SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

MERRILL LYNCH MORTGAGE INVESTORS TRUST, SERIES 2006-RM4, et al

-v-

MERRILL LYNCH MORTGAGE LENDING, INC., et al

INDEX NO. 654403/12

MOTION DATE

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion by defendants to dismiss the complaint is DENIED, except with respect to Merrill Lynch Mortgage Investors, Inc.

A Preliminary Conference is scheduled for 10-11-13 at 11:30 AM at 26 Broadway 10th Floor

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

Dated: September 10, 2013

J.S.C.
MELVIN L. SCHWEITZER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

MERRILL LYNCH MORTGAGE INVESTORS TRUST, SERIES 2006-RM4, MERRILL LYNCH MORTGAGE INVESTORS TRUST, SERIES 2006-RM5, Plaintiffs, -against- MERRILL LYNCH MORTGAGE LENDING, INC., MERRILL LYNCH MORTGAGE INVESTORS, INC., BANK OF AMERICA, NATIONAL ASSOCIATION, Defendants.	Index No. 654403/12 DECISION AND ORDER Motion Sequence No. 001

MELVIN L. SCHWEITZER, J.:

This case involves the interpretation of a mortgage purchase contract entered into in connection with the securitization of over $1 billion of residential mortgage-backed securities. Plaintiffs sue to enforce contractual rights relating to the repurchase of mortgage loans. Defendants move to dismiss the complaint.

Background

The following allegations are taken from the complaint.

Merrill Lynch Mortgage Investors Trust, Series 2006-RM4 (RM4 Trust) and Merrill Lynch Mortgage Investors Trust, Series 2006-RM5 (RM5 Trust, collectively, Trusts), by U.S. Bank National Association (U.S. Bank), not in its individual capacity but solely as current trustee with respect to the Trusts (Trustee), bring this action against Merrill Lynch Mortgage

Lending, Inc. (Merrill, Sponsor, or Merrill Sponsor), Merrill Lynch Mortgage Investors, Inc. (Merrill Depositor), and Bank of America, National Association (Bank of America).

Plaintiffs are two securitization trusts that hold and administer mortgage loans on behalf of investors who own securities collateralized by such loans. Plaintiffs seek to enforce their contractual rights against the parties that orchestrated the securitizations and created the two Trusts, sold defective loans into the Trusts, and have refused to repurchase such loans in violation of the contracts governing the securitizations.

In 2006, as a part of its effort to increase its share of the then-highly profitable residential mortgage-backed securities (RMBS) market, Merrill bought over 6,000 mortgage loans (Mortgage Loans) with an original principal balance of over $1.1 billion dollars from a third-party loan originator, ResMAE Mortgage Corporation (ResMAE). Through the process of securitization, Merrill turned these mortgages into tradable securities in the form of certificates (Certificates). Certificates were issued by the RM4 Trust and the RM5 Trust on September 27, 2006 and October 27, 2006 for the RM4 Trust and RM5 Trust, respectively, and sold to investors, which resulted in over a billion dollars of proceeds to Merrill Depositor. Each Certificate entitles its holder to cash flows from the loan payments on the corresponding mortgages.

Merrill accomplished each securitization primarily through three contracts:

(a) The Master Mortgage Loan Purchase and Interim Servicing Agreement (Purchase Agreement) pursuant to which Merrill purchased Mortgage Loans from ResMAE;

(b) The Mortgage Loan Sale and Assignment Agreements (each, a Sale Agreement), pursuant to which Merrill Sponsor transferred the Mortgage Loans to an affiliated entity Merrill Depositor; and

(c) The Pooling and Servicing Agreements (each, a PSA), pursuant to which Merrill Depositor transferred the Mortgage Loans to the Trusts.

(collectively, the Trust Agreements).

To facilitate the sale of the Certificates to investors, who had no independent means of verifying the characteristics of the underlying mortgage loans, Merrill and ResMAE made extensive representations and warranties in the securitization documents about the quality and characteristics of the Mortgage Loans underlying the corresponding Certificates. The accuracy of the representations and warranties were a key component to closing a securitization transaction because, among other reasons – unlike Merrill and ResMAE – investors were not given access to the related loan origination files and could not have independently confirmed the loans' credit characteristics. Accordingly, the veracity of these representations and warranties were the drivers of the loans' risk profile.

In the Purchase Agreement, pursuant to which Merrill purchased the loans from ResMAE, the loan originator, ResMAE represented, among other things, that the loans complied with underwriting criteria, were issued to borrowers with sufficient income to repay them, and were backed by properties valuable enough to allow investors to recoup the value of the loan through foreclosure. If any of the loans were found to breach representations and warranties, ResMAE committed to buy back the loan. Merrill's rights against ResMAE were then assigned to the Trusts.

In the securitization process, Merrill also made its own representations and warranties in the Sale Agreements concerning a loans' quality, restating many of ResMAE's promises verbatim for the benefit of the Trusts (listing specific representations and providing that such

representations "are hereby restated by the Sponsor as of the Closing Date"). In addition, Merrill contractually guaranteed ResMAE's performance under the Purchase Agreement, ensuring that the risk of non-conformance with representations and warranties was not borne by the Trusts. The right to enforce Merrill's representations and warranties was assigned to the Trusts.

Merrill's promises were designed to give investors comfort that not just ResMAE but also Merrill ultimately stood behind the quality of the loans. If the loans did not hold up to their stated standards, not only was ResMAE liable for repurchases, but so was the sponsor of the deal, Merrill. Merrill's "backstop" guaranty allowed Merrill to market the deal to investors on favorable terms, as certificateholders received two layers of protection for the mortgage quality, and were assured that the Sponsor, Merrill, had done its diligence and stood behind the loans. This was also important because, at the time, ResMAE was financially a much less secure institution than Merrill, as its bankruptcy only *three months* after the securitizations bore out.

By the time of the bankruptcy, filed in February 2007, a number of the loans in the Trusts suffered from early payment defaults (EPDs), where the borrowers missed either the first or second monthly payment under their mortgages. These EPDs violated ResMAE's and Merrill's representations and warranties. Accordingly, the Trusts, through LaSalle Bank, National Association, acting in its capacity as the original trustee with respect to the Trusts (LaSalle), filed claims against ResMAE in bankruptcy, demanding that ResMAE repurchase the EPD loans or otherwise compensate the Trusts.

In July 2008, LaSalle, then a subsidiary of Bank of America, consented to a settlement of the bankruptcy claims against ResMAE on behalf of five Merrill-sponsored trusts, including the Trusts (the Bankruptcy Settlement). Merrill, which had filed its own claims against ResMAE on

EPD loans it held on its balance sheet, likewise consented to the Bankruptcy Settlement. The settlement provided that Merrill and the Merrill-sponsored trusts would collectively accept a lump sum from the bankruptcy estate as consideration for releasing their individual bankruptcy claims against ResMAE. They would separately allocate that sum among themselves. LaSalle sent a notice to investors informing them of the settlement with ResMAE. Because ResMAE had very limited funds to satisfy a large number of bankruptcy claims, the Trusts ultimately received only a small part of the money owed for those EPD loan breaches.

To allocate the proceeds, Merrill and the Trusts entered into a second settlement agreement later that year (the Allocation Agreement). By the time of the Allocation Agreement, Bank of America had taken over as the trustee for the Trusts (in this capacity, "Bank of America as Successor Trustee), and its parent, Bank of America Corporation, was in the process of acquiring Merrill. The Allocation Agreement is dated "as of December 31, 2008," the day before Bank of America's acquisition of Merrill closed, but the date stamped on the faxed signature page for the Allocation Agreement is January 22, 2009, which suggests that the settlement was not signed until three weeks after Bank of America acquired Merrill and less than a month before Bank of America as Successor Trustee resigned as trustee due to the obvious conflict of interest. Bank of America as Successor Trustee did not send a notice to investors, informing them of the Allocation Agreement or its terms.

In late 2011 and early 2012, forensic review of Mortgage Loan files (Origination and Servicing Files) from both Trusts was undertaken and payment analysis of certain Mortgage Loans was conducted. These reviews found that at least 1,221 loans for the RM4 Trust and 1,411 loans for the RM5Trust suffered from breaches of representations and warranties and did

not have the represented characteristics. The breaching loans were subject to the cure and repurchase provisions in the transaction documents due to defects relating to, among other things:

(a) Misstatement of Income and Employment. Loan documents for many loans misstated the borrowers' incomes, misstated the borrowers' employment, or listed incomes that were clearly not reasonable for the borrowers' stated occupations.

(b) Misstatement of Debts. Loan documents for many loans misstated the borrowers' existing debt obligations, despite clear indications that the borrowers had more debts than were listed in the borrowers' allocations.

(c) Misstatement of Debt-to-Income Ratios. A borrower's "debt-to-income" ratio (or "DTI ratio") compares the borrower's monthly debt obligations to the borrower's monthly income. the higher the DTI ratio, the greater the likelihood of a default. For many Mortgage Loans, the actual DTI ratios were far higher than represented.

(d) Misstatement of Property Value. Property value is an essential loan characteristic that allows investors to make sure that they could recoup the loan amount in full through foreclosure if the borrower defaults. Merrill misrepresented the true values of the underlying properties throughout the Trusts' mortgage loan pools.

(e) Misstatement of Loan-to-Value Ratios. A property's "loan-to-value" ratio or "combined loan-to-value" ratio ("LTV" and "CLTV" ratios) expresses the amount of the Mortgage Loan as a percentage of the property's total value. The higher the LTV or CLTV ratio, the greater the likelihood of default because the borrower has less equity invested in the property. For many Mortgage Loans, the actual LTV and CLTV ratios were far higher than the ratios represented by Merrill.

(f) Misstatement of Owner-Occupancy Status. Borrowers who live in mortgaged properties are much less likely to default than borrowers who do not, which is reflected in the industry practice of assessing higher lending rates to non-owner occupied properties. If a property is not owner-occupied, then the risk of default increases. Loan documents for many loans listed properties as being "owner-occupied," despite clear indications that this was not the case.

These defects constitute breaches of multiple representations and warranties under the Purchase Agreement and Sale Agreements that were independently made or guarantied by Merrill. These defects alone and in combination show that the loans in the two Trusts did not have the credit quality they were represented to have, and that there is a higher likelihood that the borrowers would fall behind on their loan payments or would default on their loans altogether, as many in fact did. The increased risk of borrowers' delinquencies and defaults materially and adversely affects the value of the Mortgage Loans and the interests of Certificateholders therein.

Having been liquidated in bankruptcy, ResMAE can no longer fulfill any of its contractual repurchase obligations and thus Merrill must repurchase loans under the terms of the Sale Agreements.

Promptly upon becoming aware of the defects, beginning in March 2012 and continuing as the loan file investigation bore results, the successor Trustee U.S. Bank started to inform Merrill of the results of the review of the Origination and Servicing Files. According to the terms of the Trust Agreements, when Merrill learns that a loan in the pool is defective, it must buy back the loan from the Trust within 75 days. Despite being on notice of particular defects in at least 2,632 Mortgage Loans in the two Trusts, Merrill refused to honor its repurchase obligations to the Trusts.

Instead, Merrill claimed that all of its liability to the Trusts had been released in connection with the ResMAE bankruptcy settlement. Merrill informed the Trustee that the Allocation Agreement, which allocated proceeds of the Bankruptcy Settlement among the Trusts and Merrill, somehow released Merrill of all its liability to the Trusts. The papers in the bankruptcy court described the settlement as concerning only claims made against ResMAE and

the notice that LaSalle sent to certificateholders disclosing the settlement and soliciting objections only discussed the release of claims against ResMAE.

Separately, the Trusts also assert claims against Bank of America, as successor-in-interest to the initial servicer, Wilshire Credit Corporation (Wilshire), and as successor servicer itself. Those companies have modified 247 delinquent Mortgage Loans in the RM4 Trust and 296 delinquent Mortgage Loans in the RM5 Trust. During the modification process, Wilshire and Bank of America as servicer would have examined the loan files and in the process would likely have discovered breaches of representations and warranties in the loan pools. However, despite their likely discovery of breaches, neither Wilshire nor Bank of America, as servicer has notified the Trustee of any such breaches. Indeed, documentation in the loan servicing files uncovered during the loan file investigation confirms that Wilshire and Bank of America knew of information indicating breaches because that information was contained in the servicing files they created. In one instance, for example, the borrower claimed to earn $6,700 per month on the loan application, but subsequent bankruptcy filings included in the servicing file reflected an income of only $2,122 per month. To the extent the servicer, i.e., Wilshire or its successor, Bank of America, became aware of breaches of representations and warranties in the process of servicing the loans, their failure to notify constitutes a breach of their contractual obligations to do so under Section 2.03(c) of the PSAs.

Merrill is alleged to have breached the Sale Agreements and the PSAs. These alleged breaches materially and adversely affect the value of the Mortgage Loans and the interests of the Certificateholders therein because, among other things, the risks of delinquency and default associated with the Mortgage Loans were higher than what the Trusts bargained for, and, as a

result, the value of the Mortgage Loans and Certificates is diminished. Wilshire's and Bank of America's likely conduct as servicers likewise are alleged to have breached their obligations under the PSAs as Servicer.

Discussion

On a motion to dismiss on the ground that defenses are founded upon documentary evidence, the evidence must be unambiguous, authentic and undeniable. CPLR 3211 (a) (1); *Fontanetta v Doe*, 73 AD3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211 (a) (1)] motion . . . a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (3d Dept 2001), *leave to appeal denied* 97 NY2d 605. In other words, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

Breach of Contract

This case is principally about whether Merrill guaranteed ResMAE's representations and warranties. The Trusts assert that this is the case, while Merrill contends that the contract upon which the Trusts sue expressly disclaims any liability on Merrill's part for any of ResMAE's breaches.

As Merrill sees it, both ResMAE and Merrill made representations and warranties, but the scope of these representations and warranties was very different. ResMAE's representations were extensive. They covered the origination of the loans, which usually occurred months before they were transferred to the Trusts, and was the time when the most significant representations

might be violated, if at all. They also covered a period after origination; some extended through to the transfer of the loans to the Trusts (also called the "securitization" of the loans), while others were in effect only so long as ResMAE continued to service the loans. Merrill, in contrast, made extremely limited representations and warranties that covered only any "gap" in coverage between ResMAE's transfer of servicing responsibilities and the securitization of the loans. To ensure this limited sponsor coverage, the relevant contract expressly provides that *all* of Merrill's representations regarding mortgage loans (with two minor exceptions not relevant here) are "applicable only to facts, conditions or events that do not constitute a breach of any [originator, i.e., ResMAE] representation or warranty." Merrill takes the position that far from guaranteeing ResMAE's representations, Merrill agreed to be liable only for breaches occurring during this potential gap in ResMAE's representation coverage, so as to create seamless, but *not* overlapping, coverage.

Merrill's argues that when ResMAE sold the loans to Merrill, ResMAE made nearly 100 representations and warranties regarding the quality of the loans, the underwriting standards used to originate the loans, and other matters. ResMAE promised Merrill that if ResMAE breached any of these representations about any loan and the breach adversely affected the value of the loan or Merrill's interests in the loan, ResMAE would repurchase the loan. Many of ResMAE's representations concerned events that could have occurred only during the origination process (e.g., representations about compliance with ResMAE's loan underwriting guidelines), but some concerned events that could happen either at or after origination (e.g., representations that all necessary insurance policies on the mortgaged property were current).

Because several months might pass between a loan's origination and its eventual transfer to a trust, ResMAE provided complete "coverage" for the first category of representations – those mostly concerned with events occurring at origination – for the entire period from origination through the date the loans were transferred to the Trusts. But for the second category of representations, where future facts could affect their accuracy, ResMAE provided coverage only from origination until the date ResMAE transferred servicing *or* the date the loans were transferred to the Trusts – whichever came first.

This structure created a potential coverage "gap" for this second category of representations. If ResMAE transferred servicing *before* the loans were transferred to the trust, ResMAE's coverage for this second category of representations would end on the servicing transfer date, and thus would not cover any breaches occurring during the period between the servicing transfer date and the date the loans were transferred to the Trusts (the Gap Period).

Merrill argues that it filled the gap – and only the gap. It agreed to be liable for any breaches of the second category of ResMAE representations that occurred during the Gap Period, if, and only if, the breach did not violate any other ResMAE representation. To ensure that Merrill's liability was limited only to breaches occurring in the Gap Period for which ResMAE was not otherwise liable, the Sale Agreement expressly states that Merrill's representations and warranties are "applicable only to facts, conditions or events that do not constitute a breach of any [ResMAE] representation or warranty."

Under this scenario, Merrill recognizes, one issue remains. What if, despite the gap structure, ResMAE and Merrill each separately incur a repurchase obligation for the same loan? This is not merely a hypothetical possibility, as most of the Trusts' repurchase requests allege

two or more separate problems for each loan. A loan can be repurchased only once, so who must repurchase it?

According to Merrill, Section 1.04(b) of the Sale Agreement addresses this situation:

> To the extent that any fact, condition or event with respect to a Mortgage Loan constitutes a breach of both (i) a representation or warranty of a Transferor under the applicable Transfer Agreement or Bring Down Letter and (ii) a representation or warranty of the Sponsor under this Agreement, the sole right or remedy of the Depositor with respect to a breach by the Sponsor of such representation and warranty (other than a breach by the Sponsor of the representations and warranties made pursuant to Sections 1.04(b)(vi) and 1.04(b)(vii)) shall be the right to enforce the obligations of the applicable Transferor under any applicable representation or warranty made by it; *provided, however*, that to the extent Transferor fails to fulfill its contractual obligations under the applicable Transfer Agreement then Depositor shall have the right to enforce such obligations of Transferor against the Sponsor.

This provision (Ordering Provision) says Merrill "in fact simply establishes the order of repurchase obligations when both parties have already incurred separate and independent repurchase obligations for the same single loan. When that happens, the Ordering Provision aptly provides that the originator of the loans, ResMAE, goes first: the "sole right or remedy" is to enforce ResMAE's obligations. If ResMAE fails to perform its repurchase obligation, then, and only then, is Merrill Sponsor required to repurchase.

The Trusts are having none of this construct. They have marshaled analytically sound and clearly expressed arguments rebutting Merrill's position.

First, they say bluntly that Merrill's theory runs contrary to the plain and unambiguous language of the Sale Agreement itself. They emphasize Section 1.04(b) of the Sale Agreement simply says: "[T]o the extent the Transferor [ResMAE] fails to fulfill its contractual obligations under the Transfer Agreement then the Depositor shall have the right to enforce such obligations

of Transferor [ResMAE] against the Sponsor [Merrill]." Nowhere does Section 1.04(b) mention "separate" or "independent" repurchase obligations or a "gap." Concisely, the Trusts' position is that Section 1.04(b) is clear and unambiguous on its face, and should be interpreted according to its plain meaning – if ResMAE fails to perform, Merrill must step in to satisfy ResMAE's obligations. *See Coppola v Stroker*, 235 AD2d 536, 537 (2d Dept 1997) ("[P]rinciples of contract construction require that plain language should be given effect. . . .").

Second, the Trusts point out that contrary to Merrill's novel, attenuated theory, Section 1.04(b) is not an "ordering" provision. It does not say that, if ResMAE fails to fulfill its contractual obligations first, then Merrill must step in to fulfill its own "separate and independent repurchase obligations" on the same loan. Rather, the Section clearly says that, if ResMAE does not fulfill its contractual obligations, the Trustee "shall have the right to enforce such obligations of Transferor [ResMAE] against the Sponsor [Merrill]." In other words, if ResMAE does not fulfill its obligations, Merrill must fulfill ResMAE's obligations. The Trusts' argue that to accept Merrill's "interpretation which is not at all supported by the language in the contract would contradict the plain meaning of the contract resulting in an improper rewriting of the parties contract." *Nynex Corp. v Shared Res. Exch., Inc.*, No. 14577/89, 1990 WL 605347 at *3 (Sup Ct Sept 10, 1990).

Third, the Trusts' argue Merrill's artificial interpretation of the Section is predicated on the conflation of Merrill's primary and secondary liability. They go on that the fundamental premise of Merrill's argument is that Merrill did not guaranty ResMAE's obligations because Merrill's representations and warranties purportedly apply only when "(1) the breach occurred during the Gap Period, if any, and (2) the problem giving rise to the breach did not breach any

other ResMAE representation." But, according to the Trusts, whether or not Merrill's representations and warranties overlap with ResMAE's representations and warranties has nothing to do with the fact that Merrill expressly guaranteed ResMAE's obligations. If a breach occurred only during the "gap," and does not breach a ResMAE obligation, ResMAE has no liability and the guaranty of ResMAE's liability cannot apply on its face. The Trusts' argue Merrill reads the Section out of existence. *See Zullo v Varley*, 57 AD3d 536, 537 (2d Dept 2008) ("Where possible, a contract should be interpreted to avoid inconsistencies and to give meaning to all of its provisions").

Fourth, the Trusts' contend had the parties intended to limit Merrill's liability under the Section to situations where there are multiple, but separate and independent breaches of representations and warranties by Merrill and ResMAE, they could have drafted language to that effect. They did not. The language of the Section is straightforward and does not say this. The Trusts say Merrill cannot unilaterally import new and contradictory terms into a clear provision. *See e.g. Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 (2004) ("[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing."); *Reiss v Fin. Performance Corp.*, 97 NY2d 195, 199 (2001) ("[T]his Court will not imply a term where the circumstances surrounding the formation of the contract indicate that the parties, when the contract was made, must have foreseen the contingency at issue and the agreement can be enforced according to its terms.") (internal quotations omitted).

Merrill again retorts that the "Ordering Provision" establishes which party, ResMAE or Merrill, will repurchase a loan in the event that both parties incur separate and independent

repurchase obligations for that loan. Merrill says the crucial 32 words of the sentence of the Section (following "provided, however, that . . .") which the Trusts seek to convert into a guaranty that makes Merrill responsible for any breach by ResMAE of any of its representations, regardless of whether Merrill itself breached any of its representations, simply do not effect this purpose.

Merrill says the 32 words do not appear in a vacuum, but are part of a proviso that limits their reach significantly. *In re Livingston's Estate*, 14 AD2d 264, 265 (1st Dept 1961) (the words "provided, however," are "in the nature of a proviso."). Merrill argues elementary principles of contract interpretation dictate that a proviso affects only that which precedes it. *Kurlander v Inc. Vill. of Hempstead*, 31 Misc 2d 121, 124 (Sup Ct Nassau Co 1961) ("it is a familiar canon of construction that provisos generally are limited to the section immediately antecedent thereto and not extended to cover other sections").

Merrill argues that, read in its entirety, the single sentence Ordering Provision addresses only circumstances where Merrill has breached one of its representations and warranties. Merrill says the proviso language is implicated only when this predicate requirement, and the additional predicate of a separate breach of a ResMAE representation and warranty, has been met. "'Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby.'" *Kass v Kass*, 91 NY2d 554, 566 (1998) (citation omitted); "It is a fundamental canon of construction that a 'contract must be read as a whole in order to determine its purpose and intent, and that single clauses cannot be construed by taking them out of their context and giving them an interpretation

apart from the contract of which they are a part.'" *In re Friedman*, 64 AD2d 70, 81 (2d Dept 1978) (citation omitted).

The court does not see Section 1.08(b) in the crystalline light sensed by Merrill. Section 1.04(b) departs from normative protocols with respect to the drafting of representations and warranties in complex financing arrangements involving the sale of securities. Customarily, such provisions are statements of fact or characterizations of present condition, preceded only by words of introduction to the effect that one party is representing and warranting to another. That is not at all the case with Section 1.04(b). Its introduction is a six sentence paragraph purporting to set up substantive rules which govern the impact of misrepresentations and breaches of warranties by Merrill and ResMAE.

Deconstructing Section 1.04(b) compels the court to adopt plaintiffs' interpretation. The court is driven by plaintiffs' reasoning and appeal to the rule of construction that a contract must be interpreted so as to give effect to its plain meaning. The draftsperson wrote "that to the extent the Transferor fails to fulfill its contractual obligations under the *Transfer Agreement* then the Depositor shall have the right to enforce such obligations of the Transferor against the Sponsor."

Merrill's argument that the wording is contained in a proviso at the end of a sentence, and that provisos are best interpreted as restricted to modifying the antecedent sentence, depends on the circumstances. Here, the court does not believe that a sophisticated draftsperson of financial arrangements with respect to a massive securitization would use the words "Transfer Agreement" to mean the words "this sentence" which are the two actual words necessary to be included at this point to underpin Merrill's interpretation of the introductory paragraph to Section 1.04(b).

Merrill, using sophisticated construction analysis is, nonetheless, asking the court to rewrite the contract.

Merrill's arguments as to ordering, gap liability and lack of the words primary and secondary liability in the Sale Agreement, while creative and sophisticated, in every instance require the court to rewrite the contract to support its thesis.

In a recent case in which the contract drafting, compared to here, was a paradigm of order, and the issues were considerably less opaque, the court held that the presence of a somewhat counter-intuitive, but arguably reasonable, interpretation of a provision compelled a finding of ambiguity. *U.S. Bank National Association v Lightstone Holdings LLC*, 103 AD3d 458 (1st Dept 2013). The court held that for an argument or position with respect to a contract provision to be sufficient to compel a holding of ambiguity requires that it be reasonable or equally plausible. Here, since Merrill's arguments in each instance fail unless the court rewrites the contract, they can not be considered reasonable or equally plausible.

The force of the Trusts' arguments subordinates Merrill's unreasonable positions, however cleverly put they may be. Taking into account the appellate court's direction in *U.S. Bank* regarding the finding of the existence of ambiguity, the court holds as a matter of law that the Trusts' interpretation of the introduction to Section 1.04(b) is correct. Merrill has guaranteed the obligations of ResMAE under the Transfer Agreement.

The motion to dismiss the Trusts' breach of contract claim on this basis is denied.

The court turns to defendants' other arguments with respect to dismissing the Trusts' causes of action.

Standing

Merrill argues that the complaint must be dismissed in its entirety because the Trusts, as opposed to the Trustee, are the actual plaintiffs bringing suit and a Trust does not have the requisite standing to sue to enforce contracts. It argues that because the Trustee is not a plaintiff in the action, the Trusts cannot assert claims on its behalf. The court finds both arguments unavailing.

Merrill claims that the actual plaintiffs in this case are the Trust, not the Trustee, and that even if the Trustee were the intended plaintiff, the complaint does not sufficiently reflect that position. In a recent decision, *Master Adjustable Rate Mortgages Trust 2006-OA1 (MARM), et al. v. UBS Real Estate Securities, Inc.*, Index No. 651282/2012, the court granted the defendants' motion to dismiss for lack of standing without prejudice. Although the court in *MARM* granted the motion, there are several distinctions that can be drawn between that case and the subject action.

First, the *MARM* complaint lacked specific allegations that the trustee was bringing the action on behalf of the trust. Here, the complaint makes clear that the Trustee is acting on behalf of the Trust.[1] Second, in *MARM*, after finding that the complaint was unclear as to whether the trust or trustee was the actual plaintiff, the court offered the plaintiff three choices: 1) obtain some form of authorization from the trustee indicating approval to continue the litigation on its behalf, 2) commence a special proceeding to compel the trustee to bring suit for the trust, or 3) amend the complaint to include allegations that make clear that the trustee is the actual plaintiff. The court was prepared to grant the plaintiff an opportunity to amend the complaint without

[1] The complaint states that the Trust is "acting through the Trustee."

dismissing the complaint. Third, the *MARM* complaint also improperly named a certificate holder as a plaintiff. This issue was raised after the court offered the aforementioned choices to the plaintiff. For that reason, in addition to the plaintiff's willingness to file an amended complaint, the court chose to grant the motion to dismiss without prejudice so that the parties could begin anew with a clean slate.

The presence of a certificateholder as an inappropriate plaintiff is not at issue in this action. In *MARM*,[2] but for the presence of that certificate holder, the court was prepared to allow the plaintiff to amend its pleadings to meet the required standard.

Merrill implies the Trustee should be a stand-alone plaintiff. Not only does Merrill offer no evidence to support its claim, but if the Trustee were required to be a stand-alone plaintiff, the proper remedy would not be a dismissal of the complaint, but an amendment to the caption. An amendment would follow our policy of favoring liberal amendments to pleadings. *Am. Home Assur. Co. v Scanlon*, 164 AD2d 751, 752 (1st Dept 1990). The original complaint sufficiently placed the defendants on notice of the subject action and an amendment would not unduly prejudice them in any way. NY CPLR 2001 (providing that the court may permit a mistake or defect to the pleadings may be corrected if a substantial right of a party is not prejudiced).

The original complaint is sufficient in its current form. It is clear to the court that both the Trust and Trustee are plaintiffs and the challenge to standing is not cause for dismissal. Nevertheless, to ensure the absence of doubt with respect to this matter, the plaintiff is granted leave to amend the complaint to add the Trustee as a stand-alone plaintiff in addition to the Trust. As the court finds that the complaint contains sufficient allegations to establish the Trustee as the

[2] *In MASTR Adjustable Rate Mortgages Trust 2006-0A3 v UBS Real Estate Sec., Inc.*, 2013 WL 139636 (SDNY Jan. 11, 2013), the court allowed the trust to go forward, when the trust was named as plaintiff in the caption.

plaintiff, bringing suit on behalf of the Trust, it is unnecessary to address the defendants' argument that the Trust cannot seek relief on behalf of the nonparty Trustee.

Modification Obligations

The court holds that all of defendants' assertions with respect to ratification are without merit. The bankruptcy release argument is simply analytically wrong, and with respect to defendants other notification arguments, the complaint more than satisfies the notice pleading requirements for a breach of contract claim. *See E. Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 130 (App. Div. 2009) *affd*, 16 NY3d 775 (2011).

Release

Defendants' motion to dismiss plaintiffs' causes of action related to a purported release of Merrill's obligations is denied.

ML Depositor

Plaintiffs have alleged no causes of action against Merrill Depositor in the complaint. The motion to dismiss with respect to Merrill Depositor is granted.

* * *

ORDERED that defendants' motion to dismiss the complaint is denied, except with respect to Merrill Lynch Mortgage Investors, Inc.

Dated: September 10, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER