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

In the matter of the application of

THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures),

Petitioner,

-against-

WALNUT PLACE LLC; WALNUT PLACE II LLC; WALNUT PLACE III LLC; WALNUT PLACE IV LLC; WALNUT PLACE V LLC; WALNUT PLACE VI LLC; WALNUT PLACE VII LLC; WALNUT PLACE VIII LLC; WALNUT PLACE IX LLC; WALNUT PLACE X LLC; and WALNUT PLACE XI LLC (proposed intervenors),

Respondents,

for an order pursuant to CPLR § 7701 seeking judicial instructions and approval of a proposed settlement.

Index No. 651786/2011

Assigned to: Kapnick, J.

NOTICE OF PETITION TO INTERVENE

PLEASE TAKE NOTICE that, upon the affirmation of Owen L. Cyrulnik dated July 5, 2011, the petition of the Trustee, the petition filed herewith, and all previous papers and proceedings in this proceeding, the proposed intervenors listed below (referred to as Walnut Place) will move this Court on July 13, 2011, at 9:30 a.m. or as soon thereafter as counsel may be heard, for an order pursuant to CPLR 401, 1012, and 1013 permitting Walnut Place LLC, Walnut Place II LLC, Walnut Place III LLC, Walnut Place IV LLC, Walnut Place V LLC, Walnut Place VI LLC, Walnut Place VII LLC, Walnut Place VIII LLC, Walnut Place IX LLC, Walnut Place X LLC, and Walnut Place XI LLC to intervene as respondents in this proceeding, directing that the Walnut Place entities be added as respondents, directing that the Trustee's petition and notice of petition be amended by adding the Walnut Place entities as intervenors-respondents, and granting such other and further relief as may be just, proper, and equitable.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 403(b), answering papers, if any, must be served on the undersigned no later than two days before the return date of this motion.

Dated: New York, New York
July 5, 2011

GRAIS & ELLSWORTH LLP

By:_____
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Owen L. Cyrulnik
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Attorneys for Proposed Intervenor-Respondents

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

In the matter of the application of

THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures),

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WALNUT PLACE LLC; WALNUT PLACE II LLC; WALNUT PLACE III LLC; WALNUT PLACE IV LLC; WALNUT PLACE V LLC; WALNUT PLACE VI LLC; WALNUT PLACE VII LLC; WALNUT PLACE VIII LLC; WALNUT PLACE IX LLC; WALNUT PLACE X LLC; and WALNUT PLACE XI LLC (proposed intervenors),

Respondents,

for an order pursuant to CPLR § 7701 seeking judicial instructions and approval of a proposed settlement.

Index No. 651786/2011

Assigned to: Kapnick, J.

VERIFIED PETITION TO INTERVENE

For their petition pursuant to CPLR 401, 1012, and 1013 to intervene as respondents in this proceeding, which seeks the Court's approval of a settlement by which 22 self-appointed investors, many of which have extensive other business relationships with Bank of America Corporation and its subsidiaries, and a trustee that likewise has serious conflicts of interest, would extinguish the legal rights of hundreds of other investors, including the proposed intervenors, proposed intervenors Walnut Place LLC, Walnut Place II LLC, Walnut Place III LLC, Walnut Place IV LLC, Walnut Place V LLC, Walnut Place VI LLC, Walnut Place VII LLC, Walnut Place VIII LLC, Walnut Place IX LLC, Walnut Place X LLC, and Walnut Place XI LLC state and allege:

1. To continually raise new money with which to make its now-notorious mortgage loans to borrowers across the United States, Countrywide Home Loans, Inc. and its affiliates sold millions of its loans to securitization trusts that Countrywide sponsored. To raise the money to pay Countrywide for the mortgage loans, those trusts in turn sold securities called certificates,

which were backed by those mortgage loans, to investors all over the world. To assure the trusts and investors that the loans it was selling them were of good quality, Countrywide made numerous representations and warranties about those loans. And to put teeth into those representations and warranties, Countrywide agreed to repurchase from the trusts loans that did not comply with the representations and warranties.

2. The Walnut Place entities own securities issued by three of Countrywide's trusts. Concerned by widespread reports about the poor quality of Countrywide's loans, Walnut Place spent many months and hundreds of thousands of dollars to investigate the true quality of the loans in three of those trusts. It found that hundreds of loans in each trust were actually not of good quality and breached several of the representations and warranties that Countrywide had made about them.

3. The Bank of New York Mellon is the trustee for 530 of the trusts that Countrywide created, including all three of the Countrywide trusts that issued the certificates that Walnut Place owns.

4. On August 3, 2010, almost a year ago, Walnut Place presented to BNYM the detailed evidence that it uncovered in its investigation of one of those three trusts, Alternative Loan Trust 2006-OA10 (referred to as OA10). That evidence proved that many of the loans in that trust breached the representations and warranties that Countrywide had made about them. Walnut Place demanded that Countrywide repurchase those loans as it had agreed. When it refused, Walnut Place and other investors – which collectively owned more than 25% of the voting rights in that trust – demanded that BNYM sue Countrywide to enforce its promise to repurchase the defective loans. As it has in many cases in which it has been presented with evidence of Countrywide's breaches, BNYM did nothing. On February 23, 2011, Walnut Place then filed an action in this Court, derivatively on behalf of the OA10 Trust, to enforce Countrywide's obligation to repurchase the defective loans.

5. Walnut Place conducted the same investigation and made the same demands with respect to two other trusts. On April 12, 2011, Walnut Place amended its complaint to add Alternative Loan Trust 2006-OA3 (referred to as OA3). And Walnut Place has already begun to prepare a lawsuit on a third trust, Alternative Loan Trust 2006-OA21.

6. Months after Walnut Place filed its action in this Court, BNYM announced on June 29, 2011, that it had entered into an agreement with Countrywide and its corporate parent and successor by *de facto* merger, Bank of America Corporation,[1] to settle all "potential claims belonging to the [530] trusts" for which BNYM serves as trustee. On the same day, BNYM filed this Article 77 proceeding to request judicial approval of the proposed settlement. BNYM requested assignment of its proceeding to Justice Kapnick on the ground that its petition is related to Walnut Place's lawsuit. (*See* BNYM Request for Judicial Intervention ("if approved, the Settlement will resolve the claims raised by the plaintiffs in *Walnut Place LLC*.").)

7. The terms of the proposed settlement would release the claims of all 530 trusts for breaches of representation and warranties against Countrywide and Bank of America. Although BNYM concedes (BNYM Petition ¶ 13, 15) that it knew that Walnut Place and other certificateholders were likely to object to the proposed settlement, BNYM nevertheless made no effort to inform Walnut Place or the hundreds of investors in Countrywide trusts other than the 22 self-appointed investors that BNYM was secretly negotiating a deal with Countrywide and Bank of America, much less to solicit the views of those investors about what terms of settlement would be fair or whether they wished to be "represented" in those negotiations by the 22 self-appointed investors.[2]

[1] On January 11, 2008, Bank of America Corporation agreed to acquire Countrywide Financial Corporation (the parent company of Countrywide Home Loans) in a reverse triangular merger. The transaction closed on July 1, 2008, and on October 6, 2008, Bank of America announced that Countrywide would transfer all or substantially all of its assets to unnamed subsidiaries of Bank of America. Walnut Place elaborates on these facts in paragraphs 154-176 of its amended complaint in *Walnut Place LLC v. Countrywide Home Loans, Inc.*, Index No. 650497/2011 (Sup. Ct. N.Y. County) (attached as Exhibit A).

[2] Bank of America stated publicly that it was negotiating with certain investors about specific trusts in which those investors owned 25% or more of the voting rights. Those trusts did not include any of the three

8. In short, despite the fact that BNYM owes at least the same duties to Walnut Place that it owes to every other certificateholder in the 530 Countrywide-sponsored trusts, BNYM is asking this Court to approve a settlement that it negotiated in secret and that would release Walnut Place's claims without its consent while it is in the middle of an active litigation, which it brought on behalf of all cerificateholders in the OA10 ad OA3 Trusts when BNYM failed to do so.

9. On June 29, 2011, BNYM appeared *ex parte*, without notice to any potentially adverse parties like Walnut Place, and obtained from this Court an Order to Show Cause that sets forth a procedure for the approval of the proposed settlement.

10. BNYM did not name any adverse parties when it filed this proceeding, but its petition expressly contemplates that adverse parties may be added. "There currently are no adverse parties in this proceeding. To the extent that certain Certificateholders or other interested parties may wish to be heard on the subject of the Settlement or the judicial instructions sought through this Petition, those parties may become adverse." (BNYM Petition ¶ 18.)

11. Walnut Place is directly affected by this proceeding and seeks to intervene for at least two reasons. First, Walnut Place intends to ask the Court to provide a mechanism to permit certificateholders to exclude their trusts from the proposed settlement. Second, Walnut Place has serious concerns about the secret, non-adversarial, and conflicted way in which the proposed settlement was negotiated and about the fairness of the terms of the proposed settlement. If Walnut Place is not permitted to exclude the OA10, OA3, and OA21 Trusts from the proposed settlement, then Walnut Place will seek the necessary disclosure to evaluate these concerns and to bring them and the facts that support them to the attention of the Court. Walnut Place must seek this relief by intervening as a party because the procedures provided by the Order to Show

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trusts in which Walnut Place owns certificates. Moreover, neither Bank of America nor BNYM ever disclosed that BNYM was participating in negotiations to release the rights of all certificateholders in 530 Countrywide trusts.

Cause that BNYM proposed and obtained are wholly inadequate to protect the interests of certificateholders other than the 22 self-appointed investors.

A. The Settlement Agreement and the Order to Show Cause Do Not Provide a Clear Mechanism for Excluding Trusts From the Proposed Settlement.

12. Section 4(a) of the Settlement Agreement, which is attached as Exhibit B to BNYM's petition, expressly contemplates that one or more trusts may be excluded from the proposed settlement. Section 4(b) of the agreement even provides that Bank of America and Countrywide may scuttle the entire settlement if the unpaid principal balance of "Excluded Trusts" exceeds a certain "confidential percentage" of the total unpaid principal balance of all 530 trusts.

13. But neither the Settlement Agreement nor the Order to Show Cause provides any mechanism for certificateholders in a particular trust to elect to exclude that trust from the settlement. Indeed, certificateholders have no rights whatsoever under the Order to Show Cause except to submit "written objections" to the proposed settlement. The Order to Show Cause states that those objections will be heard on November 17, 2011, the same day on which the Court is to consider whether to approve the proposed settlement.

14. It is unreasonable to expect certificateholders to wait until the final approval hearing on November 17 before knowing what conditions they must satisfy to exclude their trusts from the proposed settlement and whether they have fulfilled those conditions. At the very least, certificateholders that object to the settlement must have sufficient notice that their request to be excluded has been denied so as to permit them to challenge the settlement in other ways.

15. Walnut Place intends to file a motion to modify the Order to Show Cause to provide – well in advance of the hearing on November 17 – a clear mechanism for a certain percentage of the certificateholders in any trust to "opt out" of the proposed settlement on behalf of that trust.

B. The Settlement Agreement and the Order to Show Cause Do Not Provide Enough Time for Certificateholders to Bring to the Attention of the Court their Serious Concerns about the Fairness of the Settlement.

16. Walnut Place has serious concerns about the fairness of the proposed settlement and the process by which it was negotiated. If Walnut Place cannot exclude the OA10, OA3, and OA21 Trusts from the proposed settlement, then, by intervening as a party in this proceeding, Walnut Place will have standing to seek disclosure to develop the information necessary to bring these concerns and the facts behind them to the attention of the Court. Moreover, Walnut Place respectfully submits that adverse certificateholders cannot possibly be expected to obtain the necessary disclosure and evaluate the proposed settlement in time to file objections in August and be ready for a hearing in November. BNYM, Bank of America, Countrywide, and the 22 self-appointed investors took many months to negotiate this proposed settlement and had unlimited access to the information with which to do so. Walnut Place intends to seek a modification of the Order to Show Cause to permit a reasonable time for adverse certificateholders to gather through disclosure the information necessary to evaluate the fairness of the settlement, and then to present that information to the Court before the Court decides whether to approve the proposed settlement.

17. Below are a few of many questions that Walnut Place believes must be answered about the fairness of the proposed settlement and the process by which it was negotiated.[3]

a. BNYM's conflicts of interest

18. BNYM negotiated the proposed settlement in secret, without soliciting the reviews of certificateholders other than the 22 self-appointed investors discussed below. In doing so, BNYM ignored established procedures that trustees of similar trusts have followed to solicit the views of certificateholders before taking action on behalf of a trust.

[3] Moreover, even if the settlement were reasonable, BNYM's proposal to release the rights of hundreds of certificateholders through an Article 77 proceeding is without precedent. Walnut Place has not yet had enough time to study the legal issues but reserves the right to argue that BNYM is misusing Article 77. Nor is it clear that BNYM even has the legal authority under the PSAs unilaterally to settle and release all of the rights of the trusts for breaches of the representations and warranties without at least soliciting the approval of all certificateholders in each trust.

19. BNYM purports to have the right to bind all trusts and all investors to this settlement. But BNYM has at least three conflicts of interest that raise serious doubts about its motives in negotiating the settlement.

20. *First*, under the Pooling and Servicing Agreements, BNYM is indemnified by the Master Servicer of each trust, Countrywide Home Loans Servicing, LP (another predecessor-in-interest of Bank of America Corporation), for costs and liabilities that arise out of certain duties that BNYM is to perform for the trusts. As part of the proposed settlement, BNYM negotiated for itself an indemnity from Countrywide that goes well beyond the scope of the indemnity that BNYM is otherwise entitled to under the PSAs. In particular, Countrywide agreed to indemnify BNYM for all costs and liabilities that BNYM may incur as a result of its participation in the very unusual process of negotiating the proposed settlement. This expanded indemnity is embodied in a "side letter" to the Settlement Agreement. It is very unusual, to say the least, for a trustee that says it is representing the interests of the beneficiaries of a trust, to demand and obtain an indemnity from the very party that is adverse to that trust and its beneficiaries (in this case, the certificateholders). BNYM concedes in its petition that it was concerned about its liability for the way in which it was handling (or, more accurately, ignoring) the demands of its beneficiaries that it take legal action for their benefit against Countrywide and Bank of America. For example, BNYM referred to "reports that a group of Certificateholders has considered taking action against BNY Mellon for its participation in the Settlement process." (BNYM Petition ¶ 13.) BNYM also states that "the Trustee also may be subject to claims by individual Certificateholders who believe that the Settlement, though benefiting thousands of Trust Beneficiaries now and in the future, may not be in their individual best interests." (BNYM Petition ¶ 15.) The proposed settlement protects BNYM from these liabilities by means of an indemnity from the party against which it was supposed to protect the interests of its beneficiaries and now anticipates that it may be liable for its failure to do so.[4]

[4] Walnut Place also has serious doubts about the validity of the indemnity agreement. The Court of Appeals has held that indemnity agreements that purport to provide indemnification for punitive damages are

21. *Second*, under the PSAs, BNYM is indemnified solely by Countrywide Home Loans Servicing, yet the parent and successor of that entity, Bank of America Corporation, guaranteed that indemnity to BNYM. The guarantee does nothing for the trusts or the certificateholders, but it provides a great benefit to BNYM. Indeed, BNYM states expressly in its petition that it doubts the solvency of Countrywide, so much so that it argues that Countrywide's supposed inability to pay a large judgment is a reason to accept the proposed settlement. (*Id.* ¶¶ 78-81.) Thus, the guarantee from Bank of America puts BNYM in a substantially better position than it was in before negotiating the proposed settlement, at the direct expense of the certificateholders whose interests BNYM purports to protect.

22. *Third*, BNYM cannot objectively evaluate the fairness of the proposed settlement because BNYM has duties to – and (as BNYM itself acknowledges) is potentially liable to – the certificateholders of all 530 trusts. It is obviously in BNYM's own interest to "settle" the claims of all 530 trusts at the same time on substantially identical terms. Otherwise, BNYM could be liable to certificateholders that believe they were treated less favorably than others. But not all of the trusts are identically situated. For example, Walnut Place is the only certificateholder in any Countrywide trust that has yet invested the time and money to conduct an independent investigation and actually sue Countrywide and Bank of America for breaches of representations and warranties. (None of the 22 self-appointed investors has ever done so, despite their claim to represent the interests of other certificateholders.) If BNYM were not hopelessly conflicted, it would have insisted that the proposed settlement take into account the far greater recovery that all certificateholders in the OA10, OA3, and OA21 trusts can expect because of Walnut Place's diligence.

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void as a matter of public policy. *See Zurich Insurance Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y. 2d 309, 316 (1994). Public policy also would prohibit a trustee that owes duties to the beneficiaries of a trust from enjoying an indemnity for the breach of those duties from a party that is adverse to the interests of those beneficiaries.

b. The conflicts of interest of the 22 self-appointed investors

23. BNYM's petition and the Settlement Agreement state that a group of 22 investors was heavily involved in the negotiation of the proposed settlement. (BNYM Petition ¶ 35.) The Settlement Agreement specifically refers to these 22 investors – which apparently appointed themselves to represent the interests of hundreds of other investors in Countrywide-sponsored trusts – and requires that they intervene in this proceeding to support the proposed settlement. The Settlement Agreement and BNYM's petition omit to state, however, that many of these 22 investors have substantial ongoing business relationships with Bank of America other than their ownership of certificates in Countrywide-sponsored trusts. For example, BlackRock Financial Management, Inc., is one of the 22 investors. During the time in which the Settlement Agreement was being negotiated, Bank of America *owned* up to 34 percent of BlackRock. BlackRock announced an agreement to repurchase Bank of America's remaining stake on July 1, 2011, just two days after the settlement was announced. Moreover, during some of that same time, BlackRock was a large shareholder in Bank of America Corporation. Thus, just when BlackRock says it was negotiating at "arm's length" to settle the claims of hundreds of other certificateholders, it and Bank of America owned large parts of each other and it was negotiating its own deal to buy out Bank of America's remaining stake. Many other of the 22 investors also have substantial business dealings with Bank of America or its subsidiaries other than their ownership of certificates in Countrywide-sponsored trusts. At a minimum, certificateholders should be permitted to take the discovery necessary to illuminate and bring to the Court's attention the serious conflicts of interest among the 22 investors that appointed themselves to represent the interests of hundreds of others.

c. The inadequacy of BNYM's evaluation of the proposed settlement

24. Bank of America stated in its press release announcing the proposed settlement that the Countrywide mortgage loans in the 530 trusts currently have an unpaid principal balance

of $221 billion.[5] An additional $48 billion of loans have been liquidated from those trusts by foreclosure or similar procedures. Under the PSAs, Countrywide is required to repurchase defective loans even if they have been liquidated. Thus, the total principal value of loans that Countrywide could be required to repurchase is approximately $269 billion. Audits of Countrywide loan files have revealed that as many as 90% of those loans breached representations and warranties. Walnut Place's own analyses of the loans in the OA10 and OA3 Trusts, which were performed without Walnut Place even having access to the loan files themselves, found that 66% and 58% of those loans, respectively, breached representations and warranties. Thus, Countrywide may be liable to repurchase loans with unpaid principal balances of as much as $242 billion. The $8.5 billion that Countrywide and Bank of America have agreed to pay is therefore only a small fraction of the potential liability that they would have faced in litigation on behalf of the trusts.

25. To defend this inadequate settlement, BNYM states that it engaged unidentified "financial experts" who "analyzed the various ways in which a settlement payment could be calculated" and advised BNYM on what range of settlements they would consider reasonable. (BNYM Petition ¶ 64.) Neither the Settlement Agreement nor the Order to Show Cause provides any procedure for a certificateholder to gather the information necessary to conduct an independent analysis of the same facts that BNYM and its "financial experts" considered in concluding that the proposed settlement is reasonable. Moreover, BNYM does not even disclose whether it audited a sample of the origination files of the mortgage loans in any of the 530 trusts, a procedure approved by Justice Bransten in litigation against Countrywide to determine how many of the loans that it sold were in breach of representations and warranties. *MBIA Insurance Corp. v. Countrywide Home Loans, Inc.,* Index. No. 602825/2008, slip op. (Sup. Ct. N.Y. County Dec. 22, 2010) (attached as Exhibit B). The apparent omission of that obvious step itself casts serious doubt on BNYM's motives in agreeing to the proposed settlement.

[5] The press release is available at http://investor.bankofamerica.com/phoenix.zhtml?c=71595&p=irol-newsArticle_pf&ID=1580643.

d. Countrywide's ability to satisfy a judgment and Bank of America's liability as a successor to Countrywide

26. BNYM argues that the proposed settlement is reasonable because "the Trustee has concluded that Countrywide will be unable to pay any future judgment that exceeds, equals or even approaches the Settlement Payment." (BNYM Petition ¶ 81.) BNYM also states that it believes there would be "obstacles to the Trustee of holding Bank of America liable for the alleged breaches by Countrywide." (*Id.* ¶ 92.) Without appropriate discovery, neither the Court nor certificateholders like Walnut Place have access to the necessary information to test the validity of those conclusions. But Justice Bransten's denial of Bank of America's motion to dismiss similar allegations against it, *MBIA Insurance Corp. v. Countrywide Home Loans, Inc.*, Index. No. 602825/2008, slip op. at 11-15 (Sup. Ct. N.Y. County Apr. 29, 2010) (attached as Exhibit C), the fact that Bank of America picks and chooses which of Countrywide's obligations it will honor or guarantee, and the fact that Bank of America is willing to pay $8.5 billion to settle liabilities that BNYM thinks that Bank of America does not even have, all suggest that BNYM is exaggerating the difficulty of holding Bank of America liable for Countrywide's obligations.

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27. For all of the reasons discussed above, Walnut Place respectfully submits that it and other certificateholders should be permitted the time and disclosure necessary to investigate, and then to bring to the attention of the Court these important concerns about the proposed settlement.

RELIEF REQUESTED

Walnut Place respectfully requests that the Court grant Walnut Place's petition to intervene.

Dated: New York, New York
July 5, 2011

GRAIS & ELLSWORTH LLP

By:_____
David J. Grais (DG 7118)
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Leanne M. Wilson

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Attorneys for Proposed Intervenors-Respondents

VERIFICATION

I, Owen L. Cyrulnik, hereby affirm under the penalty of perjury that the following is true and correct:

I am a member of the bar of this Court and of Grais & Ellsworth LLP, attorneys for proposed intervenors Walnut Place LLC, Walnut Place II LLC, Walnut Place III LLC, Walnut Place IV LLC¸ Walnut Place V LLC, Walnut Place VI LLC, Walnut Place VII LLC, Walnut Place VIII LLC, Walnut Place IX LLC, Walnut Place X LLC, and Walnut Place XI LLC. I have read the foregoing Verified Petition and know the contents thereof. All statements of fact therein are true and correct to the best of my knowledge and belief. I am making this affirmation in lieu of a verification by the proposed intervenors because the proposed intervenors are not within New York County, where Grais & Ellsworth LLP maintains its offices.

Executed this 5th day of July 2011, in New York, New York.

Owen L. Cyrulnik

EXHIBIT A

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

WALNUT PLACE LLC; WALNUT PLACE II LLC; WALNUT PLACE III LLC; WALNUT PLACE IV LLC; WALNUT PLACE V LLC; WALNUT PLACE VI LLC; WALNUT PLACE VII LLC; WALNUT PLACE VIII LLC; WALNUT PLACE IX LLC; WALNUT PLACE X LLC; and WALNUT PLACE XI LLC, derivatively on behalf of Alternative Loan Trust 2006-OA10 and Alternative Loan Trust 2006-OA3, Plaintiffs, -against- COUNTRYWIDE HOME LOANS, INC.; PARK GRANADA LLC; PARK MONACO INC; PARK SIENNA LLC; and BANK OF AMERICA CORPORATION, Defendants, -and- THE BANK OF NEW YORK MELLON, in its capacity as Trustee of Alternative Loan Trust 2006-OA10 and Alternative Loan Trust 2006-OA3, Nominal Defendant.	Index No. 650497/2011 **AMENDED COMPLAINT**

1. This is a derivative action for breaches of two Pooling and Servicing Agreements (PSA) under which defendant Countrywide Home Loans, Inc. and some of its affiliates sold residential mortgage loans to two securitization trusts. The trusts are Alternative Loan Trust 2006-OA10 (CWALT 2006-OA10) and Alternative Loan Trust 2006-OA3 (CWALT 2006-OA3). The trusts financed the purchase of loans by issuing certificates that were to be repaid,

with interest, from the cash flow generated by the mortgage loans. Plaintiffs are the holders of $108,084,000 original face amount of certificates in class 1-A-2 of CWALT 2006-OA10, $74,075,000 original face amount of certificates in class 2-A-1 of CWALT 2006-OA10, $10,100,000 original face amount of certificates in class 3-A-1 of CWALT 2006-OA10, $210,000,000 original face amount of certificates in class 4-A-1 of CWALT 2006-OA10 , $302,222,000 original face amount of certificates in class 4-A-2 of CWALT 2006-OA10, and $360,279,000 notional amount of certificates in class XNB of CWALT 2006-OA10. Plaintiffs are the holders of $45,000,000 original face amount of certificates in class 1-A-2 of CWALT 2006-OA3, $22,830,000 original face amount of certificates in class 2-A-1 of CWALT 2006-OA3, $25,746,000 original face amount of certificates in class 2-A-3 of CWALT 2006-OA3, $16,582,000 original face amount of certificates in class 2-A-3 of CWALT 2006-OA3, and $264,432,055 notional amount of certificates in class X of CWALT 2006-OA3. The Bank of New York Mellon is the Trustee of both of the trusts. In each PSA, Countrywide Home Loans made numerous representations and warranties about the mortgage loans. Countrywide Home Loans breached at least five of those representations and warranties in each PSA. For instance, for CWALT 2006-OA10, Countrywide Home Loans represented and warranted that no loan had a loan-to-value ratio of more than 95%, but, in fact, at least 413 mortgage loans had loan-to-value ratios of more than 95%; Countrywide Home Loans also represented that the mortgage loans were originated in accordance with its underwriting guidelines, but, in fact, at least 1,190 mortgage loans did not comply with the underwriting guidelines. For CWALT 2006-OA3, Countrywide Home Loans represented and warranted that no loan had a loan-to-value ratio of more than 95%, but, in fact, at least 196 mortgage loans had loan-to-value ratios of more than 95%; Countrywide Home Loans also represented that the mortgage loans were originated in

accordance with its underwriting guidelines, but, in fact, at least 457 mortgage loans did not comply with the underwriting guidelines. Each of these breaches of representations and warranties materially and adversely affected the interests of both the trust and Plaintiffs in those mortgage loans.

2. CWALT 2006-OA10 owned 6,531 mortgage loans as of June 30, 2006, the closing date of the PSA. Plaintiffs selected 2,166 of those 6,531 mortgage loans that were delinquent or on which the borrower had defaulted and investigated the true condition of those mortgage loans. The investigation showed that Countrywide Home Loans made false representations and warranties about at least 1,432 (or nearly 66%) of the 2,166 mortgage loans that Plaintiffs investigated. Plaintiffs are informed and believe that discovery will yield evidence that the defendants made similar misrepresentations and breached similar warranties about many of the 4,365 mortgage loans that Plaintiffs have not yet investigated.

3. CWALT 2006-OA3 owned 2,534 mortgage loans as of March 31, 2006, the closing date of the PSA. Plaintiffs selected 937 of those 2,534 mortgage loans that were delinquent or on which the borrower had defaulted and investigated the true condition of those mortgage loans. The investigation showed that Countrywide Home Loans made false representations and warranties about at least 536 (or 58%) of the 937 mortgage loans that Plaintiffs investigated. Plaintiffs are informed and believe that discovery will yield evidence that the defendants made similar misrepresentations and breached similar warranties about many of the 1,597 mortgage loans that Plaintiffs have not yet investigated.

4. Under each PSA, the defendants are required to repurchase each loan about which a representation and warranty by Countrywide Home Loans was untrue. On August 3, 2010, Plaintiffs informed the Trustee of the breaches of representations and warranties and demanded

that the defendants repurchase the loans in both trusts. On August 31, 2010, the Trustee sent the repurchase demands to the defendants. The defendants have refused to repurchase the loans despite having received the demands from the Trustee. Moreover, The Bank of New York Mellon, as Trustee, has unreasonably failed to sue the defendants to enforce their obligations to repurchase the loans. Plaintiffs are therefore suing derivatively on behalf of the trusts in order to compel the defendants to repurchase these loans.

PARTIES

5. Each of the Walnut Place entities is a limited liability company organized under the laws of Delaware. Each Walnut Place LLC owns an interest in certificates in CWALT 2006-OA10 with an original face amount of at least $10 million. Collectively, the Walnut Place LLCs own more than 25% of the Certificate Balances of all of the Certificates in CWALT 2006-OA10. Each Walnut Place LLC owns an interest in certificates in CWALT 2006-OA3 with an original face amount of at least $3.1 million. Collectively, the Walnut Place LLCs own more than 25% of the Certificate Balances of all of the Certificates in CWALT 2006-OA3. In this complaint, the Walnut Place LLCs and their predecessors in interest are referred to collectively as Plaintiffs.

6. Defendant Countrywide Home Loans, Inc. is a corporation organized under the laws of New York.

7. Defendant Park Granada LLC is a Delaware limited liability company. On information and belief, Park Granada is an affiliate of Countrywide Home Loans.

8. Defendant Park Monaco Inc. is a Delaware corporation. On information and belief, Park Monaco is an affiliate of Countrywide Home Loans.

9. Defendant Park Sienna LLC is a Delaware limited liability company. On information and belief, Park Sienna is an affiliate of Countrywide Home Loans.

10. Defendant Bank of America Corporation (referred to as **BAC**) is a corporation organized under the laws of Delaware and owns numerous subsidiaries, which will be referred to collectively as **Bank of America**. As alleged below, BAC is liable to Plaintiffs as the successor to Countrywide Home Loans, Park Granada, Park Monaco, and Park Sienna.

11. The nominal defendant, The Bank of New York Mellon, is a bank organized under the laws of New York. Plaintiffs have sued BNYM as a nominal defendant because BNYM is the Trustee of both of the trusts, and Plaintiffs are suing derivatively to enforce the rights of the trusts on behalf of themselves and all other certificateholders.

SECURITIZATION OF MORTGAGE LOANS

12. The certificates that Plaintiffs own are **mortgage-backed securities,** created in a process known as **securitization.** Securitization begins with loans (such as loans secured by mortgages on residential properties) on which the borrowers are obligated to make payments, usually monthly. The entity that makes the loans is known as the **originator** of the loans. The process by which the originator decides whether to make particular loans is known as the **underwriting** of loans. The purpose of underwriting is to ensure that loans are made only to borrowers of sufficient credit standing to repay them, and that the loans are made only against sufficient collateral. In the loan underwriting process, the originator applies its **underwriting standards.** Until the loans are securitized, the borrowers make their loan payments to the originators. Collectively, the payments on the loans are known as the **cash flow** from the loans.

13. In a securitization, a large number of loans, usually of a similar type, are grouped into a **collateral pool.** The originator of those loans sells them (and with them the right to receive the cash flow from them) to a special-purpose entity known as a **depositor**, which in turns sells the mortgage loans to a **trust.** The trust pays the originator cash for the loans. The trust raises the cash to pay for the loans by selling **bonds,** usually called **certificates,** to investors such as

Plaintiffs or their predecessors in interest. Each certificate entitles its holder to an agreed part of the cash flow from the loans in the collateral pool.

14. Because the cash flow from the loans in the collateral pool of a securitization is the source of funds to pay the holders of the certificates issued by the trust, the credit quality of those certificates is dependent upon the credit quality of the loans in the collateral pool. The most important information about the credit quality of those loans is contained in the files that the originator develops while making the loans, the so-called loan files. For residential mortgage loans, each loan file normally contains comprehensive information from such important documents as the borrower's application for the loan, credit reports on the borrower, and an appraisal of the property that will secure the loan. The loan file also includes notes from the person who underwrote the loan about whether and how the loan complied with the originator's underwriting standards, including documentation of any "compensating factors" that justified departure from those standards. To ensure that the credit quality of the loans in the collateral pool is as the parties agreed, the originator or other seller of the loans to the trust makes detailed **representations and warranties** about the loans, including many characteristics of the loans relevant to their credit quality, to the trustee for the benefit of the trust and purchasers of certificates from the trust.

ALLEGATIONS ABOUT CWALT 2006-OA10

I. The Pooling and Servicing Agreement

15. The Pooling and Servicing Agreement, or PSA, for CWALT 2006-OA10 was dated June 1, 2006. The closing date for the securitization was June 30, 2006. A true copy of the CWALT 2006-OA10 PSA is attached to this Complaint as Exhibit 1.

16. The Prospectus Supplement for CWALT 2006-OA10 as filed with the SEC was dated June 29, 2006. A true copy of the CWALT 2006-OA10 Prospectus Supplement is attached to this Complaint as Exhibit 2.

17. Defendant Countrywide Home Loans was the originator of the loans in CWALT 2006-OA10. Defendants Park Monaco, Park Granada, and Park Sienna are affiliates of Countrywide Home Loans that owned loans that Countrywide Home Loans had originated. Countrywide Home Loans and these affiliates sold loans to CWALT, Inc., the depositor of CWALT 2006-OA10, and CWALT, Inc. then sold the loans to CWALT 2006-OA10. In Schedule III-A of the CWALT 2006-OA10 PSA, Countrywide Home Loans made many representations and warranties about the loans.

18. In Schedule III-A, Countrywide Home Loans represented and warranted that the "information set forth on Schedule I to the Pooling and Servicing Agreement with respect to each Mortgage Loan is true and correct in all material respects as of the Closing Date." CWALT 2006-OA10 PSA § 2.03 & Schedule III-A (1). Schedule I to the CWALT 2006-OA10 PSA describes, among other things, the loan-to-value ratio at origination of the loan.

19. Countrywide Home Loans also represented and warranted that "[n]o Mortgage Loan had a Loan-to-Value Ratio at origination in excess of 95.00%." CWALT 2006-OA10 PSA § 2.03 & Schedule III-A (3).

20. Countrywide Home Loans also represented and warranted that "[a]ll of the Mortgage Loans were underwritten in all material respects in accordance with Countrywide's underwriting guidelines as set forth in the Prospectus Supplement." CWALT 2006-OA10 PSA § 2.03 & Schedule III-A (37).

21. Countrywide Home Loans also represented and warranted that (except with respect to some loans originated under its Streamlined Documentation program) "prior to the approval of the Mortgage Loan application, an appraisal of the related Mortgaged Property was obtained from a qualified appraiser, duly appointed by the originator, who had no interest, direct or indirect, in the Mortgaged Property or in any loan made on the security thereof, and whose compensation is not affected by the approval or disapproval of the Mortgage Loan; such appraisal is in a form acceptable to FNMA and FHLMC." CWALT 2006-OA10 PSA § 2.03 & Schedule III-A (38).

22. Countrywide Home Loans also represented and warranted that the "Mortgage Loans, individually and in the aggregate, conform in all material respects to the descriptions thereof in the Prospectus Supplement." CWALT 2006-OA10 PSA § 2.03 & Schedule III-A (44). The CWALT 2006-OA10 prospectus supplement contains tables that described the LTVs and the occupancy status of the mortgage loans as of the cut-off date.

II. Evidence of Breaches Based on Plaintiffs' Investigation

23. Because the mortgage loans in CWALT 2006-OA10 have experienced a high number of defaults, Plaintiffs conducted an investigation to determine whether the loans were accurately described when they were sold to CWALT 2006-OA10. This investigation demonstrated that many of the loans breached one or more of the five representations and warranties described above.

A. Breach of Schedule III-A (1)

24. In Schedule III-A, Countrywide Home Loans represented and warranted that the "information set forth on Schedule I to the Pooling and Servicing Agreement with respect to each Mortgage Loan is true and correct in all material respects as of the Closing Date." CWALT

2006-OA10 PSA § 2.03 & Schedule III-A (1). Schedule I to the CWALT 2006-OA10 PSA describes, among other things, the loan-to-value ratio, or LTV, at origination of the loan.

25. LTV is the ratio of the amount of money borrowed by the borrower to the value of the property mortgaged to provide security to the lender. For example, if a borrower borrowed $300,000 and gave a mortgage on property valued at $500,000, then the LTV would be 60%.

26. LTV is one of the most crucial measures of the risk of a mortgage loan. LTV is a primary determinant of the likelihood of default. The lower the LTV, the lower the likelihood of default. For example, the lower the LTV, the less likely it is that a decline in the value of the property will wipe out the owner's equity, and thereby give the owner an incentive to stop making mortgage payments and abandon the property, a so-called strategic default. LTV also determines the severity of losses for those loans that do default. The lower the LTV, the lower the severity of losses on those loans that do default. Loans with lower LTVs provide greater "cushion," thereby increasing the likelihood that the proceeds of foreclosure will cover the unpaid balance of the mortgage loan.

27. For each of these reasons, an LTV that is reported as lower than its true value materially and adversely affects the interests of both CWALT 2006-OA10 and the Certificateholders in that mortgage loan.

28. An accurate denominator (that is, the value of the property) is essential to an accurate LTV. In particular, if the denominator is too high, then the risk of the loan will be understated, sometimes greatly understated. To use the example in paragraph 25, if the property's actual value is $500,000, but it is incorrectly valued at $550,000, then the ostensible LTV of the loan would be 54.5%, not 60%, and thus the loan appears less risky than it actually is.

29. Plaintiffs' investigation showed that the true values of the properties that secured the loans in CWALT 2006-OA10 were inaccurate by using an automated valuation model, or AVM, and by looking at subsequent sales of properties that were included in CWALT 2006-OA10.

1. Automated Valuation Model

30. Using a comprehensive, industry-standard AVM, Plaintiffs determined the true market value of many of the properties that secured loans in CWALT 2006-OA10, as of the origination date of each loan. An AVM considers objective criteria like the condition of the property and the actual sale prices of comparable properties in the same locale shortly before the specified date and is more consistent, independent, and objective than other methods of appraisal. AVMs have been in widespread use for many years. The AVM used by Plaintiffs incorporates a database of 500 million sales covering zip codes that represent more than 97% of the homes, occupied by more than 99% of the population, in the United States. Independent testing services have determined that this AVM is the most accurate of all such models.

31. There was sufficient information to determine the value of 1,574 of the properties that secured loans, and thereby to calculate the correct LTV of each of those loans, as of the date on which each loan was made. On 1,134 of those 1,574 properties, the AVM reported that the appraised value in Schedule I of the CWALT 2006-OA10 PSA was 105% or more of the true market value as determined by the model, and the amount by which the stated values of those properties exceeded their true market values in the aggregate was $119,440,958. The AVM reported that the appraised value in Schedule I of the CWALT 2006-OA10 PSA was 95% or less of the true market value on only 101 properties, and the amount by which the true market values of those properties exceeded the reported values was $9,368,841. Thus, the number of properties on which the value was overstated exceeded by more than 11 times the number on which the

value was understated, and the aggregate amount overstated was nearly 13 times the aggregate amount understated. Details of the AVM results for each loan on which the appraised value was more than 105% of the value determined by the model are given in Table 1 of Exhibit 3.

2. Subsequent Sales of Refinanced Properties

32. Some of the loans in CWALT 2006-OA10 were taken out to refinance existing mortgages, rather than to purchase properties. For those loans, the value of the property was based solely on the appraised value rather than a sale price because there is no sale price in a refinancing. Of the loans secured by refinanced properties that Plaintiffs investigated, 151 sold for much less than the appraised value of the property reported in the Schedule, even when adjusted for declines in the housing price index, resulting in a loss to CWALT 2006-OA10. Details of this analysis are given in Table 2 of Exhibit 3.

*

33. With respect to 1,134 mortgage loans, the reported appraised value of the property was significantly higher than the actual value of the property, as shown by the AVM. Because the appraised value is used as the denominator in the LTV, this evidence shows that the reported LTV in Schedule I of the CWALT 2006-OA10 PSA was materially incorrect for these 1,134 mortgage loans. With respect to 151 refinanced mortgage loans, the subsequent sale information for these loans also shows that the reported appraised value of the property was incorrect. These 151 mortgage loans also had incorrect LTVs. Eliminating duplicates, 1,190 mortgage loans had incorrect LTVs.

34. Each of these differences is material and is a breach of the warranty in Schedule III-A (1) that the "information set forth on Schedule I to the Pooling and Servicing Agreement with respect to each Mortgage Loan is true and correct in all material respects as of the Closing Date."

B. Breach of Schedule III-A (3)

35. Countrywide Home Loans represented and warranted that "[n]o Mortgage Loan had a Loan-to-Value Ratio at origination in excess of 95.00%." CWALT 2006-OA10 PSA § 2.03 & Schedule III-A (3).

36. For many of the mortgage loans, the value determined by the AVM was significantly lower than the actual value of the property, so the actual LTV was higher than the reported LTV because the denominator used to calculate the reported LTV was higher than the true denominator. For 413 mortgage loans, using the true value of the property as determined by the AVM, the actual LTV was more than 95%.

37. Each mortgage loan with an actual LTV of more than 95% breached Schedule III-A (3).

C. Breach of Schedule III-A (37) & (38)

38. Countrywide Home Loans represented and warranted that "[a]ll of the Mortgage Loans were underwritten in all material respects in accordance with Countrywide's underwriting guidelines as set forth in the Prospectus Supplement." CWALT 2006-OA10 PSA § 2.03 & Schedule III-A (37).

39. Countrywide Home Loans also represented and warranted that (except with respect to some loans originated under its Streamlined Documentation program) "prior to the approval of the Mortgage Loan application, an appraisal of the related Mortgaged Property was obtained from a qualified appraiser, duly appointed by the originator, who had no interest, direct or indirect, in the Mortgaged Property or in any loan made on the security thereof, and whose compensation is not affected by the approval or disapproval of the Mortgage Loan; such appraisal is in a form acceptable to FNMA and FHLMC." CWALT 2006-OA10 PSA § 2.03 & Schedule III-A (38).

40. Originators of mortgage loans have written standards for the underwriting of loans. An important purpose of underwriting is to ensure that the originator makes mortgage loans only in compliance with those standards and that its underwriting decisions are properly documented. An even more fundamental purpose of underwriting mortgage loans is to ensure that loans are made only to borrowers with credit standing and financial resources sufficient to repay the loans and only against collateral with value, condition, and marketability sufficient to secure the loans.

41. An originator's underwriting standards, and the extent to which the originator departs from its standards, are important indicators of the risk of mortgage loans made by that originator and of certificates sold in a securitization in which mortgage loans made by that originator are part of the collateral pool. A representation that a mortgage loan was originated in accordance with the originator's underwriting standards when the loan was not originated in accordance with those standards materially and adversely affects the interests of both CWALT 2006-OA10 and the Certificateholders in that mortgage loan.

42. Underwriting guidelines usually contain requirements that the property that secures the loan be appraised by an independent appraiser. A representation that a loan was secured by a property appraised by an independent appraiser when the loan was secured by a property appraised by an appraiser who was not independent materially and adversely affects the interests of both CWALT 2006-OA10 and the Certificateholders in that mortgage loan.

43. The mortgage loans were originated by Countrywide Home Loans. Countrywide Home Loans' underwriting requirements stated that, except with respect to some mortgage loans originated pursuant to its Streamlined Documentation Program, "Countrywide Home Loans obtains appraisals from independent appraisers or appraisal services for properties that are to

secure mortgage loans. . . . All appraisals are required to conform to Fannie Mae or Freddie Mac appraisal standards then in effect." Pros. Sup. S-89. Fannie Mae and Freddie Mac appraisal standards require that appraisals be independent, unbiased, and not contingent on a predetermined result. Many of the appraisals, however, were conducted by appraisers who were not independent, and so did not comply with Fannie and Freddie standards.

1. Appraisals were not conducted by independent appraisers.

44. As reported in the 2007 National Appraisal Survey conducted by October Research, around the time of this securitization, brokers and loan officers pressured appraisers by threatening to withhold future assignments if an appraised value was not high enough to enable the transaction to close and sometimes by refusing to pay for completed appraisals that were not high enough. This pressure came in many forms, including the following:

- the withholding of business if the appraisers refused to inflate values;
- the withholding of business if the appraisers refused to guarantee a predetermined value;
- the withholding of business if the appraisers refused to ignore deficiencies in the property;
- the refusal to pay for an appraisal that did not give the brokers and loans officers the property values that they wanted; and
- the black listing of honest appraisers in order to use "rubber stamp" appraisers.

45. Appraisals made under pressure of this kind are breaches of Schedule III-A (37) because such appraisals do not conform to the underwriting requirements of the originator, which require independent, unbiased appraisals that are not contingent on a predetermined result.

46. Appraisals made under pressure of this kind are breaches of Schedule III-A (38) because such appraisals are not independent, unbiased appraisals and do not conform to Fannie Mae and Freddie Mac appraisal standards.

47. As described above, the number of properties on which the value was overstated was more than 11 times the number on which the value was understated, and the aggregate amount overstated was nearly 13 times the aggregate amount understated. This lopsided result demonstrates the upward bias in appraisals of properties that secured the mortgage loans in CWALT 2006-OA10.

48. For the 1,134 mortgage loans where the AVM reported a value significantly lower than the reported appraised value and the 151 mortgage loans where the subsequent sale prices show that the initial appraisal was too high, there is strong evidence that the appraisal was biased because the appraisers were not independent. Each such loan breached the representations and warranties in Schedule III-A (37) and (38).

2. Early Payment Defaults

49. When a loan becomes 60 or more days delinquent within six months after it was made it is called an early payment default. An EPD is strong evidence that the loan did not conform to the underwriting standards in making the loan, often by failing to detect fraud in the application. Underwriting standards are intended to ensure that loans are made only to borrowers who can and will make their mortgage payments. Because an EPD occurs so soon after the mortgage loan was made, it is much more likely that the default occurred because the borrower could not afford the payments in the first place (and thus that the underwriting standards were not followed), than because of changed external circumstances unrelated to the underwriting of the mortgage loan (such as that the borrower lost his or her job). Twenty-eight loans in the collateral pool of this securitization experienced EPDs. These 28 loans are identified in Table 3 of Exhibit 3.

50. Eliminating duplicates, 1,190 loans did not comply with the stated underwriting guidelines.

3. Additional evidence of undisclosed departures from underwriting standards.

51. In addition to the evidence from the subset of loans that Plaintiffs have investigated, cited above, there is strong evidence from governmental investigations that Countrywide Home Loans made extensive, undisclosed departures from its stated underwriting standards.

52. The Securities and Exchange Commission conducted an extensive investigation of the lending practices of Countrywide. Based on the findings of its investigation, the SEC sued three former senior officers of Countrywide. In its complaint, the SEC alleged that these three senior officers committed securities fraud by hiding from investors "the high percentage of loans [Countrywide] originated that were outside its already widened underwriting guidelines due to loans made as exceptions to guidelines."

53. A pay-option adjustable-rate mortgage loan (also called an Option ARM) is a mortgage loan where the borrower has the option to make one of three payments, a minimum payment that increases the amount of principal the borrower owns on the mortgage (called negative amortization), an interest-only payment that neither increases or decreases the principal the borrower owns on the mortgage, or a full payment that decreases the amount the borrower owes on the mortgage. At a certain point in the life of an Option ARM, a "reset" occurs and the borrower must always pay the full payment. All of the mortgage loans in this securitization were Option ARMs. At an investor conference in September 2006, Countrywide stated that its underwriting guidelines required that a borrower be able to afford the full payment on the Option ARM.

54. Among the evidence for the SEC's allegations is a memorandum dated December 13, 2007, in which the enterprise risk assessment officer at Countrywide stated that "borrower

repayment capacity was not adequately assessed by the bank during the underwriting process for home equity mortgage loans. More specifically, debt-to-income (DTI) ratios did not consider the impact of principal [negative] amortization or an increase in interest [due to a payment reset]."

55. The SEC also based its allegations on an email dated April 4, 2006, in which Countrywide's Chairman and CEO Angelo Mozilo wrote that for Option ARMs "it appears that it is just a matter of time that we will be faced with much higher resets and therefore much higher delinquencies."

56. The SEC also based its allegations on an email dated June 1, 2007, in which Mozilo wrote that borrowers of Option ARMs "are going to experience a payment shock which is going to be difficult if not impossible for them to manage." The SEC also based its allegations on an email from November 3, 2007, where Mozilo recognized that Countrywide was unable "to properly underwrite" Option ARMs.

57. These facts indicate that Countrywide did not, in fact, underwrite Option ARMs so that borrowers could afford the full payment.

58. The Attorneys General of many states also investigated Countrywide's lending practices. Among these, the Attorney General of California found, and alleged in a suit against Countrywide, that Countrywide "viewed borrowers as nothing more than the means for producing more loans, originating loans with little or no regard to borrowers' long-term ability to afford them." The Attorneys General of several other states also reached the same conclusion.

- The Attorney General of Washington alleged that "[t]o increase market share, [Countrywide] dispensed with many standard underwriting guidelines . . . to place unqualified borrowers in loans which ultimately they could not afford."

- The Attorney General of Illinois alleged in a suit against Countrywide that Countrywide was "indifferen[t] to whether homeowners could afford its loans."

- The Attorney General of West Virginia alleged that "Countrywide sold West Virginia consumers loans when there was no reasonable probability of the consumers being able to pay the loan in full."

59. Countrywide did not adhere to its own underwriting standards, but instead abandoned or ignored them. According to internal Countrywide documents recently made public by the SEC, Mozilo admitted that loans "had been originated 'through our channels with disregard for process [and] compliance with guidelines.'" Similarly, the Attorney General of California alleged that "Countrywide did whatever it took to sell more loans, faster – including by . . . disregarding the minimal underwriting criteria it claimed to require."

60. Countrywide made exceptions to its underwriting standards where no compensating factors existed, resulting in higher rates of default. According to the SEC in its action against former officers of Countrywide:

> [T]he actual underwriting of exceptions was severely compromised. According to Countrywide's official underwriting guidelines, exceptions were only proper where "compensating factors" were identified which offset the risks caused by the loan being outside of guidelines. In practice, however, **Countrywide used as "compensating factors" variables such as FICO and loan to value, which had already been assessed [in determining the loan to be outside of guidelines].**

(Emphasis in original.) Such "compensating factors" did not actually compensate for anything and did not "offset" any risk.

61. Finally, Countrywide did not apply its underwriting standards in accordance with all federal, state, and local laws. Countrywide has entered into agreements to settle charges of violation of predatory lending, unfair competition, false advertising, and banking laws with the Attorneys General of at least 39 states, including Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Iowa, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Maine, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey,

New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. The Attorneys General of these states alleged that Countrywide violated state predatory lending laws by (i) making loans it could not have reasonably expected borrowers to be able to repay; (ii) using high pressure sales and advertising tactics designed to steer borrowers towards high-risk loans; and (iii) failing to disclose to borrowers important information about the loans, including the costs and difficulties of refinancing, the availability of lower cost products, the existence and nature of prepayment penalties, and that advertised low interest rates were merely "teaser" rates that would adjust upwards dramatically as soon as one month after closing.

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62. This additional evidence shows that many of the loans already identified did not conform to Countrywide's underwriting standards, and that many more of the 6,531 loans in CWALT 2006-OA10 did not conform to Countrywide's underwriting standards.

D. Breach of Schedule III-A (44)

63. Countrywide represented and warranted that the "Mortgage Loans, individually and in the aggregate, conform in all material respects to the descriptions thereof in the Prospectus Supplement." CWALT 2006-OA10 PSA § 2.03 & Schedule III-A (44). The CWALT 2006-OA10 prospectus supplement contains tables that described the LTVs and the occupancy status of the mortgage loans as of the cut-off date. These tables were incorrect because the LTVs of the mortgage loans and the occupancy status of the mortgage loans were incorrect.

1. LTVs

64. With respect to the same 1,180 mortgage loans described above, the LTVs were incorrect. Each mortgage loan that had an incorrect LTV was a breach of Schedule III-A (44).

2. Occupancy Status

65. Residential real estate is usually divided into primary residences, second homes, and investment properties. Mortgages on primary residences are less likely to default than mortgages on non-owner-occupied residences and are therefore less risky.

66. Occupancy status (that is, whether the property that secures the mortgage is to be the primary residence of the borrower, a second home, or an investment property) is an important factor in determining the risk of a mortgage loan. The percentage of loans in the collateral pool of a securitization that are not secured by mortgages on primary residences is an important measure of the risk of certificates sold in that securitization. Other things being equal, the higher the percentage of loans not secured by primary residences, the greater the risk of the certificates. A representation that the property that secured a mortgage loan was owner occupied when the property was actually not owner occupied materially and adversely affects the interests of both CWALT 2006-OA10 and the Certificateholders in that mortgage loan.

67. In some states and counties, owners of a property are able to designate whether that property is his or her "homestead," which may reduce the taxes on that property or exempt the property from assets available to satisfy the owner's creditors, or both. An owner may designate only one property, which he or she must occupy, as his or her homestead. Sixteen loans in CWALT 2006-OA10 that were reported to be owner occupied in Schedule I of the PSA were not actually owner occupied because the borrower designated another property as his or her homestead. These 16 loans are identified in Table 4 of Exhibit 3.

68. The fact that an owner in one of these jurisdictions does not designate a property as his or her homestead when he or she can do so is strong evidence that the property was not his or her primary residence. With respect to 468 of the properties that were stated in Schedule I of

the PSA to be owner occupied, the owner could have but did not designate the property as his or her homestead. These 468 loans are identified in Table 4 of Exhibit 3.

69. For 195 properties that secured the mortgage loans, the borrower instructed local tax authorities to send the bills for the taxes on the property to the borrower at an address other than the property itself, even though the property was reported to be owner occupied in the Schedule. Such an instruction is strong evidence that the borrower did not live in the mortgaged property or consider it to be his or her primary residence. These 195 loans are identified in Table 4 of Exhibit 3.

70. With respect to 532 mortgage loans, the occupancy status of the property as reflected in the prospectus supplement was incorrect. With respect to 16 mortgage loans that were represented to be owner occupied, the borrower actually designated a different property as his or her homestead. With respect to 468 mortgage loans, the borrower could have designated the property as his or her homestead but did not. With respect to 195 mortgage loans that were represented to be owner occupied, the borrower instructed local tax authorities to send the bills for the taxes on the property to the borrower at an address other than the property itself. Each of these criteria indicates that the property was not actually owner occupied.

71. Each incorrect occupancy status was a breach of Schedule III-A (44).

III. Examples of Noncompliant Loans

72. By way of illustration, and without limitation, the following paragraphs highlight particular loans that Plaintiffs' investigation showed did not comply with the representations and warranties that Countrywide Home Loans made about them.

73. Loan number 119478315: This loan for $544,000 was secured by a property that had a reported appraised value of $680,000. The AVM determined that the true value of the property was $569,000. Thus the reported LTV was 80%, but the true LTV was 95.6%. This loan

defaulted five months after it was originated. This loan therefore breached the following representations and warranties: Schedule III-A (1), (3), (37), (38), and (44).

74. Loan number 119837840: This loan for $1,331,250 was secured by a property that had a reported appraised value of $1,775,000. The AVM determined that the true value of the property was $975,999. Thus the reported LTV was 75%, but the true LTV was 136.5%. The property that secured this loan was represented to be owner occupied, but in fact, another property owned by the same owner was designated as a homestead and the property tax bills were sent to another address. This loan therefore breached the following representations and warranties: Schedule III-A (1), (3), (37), (38), and (44).

75. Loan number 136202091: This loan for $523,500 was secured by a property that had a reported appraised value of $698,000. The AVM determined that the true value of the property was $462,000. Thus the reported LTV was 75%, but the true LTV was 113.3%. After the loan was securitized, the property was sold for only $375,000, even though housing prices in the area the property was located rose by 3% between the date of origination of the loan and the sale. This loan therefore breached the following representations and warranties: Schedule III-A (1), (3), (37), (38), and (44).

76. A list of each of the loans that the investigation uncovered that breached the representations and warranties is attached as in Exhibit 4.

77. Based on the 1,432 loans that breached the representations and warranties and on the publically available information described in paragraphs 52 through 61, Plaintiffs are informed and believe that many more loans breached the representations and warranties.

IV. Countrywide Has Refused to Repurchase the Loans.

78. Under section 2.03(c) of the CWALT 2006-OA10 Pooling and Servicing Agreement, each Countrywide defendant agreed that

> within 90 days of the earlier of its discovery or its receipt of written notice from any party of a breach of any representation or warranty with respect to a Mortgage Loan sold by it pursuant to Section 2.03(a) that materially and adversely affects the interests of the Certificateholders in that Mortgage Loan, it shall cure such breach in all material respects, and if such breach is not so cured, shall . . . repurchase the affected Mortgage Loan or Mortgage Loans from the Trustee at the Purchase Price. . . .

79. By letter dated August 3, 2010, Plaintiffs, through their attorneys, sent a letter to BNYM informing it of the breaches of representations and warranties that are described in paragraphs 18 through 22 above. This letter included an appendix that identified all loans identified in Exhibit 4. The letter from Plaintiffs dated August 3, 2010, without its appendices, is attached as Exhibit 5.

80. By letter dated August 31, 2010, BNYM sent the written notice of breaches of representations and warranties to the defendants and others. Thus, on August 31, 2010, or shortly thereafter, the Countrywide defendants received written notice from the Trustee of Countrywide's breaches of representations and warranties with respect to the mortgage loans.

81. Each Countrywide defendant is thus obligated to repurchase the loans it sold identified in Exhibit 4 that breached the representations and warranties that Countrywide made in the PSA.

82. The ninety-day period prescribed under Section 2.03(c) of the CWALT 2006-OA10 PSA expired on November 29, 2010.

83. The Countrywide defendants have not cured the breaches of representations and warranties or repurchased any of the affected mortgage loans from CWALT 2006-OA10.

V. Plaintiffs May Sue to Enforce the CWALT 2006-OA10 PSA.

84. Under the CWALT 2006-OA10 PSA, certificateholders may file a lawsuit if they meet the requirements of the limitation of suits provision. That provision states that certificateholders representing at least 25% of the Voting Rights of Certificates in CWALT

2006-OA10 must request that the Trustee sue and offer to indemnify the Trustee for the costs, expenses, and liability it incurs in connection with suing. A certificateholder may sue if the Trustee does not file suit within 60 days after receiving the request to sue and the indemnity.

85. On December 23, 2010, certificateholders of more than 25% of the Voting Rights of Certificates in CWALT 2006-OA10, including Plaintiffs, made a written request to the Trustee to sue the defendants for breach of their obligations under Section 2.03(c) of the CWALT 2006-OA10 PSA and offered to indemnify the Trustee from loss, including attorneys fees and other expenses of litigation, that may be incurred by the Trustee as a result of following the direction of the certificateholders. This written request is attached as Exhibit 6.

86. More than 60 days have elapsed since Plaintiffs and the other certificateholder sent a written request directing BNYM to file a lawsuit. BNYM has not filed a lawsuit.

87. On February 18, 2011, BNYM, through its attorneys, sent a letter informing Plaintiffs that it did not intend to sue within 60 days of receiving the demand letter dated December 23, 2010. BNYM stated that it "need[ed] additional time to evaluate this matter." BNYM refused to commit to any date certain by which it would complete its evaluation.

88. More than six weeks later, BNYM again declined to file suit in response to a virtually identical demand that Plaintiffs made on CWALT 2006-OA3, which is described in detail below. In particular, on April 5, 2011, Plaintiffs received a substantially identical letter from BNYM, and BNYM again stated that it needed additional time to evaluate the matter and again did not commit to a date certain by which it would be able to make a decision.

89. Plaintiffs have satisfied the requirements of the limitation of suits provision of the PSA and are entitled to sue to enforce breaches of the CWALT 2006-OA10 PSA.

90. The PSA authorizes the Trustee to enforce breaches of representations and warranties for the benefit of CWALT 2006-OA10.

91. BNYM's refusal to bring a lawsuit was unreasonable because Plaintiffs' investigation has produced specific evidence that gives rise to a strong inference that Countrywide breached its representations and warranties on the 1,432 loans that are the subject of this lawsuit and the other loans in CWALT 2006-OA10. BNYM's request for additional time to evaluate Plaintiff's direction was also unreasonable because BNYM refused to provide a date certain by which it would complete its evaluation and because BNYM had more than six months to evaluate whether to file suit based on the evidence of breaches of representations and warranties that Plaintiffs have identified.

92. Because BNYM has unreasonably refused to bring a lawsuit, Plaintiffs bring this action derivatively, in the right and for the benefit of the Certificateholders of CWALT 2006-OA10, to redress the defendants' breach of contract.

93. Plaintiffs are Certificateholders. Plaintiffs will fairly and adequately represent the interests of CWALT 2006-OA10 and the Certificateholders of CWALT 2006-OA10 in enforcing and prosecuting their rights, and have retained competent counsel experienced in this type of litigation to prosecute this action.

ALLEGATIONS ABOUT CWALT 2006-OA3

I. The Pooling and Servicing Agreement

94. The PSA for CWALT 2006-OA3 was dated March 1, 2006. The closing date for the securitization was March 31, 2006. A true copy of the CWALT 2006-OA3 PSA is attached to this Complaint as Exhibit 7.

95. The Prospectus Supplement for CWALT 2006-OA3 as filed with the SEC was dated March 27, 2006. A true copy of the CWALT 2006-OA3 Prospectus Supplement is attached to this Complaint as Exhibit 8.

96. Defendant Countrywide Home Loans was the originator of the loans in CWALT 2006-OA3. Defendants Park Monaco, Park Granada, and Park Sienna are affiliates of Countrywide Home Loans that owned loans that Countrywide Home Loans had originated. Countrywide Home Loans and these affiliates sold loans to CWALT, Inc., the depositor of CWALT 2006-OA3, and CWALT, Inc. then sold the loans to CWALT 2006-OA3. In Schedule III-A of the CWALT 2006-OA3 PSA, Countrywide Home Loans made many representations and warranties about the loans.

97. In Schedule III-A, Countrywide Home Loans represented and warranted that the "information set forth on Schedule I to the Pooling and Servicing Agreement with respect to each Mortgage Loan is true and correct in all material respects as of the Closing Date." CWALT 2006-OA3 PSA § 2.03 & Schedule III-A (1). Schedule I to the CWALT 2006-OA3 PSA describes, among other things, the loan-to-value ratio at origination of the loan.

98. Countrywide Home Loans also represented and warranted that "[n]o Mortgage Loan had a Loan-to-Value Ratio at origination in excess of 95.00%." CWALT 2006-OA3 PSA § 2.03 & Schedule III-A (3).

99. Countrywide Home Loans also represented and warranted that "[a]ll of the Mortgage Loans were underwritten in all material respects in accordance with Countrywide's underwriting guidelines as set forth in the Prospectus Supplement." CWALT 2006-OA3 PSA § 2.03 & Schedule III-A (37).

100. Countrywide Home Loans also represented and warranted that (except with respect to some loans originated under its Streamlined Documentation program) "prior to the approval of the Mortgage Loan application, an appraisal of the related Mortgaged Property was obtained from a qualified appraiser, duly appointed by the originator, who had no interest, direct or indirect, in the Mortgaged Property or in any loan made on the security thereof, and whose compensation is not affected by the approval or disapproval of the Mortgage Loan; such appraisal is in a form acceptable to FNMA and FHLMC." CWALT 2006-OA3 PSA § 2.03 & Schedule III-A (38).

101. Countrywide Home Loans also represented and warranted that the "Mortgage Loans, individually and in the aggregate, conform in all material respects to the descriptions thereof in the Prospectus Supplement." CWALT 2006-OA3 PSA § 2.03 & Schedule III-A (44). The CWALT 2006-OA3 prospectus supplement contains tables that described the LTVs and the occupancy status of the mortgage loans as of the cut-off date.

II. Evidence of Breaches Based on Plaintiffs' Investigation

102. Because the mortgage loans in CWALT 2006-OA3 have experienced a high number of defaults, Plaintiffs conducted an investigation to determine whether the loans were accurately described when they were sold to CWALT 2006-OA3. This investigation demonstrated that many of the loans breached one or more of the five representations and warranties described above.

A. Breach of Schedule III-A (1)

103. In Schedule III-A, Countrywide Home Loans represented and warranted that the "information set forth on Schedule I to the Pooling and Servicing Agreement with respect to each Mortgage Loan is true and correct in all material respects as of the Closing Date." CWALT

2006-OA3 PSA § 2.03 & Schedule III-A (1). Schedule I to the CWALT 2006-OA3 PSA describes, among other things, the loan-to-value ratio, or LTV, at origination of the loan.

104. For each of the reasons listed in paragraphs 25 and 26, an LTV that is reported as lower than its true value materially and adversely affects the interests of both CWALT 2006-OA3 and the Certificateholders in that mortgage loan.

105. Plaintiffs' investigation showed that the true values of the properties that secured the loans in CWALT 2006-OA3 were inaccurate by using an automated valuation model, or AVM, and by looking at subsequent sales of properties that were included in CWALT 2006-OA3.

1. Automated Valuation Model

106. Using a comprehensive, industry-standard AVM, Plaintiffs determined the true market value of many of the properties that secured loans in CWALT 2006-OA3, as of the origination date of each loan.

107. There was sufficient information to determine the value of 633 of the properties that secured loans, and thereby to calculate the correct LTV of each of those loans, as of the date on which each loan was made. On 448 of those 633 properties, the AVM reported that the appraised value in Schedule I of the CWALT 2006-OA3 PSA was 105% or more of the true market value as determined by the model, and the amount by which the stated values of those properties exceeded their true market values in the aggregate was $31,840,702. The AVM reported that the appraised value in Schedule I of the CWALT 2006-OA3 PSA was 95% or less of the true market value on only 40 properties, and the amount by which the true market values of those properties exceeded the reported values was $2,221,500. Thus, the number of properties on which the value was overstated exceeded by more than 10 times the number on which the value was understated, and the aggregate amount overstated was nearly 15 times the aggregate

amount understated. Details of the AVM results for each loan on which the appraised value was more than 105% of the value determined by the model are given in Table 1 of Exhibit 9.

2. Subsequent Sales of Refinanced Properties

108. Some of the loans in CWALT 2006-OA3 were taken out to refinance existing mortgages, rather than to purchase properties. For those loans, the value of the property was based solely on the appraised value rather than a sale price because there is no sale price in a refinancing. Of the loans secured by refinanced properties that Plaintiffs investigated, 20 sold for much less than the appraised value of the property reported in the Schedule, even when adjusted for declines in the housing price index, resulting in a loss to CWALT 2006-OA3. Details of this analysis are given in Table 2 of Exhibit 9.

*

109. With respect to 448 mortgage loans, the reported appraised value of the property was significantly higher than the actual value of the property, as shown by the AVM. Because the appraised value is used as the denominator in the LTV, this evidence shows that the reported LTV in Schedule I of the CWALT 2006-OA3 PSA was materially incorrect for these 448 mortgage loans. With respect to 20 refinanced mortgage loans, the subsequent sale information for these loans also shows that the reported appraised value of the property was incorrect. These 20 mortgage loans also had incorrect LTVs. Eliminating duplicates, 457 mortgage loans had incorrect LTVs.

110. Each of these differences is material and is a breach of the warranty in Schedule III-A (1) that the "information set forth on Schedule I to the Pooling and Servicing Agreement with respect to each Mortgage Loan is true and correct in all material respects as of the Closing Date."

B. Breach of Schedule III-A (3)

111. Countrywide Home Loans represented and warranted that "[n]o Mortgage Loan had a Loan-to-Value Ratio at origination in excess of 95.00%." CWALT 2006-OA3 PSA § 2.03 & Schedule III-A (3).

112. For many of the mortgage loans, the value determined by the AVM was significantly lower than the actual value of the property, so the actual LTV was higher than the reported LTV because the denominator used to calculate the reported LTV was higher than the true denominator. For 196 mortgage loans, using the true value of the property as determined by the AVM, the actual LTV was more than 95%.

113. Each mortgage loan with an actual LTV of more than 95% breached Schedule III-A (3).

C. Breach of Schedule III-A (37) & (38)

114. Countrywide Home Loans represented and warranted that "[a]ll of the Mortgage Loans were underwritten in all material respects in accordance with Countrywide's underwriting guidelines as set forth in the Prospectus Supplement." CWALT 2006-OA3 PSA § 2.03 & Schedule III-A (37).

115. Countrywide Home Loans also represented and warranted that (except with respect to some loans originated under its Streamlined Documentation program) "prior to the approval of the Mortgage Loan application, an appraisal of the related Mortgaged Property was obtained from a qualified appraiser, duly appointed by the originator, who had no interest, direct or indirect, in the Mortgaged Property or in any loan made on the security thereof, and whose compensation is not affected by the approval or disapproval of the Mortgage Loan; such appraisal is in a form acceptable to FNMA and FHLMC." CWALT 2006-OA3 PSA § 2.03 & Schedule III-A (38).

116. A representation that a mortgage loan was originated in accordance with the originator's underwriting standards when the loan was not originated in accordance with those standards materially and adversely affects the interests of both CWALT 2006-OA3 and the Certificateholders in that mortgage loan.

117. Underwriting guidelines usually contain requirements that the property that secures the loan be appraised by an independent appraiser. A representation that a loan was secured by a property appraised by an independent appraiser when the loan was secured by a property appraised by an appraiser who was not independent materially and adversely affects the interests of both CWALT 2006-OA3 and the Certificateholders in that mortgage loan.

118. The mortgage loans were originated by Countrywide Home Loans. Countrywide Home Loans' underwriting requirements stated that, except with respect to some mortgage loans originated pursuant to its Streamlined Documentation Program, "Countrywide Home Loans obtains appraisals from independent appraisers or appraisal services for properties that are to secure mortgage loans. . . . All appraisals are required to conform to Fannie Mae or Freddie Mac appraisal standards then in effect." Pros. Sup. S-62. Fannie Mae and Freddie Mac appraisal standards require that appraisals be independent, unbiased, and not contingent on a predetermined result. Many of the appraisals, however, were conducted by appraisers who were not independent, and so did not comply with Fannie and Freddie standards.

1. Appraisals were not conducted by independent appraisers.

119. Appraisals made under pressure of the kind described in paragraph 44 are breaches of Schedule III-A (38) because such appraisals are not independent, unbiased appraisals and do not conform to Fannie Mae and Freddie Mac appraisal standards.

120. As described above, the number of properties on which the value was overstated was more than 10 times the number on which the value was understated, and the aggregate

amount overstated was nearly 15 times the aggregate amount understated. This lopsided result demonstrates the upward bias in appraisals of properties that secured the mortgage loans in CWALT 2006-OA3.

121. For the 448 mortgage loans where the AVM reported a value significantly lower than the reported appraised value and the 20 mortgage loans where the subsequent sale prices show that the initial appraisal was too high, there is strong evidence that the appraisal was biased because the appraisers were not independent. Each such loan breached the representations and warranties in Schedule III-A (37) and (38). Eliminating duplicates, 457 loans did not comply with the stated underwriting guidelines.

2. Additional evidence of undisclosed departures from underwriting standards.

122. In addition to the evidence from the subset of loans that Plaintiffs have investigated, cited above, the strong evidence described in paragraphs 52 and 61 from governmental investigations demonstrates that Countrywide Home Loans made extensive, undisclosed departures from its stated underwriting standards. This additional evidence shows that many of the loans already identified did not conform to Countrywide's underwriting standards, and that many more of the 2,534 loans in CWALT 2006-OA3 did not conform to Countrywide's underwriting standards.

D. Breach of Schedule III-A (44)

123. Countrywide represented and warranted that the "Mortgage Loans, individually and in the aggregate, conform in all material respects to the descriptions thereof in the Prospectus Supplement." CWALT 2006-OA3 PSA § 2.03 & Schedule III-A (44). The CWALT 2006-OA3 prospectus supplement contains tables that described the LTVs and the occupancy status of the

mortgage loans as of the cut-off date. These tables were incorrect because the LTVs of the mortgage loans and the occupancy status of the mortgage loans were incorrect.

1. LTVs

124. With respect to the same 448 mortgage loans described above, the LTVs were incorrect. Each mortgage loan that had an incorrect LTV was a breach of Schedule III-A (44).

2. Occupancy Status

125. A representation that the property that secured a mortgage loan was owner occupied when the property was actually not owner occupied materially and adversely affects the interests of both CWALT 2006-OA3 and the Certificateholders in that mortgage loan.

126. Five loans in CWALT 2006-OA3 that were reported to be owner occupied in Schedule I of the PSA were not actually owner occupied because the borrower designated another property as his or her homestead. These five loans are identified in Table 3 of Exhibit 9.

127. With respect to 173 of the properties that were stated in Schedule I of the PSA to be owner occupied, the owner could have but did not designate the property as his or her homestead. These 173 loans are identified in Table 3 of Exhibit 9.

128. For 98 properties that secured the mortgage loans, the borrower instructed local tax authorities to send the bills for the taxes on the property to the borrower at an address other than the property itself, even though the property was reported to be owner occupied in the Schedule. Such an instruction is strong evidence that the borrower did not live in the mortgaged property or consider it to be his or her primary residence. These 98 loans are identified in Table 3 of Exhibit 9.

129. With respect to 198 mortgage loans, the occupancy status of the property as reflected in the prospectus supplement was incorrect. With respect to five mortgage loans that were represented to be owner occupied, the borrower actually designated a different property as

his or her homestead. With respect to 173 mortgage loans, the borrower could have designated the property as his or her homestead but did not. With respect to 98 mortgage loans that were represented to be owner occupied, the borrower instructed local tax authorities to send the bills for the taxes on the property to the borrower at an address other than the property itself. Each of these criteria indicates that the property was not actually owner occupied.

130. Each incorrect occupancy status was a breach of Schedule III-A (44).

III. Examples of Noncompliant Loans

131. By way of illustration, and without limitation, the following paragraphs highlight particular loans that Plaintiffs' investigation showed did not comply with the representations and warranties that Countrywide Home Loans made about them.

132. Loan number 116668880: This loan for $219,335 was secured by a property that had a reported appraised value of $235,000. The AVM determined that the true value of the property was $184,000. Thus the reported LTV was 93.3%, but the true LTV was 119%. The property that secured this loan was represented to be owner occupied, but in fact, another property owned by the same owner was designated as a homestead, this property was not designated as a homestead, and the property tax bills were sent to another address. This loan therefore breached the following representations and warranties: Schedule III-A (1), (3), (37), (38), and (44).

133. Loan number 117403868: This loan for $348,750 was secured by a property that had a reported appraised value of $390,000. The AVM determined that the true value of the property was $214,000. Thus the reported LTV was 90%, but the true LTV was 163%. This loan therefore breached the following representations and warranties: Schedule III-A (1), (3), (37), (38), and (44).

134. Loan number 127587373: This loan for $114,950 was secured by a property that had a reported appraised value of $149,000. The AVM determined that the true value of the property was $103,000. Thus the reported LTV was 77.2%, but the true LTV was 111%. After the loan was securitized, the property was sold for only $95,000, even though housing prices in the area the property was located only declined by 10% between the date of origination of the loan and the sale. This loan therefore breached the following representations and warranties: Schedule III-A (1), (3), (37), (38), and (44).

135. A list of each of the loans that the investigation uncovered that breached the representations and warranties is attached as in Exhibit 10.

136. Based on the 536 loans that breached the representations and warranties and on the publically available information described in paragraphs 52 through 61, Plaintiffs are informed and believe that many more loans breached the representations and warranties.

IV. Countrywide Has Refused to Repurchase the Loans.

137. Under section 2.03(c) of the CWALT 2006-OA3 Pooling and Servicing Agreement, each Countrywide defendant agreed that

> within 90 days of the earlier of its discovery or its receipt of written notice from any party of a breach of any representation or warranty with respect to a Mortgage Loan sold by it pursuant to Section 2.03(a) that materially and adversely affects the interests of the Certificateholders in that Mortgage Loan, it shall cure such breach in all material respects, and if such breach is not so cured, shall . . . repurchase the affected Mortgage Loan or Mortgage Loans from the Trustee at the Purchase Price. . . .

138. By letter dated August 3, 2010, Plaintiffs, through their attorneys, sent a letter to BNYM informing it of the breaches of representations and warranties that are described in paragraphs 97 through 101 above. This letter included an appendix that identified all loans identified in Exhibit 10. The letter from Plaintiffs dated August 3, 2010, without its appendices, is attached as Exhibit 11.

139. By letter dated August 31, 2010, BNYM sent the written notice of breaches of representations and warranties to the defendants and others. Thus, on August 31, 2010, or shortly thereafter, the Countrywide defendants received written notice from the Trustee of Countrywide's breaches of representations and warranties with respect to the mortgage loans.

140. Each Countrywide defendant is thus obligated to repurchase the loans it sold identified in Exhibit 10 that breached the representations and warranties that Countrywide made in the PSA.

141. The ninety-day period prescribed under Section 2.03(c) of the CWALT 2006-OA3 PSA expired on November 29, 2010.

142. The Countrywide defendants have not cured the breaches of representations and warranties or repurchased any of the affected mortgage loans from CWALT 2006-OA3.

V. Plaintiffs May Sue to Enforce the CWALT 2006-OA3 PSA.

143. Under the CWALT 2006-OA3 PSA, certificateholders may file a lawsuit if they meet the requirements of the limitation of suits provision. That provision states that certificateholders representing at least 25% of the Voting Rights of Certificates in CWALT 2006-OA3 must request that the Trustee sue and offer to indemnify the Trustee for the costs, expenses, and liability it incurs in connection with suing. A certificateholder may sue if the Trustee does not file suit within 60 days after receiving the request to sue and the indemnity.

144. On February 4, 2010, certificateholders of more than 25% of the trust, including Plaintiffs, made a written request to the Trustee to sue the defendants for breach of their obligations under Section 2.03(c) of the CWALT 2006-OA3 PSA and offered to indemnify the Trustee from loss, including attorneys fees and other expenses of litigation, that may be incurred by the Trustee as a result of following the direction of the certificateholders. This written request is attached as Exhibit 12.

145. More than 60 days have elapsed since Plaintiffs and the other certificateholder sent a written request directing BNYM to file a lawsuit. BNYM has not filed a lawsuit.

146. On April 5, 2011, BNYM, through its attorneys, sent a letter informing Plaintiffs that it did not intend to sue within 60 days of receiving the demand letter dated February 4, 2010. BNYM stated that it "need[ed] additional time to evaluate this matter" because Plaintiffs' demand letter "raise[d] . . . legal, contractual and practical issues . . . that BNY Mellon, in its capacity as trustee, must in good faith consider." BNYM did not commit to any date certain by which it would complete its evaluation.

147. BNYM's letter of April 5 was substantially identical to the letter that it had sent more than six weeks earlier, refusing a virtually identical demand to sue on CWALT 2006-OA10.

148. Plaintiffs have satisfied the requirements of the limitation of suits provision of the PSA and are entitled to sue to enforce breaches of the CWALT 2006-OA3 PSA.

149. The PSA authorizes the Trustee to enforce breaches of representations and warranties for the benefit of CWALT 2006-OA3.

150. BNYM's refusal to bring a lawsuit was unreasonable because Plaintiffs' investigation has produced specific evidence that gives rise to a strong inference that Countrywide breached its representations and warranties on the 937 loans that are the subject of this lawsuit and the other loans in CWALT 2006-OA3.

151. BNYM's request for additional time to evaluate Plaintiff's direction was also unreasonable because BNYM refused to provide a date certain by which it would complete its evaluation and because BNYM had more than six months to evaluate whether to file suit based on the evidence of breaches of representations and warranties that Plaintiffs have identified.

152. Because BNYM has unreasonably refused to bring a lawsuit, Plaintiffs bring this action derivatively, in the right and for the benefit of the Certificateholders of CWALT 2006-OA3, to redress the defendants' breach of contract.

153. Plaintiffs are Certificateholders. Plaintiffs will fairly and adequately represent the interests of CWALT 2006-OA3 and the Certificateholders of CWALT 2006-OA3 in enforcing and prosecuting their rights, and have retained competent counsel experienced in this type of litigation to prosecute this action.

LIABILITY OF DEFENDANTS BANK OF AMERICA CORPORATION AND ITS SUBSIDIARIES AS SUCCESSORS TO COUNTRYWIDE FINANCIAL CORPORATION AND COUNTRYWIDE HOME LOANS

154. At all relevant times, BAC was a public company whose stock was traded on the New York Stock Exchange.

155. Before the merger of Countrywide and BAC described below, Countrywide Financial Corporation (referred to as **Old CFC**) was the publicly-traded parent of numerous subsidiaries, including Countrywide Home Loans, CWALT, Park Granada, Park Monaco, and Park Sienna.

156. On January 11, 2008, BAC and Old CFC entered into an Agreement and Plan of Merger (referred to as the **Merger Agreement**) pursuant to which Old CFC would be merged into Red Oak Merger Corporation, a wholly-owned subsidiary of BAC formed to accomplish the merger.

157. Under the Merger Agreement, Old CFC would merge into Red Oak and cease to exist, and Red Oak would continue as the surviving company.

158. Under the Merger Agreement, the shareholders of Old CFC would receive, and ultimately did receive, 0.1822 shares of BAC stock for each share of Old CFC, thereby maintaining those shareholders' ownership interest in the businesses of Old CFC.

159. After the merger, Red Oak was to be renamed Countrywide Financial LLC but was in fact renamed Countrywide Financial Corporation (referred to as **New CFC**).

160. In a Form 8-K filing also dated January 11, 2008, BAC disclosed that the Merger Agreement was between Old CFC and BAC, the public company, not any subsidiary or affiliate of BAC.

161. In a press release accompanying the 8-K, BAC stated that it intended initially to operate Countrywide separately under the Countrywide brand and that integration of Countrywide's operations with the operations of Bank of America would occur in 2009.

162. On February 22, 2008, an article appeared in the periodical *Corporate Counsel* about the litigation that Countrywide then faced and its possible implications for Bank of America. In the article, a spokesperson for Bank of America acknowledged that Bank of America had "bought the company and all of its assets and liabilities[,] . . . was aware of the claims and potential claims against the company and [had] factored these into the purchase."

163. On May 28, 2008, BAC filed a Form 8-K and issued a press release stating that Bank of America was creating a new banking management structure and that a long-time Bank of America officer would become president of the new consumer real estate operations of "Countrywide Financial Corporation and Bank of America when they are combined." The press release also stated that the president of this new consumer real estate operation would be based in Calabasas, California, the location of Old CFC's principal offices.

164. BAC and Old CFC consummated the merger on July 1, 2008. As a result, Old CFC ceased to exist. By operation of law, as a consequence of the merger, Red Oak (soon thereafter renamed Countrywide Financial Corporation, which is New CFC) assumed the liabilities of Old CFC. In a July 1, 2008 8-K and press release, the president of Bank of America's consumer real estate unit stated that it was now time to "begin to combine the two companies and prepare to introduce our new name and way of operating." The release also noted that the combined entity would be based in Calabasas, California, the former principal offices of Countrywide. Plaintiffs are informed and believe, and based thereon allege, that Bank of America's consumer real estate unit has been and remains housed in the offices formerly occupied by Countrywide, and Bank of America has retained a substantial number of former employees of Countrywide to operate its consumer real estate unit.

165. On October 6, 2008, BAC filed an 8-K announcing, among other things, that New CFC and Countrywide Home Loans would transfer all or substantially all of their assets to unnamed subsidiaries of BAC. Plaintiffs are informed and believe, and based thereon allege, that the intended effect of this transaction was to integrate further into the operations of Bank of America the assets of Old CFC and Countrywide Home Loans that had been transferred to New CFC in connection with the merger, while leaving liabilities with New CFC and Countrywide Home Loans.

166. On November 7, 2008, BAC filed an 8-K announcing, among other things, that New CFC and Countrywide Home Loans had transferred substantially all of their assets and operations to BAC. Plaintiffs are informed and believe, and based thereon allege, that, primarily as a result of this transfer of assets, New CFC and Countrywide Home Loans are now moribund organizations, with few, if any, assets or operations.

167. Plaintiffs are informed and believe, and based thereon allege, that transferees of New CFC's and Countrywide Home Loans' assets may have included other subsidiaries of BAC rather than, or in addition to, BAC. In either event, the asset sales were orchestrated and controlled by BAC.

168. As part of the consideration for New CFC's and Countrywide Home Loans' assets, BAC assumed debt securities and related guarantees of Countrywide in an aggregate amount of $16.6 billion. BAC assumed much of this debt through the amendment of indenture agreements substituting BAC (but no other Bank of America company) as the issuer and/or guarantor of the securities subject to the indentures.

169. Plaintiffs are informed and believe, and based thereon allege, that the consideration given for New CFC's and Countrywide Home Loans' assets, as dictated by BAC, was not sufficient to satisfy New CFC's and Countrywide Home Loans' liabilities.

170. On April 27, 2009, Bank of America announced the rebranding of Countrywide operations as Bank of America Home Loans. Bank of America stated that the new brand would represent the combined operations of Bank of America's mortgage and home equity business and Countrywide Home Loans.

171. By the transactions described above, BAC has moved Old CFC's and Countrywide Home Loans' businesses out of Old CFC and Countrywide Home Loans, combined them with its own business operations, and proceeded to operate them.

172. Bank of America operates its combined consumer real estate unit out of what was Old CFC's and Countrywide Home Loans' headquarters. The Plaintiffs are informed and believe, and based thereon allege, that Bank of America employs many former employees of Countrywide to operate this combined unit.

173. Plaintiffs are informed and believe, and based thereon allege, that Bank of America's rebranded consumer real estate business, Bank of America Home Loans, now operates out of over 1,000 former Countrywide Home Loans offices nationwide.

174. Public statements by Old CFC and BAC reflect that the companies intended that their business operations combine. In its press release announcing the merger, BAC declared that it planned to operate Countrywide Home Loans separately under the Countrywide brand for a limited period only, with integration to occur in 2009. In its 2008 annual report, BAC stated that as a "combined company," Bank of America would be recognized as a responsible lender. Similarly, representatives of Old CFC stated that the "combination" of Countrywide and Bank of America would create one of the most powerful mortgage franchises in the world. On a November 16, 2010, conference call Brian Moynihan, the president and CEO of BAC, stated that Bank of America "would pay for the things that Countrywide did."

175. Because Bank of America continued to operate the businesses of Old CFC and Countrywide Home Loans, it had to assume the liabilities necessary to continue those operations, and Plaintiffs are informed and believe, and based thereon allege, that Bank of America did so.

176. In general, when a corporation sells all or substantially all of its assets to another, the liabilities of the seller do not pass to the asset purchaser unless they are part of the bargained-for exchange between the parties. There are, however, a number of doctrines of successor liability that create exceptions to this general rule. The relevant facts, as alleged herein, show that as a result of the circumstances surrounding the purchase and sale of New CFC and Countrywide Home Loans assets, BAC and its unnamed subsidiaries are liable to Plaintiffs because they are the successors to the liabilities of Old CFC and Countrywide Home Loans that were transferred to New CFC by virtue of the Bank of America/Countrywide merger.

FIRST CAUSE OF ACTION: BREACH OF THE CWALT 2006-OA10 PSA

177. Plaintiffs incorporate in this paragraph by reference, as though fully set forth, paragraphs 1 through 176.

178. The CWALT 2006-OA10 PSA is a valid contract.

179. In the CWALT 2006-OA10 PSA, and for valuable consideration, Countrywide Home Loans made to CWALT 2006-OA10 representations and warranties about each of the mortgage loans that CWALT 2006-OA10 purchased from CWALT.

180. At least 1,432 of the loans that CWALT 2006-OA10 purchased breached the representations and warranties that Countrywide made about those loans.

181. Under the CWALT 2006-OA10 PSA, the Countrywide defendants must repurchase the loans. The Countrywide defendants have not repurchased the loans and have breached the CWALT 2006-OA10 PSA.

182. Countrywide's failure to repurchase the loans has caused damages to CWALT 2006-OA10 and to the Certificateholders of CWALT 2006-OA10, including Plaintiffs.

SECOND CAUSE OF ACTION: BREACH OF THE CWALT 2006-OA3 PSA

183. Plaintiffs incorporate in this paragraph by reference, as though fully set forth, paragraphs 1 through 176.

184. The CWALT 2006-OA3 PSA is a valid contract.

185. In the CWALT 2006-OA3 PSA, and for valuable consideration, Countrywide Home Loans made to CWALT 2006-OA3 representations and warranties about each of the mortgage loans that CWALT 2006-OA3 purchased from CWALT.

186. At least 536 of the loans that CWALT 2006-OA3 purchased breached the representations and warranties that Countrywide made about those loans.

187. Under the CWALT 2006-OA3 PSA, the Countrywide defendants must repurchase the loans. The Countrywide defendants have not repurchased the loans and have breached the CWALT 2006-OA3 PSA.

188. Countrywide's failure to repurchase the loans has caused damages to CWALT 2006-OA3 and to the Certificateholders of CWALT 2006-OA3, including Plaintiffs.

DEMAND FOR RELIEF

Therefore, Plaintiffs demand judgment against the defendants Countrywide Home Loans, Inc., Park Granada, Park Monaco, and Park Sienna, and their successor Bank of America Corporation, for specific performance of their obligation under Section 2.03(c) of the CWALT 2006-OA10 PSA and Section 2.03(c) of the CWALT 2006-OA3 PSA with respect to the loans identified in Exhibits 4 and 10 to this Complaint, and with respect to all other loans in the trusts as to which the defendants breached one or more of their representations and warranties under the PSAs, or in the alternative, for damages in an amount to be determined at trial, with interest. Plaintiffs also demand an award of the costs and expenses of maintaining this action on behalf of the trusts, including reasonable attorneys and expert fees.

DEMAND FOR TRIAL BY JURY

Plaintiffs demand a trial by jury.

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Dated: New York, New York
April 12, 2011

EXHIBIT B

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

PRESENT: Eileen Bransten Justice PART 3

MBIA Insurance Corporation

-v-

Countrywide Home Loans, Inc., et. al.

INDEX NO. 602825/08

MOTION DATE

MOTION SEQ. NO. 015

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for in limine

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3,4,5,6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 12/22/10

HON. EILEEN BRANSTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE

----------X

MBIA INSURANCE CORPORATION,

Plaintiff,

-against-

COUNTRYWIDE HOME LOANS, INC., COUNTRYWIDE SECURITIES CORP., and COUNTRYWIDE FINANCIAL CORP.,

Defendants.

Index No.: 602825/08
Motion Date: October 13, 2010
Motion Sequence No.: 015

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PRESENT: HON. EILEEN BRANSTEN, J.S.C.

Plaintiff MBIA Insurance Corporation ("MBIA") moves *in limine* for a decision allowing MBIA to use statistical sampling to present evidence to prove its causes of action for fraud and breach of contract and to prove damages. Defendants Countrywide Home Loans, Inc., Countrywide Securities Corp. and Countrywide Financial Corp. (collectively, "Countrywide") oppose.

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.

Plaintiff filed the instant motion on April 30, 2010. After oral argument on June 16, 2010, the parties held the motion pending additional discussions. The parties filed supplemental memoranda of law of law in August 2010. An evidentiary hearing was held

on September 27, 2010, at which Plaintiff presented its expert witness, statistician Charles D. Cowan, Ph.D., for direct and cross-examination. Dr. Cowan testified about his proposed method of sampling the fifteen residential-mortgage-backed securitizations ("RMBS") at issue in this matter. By request of the court, the parties submitted additional arguments by letter on October 13, 2010, the final submissions of this motion.

ANALYSIS

I. Timeliness of Plaintiff's Motion

A. New York Statute and Code Does Not Preclude the Instant Motion

Defendants first contest Plaintiff's motion on grounds of timeliness. Defendants claim that the motion is premature, that the timing of the instant motion is not contemplated by New York law and that New York courts have held that it is premature to rule on the admissibility of evidence prior to the determination of that evidence's relevance. Defendants' arguments are unavailing.

First, the governing rules of this court do not mandate an outside time limit for a movant to initiate a motion *in limine*. The Rules of the Commercial Division of the Supreme Court state that:

> The parties shall make all motions in limine no later than ten days prior to the scheduled pre-trial conference date, and the motions shall be returnable on the date of the pre-trial conference, unless otherwise directed by the court.
>
> (22 NYCRR 202.70, Rule 27).

Plaintiff's motion was made rather well in advance of the pre-trial conference date, and this court has not mandated other times or limits for motions *in limine*. While the majority of motions *in limine* are made close to or during trial, neither New York statute nor code prevents a party from bringing a motion as their litigation strategy dictates. Neither does New York statute or code prevent the court from deciding that motion.[1]

B. New York Common Law Does Not Preclude the Instant Motion

Defendants cite second to New York cases *Speed v Avis Rent-A-Car*, 172 AD2d 267 (1st Dept 1991) and *Grant v Richard*, 222 AD2d 1014 (4th Dept 1995) for the proposition that the instant motion must be decided closer to or at time of trial (Defendants' Memorandum of Law in Opposition to Plaintiff's Motion *In Limine* Regarding Sampling ["Defendants' Opp. Memo."], pp. 8-10). Both *Speed* and *Grant* address the admissibility of specific items of evidence. The court in *Speed* found that the relevance of the particular evidence at issue, notice of recall of the automobile central to the case, was best determined at trial (*Speed*, 172 AD2d at 268). *Grant*, relying on *Speed*, similarly found that deciding the question of admissibility of unspecified evidence and testimony "should await the trial, when the determination may be made 'in context'" (*Grant*, 222 AD2d at 1014, quoting *Speed*, 172 AD2d at 268).

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[1] Defendants' argument regarding the timing of pretrial conferences under 22 NYCRR 202.26 is not relevant to the issue at bar, and is disregarded.

The court does not find these cases persuasive. The court sees no question, and Defendants do not argue, that proof regarding the securitizations and Plaintiff's contention of breach and/or fraud therein is relevant to this action. Plaintiff will present evidence to attempt to prove its contentions, and the trier of fact will hear that evidence and make its decision based thereon. The question is not of admissibility and relevance, but of the form that the relevant and admissible evidence will take at trial. New York common law does not prevent decision upon the current motion.

C. Alleged Factual Issues Do Not Preclude the Instant Motion

Defendants further contend that legal and factual issues prevent decision upon Plaintiff's motion (Supplemental Memorandum of Law in opposition to Plaintiff's Motion *In Limine* Regarding Sampling ["Defendants' Supp. Opp. Memo."], pp. 3-11).

Defendants first allege numerous "threshold disputed issues," (*id.* at. 4-6), which they contend must be resolved prior to the use of sampling. Defendants contend that should the court grant Plaintiff's motion, the court would then improperly "resolve myriad threshold legal questions not fully briefed by the parties or properly before the Court" (*id.* at 4).

While the finder of fact may need to resolve the listed issues, Defendants provide no basis for its current contention that resolution must occur prior to decision upon the instant motion or that decision upon this motion would resolve the listed issues. Defendants do not argue how resolution, or non-resolution, of any of their purported issues will be affected by

a statistically significant sampling of the securitizations at issue, nor do Defendants attempt to link the list of issues with their other arguments. Defendants simply state that if Plaintiff does not prevail upon all of the listed issues "MBIA's proposal will not work" (*id.* at 6). Conversely, Defendants do not argue or show how a sample will be affected by resolution of the alleged issues.

Defendants' footnoted federal case, in which a magistrate judge denied a motion *in limine* to exclude a criminal record, is unpersuasive (*id.* at 3, n.4). As stated above, this motion is not premature and enough is known about the shape of trial to allow this motion. Defendants' list of purported issues may be resolved upon summary judgment or at trial.

Second, Defendants argue that Plaintiff has failed to demonstrate how sampling will be useful at trial. Defendants claims that Plaintiff has not shown how it may use sampling to prove its claims for breach of contract and fraud or how it may use sampling to prove its alleged damages. Defendants contend that Plaintiff has failed to show explain what elements of its claims it will show through sampling or how sampling will prove those elements.

The use of sampling does not obviate Plaintiff's need to prove each element of its claims for breach of contract or fraud, and Plaintiff must prove entitlement to any damages. Should sampling be used, Plaintiff retains its obligation to demonstrate to the trier of fact that each element of each cause of action has been met. Plaintiff's possible use of sampling does not change Plaintiff's ultimate burden of proof, only how Plaintiff may present that proof.

Plaintiff has generally stated how it will use sampling of the securitizations at issue to demonstrate its claims for breach of contract and fraud as well as for damages (Plaintiff's Supplemental Reply Memorandum of Law in Further Support of Motion *In Limine* Regarding Sampling ["Plaintiff's Supp. Memo."], pp. 4-8; Memorandum of Law in Support of Plaintiff's Motion in Limine Regarding Sampling ["Plaintiff's Memo."], pp. 14-19). Plaintiff must prove its claims and actual damages. Defendants will have the ability to contest Plaintiff's proofs, and the trier of fact will decide the issues. Defendant has cited no authority to force Plaintiff to divulge its specific litigation strategy to prove its claims, nor any authority that Plaintiff should be required to do so in order to utilize sampling. Defendants' argument is unsupported and unavailing.

The court finds that Plaintiff's motion is timely and ready for decision on its merits.

II. Methodology of Plaintiff's Proposed Sampling Method

Defendants argue that Plaintiff's proposed sampling is improper for the case at bar and is methodologically infirm.

A. Sampling is Appropriate for the Case at Bar

As a preliminary matter, Defendants first argue that Plaintiff has not shown that sampling is appropriate for this matter (Defendants' Supp. Opp. Memo., p. 12; citing *People v Wesley*, 83 NY2d 417, 436 [1994] [Kaye, Chief Judge, concurring]). Defendants appear to misread *Wesley*.

Defendants cite to former Chief Judge Kaye's concurring opinion in *Wesley*. In relevant part, Chief Judge Kaye reiterates the primary opinion's holding that, in each inquiry as to the validity of scientific evidence, upon finding general acceptance of a scientific technique a foundational inquiry must then be completed to determine whether the generally accepted scientific techniques were actually used (*Wesley*, 83 NY2d at 436). While Chief Judge Kaye stated that this must be done "in each case," Chief Judge Kaye did not imply or state that scientific evidence was to be applied only in certain cases. Rather, she stated that the review was to ensure that when a generally accepted technique was used, the technique in question was correctly applied (*id.*). If the foundational inquiry revealed "infirmities in collection and analysis of the evidence not affecting its trustworthiness" then the weight of the evidence was affected – not its admissibility (*id.*). The evidence is then to be weighed by the trier of fact

The admission of scientific evidence is not limited to certain cases. As mortgage-backed securities are a relatively new device, it is not surprising that Plaintiff did not cite a directly analogous New York case allowing the use of statistical evidence. It is also not surprising that Defendants' do not cite a case disallowing such evidence. Scientific evidence is to reviewed of its own accord (*see, generally, Frye v United States*, 293 F 1013 [DC Cir 1923]; *Wesley, supra*), and it will be so reviewed here.

B. Plaintiff's Methodology is Acceptable

Plaintiff proposes to use expert testimony based upon a statistically significant sample of the residential mortgage-backed securities.

New York uses the "general acceptance" test of the reliability and admissibility of expert testimony using scientific evidence (*Frye*, *supra*; *see Nonnan v City of New York*, 32 AD3d 91, 102 n.18 [1st Dept 2006]). *Frye* requires that expert testimony be based on scientific principal or procedure that has been "sufficiently established to have gained general acceptance in the particular field in which it belongs" (*Frye*, 293 F at 1114).

The court must first determine whether the proffered scientific evidence at issue in the matter, here, statistical sampling, is novel (*see People v Wernick*, 89 NY2d 111, 115-16 [1996] citing *Wesley*, 83 NY2d at 422). Should statistical sampling be determined novel, then the court must find whether the sampling is generally accepted in the particular field in which it belongs (*Frye*, 293 F at 1114). The court must also determine whether the scientific evidence is reliable (*Parker v Mobil Oil Corp.*, 7 NY3d 434, 446-47 [2006]; *Wesley*, 83 NY2d at 422, 424).

1. Statistical Sampling Is Not Novel

Statistical sampling is a widely used method to present evidence from a large population of data. For example, the United States Court of Appeals for the Second Circuit has used statistical sampling to show gender-based salary disparity *(Lavin-McEleney v Marist*

College, 239 F 3d 476 [2d Cir 2001] [allowing for both liability and damages]); and numerous other courts have similarly accepted the use of statistical sampling, including our own Court of Appeals in 1856 (*see Muller v Eno*, 14 NY 597, 598-99 [1856] [allowing sampling of "several" of fourteen bales of cotton to be used as evidence as to the state of all fourteen bales]; *see also Ratanasen v State of Cal., Dept. of Health Services*, 11 F 3d 1467 [9th Cir 1993] [allowing random sampling to prove fraud, "provided the aggrieved party has an opportunity to rebut such evidence"]; *Evans v Fenty*, 714 F Supp 2d 116 [D DC 2010] [allowing the use of statistically significant samples, over objection by expert witness]; *CBS Broadcasting v Primetime 24 Joint Venture*, 48 F Supp 2d 1342 [SD Fla 1998] [approving the use of stratified sampling]. Further, New York statute expressly recognizes the use of statistical sampling in certain administrative hearings (*see, e.g., Mercy Hosp. of Watertown v. New York State Dept. of Social Servs.*, 79 NY2d 197, 203-04 [1992]).

The court finds that statistical sampling of large populations is not a novel concept.

2. Statistical Sampling Is Generally Accepted in the Scientific Community

It is undisputed that the use of statistical sampling is generally accepted in the scientific community. The court notes that while Defendants contest Plaintiff's specific methodology, Defendants contest neither the novelty nor the general acceptance in the scientific field of statistical sampling. As Plaintiff's expert, Dr. Cowan, provides, acceptance of statistical sampling is widespread (*see* Affidavit of Dr. Charles D. Cowan in Further

Support of Plaintiff's Motion *In Limine* Regarding Sampling ["Cowan Aff."], ¶ 36). Scientific literature and testing is replete with the use of statistical sampling; the validity of properly conducted sampling is not a question for debate. Sampling has also been used in examining pools of loans (*id.*, pp. 14-14, Ex. 3), a fact that Defendants do not contest.

Statistical sampling is not novel and is generally accepted. The court thus focuses upon whether Plaintiff's proposed sampling methodology is reliable (*Wesley*, 83 NY2d at 422).

3. Plaintiff's Methodology is Acceptable

Plaintiff has explained its proposed methodology in open court, in Plaintiff's Supplemental Memorandum of Law in Support of Motion *In Limine* Regarding Sampling and in Dr. Cowan's affidavit. Defendants put forward significant opposition to Plaintiff's methodology in its own memoranda of law as well as the Affidavit of Dr. Christopher M. James ("James Aff.) and the Affidavit of Roy Welsch, Ph.D. ("Welsch Aff.").

In sum, Plaintiff has stated that for each of the fifteen securitizations here at issue it will take the following actions: First, for each securitization Plaintiff's method will select 400 loans. Plaintiff asserts that a sample of 400 loans per population will provide a confidence level of approximately 95%, with a 5% margin of error (Plaintiff's Supp. Memo., p. 17; Cowan Aff. ¶¶ 56-58). Plaintiff's method will stratify the samples of 400 loans selected into mutually exclusive subgroups (Plaintiff's Supp. Memo., p. 18-19; *see* Cowan

Aff. ¶¶ 59-61). Plaintiff asserts that doing so will ensure that subgroups in each securitization will be properly represented in the sample. Plaintiff will stratify the loan samples for Plaintiff's fraud claim, insurance contract claim and repurchase contract through the use three variables: the borrower's credit score, combined loan to value ratio ("CLTV") and Countrywide's documentation program). Each of these stratum will then be divided into further subgroups (Plaintiff's Supp. Memo., p. 20; Cowan Aff. ¶¶ 69, 71, 74-78). Plaintiff will stratify the loan samples for Plaintiff's servicing contract claim and implied covenant claim using delinquency status (Cowan Aff., ¶ 86).

Defendants respond with detailed criticism of Plaintiff's proposed methodology. Defendants assert, through Drs. Welsch and James, that Plaintiff's methodology flawed. Defendants state, *inter alia*, that Plaintiff has failed to establish that the proposed samples are of sufficient size to be reliable, that the method relies on the assumption that the outcome of the sampled loans will be binary (i.e., either "yes" or "no" answer with regard to breach), and that the representations and warranties at issue contain subjective elements and may not be easily reviewed for compliance (Defendants' Supp. Memo., p. 15-16 *citing* Welsch Aff. and James Aff.). Defendants further assert that Plaintiff's proposed methodology to extrapolate results from the proposed sample to prove liability and damages is flawed (*id.* At 16-21). Defendants' assertions, and the assertions of their experts, are not without merit.

The court finds that Plaintiff's proposed methodology of statistical sampling may be used at trial. Plaintiff has shown its methodology to be scientifically accepted, valid and reliable under the *Frye* standard. However, in so deciding, the court makes no finding that Plaintiff's proposed method is the only method by which Plaintiff (or Defendant) may present evidence or that Plaintiff's method is without flaw or unsusceptible to challenge. Defendants have raised significant valid challenges to Plaintiff's methodology; however the court finds that such challenges are premature to decide here. Defendants cited issues will be decided by the trier of fact as pertaining to the weight, rather than the acceptability, of the evidence. That decision will be made at trial.[2]

III. Conclusion

This court has inherent power to regulate trial before it (*see* CPLR 4011 ["court may . . . regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at issue"]). Deciding the current motion is completed within the court's

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[2] The court notes that Defendants have argued that the instant motion "effectively attempt[s] to co-opt the Court as co-counsel for Plaintiff" (Defendants' Supp. Opp. Memo., p. 3). Defendants thus imply that should this decision not proceed as they would prefer, the court has then merely "assist[ed Plaintiff] in devising its sample" and has acted inappropriately in its rule as overseer, and has become advocate. Defendants further state that for its opposition to fail is this court's "blessing" (Defendants' Supp. Opp. Memo., pp. 2, 4) of Plaintiff's sampling motion. Defendants' hyperbole is more than troubling to the court, as the court would prefer that all parties focus upon the merits of the arguments before it, rather than impugning any part in the arguments to the court. The court welcomes questions, conferences should Defendants have issues with what the court considers its own utmost impartiality.

inherent power. The court notes that the decision of the motion *in limine* has the possibility of saving the parties and the court from significant litigation time and may significantly streamline the action without compromising either party from proving its case (*see Orange and Rockland Utilities, Inc. v Assessor of Town of Haverstraw*, 12 Misc 3d 1194[A], *6 n.37 [NY Sup. Ct., Richmond Co. 2006]). The court does not find any prejudice in deciding the motion before it and allowing the use of statistically significant samples of the securitizations at issue. No authority prevents the court from doing so, and the use of sampling is widespread as a valid method to prove cases with large amounts of underlying data.

As Plaintiff may present its case as it chooses, so may Defendants rebut Plaintiff's proffered arguments through Defendants own sampling chosen in a statistically valid manner. As is the nature of and proper in litigation, each party will then challenge the other's proofs. The ultimate trier of fact will then decide the issue. The court expects both Plaintiff and Defendants to be forthcoming to the other party in notifying and providing evidence of chosen loans in any sample undertaken to effectuate the fairness of these challenges.

Finally, while Plaintiff is permitted to present evidence as it so chooses, and the court will permit Plaintiff to present evidence of its claims through its chosen sampling methodology, the court does not necessarily endorse the Plaintiff's method as better or worse than any other method. Plaintiff must convince the trier of fact, whether it be a jury or this court, that it has proven each element of its separate claims. Plaintiff must then further show

the trier of fact that the sample chosen is actually statistically significant and is applicable to each securitization as a whole. Proof of damages must then follow. Sampling itself is not proof, but merely a vehicle to present evidence.

(Order on following page.)

Accordingly, it is

ORDERED that MBIA's motion *in limine* to be allowed to use and present evidence for its case through statistical sampling is granted.

Dated: New York, New York
December 22, 2010

ENTER

Hon. Eileen Bransten, J.S.C.

EXHIBIT C

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

PRESENT: Bransten Justice

HON. EILEEN BRANSTEN

PART 3m

MBIA

INDEX NO. 602825/08

MOTION DATE 12/17/09

- v -

MOTION SEQ. NO. 010

Countrywide et al

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the Decision and Order signed under motion sequence number 010.

RECEIVED
APR 29 2010
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

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

Dated: 4-27-10

HON. EILEEN BRANSTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE

----------X

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.

----------X

Index No.: 602825/08
Motion Date: 12/09/09
Motion Sequence No.: 010

PRESENT: HON. EILEEN BRANSTEN, J.S.C.

Defendants Countrywide Home Loans, Inc. ("Countrywide Home"), Countrywide Securities Corp. ("Countrywide Securities"), Countrywide Financial Corp. ("Countrywide Financial"), Countrywide Home Loans Servicing, LP ("Countrywide Servicing") (collectively, "Countrywide") and Bank of America Corp. ("Bank of America," together with Countrywide, "Defendants") move to dismiss the negligent misrepresentation, successor and vicarious liability, fraud and breach of the implied covenant of good faith and fair dealing causes of action in the amended complaint. Plaintiff MBIA Insurance Corporation ("MBIA") opposes the motion.

BACKGROUND[1]

MBIA is one of the nation's oldest and largest monoline insurers, and provides financial guarantee insurance and other forms of credit protection (Amended Compl at ¶ 8).

Countrywide Financial is a Delaware corporation based in Calabasas, California (*id.* at ¶ 9). Countrywide Financial engages in mortgage lending and other real estate finance-related businesses, including mortgage banking, securities dealing and insurance underwriting (*id.*).

Countrywide Home, a wholly-owned subsidiary of Countrywide Financial, is a New York corporation also based in Calabasas, California (*id.* at ¶ 10). Countrywide Home originates and services residential home mortgage loans (*id.*).

Countrywide Servicing, a wholly-owned subsidiary of Countrywide Financial, is a limited partnership organized under the laws of Texas with offices in Plano, Texas and Calabasas, California (*id.* at ¶ 11). Countrywide Servicing services residential home mortgage loans (*id.*).

Countrywide Securities, a wholly-owned subsidiary of Countrywide Financial, is a Delaware corporation based in Calabasas, California and New York, New York (*id.* at ¶ 12).

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[1] This Court assumes familiarity with the facts recited in its prior decisions.

Countrywide Securities is a registered broker-dealer and underwrites offerings of mortgage-backed securities (*id.*).

Bank of America is a Delaware Corporation based in Charlotte, North Carolina and with offices and branches in New York, New York (*id.* at ¶ 13). Bank of America is one of the world's largest financial institutions, serving individual consumers, small- and middle-market businesses and large corporations with a full range of banking, investing, asset-management and other financial and risk-management products and services (*id.*). Countrywide merged with Bank of America on July 1, 2008 (*id.*).

From 2002 through 2007, MBIA provided credit enhancement for a total of 17 securitizations of second-lien mortgage loans (*id.* at ¶ 29). This action concerns 15 securitizations of home equity lines of credit ("HELOC") and closed-end second liens ("CES") (the "Securitizations") (*id.*). Each securitization generally comprised one or two pools of mortgage loans of between approximately 8,000 and 48,000 mortgage loans (*id.*).

For each of the Securitizations, Countrywide Home originated, or acquired through external mortgage brokers or correspondent banks, the underlying second-lien residential mortgages (*id.* at ¶ 30). Countrywide Home or Countrywide Servicing serviced the mortgage loans in each Securitization (*id.*). Countrywide Home then conveyed pools of these mortgage loans to a depositor, also a Countrywide entity, in exchange for cash (*id.*). The depositor in turn conveyed the pools of mortgage loans to Countrywide-created trusts (the "Trusts") for

the purpose of using the mortgage loans as collateral for asset-backed securities that would be sold to investors (*id.*). The Trusts then worked with the underwriters, including Countrywide Securities, to price and sell the residential mortgage-backed securities ("RMBS") notes to investors (*id.*).

By the fall of 2007, a material increase in delinquencies, defaults and subsequent charge-offs of the loans underlying the Securitizations became apparent (*id.* at ¶ 74). Because of the number of loan delinquencies and defaults and subsequent charge-offs, the total cash flow from the mortgage payments in several of the Securitizations was insufficient for the Trusts to meet their payment obligations to holders of the RMBS notes (*id.*).

The Trusts submitted claims on MBIA's note guaranty insurance policies, demanding that MBIA cover the shortage of funds (*id.* at ¶ 75). Many of the delinquent loans defaulted and were subsequently charged off, increasing MBIA's exposure to even greater claims (*id.*).

MBIA contends that the loan files in the Securitizations exhibit an extremely high incidence of material deviations from the underwriting guidelines Countrywide represented that it would follow (*id.* at ¶ 78). A material deviation from underwriting guidelines suggests that the loan should never have been made (*id.*).

MBIA commenced this action against Countrywide asserting causes of action for fraud (first), negligent misrepresentation (second), breach of contract (third and fourth),

breach of the implied covenant of good faith and fair dealing (fifth) and indemnification (sixth).

Countrywide Home, Countrywide Securities and Countrywide Financial moved to dismiss the original complaint and, on July 8, 2009, this Court granted the motion in part and denied the motion in part: (1) dismissing MBIA's claims for negligent misrepresentation and narrowing the scope of MBIA's claim for breach of implied covenant of good faith and fair dealing; and (2) dismissing MBIA's breach of contract, breach of the implied covenant of good faith and fair dealing and indemnification causes of action as against Countrywide Financial and Countrywide Securities.

MBIA subsequently amended the complaint, repleading its negligent misrepresentation cause of action, adding a cause of action for successor and vicarious liability (seventh) against Bank of America, adding Countrywide Servicing as a defendant to its breach of the implied covenant of good faith and fair dealing cause action and generally adding more supporting allegations to various claims.

Defendants now move to dismiss the negligent misrepresentation, successor and vicarious liability, fraud and breach of the implied covenant of good faith and fair dealing causes of action in the amended complaint.

ANALYSIS

I. Negligent misrepresentation

Defendants argue that MBIA's repleaded negligent misrepresentation cause of action must be dismissed because MBIA fails to sufficiently allege a "special relationship."

Analysis of MBIA's negligent misrepresentation claim's viability begins with determining whether the relationship between MBIA and Countrywide imposed a duty on Countrywide to provide MBIA with correct information (*Kimmell v Schaefer*, 89 NY2d 257, 264 [1996]).

A negligent misrepresentation claim may arise from an arms-length commercial transaction – such as the Securitizations in this action – only if a special relationship exists between the parties such that the plaintiff justifiably relied on the defendant's representation (*see id.* at 263). Under New York law, a statement made in the context of an arms-length commercial transaction, without more, cannot give rise to such a duty to provide correct information (*id.*; *Parisi v Metroflag Polo, LLC*, 51 AD3d 424, 424 [1st Dept 2008]).

A special relationship exists if the defendant either (1) possesses "unique or specialized expertise" or (2) occupies a "special position of confidence and trust" with the injured party (*Kimmell*, 89 NY2d at 264; *Laskin v Bank of Am. NA*, 242 NYLJ 37, 2009 NY Misc LEXIS 2574, *33 [Sup Ct, Nassau County 2009] ["'since a vast majority of commercial transactions are comprised of such casual statements and contacts' liability for negligent

misrepresentation has been imposed in the commercial context only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party"] [citation omitted]).

MBIA alleges that "Countrywide arranged the Securitizations, and originated or acquired, underwrote, and serviced all of the underlying mortgage loans"; that "Countrywide had unique and special knowledge about the loans in the Securitizations"; that "Countrywide had unique and special knowledge and expertise regarding the quality of the underwriting of those loans as well as the servicing practices employed as to such loans"; that "MBIA could not evaluate the underwriting quality or the servicing practices of the mortgage loans in the Securitizations on a loan-by-loan basis"; that "it relied on Countrywide's unique and special knowledge regarding the underlying mortgage loans when determining whether to provide credit enhancement for each of the Securitizations"; that "MBIA engaged in its own due diligence of the Securitizations" and "was entirely reliant on Countrywide to provide accurate information regarding the loans in engaging in that analysis" (Amended Compl at ¶ 157).

Also, MBIA alleges that "[f]or at least a five year period, MBIA relied on Countrywide's unique and special knowledge regarding the quality of the underlying Mortgage Loans and their underwriting when determining whether to provide credit enhancement for each of the Securitizations" (*id.* at ¶ 158).

In determining whether a commercial relationship rises to the level of a "special relationship" under *Kimmel*, several principles come into focus. Only alleging that a party possesses "unique or special expertise" is insufficient (*M&T Bank Corp. v Gemstone CDO VII, Ltd.*, 68 AD3d 1747, 1750 [4th Dept 2009], citing *Kimmell*, 89 NY2d at 264; *Pacnet Network v KDDI Corp.*, 25 Misc 3d 1203[A], 2009 NY Slip Op 51963[U], *4 [Sup Ct, NY County 2009]; *accord JP Morgan Chase Bank v Winnick*, 350 F Supp 2d 393, 402 [SD NY 2004] [explaining that, in *Kimmel*, "the duty did not arise simply from the existence of the contract or from its terms, but rather, from the particular factual circumstances underlying the plaintiffs' decision to invest"]). Nor are vague allegations of general expertise enough to support a special relationship (*United Safety of America, Inc. v Consolidated Edison Company of New York, Inc*, 213 AD2d 283, 286 [1st Dept 1995] [reiterating the principle that an "arm's length business relationship" is insufficient]).

Furthermore, a defendant's knowledge of "the particulars" of its own business does not constitute the type of "specialized knowledge" that is required (*JP Morgan Chase Bank*, 350 F Supp 2d at 402 ["if it were, every bank would have a claim against every borrower who failed to exercise due care in the context of commercial bank loans"]; *MBIA Ins. Co. v Residential Funding Co., LLC*, 243 NYLJ 10, 26 Misc 3d 1204[A], 2009 NY Slip Op 52662[U], *6 [Sup Ct, NY County]; *compare Heard v City of New York*, 82 NY2d 66, 75

[1993] [plaintiff "was not a person wholly without knowledge seeking assurances from one with exclusive knowledge"]).

In *Batas v Prudential Ins. Co. of Am.*, the Appellate Division affirmed the trial court's finding of no special relationship between an insured and her health insurance carrier (281 AD2d 260, 265 [1st Dept 2001]). The Court explained that it was not enough that "the only claimed basis for such a relationship [was] alleged to be defendants' superior knowledge of their product, and a posting of promotional material on their web page in which they tout[ed] themselves as a 'trusted name' in health insurance" (*id.* at 265). Further, the Court affirmed the conclusion that "in the absence of some additional allegation showing a more direct or affirmative effort by defendants to gain plaintiffs' trust and confidence," plaintiff failed to allege a special relationship (*id.*).[2]

Finally, the special relationship must have existed before the contractual relationship giving rise to the alleged wrong, and not as a result of it (*Emigrant Bank v UBS Real Estate Securities, Inc.*, 49 AD3d 382, 385 [1st Dept 2008]; *MBIA Ins. Co.*, 2009 NY Slip Op 52662[U], at *6; *Tech. Support Servs. Inc. v IBM*, 236 NYLJ 43, 2006 NY Misc LEXIS 2421, *10 [Sup Ct, Westchester County 2006]).

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[2] Like fraud, claims of negligent misrepresentation must be pleaded with particularity (CPLR 3016 [b]).

To borrow an observation from the court in *JP Morgan Chase Bank*, parties to an "arm's length commercial transaction . . . must comply with the negotiated terms of [their] contract, and may not defraud [each other] by deliberate falsehood, but [one] is not liable in tort for mere carelessness about its representations" (350 F Supp 2d at 402).

Applying the principles above, MBIA fails to replead a cause of action for negligent misrepresentation against Countrywide Financial, Countrywide Home and Countrywide Securities. MBIA merely alleges an "ordinary business relationship" upon which a negligent misrepresentation claim may not be based. Accordingly, Countrywide's motion to dismiss the repleaded cause of action for negligent misrepresentation is granted.[3]

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[3]As the United States Court of Appeals for the Second Circuit has remarked, "[i]t is also worth noting that Kimmell's finding that the defendant in that case was liable because there was a special relationship between the parties rested largely on the fact that the defendant testified that 'he expected plaintiffs to rely on [his] projections,' that he informed plaintiffs 'that he could provide 'hot comfort' should plaintiff[s] entertain any reservations about investing,' and that he 'represented' his projections as 'reasonable'" (*Dallas Aero., Inc. v CIS Air Corp.*, 352 F3d 775, 789 [2d Cir 2003] [alterations in original] [citation omitted]).

II. Successor and vicarious liability

In the amended complaint, MBIA adds Bank of America as a defendant. MBIA contends that Bank of America is a successor-in-interest to Countrywide and is vicariously liable for the conduct of Countrywide under a theory of de facto merger.

Countrywide argues that the separate corporate identities of Bank of America and Countrywide should be enforced and that there is no basis to impose Bank of America with successor liability.

Relying on *Argent Classic Convertible Arbitrage Fund L.P. v Countrywide Financial Corp.* (07-cv-07097-MRP-MAN, *8-9 [CD Ca 2009] [hereinafter "*Argent*"]), Countrywide argues that Bank of America did not assume Countrywide's liabilities and, therefore, MBIA's claims against Bank of America must be dismissed. Countrywide urges this Court to reach the same result as the court in *Argent*. However, with little discussion, the District Court in *Argent* simply concluded that the

> "[Third Amended Complaint], together with judicially noticeable documents, does not allege actions that have been taken in bad faith to prejudice Countrywide's creditors – and the [Third Amended Complaint] certainly does not allege bad faith with the specificity required for alleging fraud. Nor does anything properly before the Court suggest that BofA has *de facto* merged with Countrywide. Finally, BofA is not a 'continuation' of Countrywide" (*id.*).

Countrywide offers nothing for this Court to follow and, more importantly, fails to demonstrate that each of the four exceptions, including de facto merger, are unavailable to MBIA as a matter of law.

Although, generally, an acquiring corporation does not become responsible for the pre-existing liabilities of the acquired corporation, New York law provides an exception under the de facto merger doctrine (*Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 574 [1st Dept 2001]). When the acquiring corporation has not purchased another corporation merely for the purpose of holding it as a subsidiary, but has effectively merged with the acquired corporation, the de facto merger doctrine may apply (*id.*).

> "The hallmarks of a de facto merger include: continuity of ownership; cessation of ordinary business and dissolution of the acquired corporation as soon as possible; assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and, continuity of management, personnel, physical location, assets and general business operation" (*id.*).

The exception is premised on the concept "that a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased" (*Grant-Howard Assocs. v General Housewares Corp.*, 63 NY2d 291, 296 [1984]). Also, "factors are analyzed in a flexible manner that disregards mere questions of form and asks whether, in substance, it was the

intent of the successor to absorb and continue the operation of the predecessor" (*Matter of AT&S Transp., LLC v Odyssey Logistics & Tech. Corp.*, 22 AD3d 750, 752 [2d Dept 2005]).

Here, MBIA first sufficiently alleges continuity of ownership. "[C]ontinuity of ownership, exists where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation as the result of the successor's purchase of the predecessor's assets, as occurs in a stock-for-assets transaction" (*Van Nocker v A.W. Chesteron, Co. (In re N.Y. City Asbestos Litig.)*, 15 AD3d 254, 256 [1st Dept 2005] [no continuity of ownership between the acquired company and acquiring company, since the acquiring company paid for the acquired company's assets with cash, not with its own stock, and neither the acquired company nor any of its shareholders has become a shareholder of the acquiring company]).

MBIA alleges, and Countrywide does not dispute, that Bank of America acquired Countrywide Financial and the other Countrywide defendants on July 1, 2008, through an all-stock transaction involving a Bank of America subsidiary that was created for the sole purpose of facilitating the acquisition of Countrywide (Amended Compl at ¶¶ 119-22; *see* Defendant's Memorandum of Law in Support of their Motion to Dismiss the Amended Complaint ["Mem in Supp"] at 21).

MBIA next establishes the factor analyzing the assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation.

MBIA asserts, among other things, that the Countrywide brand had been retired and that the "old Countrywide website redirects customers to the mortgage and home loans section of Bank of America's website" (Amended Compl at ¶¶ 123-24).

MBIA also establishes the factor analyzing the cessation of ordinary business and dissolution of the acquired corporation as soon as possible. "So long as the acquired corporation is shorn of its assets and has become, in essence, a shell, legal dissolution is not necessary before a finding of a de facto merger will be made" (*Fitzgerald*, 286 AD2d at 575).

MBIA alleges that

> "[s]ubstantially all of Countrywide's assets were transferred to Bank of America on November 7, 2008, 'in connection with Countrywide's integration with Bank of America's other businesses and operations,'[4] along with certain of Countrywide's debt securities and related guarantees. Countrywide Financial ceased filing its own financial statements in November 2008, and instead its assets and liabilities have been included in Bank of America's recent financial statements" (Amended Compl at ¶ 126).

Furthermore, MBIA alleges that "Bank of America has paid to restructure certain of Countrywide's home loans on its behalf, including settling predatory-lending lawsuits brought by state attorneys general" (*id.* at ¶ 127).

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[4] It is unclear from what source MBIA quotes. Presumably, MBIA quotes from an interview in the May 2009 issue of *Housing Wire* magazine – the source cited just before paragraph 126 in the amended complaint.

Based on the foregoing, MBIA sufficiently alleges a de facto merger in which Bank of America intended to absorb and continue the operation of Countrywide (*see Holme v Global Mins. & Metals Corp.*, 63 AD3d 417, 418 [1st Dept 2009]). Accordingly, Countrywide's motion to dismiss the complaint as against Bank of America is denied.

III. Fraud

Although this Court previously denied Countrywide's motion to dismiss MBIA's fraud claim, Countrywide again seeks dismissal of the fraud claim.

The only difference between the amended and original complaints in connection with MBIA's fraud cause of action is the addition of five securitizations on which MBIA brings its fraud claim. The substance, the claim, the theory and the relief sought remain the same.

Citing no authority for this Court to do so, Countrywide asks this Court to review their "properly modified arguments, which they believe require a different result as to [MBIA's] fraud claim" (Mem in Supp at 23). In the interest of judicial economy, however, this Court briefly reviews Countrywide's arguments.

In its motion to dismiss the fraud claim from the amended complaint, Countrywide simply asserts the same arguments from its motion to dismiss the original complaint (*compare* Mem in Supp at 23-26 [no justifiable reliance], 26-31 [fraud claim duplicative of breach of contract claim], 35-38 [fraud not pleaded with particularity]; *with* Countrywide

Defendants' Memorandum of Law in Support Their Motion to Dismiss [the original complaint] at 19-24 [no justifiable reliance], 12-18 [duplicative], 27-29 [particularity]). These arguments were previously rejected; the arguments are again rejected upon the same grounds (*see MBIA Ins. Co. v Countrywide Home Loans, Inc.*, 2009 NY Slip Op 31527[U], *6-14 [Sup Ct, NY County 2009]).

Countrywide further argues that MBIA fails to sufficiently plead causation. Countrywide fails to demonstrates as a matter of law that MBIA cannot establish the causation it alleges (*see Campbell v Rogers & Wells*, 218 AD2d 576, 580 [1st Dept 1995] [judgment as a matter of law "should be granted only if there is no rational process by which the jury could find for plaintiff as against the moving defendant"]). On a motion addressed to the pleadings in this highly complex action, it would be premature to make a determination as to whether an economic downturn constituted an intervening cause in the link between Countrywide's alleged conduct and MBIA's alleged injury.

Accordingly, Countrywide offers no basis for this Court to revisit its prior order denying Countrywide's motion to dismiss MBIA's fraud claim and that branch of Countrywide's motion to dismiss is denied.

IV. Breach of the implied covenant of good faith and fair dealing

Countrywide fails to assert a basis for this Court to dismiss MBIA's breach of the implied covenant of good faith and fair dealing cause of action. Countrywide's motion to dismiss MBIA's claim is therefore denied. However, consistent with this Court's Decision and Order dated July 8, 2009, MBIA's cause of action remains viable only as it relates to MBIA's allegations that Countrywide deliberately refused to take corrective action in order to collect more fees.

Accordingly, it is

ORDERED that the motion to dismiss is GRANTED in part in that the negligent misrepresentation (second) cause of action is dismissed; and it is further

ORDERED that Defendants are directed to serve an answer to the amended complaint within twenty (20) days after service of a copy of this order with notice of entry.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
April 27, 2009

ENTER

Hon. Eileen Bransten