MBIA improperly relies on a decision from another of its own RMBS lawsuits in an effort to suggest that it lacked access to the loan files. *See* MBIA Opp. at 25-26 (citing *MBIA Ins. Corp. v. Morgan Stanley*, No. 29951/10, 2011 WL 2118336 (Sup. Ct. Westchester Cnty. May 26, 2011)). In *Morgan Stanley*, the court held that MBIA had adequately pleaded justifiable

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[10] *See also* MBIA00157044 at -97, Risk Project 2008, Holland Aff., Ex. 106; *see* MBIA Opp. Stmt. at ¶ 52; J. Brown Tr. at 42:15-22, Holland Aff., Ex. 077; MBIA00368988-9041 at -9002, -9007, -9022, -9027, Mortgage Sector Review Presentation to Executive Review Committee, dated Dec. 20, 2001 ("2001 Sector Review"), Holland Aff., Ex. 119; T. Murray Tr. at 170:7-171:5, Holland Aff., Ex. 089.

reliance, because the complaint alleged that Morgan Stanley had "unique and special knowledge" regarding the loans that it originated or acquired, and MBIA was "several steps removed" from the loans. *Morgan Stanley*, 2011 WL 2118336, at *5. But this holding—on a motion to dismiss, not a motion for summary judgment—rested squarely on MBIA's allegation that it did not have access to loan files. *See id.* In contrast, here, the undisputed facts prove that MBIA *had* access to loan files—it simply chose not to look at them.

Unable to dispute that it did not conduct any loan file review, MBIA instead lists a host of other steps it purportedly undertook before agreeing to insure the Securitizations.[11] But even if MBIA did *all* of the things it claims (a question this Court need not reach now), that would not create a dispute of material fact on justifiable reliance, because the practices MBIA identifies indisputably do not involve any assessment of "the real quality of the subject of the representation[s]"—*the loans*. *Centro*, 17 N.Y.3d at 278-279 (2011). Again, MBIA *does not dispute* that, for more than three years, it chose not to review a single file for any one of the $21 billion worth of loans whose performance MBIA was agreeing to insure. MBIA cannot now evade the consequences of that decision.[12]

C. The R&Ws Do Not Exempt MBIA from Proving Justifiable Reliance.

Rather than disputing Countrywide's showing that MBIA never looked at a single loan file, MBIA argues that it should be excused for not having conducted any due diligence on the loans because it received contractual R&Ws from Countrywide. This is incorrect as a matter of

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[11] *See* MBIA Opp. at 8-13, 23-25 (listing, among other things, reviews of Countrywide's financial strength; servicing reviews; comparisons of Securitizations to past deals; and post-closing surveillance of performance).

[12] MBIA also suggests that its decision to forego loan file due diligence was reasonable, because "industry practice" between 2004 and 2007 was for insurers not to conduct loan file reviews. MBIA Opp. at 14. But as the New York Court of Appeals has explained, "industry practice" is not a proxy for reasonableness. *See Trimarco v. Klein*, 56 N.Y.2d 98, 106-107 (1982) ("[A] common practice or usage is ... not necessarily a conclusive or even a compelling test of [reasonableness]."); *see also Tzilianos v. N.Y.C. Transit Auth.*, 91 A.D.3d 435, 436 (1st Dep't 2012) (same). And, in any event, the undisputed evidence demonstrates that other monoline insurers *did* conduct loan file due diligence between 2004 and 2007. *See* CSUF at ¶¶ 58-59. MBIA points to no contrary evidence. Nor could it: MBIA's own expert on the monoline industry, James Aronoff, testified that he does not know whether other monoline insurers performed loan file reviews during the Relevant Period. *See* Aronoff Tr. at 406:14-407:24, Sheth Opp. Aff., Ex. 344.

law. MBIA relies on the Court of Appeals' decision in *DDJ Mgmt., LLC v. Rhone Grp. L.L.C.*, 15 N.Y.3d 147 (2011), arguing that, under *DDJ*, a party to a contract "often" will be justified in relying on R&Ws rather than conducting due diligence of its own. MBIA Opp. at 21 (citing *DDJ*, 15 N.Y.3d at 153-154). But *DDJ* does not absolve MBIA from its failure to conduct reasonable due diligence—rather, it expressly requires MBIA to have done so.

As an initial matter, although the Court of Appeals in *DDJ* explained that a "duty to inquire is [not] *necessarily* triggered *as soon as* a plaintiff has the *slightest* 'hints' of any '*possibility*' of falsehood," it also made clear that blind reliance on R&Ws is not justifiable where the "hints" were sufficiently great that "a reasonable [party] of equivalent experience should have inquired further." *DDJ*, 15 N.Y.3d. at 155-156 (emphasis added). Here, that indisputably is the case.

MBIA asserts that the third-party due diligence results it received from Countrywide "reflected pools of high quality loans" and did not contain any "red flags" that would have alerted MBIA to the need to "inquire further." MBIA Opp. at 11; *DDJ*, 15 N.Y.3d at 155. But this assertion is belied by the undisputed facts, which show that, on average, 29.4% of loans sampled were flagged by the due diligence firms as exception loans or potentially noncompliant with R&Ws. *See* Countrywide Mem. at 27. MBIA does not dispute that it was provided with these due diligence results. *See* MBIA Opp. at 15. Rather, MBIA takes issue with Countrywide's *math*, arguing that Countrywide's figure improperly "includ[es] loans that departed from underwriting guidelines but as to which an exception to those guidelines had been made ...." *Id.* But even under MBIA's methodology (excluding from the "questionable" category all loans identified as guideline exceptions with compensating factors), the percentage of loans flagged as potentially noncompliant by the due diligence firms is still, on average, greater than 20%, and is more than 30% for several of the Securitizations.[13] MBIA therefore

[13] CSUF at ¶¶ 74.d, 77 (excluding loans assigned salability code "4," representing loans identified as guideline exceptions with compensating factors: 04-I, 12%; 04-P, 7%; 05-A, 17.5%; 05-E, 9.5%; 05-I, 6.5%; 06-E, 18%, 06-G, 20.5%; 06-S8, 55%; 06-S9, 31%; 06-S10, 27%; 07-S1, 31.5%; 07-S2, 22%; 07-S3, 33%; 07-E, 25.5%).

does not—and cannot—dispute that it knew at the time it issued the policies that at least *one out of every five* loans in the samples had been identified by a third-party due diligence firm as potentially in breach of the contractual R&Ws. Despite these results—which in and of themselves were sufficient "hints" under *DDJ*—MBIA did not ask to review a single file for any of the flagged loans, or any others.

MBIA's claim that the due diligence results raised no cause for concern is entirely inconsistent with the position it has taken in analogous litigation against J.P. Morgan. In that case, MBIA claims that, had it been aware that approximately one-third of the loans reviewed were "flagged" by the third-party due diligence firm, it "never would have issued" the policy. *J.P. Morgan Complaint* ¶¶ 4, 8, Holland Aff., Ex. 268. Here, MBIA knew exactly that. In light of its failure to investigate further, MBIA cannot claim that it relied on the accuracy of Countrywide's R&Ws about the loans—let alone that such reliance was justifiable.

MBIA also ignores the language in *DDJ* indicating that reliance on a R&W is *never* justifiable where the relying party "kn[ows] that the warranty in question [i]s false." *DDJ*, 15 N.Y.3d at 155. MBIA does not dispute that it knew, before insuring the Securitizations, that the R&Ws about the loans were inaccurate as to certain loans. To the contrary, MBIA admits that Countrywide informed it that, on average, more than 6% of the 200 sampled loans reviewed by the third-party due diligence firms ultimately were removed from the pools by Countrywide based on the due diligence findings. MBIA Opp. at 11. Nor does MBIA seriously dispute that it was aware that similarly noncompliant loans from outside of the samples remained in the pools.[14] In the face of this indisputable evidence, MBIA resorts to the only defense it can muster: It maintains that, in its view, the percentage of loans removed from each pool for noncompliance—on average, more than 6%—reflects an "extremely small ... number," in line

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[14] MBIA argues that Countrywide improperly attempts to "extrapolate" the results of the third-party due diligence to the Securitizations as a whole. MBIA Opp. at 14-15. This is false. Rather, Countrywide argues that, given the volume of potentially noncompliant loans flagged during due diligence and the number of loans removed (and not removed) from the Securitizations, MBIA necessarily had knowledge that the R&Ws could not be entirely accurate. *See* Countrywide Mem. at 14-15, 29.

with MBIA's "expect[ations]." MBIA Opp. at 11. But for purposes of assessing MBIA's justifiable reliance, it makes no difference whether MBIA believed that the R&Ws were inaccurate 6% of the time, or 65%—what matters is that MBIA was aware that the R&Ws were not 100% accurate. As explained by the Court of Appeals, "the reliance which is a necessary element for ... a[n] action based on fraud or misrepresentation" is "a *belief in the truth* of the representations made in the express warranty and a change of position in reliance on that belief." *CBS Inc. v. Ziff-Davis Publ'g Co.*, 75 N.Y.2d 496, 502 (1990) (emphasis added). Here, in light of the due diligence results it received from Countrywide, "MBIA could not have reasonably 'believe[d] in the truth of the warranted information.'" *MBIA Ins. Corp. v. Credit Suisse Sec. (USA) LLC*, No. 603751/09, 2011 WL 4865133, at *14 (Sup. Ct. N.Y. Cnty. Oct. 7, 2011) (quoting *Ziff-Davis*, 75 N.Y.2d at 502-506). In such circumstances, although a party may have a claim for breach of R&Ws—or, in this case, a right to invoke the contractual "sole remedy" of repurchase—as a matter of law, it does not have a claim for fraud.

Finally, MBIA attempts to avoid summary judgment by citing to language in *DDJ* suggesting that a plaintiff "should not be denied recovery merely because hindsight suggests that it *might* have been possible to detect the fraud when it occurred." MBIA Opp. at 20 (quoting *DDJ*, 15 N.Y.3d at 154) (emphasis added). But here there is no "might have." Based on the findings of MBIA's own underwriting expert, Steven Butler, MBIA necessarily *would have* uncovered the purported fraud if it had only bothered to look at the loan files. Mr. Butler found that 97% of the loans he reviewed were "Significantly Defective." *See* CSUF at ¶ 97. And he admitted that, had MBIA reviewed the same loans in real time, it necessarily would have reached the same conclusion. *See* CSUF at ¶ 107. Indeed, if MBIA and its expert are correct, then MBIA *necessarily would have* detected the alleged fraud had it reviewed even a handful of loan files at any time between 2004 and 2007.[15] Because MBIA did not do so, Countrywide is

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[15] *See CIFG Assurance N. Am. v. Goldman, Sachs & Co.*, No. 652286/11, 2012 WL 1562718, at *10 (Sup. Ct. N.Y. Cnty. May 1, 2012) ("As a sophisticated party involved in an arm[']s length transaction, CIFG had a duty to undertake an independent due diligence review of the risks associated with the guaranty it sold, including, at the

entitled to summary judgment on MBIA's fraud claim.[16]

II. MBIA'S OPPOSITION DOES NOT DEFEAT COUNTRYWIDE'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON MBIA'S CLAIM FOR BREACH OF THE INSURANCE AGREEMENTS.

Countrywide is entitled to partial summary judgment on MBIA's claim for breach of the Insurance Agreements, because MBIA expressly agreed that its "sole remedy" for any breach of the applicable R&Ws would be its right to seek repurchase of any materially noncompliant loans that adversely affect its interests, and it is undisputed that MBIA has failed to provide the notice contractually-required to avail itself of this sole remedy for approximately 95% of the loans at issue. *See* Countrywide Mem. at 32-37. MBIA's Opposition does nothing more than distort this Court's prior orders, while asking the Court to ignore the plain language of the pertinent contracts by which MBIA agreed to be bound.

A. MBIA Cannot Circumvent the "Sole Remedy" to Which It Agreed.

MBIA's numerous arguments seeking to evade the contractual "sole remedy" provisions to which it agreed are without merit.

First, MBIA maintains that this Court's January 3, 2012 Order on MBIA's partial summary judgment motion is the "law of the case" and "forecloses" Countrywide's sole remedy argument. MBIA Opp. at 29-30. This contention is baseless. MBIA's prior motion merely sought "clarif[ication]" of "the elements of MBIA's claims" for common law fraud and breach of contract, and MBIA's and Countrywide's arguments—and this Court's Order—concerned

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very least, a review of a sample of the underlying mortgage loans which would have revealed the problems in such loans.").

[16] Although MBIA did not move for summary judgment on its fraud claim and any such motion would be untimely, it nonetheless half-heartedly urges the Court to grant judgment in its favor. *See* MBIA Opp. at 20. MBIA's request is not only baseless, it is also improper: Countrywide's motion for summary judgment on MBIA's fraud claim rests exclusively on MBIA's inability to prove justifiable reliance, and Countrywide has not had the opportunity to present to the Court an abundance of facts relevant to the other elements of MBIA's fraud claim. *See Vinder v. Showbran Leasing & Mgmt., Inc.*, 298 A.D.2d 325, 326 (1st Dep't 2002) (summary judgment "may not be granted *sua sponte* with respect to a separate issue which was not addressed" by the movant).

MBIA's burden of proof as to causation to sustain those claims.[17] The Court's January 3 Order did not address, let alone "foreclose," Countrywide's "sole remedy" argument.[18]

Second, MBIA attempts to evade the "sole remedy" provisions to which it agreed by misreading subsection 2.01(*l*) of the Insurance Agreements. MBIA suggests that subsection 2.01(*l*)—which provides that "[t]he remedy for any breach of *this paragraph* with respect to representations or warranties relating to a Mortgage Loan shall be limited to the remedies specified in the related Transaction Document" (*i.e.*, the sole remedy of repurchase)[19]—applies only to claims for breach of Subsection 2.01(*l*), and not to claims brought under other subsections of Section 2.01.[20] But the language and structure of the contracts makes clear that "this paragraph" refers to Section 2.01 *in its entirety*, and not just subsection 2.01(*l*). Section 2.01 is a single paragraph, denoted by one initial indentation, and it contains several subparagraphs, 2.01(a) through 2.01(o), denoted by further indentations. *See, e.g.*, 2006-G IA § 2.01, Holland Aff, Ex. 064. Moreover, where the Transaction Documents refer to a subsection, such as subsection 2.01(*l*), they use the term "subparagraph[s]," instead of "paragraph[s]."[21] Thus the "paragraph" to which subsection 2.01(*l*) refers is Section 2.01 *as a whole*, including *both* subsection 2.01(*l*) and subsection 2.01(j).

Further, to construe the phrase "this paragraph" as MBIA suggests would violate well-established principles of contract interpretation by allowing a *general* contract provision to

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17 MBIA PSJ Mem. at 9; Countrywide PSJ Opp. at 6 ("New York Law requires MBIA to prove causation to sustain its fraud and breach of contract claims for damages."); Jan. 3 Order at 8 ("The base issue before the court in this motion is when causation occurs in claims for insurance fraud and breach of representations and warranties.").

18 *See, e.g.*, *Oyster Bay Assocs. Ltd. P'ship v. Town Bd. of Town of Oyster Bay*, 21 A.D.3d 964, 966 (2d Dep't 2005) (holding the "law of the case" doctrine "applies only to legal determinations that were necessarily resolved on the merits in the prior decision") (citations omitted).

19 *See, e.g.*, 2006-G IA, § 2.01(*l*), Holland Aff., Ex. 064 (emphasis added).

20 MBIA asserts that it has alleged violations of "at least eight provisions of the Insurance Agreements," MBIA Opp. at 30, but it identifies just two in its Opposition—subsections 2.01(*l*) and 2.01(j). *See id.*

21 *See, e.g.*, 2006-G Ind. § 5.16(h) ("when any event described in *subparagraph* (a), (b), (c), (d), or (h) occurs…") (emphasis added), Holland Aff., Ex. 055; 2006-G SSA § 2.06(7) ("the items in *subparagraphs* (1) through (6), (8) and (9) …") (emphasis added), Holland Aff., Ex. 047.

govern at the expense of a more *specific* provision.[22] Subsection 2.01(j) broadly concerns all types of information furnished in connection with the Securitizations, while subsection 2.01(*l*) applies more narrowly to the precise loan-level R&Ws at issue in this case. Where, as here, there arguably is "an inconsistency between a specific provision and a general provision of a contract ..., the *specific* provision controls."[23] If subsection 2.01(j) authorized MBIA to bring suit for the *exact same* R&W violations that are subject to subsection 2.01(*l*), it would render subsection 2.01(*l*)'s express limitation of remedies mere surplusage, and enable MBIA to escape the "sole remedy" provisions to which it expressly agreed.[24]

Third, MBIA argues that it is exempted from the contractual sole remedy provisions by Section 5.02 of the Insurance Agreements, which states that, "*[u]nless otherwise expressly provided*, no remedy herein conferred upon or reserved is intended to be exclusive of any other available remedy." 2006-G IA § 5.02(b), Holland Aff., Ex. 064 (emphasis added). But, here, the contracts *do* "otherwise expressly provide[]." *Id.* Specifically, subsection 2.01(*l*) *expressly* incorporates the "sole remedy" provisions in the other Transaction Documents, which, in turn, *expressly* limit MBIA to the repurchase remedy for alleged R&W breaches. *See* Countrywide Mem. at 33-34; CSUF at ¶¶ 126-132.

Judge Rakoff's recent decision in *Assured Guar. Mun. Corp. v. Flagstar Bank, FSB*, No. 11 Civ. 2375, 2011 WL 5335566 (S.D.N.Y. Oct. 31, 2011), is instructive. In *Assured*, Judge Rakoff rejected precisely the argument that MBIA raises here. In that case, Section 5.02(b) of the insurance agreements also made clear that, "[u]nless otherwise expressly provided," the parties were free to invoke all remedies "existing at law or in equity" to redress a warranty breach. *Id.* at *4 (citation omitted). Even though the insurance agreements at issue in *Assured*

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22 *Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46 (1956).

23 *Id.*

24 *See, e.g.*, *Westmoreland Coal Co. v. Entech, Inc.*, 100 N.Y.2d 352, 358 (2003) ("A written contract will be read as a whole and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.") (internal quotation marks omitted).

did *not* expressly incorporate the sole remedy provisions set forth in the other contracts—as § 2.01(*l*) does here—Judge Rakoff still limited Assured to the contractual repurchase remedy, reasoning that the transaction documents were a "related set of contracts" that "should be read as a whole" and should be given "consistent meaning in their overall context." *Id.* at *4-5.[25] Judge Rakoff's reasoning applies with even more force here, given that the Insurance Agreements—signed by MBIA—expressly adopt and incorporate the "sole remedy" provisions set forth in the other Transaction Documents.

Fourth, MBIA attempts to defeat Countrywide's motion by relying on two inapt federal court decisions—*Syncora v. EMC* and *Assured v. UBS*.[26] But the contracts at issue in each of those cases did not expressly bind the monoline insurer to the "sole remedy" of repurchase, as they do here. The "sole remedy" provisions in *Syncora v. EMC* and *Assured v. UBS* applied to the noteholders and the trusts, but *not* to the monoline plaintiffs. *See* MBIA Opp. at 32-35; Countrywide Mem. at 35 n.19. In contrast, here it is undisputed that the "sole remedy" provisions expressly apply to the "Credit Enhancer"—*i.e.*, MBIA—for *all* of the loans comprising the HELOC Securitizations, and a portion of the loans comprising the CES Securitizations. *See* MBIA Opp. at 34-35. Similarly, the Insurance Agreements signed by Syncora and Assured did not expressly incorporate the "sole remedy" provisions, which were set forth in other transaction documents.[27] In contrast, here, the Insurance Agreements expressly limit MBIA "to the remedies specified in the related Transaction Document[s]"—*i.e.*, the "sole remedy" of repurchase. 2006-G IA, § 2.01(*l*), Holland Aff., Ex. 064.

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25 *See also Assured Guar. Mun. Corp. v. DLJ Mortg. Capital, Inc.*, No. 652837/11, at *15 (Sup. Ct. N.Y. Cnty. Oct. 12, 2012) (holding "sole remedy" provision in PSAs applied to insurer, because, as a third-party beneficiary to the PSAs, insurer's rights could not exceed those of direct beneficiaries).

26 *See* MBIA Opp. at 32-34, 35 (citing *Syncora Guarantee Inc. v. EMC Mortg. Corp.*, No. 09 Civ. 3106, 2011 WL 1135007, at *5-6 (S.D.N.Y. Mar. 25, 2011) (Crotty, J.) and *Assured Guar. Mun. Corp. v. UBS Real Estate Sec., Inc.*, No. 12 Civ. 1579, 2012 WL 3525613, at *3 (S.D.N.Y. Aug. 15, 2012) (Baer, J.)).

27 *See Syncora*, 2011 WL 1135007, at *5 ("The I & I only 'incorporates and restates' these [loan level] representations 'for the benefit of the Insurer.' (I & I § 2.02(j)). There is no indication that the parties intended to limit Syncora's rights or remedies in any way."); *see also Assured v. UBS*, 2012 WL 3525613, at *3-4.

Fifth, MBIA argues that, even assuming the contractual "sole remedy" precludes MBIA from recovering "rescissory" or other monetary damages for breach of R&Ws, if MBIA proves that it was defrauded by Countrywide, then the contracts—including the "sole remedy" provisions—will be void *ab initio*. MBIA Opp. at 34. This argument is both wrong and disingenuous. MBIA does *not* seek a declaration that the contracts are void. *See, e.g.*, Am. Compl. ¶¶ 152-153 & Prayer for Relief. To the contrary, MBIA expressly disavowed such relief in its partial summary judgment motion, and arguing that the insurance policies it issued are irrevocable. *See* MBIA PSJ Mem. at 14 ("MBIA is seeking damages, rather than to void the policies..."); *id.* at 18. Further, because MBIA has continued to accept tens of millions of dollars in premium payments *to this day*, it has indisputably waived any right it might once have had to seek to avoid its contractual obligations.[28]

Sixth, in a last ditch effort to avoid its contractual sole remedy, MBIA argues that, notwithstanding the clear language of the contracts, it should not be bound by the "sole remedy" provisions, because the repurchase process was "intended as a narrow remedy designed to redress isolated bad mortgages," not "widespread and pervasive breaches, such as MBIA alleges." MBIA Opp. at 33. But not only does MBIA fail to cite any evidence of this purported intent, it also ignores the fact that such "evidence" would be irrelevant where, as here, the contracts' plain language is unequivocal. By the plain terms of the parties' contracts, the repurchase process is the "sole remedy" available to MBIA for loans that breach R&Ws—no matter how few or how many.[29]

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[28] *See* Countrywide Opp. § VI; *see also Assured v. DLJ*, No. 6528737/11, at *10 (citing cases) (granting motion to dismiss rescissory damages claim because of plaintiff's waiver through continued acceptance of premiums).

[29] *See, e.g.*, *Kel Kim Corp. v. Cent. Mkts, Inc.*, 70 N.Y.2d 900, 902 (1987) ("[O]nce a party to a contract has made a promise, that party must perform ... even when unforeseen circumstances make performance burdensome."); *see also Macalloy Corp. v. Metallurg, Inc.*, 284 A.D.2d 227, 227 (1st Dep't 2001) (similar).

B. MBIA Cannot Circumvent the Contractual "Notice and Cure" Provisions.

MBIA does not dispute that: (i) Under the contracts, MBIA must provide Countrywide with "prompt notice" of any breaches of R&Ws that it believes require a loan to be repurchased; (ii) Countrywide has no obligation to repurchase materially breaching loans unless and until it has "becom[e] aware of" the alleged defect and has had 90 days to attempt to cure the problem; and (iii) MBIA has provided Countrywide with the contractually-mandated notice and opportunity to cure for—at most—22,000 (~5%) of the nearly 390,000 loans comprising the Securitizations. *See* MBIA Opp. at 36-37; MBIA Opp. Stmt. at ¶¶ 118-120, 134-138.

Instead, in order to avoid its contractual notice requirements, MBIA asserts that this Court's December 22 Order regarding statistical "sampling" somehow read the "notice and cure" provisions out of the parties' contracts. *See* MBIA Opp. at 35. This is untrue. The December 22 Order does not even mention, let alone abrogate, the contractual notice and cure provisions. Rather, the December 22 Order expressly requires MBIA to "prove *each element* of its claims for breach of contract."[30] One element of MBIA's repurchase breach claim is proof that Countrywide had a contractual obligation to repurchase loans. And, for approximately 95% of the loans at issue, MBIA cannot prove this element of its claim because it indisputably has not provided the particularized notice contractually required to commence the repurchase process. So, if anything, the December 22 Order supports Countrywide's motion for summary judgment with respect to the vast majority of the loans. *See also* Countrywide Opp. § IV.

MBIA further argues that, irrespective of its failure to provide the contractually-required notice of each alleged material breach, Countrywide must repurchase "all defective loans of which Countrywide has become aware," regardless of whether it learned of the defect from MBIA or some other source. MBIA Opp. at 37. But even assuming MBIA's contractual interpretation is correct, MBIA points to *no* evidence that Countrywide has failed to repurchase loans it knew to be materially defective, and that it was contractually bound to repurchase.

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[30] Dec. 22 Order at 5 (emphasis added); *see also id.* (holding that "[p]laintiff retains its obligation to demonstrate to the trier of fact that *each element* of *each* cause of action has been met") (emphasis added).

Instead, MBIA points to purported "SUS" and "fraud" findings that (i) apply to fewer than 1,200 loans in the Securitizations, and (ii) are irrelevant to the question of whether these loans breach any R&W. *See* Countrywide Opp. §§ II.B, III.B. Moreover, even if Countrywide was "on notice" with regard to this handful of loans, MBIA points to no evidence that Countrywide was aware of any breach for the remaining *365,000*-plus loans in the Securitizations.

MBIA next argues that, "[e]ven if Countrywide was not *in fact* aware of these defects, it can still be charged with constructive notice, which is also a question of fact." MBIA Opp. at 37. But as a matter of law, the concept of "constructive notice" does not apply where, as here, the express terms of a contract require that a party have *actual notice* of an issue.[31] The cases cited by MBIA to support its "constructive notice" argument are inapposite, because they pertain to *common law* notice requirements, and do not address circumstances where actual notice is contractually required.[32]

Finally, MBIA contends that it is exempt from the contractual notice requirements, because its repurchase requests have been "futile," and Countrywide purportedly has "repudiated" the repurchase process. *See* MBIA Mem. at 38. But Countrywide has repurchased nearly 800 loans in the Securitizations, at a cost of nearly $70 million, and there is no evidence that Countrywide has failed to repurchase *any* loan where it had a contractual obligation to do so. *See* Countrywide Opp. § V. The fact that Countrywide has not acceded to many of MBIA's repurchase requests does not mean it has abandoned its contractual obligations. To the contrary, it means that there are disputes as to whether these loans contain defects that materially and adversely affect MBIA's interests. A trial is necessary to resolve these disputes, but *only* these

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[31] *See, e.g.*, *Amsterdam Sav. Bank FSB v. Marine Midland Bank, N.A.*, 121 A.D.2d 815, 817 (3d Dep't 1986) (where contract only required disclosure of "any known defaults," plaintiff's constructive knowledge claim properly dismissed); *Steinhardt v. Bingham*, 182 N.Y. 326, 328-329 (1905) ("[W]here ... terms of ... contract require notice ... and there is nothing in the context of ... the contract to show that any other notice was intended, a personal or actual notice must be given.").

[32] *See generally Metro Life Ins. Co. v. Morris*, 124 A.D.2d 568 (2d Dep't 1986) (constructive notice under common law) and *Bierzynski v. N.Y. Cent. R.R. Co.*, 31 A.D.2d 294 (4th Dep't 1969) (constructive notice in common law negligence case), *aff'd sub nom.* 29 N.Y.2d 804 (1971), cited at MBIA Opp. at 37-38.

disputes. For the remaining 95% of the loans in the Securitizations, as to which MBIA has never provided notice, Countrywide is entitled to summary judgment.

III. MBIA'S OPPOSITION DOES NOT DEFEAT COUNTRYWIDE'S MOTION FOR SUMMARY JUDGMENT ON MBIA'S INDEMNIFICATION CLAIM.

MBIA concedes that Countrywide is entitled to summary judgment on its indemnification claim, "to the extent it is based on § 3.04 of the Insurance Agreements"—the provision governing "Indemnification." MBIA Opp. at 38. Nonetheless, MBIA argues that it may seek attorneys' fees and expenses under a *different* section of the contracts—Section 3.03. MBIA's argument is without merit.

Contrary to MBIA's assertion, Section 3.03—titled "Reimbursement and Additional Payment Obligation"—does not create an *independent* indemnification obligation. Rather, Section 3.04 requires Countrywide to indemnify MBIA for reasonable attorneys' fees and expenses arising in connection with certain litigation relating to the Securitizations, but not litigation between the parties. *See* Countrywide Mem. at 38-39. And Section 3.03, which must be read in conjunction with Section 3.04, requires Countrywide to reimburse MBIA for such fees and expenses where MBIA advances funds. *See, e.g.*, 2006-G IA § 3.03(a), Holland Aff., Ex. 064. Section 3.03 does not trump Section 3.04 or create a distinct duty to indemnify.

Furthermore, under New York law a contractual fee shifting provision is only enforceable if the provision is "unmistakably clear … [and] exclusively or unequivocally referable to claims between the parties." *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 492 (1989); *see also* MBIA Opp. at 39 (acknowledging that fee-shifting provisions must be "unmistakably clear"). Because Section 3.03 does not expressly reference litigation between the parties, let alone "exclusively," or "unequivocally" refer to such claims, it does not obligate Countrywide to reimburse MBIA for attorneys' fees and costs incurred in connection with this litigation.

IV. MBIA'S OPPOSITION DOES NOT DEFEAT COUNTRYWIDE'S MOTION FOR SUMMARY JUDGMENT ON MBIA'S SERVICING CLAIM.

The gravamen of Countrywide's motion for summary judgment on MBIA's servicing breach claim is that, absent the baseless, inadmissible opinion testimony of MBIA's servicing expert, Mr. Butler, there is no evidence that Countrywide breached its contractual servicing obligations. MBIA advances four arguments in opposition, each of which is meritless:

First, MBIA maintains that, even though Mr. Butler indisputably disregarded certain essential servicing records, he and his team reviewed more than a million *other* servicing-related documents, and thus his opinions cannot be viewed as baseless. *See* MBIA Opp. at 39. MBIA argues that Mr. Butler's failure to review all relevant servicing records goes to the weight of his opinions, not their admissibility. *See id.* And it further argues that for Countrywide to prevail on summary judgment, Countrywide may not simply point to undisputed "gaps" in Mr. Butler's servicing review and MBIA's proof, but instead must show that the documents Mr. Butler failed to review were material to all of his opinions. *Id.* at 41-42.

What MBIA misses is the fact that the documents Mr. Butler ignored are not just any documents, but *critical* servicing documents. The ignored documents do not simply call into question Mr. Butler's opinions, they disprove those opinions. For instance, Mr. Butler opines that many loans were improperly serviced in part because the servicing files did not include a reason for the borrower's default, but the documents he ignored explicitly contain the reason for default. *See* Bier Report at ¶ 45, Holland Aff., Ex. 143. There are countless additional examples. *See id.* at ¶¶ 43-44, 59-66, 69, Holland Aff., Ex. 143; *see also* Countrywide Mem. in Support of Motion to Strike the Butler Servicing Report ("CW Servicing MTS") (Mot. Seq. No. 56) at 2-3; Countrywide Reply Mem. in Further Support of Motion to Strike the Butler Servicing Report ("CW Servicing MTS Reply") (Mot. Seq. No. 56) at 5-7, 11. The ignored documents are not mere "gaps" in Mr. Butler's opinions; they render his opinions baseless.[33]

[33] *See Diaz v. N.Y. Downtown Hosp.*, 99 N.Y.2d 542, 544 (2002) ("Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation ... the opinion should be given no probative force and is insufficient to withstand summary judgment.").

Second, MBIA argues that Countrywide is to blame for Mr. Butler's failure to review the critical servicing documents, as Countrywide purportedly produced the documents late and in an illegible and unusable form. *See* MBIA Opp. at 41. But it is undisputed that Mr. Butler received the documents more than seven months before he submitted his expert report. *See* CW Servicing MTS at 2-3; CW Servicing MTS Reply at 8-9. And MBIA's assertion that the documents were unusable is belied both by the documents themselves and the fact that Countrywide's expert was readily able to use them. *See* CW Servicing MTS Reply at 10-12.

Third, MBIA maintains that, even without Mr. Butler's baseless opinions, its servicing claim should survive summary judgment because the record includes "substantial" independent evidence of Countrywide's alleged breach of its servicing obligations. MBIA Opp. at 39-40. MBIA points to a single email from Countrywide's former-CEO, Angelo Mozilo, a Bank of America settlement, and a purported "admission" from Countrywide's servicing expert, Barry Bier, as this allegedly "substantial" independent evidence. *See id.* But the Mozilo email (which merely expresses concerns about customer complaints regarding servicing) is irrelevant to this case, as there is no evidence that the email pertains to the servicing of any of the loans in *these* Securitizations. *See* CWMBIA0013052611-13, Mar. 2005 email chain among S. Bailey, A. Mozilo, D. Sambol, and S. Kurland, Sheth Opp. Aff., Ex. 228.[34] The Bank of America settlement likewise is irrelevant and inadmissible. Although the settlement pertains to certain servicing and foreclosure practices, it does not concern any of the loans in the Securitizations, and it does not bring with it any admission by Countrywide of any servicing improprieties or deficiencies.[35] As for the "admission" by Mr. Bier, it consists of his finding that 5% of the loans

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[34] *See Footbridge Ltd. Trust v. Countrywide Home Loans, Inc.*, No. 09 Civ. 4050(PKC), 2010 WL 3790810, at *17 (S.D.N.Y. Sept. 28, 2010) (dismissing nearly identical servicing claim against Countrywide, because it "does not tie this allegation to any of the Mortgage Loans included in the Securitizations," and deeming plaintiffs' "broad allegations of poor customer service" insufficient to support the claim).

[35] *See* Consent Judgment in *United States v. Bank of America Corp.*, at 2 (D.D.C. Mar. 12, 2012), available at http://www.justice.gov/crt/about/hce/documents/scra_boa_settle.pdf (last visited Nov. 9, 2012) ("Defendant, by entering into this Consent Judgment, does not admit the allegations of the Complaint ... "); *see also id.* ("without trial or adjudication of issue of fact or law, without this Consent Judgment constituting evidence against Defendant ..."). Such settlements are "inadmissible as proof of liability ... or the amount of damages." CPLR § 4547; *see*

he reviewed included servicing deficiencies. But MBIA fails to note that Mr. Bier also found that none of these deficiencies were material, as none of them caused any damages. *See* Bier Report at ¶¶ 20, 92-103, Holland Aff., Ex. 143.[36] Mr. Bier's findings of immaterial deficiencies cannot and do not give rise to a genuine issue of material fact.[37]

Fourth, even if Mr. Butler's opinions and MBIA's other alleged "substantial" evidence of servicing errors were admissible, all of it in the aggregate would not establish the "gross negligence" on the part of Countrywide that is contractually required for MBIA to recover on its servicing claims. In apparent recognition of this fact, MBIA argues that it need only prove simple "negligence" to prevail on its serving claim because the provisions in the PSAs and the SSAs that limit Countrywide's liability to "gross negligence" do not explicitly reference claims brought by MBIA. MBIA Opp. at 42.[38] But, as an intended third-party beneficiary of the PSAs and SSAs,[39] MBIA may not possess *greater* rights than the contracting parties—the Trusts and the Noteholders.[40] And because the contracts expressly limit the ability of the Trusts and the Noteholders to hold Countrywide liable for servicing violations to circumstances involving "gross negligence," MBIA is similarly restricted. *See Assured Guar. Mun. Corp. v. Flagstar*

Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980) (opponent of summary judgment must adduce evidence admissible at trial).

36 Contrary to MBIA's claim, Mr. Bier did *not* conclude that MBIA has suffered servicing damages. *See* Affidavit of Barry J. Bier in Further Support of Countrywide's Motions to Strike the Butler Servicing Report and for Summary Judgment (Mot. Seq. Nos. 56 and 57) ("Bier Aff.") at ¶¶ 11-13. Mr. Bier opined that only 36 of 340 loans found by Mr. Butler to have been serviced improperly (only 5% of the Sample), actually were serviced improperly. *See* Bier Report at ¶ 13, Holland Aff., Ex. 143; Bier Aff. at ¶ 12. Of those 36 loans, Mr. Bier found that 20 loans had *no* potential to damage MBIA, and only 16 loans (or 2% of the Sample) even had the *potential* to result in harm to MBIA. *See* Bier Report at ¶ 13, Holland Aff., Ex. 143; Bier Aff. at ¶ 12. He did not find that any of these 16 loans actually caused MBIA harm. Bier Report at ¶ 13, Holland Aff., Ex. 143; Bier Aff. at ¶ 13.

37 *See, e.g.*, *Lexington 360 Assocs. v. First Union Nat'l Bank of North Carolina*, 234 A.D.2d 187, 189-190 (1st Dep't 1996) ("Where a party has failed to come forward with evidence sufficient to demonstrate damages flowing from the breach alleged and relies, instead, on wholly speculative theories of damages, dismissal of the breach of contract claim is in order.").

38 *See, e.g.*, 2006-G SSA at § 5.03, Holland Aff., Ex. 047; 2006-S10 PSA at § 6.03, Holland Aff., Ex. 051.

39 *See, e.g.*, 2006-G SSA at § 9.06, Holland Aff., Ex. 047; 2006-S10 PSA at § 4.06(o), Holland Aff., Ex. 051.

40 *See, e.g.*, *Artwear, Inc. v. Hughes*, 202 A.D.2d. 76, 82 (1st Dep't 1994) ("[A] third-party beneficiary, whose rights are derivative, is subject to the same defenses as are available to the contracting party.").

Bank, FSB, No. 11 Civ. 2375, 2012 WL 4373327, at *9 (S.D.N.Y. Sept. 25, 2012) (holding, in a nearly identical case involving nearly identical contracts, that third-party beneficiaries have "no greater right to enforce a contract than the actual parties to the contract" and the contractual gross negligence requirement therefore applies equally to monoline plaintiff).

V. MBIA'S OPPOSITION DOES NOT DEFEAT COUNTRYWIDE'S MOTION FOR SUMMARY JUDGMENT ON MBIA'S PRAYER FOR PUNITIVE DAMAGES.

MBIA does not dispute that, if this Court grants Countrywide's motion for summary judgment on MBIA's fraud claim, then it likewise should dismiss MBIA's prayer for punitive damages. *See* Countrywide Mem. at 42 (citing *Rocanova v. Equitable Life Assurance Soc'y of U.S.*, 83 N.Y.2d 603, 616 (1994)); MBIA Opp. at 43-45. But MBIA's prayer for punitive damages also should be dismissed on its own merits, because MBIA has not shown, and cannot show, by the requisite admissible and "clear, unequivocal and convincing evidence" that it is entitled to punitive damages under New York law.[41] The conduct at issue in this case indisputably "occurred in the context of a commercial transaction between sophisticated parties and did not involve the type of egregious, morally reprehensible tortious conduct directed at the public generally for which an award of punitive damages is appropriate."[42] And MBIA cannot reap a windfall of punitive damages by making generalized allegations of bad conduct by Countrywide and its former officers that have nothing at all to do with this specific dispute.

In its attempt to overcome Countrywide's motion, MBIA relies on unproven allegations from complaints in other actions, and on the settlements of three former Countrywide executives in an unrelated action to which Countrywide was not even a party. *See* MBIA Opp. at 43-44 & nn.42-43 (citing MBIA Opp. Stmt. ¶¶ 366-373). But allegations in other actions are just that—allegations. They are incapable of proving any misconduct by Countrywide, let alone the

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[41] *Munoz v. Puretz*, 301 A.D.2d 382, 384 (1st Dep't 2003); *Sladick v. Hudson Gen. Corp.*, 226 A.D.2d 263, 263 (1st Dep't 1996) (same); *Camillo v. Geer*, 185 A.D.2d 192, 194 (1st Dep't 1992) (same).

[42] *CIFG*, 2012 WL 1562718, at *1; *see also HSH Nordbank AG v. UBS AG*, 95 A.D.3d 185, 189, 209 (1st Dep't 2012) (dismissing plaintiff's demand for punitive damages because there were no allegations of "egregious conduct that was 'part of a pattern of similar conduct directed at the public generally'") (citations omitted).

misconduct alleged *in this action*.[43] Likewise, settlements unaccompanied by any acknowledgement or admission of wrongdoing are not admissible proof of *anything*, much less "clear, unequivocal and convincing evidence" to support MBIA's prayer for punitive damages.[44]

Nor do the unfounded allegations and other "evidence" cited in MBIA's Opposition cast any light on the alleged egregiousness of the conduct at issue here, or clearly and unequivocally establish that the alleged conduct was aimed at the public generally, with the requisite knowledge and involvement of Countrywide's superior officers. This case is a private dispute between Countrywide and MBIA involving *only* the 15 Securitizations implicated by MBIA's allegations, and nothing more. MBIA alleges that Countrywide defrauded *MBIA* by selecting loans to serve as collateral for the Securitizations that failed to comply with the Transaction Documents' specific R&Ws. The purported "facts" cited by MBIA in its Opposition do not even allude to, much less establish, any egregious fraud on the public in connection with this conduct. And the documents MBIA cites do not establish that Mr. Mozilo, or any other superior officer of Countrywide, ratified—or were even involved in—the selection of loans or the negotiating of contractual R&Ws in connection with the 15 Securitizations at issue in this case.[45] Indeed .[46] MBIA's prayer for punitive damages should be dismissed.

CONCLUSION

For the foregoing reasons and the reasons set forth in Countrywide's other pleadings in support of this motion and its accompanying motion to strike, and in opposition to MBIA's

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43 *See Zuckerman*, 49 N.Y.2d at 562 (requiring admissible evidence in opposition to summary judgment and stating, "*mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient*") (emphasis added); *Fried v. Bower & Gardner*, 46 N.Y.2d 765, 766 (1978) (axiomatic that inadmissible "allegations" provide no basis to avoid the granting of a motion for summary judgment).

44 *Munoz*, 301 A.D.2d at 384.

45 *See, e.g.*, *Loughry v. Lincoln First Bank*, 67 N.Y.2d 369, 378 (1986) ("[P]unitive damages can be imposed on an employer for the intentional wrongdoing of its employees only where management has authorized, participated in, consented to or ratified *the conduct giving rise to such damages* ....") (emphasis added).

46 *See*

summary judgment motion, this Court should grant Countrywide's motion for summary judgment.

Dated: New York, New York
November 8, 2012

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