Exhibit 6

to Affidavit of Kathy D. Patrick in Support of the Institutional Investors' Statement in Support of the Settlement

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: HON. EILEEN BRANSTEN, JUSTICE PART 3

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MBIA INSURANCE CORPORATION,

Plaintiff,

-against-

COUNTRYWIDE HOME LOANS, INC., COUNTRYWIDE SECURITIES CORP., COUNTRYWIDE FINANCIAL CORP., COUNTRYWIDE HOME LOANS SERVICING, LP AND BANK OF AMERICA CORP.,

Defendants.

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Index No.: 602825/08
Motion Date: 12/14/12
Motion Seq. No.: 057

The following papers, numbered 1 to 3, were read on this motion for summary judgment.

	Papers Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, this motion is decided in accordance with the accompanying memorandum decision.

Dated: April 29, 2013

Hon. Eileen Bransten J.S.C.

Check One: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMITORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(s): _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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MBIA INSURANCE CORPORATION,

Plaintiff,

-against-

Index No.: 602825/08
Motion Seq. Nos.: 56, 57, 58, 71

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

Defendants.

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I. Overview

This matter comes before the Court on the motions for summary judgment filed by Plaintiff MBIA Insurance Corp. ("MBIA") and defendants Countrywide Home Loans, Inc. ("CHL"), Countrywide Securities Corporation ("CSC"), Countrywide Financial Corporation ("CFC") and Countrywide Home Loans Servicing, LP ("CHLS" and with CHL, CSC and CFC, "Countrywide"). In motion sequence no. 57, Countrywide seeks summary judgment on all of the remaining counts in MBIA's complaint: fraudulent inducement (count one); breach of the insurance agreements (count three); breach of Countrywide's contractual servicing obligations (count four); indemnification (count six); and, punitive damages (prayer for relief). MBIA confines its summary judgment motion (motion sequence no. 58) to a single claim – breach of the insurance agreements. The

two motions do not overlap significantly. Accordingly, each motion for summary judgment will be considered in turn below. In addition, the Court will consider two motions to strike, motion sequences 56 and 71, which are relevant to the summary judgment motions.

For the reasons that follow, both motions for summary judgment are granted in part and denied in part. Both motions to strike are denied.

II. **Background**

The facts of this matter have been discussed extensively in previous decisions of this court. Thus, only details necessary to this motion are referenced herein.

This action stems from MBIA's agreement to provide financial guaranty insurance for fifteen securitizations,[1] involving 389,544 residential mortgage loans, virtually all of which were either home equity lines of credit ("HELOCs") or loans known as closed-end seconds ("CES").[2] *See* Countrywide's Rule 19-a Statement in Support of its Motion for

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[1] The securitizations at issue in this litigation ("Securitizations") are CWABS 2004-I, CWABS 2004-P, CWHEQ 2005-A, CWHEQ 2005-E, CWHEQ 2005-I, CWHEQ 2005-M, CWHEQ 2006-E, CWHEQ 2006-G, CWHEQ 2007-E, CWHEQ 2006-S8, CWHEQ 2006-S9, CWHEQ 2006-10, CWHEQ 2007-S1, CWHEQ 2007-S2, and CWHEQ 2007-S3.

[2] "A HELOC is a second lien on a residential property. The borrower's equity in the property (i.e., the value of the property that is not used as collateral for the first lien) collateralizes a specified line of credit that may be drawn down by the borrower. A CES Is also collateralized by the borrower's equity, but the loan is of a fixed amount." (Countrywide 19-a Statement ¶ 4.)

Summary Judgment ("Countrywide 19-a Statement") ¶¶ 4, 137. The loans underlying each of the Securitizations were all either originated by Countrywide or purchased by Countrywide from mortgage loan brokers or "correspondent lenders." *Id.* ¶ 5. For each of the Securitizations, defendant CHL, serving *inter alia* as sponsor of the transaction and seller of the loans, sold to a trust (collectively, the "Trusts") a pool of HELOC or CES loans. *Id.* ¶ 5. The Trusts, in turn, issued securities that were sold to investors. *Id.* ¶ 6.[3]

For each Securitization, Countrywide sought insurance from MBIA covering the Trusts' obligation to make ultimate payments of principal and timely payments of interest due on the securities issued to investors. *See* MBIA Rule 19-a Statement in Support of its Motion for Summary Judgment ("MBIA 19-a Statement") ¶ 7. MBIA issued a Note or Certificate Guaranty Insurance Policy (collectively, the "Insurance Policies") to the Trusts for each Securitization. (Countrywide 19-a Statement ¶ 8.) The Insurance Policies provided that, to the extent that the payments received by the Trusts for the loans were insufficient to cover the payments due under the securities, MBIA would cover the shortfall. *Id.* Separate from the Insurance Policies, MBIA entered into an Insurance Agreement for each Securitization with CHL, the Depositor, the Trust, and the Indenture

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[3] The loans were conveyed to the Trusts through a Mortgage Loan Purchase Agreement ("MLPA") and a Sale and Servicing Agreement ("SSA") for the HELOC Securitizations and a Pooling and Servicing Agreement ("PSA") for the CES Securitizations. (Countrywide 19-a Statement ¶ 9). The Trusts issued the securities through an Indenture and sold the securities pursuant to a Prospectus and Prospectus Supplement ("Pro Supp"). *Id.* ¶ 10.

Trustee. *Id.* at ¶ 11. The Insurance Agreements contain a set of representations and warranties about the characteristics of the underlying loan pools, as well as individual loans. (MBIA 19-a Statement ¶ 11.)

In this action, MBIA alleges that Countrywide fraudulently induced it to provide financial guaranty insurance by misrepresenting the characteristics of the Securitizations' underlying loan population. Specifically, MBIA contends that Countrywide misled MBIA regarding Countrywide's loan origination, underwriting and servicing practices, as well as complete and true profiles of the loans included in the Securitizations.

MBIA further alleges that Countrywide breached certain representations and warranties in the Securitizations' Transaction Documents, as well as its contractual obligations as servicer for the underlying loans. MBIA premises its assertion of breach on the findings of its "re-underwriting" expert, Mr. Steven I. Butler, who reviewed a random sample of mortgage loans, consisting of 400 loans from each of the fifteen Securitizations ("Random Sample"). This Random Sample was drawn by another of MBIA's experts, Dr. Charles Cowan.

MBIA asserts that, as of December 2011, it has paid over $3 billion to noteholders on its guarantees as a result of Countrywide's actions, and contends that it is exposed to hundreds of millions of dollars in additional claims. (Affirmation of Manisha M. Sheth in

Opposition to Countrywide's Motion for Summary Judgment ("Sheth Affirm.") Ex. 90 at 15) (expert report of Joseph R. Mason).)

Following the close of discovery, Countrywide and MBIA each moved for summary judgment.[4] These summary judgment motions are considered below.

III. Summary Judgment Standard

A party moving for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Failure to make such a showing mandates denial of the motion, notwithstanding the sufficiency of the opposition. *Id.* If there is a prima facie showing, the party opposing must then demonstrate the existence of a factual issue requiring a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). When deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007).

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[4] The Court notes that MBIA filed an overlength reply brief on its summary judgment motion (motion sequence no. 58), without seeking leave from the Court. Countrywide then sought leave to file a sur-reply in response to MBIA's overlength arguments. While sur-replies are not granted as a matter of course, here, the Court grants Countrywide's request and considers the sur-reply already submitted. In addition, the Court directs MBIA to Commercial Division Rule 17. Any overlength memoranda filed with subsequent motions will not be considered.

"It is axiomatic that summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue of fact or where such issue is even arguable." *Trolone v. Lac d'Amiante Du Quebec, Ltee*, 297 A.D.2d 528, 528-29 (1st Dep't 2002). The summary process "classically and necessarily requires that the issues be first exposed and delineated" since "[i]ssue-finding, rather than issue-determination, is the key." *Id.*

IV. **Countrywide's Motion for Summary Judgment**

Countrywide seeks summary judgment as to each of MBIA's remaining claims. Each claim will be considered in turn.

A. *Count One – Fraudulent Inducement*

Countrywide seeks summary judgment on MBIA's fraudulent inducement claim, arguing that this claim fails because MBIA cannot demonstrate justifiable reliance. MBIA counters that it need not demonstrate justifiable reliance since there is no such showing required under Section 3105 of the New York Insurance Law.

1. Reliance Under Section 3105

Section 3105 allows an insurer to avoid an insurance contract where the insured made a false statement of fact as an inducement to entering into the contract and that misrepresentation was "material." N.Y. Ins. Law § 3105. Specifically, Section 3105(b) provides that:

> No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract.

MBIA correctly notes that this provision makes no reference to the reasonableness of the insurer's reliance. Instead, the pertinent question under Section 3105 is whether the information allegedly misrepresented by Countrywide induced MBIA to take action that it might otherwise not have taken. *Interested Underwriters at Lloyd's v. H.D.I. III Assoc.*, 213 A.D.2d 246, 247 (1st Dep't 1995) ("A fact is material so as to avoid *ab initio* an insurance contract if, had it been revealed, the insurer or reinsurer would either not have issued the policy or would have only at a higher premium.").

Nonetheless, Countrywide seeks to graft a reasonableness requirement on to Section 3105, arguing that the provision's legislative history reveals an intent to codify the common law understanding that a material fact be one that "would affect the mind of a rational underwriter." (Countrywide's Reply Memorandum of Law ("Countrywide Reply Br.") at 6.) Countrywide cites no cases that address this issue, but instead points to

Geer v. Union Mut. Life Ins. Co., 273 N.Y. 261 (1937), a Court of Appeals decision which it claims is representative of the common law principles that the legislature sought to codify through Section 3105 and its predecessor statute, Section 149. Far from supporting Countrywide's argument, *Geer*, in fact, demonstrates the absence of a justifiable reliance requirement. As the *Geer* Court noted in assessing the materiality of an insured's misrepresentation:

> Here the applicant gave erroneous information, and the insurance company acted upon the information it received. If the truth had been disclosed, it might perhaps have rejected the application or it might have accepted it. No person can say with any degree of certainty what action it would have taken, but it cannot be doubted that the erroneous statement deprived the company of its freedom of choice and that it acted upon a statement of facts which did not exist *and if the truth had been disclosed, it might, reasonably, have acted differently*. It follows then that the representation was material as matter of law.

Id. at 270 (emphasis added).

"Reasonably" in *Geer* is not used to assess the reasonableness of the insurer's reliance on the insured's misrepresentations but rather to describe the circumstances in which a misrepresentation is material – i.e. whether an insurer would have acted differently had it been presented with accurate information. Accordingly, where the "departure in a representation from an accurate statement of the truth may be so slight that we may confidently say that the difference could not affect [the] decision of any reasonable person ... then as a matter of law the misrepresentation is not material." *Id.* at

266. On the other hand, where a misrepresentation induces an insurer "to accept an application it might otherwise have refused," such a representation is material under *Geer.*

Thus, under *Geer*, and under Section 3105, the inquiry is not whether the insurer's reliance on the misrepresented information was justifiable but instead whether the insurer might have refused the application had it been aware of the truth of the misrepresentation. *See Aguilar v. U.S. Life Ins. Co.*, 162 A.D.2d 209, 210-11 (1st Dep't 1990) ("To demonstrate materiality as a matter of law, an insurer need only show that the misrepresentation 'substantially thwarts the purpose for which the information is demanded and induces action which the insurance company might otherwise not have taken.'") (quoting *Geer*); *see also Vander Veer v. Cont'l Cas. Co.*, 34 N.Y.2d 50, 53 (1974) ("As an insurer, the defendant is free to select its risks and it makes inquiry of matters which it deems material to the risk. ... By his failure to disclose his heart condition, plaintiff deprived the defendant of freedom of choice in determining whether to accept or reject the risk. On the record, there is little doubt that the defendant would have rejected the risk ..."). Countrywide has pointed to no case law, aside from *Geer*, in support of its argument. Accordingly, the Court finds no justifiable reliance requirement for a fraud claim under Section 3105.

2. Justifiable Reliance Under the Common Law

Countrywide next argues that, regardless of the requirements of Section 3105, under the common law, a sophisticated entity like MBIA cannot establish a fraud claim where it had the means to verify the accuracy of the representations it received. Assuming for the sake of argument that this concept is applicable to a statutory claim under Section 3105, construing all facts in the light most favorable to the non-movant, MBIA, the record is replete with factual issues precluding summary resolution on this basis.

Here, Countrywide's arguments present several variations on the same theme, i.e., that MBIA's failure to conduct its own "loan file reviews" forecloses any demonstration of justifiable reliance. Specifically, Countrywide asserts that MBIA had the opportunity to request loan files from Countrywide in order to perform a loan-level analysis before closing but chose not to do so. MBIA responds by pointing to the express representations and warranties obtained from Countrywide regarding the characteristics of the loans. MBIA asserts that it was justified in accepting these representations and warranties from Countrywide, as they pertained to the same facts that due diligence would have examined.

In vetting whether sophisticated plaintiffs could justifiably rely on representations and warranties made as part of a business transaction, the Court of Appeals explained:

> [I]f the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations.

DDJ Mgmt., LLC v. Rhone Grp L.L.C., 15 N.Y.3d 147, 154 (2010).

Countrywide asserts that MBIA "blindly" relied on the representations and warranties and failed to use the means available to it to determine the "real quality of the subject of" Countrywide's representations – the loans. However, MBIA notes that it did not receive the loan files from Countrywide before the deal closed, nor did MBIA possess the right to obtain the loan files necessary to perform the loan-level review. (MBIA's Responses to Countrywide Rule 19-a Statement ("MBIA 19-a Opp. Statement") ¶¶ 58, 63, 87, 103 (citing Affirmation of Mark Holland in Support of Summary Judgment ("Holland Affirm.") Ex. 64 § 2.02.) Further, MBIA cites to evidence that it nonetheless performed due diligence on the Securitizations before entering into the Insurance Agreements. MBIA notes that it: (1) evaluated the structure of each securitization; (2) performed cash flow analysis of the loan pool; (3) analyzed historical performance of similar collateral, including defaults, delinquencies and pre-payments; and, (4) reviewed results of loan-level credit and compliance reviews performed by Countrywide's third-party due diligence providers. *See* MBIA Memorandum of Law in Opposition to

Countrywide's Motion ("MBIA Opp. Br.") at 23; MBIA's Counterstatement of Material Facts ¶¶ 188-226, 286-96.

Thus, taking all reasonable inferences in favor of MBIA, a jury could find that MBIA did not enter into the transactions "blindly," as it performed due diligence on each of the Securitizations. This case is therefore outside the bounds of certain recent First Department cases, such as *Barnelli & Cie SA v. Dutch Book Fund SPC, Ltd.*, 95 A.D.3d 736, 737 (1st Dep't 2012), which have found no justifiable reliance where plaintiff entered into a transaction without conducting any investigation.

The issue then is whether MBIA's admitted failure to perform the particular type of due diligence now urged by Countrywide – a review of the individual files for the loans at issue – rendered its reliance on Countrywide's representations unreasonable as a matter of law. Notwithstanding Countrywide's exhortations to the contrary, this Court cannot state at this juncture that the due diligence performed by MBIA in vetting the Securitizations rendered its reliance unreasonable. Put another way, this Court cannot find that MBIA's failure to perform the particular type of due diligence that Countrywide suggests makes MBIA's reliance unjustifiable, especially since MBIA did not have a right to access the loan files before closing. Whether MBIA's due diligence review was sufficient and whether MBIA's review made adequate use of the means available to it, at bottom, are disputed issues of fact. *See DDJ Mgmt, LLC*, 15 N.Y.3d at 155 ("The

question of what constitutes reasonable reliance is always nettlesome because it is so fact intensive.").

MBIA's ability to access the loan files after the closing of the Transactions does not alter this analysis. Moreover, whether other monoline insurers accessed loan files from Countrywide pre-closing is not dispositive of the issue. MBIA's post-closing loan file access and other insurers' decisions to review loan files do not resolve as a matter of law whether MBIA itself made use of the means available to it pre-closing, such that it could justifiably rely on Countrywide's representations and warranties as an inducement to enter into the agreements now before the Court. To the extent that Countrywide maintains that MBIA should have reviewed the loan files for previous deals or should have emulated its competitors before entering into the instant Securitizations, the reasonableness of MBIA's actions again present an issue of fact not amenable to resolution on summary judgment.

This is particularly so given the representations and warranties provided to MBIA. "[W]here a plaintiff has gone to the trouble to insist on a written representation that certain facts are true, it will often be justified in accepting that representation as true rather than making its own inquiry." *DDJ Mgmt, LLC*, 15 N.Y.3d at 154. Moreover, the presence of "hints" which may have put plaintiff on their guard do not bar justifiable reliance as a matter of law, especially where "plaintiff[] made a significant effort to

protect" itself by obtaining representations and warranties. *Id.* at 156. While Countrywide points to certain "red flags" that it contends should have alerted MBIA to the falsity of Countrywide's representations, these alleged red flags present factual issues that preclude summary judgment.

Countrywide points to two "hints" in particular that should have tipped off MBIA to the falsity of the representations. First, Countrywide asserts that disclaimers in the Prospectus Supplements ("Pro Supp") for the Securitizations put MBIA on notice of increasing risk in the loan pools, which should have led MBIA to review the loan files. *See, e.g.* Holland Affirm. Ex. 3 at S-20 (noting that pools contain loans originated under Countrywide's Reduced, Streamlined, and Super-Streamlined Documentation Programs) (CWABS 2004-I Pro Supp).[5] Also, Countrywide maintains that its disclaimers should have alerted MBIA to deteriorating macroeconomic conditions. *See* Holland Affirm. Ex. 126 at S-25 ("Recently, the residential mortgage market in the United States has experienced a variety of difficulties and changed economic conditions that may adversely affect the performance and market value of your securities.") (CWHEQ 2007-S1 Pro Supp).[6]

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[5] Similar language appeared in the Pro Supps for the other Securitizations at issue in this litigation. *See* Countrywide Rule 19-a ¶ 26.

[6] Countrywide notes that this language appeared in the CWHEQ 2007-S1 Pro Supp and in the Pro Supps for the three securitizations that followed the 2007-S1 transaction. *See* Countrywide Rule 19-a ¶ 46. Countrywide does not assert that any such "disclaimer" appeared

Viewed in the light most favorable to MBIA, to the extent that these statements would be considered disclaimers, they are far too general to bar plaintiff's reliance as a matter of law. At most, these "hints" speak generally to risks that may exist with regard to the loans. They do not contradict the specific representations and warranties given to MBIA with regard to the loans in the Securitizations. *Compare HSH Nordbank AG v. UBS AG*, 95 A.D.3d 185, 201 (1st Dep't 2012) ("Since the plaintiff stipulated in the contract that it was not relying upon any representations 'as to the very matter as to which it now claims it was defrauded,' such specific disclaimer destroys the allegations in the plantiff's complaint that the agreement was executed in reliance upon the defendant's ... representations.") (quoting *Mahn Real Estate Corp. v. Shapolsky*, 178 A.D.2d 383, 385-86 (1st Dep't 1991) *with Silver Oak Capital L.L.C. v. UBS AG*, 82 A.D.3d 666, 667 (1st Dep't 2011) (finding that "general disclaimers contained in private placement memorandum" did not bar plaintiff's justifiable reliance where "they were not specifically applicable to the alleged misrepresentation at issue."). Further, the disclaimers identified by Countrywide speak to the future performance of the loans, not to the characteristics of the loans at the time the representations were made and the transaction was entered into. Accordingly, the Pro Supp information cited by Countrywide cannot preclude MBIA's

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in the Pro Supps prior to 2007-S1.

fraud claim. At most, the disclaimers, and their effect on MBIA, present an issue of fact to be considered at trial in vetting MBIA's reliance.

Second, Countrywide contends that the due diligence reports prepared by its third-party vendors should have alerted MBIA to the fact that there were loans in the securitization that breached representations and warranties. Countrywide points to due diligence reports given to MBIA prior to closing, showing that at least one out of every five loans sampled had been flagged as potentially containing underwriting issues.

While a party may not justifiably rely on a representation it knows to be false, *see DDJ Mgmt*, 15 N.Y.3d at 155, there is a material issue of disputed fact regarding the extent of MBIA's knowledge as to problems with the loans. MBIA maintains that the reports showed only that the diligence providers recommended removal of a small number of loans from the Securitizations – approximately 183 out of 3000 loans sampled. *See* Sheth Affirm. Ex. 84 at 52 (Expert Rebuttal Report of Steven I. Butler). After these loans were identified by the due diligence providers, the loans were removed from the pools and were not included in the Securitizations. *See* Sheth Affirm. Exs. 144-152 (emails Countrywide employees to MBIA employees discussing the removal of loans flagged by due diligence as defective from CWABS 2004-I, CWABS 2004-P, CWHEQ 2005-E, CWHEQ 2005-I, CWHEQ 2005-M, CWHEQ 2006-E, CWHEQ 2006-G, CWHEQ 2006-S8, and noting no defective loans or "kicks" in CWHEQ 2005-A). Thus,

to the extent that MBIA was informed about loans that were potentially in breach, it was told that such loans were removed from the pool. While Countrywide urges that MBIA should have extrapolated the number of breaching loans identified in the samples to the pools as a whole, the extent of MBIA's knowledge regarding the presence of defective loans in the pools requires a factual determination that cannot be resolved on the instant motion.

Thus, even if MBIA were required to demonstrate justifiable reliance, taking all inferences in its favor as the non-movant, there are sufficient facts in dispute as to preclude Countrywide's motion for summary judgment. *See DDJ Mgmt*, 15 N.Y.3d at 155.

B. *Count Two – Breach of the Insurance Agreements*

Countrywide next seeks partial summary judgment on MBIA's claim for breach of the insurance agreements, asserting that: (1) MBIA's remedy is limited to repurchase of any breaching loans, the so-called "sole remedy" in the Insurance Agreements and (2) MBIA's claim that Countrywide failed to repurchase breaching loans should be dismissed. For the reasons that follow, Countrywide's motion is denied as to both requests.

1. "Sole Remedy" For Breaches of Representations and Warranties

Countrywide argues that the Transaction Documents foreclose MBIA's attempt to recover rescissory damages for its breach of representations and warranties claim. This position is consistent with the First Department's recent April 2, 2013 ruling, finding that rescissory damages are not "legally available" because MBIA "voluntarily gave up the right to seek rescission" and "never actually requested" rescission. *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, – A.D.3d –, 2013 WL 1296525, at *1 (1st Dep't Apr. 2, 2013). Accordingly, in light of the First Department's holding, the Court grants Countrywide's motion and concludes that MBIA's request for rescissory damages for the breach of contract claim fails.

Countrywide next asserts that MBIA's "sole remedy" instead is repurchase of breaching loans. This "sole remedy" argument is not expressly referenced in the First Department's April 2, 2013 decision,[7] nor was it raised in this Court's January 3, 2012 ruling that was the subject of the First Department's decision. *See* Docket Nos. 661, 973, and 1045 (briefing for motion sequence no. 37). Upon considering this issue, this Court

[7] Following the First Department's April 2, 2013 decision, both Countrywide and MBIA sent several argumentative letters to this Court. *See* Docket Nos. 4079, 4085, 4086, and 4088. This supplemental briefing was submitted without first seeking leave from the Court. These were not the only post-submission argumentative letters submitted by the parties. *See* Docket Nos. 4039, 4040, 4041, 4042, and 4043; MBIA's January 18, 2013 Letter (not e-filed). Accordingly, the Court notes that none of these letters are part of the record for this set of summary judgment motions. Further, the Court directs both parties to the text of Commercial Division Rule 18.

concludes that the contractual provisions referenced by Countrywide do not limit MBIA's potential recovery to the repurchase remedy but appear to accommodate other forms of monetary relief.

In support of its "sole remedy" argument, Countrywide cites to Section 2.01 of the Insurance Agreements. Section 2.01 contains fifteen sets of representations and warranties in paragraphs (a) through (o). *See* Holland Affirm. Ex. 64 §§ 2.01(a)-(o) (CWHEQ 2006-G Insurance Agreement ("2006-G IA")). Specifically, Countrywide points to Section 2.01(l), which states that each of the representations and warranties in the Transaction Documents is "true and correct in all material respects" and that the remedy for "any breach of *this paragraph*" is limited to the remedies in the related Transaction Document. *See* Holland Affirm. Ex. 64 at § 2.01(l) (emphasis added). Countrywide notes that the "related Transaction Documents" specify that the "sole remedy" available to MBIA for loans that breach representations and warranties is the so-called repurchase process.[8]

While Countrywide seeks to impose Section 2.01(l)'s remedial limitations on the entirety of the representations and warranties provided in Section 2.01, the wording of the contract is not amenable to this reading. Instead, the limitations contained in Section

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[8] Countrywide cites to the 2006-G Insurance Agreement and asserts without opposition from MBIA that the language of Section 2.01(l) is "materially identical for each of the other Securitizations." (Countrywide 19-a Statement ¶ 127.)

2.01(l) expressly pertain to the representations and warranties contained in that "paragraph," i.e. in Section 2.01(l). Notably, none of the other fourteen alphabetically-numbered paragraphs under Section 2.01 – either the ones before or after (l) – contain any such limitation.

Countrywide nonetheless argues that Section 2.01(l)'s reference to "this paragraph" is meant to apply to Section 2.01 as a whole. However, the term "paragraph" is used elsewhere within the Insurance Agreement to refer to discrete paragraphs contained within larger Sections, just as paragraph (l) is contained within the larger Section 2.01. *See* 2006-G I § 3.04(b) ("Notwithstanding the second to last paragraph of Section 3.04(a) above ..."). Accordingly, it does not appear that the "sole remedy" limitation contained in Section 2.01(l) applies to the other representation and warranty provisions of Section 2.01.

This reading is supported by Section 5.02(b) of the Insurance Agreements, which provides that:

> *[u]nless otherwise expressly provided, no remedy herein conferred upon or reserved is intended to be exclusive of any other available remedy*, but each remedy shall be cumulative and shall be in addition to other remedies given under the Transaction Documents or existing at law or in equity.

2006-G IA § 5.02(b) (emphasis added).[9]

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[9] This language is representative of Section 5.02(b) as it appears in the other Insurance Agreements at issue in this litigation. *See* Holland Affirm. Exs. 57, 58 , 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, and 71.

Among the remedies "herein conferred" upon MBIA in the Insurance Agreement is the ability to "take whatever action at law or in equity as may appear necessary or desirable in its judgment to collect the amounts then due under the Transaction Documents . . ." *Id.* at § 5.02(a)(ii). This broad remedy is not expressly limited to repurchase and accommodates other forms of recovery.

Further, Section 5.02(b) provides that none of the remedies provided "herein," i.e. in the Insurance Agreement, is intended to be exclusive of remedies in other Transaction Documents "unless otherwise expressly provided." Countrywide inverts this provision and argues that remedies or limitations on remedies contained in other Transaction Documents can bar remedies conferred in the Insurance Agreement. But that is not what Section 5.02(b) states. The provision is broadly stated and provides that none of the remedies conferred on the Insurer in the Insurance Agreement is meant to be exclusive of any other available remedy, unless it is expressly stated that the remedy is exclusive of the Insurance Agreement remedy. This provision does not state the inverse – that remedies conferred in the Transaction Documents can be exclusive of remedies provided in the Insurance Agreement. Thus, although Countrywide points to language in the Sale and Servicing Agreements ("SSA") and Mortgage Loan Purchase Agreements ("MLPA) for the Securitizations providing that the sole remedy for breaches of representations is

repurchase, the wording of Section 5.02(b) of the Insurance Agreement does not state that such provisions limit the Insurer's recovery.

Turning back to Section 2.01(l), while that provision "expressly provided" that the remedy for breach of the representation and warranty contained in that particular paragraph is limited to repurchase, no other paragraph of Section 2.01 contains that express "exclusive" limitation barring MBIA from seeking relief under Section 5.02(a). Given that Countrywide and MBIA are both very sophisticated parties, they certainly could have included such a limitation in all of the paragraphs in Section 2.01. Since they did not do so, this Court is constrained now to interpret Section 2.01 as written.

Thus, to the extent that MBIA can demonstrate a breach under one of the other representations and warranties in Section 2.01 that do not contain this express limitation, it appears that MBIA's recovery would not be limited to repurchase. While rescissory damages are unavailing for the reasons explained by the First Department, nothing in the contract language cited above bars other forms of monetary damages, such as compensatory relief.[10]

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[10] Further, the Court notes that Countrywide's briefing addresses only those Transaction Document provisions that pertain to breaches of representations and warranties. To the extent that MBIA seeks recovery under other provisions of the Transaction Documents, including for breach of the repurchase provisions, Countrywide has not argued that MBIA's recovery for such breaches would be limited to the repurchase protocol.

Moreover, the First Department's decision supports this reading. Although the First Department noted that the Insurance Law does not allow for rescission under the circumstances of this case, the appellate court also noted that Countrywide failed to demonstrate that the Insurance Law bars "the recovery of payments made pursuant to an insurance policy without resort to rescission." *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, – A.D.3d –, 2013 WL 1296525, at *1 (1st Dep't Apr. 2, 2013). The relief accorded through recovery of payments made under the insurance policy is plainly different from the repurchase protocol, which provides for the repurchase of loans from the Securitizations' Trusts. Thus, the First Department's recent ruling supports the conclusion that MBIA's potential recovery is not contractually limited to the repurchase remedy and may include monetary relief, such as compensatory damages.

Countrywide cites to no other contractual provisions in its briefing supporting its argument that repurchase is the "sole remedy."

2. Breach of the Repurchase Protocol

Countrywide next seeks summary judgment on MBIA's claim for breach of the repurchase remedy, arguing that MBIA has failed to give the requisite notice to trigger Countrywide's repurchase obligations. Specifically, Countrywide asserts that MBIA has

given it no particularized notice as to over 95 percent of the loans in the Securitizations. (CW 19-a Statement ¶ 139.) As discussed below, there is no such notice requirement.

MBIA correctly notes that this Court permitted it to use statistical sampling as a means to prove both its fraud and breach of contract claims. *See* December 22, 2010 Order at 12. As the decision noted, "Plaintiff's possible use of sampling does not change Plaintiff's ultimate burden of proof, only how Plaintiff may present that proof." *Id.* at 5. Thus, to the extent that MBIA uses sampling at trial, it will have the burden of establishing breaches on a pool-wide basis.

Countrywide asserts that such a pool-wide showing will deprive it of the particularized loan-by-loan notice that MBIA is required to give under the Securitizations' Transaction Documents. This argument, however, is belied by the repurchase provisions themselves. For example, Countrywide cites to Section 2.04(d) of the 2006-G Sale and Servicing Agreement in support of its argument that MBIA must inform Countrywide of breaching loans in order to trigger the repurchase obligation. Section 2.04(d) provides in relevant part that:

> the Sponsor [Countrywide Home Loans, Inc.] shall use all reasonable efforts to cure in all material respects any breach of any of the foregoing representations and warranties (other than a breach of the representation and warranty in Section 2.04 by virtue of the repetition of Section 3.02(a)(5) of the Purchase Agreement) *within 90 days of becoming aware of it* . . .

Holland Affirm. Ex. 47 ("2006-G SSA"), § 2.04(d) (emphasis added).[11] This provision does not put the onus on MBIA to give Countrywide notice in order to trigger Countrywide's obligations. Instead, Countrywide merely needs to "become aware" of the breach. Therefore, the issue is not whether MBIA gave notice to Countrywide of breaching loans but whether Countrywide was "aware" of the breaches.

MBIA asserts that Countrywide has monitored the performance and likelihood of delinquency for the Securitizations' loans and kept databases tracking loans that Countrywide suspected to be the product of fraud. *See* MBIA 19-a Statement ¶ 138; Sheth Affirm. Ex. 162 & 163. In addition, MBIA argues that Countrywide has been aware of a significant number of defective loans since 2008, when MBIA disclosed in its Complaint in this action that its review discovered breaches in approximately 90% of the loans reviewed. *See* Sheth Affirm. Ex. 349 (MBIA's September 30, 2008 Complaint). Countrywide disputes that it had actual notice of breaches and that it failed to repurchase any loans it knew to be defective. *See* CW Reply Br. at 18-19. Whether Countrywide had actual notice of breaches and refused to repurchase breaching loans presents issues of

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[11] Countrywide notes that slightly different language is used in the earlier HELOC SSAs – 2004-I and 2004-P – as well as in the analogous CES Transaction documents. *See* Countrywide Rule 19-a ¶¶ 122-24. However, for the purposes of the instant motion, Section 2.04(d) of the 2006-G SSA is sufficiently representative of all of the analogous provisions in the Transaction Documents for use in the instant analysis. Also, Section 2.04(d) of the 2006-G SSA is the only provision referenced by Countrywide in its briefs for this point.

fact that are not capable of resolution on this motion. Accordingly, Countrywide's motion for summary judgment on this claim is denied.[12]

C. *Count Four – Breach of Servicing Obligations*

In Count Four, MBIA asserts that Countrywide breached its obligation to "service and administer the Mortgage Loans in a manner consistent with the terms of this Agreement and with general industry practice." *See* 2006 SSA at § 3.01.[13] Countrywide now seeks summary judgment on this claim, arguing that MBIA "cannot adduce any evidence" in support of its claim. *See* Countrywide's Memorandum in Support of Summary Judgment ("Countrywide Moving Br.") at 40. The essence of Countrywide's argument is that the report of MBIA's servicing expert, Steven Butler, should be stricken, and without Mr. Butler's report, MBIA has no proof to support its claim.

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[12] At the end of its argument regarding breach of the repurchase obligation, Countrywide adds a single sentence seeking to limit MBIA's claim for repurchase to those loans that are in default or are significantly delinquent. Countrywide offers no citation in support of this request. Moreover, this argument has been rejected by the First Department in its recent April 2, 2013 ruling in this case. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, – A.D.3d –, 2013 WL 1296525, at *2 (1st Dep't Apr. 2, 2013) ("[P]laintiff is entitled to a finding that the loan need not be in default to trigger defendants' obligation to repurchase it. There is simply nothing in the contractual language which limits defendants' repurchase obligations in such a manner."). Accordingly, Countrywide's request to limit MBIA's ability to recover under the repurchase provision is denied.

[13] The 2006-G SSA cited here is representative of the servicing language applicable to the Securitizations. While the language may differ slightly from deal to deal, and may be found in Pooling and Servicing Agreements for some deals instead of a Sale and Servicing Agreement, the content of the provisions is consistent. *See* Countrywide 19-a Statement ¶¶ 146-47, 149.

1. Countrywide's Summary Judgment Burden

Countrywide's argument misconstrues the nature of its burden as the proponent of this summary judgment motion. To succeed on summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Given this burden of adducing affirmative evidence to demonstrate its entitlement to summary judgment, the movant "cannot obtain summary judgment by pointing to gaps in plaintiffs' proof." *Torres v. Indus. Container*, 305 A.D.2d 136, 136 (1st Dep't 2003); *see also Cole v. Homes for the Homeless Inst., Inc.*, 93 A.D.3d 593, 594 (1st Dep't 2012) ("On a motion for summary judgment, the movant bears the burden of adducing affirmative evidence of its entitlement to summary judgment."); *Coastal Sheet Metal Corp. v. Martin Assoc., Inc.*, 63 A.D.3d 617, 617 (1st Dep't 2009) ("Accordingly, defendant's failure to make a prima facie showing required the denial of its motion, regardless of the claimed insufficiency of plaintiff's opposition."). Thus, merely arguing that MBIA cannot prove its claim because Mr. Butler's report is insufficient is not the affirmative showing required to justify the granting of summary judgment in Countrywide's favor. *See* Countrywide Moving Br. at 42 ("And, without Mr. Butler's opinion, there is no evidence that Countrywide failed to service the loans in accordance with contractual requirements . . .").

Countrywide argues that the "gravamen" of its summary judgment motion is that "absent the baseless, inadmissible opinion testimony of MBIA's servicing expert, Mr. Butler, there is no evidence that Countrywide breached its contractual servicing obligations." (Countrywide Reply Br. at 21.) However, the Court notes that Countrywide also makes passing reference in its brief to "undisputed evidence establish[ing] that Countrywide was a very strong and effective servicer." (Countrywide Moving Br. 40-41.) Specifically, Countrywide references "servicing review" reports prepared by MBIA between 2004 and 2007, stating that Countrywide exhibited "sound practices" and earned a "strong" rating. *See* Countrywide Moving Br. at 40; Countrywide 19-a Statement ¶¶ 160-63. Although Countrywide maintains that this evidence is "undisputed," MBIA states that Countrywide was not "forthright about its servicing practices" during the visits on which the reports cited by Countrywide are based and points to internal Countrywide emails in support. *See* MBIA Opp. 19-a Statement ¶¶ 158, 160-62, 165, 167. Thus, while Countrywide states that it cites to "undisputed" evidence demonstrating its strong servicing practices, the Court concludes that there are material issues of fact in dispute precluding summary judgment.

2. Countrywide's Motion to Strike the Butler Expert Report

Moreover, as to the merits of Countrywide's attack on Mr. Butler's servicing report, the criticisms lobbed by Countrywide fall far short of the high threshold required for a motion to strike.[14]

The Butler Servicing Report concerns Countrywide's loan servicing practices. *See* Affidavit of David Wells in Support of Motion to Strike Butler Servicing Report ("Wells Aff."), Ex. A ("Servicing Report"). Mr. Butler therein opines that Countrywide failed to service 46% of sampled loans in accordance with both industry standards and Countrywide's own stated servicing practices. *Id.* Butler based his opinion on a sample of 750 loans across the 15 Securitizations at issue in this case. *Id.*

Countrywide alleges that, in reaching his conclusions in the Servicing Report, Mr. Butler ignored thousands of pages of servicing records and failed to consider the contracts that delineate Countrywide's loan servicing obligations. Countrywide contends that Butler's report should thus be stricken as speculative and inconsistent with the record.

"Where [an] expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force." *Diaz v. N.Y. Downtown Hosp.*, 99 N.Y.2d 542, 544 (2002). Countrywide does not argue that Mr.

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[14] Countrywide attacks Mr. Butler's report in its summary judgment papers and also devotes a separate motion to strike to the same subject (motion sequence no. 56). The Court addresses motion sequence no. 56 herein.

Butler's Servicing Report lacked *any* evidentiary foundation, but rather that Mr. Butler failed to consider certain evidence that Countrywide considers to be important. The adequacy and completeness of Mr. Butler's analysis goes to the weight and not the admissibility of the Servicing Report, and is thus an issue for the finder of fact to determine at trial. *See Harding v. Noble Taxi Corp.*, 182 A.D.2d 365, 370 (1st Dep't 1992) (holding that "it is the jury's function to determine the credibility of witnesses and the weight to be accorded the testimony of experts"); *see also Schlansky v. Augustus v. Riegel, Inc.*, 9 N.Y.2d 493, 497 (1961) (holding that an expert's "lack of further information affected the weight but not the admissibility of his evidence."). Therefore, Countrywide's motion to strike the Butler servicing report is denied.

3. Standard Applied to MBIA's Servicing Breach Claim

Finally, Countrywide and MBIA dispute the showing that must be made to impose liability on Countrywide for breach. Countrywide maintains that its liability under the servicing provisions is limited to "gross negligence," while MBIA argues that it need only show negligence.

MBIA brings its servicing breach claim under the Sale and Servicing Agreements ("SSA") for the HELOC Securitizations and the Pooling and Servicing Agreements ("PSA"), applicable to the CES Securitizations. For the purpose of the instant briefing,

the parties each focus on Section 5.03 of the 2006-G SSA. By its terms, this provision limits the liability of Countrywide for claims brought by the Trust, Owner Trustee, Transferor or the Noteholders under the Agreement, except for:

> any liability that would otherwise be imposed for misfeasance, bad faith, or gross negligence in the performance of the duties of the Master Servicer or for reckless disregard of the obligations of the Master Servicer.

2006-G SSA § 5.03.[15]

MBIA maintains that, while Section 5.03 governs its claim, the limitation of liability in Section 5.03 is inapplicable. MBIA premises its argument on the fact that Section 5.03 does not expressly reference claims brought by the Insurer. However, MBIA is not a party to the Sale and Servicing Agreement that contains this provision, or to any of the Securitization Transaction Documents on which it bases its servicing claim. Instead, MBIA is designated as an intended third-party beneficiary. *See* Holland Affirm. Ex. 47 § 9.06 ("The Credit Enhancer is a third party beneficiary of this Agreement."). As a third-party beneficiary, MBIA has no greater rights under the contract than any of the contracting parties. *See Assured Guar. Mun. Corp. v. Flagstar Bank, FSB*, 2012 WL 4373327, at *9 (S.D.N.Y. Sept. 25, 2012) (noting that insurer, as third-party-beneficiary to the Sale and Servicing Agreement is bound to the Agreement's terms and "possessed

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[15] Countrywide asserts without opposition from MBIA that Section 5.03 of the 2006-G SSA is "materially identical in all nine of the SSAs governing the HELOC Securitizations and all six of the PSAs governing the CES Securitizations." (Countrywide Rule 19-a ¶ 149.)

no greater right to enforce [the] contract than the actual parties to the contract."). Since the Agreements at issue limit the Trusts' ability to recover to "misfeasance, bad faith, or gross negligence in the performance of the duties of the Master Servicer or for reckless disregard of the obligations of the Master Servicer," MBIA is similarly restricted and must make the same showing for its servicing claims.

D. *Count Six – Indemnification*

Countrywide next requests summary judgment on MBIA's cause of action for indemnification. While captioned as a claim for "indemnification," MBIA now asserts its claim under a reimbursement provision, Section 3.03 of the Insurance Agreement. This semantic difference notwithstanding, Countrywide's summary judgment motion is granted. Whether a request for indemnification or reimbursement, the claim is barred by the language of the Agreement and the Court of Appeals' decision in *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 492 (1989).

MBIA seeks reimbursement "for its costs in enforcement" of its rights under the Insurance Agreements under Section 3.03(c) of the Insurance Agreements. (12/13/12 Oral Argument Tr. at 352: 7-10.) Section 3.03(c) provides that:

> The Master Servicer and the Sponsor agree to pay to the Insurer (or the Trust, to the extent the Insurer has previously been paid or reimbursed for such amount pursuant to Section 3.03(a)) as follows: any and all reasonable

> charges, fees, costs and expenses that the Insurer may reasonably pay or incur, including, but not limited to, reasonable attorneys' and accountants' fees and expenses, in connection with ... (ii) the enforcement or defense or preservation by the Insurer of any rights in respect of any of the Transaction Documents, including without limitation, instituting, defending, monitoring or participating in any litigation proceeding (including, without limitation, any insolvency or bankruptcy proceeding in respect of any Transaction participant or any affiliate thereof) relating to any of the Transaction Documents, any party to any of the Transaction Documents, in its capacity as such a party, or the Transaction ..."

2006-G IA, § 3.03.[16]

While Section 3.03(c) references payment of costs, the language of the Section "falls short of satisfying the exacting standard" set forth by the Court of Appeals in *Hooper Associates* for an indemnification claim. *See Gotham Partners, L.P. v. High River Ltd. P'ship*, 76 A.D.3d 203, 207 (1st Dep't 2010). Under *Hooper*, the court "should not infer a party's intention to waive the benefit of the [American] rule unless the intention to do so is unmistakably clear from the language of the promise." *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 492 (1989). Thus, the presumption that each side pays its own costs will not be set aside absent "unmistakably clear" language to the contrary.

The *Hooper* court found that this "unmistakably clear" language must "exclusively or unequivocally" refer to "claims between the parties themselves." *Hooper*

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[16] This language is representative of Section 3.03(c) as it appears in the other Insurance Agreements at issue in this litigation. *See* Holland Affirm. Exs. 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, and 71.

Assoc., 74 N.Y.2d at 492. Just as in *Hooper*, the provision cited here has the potential to cover third-party actions seeking damages from MBIA in connection with its obligations under the Transaction Documents. Where this potential exists, the Court of Appeals found that the provision was not sufficiently unequivocal as to accommodate reimbursement of attorneys' fees. *Hooper Assoc.*, 74 N.Y.2d at 494; *see also Gotham Partners*, 76 A.D.3d at 206 ("the [*Hooper*] court considered the indemnification provision's list of potential grounds for claims, and observed that all were 'susceptible to third-party claims' and none were 'exclusively or unequivocally referable to claims between the parties themselves.'")

"The problem with plaintiffs' position is not that their interpretation is irrational; it is that the strict standard imposed by *Hooper* requires more than that." *Gotham Partners*, 76 A.D.3d at 207. The language of the reimbursement provision at issue fails to meet *Hooper*'s strict standard, as it is does not "exclusively or unequivocally" refer to claims brought between the parties themselves. Accordingly, Countrywide's motion for summary judgment as to count six is granted.

E. *Punitive Damages*

In its prayer for relief, MBIA seeks punitive damages, arguing that Countrywide's alleged misconduct harmed many victims beyond MBIA and that the misrepresentations

at issue in this case were "part of a carefully-orchestrated scheme encompassing much more than the MBIA-Countrywide transaction," carried out with the blessing of CW's senior executives. (MBIA Opp. Br. 43-44.) Countrywide now seeks summary judgment, dismissing this claim for relief.

Punitive damages "may not be awarded to redress a private wrong, and accordingly ... such damages are not available in the ordinary fraud and deceit case." *Kelly v. Defoe Corp.*, 223 A.D.2d 529, 529 (2d Dep't 1996). Instead, exemplary damages are "permitted only when a defendant's wrongdoing is not simply intentional but evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations." *Hoeffner v. Orrick, Herrington & Sutcliffe LLP*, 85 A.D.3d 457, 458 (1st Dep't 2011) (citations omitted). Plaintiff must demonstrate "circumstances of aggravation or outrage, or a fraudulent or evil motive on the part of the defendant." *Id.*

Countrywide argues that the punitive damages demand must be stricken because the instant transactions were "privately negotiated" and "the dispute over whether the loans breached contractual [representations and warranties] does not have any bearing on the public at large." (Countrywide Moving Br. at 43.) However, while a punitive damages award premised on breaches of contract may be limited to conduct directed at the public, this limitation does not categorically apply to tort claims. *See Don Buchwald*

& Assoc., Inc. v. Rich, 281 A.D.2d 329, 330 (1st Dep't 2001) ("The limitation of an award for punitive damages to conduct directed at the general public applies only in breach of contract cases, not in tort cases"); *see also Giblin v. Murphy*, 73 N.Y.2d 769, 772 (1988) (stating that it could not "accept defendants' argument that the punitive damages award must be overturned because there was no harm aimed at the public generally" since "[p]unitive damages are allowable in tort cases such as this so long as the very high threshold of moral culpability is satisfied.").

In this case, MBIA brings a tort claim, asserting that Countrywide fraudulently induced it to enter into Insurance Agreements based on misrepresentations about the loans underlying the transactions. The question then is whether Countrywide's conduct toward MBIA regarding the fraudulent inducement claim asserted in this action demonstrates the "high degree of moral turpitude" and "wanton dishonesty" to sustain a punitive damages award. This extremely high threshold is difficult for any litigant to meet, and it will be difficult for MBIA, but this Court cannot decide this issue now as a matter of law.

While Countrywide seeks summary judgment, it offers only its disagreement with MBIA's assertions. Countrywide argues without citation that there is "nothing reprehensible, wanton, or malicious about the conduct of which MBIA complains" and that "[t]here is no evidence that any 'superior officer' of Countrywide participated in, or ratified the decision by Countrywide to include these allegedly noncompliant loans in the

Securitizations." (Countrywide Moving Br. at 43.) As such, Countrywide has not demonstrated its entitlement to "judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact" regarding MBIA's prayer for punitive damages. *See Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Accordingly, Countrywide's motion for summary judgment on MBIA's request for punitive damages is denied.

V. **MBIA's Motion for Summary Judgment**

In its motion for summary judgment, MBIA seeks judgment on its claim for breach of the repurchase obligation, asserting that Countywide has conceded that certain loans are in breach and therefore must be repurchased. Further, MBIA moves for summary judgment on its claim for breach of the Insurance Agreements. MBIA maintains that certain of the breaches identified by its "loan review" or reunderwriting expert, Steven Butler, are undisputed, and as a result, should be extrapolated to the Securitizations as a whole to demonstrate material breach. Countrywide opposes.

A. *Breach of the Repurchase Obligation*

MBIA first seeks judgment on its claim that Countrywide breached its contractual obligation to repurchase breaching loans under the SSAs, MLPAs, and PSAs for the

Securitizations.[17] Here, MBIA raises issues different than those raised by Countrywide in its motion for summary judgment on the same claim. *See* Section IV.B.2, *supra*. First, MBIA argues that a loan need not be in default in order to be repurchased pursuant to the Transaction Documents; instead, the loan need only be in breach of representations and warranties. Next, MBIA argues that Countrywide refused to repurchase loans that, by Countrywide's own admission, breached representations and warranties.

1. Performing Loans are Eligible for Repurchase

In support of its request for summary judgment, MBIA argues that the plain language of the Transaction Documents makes clear that performing loans, or loans not in default, are eligible for repurchase. While Countrywide notes its objection, the First Department's April 2, 2013 ruling decides this issue. The First Department held that MBIA "is entitled to a finding that the loan need not be in default to trigger defendants' obligation to repurchase it." *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, – A.D.3d –, 2013 WL 1296525, at *2 (1st Dep't Apr. 2, 2013). However, the First Department notes that its ruling extends only to a single Securitization – CWHEQ 2006-E. *Id.* at *2. For the

[17] MBIA asserts that the repurchase remedy provisions for each of the Securitizations are found at: Sheth Affirm. Exs. 42-43 at § 2.04(b); Exs. 45-50 at §§ 2.04(b), (d); Exs. 51-56 at § 2.03(f). (MBIA Moving Br. at 8 n.11.)

reasons that follow, the Court finds that the logic of the First Department's decision extends to the other Securitizations at issue in this litigation.

To support its argument that performing loans are eligible for repurchase, MBIA points to the pertinent Transaction Documents for each of the Securitizations at issue. MBIA cites to the repurchase provisions found at Section 2.04(b) of the SSA for the HELOC Securitizations and Section 2.03(f) of the PSA for the CES Securitizations. *See* Sheth Affirm. Exs. 42-50 (SSAs for HELOC Securitizations) and 51, 53-56 (PSAs for CES Securitizations[18]). As MBIA correctly notes, neither of these provisions state that a mortgage loan must be in default in order to be repurchased. In fact, neither "default" nor "cause" appears anywhere within these provisions.

Moreover, the Transaction Documents for eleven of the fifteen Securitizations contain a provision that expressly contemplates repurchase of performing loans. Section 2.10 of the SSAs for the HELOC Securitizations states:

> Notwithstanding any contrary provision of this Agreement, *with respect to any Mortgage Loan that is not in default or as to which default is not imminent*, no repurchase or substitution as to Sections 2.02, 2.03, 2.04 or 206 shall be made unless the party repurchasing or substituting delivers to the Indenture Trustee an Opinion of Counsel . . .

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[18] This list excludes the PSA for CWHEQ 2006-E, which was addressed by the First Department in its April 2, 2013 decision. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, – A.D.3d –, 2013 WL 1296225, at *2 (1st Dep't Apr. 2, 2013).

See Sheth Affirm. Ex. 49 at § 2.10 (2006-G SSA) (emphasis added); *see also id.* Exs. 46 at § 2.10, 47 at § 2.10, and 50 at § 2.10 (containing the same language). The PSAs for the CES Securitizations contain substantially similar provisions that likewise reference repurchase of "any Mortgage Loan that is not in default or as to which default is not imminent." *See* Sheth Affirm. Ex. 51, 53-56 at § 2.05(a).

While the Transaction Documents for the four remaining Securitizations do not contain such a provision, this Court does not read the provision's absence to require that default be shown. This is especially so, given the repurchase provision's notable failure to include such a requirement, as discussed above.

Countrywide cites to extrinsic evidence for the proposition that Countrywide treated repurchase requests as requiring a showing of a material breach that "caused the loan to default." *See* Countrywide Opp. Br. at 10 (citing Sheth Affirm. Ex. 176 at 152: 1-4 (deposition testimony of employee of Bank of America subsidiary). However, the Court need not resort to extrinsic evidence where the language of the contract is clear and unambiguous, as it is here. *See NFL Enterprises LLC v. Comcast Cable Commc'ns, LLC*, 51 A.D.3d 52, 58 (1st Dep't 2008) ("A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous...").

Section 2.04(b) of the SSA for the HELOC Securitizations and Section 2.03(f) of the PSA for the CES Securitizations do not speak to or prohibit the repurchase of performing loans. This interpretation is only bolstered by the "with respect to any Mortgage Loan that is not in default or as to which default is not imminent" language in Section 2.10 of the SSAs and Section 2.05(a) of the relevant PSAs. Accordingly, in the absence of language restricting Countrywide's repurchase obligation to defaulting loans, the Court concludes that MBIA need not show that a Securitization loan is in default in order to be repurchased. This ruling is consistent with the First Department's ruling as to CWHEQ 2006-E. Accordingly, MBIA's request for summary judgment as to issue of whether performing loans are eligible for repurchase is granted.

2. Countrywide's Repurchase of 88 Loans from the Securitizations

MBIA next argues that Countrywide conceded breaches in 88 Random Sample loans, which Countrywide's loan review expert recommended for repurchase in her July 3, 2012 report. *See* Sheth Affirm. Ex. 68 at 6 n.4 (rebuttal report of Karen Godfrey). MBIA argues that Countrywide failed to repurchase these loans, demonstrating breach of the repurchase protocol. Countrywide responds that the 88 loans have been repurchased by Countrywide; therefore, there has been no breach. Affidavit of Elizabeth Chen in

Opposition to MBIA's Motion for Summary Judgment ("Chen Aff.") ¶¶ 4, 6. On reply, MBIA concedes that the loans have been repurchased. *See* MBIA Reply Br. at 23.

While MBIA argues that the repurchase of these 88 loans was untimely and therefore demonstrates breach of the repurchase protocol, there is an issue of fact regarding when Countrywide received notice that these loans were in breach. As discussed earlier with regard to Countrywide's motion for summary judgment, the repurchase provisions in the Securitizations' Transaction Documents state that:

> the Sponsor [Countrywide Home Loans, Inc.] shall use all reasonable efforts to cure in all material respects any breach of any of the foregoing representations and warranties (other than a breach of the representation and warranty in Section 2.04 by virtue of the repetition of Section 3.02(a)(5) of the Purchase Agreement) *within 90 days of becoming aware of it. . .*

Sheth Affirm. Ex. 49 (2006-G SSA), § 2.04(d) (emphasis added); *see also* Point IV.B.2, *supra*.

In her affidavit, Elizabeth Chen states that Countrywide's underwriting expert, Karen Godfrey, notified her in July 2012 that the 88 loans should be repurchased. Chen Aff. ¶ 4. Chen affirms that 87 loans were repurchased on August 15, 2012. *Id.* ¶ 7. The remaining loan was "previously repurchased." *Id.* ¶ 6. MBIA asserts that Countrywide learned of the breaches earlier, noting that 10 of the repurchased loans were the subject of repurchase requests by MBIA over four years ago. *See* MBIA Reply Br. at 23 n. 27

(citing Sheth Affirm. Ex. 98). In addition, MBIA asserts that it gave notice as to the 77 remaining loans through the submission of its expert report on February 27, 2012. *Id.*

Based on the parties' assertions, there appears to be an issue of fact regarding when Countrywide "became aware" of the breaches in the 88 loans at issue and whether the loans were repurchased within 90 days, in accordance with the repurchase provisions. This dispute cannot be resolved on the instant motion.

3. Repurchase of Loans Classified as "SUS" by Countrywide

MBIA next argues that Countrywide conceded breaches in another 1,099 loans that Countrywide classified as "severely unsatisfactory" or "SUS." MBIA asserts that imposition of this SUS classification by Countrywide's Corporate Quality Control Department demonstrates that the loan at issue breaches the representation and warranty that each mortgage loan included in the Securitizations was underwritten in accordance with Countrywide's underwriting guidelines.[19] (MBIA Moving Br. at 15.) Countrywide disagrees.

The parties dispute the significance of the SUS designation. MBIA maintains that the SUS loans qualify for repurchase since they pose a "[s]evere underwriting risk with limited or no compensating factors." *See* Sheth Affirm. Ex. 99 at CWMBIA0011001655.

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[19] *See* Sheth Affirm. Ex. 33 at § 3.02(xxxvi); Ex. 34 at § 3.02(xxxviii); Exs. 35-41 at § 3.02(a)(37); Exs. 51-56 at § 2.03(b)(45).

Countrywide argues that a SUS finding "does not mean that that a particular loan is not in material compliance with underwriting guidelines or ... otherwise breaches contractual representations and warranties made to MBIA." *See* Countrywide Rule 19-a Counterstatement of Material Facts in Opposition to Summary Judgment ("Countrywide Opp. 19-a Counterstatement") ¶ 49. For example, Countrywide notes that loans may have received SUS ratings for procedural reasons, including that "a branch didn't cross a 'T' properly." *See id.* ¶ 47 (citing Sheth Affirm. Ex. 103 at 1144: 19-20).

Thus, taking all inferences in favor of the non-movant, Countrywide, there are sufficient facts in dispute as to the meaning of SUS – and therefore whether the SUS loans are in breach – as to preclude MBIA's motion for summary judgment as to the breaches in the 1,099 SUS loans. *See Asabor v. Archdiocese of New York*, 102 A.D.3d 524, 527 (1st Dep't 2013) (stating that court must "draw all reasonable inferences in the light most favorable" to the non-movant on a motion for summary judgment).

4. Anticipatory Repudiation of Repurchase Obligations

Arguing that Countrywide has stonewalled and repeatedly refused to repurchase loans, MBIA maintains that Countrywide's conduct constitutes an anticipatory repudiation of its repurchase obligations.

A party repudiates a contract when it "voluntarily disables itself from complying" with its contractual obligations. *Computer Possibilities Unlimited, Inc. v. Mobil Oil Corp.*, 301 A.D.2d 70, 77 (1st Dep't 2002). A repudiation can be either "a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach" or "a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach." *Norcon Power Partners v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 463 (1998). The repudiation must be "unequivocal." *Id.* ("That switch in performance expectation and burden is readily available, applied and justified when a breaching party's words or deed are unequivocal. Such a discernible line in the sand clears that way for the nonbreaching party to broach some responsive action."); *see also Bank of New York v. River Terrace Assoc., LLC*, 23 A.D.3d 308, 309 (1st Dep't 2005) (affirming denial of summary judgment on anticipatory repudiation claim where record "too equivocal").

Here, MBIA's anticipatory repudiation argument hinges on three points: (1) the fact that Countrywide agreed to repurchase only 4.51% of the 13,607 loans for which MBIA has submitted repurchase requests; (2) that Countrywide "dragged out" its approval of these repurchases over a period of six to eighteen months; and (3) that Countrywide deliberately designed and orchestrated a scheme to frustrate the repurchase process.

MBIA's arguments present a number of factual issues that prevent this Court from finding an "unequivocal" repudiation and thus require denial of its motion. First, MBIA's argument regarding Countrywide's repurchase rate presupposes a finding that Countrywide was required to repurchase additional loans. The Court cannot make that finding on this summary judgment motion. *See supra.* For this reason, MBIA's first argument fails to demonstrate its entitlement to judgment as a matter of law.

The same is true regarding MBIA's second and third arguments. Countrywide counters MBIA's allegation that it "dragged out" the repurchase process by pointing to testimony from Countrywide employees offering other reasons for the amount of time the process took. For example, Countrywide asserts that MBIA submitted its repurchase requests "in bulk – thousands of claims at a time." *See* Countrywide Opp. 19-a Statement ¶ 18. Countrywide also cites to the testimony from a Countrywide Home Loans employee stating that repurchase requests from monoline insurers, such as MBIA, were "just coming in incomplete, kind of half done on spreadsheets." *See* Sheth Affirm. Ex. 103 at 972: 18-19. MBIA disagrees with Countrywide's position and points to documents stating that Countrywide chose to prioritize other monoline repurchase demands after MBIA initiated litigation. *See* Sheth Affirm. Ex. 200 (March 2009 email between Countrywide and Bank of America employees discussing monoline repurchase demands).

Again, the parties have presented a factual dispute regarding the time lag that is not capable of resolution on this motion.

Countrywide also disputes MBIA's assertion that it orchestrated a scheme to frustrate the repurchase process and denied repurchase requests in bad faith. In particular, MBIA points to a March 4, 2009 Bank of America presentation, stating: "only repurchasing those loans considered 'red faced.'" *See* Sheth Affirm. Ex. 190 at BACMBIA-X0000006474 (presentation entitled "Mortgage Investor Services/Workout Strategies Update; Rep and Warrant/Monoline Discussion"). While MBIA maintains that this "red faced" language demonstrates Countrywide's frustration of the repurchase process, the parties dispute the meaning of "red faced." MBIA maintains"red face" loans were those with "blatant issues." *See* Sheth Affirm. Ex. 103 at 1094: 24-1095: 2 (deposition testimony of Executive Vice President, Countrywide Home Loans). However, the President of Countrywide Home Loans testified that "red faced" referred to those repurchase requests for which Countrywide had no credible arguments for appeal and that should not be "appealed" by Countrywide. *See id.* Ex. 161 at 950: 21-23; *see also id.* at 951:10-14 ("I can only tell you as the manager of this group what, you know, guiding principles and other guidance were passed down from me and others in senior management roles."). Whether "red faced" means that a loan has "blatant issues" or should not be "appealed" is a factual dispute that cannot be resolved on the instant

motion. MBIA contends that use of the term demonstrates Countrywide's bad faith *ipso facto* but the Court cannot make that determination at this juncture.

These disputes illustrate material issues of fact that militate against a finding on summary judgment of an "unequivocal" repudiation by Countrywide. Again, this Court cannot state how these issues may appear at trial. However, for the purpose of this summary judgment motion, taking all inferences in favor of the non-movant, MBIA's request for relief cannot be granted.

B. *Breach of the Insurance Agreements*

MBIA contends that its underwriting expert discovered breaches in 96.8% of the loans reviewed. Of those loans found to contain breaches, MBIA now seeks summary judgment, arguing that five categories of breaches, found in 56% of the loans reviewed, are indisputable. Further, MBIA maintains that these five categories of breaches had a material and adverse effect on MBIA's interest in the loans. By extrapolating these indisputable material breaches to the Securitizations as a whole, MBIA argues that it has demonstrated material breach of the Insurance Agreement, warranting the granting of rescissory damages by the Court.[20]

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[20] As noted above, the First Department ruled on April 2, 2013 that rescissory damages are unavailing. *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, – N.Y.S. 2d –, 2013 WL 1296525, at *1 (1st Dep't Apr. 2, 2013).

The five categories of breaches identified by MBIA pertain to the following representations and warranties: (1) that an appraisal by a "qualified appraiser" was obtained for each of the loans; (2) that "no default" existed under any applicable Mortgage Note or applicable mortgage loan; (3) that the Mortgage Loan Schedules ("MLS") for each Securitization were true and correct in all material respects; (4) that the mortgage file for each loan in the Securitizations contained all required documents; and, (5) that none of the loans in the Securitizations had a Combined-Loan-to-Value Ratio ("CLTV") greater than 100%.

1. Appraisal Representation

First, MBIA argues that Countrywide represented and warranted that an appraisal was performed for each loan in the Securitizations and that the appraisal was performed by a "qualified appraiser." The crux of MBIA's instant motion for summary judgment is that 1,423 loans in the sample reviewed by MBIA's underwriting expert breach this representation and warranty because they contain electronic appraisals, as well as appraisals offered by stated income borrowers. MBIA contends that neither type of appraisal satisfies the "qualified appraiser" argument.

The language of the agreements at issue represent that an appraisal was performed for each loan before approval of the loan application. Specifically, the Mortgage Loan

Purchase Agreement ("MLPA") associated with each of the HELOC Securitizations represents and warrants that "[b]efore the approval of the Mortgage Loan application, an appraisal of the related Mortgaged Property was obtained from a qualified appraiser." *See* Sheth Affirm. Ex. 33 ("2004-I MLPA") § 3.02(li).[21] Further, the Pool and Servicing Agreement ("PSA") associated with each of the CES Transactions contains a similar provision, requiring an appraisal "obtained from a qualified appraiser." *See* Sheth Affirm. Ex. 51 ("2006-S8 PSA") § 2.03(b)(46); *see also* MBIA 19-a Statement ¶ 59. While the MLPA and PSA provisions represent that an appraisal was performed, the term "qualified appraiser" is not defined in the agreements. MBIA asserts that the representations required that appraisals be performed by a "licensed appraiser," MBIA 19-a Statement ¶ 60, while Countrywide argues that the parties' agreements, as well as Countrywide's underwriting guidelines, permit electronic appraisals and loans with stated values. *See* Countrywide Opp. 19-a Statement ¶¶ 58-60.

a. **Electronic Appraisals**

With regard to electronic appraisals, Countrywide points to the MLPAs for the HELOC Securitizations – the same documents containing the "qualified appraiser" representation – and notes that the MLPAs expressly permit a certain percentage of the

[21] The MLPAs for the other HELOC Securitizations contain the same language. *See* MBIA's Rule 19-a Statement of Undisputed Facts ("MBIA 19-a Statement") ¶ 58).

loans to be "appraised electronically." *See, e.g.,* 2004-I PA § 3.02(xxxiv)*; see also* Countrywide Opp. 19-a Counterstatement ¶ 58 (citing MLPAs for the other HELOC Securitizations). While Countrywide does not cite to a similar provision in the PSAs for the CES Securitizations, Countrywide notes that the Pro Supps for these transactions reference the use of electronic appraisals. *See* Countrywide Opp. 19-a Counterstatement ¶ 59. MBIA asserts that the term "qualified appraiser" on its face requires that the appraisal be performed by a person, who conducts an on-site inspection of the property. MBIA Moving Br. 18.

The term "qualified appraiser" is not clear on its face and does not appear to have "a definite and precise meaning." *Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.,* 13 N.Y.3d 398, 404 (2009). In this case, the term as it applies to electronic appraisals appears reasonably susceptible to either of the parties' interpretations. Based on the language of the contract and the interpretations of that language offered by the parties as it relates , the term "qualified appraiser" is ambiguous. *See Telerep, LLC v. U.S. Int'l Media, LLC*, 74 A.D.3d 401 (1st Dep't 2010) ("A contract is ambiguous if on its face it is reasonably susceptible of more than one interpretation.").

The parties cite to competing extrinsic evidence to support their competing constructions. MBIA cites to deposition testimony that Countrywide treated appraisals as needing to be completed by "a licensed appraiser." *See, e.g.,* Sheth Affirm. Ex. 113 at

508: 14-18 (testimony from employee in Countrywide's Secondary Marketing Group); *see also id.* Ex. 116 at 121: 11-14 (testimony by Countrywide executive that "an AVM isn't completed by a licensed appraiser, so if .... [the representation and warranty] says it's a licensed appraiser, AVM won't fit."). Further, MBIA maintains that a "licensed" appraiser is equivalent to a "qualified" appraiser "because it was industry standard from 2004 to 2007 to use licensed appraisers." MBIA Reply Br. 7 n.6 (citing Sheth Affirm. Ex. 112 at 839: 23-840: 17). Countrywide notes that its underwriting guidelines, which were disclosed to MBIA between 2004 and 2007, expressly permit loans with electronic appraisals. *See* Affirmation of Sarah Concannon Ex. 109 (Countrywide Loan Program Guide). Further, Countrywide maintains that MBIA's own summaries of the Securitization deals include Countrywide guidelines that allow the use of electronic appraisals. *See* Holland Affirm. Ex. 163 (MBIA deal summary for 2006-G). As such, Countrywide maintains that the electronic appraisals were treated as "qualified appraisals" by the parties.

Thus, the Court is left with "a choice among reasonable inferences to be drawn from extrinsic evidence," creating an issue of fact for the trier of fact that cannot be resolved as a matter of law. *Hartford Acc. & Indem. Co. v. Wesolowski*, 33 N.Y. 2d 169, 172 (1973). Accordingly, this issue is not amenable to summary judgment. *See NFL Enter. LLC v. Comcast Cable Commc'n, LLC*, 51 A.D.3d 52, 61 (1st Dep't 2008)

("Where the language of a contract is ambiguous, its construction presents a question of fact which may not be resolved by the court on a motion for summary judgment.") (internal quotation omitted).

b. **Stated Value Appraisals**

While Countrywide points to contractual provisions supporting its argument that "qualified appraiser" may encompass electronic appraisals, it makes no such argument with regard to stated value appraisals. The parties agree that a "stated value" appraisal is one where the borrower him or herself provides an estimate of the property's value. *See* MBIA 19-a Statement ¶ 64; Countrywide Opp. 19-a Statement ¶ 64. MBIA argues that the borrower's own value estimation is not a "qualified appraisal." In response, Countrywide offers no interpretation of the term that would include this self-appraisal, and instead argues simply that MBIA knew that self-appraised loans were included in the Securitizations. The Court concludes that no reasonable interpretation of "qualified appraisal" would include this reading.

Countrywide does not explain how the language of the contract itself supports a reading that borrower self-appraisals constitute "qualified appraisals." Instead, Countrywide invites the Court to look to its underwriting guidelines, which it states "expressly permit loans with ... stated values" and demonstrate MBIA's knowledge that

loans with such appraisals were included in the transactions. (Countrywide Opp. Br. at 17.) The Court cannot resort to extrinsic evidence to interpret a contract, absent a showing that the contractual language is ambiguous. *See Greenfield v. Phillies Records*, 98 N.Y.2d 562, 569 (2002) (noting that "[e]xtrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous"). Countrywide has made no such demonstration with regard to the stated value appraisals. As a result, the Court is left with MBIA's unrebutted contractual interpretation that such appraisals, which involve the borrower himself or herself stating the value of the property, are not performed by a "qualified appraiser." The Court agrees with this interpretation. While the meaning of "qualified appraiser" is ambiguous as to electronic appraisals, *see supra*, the term cannot accommodate the interpretation advanced here by Countrywide as to "stated value" appraisals.

As the parties are aware, this finding that the representation was inaccurate is not the end of the analysis. To grant summary judgment as to breach, the parties argue that the Court must next find that the inaccuracy "materially and adversely affected" MBIA's interest in the loan. *See* Sheth Affirm. Ex. 45 at § 2.04(b) (CWHEQ 2005-E SSA) ("If the substance of any representation and warranty in this Section ... is inaccurate and the inaccuracy materially and adversely affects the interest of the ... Credit Enhancer in the

related Mortgage Loan then ... the inaccuracy shall be a breach of the applicable representation or warranty.").[22]

However, the Court's January 3, 2012 Order already found that this "materially and adversely affected" language is ambiguous and denied MBIA's earlier motion for partial summary judgment. *See* January 3, 2012 Order, 34 Misc. 3d at 912 ("[T]his court finds that the applicable provisions of the SSA and the PSA are subject to varying interpretations regarding 'interest' and affect on interest, as well as varying and equally valid interpretations of how the 'aggregate' in SSA § 2.04(d) must be defined."); *see* Point V.A.1.a, *supra*. Here, it appears that MBIA seeks to have this Court apply a definition of material and adverse affect that the Court already concluded it could not do as a matter of law. Since the instant motion neither addresses nor resolves this ambiguity, the Court sees no reason to revisit this particular ruling.

Thus, the Court cannot conclude based on the record before it that these inaccuracies satisfy the "materially and adversely affect" standard, and therefore are breaches. Accordingly, MBIA's motion for summary judgment as to loans in breach of the appraisal representation is denied.

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[22] This "materially and adversely affected language" is also found in the repurchase provisions of the other SSAs and PSAs for the Securitizations. *See* Sheth Affirm. Exs. 42-43 at §§ 2.04(a), (b); Exs. 46-50 at §§ 2.04(b); Exs. 51-56 at § 2.03(f).

2. "No Default" Representation

MBIA next points to the "no default" representation contained in MLPAs for the HELOC Securitizations and asserts that "at least" 626 loans in the random sample contain a misrepresentation of income in breach of this representation. Countrywide disagrees, contending that "default" does not refer to borrower fraud or misrepresentations; instead, Countrywide asserts that "default" refers to the payment status of the loans.

A representative "no default" representation is found in the CWHEQ 2004-P MPLA. The provision states:

> As of the Closing Date ... *no default exists under any Mortgage Note or Mortgage Loan* and no event that, with the passage of time or with notice and the expiration of any grace or cure period, would constitute a default under any Mortgage Note or Mortgage Loan has occurred and been waived.

Sheth Affirm. Ex. 34 at § 3.02(xxxvii) (emphasis added).[23]

The Mortgage Notes referred to in the "no default" representation provide that the lender may take certain actions in response to the borrower being "in default of any material obligation of this Agreement, such as my important obligations in paragraph 12 below." *See* MBIA Opening Br. 22 n.35; Sheth Reply Affirm. Ex. 15 at CWMBIA-D0012998918. Paragraph 12 includes a promise by the borrower that he or she has "not

[23] Substantially similar language is found in the MLPAs for the other HELOC Securitizations. *See* Sheth Affirm. Exs. 33 at § 3.02(xxv); 34 at § 3.02(xxxvii); 35 at § 3.02(a)(36); 36 at § 3.02(a)(36); 37 at § 3.02(a)(36); 38 at § 3.02(a)(36); 39 at § 3.02(a)(36); 40 at § 3.02(a)(36); and 41 at § 3.02(a)(36).

made and will not make any misrepresentation in connection with my Account whether in my application, in this Agreement, or in the Mortgage." Sheth Reply Affirm. Ex. 15 at CWMBIA-D0012998919.

The language of the MLPA is clear. The representation states that, as of the closing date, no default exists under any Mortgage Note. Turning to the Mortgage Note, default refers to the "material obligations" owed under the Note, including the obligation not to make any misrepresentation in connection with the mortgage at issue. Countrywide does not dispute that this Mortgage Note language is representative. *See* Countrywide Opp. 19-a Statement ¶ 88. Instead, it argues that extrinsic evidence, such as "the commonly understood meaning of [default]" and "industry practice" evince a different meaning. *See* Countrywide Opp. Br. 21-22. In support of this argument, Countrywide cites to the Affidavit of Michael W. Schloessmann. *See* Affidavit of Michael W. Schloessmann in Support of Countrywide's Opposition ("Schloessmann Aff.") ¶¶ 11-20.[24]

However, where the plain language is clear, there is no ambiguity and thus no need to resort to extrinsic evidence. *See NFL Enter. LLC v. Comcast Cable Commc'n, LLC*, 51 A.D.3d 52, 58 (1st Dep't 2008) ("A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. Extrinsic evidence of the parties' intent may be considered only if the agreement is

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[24] MBIA filed a motion to strike the Schloessmann Affidavit, which the Court denies. *See* Section VII of this opinion.

ambiguous, which is an issue of law for the courts to decide."). Moreover, Countrywide cannot "introduce evidence of custom or industry practice to subvert the agreement's plain meaning." *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 10 A.D.3d 293, 295 (1st Dep't 2004). Thus, the Court need not resort to extrinsic evidence here. Looking at the clear plain language of the MLPAs and the Mortgage Note, the Court concludes that MBIA's interpretation of the term "default" is correct.

a. "No Default" Breaches in the Random Sample

Although MBIA's reading of the "no default" representation is correct, that is not the end of the inquiry. MBIA still has not shown that it is entitled to summary judgment as to the "at least 626 loans" that it claims are in breach of the "no default" representation, as there are material facts in dispute regarding MBIA's breach findings.

For example, Countrywide disputes MBIA's breach assertion as to the loan number ending in -8014. *See* Countrywide Opp. Br. at 25. MBIA's expert, Steven I. Butler, found that the borrower falsely represented that she had a monthly income of $4500 from her job working as a server at a chain restaurant. *See* Affirmation of Sarah Concannon in Opposition to Summary Judgment ("Concannon Affirm.") Ex. 159 at 4. In support, MBIA's expert cited to a letter received from the restaurant chain stating that the

borrower never worked there.[25] *Id.* Countrywide responds by noting that the same letter goes on to explain that the borrower never worked as "an employee of any of our corporate locations" and that "said person may be employed by a franchisee in which case this Company would have no record of her employment." *See* Concannon Affirm. Ex. 136 at MBIAS00036866. Thus, the evidence offered by MBIA as to this loan – the results of its expert's loan review – fails to demonstrate as a matter of law that this borrower misrepresented her income or employment because it leaves open the possibility that the borrower may have worked at a franchise of the restaurant chain.

In addition, Countrywide disputes MBIA's breach assertion regarding the loan ending in -0157. *See* Countrywide Opp. 19-a Statement ¶ 89. MBIA's expert found that the borrower misrepresented his income based on a letter from the borrower's purported employer who claimed that the borrower never worked there. *See* Concannon Affirm. Ex. 133 at MBIAS00021103. Countrywide disputes this finding, explaining that the letter used by MBIA's expert does not stand for the proposition asserted – i.e., that the

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[25] Countrywide argues that documents submitted by borrowers' employers and accountants constitute inadmissible hearsay that cannot be considered on this motion. Countrywide fails to note, however, that it entered into a stipulation, so-ordered by this Court, allowing for the submission of these subpoenaed documents. *See* Sheth Reply Affirm. Ex. 4. This stipulation allowed for Countrywide to object to the submission of subpoenaed documents on a document by document basis and described the process for doing so. Countrywide does not point this Court to any such objection under the procedure set forth in the stipulation, nor does Countrywide argue that the documents at issue are outside the scope of the stipulation. Based on the foregoing, the Court rejects Countrywide's argument as to the admissibility of the subpoenaed records.

borrower did not work for the employer at the time of the loan's origination. Countrywide Opp. 19-a Statement ¶ 89. Instead, Countrywide points to the verification of employment in the borrower's loan file, which notes that the borrower worked for the same employer as an "outside sales person." *See* Concannon Aff. Ex. 97 at CWMBIA-D0107580102. Based on the disputed facts offered by the parties, determination of whether this loan – and the loan above – breach the representation are ultimately factual and credibility determination that this court cannot render on summary judgment.

Countrywide identifies 14 other loans for which it disputes MBIA's assertion of breach under the "no default" representation. For each of these loans, Countrywide raises issues of fact regarding the reliability of the information considered by MBIA's expert, the relevance of these information to the borrowers' representations at the time of origination, and whether the borrowers, in fact, made misrepresentations, as found by MBIA. *See* Countrywide Opp. 19-a Statement ¶¶ 89-91.

However, Countrywide makes no reference in its papers to the other 610 loans for which MBIA asserts breach. In its Opposition to MBIA's Rule 19-a Statement, Countrywide provides only the rebuttals to MBIA's breaches as noted above and alludes to the fact that these rebuttals apply to more loans by using a "*See, e.g.,*" cite. *See* Countrywide Opp. 19-a Statement ¶ 91 ("With regard to the seven loans Ms. Godfrey fully rebutted, in each instance, Ms. Godfrey found that the stated income by the borrower

was reasonable and supported by the borrower's overall profile. *See, e.g.,* Loan No. -9805 . . . Loan No. -2468 . . ."); *see also id.* ¶ 90 ("Individual loans within the 626 further illustrate the absurdity of MBIA's so called 'proof' of material misrepresentations of income by the borrower at the time of origination. For example: Loan No. -4370 . . .").

A citation suggesting the presence of additional disputed facts cannot replace actual arguments and citations to fact. In Butler Aff. ¶ 7 Ex. 2, each loan has its own set of findings, which Countrywide does not dispute on a loan-by-loan basis. "Examples" of disputed breaches and "*see, e.g.,*" citation signals are not sufficient to generate disputed issues of material fact as to those loans never addressed by Countrywide.

On a motion for summary judgment, where the proponent satisfies its burden of making a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact, the burden shifts to the party opposing the summary judgment motion. The opponent must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

For 610 loans at issue, Countrywide offers no proof in its briefing or in its opposition to MBIA's Rule 19-a Statement as to the existence of material issues of fact

requiring a trial.[26] Countrywide cites to no expert evidence pertaining to these loans, unlike MBIA, and no evidence otherwise rebutting MBIA's showing. Moreover, Countrywide makes no showing that the loans discussed in its papers were representative of the 626 loans as a whole. Instead, Countrywide merely alludes to issues similar to those raised with regard to the 16 loans discussed its Opposition to MBIA's Rule 19-a Statement. However, "[a] shadowy semblance of an issue is not enough to defeat the motion." *S. J. Capelin Assoc., Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 (1974) (internal quotation omitted).

Moreover, the general criticisms lobbed by Countrywide at Mr. Butler's analysis in its motion to strike Mr. Butler's reports (motion sequence no. 62) do nothing to rebut the specific issues raised by MBIA here.[27] And, even these criticisms made by Countrywide in its separate motion to strike are not cited by Countrywide here in its voluminous briefing in its response to MBIA's assertion of breach for the "no default" loans.

Countrywide's argument, or lack thereof, requires the Court either to (1) guess at which loans – and how many – Countrywide seeks to rebut, which puts the Court in the inappropriate posture of making Countrywide's arguments for it without notice to MBIA;

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[26] The Court notes that Countrywide discussed the same loans cited in its papers during its oral argument presentation.

[27] For a fuller discussion of Countrywide's motion to strike the Butler underwriting reports, see the Court's separate opinion for motion sequence no. 62.

or (2) adopt Countrywide's position wholecloth, finding issues of fact generated for the 626 loans as a whole based on the "examples," again making determinations based on arguments never raised by Countrywide, without notice. Neither position is proper.

Countrywide had the opportunity to rebut these 610 loans in its briefing, as it did for many other loans. Countrywide's failure to do so here dooms its opposition. *See Poluliah v. Fidelity High Income Fund*, 102 A.D.2d 720 (1st Dep't 1981) ("It is axiomatic that when, upon motion for summary judgment, the movant's papers make out a prima facie basis for the grant of such motion, the opposing party must come forward and lay bare his proofs of evidentiary facts showing that there is a bona fide issue requiring trial. The opponent cannot defeat the motion by general conclusory allegations which contain no specific factual references."). While the Court ordinarily will construe evidence in the light most favorable to the non-movant, this presumption does not absolve the non-movant of the burden of demonstrating the existence of facts in dispute.

Here, MBIA made its prima facie showing through citation to the loan review findings of its expert. *See* Butler Aff. ¶ 7, Ex. 2. These findings detail how the "no default" representation is inaccurate as to specific loans and provide citations to documentary evidence in support. While Countrywide's motion to strike attacks Butler's qualifications as an expert and the time he spent on each loan file, Countrywide offers no argument here as to why Mr. Butler's loan review findings are incorrect as to these 610

loans. Since Countrywide fails to rebut these findings for 610 of the loans, the Court concludes that these loans violate the "no default" representation. For the remaining 16 loans, the Court has noted material issues of fact in dispute for trial.

Since Countrywide has failed to create issues of fact for trial as to the 610 loans for which MBIA demonstrated that the representations made are inaccurate, the next inquiry is whether the inaccuracies "materially and adversely affected" MBIA's interest in the loan. However, as noted above, the Court cannot make that determination at this time. Thus, the materiality of the inaccuracies is the sole issue remaining for trial as to these 610 loans. Accordingly, MBIA's motion for summary judgment as to the 610 loans in breach of the "no default" representation is denied.

b. Loans Reviewed by Countrywide's Fraud Risk Management Division

Finally, MBIA also seeks summary judgment on the 97 Securitization loans that were reviewed by Countrywide's Fraud Risk Management division ("FRM"). Specifically, MBIA points to a spreadsheet produced by Countrywide, which MBIA asserts confirms that fraud was found in these 97 loans. *See* Sheth Affirm. Ex. 130. MBIA does not identify where the 97 loans at issue are found in this 2714 row spreadsheet; however, Countrywide points to specific examples of the loans at issue.

Countrywide disputes that review by FRM in and of itself means that the loan breaches the "no default" representation. Further, Countrywide notes that the spreadsheet referred to by MBIA lists at least one Securitization loan for which "no fraud" was found, *see id.* at row 2659 (loan no. -2310), and one loan in which the "fraud" found pertained to excessive closing fees charged to the borrower. *See* Countrywide Opp. 19-a Statement ¶ 98 (loan no. -8703). Moreover, Countrywide asserts that several of the "fraudulent" findings cited by MBIA identify fraud that occurred post-closing. *See* Countrywide Opp. 19-a Statement ¶¶ 96 (discussing loan nos. -6348, -7803, -4355, -1663, -1601, -2543, -1211, -8183, -4891, -4334, -8854, -9520, -6130, -4162, -5716, -3538, -6564, -3105); ¶ 97 (loan no. -3654, -2723, -2268, -6012); ¶ 100 (loan no. -5116). Since the "no default" representation is expressly limited to "as of the closing date," Countrywide argues that any post-closing fraud is outside the scope of the representation. Given the material disputes raised by Countrywide, the Court finds that MBIA's request is not amenable to summary judgment as to these twenty-five FRM loans.

Looking at the proofs offered by MBIA, this Court cannot determine whether the remaining 72 loans satisfy MBIA's prima facie obligation. The spreadsheets submitted by MBIA in support of its motion, *see* Sheth Affirm. Ex. 97, 130, and 131, are voluminous and do not identify the loans at issue. Therefore, since this Court cannot ascertain whether MBIA has made its threshold showing, MBIA's motion is denied.

3. Mortgage Loan Schedule Representation

MBIA next seeks summary judgment based on the "mortgage loan schedule" or "MLS" representation contained in the MLPAs and PSAs for the Securitizations. For the HELOC Securitizations, this representation states that "[a]s of the Closing Date the Mortgage Loan Schedule is correct in all material respects." *See* Sheth Affirm. Exs. 33-41 at § 3.02(a)(4). The CES Securitizations contain a substantially similar provision. *See id.* Ex. 51-56 § 2.03(b)(7).

MBIA maintains that the MLS contained materially false and incorrect information regarding at least 1,416 unique mortgage loans in the random samples reviewed by its expert. *See* Butler Aff. ¶¶ 8-14, Exs 3-9. Countrywide offers an omnibus response to the seven types of MLS breaches cited by MBIA. Among its arguments, Countrywide disputes the breach findings offered by MBIA.

However, Countrywide discusses only two of MBIA's breach findings in its papers – of the 1,416 loans presented by MBIA. *See* Countrywide Opp. Br. at 32. Although Countrywide maintains that the two loans addressed are "just two of hundreds" of disputed examples, Countrywide does nothing to direct the Court to those other examples and to the number of loans contested or to any expert evidence that summarizes these other loans. *See id.* Even in its Rule 19-a Statement, Countrywide cites to the same two examples in paragraph 109 and cross-references that paragraph – and the same two

breaches – to dispute MBIA's seven categories of MLS breaches. *see also* Countrywide Opp. 19-a Statement ¶¶ 110-22. Countrywide's conclusory assertion that there are "hundreds" of disputed examples is plainly insufficient to generate material issues of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980) ("We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.").

Moreover, Countrywide's attempt to resuscitate its argument by citing to specific examples of these "hundreds" of breaches during oral argument likewise fails. *See* Docket No. 3987 at 44-51. As the parties know, this Court does not look favorably on arguments raised for the first time during oral argument. Countrywide cannot offer vagaries in its papers and wait until oral argument to present specifics that could have offered in the first instance. These arguments could have been made in the first instance, since they were derived from exhibits submitted by Countrywide and MBIA with their voluminous submissions. *See* Docket No. 3987 at 51 (citing Holland Affirm. Ex. 145 (Butler Underwriting Report); Ex. 147 (Godfrey Underwriting Report); Butler Aff. Ex. 3-9; Concannon Affirm. Ex. 44 (Godfrey Finding Responses); and, Sheth Affirm. Ex. 133-147

(MLS Tapes)). MBIA correctly objected that the MLS loan level findings put forward by Countrywide were not in the summary judgment record. *See* 12/12/12 Oral Argument Tr. 146: 7-10, 23-26.

Even if this Court were to consider Countrywide's argument as to loans not specifically addressed in its papers, Countrywide still fails to generate material issues of fact to defeat MBIA's breach assertion. Countrywide's oral argument regarding MLS breaches is supported by five sources, which are listed above. This argument is presented in table form, but unfortunately, Countrywide does not specify which particular sources supplied each data point presented in the table. This is problematic, since MBIA represents without opposition, that one of the sources cited by Countrywide – the Godfrey Funding Responses, Concannon Aff. 44 – has been withdrawn. *See* Sheth Affirm. Ex. 148 (August 1, 2012 letter from Goodwin Procter to Quinn Emanuel stating that Countrywide's loan review expert withdrew her rebuttal report to MBIA's expert findings). From the face of Countrywide's argument, *see* Docket No. 3987 46-51, the Court cannot differentiate those findings supported by the withdrawn report from those supported by other sources. Therefore, the Court is left without means to assess the information presented by Countrywide in opposition to summary judgment.

Thus, even if this Court were to consider Countrywide's evidence, it still fails to rebut MBIA's prima facie demonstration, through Butler Aff. Ex. ¶¶ 8-14, Exs 3-9, that

these loans violated the MLS representation. After review of the findings in the Butler Affidavit, the Court concludes that MBIA has shown an absence of material facts in dispute as to whether these 1,414 loans violate the mortgage loan schedule representation. Again, Countrywide's motion to strike criticizes Mr. Butler's qualifications and the time spent by Mr. Butler reviewing the loan files; however, Countrywide makes no argument here as to why Mr. Butler's findings as to these 1,414 loans are incorrect. Accordingly, there are no issues of fact for trial as to whether the loans violate the representation. This figure excludes the two loans noted above, for which Countrywide made arguments in its papers. Countrywide's opposition demonstrates that there are issues of fact as to whether these two loans are violate the representation, and this Court cannot resolve the dispute between the parties' experts as to these two loans on this motion. Whether these two loans violate the representation is a matter left for trial.

The next inquiry is whether the inaccuracies in the 1,414 loans discussed above "materially and adversely affected" MBIA's interest in the loan. However, as noted above, the Court cannot make that determination at this time. Thus, the materiality of the inaccuracies is the sole issue remaining for trial as to these 1,414 loans. Accordingly, MBIA's motion for summary judgment as to loans in breach of the MLS representation is denied.

4. Mortgage Loan File Representation

The MLPAs for the HELOC Securitizations contain a representation that "[a]s of the Closing Date ... the Mortgage File for each Mortgage Loan contains each of the documents specified to be included in it." *See* Sheth Affirm. Ex. 39, at § 3.02(a)(13) (MLPA for CWHEQ 2006-E); *see also id.* Exs. 33-38, 40-41. MBIA argues that 460 loans in the Random Samples were missing one or more required documents, in violation of this representation.

Countrywide makes several arguments in opposition. First, Countrywide asserts that 74 of these 460 loans at issue were found to be in breach because they lack grant deeds. However, according to Countrywide, a grant deed is not a required document. The parties cite to the definition of "Mortgage File" in the "Master Glossary of Defined Terms" appended to each of the Securitizations' Indentures. *See* Sheth Affirm. Exs. 57-66 (Annex I to Indentures for HELOC Securitizations).[28] As Countrywide correctly notes, this definition does not include the term "grant deed." While MBIA urges the Court to find that a grant deed is "part and parcel of the mortgage," MBIA cites to no evidence for this assertion. *See* MBIA Reply Br. 14 & n. 21. Accordingly, these 74 loans are not amenable to summary judgment.

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[28] Neither MBIA nor Countrywide points to an analogous provision in the Transaction Documents for the CES Securitizations.

Second, Countrywide disputes MBIA's assertion that documents currently missing from the Mortgage File were missing "as of the closing date." Countrywide points to seven loans for which its compliance expert, Lisa Murphy, found evidence indicating that the missing documents were in the loans' respective files at origination. *See* Concannon Affirm. Exs. 183, 193 and 181 (Summary Reports Prepared by Karen Godfrey for loans -7956, -2126, and -5729); *see also* Countrywide Opp. 19-a Statement ¶ 175 (listing a total of seven loans for which "information in the loan file make[s] it clear that the 'missing' material was present at the time of origination). Moreover, Countrywide notes that, for two additional loans, Ms. Godfrey was able to locate purportedly missing documents in the loan files themselves. *See* Concannon Affirm. Ex. 175 and 187. Thus, for the nine loans discussed in this paragraph, Countrywide has demonstrated issues of fact precluding a finding that these loans violate the representation at this juncture.

However, for the seventeen missing title report loans, Countrywide's opposition falls short of demonstrating material issues of fact. Countrywide disputes the finding of MBIA's expert by arguing that each of the 17 loans had an original balance of less than $100,000, which exempted them from the requirement that a final title report be included in the Mortgage File. Countrywide cites to Butler Aff. Ex. 10 in support of its argument. However, Countrywide's argument disintegrates upon review of Butler Aff. Ex. 10, which reveals that each of the 17 loans had a balance in excess of $100,000. Thus,

Countrywide's exemption argument is inapplicable. Accordingly, Countrywide has failed to show an issue of fact as to these loans.

Moreover, Countrywide has made no attempt to rebut the remaining 360 loans for which MBIA asserts breach. *See* Butler Aff. Ex. 10. Again, while Countrywide's motion to strike criticizes Mr. Butler's qualifications and the time spent by Mr. Butler reviewing each loan file, Countrywide makes no argument here as to why Mr. Butler's findings as to these 360 loans are incorrect. As to these loans, after review of the findings in Butler Exhibit 10, the Court finds that MBIA has demonstrated that the loans violate the Mortgage Loan File representation. However, as discussed above, the Court cannot find that the inaccuracies materially and adversely affect MBIA's interest in the loans, given the ambiguities identified by the Court in the relevant Agreements. *See* January 3, 2012 Order, 34 Misc. 3d at 912 ("[T]his court finds that the applicable provisions of the SSA and the PSA are subject to varying interpretations regarding 'interest' and affect on interest . . ."); *see* Section V.A.1.a, *supra*. Thus, the materiality of the inaccuracies is the sole issue remaining for trial as to these 360 loans, as well as the seventeen missing title report loans discussed above. Accordingly, MBIA's motion for summary judgment is denied.

5. CLTV Representation

The Transaction Documents likewise provide a representation and warranty that no mortgage loan included in the Securitizations has a combined loan-to-value ratio ("CLTV") in excess of 100%.[29] MBIA asserts that it identified 10 loans in its Random Sample with CLTVs that breach the representation. *See* Butler Aff. ¶ 16 Ex. 11.

Countrywide counters that its loan review expert examined the ten purportedly breaching loans and found that seven did not have CLTVs over 100%. *See* Countrywide Opp. 19-a Statement ¶ 190; Butler Aff. Ex. 11, at column F (loan numbers -7497, -1442, -7071, -2733, and -0895); Concannon Affirm. Ex. 185 (loan number -053); Concannon Affirm. Ex. 196 (loan number -7618). After reviewing the loan-specific findings of Countrywide's expert, it appears that there is a factual dispute between the two experts as to these seven loans, which is not amenable to resolution on summary judgment.

However, Countrywide fails to rebut MBIA's proof as to the three remaining loans identified on Butler Aff. Ex. 11 – loan numbers -0897, -8788, and –0185. Again, while Countrywide's motion to strike criticizes Mr. Butler's qualifications and questions

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[29] The CLTV representation for the HELOC Securitizations states that the CLTV ratio for each Mortgage Loan "was not in excess of the percentage specified in the Adoption Annex," and the Adoption Annex in turn specifies that the CLTV ratio for each Mortgage Loan was "not in excess of 100%." *See, e.g.,* Sheth Affirm. Ex. 39 at § 3.02(a)(19), Adoption Annex at MBIA00001794 (CWHEQ 2006-E PSA); *see also id.* Exs. 33-38, 40-41. The CES PSAs state that no Mortgage Loan has a CLTV ratio "at origination in excess of 100.00%." *See id.* Ex. 51, at § 2.03(b)(10); *see also id.* Exs. 52-56.

whether Mr. Butler allotted sufficient time to each loan file during his review, Countrywide here makes no argument here as to why Mr. Butler's findings as to these three loans are incorrect. In the absence of Countrywide's objection, and based on Butler Affidavit Ex. 11, this Court concludes that there are no disputed issues of fact for trial as to whether these loans violate the representation.[30] Thus, the materiality of the inaccuracies is the sole issue remaining for trial as to these three loans. Despite this finding, the Court cannot grant summary judgment as it cannot find that the breaches materially and adversely affect MBIA's interest in the loans. *See supra.*

C. *Extrapolation and Rescissory Damages*

Since the Court has not granted summary judgment as to MBIA's assertions of breach, extrapolation of breaches would be premature at this time. In addition, the First Department has ruled that rescissory damages are not "legally available" in this instance; therefore, even if breaches could be extrapolated, MBIA's request for rescissory relief for its breach of contract claim would be denied.

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[30] MBIA also asserts that there are 60 Securitization loans for which the MLS reflects a CLTV higher than 100%. (MBIA Moving Br. at 37.) Since MBIA provides no citation to substantiate this factual assertion, the Court cannot consider its request for summary judgment as to these 60 loans.

VII. **MBIA's Motion to Strike the Schloessmann Affidavit**

In addition to its summary judgment motion, MBIA filed a separate motion to strike the Affidavit of Michael W. Schloessmann, which was submitted by Countrywide with its opposition papers. *See* motion sequence No. 71. MBIA argues that the Schloessmann Affidavit should be stricken because the industry custom evidence discussed therein is inadmissible. Further, MBIA maintains that Mr. Schloessmann's arguments are conclusory and not based on personal knowledge.

None of the grounds offered by MBIA in its motion is sufficient to strike the Schloessmann Affidavit. For the reasons discussed in Section V.B.2, the extrinsic industry custom evidence discussed by Mr. Schloessmann with regard to the "No Default" representation and warranty is not being considered by the Court, since the contract language is unambiguous. Moreover, to the extent that MBIA challenges Mr. Schloessmann's knowledge of the assertions in his affidavit, such challenge goes to the weight, and not the admissibility, of this evidence. *See Castro v. New York University*, 5 A.D.3d 135, 136 (1st Dep't 2004) (noting that affidavits "devoid of evidentiary facts and consisting of mere conclusions, speculation and unsupported allegations," lack probative value and are insufficient to sustain or defeat a motion for summary judgment); *see also MBIA Ins. Corp. v. Countrywide Home Loans Inc.*, Index No. 602825, Slip Op. at 4-6

(Sup. Ct. N.Y. Cty. Apr. 29, 2013) (motion sequence numbers 65, 72). Accordingly, motion sequence no. 71 is denied.

VIII. **Conclusion**

For the foregoing reasons, Countrywide's motion for summary judgment is granted in part and denied in part. MBIA's motion for summary judgment is likewise granted in part and denied in part. In addition, Countrywide's motion to strike the Butler Expert Report and MBIA's motion to strike the Schloessmann Affidavit are denied.

ORDER

Accordingly, it is

ORDERED that defendant Countrywide's motion for summary judgment (motion sequence no. 57) is granted in part and denied in part; and it is further

ORDERED that plaintiff MBIA Insurance Corporation's motion for summary judgment (motion sequence no. 58) is granted in part and denied in part; and it is further

ORDERED that defendant Countrywide's motion to strike the Butler Expert Report (motion sequence no. 56) is denied; and it is further

ORDERED that plaintiff MBIA Insurance Corporation's motion to strike the Schloessmann Affidavit (motion sequence no. 71) is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
April 29, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.