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

MBIA INSURANCE CORPORATION,

Plaintiff,

-against-

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

Defendants.

Index No.: 08/602825
IAS Part: 3 (Bransten, J.)
Motion Sequence No. 58

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON BREACH OF THE INSURANCE AGREEMENTS

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November 9, 2012

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Plaintiff MBIA Insurance Corporation ("MBIA" or "Plaintiff") respectfully submits this reply memorandum of law in further support of its Motion for Summary Judgment.[1]

PRELIMINARY STATEMENT

A fundamental principle of summary-judgment procedure is that the non-moving party may not rest on conclusory assertions in its opposition brief or affirmations. Such assertions of a factual dispute are properly recognized as "feigned," not genuine disputes, and thus do not preclude summary judgment. *Kornfeld v. NRX Techs., Inc.*, 93 A.D.2d 772, 773 (1st Dep't 1983). To demonstrate a genuine dispute, the non-moving party must point to concrete evidence from which a reasonable fact-finder could find in its favor. Countrywide has failed to do so here.

MBIA's claim for breach of the entire Insurance Agreements. MBIA moved for summary judgment on this claim because (1) MBIA's expert found indisputable breaches of certain of Countrywide's representations and warranties in a random sample of loans from the Securitizations which could be extrapolated to the rest of the pool; and (2) Countrywide's experts could not and did not meaningfully respond to the vast majority of those breaches. Once these breaches alone are extrapolated from the random sample to the total population of loans, they indicate that 56% of the loans are indisputably and objectively in breach, surely enough to constitute a material breach of the entire Insurance Agreements and to entitle MBIA to rescissory damages under this Court's January 3, 2012 Order. (The actual percentage of materially breaching loans is much higher.) In its opposition, Countrywide fails to raise a genuine dispute

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[1] "Countrywide" refers to Countrywide Financial Corporation ("CFC"), Countrywide Securities Corporation ("CSC"), Countrywide Home Loans, Inc. ("CHL"), and Countrywide Home Loans Servicing, L.P. ("CHLS"); "Sheth Aff." to the Affirmation of Manisha M. Sheth in Support of Plaintiff's Motion for Summary Judgment, dated September 19, 2012; "Sheth Reply Aff." to the Reply Affirmation of Manisha M. Sheth in Further Support of Plaintiff's Motion for Summary Judgment, dated November 8, 2012; "Cowan Aff." to the Affidavit of Charles Cowan in Support of Plaintiff's Motion for Summary Judgment, dated September 19, 2012; "Butler Aff." to the Affidavit of Steven I. Butler in Support of Plaintiff's Motion for Summary Judgment, dated September 19, 2012; "SUF" to MBIA's Rule 19-A Statement of Undisputed Facts in Support of Its Motion for Summary Judgment, dated September 19, 2012; "CSMF" to Countrywide's Rule 19-a Counter-Statement of Material Facts in Opposition to Plaintiff's Motion for Summary Judgment, dated October 19, 2012; "MBIA Br." or "Br." to Plaintiff's Memorandum of Law in Support of its Motion for Summary Judgment on Breach of the Insurance Agreements, dated September 19, 2012; and "Opp." to Countrywide Defendants' Memorandum of Law in Opposition to Plaintiff's MBIA's Motion for Summary Judgment, dated October 19, 2012.

of fact, and its legal arguments have already been rejected by this Court.

First, Countrywide purports to dispute MBIA's showing of breach and material and adverse effect upon MBIA's interest in the loans, but its assertions are unsupported. To take one prominent example, as to the 1,416 loans in the random sample that Mr. Butler found contained materially false information as compared to what was represented on the Mortgage Loan Schedule ("MLS"), Countrywide relies heavily on loan performance data to show that these breaches did not impact the performance of the loans. But under New York Insurance Law § 3106, as construed in this Court's January 3 Order, such *ex post* performance is irrelevant to MBIA's claim. Rather, MBIA need only show that the *risk* of non-performance of these loans was increased by Countrywide's breaches of its representations and warranties *as of the time the policies were issued.* Countrywide's responses on the other categories of loans for which Mr. Butler's findings support a material breach of representations and warranties are equally unsupported:

- On the 1,423 loans that breached the representation and warranty that an appraisal had been performed by a "qualified appraiser," Countrywide ignores the "qualified appraiser" requirement and suggests that the borrower's own representation suffices.
- On the 626 loans that breached the representation and warranty that there had been "no default," Countrywide ignores that "default" is defined to include a misrepresentation by the borrower.
- On the 460 loans that breached the representation and warranty that the Mortgage File is complete, Countrywide ignores the plain language of the Transaction Documents, and thus, incorrectly claims that with respect to certain of the loans, the missing document is not part of the Mortgage File. *See* Point I.A, *infra*

Second, Countrywide disputes MBIA's expert's methodology of analyzing a random sample of 6,000 loans from the approximately 389,000 total loans in the Securitizations, and then extrapolating the results to that total population of loans. But this Court already resolved that dispute in its December 22, 2010 Order, after hearing testimony from MBIA's expert (Dr. Charles Cowan) *as to this very sample* and allowing Countrywide an opportunity to contest the sample (after which two of Countrywide's experts actually endorsed Dr. Cowan's approach). This Court held that sampling and extrapolation is not only reasonable but appropriate because,

inter alia, it is not feasible for the parties and the Court to examine each of the 389,000 loans. Given this Court's ruling, Countrywide's argument should be rejected at the threshold under the law-of-the-case doctrine. In any event, Countrywide's argument lacks precedential support, entails an impractical procedure, and is inconsistent with its own experts' endorsement of this approach. *See* Point I.B, *infra.*

Third, ignoring a further prior legal ruling from this Court, Countrywide argues that MBIA is not entitled to rescissory damages. This Court's January 3, 2012 Order held to the contrary, and again the law-of-the-case doctrine forecloses Countrywide's ability to re-litigate the issue. In any event, Countrywide's argument is unpersuasive. Both this Court and Judge Crotty (in *Syncora*) correctly reasoned that, where a financial guaranty insurer that would be entitled to *rescission* under New York Insurance Law but for language in the insurance policies that protects innocent insureds by making the insurer's obligation absolute and unconditional, such insurer may seek *rescissory damages* from the culpable applicant for the insurance. Countrywide's other arguments are similarly unpersuasive; for example, its contention that rescissory damages are barred by the "sole remedy" provision in the Insurance Agreements ignores that provision's limited scope and case law confirming that scope. *See* Point I.C, *infra.*

MBIA's claim for breach of the repurchase obligation. MBIA moved for summary judgment on this claim because Countrywide's own expert and contemporaneous documents deem certain loans eligible for repurchase, yet Countrywide has failed to repurchase the vast majority of them. Again, Countrywide's responses are a mélange of feigned disputes and unpersuasive legal arguments.

First, Countrywide argues that a loan must be in default before it can be eligible for repurchase. On MBIA's motion for partial summary judgment, this Court declined to resolve this issue mainly because it construed MBIA's supporting evidence as focusing only on 1 of the 15 Securitizations. MBIA has now adduced new evidence and also made clear that its showing encompasses all 15 Securitizations; that showing demonstrates beyond dispute that there is no "loan default" prerequisite. To the contrary, the Transaction Documents for all 15

Securitizations require only that the breach materially and adversely affect MBIA's interest in the loan. Just as Judge Crotty and Judge Rakoff have ruled on this issue in favor of financial guaranty insurers, so should this Court. *See* Point II.A, *infra*.

Second, Countrywide attempts to dispute the two categories of loans that MBIA's motion identified as clearly eligible for repurchase: (1) 88 loans recommended for repurchase by Countrywide's own expert (Ms. Godfrey); and (2) 1,099 loans that Countrywide itself rated "Severely Unsatisfactory" ("SUS"). As to the first, Countrywide's repurchase constitutes an admission that the 88 loans qualify for repurchase, and, by virtue of extrapolation, that some 4,000 loans in the Securitizations likewise qualify. As to the second, Countrywide's prior statements are admissions that clearly show that Countrywide viewed SUS loans as materially breaching one or more representations and warranties and thus qualifying for repurchase. *See* Point II.B, *infra*.

Third, while Countrywide denies any anticipatory repudiation of its repurchase obligations, that conclusory denial is undermined by its repeated stonewalling and rejection of MBIA's repurchase requests. Countrywide cannot dispute that, in response to MBIA's detailed repurchase demands, Countrywide has repurchased only about 0.2% of the approximately 389,000 loans in the pools, even though 56% of those 389,000 loans are indisputably in breach and hence should have been repurchased. *See* Point II.C, *infra*.

ARGUMENT

I. ON MBIA'S MOTION FOR SUMMARY JUDGMENT ON ITS CLAIM FOR BREACH OF THE ENTIRE INSURANCE AGREEMENTS, COUNTRYWIDE FAILS TO RAISE A GENUINE DISPUTE OF FACT AND ITS LEGAL ARGUMENTS ARE ERRONEOUS

This branch of MBIA's motion concerns Countrywide's pervasive breaches of representations and warranties, which constitute a breach of the entire Insurance Agreements and warrant rescissory damages. Acknowledging the standard for summary judgment, MBIA restricted this branch of its motion to those categories of loans as to which there is no *reasonable* dispute concerning (a) breach of the representation and warranty; or (b) material and adverse

effect of such breach on MBIA's interest in the loan. (*See* MBIA Br. 2-4.) Extrapolating these breaches, 56% of the loans breached Countrywide's representations and warranties, thus demonstrating a material breach of the entire Insurance Agreements.

MBIA is *not* now moving based on the remaining loans (above the 56%) that Mr. Butler deemed "Significantly Defective."[2] Thus, Countrywide's critique (Opp. 14-15) of Mr. Butler's methodology for determining Significantly Defective Loans is irrelevant to this motion.[3]

When Countrywide turns to the categories of loans on which MBIA is moving, it merely raises feigned disputes that are belied by the record evidence and thus do not preclude summary judgment. MBIA begins by addressing each factually undisputed category, and then explains that, contrary to Countrywide's legal arguments, this Court has already correctly held that sampling and rescissory damages are available.

A. Countrywide Fails To Raise A Genuine Dispute Of Fact Regarding The Categories Of Loans At Issue On This Motion That Breach Representations And Warranties[4]

1. Loans That Indisputably Breached The Representation And Warranty That The Loan Was Appraised By A Qualified Appraiser

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[2] Because the loans addressed by this motion (which constitute 56% of all loans) suffice to show a material breach of the entire Insurance Agreements, summary judgment is warranted without regard to the remaining Significantly Defective Loans above the 56%. If this Court nonetheless were to deny MBIA's motion, MBIA would seek to persuade the fact-finder at trial that all of the Significantly Defective Loans are in material breach.

[3] Countrywide also claims (Opp. 1) that Mr. Butler is unqualified to opine on re-underwriting. To the contrary, Mr. Butler is a highly qualified expert, with over 41 years of experience in the banking industry in all stages of the mortgage-lending process, including origination, underwriting, closing, monitoring, and servicing of mortgage loans. *See* Sheth Aff. Ex. 67, at 3-10. Any suggestion that Mr. Butler is unqualified should be rejected, particularly since Countrywide's own proffered loan-review expert (Ms. Godfrey) is far less qualified than Mr. Butler. Ms. Godfrey has never re-underwritten a mortgage loan, Sheth Aff. Ex. 110, at 30:14-17, *id.* Ex. 112, at 784:16-21, has never been retained as an expert in re-underwriting mortgage loans, *id.* at 761:15-22, and has no experience performing due diligence on loans to determine whether they are properly included in securitizations, nor any familiarity with the standards used to determine whether a loan should be included in the Securitizations here, *id.* at 761:10-763:24.

[4] In its opposition papers, Countrywide discusses multiple examples of loans where it claims that there is a genuine issue of fact as to MBIA's expert findings of breach and material and adverse effect. In several instances, Countrywide blatantly misrepresents the contents of the documents on which it relies to manufacture a dispute of fact. Appendix at pp. 4-5 (discussing loan nos. [redacted] MBIA's further review of Countrywide's arguments confirms that there are no genuine disputes of fact. To assist the Court, MBIA has prepared an appendix responding to the many of the purported disputes discussed in Countrywide's opposition either by loan or by category of loans. *Id.*

MBIA explained (Br. 3, 18) that, as to 1,423 loans in the random sample, Countrywide breached its representation and warranty that an "appraisal" of the value of the mortgaged property had been obtained from a "qualified appraiser" prior to approval of the loan application, and that these breaches materially and adversely affected MBIA's interest in the loans.

Unable to dispute the plain text of its representation and warranty, Countrywide argues (Opp. 16-17) that this representation and warranty was satisfied insofar as the transaction documents contemplate the use of "electronic" appraisals, and thus Countrywide was supposedly permitted to use alternative valuation methods, such as automated valuation models ("AVMs") and so-called "stated value" programs. Countrywide's argument is definitively refuted by the record evidence. Even assuming *arguendo* that electronic valuations are contemplated,[5] they still must be performed by a "*qualified appraiser*". Yet Countrywide provides no evidence showing that any electronic valuations on these 1,423 loans in the random sample were performed by a qualified appraiser. Indeed, Countrywide's own witnesses have conceded that AVMs are generally not completed by appraisers. Sheth Aff. Ex. 116, at 119:19-120:18.

Likewise, a stated value program, which consists simply of "ask[ing] a *borrower* how much his house is worth," Sheth Aff. Ex. 114, at 219:3-24 (emphasis added); *id.* Ex. 112, at 843:14-844:14, with no involvement by a "qualified appraiser," does not constitute an appraisal by a qualified appraiser. Countrywide cites no documentary evidence to the contrary, and indeed its own witnesses confirm that alternative valuation methods such as stated value programs violate the appraisal representation and warranty. For example, a senior Countrywide executive admitted that, "[i]f we are going to continue to include these [stated value HELOC] loans in HELOC securities, we need to revise our disclosure and reps and warranties." Sheth Aff. Ex.

[5] In fact, Countrywide's argument is incorrect in that respect as well because Countrywide (Opp. 16-17) relies on provisions other than the appraisal representation and warranty. For the CES Securitizations, Countrywide relies on the Prospectus Supplements; but the specific terms of the representations and warranties trump general statements in the Prospectus Supplements. For the HELOC Securitizations, Countrywide relies on annexes to the MLPA and SSA which they claim contemplate electronic valuations. However, the plain language of the representation and warranty requires an appraisal, and Countrywide's experts have readily conceded that an electronic valuation is not an appraisal, and in fact, contains less information and is not as reliable. Sheth Aff. Ex. 112, at 837:17-839:16; Sheth Reply Aff. Ex. 44, at 183:16-185:7; *id.* Ex. 39, at 16-19.

125.[6] These on-point admissions are not undermined by subsequent testimony from those same executives that they "don't recall" or "don't remember" their earlier statements. CSMF ¶ 81. That testimony is the paradigm of a feigned factual dispute.

As to whether Countrywide's breach had a material and adverse effect on MBIA's interest in the loan, Countrywide purports (Opp. 17) to raise a dispute, but in fact Countrywide's argument goes to whether there was a breach in the first instance.[7] Specifically, Countrywide asserts that Mr. Butler "concluded in his expert report that the use of electronic valuations or stated value programs does not breach the 'qualified appraiser' representation." (Opp. 17.) But this mischaracterizes Mr. Butler's report. Mr. Butler could not and did not opine upon the legal meaning of representations and warranties and when they are breached.[8] Rather, the relevant portion of his report for present purposes is his description of the types of property valuations, if any, actually located in the loan files, Sheth Reply Aff. Ex. 1—and as to 1,423 loans in the random sample, he found that the loan file did not contain an appraisal completed by a qualified appraiser, *see* Butler Aff. ¶ 6 & Ex. 1. That factual predicate, together with the plain language

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[6] Countrywide's experts and witnesses made similar concessions. *See* Sheth Aff. Ex. 116, at 119:24-121:14 ("an AVM isn't completed by a licensed appraiser, so if . . . [the representation and warranty] says it's a licensed appraiser, AVM doesn't fit"); *id.* Ex. 112, at 837:17-839:2 (AVMs provide "automated values based on information in their databases rather than relying on an appraiser to individually research each property and visit the property and do a physical inspection"); *id.* Ex. 117, at CWMBIA-G0000087252, CWMBIA-G0000087345 (an AVM "does not take into account an appraiser's input," and "[d]oesn't replace the appraiser since this is database information only and a completely automated product"). "Licensed" appraiser is equivalent to "qualified" appraiser because it was the industry standard from 2004-2007 to utilize licensed appraisers. *See, e.g.*, *id.* Ex. 112, at 839:23-840:17.

[7] Countrywide's failure to dispute that this breach materially affected MBIA's interest in the loans is not surprising given that (1) Countrywide's own practice was to rate a loan SUS if the appraisal was missing, Sheth Aff. Ex. 107 (Loan Nos [redacted]; (2) Ms. Godfrey admitted that "in general there are some benefits of using a licensed appraiser that relate to what is behind the license; that is a demonstrated level of knowledge, experience and professionalism, and adherence to code of ethics," *id.* Ex. 112, at 841:4-14; and (3) Countrywide has recognized that it could submit repurchase demands to third party originators and correspondent lenders if they sold loans to Countrywide that did not contain an appraisal performed by a licensed appraiser, *id.* Ex. 118, at CWMBIA0008726791 ("Loans may be subject to repurchase if the appraiser does not meet the licensing requirements.").

[8] Indeed, in its October 19, 2012 Motion to Strike the Butler Underwriting Report, the Butler Rebuttal Report, and the Butler Affidavit ("Mot. To Strike"), Countrywide acknowledged that "expert witnesses should not . . . offer opinion as to the legal obligations of parties" (Mot. To Strike 20), and are not "qualified to offer an opinion as to whether [the Mortgage Loans] 'comply with the representations and warranties' set forth in the relevant contractual documents" (*id.* at 21).

of Countrywide's representation and warranty that an appraisal by a qualified appraiser had been performed, demonstrates the absence of any genuine dispute that Countrywide materially breached the appraisal representation and warranty.

2. Loans That Indisputably Breached The HELOC Representation And Warranty That "No Default" Exists

As MBIA explained (Br. 21-24), the Mortgage Loan Purchase Agreements for the HELOC Securitizations contain a representation and warranty that "*no default* exists under any [applicable] Mortgage Note or [applicable] Mortgage Loan." Sheth Aff. Ex. 33, at § 3.02(xxxv) (emphasis added), *id.* Ex. 34, at § 3.02(xxxvii), *id.* Exs. 35-41, at § 3.02(a)(36). "Default," in turn, is defined in the "Mortgage Note," an agreement signed by the borrower and lender (often Countrywide), to include, *inter alia*, "any misrepresentation" by the borrower "whether in [the] application, in this Agreement, or in the Mortgage." *See, e.g.,* Sheth Reply Aff. Ex. 15, at CWMBIA-D0012998919; *see* Butler Aff. Ex. 2. Thus, according to the plain language, a borrower misrepresentation is a "default" under the Mortgage Note and a breach of the "no default" representation and warranty. Under New York law, that plain language controls, and extrinsic evidence is inadmissible. *See Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 13 N.Y.3d 398, 403 (2009) ("when parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms") (internal cite marks omitted).

Attempting to escape this plain language, Countrywide relies (Opp. 21-24) on just such extrinsic evidence. Specifically, Countrywide asserts, relying on purported industry custom concerning a "*no fraud*" representation and warranty, that a "*no default*" representation and warranty cannot be read to encompass misrepresentations by the borrower. This extrinsic evidence is inadmissible in view of the plain language discussed above and thus should be rejected.[9] But even if considered, it does not support Countrywide's position. As Countrywide admits, a "no fraud" representation and warranty covers fraud by borrowers, appraisers, and mortgage brokers. CSMF ¶ 87. The "no default" representation and warranty, on the other hand,

[9] Countrywide's reliance (Opp. 22) on Fannie Mae Seller Guides should be rejected for the same reason.

covers only *borrower* misrepresentations (and non-payments) and thus cannot possibly be "expanded" (by custom or otherwise) to encompass misrepresentations by *others*. *See, e.g.*, Sheth Reply Aff. Ex. 15, at CWMBIA-D0012998919. Thus, "industry custom" relating to a "no fraud" representation and warranty [10] is irrelevant to the meaning of the "no default" representation and warranty in the HELOC Securitizations.[11]

Countrywide cites (Opp. 21) dictionaries to suggest that "default" can only mean failure to repay debt. But dictionary definitions cannot override definitions in the relevant documents. *See Riverside*, 13 N.Y.3d at 404 ("[w]here the language chosen by the parties has a definite and precise meaning, there is no ambiguity") (internal cite and quotation marks omitted). In any event, other dictionary definitions are entirely consistent with the relevant documents: for example, *A Dictionary of Modern Legal Usage* 255-56 (2d ed. 1995), primarily defines "default" as "failure to act when an action is required." Here, as defined in the mortgage documents, the "failure to act"—the default—is the failure to abide by the borrowers' obligations, including the promise to not make misrepresentations in connection with the application. *See* Sheth Reply Aff. Ex. 15, at CWMBIA-D0012998919.[12]

Countrywide next claims that MBIA's course of conduct *regarding reduced-documentation loans* shows that MBIA "tacit[ly] recogni[zed]" (Opp. 23) that it would be responsible for losses borne by borrower fraud. But as Countrywide itself has recognized, while reduced-documentation loans are likely to be riskier than full-documentation loans, this is not because of borrower fraud. *See* Sheth Aff. Ex. 158; Sheth Reply Aff. Ex. 16, at CWMBIA0012017478 (Countrywide's Technical Manual provided that the limited income

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[10] Countrywide's position is further undermined by BAC's conclusion in 2010 that its Transaction Documents should be modified to "[e]xpressly exclude R&W re: borrower fraud." Sheth Reply Aff. Ex. 14.

[11] Countrywide's evidence of industry custom is also contradicted by documents in which its fraud investigators described income and occupancy misrepresentations on MBIA-wrapped loans as "existing defaults," in accord with the plain language of the Transaction Documents and the Mortgage Notes. *See, e.g.*, Concannon Aff. Ex. 83.

[12] Nor do other "definitions" suggest otherwise. For instance, "MBIA's own glossary of terms" (*see* Opp. 21 n.34) describes default (1) by a securitization issuer, not a borrower; and (2) to include conduct in addition to nonpayment. *See* Concannon Aff. Ex. 123.

verification permitted by reduced documentation programs "*does not* eliminate the need to analyze and evaluate the borrower's ability and willingness to repay the mortgage debt. . . . The purpose of stated income programs is to provide expedited processing for qualified loans and credit worthy borrowers."). Thus, MBIA's approach to reduced-documentation loans says nothing about its assumptions regarding borrower fraud.[13]

Countrywide's claim (Opp. 24-25) that MBIA cannot rely on subpoenaed information should be rejected out of hand because Countrywide stipulated that subpoenaed documents from the employers and/or accountants of borrowers are presumptively authentic and non-hearsay.[14] Even though the stipulation permits Countrywide to rebut the presumption, Countrywide has done so only as to a small sub-set of these documents, and thus its argument cannot extend to the hundreds of documents it does not dispute or the loans to which those documents pertain.

Finally, even though Countrywide's own internal fraud database clearly stated "Fraud Confirmed" for 97 loans, Countrywide now argues (Opp. 27-28) that the evidence is equivocal. Those assertions are baseless. For example, as to Loan No. 54573654, Countrywide claims that it is "unclear" (Opp. 27) whether the borrower misrepresented his social security number. However, all three internal search engines run by Countrywide's investigator reported that the borrower was not the best match for the social security number, and Countrywide declined to make another loan to this borrower on that very basis. Sheth Reply Aff. Ex. 5.[15] Countrywide's obfuscation of its records should not be credited and does not raise any genuine dispute of fact.[16]

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[13] As to *Countrywide's* course of conduct, MBIA did not "agree[]" (Opp. 24) that Countrywide never repurchased early payment default ("EPD") loans (*i.e.*, loans that missed one of the first three payments or so); MBIA was responding to a different question on the email chain about forwarding an invoice. *See* Concannon Aff. Ex. 62. In any event, the reason why Countrywide did not repurchase EPD loans had nothing to do with whether those loans involved borrower fraud; rather, the Transaction Documents simply did not require repurchase of EPD loans. Countrywide's own witnesses confirmed that EPD loan repurchase was a feature only of whole-loan trades, not securitizations. Sheth Aff. Ex. 168, at 22:20-23:4; *id.* Ex. 160, at 559:14-561:8; *id.* Ex. 167, at 59:15-60:2.

[14] Pursuant to the Stipulation and Order Regarding Admissibility of Documents Produced in Response to Borrower Subpoenas, dated February 26, 2012, "*All Borrower Records*," as defined above, produced in response to the Subpoenas, are presumptively authentic and non-hearsay." Sheth Reply Aff. Ex. 4.

[15] In its effort to manufacture a factual dispute where none exists, Countrywide discusses several loans from the CES Securitizations where MBIA did not even move for summary judgment, because the CES Securitizations did not contain the "No Default" representation and warranty. As to several other loans that were included in MBIA's motion, where Countrywide's own fraud investigators "confirmed fraud," Sheth Aff. Ex. 130, Countrywide attempts

Countrywide's opposition brief does not dispute MBIA's showing (Br. 16-17) that this category of breach materially and adversely affected MBIA's interest in the loans.

3. Loans That Indisputably Breached The Representation And Warranty That The MLS Contain Accurate Information

As MBIA explained (Br. 24-28), this category consists of loans whose characteristics were materially and falsely reported on the MLS, contrary to Countrywide's representation and warranty that the MLS was true and correct in all material respects. Countrywide's responses (Opp. 28-32) at most raise feigned disputes of fact.

Countrywide argues (Opp. 28-29) that the MLS representation and warranty applies only to inaccurate information at the *pool* level. But the plain language of the Transaction Documents provides that the MLS representation and warranty relates to "each Initial Mortgage Loan" or to "the Mortgage Loans," not the pool of loans. *See* Sheth Aff. Exs. 51-56, at § 2.03(b)(7); *id.* Exs. 33-34, at § 3.02(iv), *id.* Exs. 35-41, at § 3.02(a)(4). Countrywide's argument should therefore be rejected as a matter of law.

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to feign factual disputes to avoid summary judgment. Opp. 27-28; CSMF ¶¶ 96, 98. However, even a cursory glance at Countrywide's fraud investigation case summaries reveals that there is no genuine factual dispute that fraud occurred. *See* Sheth Reply Aff. Ex. 42 (Loan No. [redacted] FBI Investigation confirming Countrywide Quality Control audit findings of a "confirmed occupancy misrepresentation and suspected [borrower's] income was overstated," that "the Borrower would not have qualified for any of the loans had her actual income been known," and "another undisclosed property owned by the Borrower."); Concannon Aff. Ex. 223 (Loan No. [redacted] Countrywide Fraud Risk Management found that "[a]ll of the properties held by the [borrower] appear to be vacant lots or undeveloped areas per LandSafe's virtual data and SiteX Data . . . Therefore, it is recommended that this Borrower be referred to Fraud Investigations as a perpetrator of fraudulently originated loans, as well as possible property flipping and investment schemes."). Moreover, because the FACTS database's "Confirmed Fraud" findings for each of these loans are dated *after* the case summaries, there can be no question that fraud was confirmed for such loans. Sheth Aff. Ex. 130.

[16] Countrywide's other attempts to explain away its own findings of fraud are similarly without basis and do not suffice to raise a *genuine* issue of disputed fact. Countrywide argues that, even where the borrower made misrepresentations on the loan application, if there were no red flags in the loan file that would have alerted the underwriter to investigate potential fraud, then the "No Default" representation and warranty would be inapplicable. (Opp. 21, 27-28; CSMF ¶ 98, 100) (discussing Loan Nos. [redacted]. However, the "No Default" representation and warranty provides no such exception, and is breached upon a showing of borrower fraud. *See, e.g.*, Sheth Aff. Exs. 35-41, at § 3.02(a)(36) ("*no default* exists . . .") (emphasis added); *see also id.* Ex. 33, at § 3.02(xxxv); *id.* Ex. 34, at § 3.02(xxxvii). In fact, a default under the Mortgage Note is broadly defined to include even post-origination fraud. *See* Sheth Reply Aff. Ex. 15, at CWMBIA-D0012998919-20 (where the borrower promises that the borrower "ha[s] not made *and will not make* any misrepresentation in connection with my Account," and that the borrower "*will not use* or allow use of the Real Property for any illegal purpose") (emphasis added).

Countrywide cannot seriously dispute Mr. Butler's factual findings of inaccuracies in the MLS because Ms. Godfrey withdrew the entirety of her rebuttal report relating to all of Mr. Butler's MLS findings. Sheth Aff. Ex. 148. Instead, Countrywide disputes (Opp. 32) Mr. Butler's findings of MLS inaccuracies as to a mere *2* out of these 1,416 loans. That dispute evaporates upon scrutiny: (1) for Loan No. [redacted] which Mr. Butler determined was a third lien (contrary to the MLS' identification of it as a second lien), the presence in the file of a signed form stating that the borrower would pay off the second lien as a condition of closing cannot prove that the second lien was actually paid off; (2) for Loan No. [redacted], which Mr. Butler found to have an actual combined loan-to-value ratio ("CLTV") of 104.5% (contrary to the MLS's statement of 95%), Countrywide improperly relies on a variance letter that was not contained in the loan origination file.[17] Even if Countrywide could raise a factual dispute as to those 2 loans, it fails to do so as to the remaining 1,414 loans. While Countrywide may claim that the 2 loans are "just two of hundreds of such examples" (Opp. 32), it identifies no other "examples." Thus, MBIA's findings as to these 1,414 loans are uncontested.

Turning to whether the breaches materially and adversely affected MBIA's interest in the loans, Countrywide contends (Opp. 30-31) that Mr. Butler's analysis of the inaccuracies in the MLS "rests on faulty assumptions" about the relationship between certain loan characteristics and credit risk. But Countrywide's argument erroneously relies on a review of loan performance. As this Court has ruled, under New York Insurance Law provisions relevant to MBIA's breach of warranty claim, the relevant issue is whether the *risk* of the securitizations was increased on day one of the transaction; *ex post* loan performance is not relevant to that evaluation. *See* Jan. 3, 2012 Order at 15.[18] As a matter of law, this disposes entirely of

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[17] Variance letters contain certain requirements or parameters for loans purchased by Countrywide from correspondent lenders that may differ from Countrywide's underwriting guidelines. A copy of the variance letter should be present in the loan origination file to confirm that the loan was acquired as part of a pool to which the variance letter applies, Sheth Reply Aff. Ex. 43, at CWMBIA0009464205, and that the terms of that particular variance letter are in effect for that loan, *see id.*

[18] Consistent with his opinion, *see Assured Guar. Municipal Corp. v. Flagstar Bank, F.S.B.*, No. 11-CV-2375, 2012 WL 4373327 (S.D.N.Y. Sept. 25, 2012), Judge Rakoff recently observed during the *Assured v. Flagstar* trial, that the relevant issue is the "risk at the time the loan was approved," not "whether in hindsight [the borrower] was

Countrywide's reliance on the work of its expert, Dr. Hausman, who exclusively analyzed the relationships between loan characteristics and credit risk on the basis of *ex post* loan performance. *See* Sheth Aff. Ex. 165, at ¶ 24.[19]

Countrywide also points (Opp. 30) to MBIA's receipt of third-party KPMG's report of inaccuracies in the loan tapes, after which MBIA nonetheless proceeded to insure the Securitizations. But this argument confuses reliance with materiality. As explained in detail in MBIA's Opposition To Countrywide's Motion For Summary Judgment (at 4), New York Insurance Law § 3106 requires only that MBIA establish that Countrywide's breaches of representations and warranties were material to the risk insured, not that MBIA justifiably relied on those representations. Indeed, the entire purpose of the representations and warranties was to allow MBIA to rely on them as "insurance policies" against any possibility that facts regarding the loans were not as Countrywide represented. *See Assured Guar. Mun. Corp. v. Flagstar Bank*, Index No. 11 Civ. 2375, 2012 WL 4373327, at *6 (S.D.N.Y. Sept. 25, 2012) ("[t]he critical question is not whether [the buyer] believed in the truth of the warranted information . . . but whether [the buyer] believed the buyer was purchasing the seller's promise as to its truth") (quoting *CBS Inc v. Ziff-Davis Publishing Co.*, 75 N.Y.2d 496, 503 (1990)).

There remains only Countrywide's conclusory assertion that Mr. Butler's determination of which data discrepancies increased the credit risk of the loan is "flawed" and "arbitrary." (Opp. 31.) But Mr. Butler's determination is neither flawed nor arbitrary. As with many of the other arguments in its Opposition, Countrywide's assertion is belied by Countrywide's own

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able to pay off the loan," and the "fact that later on the loan turned out to be fully payable is...completely irrelevant." Sheth Reply Aff. Ex. 45, at 1308:3-16.

[19] Even aside from Countrywide's persistently incorrect focus on *ex post* analysis, its denial of a material effect on MBIA's interest in the loans fails for additional reasons. *First*, Countrywide's experts relied on the loan tapes without correcting for the undisputed errors that Mr. Butler found in reviewing the loan files. *See* Sheth Aff. Ex. 154, at 94:12-95:12; Sheth Reply Aff. Ex. 17, at 54:13-57:8; *id.* Ex. 18. *Second*, two of its experts (Dr. Hausman and Dr. Hubbard) reached inconsistent results on the impact of cash-out refinance on loan performance, and Dr. Hausman had "[n]o [idea] at all" why. *See* Sheth Aff. Ex. 154, at 232:5-14. *Third*, these experts also diverged on whether reduced-documentation loans are less likely to perform than full-documentation loans. *Compare* Hausman Aff. ¶ 13, *with* Sheth Aff. Ex. 158, at 1.

contemporaneous documents and the sworn testimony of its witnesses, which largely track Mr. Butler's analysis, *see* SUF ¶¶ 109-132, and confirm, for example, that even a slight increase in CLTV raises the credit risk of a loan. *See* Sheth Aff. Ex. 116, at 258:12-259:10.

4. Loans That Indisputably Breached The Representation And Warranty That The Mortgage Files Are Complete

As MBIA explained (Br. 34-35), the HELOC Transaction Documents define the Mortgage File to include a number of important documents such as the Mortgage Note. Mr. Butler found that 460 loans were missing one or more documents that were required under the representation and warranty to be included in the loan files. *Id.* at 35.

First, Countrywide misconstrues (Opp. 34) the findings of its own experts. For 17 loans that Mr. Butler identified as missing final title policies, Countrywide claims that its expert (Ms. Lisa Murphy) found that "a final title report is not required." In fact, Ms. Murphy's statement was limited to "second mortgages with an original balance *less* than $100,000.00." Butler Aff. Ex. 10; Sheth Aff. Ex. 194 (emphasis added). Because Countrywide's proffered loan review expert (Ms. Godfrey) agrees with Mr. Butler that all 17 of these loans have loan amounts *over* $100,000.00, there is simply no dispute that these loans were in breach. *See* Butler Aff. Ex. 10.[20]

Second, Countrywide tries (Opp. 34) to dispute that a "grant deed" is not required to be included in the Mortgage File, presumably because those words are not found in the Mortgage File definition. But a "grant deed" is part and parcel of the mortgage given that it evidences a transfer of ownership of the underlying property, and thus is included within the definition of "Mortgage File."[21] Thus, there is no question that the 74 loans that are missing the applicable

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[20] Countrywide's claim (Opp. 34 n.53) that Ms. Godfrey was able to locate two Mortgage Notes that Mr. Butler had identified as missing is demonstrably false. Even a cursory glance at the documents Ms. Godfrey identified reveals that they are not, in fact, the missing second lien Mortgage Notes (otherwise known as "Home Equity Line of Credit and Disclosure Agreements"). Rather, for one loan, Ms. Godfrey points to a *first lien* note, Sheth Reply Aff. Ex. 12, and, for the second loan, Ms. Godfrey points to a Home Equity *Confirmation Agreement*, *id.* Ex. 13.

[21] When it is required, a grant deed transfers ownership of the collateral property. For example, if a property is owned by Mr. and Mrs. Jones, but a loan is made only to Mr. Jones, Mrs. Jones would have to "grant" her interest in the property to Mr. Jones. This transfer of interest would be reflected in a grant deed. In addition, in some jurisdictions, grant deeds are used to transfer ownership in the property about to be mortgaged in the course of routine buy/sell transactions. As such, the grant deed is included within the definition of Mortgage File.

"grant deed" breached that representation and warranty. Butler Aff. Ex. 10, Sheth Aff. Ex. 194.

Finally, Countrywide's attempts to argue that missing Mortgage File documents do not materially and adversely affect MBIA's interests on the ground that Ms. Murphy "unequivocally concludes that none of the allegedly missing documents had any adverse effect on MBIA." (Opp. 34.) But despite her conclusory statement, even Ms. Murphy concedes that missing Mortgage File documents "do *have the potential to impact the performance of the Securitizations*," Sheth Reply Aff. Ex. 2, at 8 (emphasis added), and specifically refers to missing final title policies and missing recorded mortgages as "*material* findings," *id.* (emphasis added). So too, in *Financial Security Assurance, Inc. v. Bay View Capital Corp.*, No. 03 Civ. 7591 (S.D.N.Y. 2006), involving a financial guarantor and representations and warranties regarding the completeness of loan files, Judge Hellerstein held on summary judgment that the absence of a recorded leasehold mortgage impacted a financial guarantor because "it is important for the guarantor to know that there is an equity and he can only know that if he can examine the lease and an encumbrance on the lease." Sheth Reply Aff. Ex. 9, at 18. Judge Hellerstein also held that missing title insurance policies materially breached the representations and warranties. *Id.* at 58-64.

B. This Court Has Already Approved Sampling

The categories of loans just discussed are based on MBIA's analysis of a random sample of 6,000 loans in the pools; once such findings are extrapolated to the Securitizations, some 56% of the loans breached one or more representations and warranties, a figure sufficiently high to constitute a material breach of the entire Insurance Agreements as a matter of law.

Countrywide argues (Opp. 5, 35-39) that MBIA's sampling method is improper. But this Court has already resolved that issue. Specifically, on December 22, 2010, the Court granted MBIA's motion *in limine* for a decision to use statistical sampling to present evidence to prove its fraud and contract claims and to prove damages. Dec. 22 Order, at 1. The Court rejected Countrywide's objections and indeed found "troubling" their suggestion that the Court lacked "impartiality" if it approved MBIA's use of sampling. *Id.* at 12 n.2. To the contrary, this Court

gave Countrywide ample opportunity to contest the use of sampling in general as well as MBIA's proffered methodology and its application to *this specific sample*. This Court reached its decision only after "[a]n evidentiary hearing was held on September 27, 2010, at which MBIA presented its expert witness, statistician Charles D. Cowan, Ph.D., for direct and cross-examination. Dr. Cowan testified about his proposed method of sampling the [Securitizations] . . . at issue in this matter." *Id.* at 1-2. Since this Court's decision, Countrywide has declined to accept this Court's invitation to use its "own sampling chosen in a statistically valid manner," *id.* at 13, to rebut MBIA's proof. Indeed, two of Countrywide's experts have endorsed or explicitly declined to object to Dr. Cowan's approach. *See* Sheth Aff. Ex. 154, at 60:2-61:15 (Dr. Hausman explaining that Dr. Cowan did "not introduce any biases or errors into the sample" and that the sampling procedure and extrapolation are "correct."); Sheth Reply Aff. Ex. 10, at 92:2-9 (another Countrywide expert testifying that he does not "object[] to the mechanical processes by which Doctor Cowan goes from those numbers [*i.e.*, Mr. Butler's findings] to an estimate of the population as a whole").

Against this backdrop, Countrywide's renewal of the argument should thus be rejected under the law-of-the-case doctrine. *See, e.g.*, *Martin v. City of Cohoes*, 37 N.Y.2d 162, 165 (1975) ("law of the case" doctrine provides that "when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned"). In any event, Countrywide's arguments against sampling lack merit.

First, Countrywide argues (Opp. 37) that sampling is inappropriate because neither party will actually review all the loans at issue. But that is the whole point of sampling—to obviate the need for the parties (and this Court) to review each one of the approximately 389,000 loans in the Securitizations. Proceeding by sampling and extrapolation "sav[es] the parties and the court from significant litigation time and may significantly streamline the action without compromising either party from proving its case." Dec. 22 Order, at 13.

Second, Countrywide contends (Opp. 37) that sampling and extrapolation are inappropriate because it needs notice and an opportunity to cure for specific loans. But

Countrywide has indisputably received the requisite notice: Since at least September 2008, when MBIA filed its complaint, Countrywide has been aware that MBIA's reunderwriting review found defects in about 90% of the loans reviewed. Sheth Aff. Ex. 1, at ¶ 68; *id.* Ex. 2, at ¶ 80; CSMF ¶ 136. Moreover, Countrywide had knowledge of defective loans from its "Loan Auditor" databases, which tracked SUS loans, and the "FACTS" database, which tracked instances of suspected or confirmed fraud in Countrywide's origination and underwriting. (*See* Br. 36-37). Countrywide also had notice of defective loans in the random sample since February 27, 2012, when the Butler Underwriting Report was served. Despite such notice, Countrywide has agreed to repurchase only a nominal percentage of defective loans.[22]

C. The Court Has Already Ruled That Rescissory Damages Are Appropriate

Given this Court's ruling that MBIA "may seek rescissory damages upon proving all elements of its claims for . . . breach of representation and/or warranty," *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 936 N.Y.S.2d 513, 527 (N.Y. Sup. Ct. 2012), Countrywide's argument is foreclosed by the law-of-the-case doctrine. *See, e.g.*, *Martin*, 37 N.Y.2d at 165. In any event, it is meritless.

MBIA did not waive its claim for rescissory damages against Countrywide by continuing to pay claims and accept premiums under the Note Guaranty Insurance Policies (HELOCs) and the Certificate Guaranty Insurance Policies (CESs) ("Policies"). Rather, MBIA had no choice but to honor the Policies. As the Court held in its January 3 Order, rescission of the Policies is "impractical, if not impossible under the Governing Transaction Documents," which provide that MBIA "unconditionally and irrevocably guarantees" payments under the Policies." *MBIA,* 936 N.Y.S.2d at 523. It would be plainly inequitable to deny MBIA the right to receive premiums due under Policies that it must continue to honor by paying claims to the Trusts for the benefit of innocent Certificateholders (especially when the premiums MBIA is collecting are so minimal

[22] Even if there were a genuine dispute regarding Countrywide's receipt of notice and an opportunity to cure, that would be relevant only to the claim for damages from breach of the repurchase obligation, not the claim for rescissory damages based on material breach of the entire Insurance Agreements.

relative to the claims it has paid out and will continue to pay out). There is no risk of MBIA receiving a windfall because "should MBIA prove its case, rescissory damages *minus premiums received* will make MBIA whole without providing a windfall." *Id.* (emphasis added).

Judge Crotty reached the same conclusion in *Syncora*. There, as here, that the policies remained in effect and the insurer continued to receive premiums did not prevent Judge Crotty from holding that "[t]here is no question as to the Court's equitable power[]" to award "relief equivalent to rescission, namely claims payments *less premiums*" (*i.e.*, rescissory damages), if, among other things, there has been "a breach in the contract which substantially defeats the purpose thereof." *Syncora*, 2012 U.S. Dist. LEXIS 84937 at *30-31 (emphasis added).

By contrast, Justice Kornreich's decision in *Assured Guaranty Corp. v. DLJ Mortgage Capital, Inc.*, No. 652837/2011 (N.Y. Sup. Ct. Oct. 11, 2012) (cited at Opp. 42), is simply wrong. Not only does it ignore both this Court's January 3 Order and Judge Crotty's decision in *Syncora*, it is based on a series of cases holding that acceptance of benefits under a contract waives the right to *rescission*. Slip op. at *17. Neither MBIA here nor Assured in *Flagstar*,[23] is seeking rescission of the Policies against the Certificateholders; rather, both plaintiffs are seeking rescissory damages from the Sponsor. As this Court held, rescissory damages are available here precisely because rescission is "impractical, if not impossible."

Countrywide's argument that rescissory damages are barred by the "sole remedy" provisions in certain transaction documents is also wrong because, *inter alia*, only one of the numerous provisions on which MBIA relies incorporates any such limitation and, as Judge Crotty correctly explained in *Syncora*, the repurchase remedy is an impractical and incomplete remedy under the circumstances where a majority, rather than an isolated few, loans breach the representations and warranties.[24]

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[23] *Id.* at *14.

[24] *See also* MBIA's Mem. Of Law in Opp. to Countrywide's Mot. for Sum. Judg't, at 32-33. Justice Kornreich's holding in *Assured* on this point was based on different language, and in any event was incorrect. Her finding that "[t]he Insurers are third-party beneficiaries of the PSAs with all the rights of the Certificateholders," Slip op. at *25, was not supported by the text of the PSAs at issue, which stated that Assured is a "third-party beneficiary of the Agreement to the same extent as if it were a party hereto." The Certificateholders were not parties to the PSAs, and

Countrywide's argument that rescissory damages are barred because MBIA has an adequate remedy at law—specifically, compensatory damages for claims paid out as a direct result of Countrywide's misrepresentations—is just another attempt to circumvent the Court's January 3 Order. That Order expressly held that MBIA "is not required to establish a direct causal link between defendant(s) misrepresentations and MBIA's claims payments," and that MBIA "may seek rescissory damages upon proving all elements of its claims for fraud and breach of representation and/or warranty." *MBIA,* 936 N.Y.S.2d at 527. This holding would be nullified if Countrywide's "adequate remedy" argument were correct.[25]

Finally, Countrywide's argument (Opp. 44) that rescissory damages are barred because its experts opined that Significantly Defective Loans performed no worse than other loans again ignores this Court's January 3 Order. The predicate for rescissory damages is a material breach of Countrywide's representations and warranties *as of the time the policies were issued*; subsequent events, namely performance of the loans, are irrelevant.

II. ON MBIA'S MOTION FOR SUMMARY JUDGMENT ON ITS CLAIM FOR BREACH OF COUNTRYWIDE'S REPURCHASE OBLIGATION, COUNTRYWIDE AGAIN FAILS TO RAISE A GENUINE DISPUTE OF FACT AND ITS LEGAL ARGUMENTS ARE ERRONEOUS

This separate branch of MBIA's motion for summary judgment focuses on Countrywide's persistent refusal to adhere to its contractual obligation to repurchase loans as to which Countrywide breached a representation and warranty in a way that materially and adversely affected MBIA's interest in the loans. Countrywide responds by arguing that a loan must be in default in order to qualify for repurchase, that there are other disputes of fact concerning whether loans qualify for repurchase, and that Countrywide's past conduct cannot be deemed an anticipatory repudiation of its repurchase obligations. Each argument fails.

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thus there was no basis to limit Assured in the same manner as Certificateholders. Moreover, Justice Kornreich ignored Judge Baer's contrary decision in another case brought by Assured involving the same provisions, *Assured Guar. Mun. Corp. v. UBS Real Estate Secs., Inc.*, 2012 U.S. Dist. LEXIS 115240 (S.D.N.Y. Aug. 15, 2012).

[25] Countrywide's assertion (Opp. 43-44) that MBIA's expert (Dr. Mason) "admits that MBIA has an adequate legal remedy" is belied by Dr. Mason's statement that "Benefit of the Bargain and Out of Pocket Damages are not adequate forms of relief for MBIA." Sheth Reply Aff. Ex. 19, at 6.

A. Text, Case Law, And Countrywide's Own Witnesses Refute Countrywide's View That The Loan Must Be In Default To Qualify For Repurchase

MBIA explained (Br. 8-14) that the Transaction Documents for all 15 Securitizations require Countrywide to repurchase loans as to which a representation or warranty has been materially breached, without any requirement that the loan has gone into default. *See* Sheth Aff. Exs. 33-34, at § 3.02; *id.* Exs. 35-40, at § 3.02(b); *id.* Ex. 41, at § 3.02(c); *id.* Exs. 42-43, at § 2.04(b); *id.* Exs. 45-50, at §§ 2.04(b), (d); *id.* Exs. 51-56, at § 2.03(f). Those provisions plainly suffice to establish MBIA's position. Additional confirmation is provided in the Transaction Documents for 11 of the 15 Securitizations, which contain a provision that contemplates repurchase of loans "*that [are] not in default or as to which default is not imminent*," *id.* Ex. 48, at § 2.10 (emphasis added); *see also id.* Exs. 46-47 & 49-50, at § 2.10; *id.* Exs. 51-56, at § 2.05(a) (emphasis added); *Syncora Guar. Inc. v. EMC Mortg. Corp.*, No. 09-CV-3106, 2012 U.S. Dist. LEXIS 84937 (S.D.N.Y. June 19, 2012) (repurchase remedy in a similar agreement did not require a showing that the loan had defaulted); *Assured Guar. Municipal Corp. v. Flagstar Bank, FSB*, No. 11-CV-2375, 2012 WL 4373327 (S.D.N.Y. Sept. 25, 2012) (same). Countrywide does not respond to this language, and its other arguments are unpersuasive.

At the threshold, Countrywide asserts (Opp. 7) that MBIA's motion is foreclosed by the Court's January 3, 2012 Order on MBIA's motion for partial summary judgment. But Countrywide ignores that this Court contemplated renewal of MBIA's argument before trial. Specifically, the Court noted that, "[w]hile MBIA has posited a strong argument, its contention is wholly based upon the Revolving Home Equity Loan Asset Backed Notes, Series 2006-E, and that securitization's Sales and Servicing Agreement," which was "insufficient to be extrapolated to all of the Securitizations." *MBIA,* 936 N.Y.S.2d at 526. MBIA has redressed any arguable deficiency in its present motion, which rests on a full record of all of the relevant Transaction Documents and discovery obtained in this action.

Countrywide also fails adequately to address Judge Crotty's decision in *Syncora*, 2012 U.S. Dist. LEXIS 84937, which held that materially identical repurchase provisions do not require that loans be in default. Contrary to Countrywide's assertion (Opp. 10 n.15) that *Syncora*

rested on different language and additional provisions not present here, Judge Crotty made clear that he would have reached the same decision even aside from those distinctions. *See* 2012 U.S. Dist. LEXIS 84937 at *12-13; *see also* Br. 10 n.13, 11 n.14.

Moreover, a new decision by Judge Rakoff, issued subsequent to MBIA's opening brief on this motion, involving agreements also materially identical to those here, followed *Syncora*, rejecting distinctions similar to those proffered by Countrywide here. *See Assured*, 2012 WL 4373327. The repurchase provision in *Assured* applied when a breach "materially and adversely affects the interest of the Issuer, the Noteholders or the Note Insurer in the related Mortgage Loan" and did not contain the additional provisions addressed in *Syncora*. *Id.* at *4. Judge Rakoff held that this provision was "nearly identical" to the *Syncora* provision. *Id.* Following *Syncora*, Judge Rakoff held that this provision "did not require the plaintiff to show that the breaches caused the loans to default," *id.*, and that "the causation that must here be shown is that the alleged breaches caused plaintiff to suffer an increased risk of loss," *id.* at *5. Judge Rakoff reasoned that, giving "adverse" its ordinary meaning of "opposed to one's interests," "a breach of contract that materially increased Assured's risk of loss would be adverse, because it was opposed to the insurer's interests." *Id.* at *4. He noted that "New York Insurance Law (1) defines warranty as 'any provision of an insurance contract which has the effect of requiring . . . the existence of a fact which tends to diminish, or the non-existence of a fact which tends to increase, *the risk of the occurrence of any loss*, damage, or injury within the coverage of the contract,' and (2) states that '[a] breach of warranty shall not avoid an insurance contract or defeat recovery thereunder unless such breach materially increases *the risk of loss*, damage or injury within the coverage of the contract.'" *Id.* at *5.[26] Finally, like Judge Crotty, Judge Rakoff noted that the Transaction Documents—as here—"do not mention 'cause,' 'loss' or 'default' with respect to the defendants' repurchase obligations." *Id.* He concluded that, "[i]f the

[26] Judge Rakoff also explained that the agreements, like those here, "as an alternative to the remedy of repurchase, contain cure provisions, and if a breach only occurred after the loan had already defaulted, the cure provision would have no meaning [because a defaulted loan cannot be cured]." *Id.*

sophisticated parties had intended that the plaintiff be required to show direct loss causation, they could have included that in the contract, but they did not do so, and the Court will not include that language now 'under the guise of interpreting the writing.'" *Id.*

To the extent further confirmation were needed, it is provided by the testimony of Countrywide's witnesses, who conceded that Countrywide "felt there was a . . . legal, contractual obligation" to repurchase breaching loans even if they were not in default. Sheth Aff. Ex. 105, at 142:20-143:8; *see also* MBIA Br. 12-14. Contrary to Countrywide's contention that this testimony "is not new" (Opp. 8), three of these witnesses (Messrs. Williams and Schloessman and Ms. Jewett) did not testify until after MBIA brought its motion for partial summary judgment. Countrywide's further contention (Opp. 9) that this testimony related to pre-2008 repurchases of loans sold to government-sponsored entities ("GSEs") is not borne out by the testimony, which makes no distinction between repurchase of loans sold to GSEs and loans in securitizations insured by monolines, and which indicates that Countrywide continued to repurchase performing loans from securitizations insured by monolines after 2008. *See, e.g.*, Sheth Aff. Ex. 161, at 1026:8-12, 1137:2-9; *id.* Ex. 183, at 310:3-19.

B. Countrywide's Repurchase Of 88 Loans Constitutes An Admission That Those Loans Are Eligible For Repurchase And, Once Extrapolated To The Securitizations As A Whole, That Countrywide Must Pay Repurchase Damages For Over 4,000 Loans

MBIA showed (Br. 14-16) that Countrywide breached its repurchase obligations by refusing to repurchase two categories of loans—in addition to the categories discussed in Point I.A, *supra*—that so clearly qualify for repurchase that Countrywide's obligation to do so is beyond reasonable dispute: (1) loans that its proffered expert (Ms. Godfrey) recommended for repurchase; and (2) loans that Countrywide itself rated as SUS.

As to the first category, Countrywide does not deny that Ms. Godfrey recommended repurchase of 88 loans in her July 3, 2012 rebuttal report. Sheth Aff. Ex. 68, at 6 n.4; *see also*

MBIA Br. 14.[27] In fact, by repurchasing these 88 loans, Countrywide has admitted that these loans qualified for repurchase and that it was contractually required to repurchase these loans. Moreover, consistent with the principles of sampling discussed above, once extrapolated from the random sample to the population of loans in the Securitizations, these 88 loans translate into over 4,000 loans with an original principal balance of $314 million. *See* Cowan Aff. Ex. 1. Yet Countrywide has failed to remit to the relevant Trusts the contractually defined purchase price for almost all of these loans.

Although the second category—1,099 loans that Countrywide rated SUS—of loans discussed in this portion of MBIA's motion (Br. 15-16) is not susceptible to extrapolation because they are not drawn from a random sample, they nonetheless provide another important and undisputed indicium of Countrywide's breach of its repurchase obligation. Although it is clear that these 1,099 loans qualify for repurchase, Countrywide has repurchased only 7 of them. As MBIA explained (Br. 15-16), these loans qualified for repurchase because they were rated by Countrywide itself as SUS—the worst rating a loan could receive. *See* Sheth Aff. Ex. 99, at CWMBIA0011001655 (an SUS loan poses a "[s]evere underwriting risk with limited or no compensating factors"). Countrywide does not dispute that it gave this rating to these loans; instead, it contends (Opp. 12-13) that such loans do not necessarily materially breach any representation and warranty and therefore need not be repurchased. But Countrywide's own documents refute that position, explaining that an SUS loan would "result in repurchase if/when investor becomes aware of issue(s)," and that, "[i]f reviewed, there is an unacceptably high probability of fallout, indemnification or repurchase." Sheth Aff. Ex. 99, at CWMBIA0011001655. In other words, Countrywide's documents make clear that inclusion of

[27] Countrywide waited until July 2012, well over 90 days upon discovery of the breaches of representations and warranties, before it repurchased 87 of these 88 loans. *See* Sheth Aff. Exs. 42-43, at § 2.04(b); *id.* Exs. at 44-50, § 2.04(d); *id.* Exs. 51-56, at § 2.03(f). As to 10 of the loans, MBIA submitted notice to Countrywide for repurchase over four years ago. *See* Sheth Aff. Ex. 98. As to the 77 remaining loans, MBIA gave notice on February 27, 2012 through the Expert Report of Steven I. Butler Regarding Countrywide's Underwriting Practices.

an SUS loan in the pool breaches one or more of Countrywide's representations and warranties and that the breach materially and adversely affects MBIA's interest in the loan.

Given this clear statement by Countrywide of its own position as to SUS loans before this litigation began, reasonable jurors would clearly reject Countrywide's current, *post-hoc* attempts to distract from that clear position. *First*, neither Ms. Simantel's testimony that a loan could be rated SUS for non-credit reasons (*see* Opp. 13) nor Ms. Godfrey's loan review (*see id.* at 13-14) can contradict Countrywide's contemporaneous assessment that SUS loans are "unacceptably" risky and thus constitute not just a breach, but a material one. *See* Sheth Aff. Ex. 99, at CWMBIA0011001655. *Second*, as to Countrywide's assertion that one-third of the SUS loans were so rated only for "procedural" (Opp. 13) reasons during a Quality Verification Document Questionnaire ("QVDQ") audit, Countrywide's own contemporaneous documents describe a loan's failure during the QDVQ audit as revealing a "considerable risk." Sheth Reply Aff. Ex. 11, at CWMBIA0012527496. No factual issue regarding breach or materiality exists here.[28]

C. Countrywide's Conduct Constitutes An Anticipatory Repudiation Of Its Repurchase Obligations

MBIA catalogued (Br. 40-44) Countrywide's repeated stonewalling and refusal to repurchase loans that failed to comply with its representations and warranties, and further explained that such conduct constitutes anticipatory repudiation under applicable case law. *See, e.g.*, *Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 462-63 (1998). Not surprisingly, Countrywide denies (Opp. 39) that it repudiated its obligations. But its unsupported denial is belied by the record evidence and hence does not preclude summary judgment.

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[28] MBIA discussed (Br. 37-38) an additional category of loans that breached Countrywide's representation and warranty that no loan had a CLTV ratio exceeding 100%. This category consists of 60 loans in the MLS and 10 loans from the random sample. Countrywide does not seriously contest the 60 loans. CSMF ¶ 189 (arguing only that MBIA is "vague and ambiguous as to the identity of the '60 mortgage loans'"). As to the other 10 loans, Countrywide makes conclusory statements that it disputes that certain of these loans have a CLTV greater than 100% without providing any specifics. Even assuming Countrywide has a genuine factual dispute (which it has not established), excluding these loans from the sample does not materially affect the number of loans in the random sample that materially breach a representation and warranty (approximately 56%).

Countrywide repurchased only a small number of loans submitted to it by MBIA, and for most of these loans, it waited until eight months after this action was commenced, and then further delayed these small number of repurchases for upwards of over a year. *See* MBIA Br. 7-8. Moreover, the extremely small number of loans that Countrywide *has* deigned to repurchase is powerful evidence in itself of Countrywide's repudiation. Even accepting Countrywide's assertion that it repurchased 764 loans, CSMF ¶ 17, that number still reflects an unconscionably low repurchase rate (relative to the total number of loans in the pools) of about 0.2%—a rate so low compared to the number of loans at issue in this motion (over 56% of the total number of loans in the Securitizations) that it evidences Countrywide's intent all along to delay and to frustrate the repurchase process for as long as possible.

Countrywide also fails sufficiently to dispute MBIA's direct evidence (Br. 40-44), including documents and sworn testimony by Countrywide witnesses, of Countrywide's repudiation of its repurchase obligations by: (1) dragging out the review of loans well beyond the 90 days provided under the Transaction Documents; (2) prioritizing other entities over MBIA; (3) deciding on repurchase based not on defects in the loans but on a "red faced" standard (*i.e.*, repurchasing only the loans that have the most egregious breaches); and (4) imposing a more burdensome process for monolines like MBIA than for GSEs. Countrywide "disputes" some of this evidence by citing witnesses who could not recall and, incredibly, by blaming *MBIA* for Countrywide's own delays. *See* CSMF ¶ 18. That does not suffice to raise a genuine dispute of fact.

CONCLUSION

This Court should grant MBIA's motion for summary judgment.

Dated: New York, New York
November 9, 2012

Respectfully submitted,

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APPENDIX

Loan Number	Butler Finding	Countrywide's Response from Summary Judgment Papers	MBIA's Reply
[redacted]	Appraisal not obtained from a qualified appraiser.	Regarding Loan No. [redacted] Mr. Lucco finds that even Mr. Butler did not find the appraiser to be unlicensed at the time of the appraisal. Godfrey Summary Report, Loan No. [redacted] at 5, Concannon Aff., Ex. 206. Rather, Mr. Butler finds the appraiser to have a trainee license, which Mr. Lucco concludes was likely due to a reporting error and does not call the appraisal into question. *See id.*	There is no genuine factual dispute that the appraisal was not performed by a qualified appraiser. According to Countrywide's proffered appraisal expert, Mr. Lucco, the appraisal was performed by a trainee as opposed to a qualified appraiser. Mr. Lucco concedes that, "[p]er the California Office of Real Estate Appraisers, the appraiser's license number appears to be a trainee number," Sheth Aff. Ex. 195, and that "[i]f the appraiser was in fact a trainee at the time the appraisal was performed, a supervisory signature would be required." *Id*. Here, it is undisputed that the appraisal did not contain any supervisory signature, and in his loan-level analysis, Mr. Lucco offers only speculation that "the appraiser *may have incorrectly reported his license number*." *Id.* (emphasis added). Such mere speculation, unsupported by any documentary evidence, cannot serve as a genuine dispute of fact warranting denial of summary judgment.
[redacted]	Material misrepresentation on the loan application: Subpoena documentation verifies that the employment information provided in the mortgage loan file was misrepresented. The application states the borrower is employed at [redacted] earning a monthly income of $4,666.67. However, the documentation obtained via subpoena consisted of a Certification of Business Records, which reveals that at the time the loan closed, the borrower was not ever employed at [redacted]	Loan No. [redacted] Based on a letter from the employer, Mr. Butler claims that the borrower was never employed at [redacted] *See* MBIAS00021101-03 at -03, Certificate of Business Records for [redacted] ("Cert for [redacted]"), dated Dec. 5, 2011, Concannon Aff., Ex. 133. Mr. Butler then leaps to the conclusion that the borrower was not employed at the time of origination and had a "true" DTI of over 311%. *See* Butler Summary Report for Loan No. 22970157, Concannon Aff., Ex. 155, at 4. But Mr. Butler ignores a verification of employment form in the loan file that confirms that the borrower worked for [redacted] which likely explains why the employer did not have a record of the borrower's employment years later. *See* CWMBIA-D0107580102, Pre-Closing Employment Re- Verification Checklist for [redacted] ("Pre-Closing Verification for [redacted]"), dated Mar. 27, 2003, Concannon Aff., Ex. 97. Mr. Butler also ignores 98 consecutive timely payments by the borrower. CWMBIA-G0000183204, Performance Data of Loan No. 22970157, 2011, Concannon Aff., Ex. 100. In other words, the borrower— who Mr. Butler claims has a "proven" DTI of 311%—has made over 8 years of payments on his loan, without missing a single one.	There is no genuine dispute of fact that the borrower was not an employee of [redacted], as the employee represented on his loan application. Countrywide concedes that the subpoena documentation obtained from [redacted] states that the borrower "is not no[w], nor ever has been an employee of [redacted] Sheth Aff. Ex. 22970157-D-2, at MBIAS00021103, as he indicated on his loan application, Sheth Aff. Ex. 22970157-A, at CWMBIA-D0023773558 (job title listed as [redacted] The only evidence Countrywide points to is a pre-closing employment re-verification checklist indicating that the temporary employee from Countrywide relied on the *borrower's own cell phone message* stating the company name and that he was an "outside sales person." Concannon Aff. Ex. 97. Such a verification that relies on the borrower's own cell phone message does not create a genuine dispute of fact in the face of subpoenaed documentation obtained from [redacted] that he "is not no[w], nor ever has been an employee." As set forth in MBIA's opening brief, a misrepresentation of employment or income demonstrably "increases the credit risk of the impacted loan, and as such, materially and adversely affects MBIA's interest in the loan." (Br. 23.) As such, Countrywide's repeated reliance on the *ex post* performance of the loan is inconsistent with this Court's January 3, 2012 Order, and irrelevant to whether the credit risk of the loan was increased at the time the loan was included in the Securitization.

Loan Number	Butler Finding	Countrywide's Response from Summary Judgment Papers	MBIA's Reply
[redacted]	Material misrepresentation on the loan application: Subpoena documentation verifies that the income documents provided in the mortgage loan file were misrepresented. The application states the borrower's monthly income is $6,100.00. However, the documentation obtained via subpoena consisted of Verification of Employment Letter dated 01/27/2012 from HR, [redacted] which reveals that the borrower's monthly income at the time the loan closed was $4,500.00.	Loan No. [redacted] Based on subpoenaed information, Mr. Butler claims that the borrower's actual income was $4,500 per month, not the $6,100 a month stated on his loan application. Butler Summary Report for Loan No. [redacted] Concannon Aff., Ex. 161, at 5. But the $4,500 figure comes from an unverified letter from the employer without any accompanying income documentation in support. MBIAS00059926, letter from [redacted] to R. Shoemaker, dated January 27, 2012, Concannon Aff., Ex. 139. And even if MBIA established an income discrepancy—which it has not—MBIA's interests have not been materially and adversely affected because this borrower made seven on-time payments before paying the loan off in full. CWMBIA-G0000183204, Performance Data of Loan No. [redacted] 2011, Concannon Aff., Ex. 100.	There is no genuine dispute of fact that the borrower misrepresented his income on the loan application. What Countrywide attempts to characterize as an "unverified letter from the employer"—printed on the employer's letterhead and provided in response to a subpoena—clearly states that the borrower's base salary during the relevant time period was $54,000 (or $4,500 per month), not the $6,100 per month stated on the loan application. Concannon Aff. Ex. 139. Furthermore, Countrywide makes no attempt to dispute the finding with respect to the co-borrower, who also misrepresented her income. Butler Aff. Ex. 2. Countrywide does not, and cannot, point to any documentary evidence that contradicts MBIA's finding that the borrower materially misrepresented his income on the loan application. As set forth in MBIA's opening brief, a misrepresentation of employment or income demonstrably "increases the credit risk of the impacted loan, and as such, materially and adversely affects MBIA's interest in the loan." (Br. 23.) As such, Countrywide's repeated reliance on the *ex post* performance of the loan is inconsistent with this Court's January 3, 2012 Order, and irrelevant to whether the credit risk of the loan was increased at the time the loan was included in the Securitization.
[redacted]	Material misrepresentation on the loan application: Subpoena documentation verifies that the employment and income information provided in the mortgage loan file were misrepresented. The application states that the borrower is employed at [redacted] as the owner, making a monthly income of $12,500.00. However, the documentation obtained via subpoena consisted of appendix A to Certification of Business Records, which reveals that at the time the loan closed the borrower was not employed and/or did not own [redacted].	Loan No. [redacted] Mr. Butler claims that the borrower's "actual income revealed through the subpoenaed documents" results in the borrower's debts exceeding his income by more than ten times. Butler Summary Report for Loan [redacted] Concannon Aff., Ex. 157, at 2. But this borrower managed to make 22 consecutive timely payments before paying off the loan in full, despite his allegedly overwhelming debt load. Moreover, the document on which Mr. Butler relies—MBIAS00041200 at -02, Concannon Aff., Ex. 138—is an unverified and inadmissible handwritten note from an employer, and therefore is not permissible "proof" on summary judgment.	There is no dispute of fact that the borrower was not employed with [redacted] as the borrower represented on his loan application. Countrywide does not, and cannot, point to any documentary evidence that contradicts the information in the documents obtained in response to the subpoena. As set forth in MBIA's opening brief, a misrepresentation of employment or income demonstrably "increases the credit risk of the impacted loan, and as such, materially and adversely affects MBIA's interest in the loan." (Br. 23.) As such, Countrywide's repeated reliance on the *ex post* performance of the loan is inconsistent with this Court's January 3, 2012 Order, and irrelevant to whether the credit risk of the loan was increased at the time the loan was included in the Securitization.

Loan Number	Butler Finding	Countrywide's Response from Summary Judgment Papers	MBIA's Reply
[redacted]	Material misrepresentation on the loan application: Subpoena documentation verifies that the income documents provided in the mortgage loan file were misrepresented. The application states the borrower's monthly income is $6,018.00. However, the documentation obtained via subpoena consisted of an hours worked report for 2003 and 2004 and a W2 for 2005, which reveals that the borrower's monthly income at the time the loan closed was $3,302.18.	Loan No. [redacted] Mr. Butler's allegation that the borrower committed fraud rests on the borrower's 2005 income, despite the fact that the borrower applied for the loan in 2004. *See* MBIAS00015063-80 at -70, letter from [redacted] to K. Fish enclosing Certification of Business Records and attached Exhibits, dated Nov. 15, 2011, Concannon Aff., Ex. 132; Loan Application for Loan No. [redacted], CWMBIAD0065227088-103 at -92, Uniform Residential Loan Application, dated Aug. 20, 2004, Concannon Aff., Ex. 95 (showing 2005 W-2 for a loan closed in 2004). The borrower's 2005 W-2 says nothing about whether the borrower lied on his application in 2004.	There is no dispute of fact that the borrower misrepresented his income on his loan application. Countrywide's claim that Mr. Butler relied on a 2005 W-2 Form to determine income for the year 2004 is incorrect. In fact, Mr. Butler used other records from 2004 to determine the 2004 income. More specifically, although the employer indicated that the borrower's 2003 and 2004 W-2s had been destroyed in accordance with the employer's document retention policy, Sheth Aff. Ex. [redacted]-D, at MBIAS00015066, the employer nevertheless provided MBIA with a record of the borrower's rate of pay and number of hours worked for 2004, *id.* at, MBIAS00015068-069, MBIAS00015080. Those documents, evidencing the borrower's 2004 income, confirmed that the borrower had significantly overstated his 2004 income on his loan application. Countrywide does not, and cannot, point to any documentary evidence that contradicts MBIA's finding that the borrower materially misrepresented his income on the loan application.
[redacted]	Material misrepresentation on the loan application: Subpoena documentation verifies that the income documents provided in the mortgage loan file were misrepresented. The application states that the borrower's monthly income is $6,800.00, but the documentation obtained from the subpoena reveals that the borrower's monthly income at the time the loan closed was only $4,383.98.	Loan No. [redacted] Once again, Mr. Butler concludes the borrower committed fraud based on a 2005 W-2 for a 2004 loan application. *Compare* CWMBIA-D0023043590-95 at -93, Uniform Residential Loan Application, dated Aug. 11, 2004, Concannon Aff., Ex. 91 (August 11, 2004 application) *with* CWMBIAS00029940, 2005 W-2 Form for Applicant [redacted] Concannon Aff., Ex. 91 (2005 W-2). The employer's verification even notes that the 2004 W-2 is missing. MBIAS00029994-97 at -96, Certification of Business Records for [redacted] with attached Appendix, dated Nov. 21, 2011, Concannon Aff., Ex. 135.	There is no genuine dispute of fact that the borrower misrepresented his income on the loan application. Countrywide's claim that Mr. Butler relied on the 2005 Form W-2 to determine income in 2004 does not create a genuine dispute of fact because other documents produced by the employer in response to the subpoena, namely, the employer's Payroll Register for 2004, reveals that, at the time the loan closed in August 2004, the borrower was paid a bi-weekly salary of $1,730.77—or $3,500 per month, almost half what he stated. Concannon Aff. Ex. 135, at MBIAS00029953-54. In addition, the borrower's 2005 Form W-2, which was from the same employer and only one year after origination, also confirms that the borrower misrepresented his income. In fact, Mr. Butler's decision to use that document was conservative in that it gave the borrower the benefit of the doubt of a higher actual income given that an individual's income from a given employer is likely to increase over time given inflation. As such, there is no evidence to contradict MBIA's finding that the borrower misrepresented his income. Countrywide does not, and cannot, point to any documentary evidence that contradicts MBIA's finding that the borrower materially misrepresented his income on the loan application.

Loan Number	Butler Finding	Countrywide's Response from Summary Judgment Papers	MBIA's Reply
[redacted]	Material misrepresentation on the loan application: Subpoena documentation verifies that the income documents provided in the mortgage loan file were misrepresented. The application states the borrower's monthly income is $4,000.00. However, the documentation obtained via subpoena consisted of 2005 W2s and payroll records, which reveals that the borrower's monthly income at the time the loan closed was $1,906.67.	Loan No. [redacted]: Yet again, Mr. Butler rests his claim on a 2005 W-2 for a 2004 loan. *Compare* CWMBIA-D0016710287-90 at -89, Uniform Residential Loan Application, dated Dec. 10, 2004, Concannon Aff., Ex. 88 with MBIAS00002066-79 at -68 &-72, Certification of Business Records for [redacted], *with* attached Exhibits, dated Oct. 31, 2011, Concannon Aff., Ex. 129 (showing 2005 W-2 for a loan closed in 2004 and a certification noting that the company was unable to locate the 2004 W-2).	There is no dispute of fact that the borrower misrepresented his income on the loan application. Countrywide's claim that Mr. Butler relied on the 2005 Form W-2 to determine income in 2004 is incorrect. Although the employer indicated that the borrower's 2004 W-2 was missing, Sheth Aff. Ex. [redacted]-D, at MBIAS00002068, the employer also stated that the "Payroll Journal shows this information," *id.* at MBIA00002068, and provided MBIA with the 2004-2005 Payroll Journal displaying the borrower's rate and hours billed for 2004-2005, *id.* at MBIA00002073-2079. This information included the borrower's income for December 2004, when the loan closed. *Id.* Those documents confirmed that the borrower had overstated his 2004 income on his loan application. Countrywide does not, and cannot, point to any documentary evidence that contradicts MBIA's finding that the borrower materially misrepresented his income on the loan application.
[redacted]	Material misrepresentation on the loan application: Subpoena documentation verifies that the employment and income documents provided in the mortgage loan file were misrepresented. The application states the borrower is employed at [redacted] as the owner, making a monthly income of $9,750.00. However, the documentation obtained via subpoena consisted of a statement from the business, which reveals that at the time the loan closed the borrower was not employed at [redacted]	Loan No. [redacted]: Mr. Butler claims that the borrower was never employed at '[redacted] based on a note from the employer. *See* MBIAS0003488-90 at -90, Certification of Business Records for [redacted] with attached Appendix, dated Nov. 10, 2011, Concannon Aff., Ex. 130. Mr. Butler therefore claims that the "true" DTI is "in excess of 1,000%." Butler Summary Report for Loan No. [redacted] Concannon Aff., Ex. 225, at 3. Mr. Butler ignores verification in the loan file showing that a CPA letter confirming the borrower's employment with [redacted] was obtained by the underwriter. *See* CWMBIA-D0017717675, WLD Quality Verification and Documentation Questionnaire for [redacted], dated Sept. 13, 2004, Concannon Aff., Ex. 90. Mr. Butler also ignores the borrower's 37 consecutive timely payments (over three years' worth), before paying his loan off in full. CWMBIA-G0000183204, Performance Data of Loan No. [redacted] 2011, Concannon Aff., Ex. 100.	There is no genuine dispute of fact that the borrower misrepresented his employment on his loan application. Countrywide concedes that the records obtained via employer subpoena state that [redacted] was not employed by [redacted] Sheth Aff. Ex. [redacted] D, at MBIAS00003490. The only documentation Countrywide points to in an effort to manufacture a dispute of fact, is a questionnaire filled out by a Countrywide employee which states that a CPA letter was obtained. Concannon Aff. Ex. 90. However, contrary to Countrywide's representation, that CPA letter in the loan file merely states that the borrower is "self-employed," not that the borrower was employed by [redacted] Sheth Aff. Ex. [redacted]-A, at CWMBIA-D0017717546. Accordingly, Countrywide does not, and cannot, point to any documentary evidence that contradicts MBIA's finding that the borrower materially misrepresented his employment on the loan application. Additionally, as set forth in MBIA's opening brief, a misrepresentation of employment "increases the credit risk of the impacted loan, and as such, materially and adversely affects MBIA's interest in the loan." (Br. 23.) As such, Countrywide's repeated reliance on the *ex post* performance of the loan is inconsistent with this Court's January 3, 2012 Order, and irrelevant to whether the credit risk of the loan was increased at the time the loan was included in the Securitization.

Loan Number	Butler Finding	Countrywide's Response from Summary Judgment Papers	MBIA's Reply
[redacted]	Material misrepresentation on the loan application: Subpoena documentation verifies that the income documents provided in the mortgage loan file were misrepresented. The application states the borrower's monthly income is $4,167, but the documentation obtained from the subpoena reveals that the borrower's monthly income at the time the loan closed was only $2,510.18.	Loan No. [redacted] Mr. Butler claims that the borrower's stated income of $4,167 is misrepresented, because income information MBIA obtained seven years later from the borrower's employer showed an income of $2,510.18. *See* Exhibit 2 to Butler Rebuttal Report, dated July 5, 2012, Concannon Aff., Ex. 40, at row 32. But the borrower listed two jobs on her loan application, stating that she received $2,500 as a waitress for a casino and $4,167 in total income, which included another job as a freight coordinator for a transportation company. CWMBIA-D00856455680-85 at -80-81, Uniform Residential Loan Application, dated Mar. 14, 2004, Concannon Aff., Ex. 96. MBIA only subpoenaed income information from the casino, not the transportation company. MBIAS00007744-61 at -44-45, Certification of Business Records for Cynthia Q. Rosenberry, with attached Exhibits, dated Nov. 11, 2011, Concannon Aff., Ex. 131. The income reported by the casino is higher than the income stated by the borrower.	There is no genuine dispute of fact that the borrower misrepresented her income on her loan application. Countrywide attempts to manufacture an issue of fact by claiming that the borrower had a second job at a transportation company and that MBIA failed to subpoena that employer. However, even according to the document that Countrywide cites, the borrower's "second job" ended on March 3, 2004, fourteen days before the completion of the final loan application, which was dated March 17, 2004. Concannon Aff. Ex. 96, at CWMBIA-D00856455680. As such, Countrywide's claim that Mr. Butler erred by excluding income from the second job is incorrect, and does nothing to contradict MBIA's finding that the borrower materially misrepresented her income on the loan application.
[redacted]	Material misrepresentation on the loan application: Subpoena documentation verifies that the income documents provided in the mortgage loan file were misrepresented. The application states the co-borrower's monthly income is $2,200.00. However, the documentation obtained via subpoena consisted of 2003 and 2004 W2s, which reveals that the co-borrower's monthly income at the time the loan closed was $1,734.59.	Loan No. [redacted] Mr. Butler alleges that the borrower committed fraud, because the co-borrower stated an income of $2,200 per month on the application, but only made $1,734.59 per month. *See* Exhibit 2 to Butler Rebuttal Report, dated July 5, 2012, Concannon Aff., Ex. 40, at row 40. This is incorrect. The co-borrower in fact listed two jobs on the loan application—[redacted]," with a monthly income of $700, and [redacted], with a monthly income of $1,500—for a total income of $2,200 per month. CWMBIA-D0023324991-96 at -91, Uniform Residential Loan Application, dated June 24, 2004, Concannon Aff., Ex. 92. Documentation received from MAAC provided an income of $1,556 per month. MBIAS00001761-67 at -65, Certification of Business Records for [redacted], with attached Exhibits, dated Nov. 7, 2011, Concannon Aff., Ex. 128. Documentation received from [redacted] provided an income of $1,789.17 per month. *Id* at -67. The documentation MBIA received via subpoena therefore shows that the borrower's income on her loan application was in fact understated by as much as $1,145 a month.	There is no genuine dispute of fact that the borrower misrepresented her income on her loan application. Countrywide attempts to manufacture an issue of fact by misrepresenting the employment information reflected on the loan application and the records obtained via subpoena. First, according to the loan application that Countrywide cites, the borrower's "second job" at [redacted] ended on March 1, 2004—several months before the final loan application, which was dated June 24, 2004. Concannon Aff. Ex. 92, at CWMBIA-D0023324991. It is inappropriate and misleading for Countrywide to represent that Mr. Butler erred by excluding income associated with a job that the borrower *no longer held* as of the date of the loan application. In fact, contrary to Countrywide's representation, MBIA received no subpoena documentation from [redacted] because the borrower was no longer employed by that organization at the time the loan closed. As such, Countrywide's claim that the subpoenaed documentation received from MAAC provided an income of $1,556 per month is false. Accordingly, contrary to Countrywide's representation, there is absolutely *no evidence* that the borrower *understated* her income. Concannon Aff. Ex. 128

Loan Number	Butler Finding	Countrywide's Response from Summary Judgment Papers	MBIA's Reply
[redacted]	Material misrepresentation on the loan application: Subpoena documentation verifies that the employment and income information provided in the mortgage loan file were misrepresented. The application states that the borrower is employed at [redacted], making a monthly income of $6,833.00. However, the documentation obtained via subpoena consisted of 2002, 2003, and 2004 1040's with Schedule C which reveals that at the time the loan closed the borrower was Self Employed as a [redacted], making a monthly income of $1,235.17.	Loan No. [redacted] Since February 2004, this borrower has made every single payment on time, despite MBIA's allegation that this borrower had an "actual" debt-to-income ratio of 218.82%. Butler Summary for Loan No. [redacted] Concannon Aff., Ex. 156, at 4; CWMBIA-G0000183204, Performance Data of Loan No. 47494370, 2011, Concannon Aff., Ex. 100.	There is no dispute of fact that the borrower misrepresented his income and employment on the loan application, and indeed Countrywide has not even attempted to raise a factual dispute as to such misrepresentations. In light of the borrower's tax return demonstrating that the borrower misrepresented his income on his loan application, Sheth Aff. Ex. [redacted] D, Countrywide does not and cannot point to any documentary evidence that contradicts MBIA's finding that the borrower materially misrepresented his income and employment on the application. Instead, Countrywide improperly relies on its causation argument, which this Court has already rejected in its January 3, 2012 Order. As set forth in MBIA's opening brief, a misrepresentation of employment or income "increases the credit risk of the impacted loan, and as such, materially and adversely affects MBIA's interest in the loan." (Br. 23.) As such, Countrywide's repeated reliance on the *ex post* performance of the loan is irrelevant to whether the credit risk of the loan was increased at the time the loan was included in the Securitization.
[redacted]	Material misrepresentation on the loan application: Subpoena documentation verifies that the employment and income information provided in the mortgage loan file were misrepresented. The application states the borrower is employed at [redacted], making a monthly income of $6,500.00. However, the documentation obtained via subpoena consisted of Certification of Records, which reveals that at the time the loan closed the borrower was not employed at [redacted].	Loan No. [redacted] This borrower has made every single payment since March 2005 on time, despite Mr. Butler's assertion that the borrower has a DTI "in excess of 1,000.00 percent." Butler Summary for Loan No. [redacted] Concannon Aff., Ex. 226, at 4; CWMBIA-G0000183205, Performance Data of Loan No. 49225662, 2011, Concannon Aff., Ex. 101.	There is no dispute of fact that the borrower misrepresented his employment and income, and indeed Countrywide has not even attempted to raise a factual dispute as to such misrepresentations. In light of both the employer's *and* the borrower's admissions that the borrower was not employed at the time of his loan application—let alone making $6500 per month as the manager of a coffee shop, Sheth Aff. Ex. [redacted]-D-1, at MBIAS00042406, Sheth Aff. Ex. [redacted]-D-2, at MBIAS00016227—Countrywide does not and cannot point to any documentary evidence that contradicts MBIA's finding that the borrower materially misrepresented his employment and income on his application. Instead, Countrywide improperly relies on its causation argument, which this Court has already rejected in its January 3, 2012 Order. As set forth in MBIA's opening brief, a misrepresentation of employment or income "increases the credit risk of the impacted loan, and as such, materially and adversely affects MBIA's interest in the loan." (Br. 23.) As such, Countrywide's repeated reliance on the *ex post* performance of the loan is irrelevant to whether the credit risk of the loan was increased at the time the loan was included in the Securitization.

Loan Number	Butler Finding	Countrywide's Response from Summary Judgment Papers	MBIA's Reply
[redacted]	Material misrepresentation on the loan application: Subpoena documentation verifies that the income documents provided in the mortgage loan file were misrepresented. The application states the borrower's monthly income is $10,000.00. However, the documentation obtained via subpoena consisted of 2003 Tax Return, which reveals that the borrower's monthly income at the time the loan closed was $752.67.	Loan No. [redacted] This borrower has made every payment since March 2004, despite Mr. Butler's allegation that the borrower's DTI is 344.67%. Butler Summary Loan for No. [redacted] Concannon Aff., Ex. 158, at 5; CWMBIA-G0000183204, Performance Data of Loan No. [redacted] 2011, Concannon Aff., Ex. 100.	There is no dispute of fact that the borrower misrepresented the income on the loan application, and indeed Countrywide has not even attempted to raise a factual dispute as to such misrepresentations. In light of the borrower's tax return demonstrating that the borrower misrepresented his income on his loan application, Sheth Aff. Ex. [redacted]-D-1, Countrywide does not, and cannot, point to any documentary evidence that contradicts MBIA's finding that the borrower materially misrepresented his income on his loan application. Instead, Countrywide improperly relies on its causation argument, which this Court has already rejected in its January 3, 2012 Order. As set forth in MBIA's opening brief, a misrepresentation of employment or income "increases the credit risk of the impacted loan, and as such, materially and adversely affects MBIA's interest in the loan." (Br. 23.) As such, Countrywide's repeated reliance on the *ex post* performance of the loan is irrelevant to whether the credit risk of the loan was increased at the time the loan was included in the Securitization.

Loan Number	Butler Finding	Countrywide's Response from Summary Judgment Papers	MBIA's Reply
[redacted]	Material misrepresentation on the loan application: Pacer BK documentation indicates borrower misrepresented income. The loan application states that the borrower was a [redacted] with stated income of $8,300.00, however according to the Chapter 7 Bankruptcy filed on 03/09/2007, at the time the loan closed, borrower was employed by the [redacted] with monthly income of $1,159.17.	For example, Mr. Butler claims that bankruptcy information obtained twenty months after origination for Loan No. [redacted] (one of the 626 loans) shows that the borrower misrepresented his income and employment. *See* Godfrey Summary Report, Loan No. [redacted] Concannon Aff., Ex. 180. The bankruptcy information, filed twenty months after loan origination, reflects that the borrower stated he had been a county security guard for "2 years" making $1,159.17 a month. *See* Butler Summary Report for Loan No. 104682755, Concannon Aff., Ex. 162, at Ex. 10. MBIA asks this Court to believe that this after the fact claim proves the borrower lied on his loan application, because at the time he applied for his loan, the borrower stated that he was employed as a [redacted] making $8,300 dollars a month. *See* Godfrey Summary Report, Loan No. [redacted] Concannon Aff., Ex. 180, at 2. MBIA further asserts, falsely, that Countrywide "does not and cannot dispute" that this borrower misrepresented his income. As Ms. Godfrey opines, MBIA's claim is belied by the documentary evidence in the loan file showing that the reserves, credit history, and occupation support the borrower's stated income. Ms. Godfrey rebuts Mr. Butler's findings on this loan. Godfrey Summary Report, Loan No. [redacted] Concannon Aff., Ex. 180, at 1. Ms. Godfrey shows that, at the time of loan origination, the borrower had $67,920.58 dollars in verified reserves, a 746 FICO score with a 15-year credit history, and owned another property on which he had made every single mortgage payment on time since 1993. *See id.; see also* Verification of Employment, signed by borrower's manager (CWMBIA-D0044867858, Request for Verification of Employment for [redacted], dated Aug. 10, 2005, Concannon Aff., Ex. 94) and borrower's authorization for Countrywide to retrieve his income documentation from the IRS (CWMBIA-D0044867822-31, Request for Copy of Tax Return for [redacted], dated Aug. 16, 2005, Concannon Aff., Ex. 93).	There is no genuine dispute of fact that the borrower misrepresented his employment and income on his loan application. Countrywide concedes that, in the borrower's bankruptcy filing, the borrower states that at the time of the origination of his loan, he was employed as a [redacted] making approximately $1,100 per month—not as a [redacted]" making $8,300 per month, as represented on his loan application. *Compare* Sheth Aff. Ex. [redacted]-D, *with* Sheth Aff. Ex. [redacted]-A, at CWMBIA-D0044867770. In a transparent attempt to manufacture a factual dispute, Countrywide mischaracterizes the basis of the identified breach, arguing that the income stated by the borrower was reasonable based on the asset and credit profile of the borrower. *See* Concannon Aff. Ex. 180. However, the basis of this breach claimed by MBIA on summary judgment is a violation of the "No Default" representation and warranty. The reasonableness of the borrower's stated income is irrelevant to that representation and warranty. Rather, any misrepresentation by the borrower on the loan application would breach the "No Default" representation and warranty.

Loan Number	Butler Finding	Countrywide's Response from Summary Judgment Papers	MBIA's Reply
[redacted]	LienType: Tape Value is 2, verified value is Confirmed third or above.	Mr. Butler claims that Loan No. [redacted] is incorrectly listed as a second lien loan on the MLS, but is in fact a third lien, because there is no evidence that the current second lien was paid off. *See* MBIA Mem. at 34; Butler Aff., Ex. 9 at row 4. But there is signed documentation in the loan file from the borrower acknowledging that a condition of closing was to pay off the second lien loan. Godfrey Summary Report, Loan No. [redacted] at 2, Concannon Aff., Ex. 178. Countrywide's underwriting expert, Ms. Godfrey, therefore concludes that the loan is in the second lien position. *Id.*	There is no genuine dispute of fact that the MLS identified the mortgage loan as a second lien, when in fact the mortgage loan was in a third lien position. The borrower's loan application Schedule of Real Estate Owned discloses that the borrower had two existing liens on the subject property at the time of the application, Sheth Aff. Ex. [redacted]-A, at CWMBIA-D0020300572, whereas the HUD-1, reflecting the monies paid out as a result of the borrower receiving the loan, does not reflect the previously-existing second lien having been paid off with the proceeds of the loan, *id.* at CWMBIA-D0020300814. In an attempt to manufacture a disputed issue of fact, Countrywide cites to a document in the loan file indicating the *borrower's acknowledgement* that paying off the previously-existing second lien was *a condition to closing* the subject mortgage. Concannon Aff. Ex. 178. Countrywide does not, and cannot, point to any documentation indicating that the previously existing second lien in fact was paid off. As such, Countrywide has failed to offer any evidence contradicting MBIA's finding that the MLS was materially false and incorrect as to this loan.
[redacted]	Missing required grant deed in file.	Many of Mr. Butler's 460 allegedly undisputed breaches are based on "missing" documents that are not required to be included in the Mortgage File. . . . For example, Mr. Butler alleges that 74 of 460 loans breach this representation and warranty because they are missing a grant deed. *See* Butler Ex. 10 (see, e.g., Loan Nos. [redacted]). But a grant deed is not a "required document" and need not be included in the Mortgage File. *See id*., Lisa Murphy's Responses; Countrywide's Response No. 174, above (providing the definition of "mortgage file" from the HELOC Indenture agreements).	There is no dispute of fact that the grant deeds are missing from these loan files. Countrywide's proffered compliance expert, Ms. Murphy, admits that a "Grant Deed could not be located in the file," but claims without support, that it "is not a required document." *See* Butler Aff. Ex. 10 (Loan Nos. [redacted] Ms. Murphy's claim that the grant deed is not required is contradicted by the plain language of the Transaction Documents. The MLPA associated with each of the HELOC Securitizations provides that, with respect to each of the Mortgage Loans, "the related Mortgage File contains each of the documents specified to be included in it." Sheth Aff. Exs. 33-34, at § 3.02(xiii), *id.* Exs. 35-41, at § 3.02(a)(13). A "grant deed" is part and parcel of the mortgage given that it evidences a transfer of ownership of the underlying property, and thus is included within the definition of "Mortgage File." *See e.g. id.* Ex. 57, at Ann-1-11-Ann-1-13. MBIA further notes that Countrywide does not provide information sufficient to identify the 74 loans for which it claims that a grant deed is not required. CSMF 175. Of the five loans that Countrywide specifically identified in its opposition, two loans (Loan Nos. [redacted] were not even the subject of MBIA's summary judgment motion. Butler Aff., Ex. 10.

Loan Number	Butler Finding	Countrywide's Response from Summary Judgment Papers	MBIA's Reply
[redacted]	Missing final title policy.	By way of further example, in another 17 cases, MBIA's claim of breach is based on an allegedly missing final title report, but for each of these 17 loans, Countrywide's compliance expert, Ms. Murphy, finds that a final title report is not required. See Butler Ex. 10. As Ms. Murphy explained, a final title report is not a required part of the "Mortgage File" for HELOC loans under $100,000. *See id*. (Loan Nos. [redacted] (all are HELOC loans below under $100,000).	There is no genuine dispute of fact that these 17 loans are missing final title policies. Countrywide's proffered compliance expert, Ms. Murphy, was unable to locate any such final title policies in the file. Rather, her only response is that "[f]or second mortgages *with an original balance less than $100,000.00*, a preliminary title is sufficient to meet the title requirements." The MLPA associated with each of the HELOC Securitizations provides that, with respect to each of the Mortgage Loans, "the related Mortgage File contains each of the documents specified to be included in it," Sheth Aff. Exs. 33-34, at § 3.02(xiii), id. Exs. 35-41, at § 3.02(a)(13), which is defined to include "a title policy for each Mortgage Loan with a Credit Limit in excess of $100,000." *See e.g. id.* Ex. 57, at Ann-1-11- Ann-1-13. Countrywide's own proffered loan review expert, Ms. Godfrey, concedes that the loan amounts for each of these 17 mortgage loans exceed $100,000. Sheth Reply Aff. Exs. 20-36, at 1 (*see* "Loan Amount" field). Therefore there is no genuine factual dispute that these 17 loans are missing their final title policies, and that such policies are required by the Mortgage File representation and warranty.

Loan Number	Butler Finding	Countrywide's Response from Summary Judgment Papers	MBIA's Reply
[redacted]	Missing copy of the note in file. Prudent and reasonable lending practices require the document to be provided and it is missing from the mortgage loan file.	The Senior Lien Note is in the file. [For Senior Lien Note, see CWMBIA-DF00858022 to CWMBIA-DF00858025] This finding was also reviewed by Lisa Murphy. Ms. Murphy's detailed discussion of this finding is attached.	There is no genuine dispute of fact that the loan file is missing a copy of the Mortgage Note. *See* Sheth Aff. Ex. [redacted]-A. The MLPA associated with each of the HELOC Securitizations provides that, with respect to each of the Mortgage Loans, "the related Mortgage File contains each of the documents specified to be included in it," Sheth Aff. Exs. 33-34, at § 3.02(xiii), *id.* Exs. 35-41, at § 3.02(a)(13), which is defined to include the "Mortgage Note." *See e.g. id.* Ex. 57, at Ann-1-11- Ann-1-13. "Mortgage Note" is then further defined as the "Credit Line Agreement for a Mortgage Loan pursuant to which the related mortgagor agrees to pay the indebtedness evidenced by it and secured by the related mortgage." *See e.g. id*, at Ann-1-13. In an apparent attempt to manufacture a factual dispute, Ms. Godfrey trumpets her ability to find the *senior lien note* in the loan file. Sheth Reply Aff. Ex. 37. However, this is not the Mortgage Note for the loan in question, nor does it evidence an agreement to pay the indebtedness on the second lien. As such, Countrywide has not, and cannot, point to any documentary evidence contradicting MBIA's finding that the *second lien* note—the Home Equity Line of Credit and Disclosure Agreement—was missing from the loan file.
[redacted]	Missing copy of the note in file. Prudent and reasonable lending practices require the document to be provided and it is missing from the mortgage loan file.	The Senior Lien Note is in the file. The Note is in the file. [For Note, see CWMBIA-D0093950537 to CWMBIA-D0093950538. For Senior Lien Note, see CWMBIA-D0093950532 to CWMBIA-D0093950536] This finding was also reviewed by Lisa Murphy. Ms. Murphy's detailed discussion of this finding is attached.	There is no genuine dispute of fact that the loan file is missing a copy of the Mortgage Note. *See* Sheth Aff. Ex. [redacted]-A. The MLPA associated with each of the HELOC Securitizations provides that, with respect to each of the Mortgage Loans, "the related Mortgage File contains each of the documents specified to be included in it," Sheth Aff. Exs. 33-34, at § 3.02(xiii), *id.* Exs. 35-41, at § 3.02(a)(13), which is defined to include the "Mortgage Note." *See e.g. id.* Ex. 57, at Ann-1-11- Ann-1-13. "Mortgage Note" is then further defined as the "Credit Line Agreement for a Mortgage Loan pursuant to which the related mortgagor agrees to pay the indebtedness evidenced by it and secured by the related mortgage." *See e.g. id.*, at Ann-1-13. In an apparent attempt to manufacture a factual dispute, Ms. Godfrey cites to the senior lien note and the Home Equity *Confirmation Agreement*, Sheth Reply Aff. Ex. 38, a document which expires 45 days after issuance and does not create indebtedness. Neither of these documents is the Mortgage Note for the loan in question. As such, Countrywide has not, and cannot, point to any documentary evidence contradicting MBIA's finding that the *second lien* note—the Home Equity Line of Credit and Disclosure Agreement—was missing from the loan file.

Loan Number	Butler Finding	Countrywide's Response from Summary Judgment Papers	MBIA's Reply
[redacted]	Missing recorded mortgage in file. Prudent and reasonable lending practices require the document to be provided and it is missing from the mortgage loan file.	Furthermore, there are many instances where Mr. Butler alleges that a document is missing, but other documents or information in the loan file make it clear that the "missing" material was present at the time of origination. *See, e.g.*, Loan nos. [redacted] where Ms. Murphy cleared "missing" recorded mortgages using HUD-1 forms and HELOC Agreements which document the mortgage recording fee; Loan no. [redacted] where Ms. Murphy cleared a "missing" title using a HUD-1 form which documents that title insurance was obtained; and Loan nos. [redacted] where Ms. Murphy cleared "missing" fee addendums using HELOC Agreements where the borrower acknowledged receipt of these documents. *See* Godfrey Summary Reports, Concannon Aff., Exs. 219, 190, 173, 208, 183, 193, & 181.	There is no dispute of fact that these loan files did not contain the original recorded mortgage. The MLPA associated with each of the HELOC Securitizations provides that, with respect to each of the Mortgage Loans, "the related Mortgage File contains each of the documents specified to be included in it," Sheth Aff. Exs. 33-34, at § 3.02(xiii), *id.* Exs. 35-41, at § 3.02(a)(13), which is defined to include "the original recorded mortgage with evidence of recording on it," *id.* Ex. 57, at Ann-1-11. Ms. Murphy points to HUD-1 forms and/or HELOC Agreements to suggest that the mortgage *was recorded at some point*—but Ms. Murphy concedes that the recorded mortgage is not actually in the loan file as explicitly required by the representation and warranty. *See* Butler Aff. Ex. 10 (Loan Nos. [redacted]
[redacted]	Missing final title policy, only preliminary title report in file. Prudent and reasonable lending practices require the document to be provided and it is missing from the mortgage loan file. Required by prudent and reasonable lending practices and guidelines, Countrywide Technical Manual, Chapter 3, Section 8.2, revised 08/15/2006.	Furthermore, there are many instances where Mr. Butler alleges that a document is missing, but other documents or information in the loan file make it clear that the "missing" material was present at the time of origination. *See, e.g.*, Loan nos. [redacted] where Ms. Murphy cleared "missing" recorded mortgages using HUD-1 forms and HELOC Agreements which document the mortgage recording fee; Loan no. [redacted] where Ms. Murphy cleared a "missing" title using a HUD-1 form which documents that title insurance was obtained; and Loan nos. [redacted] where Ms. Murphy cleared "missing" fee addendums using HELOC Agreements where the borrower acknowledged receipt of these documents. *See* Godfrey Summary Reports, Concannon Aff., Exs. 219, 190, 173, 208, 183, 193, & 181.	There is no dispute of fact that these loan files did not contain their final title policies. The MLPA associated with each of the HELOC Securitizations provides that, with respect to each of the Mortgage Loans, "the related Mortgage File contains each of the documents specified to be included in it," Sheth Aff. Exs. 33-34, at § 3.02(xiii), *id.* Exs. 35-41, at § 3.02(a)(13), which is defined to include "a title policy for each Mortgage Loan with a Credit Limit in excess of $100,000." *See e.g. id.* Ex. 57, at Ann-1-11- Ann-1-13. Countrywide's proffered compliance expert, Ms. Murphy, points to a HUD-1 form to suggest that title insurance *was obtained at some point*—but she concedes that the final title policy is not actually in the loan file as explicitly required by the representation and warranty. *See* Butler Aff. Ex. 10 (Loan No. [redacted]
[redacted]	Missing complete copy of note Prudent and reasonable lending practices require the document to be provided and the complete document is missing from the mortgage loan file. The Fee Addendum as required by the HELOC Agreement and Disclosure Statement is missing from the file.	Furthermore, there are many instances where Mr. Butler alleges that a document is missing, but other documents or information in the loan file make it clear that the "missing" material was present at the time of origination. *See, e.g.*, Loan nos. [redacted] where Ms. Murphy cleared "missing" recorded mortgages using HUD-1 forms and HELOC Agreements which document the mortgage recording fee; Loan no. [redacted] where Ms. Murphy cleared a "missing" title using a HUD-1 form which documents that title insurance was obtained; and Loan nos. [redacted] where Ms. Murphy cleared "missing"	There is no dispute of fact regarding this finding. The MLPA associated with each of the HELOC Securitizations provides that, with respect to each of the Mortgage Loans, "the related Mortgage File contains each of the documents specified to be included in it," Sheth Aff. Exs. 33-34, at § 3.02(xiii), *id.* Exs. 35-41, at § 3.02(a)(13), which is defined to include the "Mortgage Note." *See e.g. id.* Ex. 57, at Ann-1-11- Ann-1-13. "Mortgage Note" is then further defined as the "Credit Line Agreement for a Mortgage Loan pursuant to which the related mortgagor agrees to pay the indebtedness evidenced by it and secured by the related mortgage." *See e.g. id.*, at Ann-1-13. Mr. Butler has identified numerous loan files missing the fee addendum, a required portion of the HELOC Agreement (Mortgage Note). Ms. Murphy points to

Loan Number	Butler Finding	Countrywide's Response from Summary Judgment Papers	MBIA's Reply
		fee addendums using HELOC Agreements where the borrower acknowledged receipt of these documents. *See* Godfrey Summary Reports, Concannon Aff., Exs. 219, 190, 173, 208, 183, 193, & 181.	the HUD-1 forms and HELOC Agreements to suggest that the Fee Addendum *was received* by the borrower—but Ms. Murphy concedes that the Fee Addendum is not actually in the loan file. *See* Butler Aff. Ex. 10 (Loan Nos. [redacted]).
[redacted]	Missing required grant deed in file.	Further responding, MBIA improperly includes among these 284 loans numerous complaints that documents are "missing" that are not required to be contained in the "Mortgage File." For example, Mr. Butler alleges that 99 of the 284 loans are missing a grant deed, but are not missing any additional documents. *See* Butler Ex. 20 (see, e.g., Loan Nos. [redacted]. As discussed in Countrywide's Response to Statement No. 175, a grant deed is not part of the Mortgage File. Furthermore, as discussed in Countrywide Response to Statement No. 175, above, MBIA has not shown that a missing Mortgage File document materially and adversely affects its interests.	There is no dispute of fact that the grant deeds are missing from these loan files. *See* Butler Aff. Ex. 20 (Loan Nos. [redacted]). Ms. Murphy does not dispute that the grant deeds are missing from these loan files, but rather argues only that the grant deeds are not required. Ms. Murphy's claim that the grant deed is not required is contradicted by the plain language of the Transaction Documents. The MLPA associated with each of the HELOC Securitizations provides that, with respect to each of the Mortgage Loans, "the related Mortgage File contains each of the documents specified to be included in it." Sheth Aff. Exs. 33-34, at § 3.02(xiii), Exs. 35-41, at § 3.02(a)(13); Ex. 57, at Ann-1-11- Ann-1-13. A "grant deed" is part and parcel of the mortgage given that it evidences a transfer of ownership of the underlying property, and thus is included within the definition of "Mortgage File." In any event, Countrywide does not provide information sufficient to identify the 99 loans for which it claims that a grant deed is not required. CSMF 176.
[redacted]	The CLTV of the Mortgage Loan exceeds 100%. Recalculated CLTV using the following values: $200,000 HELOC (Subject Loan) + $586,629 (Senior Mortgage Balance from Credit Report) = $786,629 CLTV = $786,629/ $739,000 Purchase Price value derived from the Appraisal = 106.45%	For two of the remaining five loans, Ms. Godfrey, upon examination of the full file, disputes Mr. Butler's finding that the CLTVs exceed 100%. *See* Godfrey Summary, Loan Nos. [redacted] Concannon Aff. Exs. 185 & 196. For Loan No. [redacted] for example, Ms. Godfrey finds that a variance letter in the file authorizes that, pursuant to guidelines, the seasoning requirement for the use of appraisals less than 12 months from a previous sale has been waived where the sale price was 11 months old and the increase in appraised value was consistent with Florida real estate appreciation at the time. *See* Godfrey Summary, Loan No. [redacted] Concannon Aff., Ex. 185. Ms. Godfrey therefore concludes that the CLTV for this loan is 93% and does not exceed 100%. *See id*.	There is no genuine dispute of fact that the CLTV exceeds 100%. Although Countrywide's proffered loan review expert, Ms. Godfrey, suggests that a variance letter provided to correspondent lenders could result in a method of re-calculating CLTV that would arrive at a lower CLTV, she nevertheless states that her re-calculated CLTV is 107%. Sheth Aff. Ex. 207, at pg. 1. And in any event, use of a variance letter not contained in the loan file is improper. A copy of a variance letter should be present in the loan origination file to confirm that the loan was acquired as part of a pool to which the variance letter applies, Sheth Reply Aff. Ex. 43, at CWMBIA00096464205 (stating in variance letter to "include a copy of this concession letter with each file submitted to CHL."), and that the terms of that particular variance letter are in effect for that loan, *see id.* ("This letter supersedes any previous accommodation letters issued in the past.").

Loan Number	Butler Finding	Countrywide's Response from Summary Judgment Papers	MBIA's Reply
[redacted]	The CLTV of the Mortgage Loan exceeds 100%. Recalculated CLTV using the following values: $23,054 HELOC (Subject Loan) + $383,788 (Senior Mortgage Balance from Credit Report) = $406,842 CLTV = $406,842/ $406,000 Value from CountryWide CAPES Valuation (no appraisal in file) = 100.21%	For two of the remaining five loans, Ms. Godfrey, upon examination of the full file, disputes Mr. Butler's finding that the CLTVs exceed 100%. See Godfrey Summary, Loan Nos. [redacted] Concannon Aff. Exs. 185 & 196. For Loan No. [redacted] Ms. Godfrey finds that the CLTV appears to be 100.2%, which equates to an overage of just $842.00. *See* Godfrey Summary, Loan No. [redacted] Concannon Aff., Ex. 196. Ms. Godfrey further finds that "the CLTV calculation is from two months prior to the subject loan closing. Since the monthly payment for the senior lien is $2,882.79, the resulting principal reduction over 2 payments could reduce the principal balance by $842.00 or more, bringing the CLTV at or below 100%." *Id.* Ms. Godfrey therefore concludes that the CLTV is at or below 100%, does not exceed the maximum, and rebuts Mr. Butler's finding of "significant defective." *Id*.	There is no dispute of fact that the CLTV exceeds 100%. According to Countrywide's own proffered loan review expert, the actual CLTV for this loan is 101%. Sheth Reply Aff. Ex. 209, at 1. Ms. Godfrey offers only speculation, that the senior lien balance *could* reduce the principal balance . . . bringing the CLTV at or below 100%." *Id.* Mere speculation as to the decrease of the senior lien balance—not reflected in the loan file—cannot be the basis to deny summary judgment, particularly where, as here, Countrywide has conceded that the recalculated CLTV exceeds 100%. *See id.*
[redacted]	The CLTV of the Mortgage Loan exceeds 100%. Recalculated CLTV using the following values: $24,800 HELOC (Subject Loan) + $216,132 (Senior Mortgage Balance from Credit Report) = $240,932 CLTV = $240,932/ $239,000 Value from CAPES Home Equity Property Valuation = 100.81%	Not only does MBIA fail to show that these alleged breaches have any material and adverse effect on MBIA's interests, but its claim also hinges on its nonsensical assertion that any CLTV over 100%, no matter how small the overage, has a "greater credit risk," notwithstanding any other characteristics of the loan. *See* MBIA Mem. at 38-39; Butler Aff., Ex. 11, row 4 and 8.	There is no dispute of fact that the CLTV exceeds 100%. According to Countrywide's own proffered loan review expert, the actual CLTV for this loan is 101%. Sheth Aff. Ex. 205. As set forth in MBIA's opening brief, an increase of the CLTV ratio beyond 100% demonstrably "had a material and adverse impact on MBIA's interests in such loans because such loans had greater credit risk than represented to MBIA." (Br. 38-39.)