SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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U.S. BANK NATIONAL ASSOCIATION, not in its individual capacity, but as trustee for MERRILL LYNCH MORTGAGE INVESTORS TRUST, SERIES 2006-RM4 and MERRILL LYNCH MORTGAGE INVESTORS TRUST, SERIES 2006-RM5,

Index No.: 654403/2012

DECISION & ORDER

Plaintiff,

-against-

MERRILL LYNCH MORTGAGE LENDING, INC. and BANK OF AMERICA, NATIONAL ASSOCIATION,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 009, 010, and 011 are consolidated for disposition.

Defendants Merrill Lynch Mortgage Lending, Inc. (Merrill) and Bank of America, National Association (BANA) move, pursuant to CPLR 3212, for partial summary judgment against plaintiff U.S. Bank National Association (U.S. Bank or the Trustee). Seq. 009. The Trustee opposes, and moves for partial summary judgment against defendants. Seq. 010. The Trustee separately moves, pursuant to CPLR 3025(b), for leave to file a proposed Third Amended Complaint (the PTAC). Seq. 011. Defendants oppose the Trustee's motions. For the reasons that follow, the motions are granted in part and denied in part.

I. Introduction

This is a residential mortgage-backed securities (RMBS) put-back case. In 2006, Merrill sponsored the two subject RMBS trusts (the Trusts), each owning a pool of residential mortgages. The mortgages were originated by non-party ResMAE Mortgage Corporation (ResMAE). The governing contracts between the various parties, discussed in more detail herein, contain representations and warranties concerning the mortgages. According to U.S.

Bank – the Trusts' current Trustee – many of those representations were false. In this action, U.S. Bank seeks redress for these alleged breaches of warranty.

While the classic RMBS summary judgment issues raised by the parties (e.g., the meaning of various warranties and the implications of undisputed breaches) are not difficult to resolve given precedent that has developed in this heavily litigated area, a trial is far more challenging.[1] In this case, three major issues increase that complexity.

The first issue is the parties' dispute over whether Merrill has any contractual liability. As further discussed herein, the question centers on whether certain contractual language purports to operate as a guaranty by Merrill of ResMAE's put-back liability. For the purposes of the instant motions, the issue is relatively straightforward because the Appellate Division has ruled that the subject provision is ambiguous. Since the court's review of the extrinsic evidence does not conclusively resolve the ambiguity, summary judgment on its meaning must be denied and, under these circumstances, the court is not permitted to grant summary judgment simply by resorting to the doctrine of *contra proferentem*. The disputed language will have to be tried.

The second issue arises from ResMAE's summer of 2008 settlement, while in bankruptcy, of put-back claims made against it. ResMAE settled early payment default (EPD) warranty breach claims asserted by BANA on behalf of a number of trusts, including the two at issue in this case. The bankruptcy court allocated a certain amount of money to such claims, and then Merrill and the Trusts' then-trustee, LaSalle Bank, National Association (LaSalle), were to

[1] *See U.S. Bank, N.A. v UBS Real Estate Secs. Inc.*, 205 FSupp3d 386, 526 (SDNY 2016) (*UBS*) (post-trial decision delegating adjudication majority of loan-specific breaches to multiple special masters because "the sheer volume of loans, several thousand for which findings and conclusions are necessary … proves that the process 'cannot be effectively and timely addressed' by the available resources in this District."). Without opining on the wisdom of such a process, it bears mentioning that the "available resources" in this court do not exceed those of the Southern District.

negotiate the funds' allocation between Merrill and the Trusts. While those negotiations were ongoing, in September 2008 (i.e., during the financial crisis), BANA's parent, Bank of America Corporation (BAC) (collectively with BANA, Bank of America) publicly announced that it had entered into an agreement to acquire Merrill, and that the merger would close on January 1, 2009. Then, in October 2008, BANA merged with LaSalle, thereby become the Trusts' trustee. As a result, the negotiation over the allocation of the bankruptcy funds went from being one between arm's length banks to a negotiation between a Bank of America entity and a soon-to-be Bank of America entity. The very day before closing of the Bank of America-Merrill merger, BANA and Merrill entered into an agreement for the allocation of the bankruptcy funds. Perhaps unsurprisingly, the result appears suspect. That agreement, as discussed herein, contains broad release language that Merrill now contends waived any right the Trusts had to assert put-back claims against Merrill, despite Merrill not having faced any put-back liability in the bankruptcy proceedings (nor was Merrill faced with any then-pending repurchase demands or put-back litigation with the Trusts). U.S. Bank proffers a competing interpretation of the release and claims it does not apply. For the reasons discussed herein, the court concludes that the release applies, and, thus, summary judgment is granted to Merrill on this issue.

That conclusion, however, leads to the final (and most troublesome) issue, which is the context, noted above, in which the release was negotiated and executed. U.S. Bank maintains that the release is unenforceable because BANA, as Trustee, purportedly released Merrill, the sponsor, from any put-back liability to the Trusts. U.S. Bank claims that BANA had no right to effectively release itself (i.e., Merrill, whose liabilities it was acquiring) in a deal that is patently unfair to the Trusts (for a number of reasons discussed herein). Consequently, U.S. Bank wants

the release set aside so it may pursue its claims against Merrill. The court finds there to be material questions of fact about the release's enforceability.

In sum, before the court may reach the merits of the put-back claims in this action, U.S. Bank must (1) establish that Merrill guaranteed ResMAE's put-back liability; and (2) either demonstrate that the release does not apply or is unenforceable.[2] As for the balance of the motion, the court grants summary judgment to U.S. Bank on various (more typical) RMBS issues. The court's reasoning follows.

II. Factual Background

Unless otherwise indicated, the following facts are undisputed. *See* Dkt. 674.[3]

The two RMBS Trusts at issue in this case were part of a series of five "shelf" securitizations sponsored by Merrill, referred to as the "RM Series". *Id.* at 3. They are: (1) Merrill Lynch Mortgage Investors Trust, Series 2006-RM4 (RM4), which closed on September 27, 2006; and (2) Merrill Lynch Mortgage Investors Trust, Series 2006-RM5 (RM5), which closed on October 27, 2006. *Id.* at 3-4. All five trusts in the RM Series "were collateralized entirely by first-lien residential mortgage loans originated by ResMAE." *Id.* at 4. The depositor, Merrill Lynch Mortgage Investors, Inc. (the Depositor), is a Merrill affiliate. *Id.* at 4-5.

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[2] Plaintiff's Note of Issue, filed on June 23, 2017, requests a bench trial. *See* Dkt. 742. An implication of this election is that the court has greater flexibility in determining how each issue is tried because, for instance, the logistics of selecting multiple juries and possible prejudice of trying distinct issues before the same jury (i.e., the alleged fraud and the contractual put-back claims) will not be a concern. The court's inclination is to try the issue of the enforceability of the release and the meaning of the guaranty (in that order, as the former is a threshold issue to the latter's relevance) before it tries the underlying put-back liability. These two threshold issues are complex, time consuming, and (perhaps most importantly) require proof distinct from that relevant to the put-back claims. The specifics of the next steps will be addressed at a forthcoming conference.

[3] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing system (NYSCEF). Dkt. 674 is the parties' joint statement of undisputed facts.

"[LaSalle] was the initial Trustee of the RM Series." *Id.* at 5. "On September 15, 2008, [BAC] announced its intention to acquire Merrill Lynch & Co." *Id.* "On October 17, 2008, the charter of LaSalle was collapsed into the charter of BANA, with the result that LaSalle no longer had separate legal existence, but became part of, and known as, BANA." *Id.* at 6. "BAC closed on its acquisition of Merrill Lynch & Co. [] on January 1, 2009." *Id.* at 7. "BANA acted as the trustee for RM4 and RM5 from October 17, 2008 to March 31, 2009." *Id.* at 6. "U.S. Bank was appointed trustee of RM4 and RM5 as of March 31, 2009, and is the current trustee of RM4 and RM5." *Id.*

The Trusts' governing documents are structurally similar to those of a typical RMBS transaction. There is a contract governing the sale of the mortgage loans from the originator (ResMAE) to the sponsor (Merrill): "a Master Mortgage Loan Purchase and Interim Servicing Agreement dated January 1, 2006, as amended on March 1, 2006, May 1, 2006, and August 1, 2006" (the Purchase Agreement, which, it should be noted, is sometimes referred to in the record as the Transfer Agreement). *Id.* at 7; *see* Dkts. 492-504. In section 7.02 of the Purchase Agreement, "ResMAE made dozens of representations and warranties regarding the mortgage loans that collateralize the RM Series." Dkt. 674 at 8; *see* Dkt. 492 at 28-42. In section 7.04, ResMAE also agreed that "in the event that the Mortgagor does not make either the first or second[4] Monthly Payments due to [Merrill] in the month in which such Monthly Payments were due, [ResMAE] shall promptly repurchase the affected Mortgage Loans at the Repurchase Price, which shall be paid as provided for in Subsection 7.03." Dkt. 493 at 3. In other words, if there

[4] For some of the loans, pursuant to one of the trade confirmations, EPD is defined to include a default within the first *three* months. *See* Dkt. 674 at 9. It should be noted that "ResMAE executed 'Bring Down letters' for the RM Series securitization which extended certain representations and warranties contained in the Purchase Agreement and corresponding Trade Confirmations through the closing of the securitization." *Id.*

was an EPD on a loan, that loan could be put-back to ResMAE in accordance with the Purchase Agreement's repurchase protocol (the gravamen of RMBS put-back cases),[5] which is set forth in section 7.03, and begins by providing:

> Upon discovery by either the [ResMAE or Merrill] of a breach of any of the foregoing representations and warranties [i.e. in sections 7.01 and 7.02] **which adversely affects[6] the value of the Mortgage Loans or the interest of the Purchaser** (or which adversely affects the interests of [Merrill] in the related Mortgage Loan in the case of a representation and warranty relating to a particular Mortgage Loan), the party discovering such breach shall give prompt written notice to the other. With respect to any of the representations and warranties set forth in Subsections 7.01 and 7.02 that is made to the best of or based on [ResMAE's] knowledge or belief, if it is discovered that the substance of such representation and warranty is inaccurate and such inaccuracy materially and adversely affects the value of the related Mortgage Loan or the interests of [Merrill], then, notwithstanding [ResMAE's] lack of knowledge with respect to the substance of such representation and warranty being inaccurate at the time the representation and warranty was made, such inaccuracy shall be deemed a breach of the applicable representation or warranty.

Dkt. 492 at 42 (emphasis added).

Next, the mortgages were transferred from the sponsor, Merrill, to the Depositor. This occurred pursuant to five separate, but materially identical Mortgage Loan Sale and Assignment Agreements (the MLSAs or the MLSAAs). *See* Dkts. 509-513. RM4's MLSA is dated as of September 1, 2006 (Dkt. 512); RM5's MLSA is dated as of October 1, 2006 (Dkt. 513). These MLSAs contain the disputed provisions in which Merrill allegedly guaranteed ResMAE's put-back obligations.

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[5] *See, e.g., U.S. Bank N.A. v GreenPoint Mortg. Funding, Inc.*, 147 AD3d 79, 81-85 (1st Dept 2016) (*GreenPoint*).

[6] Notably, but not at issue on the instant motions, section 7.03's repurchase protocol speaks only to warranty breaches that "adversely" affect the value of the loans, instead of the "materially and adversely" affects language that is often found in RMBS contracts. *See, e.g.*, *GreenPoint*, 147 AD3d at 82. The implications of this difference, if any, are not discussed herein.

Section 1.04 of the MLSAs sets forth Merrill's representations and warranties. *See* Dkt. 512 at 3. The relevant one – the alleged guaranty – is in section 1.04(b), which provides, in pertinent part:

> 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 [ResMAE] under the [Purchase Agreement] or Bring Down letter **and** (ii) a representation or warranty of [Merrill] under this Agreement, the sole right or remedy of the Depositor **with respect to a breach by [Merrill] of such representation and warranty** (other than a breach by [Merrill] 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 [ResMAE] under any applicable representation or warranty made by it; **provided, however, that to the extent [ResMAE] fails to fulfill its contractual obligations under the [Purchase Agreement] then the Depositor shall have the right to enforce such obligations of [ResMAE] against [Merrill]** ... Subject to the foregoing, [Merrill] represents and warrants upon delivery of the Mortgage Loans to the Depositor hereunder, as to each, that as of September 1, 2006 [list of 8 representations and warranties omitted].

Dkt. 512 at 4-5 (emphasis added) (the Guaranty). Section 1.04(b) concludes with a paragraph that contains a repurchase protocol. *See id.* at 6.

Attorneys at the law firm of Dechert LLP drafted the MLSAs on behalf of both Merrill and the Depositor. *See* Dkt. 674 at 12. Paul Park, "a Managing Director for Merrill Lynch's Structuring Group", signed the RM4 MLSA on behalf of both Merrill entities; Vincent Mora, "a Managing Director for Merrill Lynch's Whole Loan Trading/Origination Group", signed the RM5 MLSA on behalf of both Merrill entities. *Id.* at 12-13. "No certificateholder (other than Merrill Lynch as residual holder) participated in the drafting of the [the MLSAs]." *Id.* at 12. ResMAE and LaSalle did not participate in the drafting. *Id.*

The final key RMBS contracts are five materially identical Purchase and Sale Agreements (the PSAs), pursuant to which the mortgage loans were transferred to the five trusts. The RM4 PSA is dated as of September 1, 2006 (Dkts. 675-677); the RM5 PSA is dated as of

October 1, 2006 (Dkts. 469-472). Section 2.03 of the PSAs contains the Depositor's representations and warranties. *See* Dkt. 675 at 75. Section 2.03(c) contains the PSAs' repurchase protocol. *See id.* at 76-78.[7]

Wilshire Credit Corporation (Wilshire), a Merrill affiliate, was the servicer of the loans in the RM Series. *See* Dkr. 674 at 7. When BAC acquired Merrill Lynch & Co., it also acquired Wilshire. *See id.*[8] "On December 12, 2006, Wilshire demanded that ResMAE repurchase a number of loans in the RM Series Trusts that allegedly were 'in breach of [EPD] representations." *Id.* at 34. "ResMAE disputed that it was obligated to repurchase a substantial majority of the loans identified in Wilshire's December 12, 2006 demand." *Id.*

On February 12, 2007, ResMAE filed for bankruptcy in the United States Bankruptcy Court for the District of Delaware [*In Re: Liquidating Trust of ResMAE Mortgage Corp.*, Case No. 07-10177]. *Id.* On April 27, 2007, Merrill, each of the five RM Series Trusts, and others "filed 'Proofs of Claim' in the ResMAE bankruptcy proceeding against the ResMAE bankruptcy estate." *Id.* "Neither [Merrill] nor any of the five RM Series Trusts was a party to adversary proceedings that may have been filed in connection with the ResMAE bankruptcy." *Id.* The Trusts' proofs of claim sought to recover on its put-back claims against ResMAE. *See id.* at 35-38.

"On July 1, 2008, certain parties to the ResMAE bankruptcy proceeding—including [Merrill and the RM Series Trusts]—entered into a Stipulation of Settlement Resolving Claims with ResMAE, i.e., the ResMAE Bankruptcy Settlement Agreement." *Id.* at 39. "[T]he claims

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[7] Importantly, it is undisputed that, in the PSAs, the Depositor's put-back rights were transferred to the trustee. Thus, the right to enforce Merrill's alleged guaranty of ResMAE's put-back obligations now belongs to U.S. Bank, not the Depositor.

[8] BAC sold Wilshire to IBM in 2010, after the relevant underlying events occurred. *See* Dkt. 674 at 7.

of Merrill and the RM Series Trusts were treated collectively and referred to as the 'Allowed ML Claim.'" *Id.* Nixon Peabody LLP represented the Trusts; Loeb & Loeb LLP (Loeb & Loeb) represented Merrill. *Id.* "The ResMAE Bankruptcy Settlement Agreement provides, in part, that '[i]n full and final resolution' of their claims filed against ResMAE in the ResMAE bankruptcy, Merrill and the RM Series Trusts 'shall have a single allowed unsecured claim in the amount of [$10 million].'" *Id.* It further provides "that that Merrill and the RM Series Trusts 'reserve[d] the right to determine the appropriate allocation . . . of any distributions received . . . on behalf of the Allowed ML Claim." *Id.* at 40. Additionally, it states "that '[a]ny distribution due to' Merrill and the RM Series Trusts 'shall be paid to [Merrill] in trust for itself and [the RM Trusts],'" and that Merrill "agreed to hold any funds received by it pursuant to the ResMAE Bankruptcy Settlement Agreement in escrow until Merrill and the RM Series Trusts reached agreement on how such proceeds would be allocated." *Id.* "[T]he RM Series Trusts could 'withdraw its consent to [the settlement]' if fifty percent of certificateholders directed the trustee to withdraw from the settlement." *Id.*

"On July 8, 2008, LaSalle sent a notice to the certificateholders of RM4 and RM5 informing them of the proposed terms of the bankruptcy settlement with ResMAE." *Id.* It noted the settlement of the Trusts' claims against ResMAE and "that the bankruptcy court had grouped the claims of Merrill and the RM Series Trusts together into 'a single allowed unsecured claim of ten million dollars' and that it would be necessary for Merrill and the RM Series Trusts to 'reach agreement on how [any bankruptcy] proceeds [would] be allocated.'" *Id.* at 40-41. Specifically, the notices provided:

> The Trustee further understands that **the vast majority of the alleged claims in the case are for breaches of representations and warranties arising out of loan sales, including repurchase obligations arising out of so-called "early payment default" claims** (the "Repurchase Claims"). If the Settlement is not

> approved or if the Trustee's consent to the Settlement is withdrawn, the Trustee anticipates that it would be required to litigate the merits of the Repurchase Claims filed on behalf of the Trust. The Trustee has been advised that such litigation will require the retention of expert(s), substantial financial analysis, and that the likely legal costs may far exceed any potential recovery from the bankruptcy estate given the limited amount of assets in the Liquidating Trust. The costs of any such litigation would need to be paid as incurred by the Trust. In addition, any decision to engage in such litigation would expose the Trust to the possibility of an unsuccessful outcome.

Dkt. 674 at 41 (emphasis added).

The notices did not indicate that the Trusts would be releasing any possible claims against Merrill for breach of Merrill's representations and warranties under the governing contracts. "No certificateholder responded to the July 8, 2008 notices or objected to the terms of the ResMAE Bankruptcy Settlement Agreement." *Id.* "The bankruptcy court approved the ResMAE Bankruptcy Settlement Agreement on July 30, 2008." *Id.* at 42. "The ResMAE bankruptcy estate made an initial distribution of approximately $2.4 million in satisfaction of the Allowed ML Claim, as well as two additional distributions of approximately $50,302.14 and $150,000." *Id.*

Hence, Merrill and the Trusts had to negotiate the allocation of approximately $2.6 million. On September 15, 2008, in the midst of negotiations, BAC publicly announced its merger with Merrill. On October 17, 2008, BANA became the trustee when it merged with LaSalle. In effect, the posture of the negotiations ceased being unquestionably arm's length, as one Bank of America entity (BANA) was negotiating with its soon-to-be affiliate (Merrill). Moreover, that soon-to-be affiliate was the very party that BANA, as trustee, would have to name as a defendant in a put-back suit against the Trusts' sponsor.

The day before the Bank of America-Merrill merger closed, on December 31, 2008, Merrill and BANA, on behalf of the RM Trusts, "executed a settlement agreement allocating the

ResMAE bankruptcy proceeds among themselves." *Id.* at 42; *see* Dkt. 574 (the Allocation Agreement). Covenant and Condition 2 of the Allocation Agreement provides:

> In full settlement of all claims that the Parties had, have or could have against one another on account of, or pertaining to the Claims, the Parties agree that all Proceeds shall be allocated among the Parties in the following manner: 70% to the Trusts (the "Trusts Allocable Share") and 30% to Merrill (the "Merrill Allocable Share").

Dkt. 574 at 3. Covenant and Condition 3 provides that "the Trustee shall determine how to apportion the Trusts Allocable Share among the Trusts." *Id.* "RM4 received $507,530 in bankruptcy proceeds following the execution of the Allocation Agreement"; "RM5 received $141,628." Dkt. 674 at 63.

The parties to the Allocation Agreement provided each other with broad mutual releases. The disputed release provision containing the Trusts' release of Merrill is set forth in Covenant and Condition 8(b):

> As of the Effective Date, each of the Trusts and the Trustee hereby irrevocably and absolutely releases, acquits and discharges each of the Merrill Parties, and each of their respective officers, directors, managers, employees, attorneys, consultants, agents and advisors, and any person acting on its or their behalf, and each of their successors and assigns, of and **from any and all claims, causes of action**, actions, fees, costs and expenses, **of any type whatsoever**, direct or derivative, contract or tort, legal or equitable, **known or unknown**, common law or statutory, contingent or fixed, liquidated or unliquidated, matured or unmatured, **that arise out of or relate in any way to any or all of the Claims**; provided, that nothing in this Section 8(b) or the Agreement shall act as a waiver, **nor shall it affect in any way, the rights and protections to which the Trustee is entitled under the PSAs and related trust documents for the Trusts**; provided further, that nothing in this Section 8(b) shall release the Merrill Parties' obligations under this Agreement.

Dkt. 574 at 5 (emphasis added) (the Release). "Claims" are defined to mean claims the parties "may have against each other with respect to the EPD Loans, the Merrill Claims and the Trust Claims." *Id.* at 3. The "Merrill Claims" and the "Trust Claims" are defined to mean the claims

filed in the parties' proofs of claims in the ResMAE bankruptcy proceeding. *See id.* at 2. The Trust Claims are broad; they are not limited to EPD claims. *See* Dkt. 576 at 4 ("The Trust has been damaged by virtue of Resmae's defaults and breaches with respect to Resmae's covenants, representations and warranties under the Purchase Agreement, the other Agreements and the Bring-Down Letter, including by virtue of Resmae's failure to comply with its repurchase obligations thereunder.").[9] In negotiating the Allocation Agreement, Alston & Bird LLP represented BANA (and LaSalle before BANA merged with it); Loeb & Loeb represented Merrill.

The emails in the record reveal that while some negotiations occurred in the latter portion of September 2008 (after the Bank of America-Merrill merger was announced), the critical negotiations that led to the final version of the contract occurred in the latter portion of December 2008 (after BANA became the trustee). Indeed, significant negotiations occurred on December 31, 2008 – the same day the Allocation Agreement was executed, the day before the merger closed.

There is no question of fact that there was significant pressure to get the Allocation Agreement executed prior to closing. This is best exemplified by Merrill Managing Director Jim Cason, who emailed the following to Merrill's head of its residential loan business just before 10:00 p.m. on December 30, 2008:

> This is in connection with a Resmae settlement **and is hugely favorable to [Merrill]**. … Can you sign any or all of the others [i.e. some of the Merrill

[9] Even though repurchase demands were served concerning EPD claims, once ResMAE filed for bankruptcy, that was the last chance for the Trusts to pursue any and all put-back claims against it, as such unsecured claims would presumably be discharged in the bankruptcy. The issue, as explained herein, is whether claims by the Trustee against Merrill for breach of Merrill's representations and warranties (including Merrill's alleged guarantee of ResMAE's non-EPD warranty breaches) arise out of or relate to the warranty breach claims asserted against ResMAE in the bankruptcy proceedings.

> entities]? We need to have this done by 2:00 pm tomorrow and are trying to collect them all by noon. **If we miss the deadline, the deal will end up getting re-reviewed by new counsel for the Resmae trusts and the deal could end up changing materially**. The agreement we have currently provides for all claims against [Merrill] to be withdrawn. **As you (and I) were on the scene when discussions between [Merrill] and Resmae were underway when they were trying to sell themselves in Sept, '06, I am sure you can appreciate the import of getting this done.**

Dkt. 759 at 1 (emphasis added). As discussed herein, this email, when viewed in light of the merger, creates a reasonable inference that BANA was settling the Trusts' claims in a manner utterly incompatible with its obligations as trustee.

Approximately three months after the Allocation Agreement was executed, on March 31, 2009, U.S. Bank became the trustee, and has remained in that role to date. Like many other RMBS trustees, U.S. Bank sent written repurchase demands to Merrill between March 16 and December 14, 2012. Merrill refused those demands, and this litigation followed.

III. Procedural History

On December 18, 2012, the Trustee commenced this action by filing its original complaint. *See* Dkt. 1. The case was assigned to the Hon. Melvin L. Schweitzer. In February 2013, defendants moved to dismiss the original complaint. By order dated September 10, 2013, Justice Schweitzer granted the motion only as against the Depositor. *See* Dkt. 44. In denying the balance of the motion, Justice Schweitzer held that the Guaranty (section 1.04(b) of the MLSAs) is unambiguous, and that it means that Merrill "guaranteed the obligation of ResMAE under the [Purchase] Agreement." *See id.* at 18. While the Appellate Division affirmed Justice Schweitzer's denial of the motion to dismiss, it did so "for reasons different from those given by the motion court." *Merrill Lynch Mort. Inv'rs Tr. v Merrill Lynch Mort. Lending, Inc.*, 118 AD3d 555, 556 (1st Dept 2014). Without refuting Justice Schweitzer's compelling, detailed

analysis of why Merrill's interpretation was unreasonable, in one sentence and without any explanation, the Appellate Division wrote that "[t]he contract provision at issue is ambiguous, and therefore its meaning cannot be determined without reference to extrinsic evidence." *See id.* That holding is binding on this court. As explained below, since section 1.04(b) of the MLSAs has been held to be ambiguous by the Appellate Division, this court may only grant summary judgment on its meaning if the extrinsic evidence supports only one interpretation. As further explained below, that is not the case.

The Trustee filed its first amended complaint (the FAC) on September 16, 2013, in which it corrected the caption to more clearly reflect that the Trustee is the plaintiff and is suing on behalf of the Trusts. *See* Dkt. 45. Defendants filed an answer to the FAC on October 21, 2013. *See* Dkt. 65.[10]

On February 17, 2015, pursuant to a so-ordered stipulation, the Trustee filed its operative pleading, the Second Amended Complaint (the SAC). *See* Dkt. 263. The SAC asserts seven causes of action: (1) breach of contract against Merrill (i.e., put-back claims); (2) anticipatory breach of contract against Merrill; (3) breach of contract (failure to notify) against BANA and as successor to the original servicer, Wilshire; (4) indemnification for failure to notify asserted against BANA and as successor to Wilshire; (5) declaratory judgment on the invalidity of the Release on the ground of self-dealing; (6) breach of contract, pleaded in the alternative, against BANA for "unauthorized modification" of the Trusts' rights under the governing contracts; and (7) breach of contract, pleaded in the alternative, against BANA for "failure to administer the Trusts for [the] benefit of [the] Certificateholders."

[10] Justice Schweitzer retired at the end of 2014, and the case was reassigned to Part 54.

In accordance with an order dated February 19, 2015, the parties' outstanding motions filed prior to Justice Schweitzer's retirement were resolved by stipulation. Between February 2015 and March 2017, this court oversaw the balance of fact discovery and all of the expert discovery. The parties filed their respective summary judgment motions on May 5, 2017. On June 30, 2017, the Trustee moved for leave to file a third amended complaint. *See* Dkt. 786 (the PTAC); *see also* Dkt. 773 (redline against SAC). The PTAC bolsters the SAC's factual allegations, and changes the sixth cause of action from breach of contract for "unauthorized modification" to "breach of trust". *See* Dkt. 773 at 52-53. The court reserved on the motions after oral argument. *See* Dkt. 853 (9/12/17 Tr.).

IV. Discussion

A. Summary Judgment Standard

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to

defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978)

B. The Release

The parties dispute the scope of the Release. Under New York law, which governs the Allocation Agreement, a "contractual provision that is clear on its face must be enforced according to the plain meaning of its terms." *Bank of N.Y. Mellon v WMC Mortg., LLC*, 136 AD3d 1, 6 (1st Dept 2015) (citation omitted). "This rule applies with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople. In addition, courts 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." *Id.*, accord *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-70 (2002) ("if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity."); *see Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 (2014) ("Where the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and reading the contract as a whole.").

"Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties' intent." *Ellington*, 24 NY3d at 244. "To be found ambiguous, a contract must be susceptible of more than one commercially reasonable interpretation." *Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 (1st Dept 2017). "The existence of ambiguity must be determined by examining the 'entire contract and consider[ing] the relation of

the parties and the circumstances under which it was executed,' with the wording to be considered 'in the light of the obligation as a whole and the intention of the parties as manifested thereby.'" *Id.* (citation omitted). However, "parties cannot create ambiguity from whole cloth where none exists, because provisions 'are not ambiguous merely because the parties interpret them differently.'" *Universal Am. Corp. v Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 (2015), quoting *Mount Vernon Fire Ins. Co. v Creative Housing Ltd.*, 88 NY2d 347, 352 (1996). Moreover, "extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." *W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 163 (1990); *see Impala Partners v Borom*, 133 AD3d 498, 499 (1st Dept 2015) ("Only where a contract term is ambiguous may parol evidence be considered to clarify the disputed portions of the parties' agreement."). Thus, "if the language [in the contract] has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion,'" the court must interpret the contract in accordance with such meaning. *Ellington*, 24 NY3d at 244, quoting *Greenfield*, 98 NY2d at 569.

The Allocation Agreement is a contract in which the parties settled various claims against each other and issued mutual releases. Settlement agreements "are favored by the courts and not lightly cast aside." *Hallock v State*, 64 NY2d 224, 230 (1984). In a settlement agreement, "a valid release constitutes a complete bar to an action on a claim which is the subject of the release." *Centro Empresarial Cempresa S.A. v Am. Movil, S.A.B. de C.V.*, 17 NY3d 269, 276 (2011), quoting *Global Minerals & Metals Corp. v Holme*, 35 AD3d 93, 94 (1st Dept 2006). If "the language of a release is clear and unambiguous, the signing of a release is a 'jural act' binding on the parties." *Centro*, 17 NY3d at 276, quoting *Booth v 3669 Delaware, Inc.*, 92

NY2d 934, 935 (1998). "Notably, a release may encompass unknown claims ... if the parties so intend and the agreement is '**fairly** and knowingly made.'" *Id.* (emphasis added). "A release may be invalidated, however, for any of 'the traditional bases for setting aside written agreements, namely, duress, **illegality, fraud**, or mutual mistake.'" *Id.* (emphasis added); *see Toos v Leggiadro Int'l, Inc.*, 114 AD3d 559, 561 (1st Dept 2014) ("[a] party will only be relieved from the consequences of a stipulation made during litigation when there is sufficient cause to invalidate a contract, such as **fraud, collusion**, or mistake.") (emphasis added).

The Release unambiguously covers all of the Trusts' claims based on Merrill's alleged guaranty of ResMAE's put-back liability. It contains classic broad language covering all known and unknown claims against Merrill, applicable to Merrill's liability "that arise[s] out of or relate[s] in any way to any or all of the Claims." Claims are defined to include ResMAE's EPD put-back liability (which Merrill indisputably did not guaranty), as well as ResMAE's liability for warranty breaches, which Merrill is allegedly liable for under the Guaranty.

Merrill contends that a claim to hold it liable as a guarantor of ResMAE's put-back liability arises out of and "relates to" ResMAE's put-back liability. The court agrees. It is unreasonable to interpret a contractual provision that waives claims relating to a liability to not include a claim against the guarantor of that underlying liability. In other words, if the Claims include ResMAE's liability, Merrill's guaranty of ResMAE's liability also "relates to" the Claims. Thus, the Trustee's claims against Merrill are covered by the Release. The court, therefore, holds that the Release unambiguously bars all of the Trustee's claims predicated on Merrill's alleged guarantee of ResMAE's put-back liability.[11]

[11] The carveout of the Trustee's rights at the end of the Release does not create an ambiguity. *See* Dkt. 574 at 5 ("nothing in this Section 8(b) or the [Allocation] Agreement shall act as a waiver, nor shall it affect in any way, the rights and protections **to which the Trustee** is entitled

That, however, is not the end of the relevant inquiry. Plaintiff contends that even if the Release applies, it is unenforceable. The court finds material questions of fact exist, precluding summary judgment on this issue. As discussed earlier, when BANA and Merrill negotiated the Allocation Agreement, they were not in a true arm's length posture. BANA, which began serving as Trustee and acting on behalf of the Trusts on October 17, 2008, had announced that its acquisition of Merrill was to close on January 1, 2009. The Allocation Agreement was executed on December 31, 2008. On December 30, 2008, the Merrill bankers who executed the Allocation Agreement opined on it being "hugely favorable" to Merrill and suggested that, post-closing, new counsel might take issue with the Allocation Agreement's release of Merrill and that "the deal could end up changing materially." *See* Dkt. 759 at 1. That candid, contemporaneous opinion is telling (and, as it turns out, prescient). Having been involved with Trusts at the outset in 2006 – and thus having firsthand knowledge of the potential for put-back claims – these Merrill bankers were keen to see Merrill obtain a release. *See id.* ("I am sure you can appreciate the import of getting this done.").

Moreover, unconscionability concerns are raised. Merrill provided no meaningful consideration for a release of tens (if not hundreds) of millions of dollars of potential put-back

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under the PSAs and related trust documents for the Trusts.") (emphasis added). The Release distinguishes between the Trusts and the Trustee [*see id.* ("As of the Effective Date, **each of the Trusts and the Trustee** hereby irrevocably and absolutely releases …") (emphasis added)]. If the Trusts' put-back claims were meant to be excluded, the Release simply would have said so, or at least specifically referred to the Trusts' rights. An RMBS trustee has its own rights (e.g., indemnification) under PSAs. The drafter of an RMBS contract knows this and would differentiate between the Trustee's rights and those of the Trust. Indeed, a Trustee's rights would be preserved and excluded from a release, just as they were here. *See* Dkt. 676 at 33-35 (Trustee's indemnification rights under the PSA). On the other hand, put-back claims implicate the rights of the Trusts, not the Trustee. The Trustee merely is authorized to enforce those rights, as it seeks to do in this action. It makes no sense to interpret the carveout of the Trustee's rights to include put-back claims, as it would then serve as an exception that swallows the rule, since Merrill's principal liability relating to the Claims is its own put-back liability.

liability. The contract in which it obtained the Release concerned the allocation of approximately $2 million ***of ResMAE's money***. At the time, Merrill had not been served with a repurchase demand, and it is undisputed that there was no pending claim (in the bankruptcy or elsewhere) against Merrill for breach of its repurchase obligations. It, therefore, is hard to fathom why the trustee for the two subject Trusts would gratuitously surrender the Trusts' claims at issue here. Leaving aside the ultimate merits of those claims (which is an issue for trial), the subject claims had significant settlement value. No one has ever adjudicated the Guaranty to mean what Merrill says it does (i.e., that Merrill did not guaranty ResMAE's put-back liability). Justice Schweitzer adopted plaintiff's interpretation, and the Appellate Division held that it is ambiguous. At a minimum, it is reasonable to interpret the Guaranty to mean that Merrill is responsible for ResMAE's breaches. Accordingly, it can be argued that a reasonably prudent trustee, acting in the best interest of the Trusts' certificateholders, would not have gratuitously given up the Trusts' claims against Merrill. Merrill had no leverage over BANA that could possibly justify granting Merrill a general release of claims that were not even on the table.

The record permits a reasonable inference that Bank of America was faced with the prospect of inheriting Merrill's possibly significant put-back liability, saw an opportunity to extinguish that liability before closing, and did so. Plaintiff complains this was unfair and proffers various theories as to why Merrill's release is unenforceable. For the reasons discussed below, those theories will be tested at trial.[12]

That said, as defendants correctly note, "[u]nlike ordinary trustees, the rights and duties of an indenture trustee are not defined by a fiduciary relationship. Instead, they are defined

[12] Indeed, BANA concedes that the claim asserted directly against it for breach of its contractual duties as trustee is not amenable to summary judgment. This issue here is whether Merrill's participation in BANA's alleged wrongdoing suffices to set aside the Release.

exclusively by the terms of the agreements by which the relationships were formed." *NMC Residual Ownership L.L.C. v U.S. Bank N.A.*, 153 AD3d 284, 288 (1st Dept 2017), citing *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 11 NY3d 146, 156 (2008); *see also Cece & Co. v U.S. Bank N.A.*, 153 AD3d 275, 280 (1st Dept 2017) (same). "That does not mean, however, that an indenture trustee does not owe security holders a duty of care." *Id.* Instead, the trustee has a contractual duty "to protect the interests of individual investors", which, here, are the RM4 and RM5 certificateholders. *Id.*, citing *Quadrant Structured Prods. Co. v Vertin*, 23 NY3d 549, 555 (2014). Thus, "[i]t is well recognized by the Court of Appeals that an indenture trustee owes the security holders a duty to perform its ministerial functions with due care." *Id.* Moreover, "**courts have recognized that even an indenture trustee has a fundamental duty to avoid conflicts of interest.**" *Id.* (emphasis added), citing *Commerce Bank v Bank of N.Y. Mellon*, 141 AD3d 413, 416 (1st Dept 2016). And, "the duty to avoid conflicts of interest **is a fiduciary duty**." *Commerce Bank*, 141 AD3d at 416 (emphasis added; internal citation omitted), citing *Beck v Manufacturers Hanover Trust Co.*, 218 AD2d 1, 11-13 (1st Dept 1995).

In the RMBS context, courts have held that a trustee who is alleged to have personally benefited from acting in a manner inconsistent with its duty to avoid conflicts may be held liable for breach of fiduciary duty. *Fixed Income Shares: Series M v Citibank, N.A.*, 56 Misc3d 1205(A), at *5 (Sup Ct, NY County 2017) (Ramos, J.), *mod. on other grounds*, 157 AD3d 541 (1st Dept 2018). Likewise, while some federal district courts appear to hold (in apparent contravention of First Department precedent, i.e., *Commerce Bank* and *Beck*) that a conflict claim does not give rise to a claim for breach of fiduciary duty,[13] those cases nonetheless

[13] In *AG Capital*, the Court of Appeals *did not* hold that pre-default conflict claims cannot give rise to a fiduciary duty claim, only that pre-default failure to exercise due care claims sound in tort, not breach of fiduciary duty. *See AG Capital*, 11 NY3d at 157. By contrast, in *Commerce*

recognize that such a claim may still be pleaded as a breach of contract that may give rise to tort liability. *Royal Park Investments SA/NV v HSBC Bank USA, N.A.*, 109 FSupp3d 587, 609 (SDNY 2015) ("plaintiffs have raised the plausible inference that HSBC was beholden to the Master Servicers and therefore conflicted, and it would be premature to dismiss these claims at this stage."); *see BlackRock Allocation Target Shares: Series S. Portfolio v Wells Fargo Bank, N.A.*, 247 FSupp3d 377, 398 (SDNY 2017) ("motion to dismiss Plaintiffs' conflict-of-interest claims is accordingly denied."). Then too, here, unlike the cases in state and federal court in which the RMBS trustee is sued for breaching its duty to avoid conflicts of interest, the alleged conflict is not based on allegations of a *quid pro quo* scheme with other banks to avoid reciprocal put-back lawsuits (i.e., where the same banks served as trustee on some deals and sponsor on others). *See BlackRock*, 247 FSupp3d at 397-98. The conflict claim here is equally (if not more) compelling, and does not rest on a troubling alleged fraudulent scheme orchestrated by multiple banks. Rather, as discussed herein, the unique facts of this case gave rise to a situation where Bank of America effectively served as both trustee and sponsor *on the same trusts*, and there is record evidence suggesting Bank of America acted on that conflict.

In light of that evidence, plaintiff claims that Merrill's release was fraudulently induced by omission. *See Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009) ("The elements of a cause of action for fraud [are] a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages."); *but see Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 42 (1st Dept 2012)

Bank, the Appellate Division, citing *AG Capital*, expressly held that "the pre-default duty to avoid conflicts of interest is a fiduciary duty." *See Commerce Bank*, 141 AD3d at 416. That the plaintiff in *Commerce Bank* did not properly plead a breach of fiduciary duty claim does not affect this clear pronouncement of the law, which is consistent with the Appellate Division's prior holding in *Beck*, 218 AD2d at 11-13.

("[A]n omission does not constitute fraud unless there is a fiduciary relationship between the parties."), quoting *SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 356 (1st Dept 2004), accord *Kaufman v Cohen*, 307 AD2d 113, 120 (1st Dept 2003) ("where a fiduciary relationship exists, the mere failure to disclose facts which one is required to disclose may constitute actual fraud, provided the fiduciary possesses the requisite intent to deceive.") (citation and quotation marks omitted); *see also Jana L. v W. 129th St. Realty Corp.*, 22 AD3d 274, 277 (1st Dept 2005) ("It is well established that, absent a fiduciary relationship between the parties, a duty to disclose arises only under the 'special facts' doctrine **where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair**.") (emphasis added; citation and quotation marks omitted), accord *Greenman-Pedersen, Inc. v Berryman & Henigar, Inc.*, 130 AD3d 514, 516 (1st Dept 2015); *TIAA Global Investments, LLC v One Astoria Square LLC*, 127 AD3d 75, 87 (1st Dept 2015) ("This 'special facts doctrine' applies regardless of the level of sophistication of the parties.").

Here, the certificateholders were provided written notice in July 2008 of the terms of the ResMAE Bankruptcy Settlement Agreement. While no certificateholder objected, the notice did not mention the prospect of settling or releasing any put-back claims against Merrill (it only disclosed that an allocation agreement to divvy up ResMAE's funds would be negotiated). Nor were the certificateholders given prior notice of the specific terms of the Allocation Agreement or warned that Merrill would be granted a release of its obligation to backstop ResMAE's liability. Hence, that there is no evidence in the record as to the certificateholders' detrimental reliance on Merrill's alleged fraud is of no moment. Without notice of Merrill's release, there was no opportunity for certificateholders to object. It is reasonable to assume that a sophisticated certificateholder would have objected had notice been provided. That the certificateholders were

not informed is telling and permits a reasonable inference of scienter. The impetus of this action, like many put-back actions, is that certain certificateholders demanded that the Trustee take legal action against the sponsor to enforce the Trusts' put-back rights. Here, certificateholders eventually saw fit to do so, which suggests they would have had a serious problem with their claims against Merrill being extinguished in an agreement in which Merrill did not provide any meaningful consideration (and certainly not enough to justify the amount of liability released).

Notably absent from the record is any evidence that BANA, prior to entering into the Allocation Agreement, considered or performed any meaningful analysis of the value of the Trusts' claims against Merrill and whether it was worth giving them up in exchange for amount it received in the allocation of ResMAE's funds. A reasonable finder of fact could conclude that, absent bad faith, only a "delusional trustee" could reach the conclusion that the Allocation Agreement was a good deal for the Trusts. *See B.D. Estate Planning Corp. v Trachtenberg*, 114 AD3d 477, 478 (1st Dept 2014) ("an unconscionable agreement was one that no promisor (absent delusion) would make on the one hand and no honest and fair promisee would accept on the other."), quoting *King v Fox*, 7 NY3d 181, 191 (2006). In other words, a reasonable finder of fact could conclude that Merrill's release was substantively unconscionable because it "was unreasonably favorable" to Merrill. *Lawrence v Miller*, 11 NY3d 588, 595 (2008); *see Green v 119 W. 138th St. LLC*, 142 AD3d 805, 809 (1st Dept 2016), citing *Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1, 7 (1988). On this record, at least two plausible inferences may be drawn to explain the Release: (1) BANA completely abdicated its contractual duty to the Trustee to protect its interest by settling millions of dollars of claims against Merrill for nothing; or (2) BANA and Merrill fraudulently colluded to deprive the Trusts of their claims. If at trial plaintiff

proves a ground precluding the Release's enforceability,[14] it will be set aside, and Merrill might face put-back liability. Summary judgment on the Release's enforceability, therefore, is denied.

The court also grants plaintiff's motion for leave to amend to add a "breach of trust" cause of action against BANA. *See McGhee v Odell*, 96 AD3d 449, 450 (1st Dept 2012) ("Leave to amend pleadings under CPLR 3025(b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay or if the proposed amendment is palpably improper or insufficient as a matter of law.") (quotations marks and internal citation omitted). On this record, this claim is not clearly devoid of merit.

C. The Guaranty

Since the Appellate Division ruled that the Guaranty, on its face, is susceptible to more than one commercially reasonable interpretation, the court cannot rule on its meaning without considering the parties' proffered parol evidence.[15] Generally, "[i]f the court concludes that a contract is ambiguous, **it cannot be construed as a matter of law**." *Telerep, LLC v U.S. Int'l Media, LLC*, 74 AD3d 401, 402 (1st Dept 2010) (emphasis added). Thus, "its construction presents a question of fact which may not be resolved by the court on a motion for summary

[14] The Trustee does not assert a claim for tortious interference with contract against Merrill. *See Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 (1996) ("Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, **defendant's intentional procurement of the third-party's breach of the contract without justification**, actual breach of the contract, and damages resulting therefrom.") (emphasis added). That said, since the Trustee takes the position that BANA breached its contractual duties as trustee by improperly releasing Merrill's liability, and since BANA and Merrill are alleged to have acted collusively (i.e., due to the alleged conflict), a tortious interference with contract claims appears to lie.

[15] As discussed herein, the parol evidence is not entirely one sided and, therefore, parsing the contractual language could not result in a dispositive conclusion on this motion. For this reason, the court declines to engage in the sort of analysis conducted by Justice Schweitzer. After hearing the parties' trial testimony, the court will be in a position to make credibility determinations to aid its decision on which party's interpretation is more persuasive.

judgment." *NFL Enterprises LLC v Comcast Cable Commc'ns, LLC*, 51 AD3d 52, 61 (1st Dept 2008), quoting *Pepco Const. of N.Y., Inc. v CNA Ins. Co.*, 15 AD3d 464, 465 (2d Dept 2005); *see Chiusano v Chiusano*, 55 AD3d 425, 426 (1st Dept 2008) ("Because the extrinsic evidence in the record is insufficient to resolve the ambiguity, the parties' intent must be determined at trial"); *LoFrisco v Winston & Strawn LLP*, 42 AD3d 304, 307 (1st Dept 2007) (same). The court may deviate from this rule *only* when "[t]he documentary evidence submitted on summary judgment ... resolve[s] the ambiguity." *Kolbe v Tibbetts*, 22 NY3d 344, 355 (2013).

Here, there is compelling record evidence that supports the Trustee's contention that Merrill intended to provide a backstop to ResMAE's put-back liability. It is undisputed that "[o]btaining a specific rating from [Moody's Investors Service (Moody's)] was a condition precedent" to the issuance of the subject RMBS certificates. *See* Dkt. 691 at 14 n.3, citing Dkt. 674 at 26. Moreover, all of witnesses that actually recalled the intent behind the RM Series deal documents support the Trustee's position. Specifically, "[f]ormer Merrill Lynch employees Messrs. Fred Hubert, Vincent Mora, Paul Park, and Matt Whalen all testified that the decision to provide a guaranty would be driven by the rating agencies." *Id.* at 14. In fact:

> Only one witness had a clear recollection of the RM series and ResMAE's ability to give stand-alone R&Ws in 2006: former Moody's analyst Mr. Douglas Hamilton, who focused on securitizations that included ResMAE collateral. Mr. Hamilton was the Moody's analyst assigned to rate RM1 and RM3 and sat on the rating committee for RM2. He testified that "ResMAE was, at the time, too new of an entity to give reps," and thus the [Sponsor] was providing the R&W on securitizations that included ResMAE collateral. In fact, Mr. Hamilton testified that "[t]o the best of [his] knowledge, [he] never recommended a securitization of the ResMAE collateral where ResMAE gave reps." Though Mr. Hamilton no longer worked at Moody's at the time of the RM4 or RM5 securitizations, the relevant language in the MLSAAs did not change.

Dkt. 691 at 14-15 (citations omitted). This testimony is highly probative of the intent to have Merrill provide a backstop. Ergo, it is prima facie evidence that the RM Series would not have

received the requisite Moody's rating if Merrill was not providing a guaranty of ResMAE's put-back liability. This evidence is further supported by the undisputed fact that all of the public shelf securitizations in which ResMAE was the sole originator, or originated at least 15% of the loans, had a sponsor backstop. *See* Dkt. 674 at 77-85.

Faced with this compelling prima face case, Merrill has the burden of raising a material question of fact supporting an alternative conclusion. To do so, Merrill proffers the terms of a ResMAE deal without a sponsor backstop. However, that deal actually bolsters the Trustee's case. The Trustee explains:

> ResMAE sponsored one private placement securitization (ResMAE 2006-1) in which it provided the R&Ws without a guaranty **but structured the transaction with a replenishing "originator reserve account" that put monies aside that could be tapped to satisfy ResMAE's liability for R&W repurchases if it did not otherwise pay**. The public RM series lacks such a fund. Moreover, **between July 2004 and June 2007, there were 17 public RMBS consisting of at least 15% ResMAE collateral. In every single one, the sponsor either made all the R&Ws directly or provided a guaranty of ResMAE's obligations**. Indeed, Mr. Hamilton testified that for securitizations consisting of ResMAE originated mortgages, the direct-sponsor or guaranty structure was "common."

Dkt. 691 at 28 n.17 (emphasis added; citations omitted). Hence, in the one instance where there was no sponsor backstop (which was a private placement, not a shelf securitization), a reserve fund was created to guard against the risk for which a sponsor backstop normally accounts (an insolvent originator being unable to fulfill put-back claims). That the size of ResMAE 2006-1's reserve fund was relatively small compared to the amount of non-complaint loans is not surprising, as it is common knowledge that prior to the financial crisis, no one thought there would so many put-back claims. In point of fact, courts have recognized that repurchase protocols were not designed for the deluge of post-financial crisis put-back litigation, the magnitude of which was not anticipated during the RMBS bubble. *See Syncora Guarantee Inc. v*

EMC Mortg. Corp., 2011 WL 1135007, at *6 (SDNY 2011) (noting that "[t]he repurchase protocol is a low-powered sanction for bad mortgages that slip through the cracks" and that "[i]t is a narrow remedy ('onesies and twosies') that is appropriate for individualized breaches," as opposed to widespread breeches that were discovered after the financial crisis).

That said, Merrill persuasively relies on evidence that it provided a backstop of the originator's put-back liability in other RMBS deals, and that the language in those deal documents much more clearly evidences the intent of Merrill to backstop the originator's liability, as compared to the Guaranty in this case. *See* Dkt. 674 at 70 ("The OWNIT 2006-2 transaction included a guarantee by [Merrill] of all of [the originator's] obligations to repurchase loans that breached [the originator's] representations and warranties regarding such loans."), 74 (section 1.04(b) of the OWNIT 2006-2 MLSAA providing that "only if the Transferor is unable or unwilling to fulfill its obligation to cure or repurchase such Mortgage Loan, the Depositor shall have the right to enforce such rights against the Seller under this Agreement with respect to such representation or warranty."). Merrill notes that prior to Moody's rating the RM Series, Merrill provided Moody's with a redline of the OWNIT 2006-2 MLSAA against the RM Series' MLSAAs, which shows the difference in the language of those contracts' section 1.04(b) – the section in which Merrill's alleged backstop liability arises. *See id.* at 75-76. Merrill avers that when comparing these two versions of section 1.04(b), a reasonable inference may be drawn that the parties did not intend for Merrill to backstop ResMAE's liability. According to Merrill, if it was the intention to have Merrill backstop ResMAE's liability, it simply would have sufficed to use the same contract language found in section 1.04(b) of the OWNIT 2006-2 MLSAA. Hence, according Merrill, the intention must have been different with the RM Series.

While Merrill's argument is not dispositive in light of the compelling, previously discussed extrinsic evidence proffered by the Trustee, Merrill's evidence is enough to defeat summary judgment. Critically, as the party opposing the Trustee's summary judgment motion, the facts must be viewed "in the light most favorable" to Merrill [*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 (2012)], and all reasonable inferences from those facts must be drawn in Merrill's favor. *Flomenbaum v N.Y. Univ.*, 71 AD3d 80, 91 (1st Dept 2009), *aff'd*, 14 NY3d 901 (2010). Consequently, while a reasonable finder of fact may conclude that the Trustee's rating agency testimony is more compelling than Merrill's proffered parol evidence, that possibility cannot tip the scales on this summary judgment motion. There is no definitive evidence in the record as to why the backstop language in the Trusts' MLSAAs differs from the OWNIT 2006-2 MLSAA if the intent was the same. This open question is sufficiently material to warrant a trial.

The court rejects the Trustee's contention that this conflicting parol evidence requires the court to apply the doctrine of *contra proferentem* and construe the guaranty in the Trustee's favor. To be sure, it is undisputed that an attorney representing both Merrill and its affiliate Depositor drafted the MSLAAs without any negotiations (arm's length or otherwise) with the original trustee or certificateholders. *See Wormser, Kiely, Galef & Jacobs, LLP v Frumkin*, 125 AD3d 516, 517 (1st Dept 2015) ("ambiguities in a contractual instrument will be resolved contra proferentem, against the party who prepared or presented it"), quoting *151 W. Assocs. v Printsiples Fabric Corp.*, 61 NY2d 732, 734 (1984); *see also Natt v White Sands Condo.*, 95 AD3d 848, 849 (2d Dept 2012) ("a contract which is internally inconsistent in material respects

or that reasonably lends itself to two conflicting interpretations is subject to the rule invoking strict construction of the contract in the light most favorable to the nondrafting party.").[16] *Contra proferentem* is a doctrine of "last resort" that generally should not be applied unless the finder of fact is unable to resolve the ambiguity – that is, if the finder of fact concludes that the extrinsic evidence fails to clearly reveal the meaning of the contract. *Perella*, 153 AD3d at 448 ("That doctrine may only be applied **as a last resort**, if the extrinsic evidence is inconclusive.") (emphasis added); *Fernandez v Price*, 63 AD3d 672, 676 (2d Dept 2009) ("the axiom 'contra proferentum,' which advises that any ambiguity in a document is resolved against its drafter, is a rule of construction that should be employed **only as a last resort**.") (emphasis added). The applicability of the doctrine and the need to resort to it are issues reserved for trial.

[16] The parties do not cite controlling authority that provides the answer to the question of whether the doctrine of *contra proferentem* applies to a contract governing a structured finance transaction where the intended investors are all sophisticated. The answer to this question is not clear, though an argument against the applicability of *contra proferentem* would find support under case law concerning sophisticated insureds. *See Westchester Fire Ins. Co. v MCI Commc'ns Corp.*, 74 AD3d 551 (1st Dept 2010) ("Nor is there a need to resort to contra proferentem, which, in any event, ***would be inapplicable to this sophisticated policyholder***") (emphasis added); *see also Cummins, Inc. v Atl. Mut. Ins. Co.*, 56 AD3d 288, 290 (1st Dept 2008) (same). Since the doctrine cannot be applied here, the court declines to opine on this issue now, especially given the widespread implications such a ruling could have on structured finance deal documents which, in this court's experience, can often be less than clear, notwithstanding the significant amount of money at stake. *See Assured Guar. Mun. Corp. v DLJ Mort. Capital, Inc.*, 44 Misc3d 1206(A), at *9 n.22 (Sup Ct, NY County 2014), quoting Matt Levine, BLOOMBERGVIEW, *Caesars and the $450 Million 'And'*, http://www.bloombergview.com/articles/2014-05-13/caesars-and-the-450-million-and (May 13, 2014) (positing that "[t]he entire edifice of modern financial capitalism is built on 100-page documents drafted by exhausted 26-year-olds and read by nobody [and] [t]he reason disputes like this always bring out people talking about how important it is to dig deep into the documents is that *nobody ever does*.") (emphasis in original).

D. RMBS Issues

Finally, plaintiff seeks summary judgment on the following issues: (1) the meaning of section 7.02(1) of the Purchase Agreement; (2) the meaning of section 7.02(73) of the Purchase Agreement; (3) loans left "unresolved" by defendants' experts, i.e., loans for which defendants did not rebut plaintiff's breach analysis; and (4) defendants' causation defenses.

Section 7.02(1) of the Purchase Agreement warrants: "The information set forth in the related Final Mortgage Loan Schedule is complete, true and correct." Dkt. 492 at 28. As this court recently explained, there is both controlling and persuasive New York authority holding such language is unambiguous and actually warrants the truth of the information on the loan tape, i.e., it does not merely warrant accurate transcription. *See MBIA Ins. Corp. v Credit Suisse Secs. (USA) LLC*, 55 Misc3d 1204(A), at *9-12 (Sup Ct, NY County 2017), citing *Bank of N.Y. Mellon v WMC Mort., LLC*, 41 Misc3d 1230(A) (Sup Ct, NY County 2013), *rearg. denied* 2014 WL 3738083 (Sup Ct, NY County 2014), *aff'd* 136 AD3d 1 (1st Dept 2015), *aff'd* 28 NY3d 1039 (2016); and citing *UBS*, 205 FSupp3d at 429. Thus, summary judgment on the meaning of section 7.02(1) is granted to plaintiff.

Next, section 7.02(73) of the Purchase Agreement warrants:

> The **methodology used** in underwriting the extension of credit for each Mortgage Loan . . . confirmed that at the time of origination the borrower had a reasonable ability to make timely payments on the Mortgage Loan [and] did not rely solely on the extent of the borrower's equity in the collateral as the principal determining factor in approving such extension of credit. ... **[B]ased on such methodology**, the Mortgage Loan's originator **made a reasonable determination** that at the time of origination the borrower had the ability to make timely payments on the Mortgage Loan.

Dkt. 492 at 39 (emphasis added). "Defendants argue that this requires only that the originator possessed a set of underwriting guidelines that evaluated the borrower's credit risk and not just

the collateral." Dkt. 691 at 39. Plaintiff contends this is an erroneous interpretation of section 7.02(73). Plaintiff is correct. This section "unambiguously warrants that the originator **in fact 'used' such guidelines** ('methodology') and that '[b]ased on such methodology, the . . . originator made a reasonable determination' as to the borrower's ability to pay." *Id.* at 40 (emphasis added). "Thus, this R&W is breached whenever ResMAE failed to apply its guidelines relating to a borrower's ability to repay, or failed to apply those guidelines so as to ensure a reasonable determination of the borrower's ability to repay." *Id.* While plaintiff concedes that the question of whether section 7.02(73) was in fact breached as to 1,433 loans is an issue for trial, plaintiff is entitled to summary judgment on the meaning of section 7.02(73).

As for the "unresolved" loans, the issue is the same as in *MBIA*, where the defendant's expert did not rebut the existence of alleged warranty breaches in the plaintiff's expert report. *See MBIA*, 55 Misc3d 1204(A), at *3 ("Credit Suisse admits that its expert did not refute the fact that there are warranty breaches affecting the Unrebutted Loans."). Similarly, here, plaintiff explains:

> There is no genuine dispute as to breach for 673 loans that Defendants' experts marked "unresolved." Plaintiff's underwriting expert, Mr. Richard Payne, opined that all of these loans breached one or more warranties. Although Defendants' purported experts described these loans as "unresolved," they did not rebut Mr. Payne's opinion as to at least one of the alleged breaches in each loan, and put forward no evidence to contradict the evidence offered by Mr. Payne in support of his opinion.

Dkt. 691 at 40.

For the 314 of the 1,072 loans that Mr. Payne opined are affected by "No Error of Fraud" warranty breaches, defendants' expert, Mr. Daniel Gill, concedes that Mr. Payne "'cited to reliable first-hand or other information sufficient to show an inconsistency' with the borrower's statement." *Id.* at 41, quoting Dkt. 674 at 87. Indeed, "on 232 of these loans, Mr. Gill expressly

concedes Mr. Payne 'has established that it is more likely than not that a misrepresentation occurred at origination.'" *Id.* at 42 (emphasis in original). It is plaintiff's position that defendants have conceded that plaintiff, who must prove its breach of contract claims based on a preponderance of the evidence standard [*see Rinaldi & Sons, Inc. v Wells Fargo Alarm Serv., Inc.*, 39 NY2d 191, 194 (1976); *Khan v Kaieteur Const., Inc.*, 120 AD3d 770, 771 (2d Dept 2014)], will prevail at trial.

> Likewise, Mr. Payne opined that:
>
> 1,671 loans breached R&Ws other than the No Error or Fraud R&W. Defendants offered their purported underwriting expert Mr. Robert Broeksmit to opine as to these breach findings. **Mr. Broeksmit marked 408 of these loans "unresolved,"** meaning he was unable to "conclude[] to a reasonable degree of professional certainty that Mr. Payne's conclusions are wrong." JSUF ¶ 295.

Dkt. 691 at 42 (emphasis added; footnote omitted), quoting Dkt. 674 at 87.[17]

> Likewise:
>
> Mr. Payne opined that 149 of the loans breach the No Default R&W based on the borrower's failure to make required payments. For each of these loans, the mortgage note required the borrower to make monthly payments on the first of the month. The servicing records show the borrower failed to make the last payment due before closing.
>
> For 128 of these loans, the note provided that a failure to make such payment constitutes a default. Thus, these loans breached the No Default R&W, which states that as of closing "there is no default . . . existing under the . . . Mortgage Note." For 18 loans, the note required the servicer to send the borrower an overdue notice and provided that, if the borrower did not pay by the date in the notice, the loan would be in default. Thus, these loans also breached the No Default R&W, which further states that "there is . . . no event which, with the passage of time or with notice and the expiration of any grace or cure period, would constitute a default." Finally, for the remaining three loans, which Defendants have not produced, Defendants have stated that they do not contest that the notes provide that the borrower would make the monthly payments on the first day of each month. Thus, these loans also breached the No Default R&W.

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[17] It should be noted that some of these loans overlap with some of the other "unresolved" loans, i.e., certain unresolved loans were impacted by multiple warranty breaches. *See MBIA*, 55 Misc3d 1204(A), at *7 n.17 (noting overlap across unrebutted loans).

Dkt. 691 at 43 (internal citations omitted).

Defendants do not point to any evidence in the record that creates a material question of fact about whether there are warranty breaches affecting the "unresolved" loans. *See Red Zone LLC v Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048, 1049 (2016) ("a party may not create a feigned issue of fact to defeat summary judgment."). Hence, at trial, defendants "may not contest the existence of the warranty breaches found by Mr. [Payne] that were not rebutted by [defendants' experts]." *MBIA*, 55 Misc3d 1204(A), at *6.[18] Of course, as in *MBIA*, defendants are still entitled to litigate the implications of these warranty breaches. They are only precluded from denying the existence of such breaches. However, for some of the warranty breaches (e.g., § 7.02(73)), the Purchase Agreement provides that a breach "shall be deemed to materially and adversely affect the value of the Mortgage Loan and shall require a repurchase." *See* Dkt. 691 at 40, quoting Dkt. 492 at 39. For such breaches, defendants cannot contest the material and adverse prong.

Additionally, plaintiff correctly avers that "under controlling First Department authority, Plaintiff need not show that a defective loan has defaulted or is otherwise non-performing in order to trigger Defendants' repurchase obligations," and that "it necessarily follows that Plaintiff is not required to prove that a breach caused a defective loan to default or otherwise not perform." *See* Dkt. 691 at 45, citing *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 105 AD3d 412, 413 (1st Dept 2013) (*Countrywide*) ("plaintiff is entitled to a finding that the loan need not be in default to trigger defendants' obligation to repurchase it. There is simply nothing in the contractual language which limits defendants' repurchase obligations in such a manner.

[18] Plaintiff concedes that it is only moving "for summary judgment as to breach, not as to material and adverse effect." *See* Dkt. 691 at 42 n.30. As noted earlier, the Purchase Agreement omits the word "material", and the implications of that fact (if any) are issues for trial.

The clause requires only that 'the inaccuracy [underlying the repurchase request] materially and adversely affect[ ] the interest of' plaintiff.") (brackets in original). While plaintiff again concedes that a trial is needed to adjudicate the meaning of the words "adversely affects the value of the Mortgage Loan or Mortgage Loans" and to determine how such meaning applies "to each particular warranty," plaintiff is entitled to dismissal of the portion of defendants' affirmative defenses predicated on the claim that defendants are not liable unless plaintiff proves "that a breach of warranty caused a default or other non-performance." *See* Dkt. 691 at 45-46, quoting *MBIA*, 55 Misc3d 1204(A), at *6 n.15; *see also* Dkt. 691 at 45 n.33 (collecting cases).

Finally, the court would be remiss if it did not address the incorrect contention in defendants' opposition brief that, in *MBIA*, "this Court held squarely that the meaning of 'material and adverse' could not be decided at summary judgment." *See* Dkt. 794 at 13; *see also id.* at 49 ("Earlier this year [in *MBIA*], the Court held that the meaning of 'material and adverse in an RMBS contract" could not be decided at summary judgment."). In *MBIA*, the court merely noted an apparent disagreement between certain state and federal judges on the question of whether such a ruling could be made at the summary judgment stage. *See MBIA*, 55 Misc3d 1204(A), at *5 (collecting cases). This court expressly declined to opine on this issue because the court found that MBIA failed to meet its prima facie summary judgment burden, thereby precluding the possibly of summary judgment on the meaning of material and adverse. *See id.* at *6. Nothing in *MBIA* purports to foreclose the possibility that, on a proper record, the meaning of material and adverse might be susceptible to a summary judgment interpretation. That said, while neither party seeks summary judgment on this issue, and leaving aside the actual meaning of material and adverse, *Countrywide* clearly forecloses an affirmative defense based on plaintiff's failure to prove that a warranty breach actually caused a loan to default.

As noted at the outset, given the myriad issues that are left for trial, counsel should be prepared at the next conference, scheduled below, to discuss the logistics of conducting bifurcated bench trials. Accordingly, it is

ORDERED that summary judgment is granted to defendants to the extent that the Release, on its face, is unambiguous and would bar plaintiff's claims predicated on Merrill's alleged liability under the Guaranty unless, at trial, plaintiff establishes the Release is unenforceable for the reasons stated herein; and it is further

ORDERED that summary judgment is granted to plaintiff on (1) the meaning of sections 7.02(1) and (73) of the Purchase Agreement; (2) the existence of warranty breaches on the "unresolved" loans; and (3) defendants' causation defenses (the 11th and 14th affirmative defenses), which are dismissed to the extent they are predicated on an alleged warranty breach not being the proximate cause of a loan's default; and it is further

ORDERED that plaintiff's motion for leave to amend is granted, and plaintiff shall file its PTAC within one week of the entry of this order on NYSCEF, to which defendants shall file a responsive pleading within two weeks thereafter; and it is further

ORDERED that the parties' motions are otherwise denied; and it is further

ORDERED that a telephone conference will be held on June 27, 2018 at 4:30 p.m.

Dated: May 16, 2018

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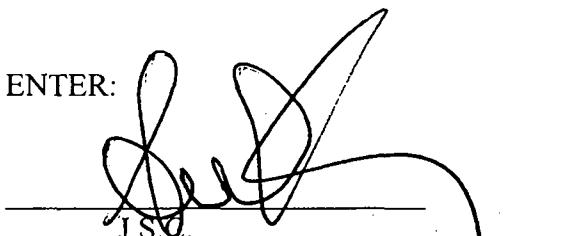

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C