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

MBIA INSURANCE CORPORATION,

Plaintiff,

-against-

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

Defendants.

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

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

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Plaintiff MBIA Insurance Corporation ("MBIA") respectfully submits this memorandum of law in support of its motion for summary judgment, pursuant to CPLR 3212, that: (i) the test of materiality for breach of the obligation to repurchase defective loans requires a showing of a material and adverse impact on MBIA's interests, not a showing that the defective loans defaulted or became delinquent; (ii) Defendant Countrywide Home Loans, Inc. ("CHL") breached representations and warranties with respect to at least 56.0% of the loans in the 15 securitizations of residential mortgages (the "Securitizations") at issue in this action and that such breaches had a material and adverse impact on MBIA's interests in the affected mortgage loans; (iii) CHL further repudiated its contractual obligations to repurchase defective loans in complete and utter frustration of the contractual repurchase remedy;[1] and (iv) CHL's wholesale breach of its representations and warranties, and separately, its repudiation of its repurchase obligations, are far more than sufficient to constitute material breaches that entitle MBIA to rescissory damages; and for such other and further relief as this Court deems just and proper.

PRELIMINARY STATEMENT

This motion culminates a lengthy investigation and multi-year prosecution of myriad types of misconduct initially orchestrated by Countrywide[2] and subsequently continued by BAC as Countrywide's successor. Evidence adduced in discovery established that Countrywide committed fraud and breached numerous representations and warranties in the Transaction Documents by misrepresenting the credit characteristics of the mortgage loans included in each Securitization. Countrywide, and later BAC, then compounded this misconduct by refusing to

[1] Under MBIA's claim for successor liability, BAC is also liable for CHL's breaches as a successor to its repurchase obligations under the Insurance Agreements. Under those agreements, in connection with the contemplated sale of substantially all of its assets, CHL had an obligation to negotiate for BAC to assume its obligations as its "successor." Sheth Aff. Exs. 18-32 at § 4.04 (a) ("This Insurance Agreement shall be a continuing obligation of the parties hereto and shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns…"); *see Glass v. Owens*, 758 F.Supp. 962, 971 (D.N.J. 1991) (the selling party "had an affirmative obligation to secure the purchaser's assumption of the agreement may be viewed as simply another way of recognizing that [the seller] would be liable to the Union if the purchaser did not assume the agreement.").

[2] Countrywide refers to Countrywide Financial Corporation ("CFC"), Countrywide Securities Corporation ("CSC"), Countrywide Home Loans, Inc. ("CHL"), and Countrywide Home Loans Servicing, L.P. ("CHLS").

repurchase mortgage loans that plainly failed to comply with CHL's representations and warranties, and instead created a "catch-22" repurchase process designed to frustrate, if not utterly destroy MBIA's repurchase rights. As a consequence, MBIA seeks summary judgment that CHL is liable for those breaches which are undisputed, and that CHL is liable for repudiation of the obligation to repurchase defective loans across the Securitizations. For either reason, the level of undisputed breaches is, as alleged, so extraordinarily pervasive and material that MBIA is entitled to rescissory damages that would fully compensate MBIA for its current and future losses arising from its insurance on the Securitizations.

As a threshold matter, the repurchase remedy does not require that the loan be in default. The plain language of the Transaction Documents for each of the 15 Securitizations makes clear that the repurchase remedy is not limited to defaulted loans, and the testimony of Countrywide's own witnesses confirms that Countrywide in fact repurchased performing loans. In light of this Court's prior finding that "MBIA has posited a strong argument," it is now appropriate, on the basis of a full record, for this Court to hold that the test of materiality for breach of the repurchase obligation does not require a showing of default.

As to the breaches themselves, as described in the report of MBIA's re-underwriting expert, Mr. Steven I. Butler, there are over 49,000 defects in a random sample of 6,000 mortgage loans (consisting of 400 loans from each of the 15 Securitizations) (the "Random Samples"). 96.8% of the mortgage loans in the Random Samples contained one or more serious defects, including credit defects, appraisal-related defects, compliance defects, and data errors, that meaningfully and substantially increased the credit risk associated with the loan.[3] Although MBIA is confident that it will substantiate those findings at trial, in this motion, MBIA seeks summary judgment only on a subset of those findings (amounting to a breach rate still well in excess of over 50%) where the breach of the representations and warranties is indisputable, and

[3] Sheth Aff. Ex. 67, at 54-58. In these 49,000 findings, MBIA's re-underwriting expert found pervasive breaches by Countrywide arising out of its failure to comply with its own underwriting guidelines, and prudent and customary standards of underwriting. *Id.* The vast majority of these egregious breaches are not even included in this motion.

where such breaches had an equally clear material and adverse impact on MBIA's interests in the affected mortgage loans by increasing the credit risk of such loans. Each of these undisputed categories is summarized below:

- First, Countrywide does not and cannot dispute that its own Corporate Quality Control ("CQC") Department determined that [redacted] mortgage loans in the Securitizations were rated "severely unsatisfactory" or "SUS". An SUS rating—the worst rating the CQC Department could give a loan—meant that the mortgage loan posed a "severe underwriting risk with limited or no compensating factors." In other words, the loans were not underwritten to Countrywide's own internal underwriting standards, despite the representation and warranty in the Transaction Documents that all mortgage loans met Countrywide's purported standards for origination. Countrywide's own internal documents acknowledge that these loans would result in repurchase when investors became aware of the underwriting risks they posed, and yet, incredibly, Countrywide has failed to repurchase all but [redacted] of these [redacted] SUS loans.

- Second, Countrywide does not and cannot dispute that at least 1,423 mortgage loans in the Random Samples did not contain an appraisal of the related mortgaged property from a qualified appraiser, in violation of Countrywide's representation that such an appraisal had been obtained. Countrywide's CQC Department required that loans that were missing an appraisal should be rated as SUS due to the increased credit risk associated with such loans. Moreover, internal documents produced by Countrywide in discovery reveal that its senior executives acknowledged that loans originated without appraisals by qualified appraisers breached the representations and warranties in the Transaction Documents and would be subject to repurchase.

- Third, Countrywide does not and cannot dispute that the loan origination files for at least 626 mortgage loans in the Random Samples reflect misrepresentations concerning the borrower's income.[4] Such misrepresentations constitute a default under the mortgage or mortgage note, in violation of Countrywide's representation and warranty in the HELOC securitizations that no default exists under any applicable Mortgage Note or applicable mortgage loan. There can be no question that misrepresentations of the borrower's income have a negative impact on the borrower's ability to repay, and thus, increase the credit risk associated with a loan.

- Fourth, Countrywide does not and cannot dispute that the Mortgage Loan Schedules ("MLS") for the Securitizations contain materially false information for at least 1,416 mortgage loans in the Random Samples, in violation of Countrywide's representation and warranty in each of the Securitizations that the MLS is true and correct in all material respects. More specifically, Countrywide does not dispute that: (i) for at least 238 mortgage loans, the MLS sets forth a materially false combined loan-to-value ("CLTV")

[4] These 626 loans, while consisting of approximately 10% of the Random Samples, represent the tip of the proverbial iceberg in that loan origination files for countless other loans contain misrepresentations of income. *See generally* Sheth Aff. Ex. 67, at 75-95. Although MBIA will demonstrate at trial that loans where income is misrepresented breach other representations and warranties in addition to the no-default representation and warranty, MBIA does not present such breaches for resolution on summary judgment.

ratio; (ii) for at least 185 mortgage loans, the MLS materially misrepresents the documentation program pursuant to which the loans were underwritten; (iii) for at least 12 mortgage loans, the MLS sets forth a materially false occupancy status; (iv) for at least 541 mortgage loans, the MLS materially misrepresents the purpose for which the loan was made; (v) for at least 599 mortgage loans, the MLS materially misrepresents whether the loans were "piggyback" loans; (vi) for at least 20 mortgage loans, the MLS materially misrepresents the FICO score of the borrower; and (vii) for at least 4 mortgage loans, the MLS materially misrepresents the lien status of the loan. Countrywide recognized that each of these variables impacted the probability of delinquency and default on a mortgage loan, and thus, impacted the credit risk of the loan.

- Fifth, Countrywide does not and cannot dispute that at least 460 mortgage loans in the Random Samples are missing legal documents that are required to be contained in the loan origination file. Various files are missing documents as crucial as the original mortgage note, the original assignment of mortgage, the original recorded mortgage with evidence of recording on it, and if applicable, each intervening assignment needed for a complete chain of title. The absence of such required legal documents increases the credit risk and likelihood of loss on the loan in the event of default by impairing the lender's ability to foreclose on the underlying property.
- Finally, Countrywide does not and cannot dispute that at least 10 mortgage loans in the Random Samples have a CLTV ratio greater than 100%, in violation of CHL's representation and warranty that no mortgage loans in the Securitizations had a CLTV ratio exceeding 100%. As illustrated by Countrywide's underwriting guidelines, pricing schedules, and internal default and pre-payment models, and confirmed by the sworn testimony of its fact witnesses and experts, increases in the CLTV ratio increase the credit risk of a loan. Moreover, CLTV ratios exceeding 100% mean that the borrower has no equity in the property, and thus, the risk of loss in the event of a foreclosure is virtually certain.

CHL's breaches of the representations and warranties described above are not only undisputed, but are indisputable, and thus, they are appropriate for resolution on summary judgment. As set forth herein, the documents produced by Countrywide and the testimony of Countrywide's own witnesses confirm that there is not and cannot be any meaningful question[5] that the mortgage loans which did not comply with such representations and warranties had significantly greater credit risk than represented and warranted to MBIA. As such, CHL's

[5] In the report of Countrywide's expert, Ms. Karen S. Godfrey, and later in her deposition, Ms. Godfrey took the less-than-credible position that she did not agree with *a single one* of Mr. Butler's 49,000 findings. She maintained this position despite being forced to admit that she had no experience re-underwriting loans or determining whether loans should be included in securitizations. Sheth Aff. Ex. 110, at 30:14-17, 269:6-15; Ex. 112, at 784:16-21, 761:15-22. Given that Ms. Godfrey's findings and conclusions are unsupported, they do not create a genuine issue of material fact to warrant a denial of summary judgment. *Diaz v. N.Y. Downtown Hosp.*, 99 N.Y.2d 542 (2002) (granting summary judgment where the "expert's ultimate assertions are speculative or unsupported by any evidentiary foundation").

breaches of such representations and warranties had a material and adverse impact on MBIA's interests in the affected loans.

Additionally, while the breaches set forth herein are significant of their own accord, far more significant is the magnitude of these breaches when they are extrapolated from the Random Samples to the over 388,000 loans in the Securitizations. Indeed, on the basis of these extrapolated breaches, MBIA is entitled to rescissory damages under common law and the N.Y. Insurance Law. Extrapolation from the Random Samples to the Securitizations reveals that at a minimum, 217,765 loans (or 56.0%) were materially defective. Against this backdrop, CHL and BAC repurchased only 4.51% of the loans tendered back to them. The discrepancy is especially shocking when viewed in light of the numerous additional defective loans that are not the subject of this motion.

Accordingly, summary judgment should be granted to MBIA that: (i) the test of materiality for breach of the obligation to repurchase defective loans does not require a showing that the defective loans defaulted or became delinquent; (ii) CHL breached its representations and warranties as to the subset of loans in the Random Samples and Due Diligence Sample identified in this motion, and the extrapolated percentage of loans in the Securitizations; (iii) CHL repudiated the repurchase process; and (iv) as a result of CHL's pervasive undisputed breaches, and equally, as a result of CHL's repudiation, MBIA should be awarded rescissory damages, which would fully compensate it for its losses and avoid a protracted trial.

FACTUAL BACKGROUND

Countrywide originated or acquired the mortgage loans included in each of the Securitizations and then sold or otherwise conveyed them to various trusts. Those trusts in turn issued and sold residential mortgage-backed securities ("RMBS") to investors. Glehan Aff. ¶ 4; *see also generally* Sheth Aff. Exs. 33-56. The Securitizations closed between September 2004 and May 2007 and were effectuated through the Transaction Documents. *See generally* Sheth Aff. Exs. 33-56. The Securitizations generally comprised one or two pools of between approximately 8,000 and 48,000 mortgage loans. The mortgage loans in the Securitizations are primarily home equity lines of credit ("HELOCs") or closed-end second liens ("CESs"). Glehan Aff. ¶ 4; Sheth Aff. Exs. 133-147.

To make the RMBS more marketable to potential investors, Countrywide sought from MBIA the provision of insurance covering the trusts' obligations to make payments on the RMBS issued to investors. Glehan Aff. ¶ 5. For each Securitization, MBIA entered into an agreement ("Insurance Agreement") that provides the terms for the issuance of an MBIA financial guaranty policy ("Insurance Policy") through which MBIA insures ultimate payments of principal and timely payments of interest due on the RMBS issued to investors. *See generally* Sheth Aff. Exs. 3-32. MBIA's obligation to make payments under the Insurance Policies is irrevocable and unconditional. *Id.* Exs. 3-11, at 4; *Id.* Exs. 12-17, at 3.

In connection with MBIA's agreement to provide financial guaranty insurance on the Securitizations, CHL made a series of comprehensive representations and warranties relating to the mortgage loans included in each of the Securitizations. Many of those representations and warranties are contained or incorporated in the Insurance Agreements. For example, the Insurance Agreements incorporate a comprehensive set of representations and warranties about the characteristics of the underlying loan pools and of individual loans (the "Loan-level Warranties"). The Loan-level Warranties consist predominantly of representations and warranties made by CHL in other Transaction Documents associated with each Securitization, including the Mortgage Loan Purchase Agreement ("MLPA") and the Sale and Servicing Agreement ("SSA") for the HELOC Securitizations, and the Pooling and Servicing Agreement ("PSA") for the CES Securitizations. *See id.* Exs. 33-41, at § 3.02; Exs. 42-50, at § 2.04; Exs. 51-56, at § 2.03.[6] The Loan-level Warranties relevant to this motion are described in detail in Section III.

[6] These representations and warranties are fully incorporated into the Insurance Agreement for MBIA's benefit. *Id.* Exs 18-32, at § 2.01(l). Sections 2.04(j) and 2.07(g) of the Insurance Agreement similarly state that the Issuer, the Indenture Trustee, and the Co-Trustee "hereby make[] each such representation and warranty to, and for the benefit of, the Insurer as if the same were set forth in full herein." *Id.* Exs. 18-25, at §§ 2.04(j), 2.07(j); Exs. 26-28, at § 2.04(g).

One of the remedies provided in the Transaction Documents for a breach of the Loan-level Warranties is the repurchase remedy. The repurchase remedy provides that, in the event of a breach of any representation or warranty related to a mortgage loan, Countrywide would either cure the breach or repurchase or substitute eligible mortgage loans for the defective mortgage loan. *Id.* Exs. 42-50, at §§ 2.04(b), 2.04(d); Exs. 33-41, at § 3.02(b); Exs. 51-56, at § 2.03(f). Under the Transaction Documents, CHL is required to repurchase defective loans within 90 days of "becoming aware of" or "upon discovery" of such loans. *See, e.g.*, *id.* Exs. 42-43, at § 2.04(b); Exs. 44-50, at § 2.04(d); Exs. 51-56, at § 2.03(f).

In the late fall of 2007, the mortgage loans underlying the Securitizations began to show increased delinquencies and defaults, resulting in charge-offs that subsequently led the trusts to submit claims to MBIA under the Insurance Policies. *See id.* Exs. 214-215; Glehan Aff. ¶ 6. In 2008, after investigating the causes for these charge-offs, MBIA provided Countrywide with notices of breach of representations and warranties. *See, e.g.*, Glehan Aff. ¶ 7; Sheth Aff. Exs. 71-97. In doing so, MBIA attempted to exercise its contractual put-back rights, demanding that Countrywide repurchase thousands of defective loans from the Securitizations. *Id.*

Rather than comply with these legitimate demands however, Countrywide set up a contrived series of obstacles designed to utterly frustrate the contractual repurchase remedy, including requiring multiple levels of review for repurchase approvals, applying a red-face standard where only the most egregious loans would be approved for repurchase, and inventing new requirements for repurchases not found in the Transaction Documents. Indeed, Countrywide's failure to repurchase any of these loans led MBIA to commence this action in September 2008. Countrywide's refusals to abide by its repurchase obligations were occurring at a time when MBIA was making hundreds of millions of dollars in claim payments under its financial guaranty policy.[7] It was only after MBIA was forced to litigate that Countrywide agreed to repurchase 614 (only 4.5%) of the 13,607 loans MBIA had requested for repurchase,

[7] To date, MBIA has made well in excess of $2 billion dollars in claim payments under its Insurance Policies. Glehan Aff. ¶ 8.

and even then it delayed these nominal repurchases for upwards of over a year, eventually putting the entire process on hold. *See infra*, Section V; Sheth Aff. Ex. 108; Ex. 97, Ex. 67, at 164.[8]

As additional losses mounted, MBIA filed its amended complaint on August 24, 2009, alleging, inter alia, (i) fraud against CFC, CHL, and CSC; (ii) breach of the representations and warranties in the Insurance Agreement by CHL; (iii) breach of the repurchase obligation by CHL; and (iv) breach of the contractual servicing obligations by CHL and CHLS.[9]

ARGUMENT

I. THE REPURCHASE REMEDY DOES NOT REQUIRE THAT THE LOAN BE IN DEFAULT[10]

A. The Plain Language Of The Transaction Documents Makes Clear That The Repurchase Remedy Is Not Limited To Defaulted Loans

By their plain terms, the repurchase remedy provisions for each of the Securitizations provide—in language which is substantively identical in each transaction—that the cure for any breach of a representation and warranty relating to the characteristics of the mortgage loans included in the Securitizations shall be a repurchase of or a substitution for the defective mortgage loans.[11] This provision does not state that the Mortgage Loans must be in default or

[8] [redacted]

[9] In this motion, MBIA is not moving for summary judgment on its claim for fraud or breach of the servicing contract.

[10] In an Order dated January 3, 2012, this Court ruled that to prevail on the fraud and contract claims, MBIA did not have to prove a direct causal link between misrepresentations and warranty breaches and MBIA's claims payments. *Id.* Ex. 192 at 25. On the issue that the repurchase obligation does not depend on the performance or non-performance of the loan, the Court deferred a ruling at that time. Although the Court recognized that MBIA "posited a strong argument," it found that summary judgment was not appropriate because MBIA's argument was based on the Transaction Documents for only the 2006-E Securitization. *Id.* at 23-24. The Court further found that "the applicable provisions of the SSA and the PSA are subject to varying interpretations regarding 'interest' and affect on interest . . . ." *Id.* at 24. MBIA now submits substantial additional evidence obtained in discovery to renew its motion for summary judgment regarding the repurchase remedy.

[11] Sheth Aff. Exs. 42-43, at § 2.04(b); Exs. 45-50, at §§ 2.04(b), (d); Exs. 51-56, at § 2.03(f); *see also* Exs. 33-34, at § 3.02; Exs. 35-41, at § 3.02(b).

that the breach have caused such default. In fact, neither "default" nor "cause" appears anywhere in the provision. If the parties had intended that repurchase would be required only if a Mortgage Loan had defaulted, they would have explicitly said so in the contracts.

Moreover, the Transaction Documents for 11 of these 15 Securitizations contain a provision which expressly contemplates repurchase of loans that are still performing. This provision states, in language which is again materially identical in each transaction, that, "with respect to any Mortgage Loan that is not in default or as to which default is not imminent, no repurchase or substitution pursuant to [the repurchase obligation] shall be made unless the party repurchasing or substituting delivers to the Indenture Trustee" an opinion of counsel concerning the tax implications of such repurchase or substitution.[12] By its plain terms, this provision makes clear that the repurchase provision may apply to a loan which is not in default, and as to which default is not even imminent, and thus that default—much less causation with respect to such default—is not a condition of a repurchase claim.

B. Directly Relevant Authority Holds That The Repurchase Obligation Can Extend To Performing Loans

A recent decision by Judge Crotty in the Southern District of New York held that a materially identical repurchase provision could apply to loans which breached representations or warranties even if they were still performing. *See Syncora Guarantee Inc. v. EMC Mortg. Corp.*, Index No. 09-Civ-3106, 2012 U.S. Dist. LEXIS 84937, at *17 (S.D.N.Y. Jun. 19, 2012), reconsideration denied, Dkt. No. 146 (Sep. 7, 2012). The repurchase provision in Syncora provided that the obligation to cure or repurchase a loan was triggered by discovery "of a breach of any representation or warranty of the HELOC Seller set forth in this Section 7 which materially and adversely affects the value of the interests of the Purchaser, the Noteholders, the Indenture Trustee or the Note Insurer in any of the HELOCs . . . or which adversely affects the interests of the Note Insurer." *Id.* at *7. The court held that this provision "does not require

[12] Sheth Aff. Ex. 48, at § 2.10; *see also* Exs. 42-47 and 49-50, at § 2.10; Exs. 51-56, at § 2.05(a).

Syncora to prove that EMC's alleged warranty breaches caused HELOC loans to default." *Id.* at *12. It reasoned that, under New York law, "an insurer has an interest in receiving complete and accurate information before deciding whether to issue a policy." *Id.* at *13 (citing to N.Y. Ins. Law § 3105(a) and to *Lin v. Metro. Life Ins. Co.*, No. 07-CV-3218, 2009 WL 806572, at *1 (S.D.N.Y. Mar. 30, 2009) ("Insurance is the business of pricing risk; and it cannot function efficiently if the insured conceals or misrepresents the risks a policy covers.")). Since "Syncora relied on EMC's representations and warranties in deciding whether to insure the Transaction and how to price that risk," it followed that "[a] breach of these warranties, if proven, would have adversely affected Syncora's interests as an insurer."[13] *Id.* at *14-15.

The court rejected EMC's argument—identical to Countrywide's here—that "any increased risk to Syncora as a result of the alleged breaches does not adversely affect Syncora's interest unless the breach caused a loan to default," and that "the repurchase provision contemplated a remedy only where breached representations and warranties caused actual adverse effect, and not simply an increase in risk." *Id.* at *15. In rejecting EMC's argument, the court held that "nothing in the language of the parties' agreements provides for this result, and New York law does not support EMC's construction." *Id.* The court reasoned that "the parties' written agreements do not provide that breaches of representations or warranties must cause any HELOC loan to default, before the Note Issuer can enforce its remedies under the repurchase provision. Had the parties intended this requirement, they could have included such language. They did not, and the Court will not do so now 'under the guise of interpreting the writing.'" *Id.* at *15-16 (quoting *Reiss v. Fin. Performance Corp.*, 97 N.Y.2d 195, 199 (2001)).

In fact, the court held that "the plain language of the parties' agreements suggests that this omission was deliberate." *Id.* at *16. Specifically, the agreements contained a provision,

[13] Although the court noted that provisions of the I&I applicable to the transaction at issue reinforced this conclusion, *id.* at *14, its reasoning would have led to the same conclusion even in the absence of the I&I. *Id.* Moreover, the fact that the Syncora repurchase provision was triggered by a breach that "adversely affects the interests of the Note Insurer," not merely by a breach that "materially and adversely affects" its interests, is immaterial to the question of precisely which "interest" the provision is referring to. The court made clear that it believed the relevant interest was the insurer's interest in accurately pricing risk at closing. *Id.* at *12-13.

materially identical to that in 11 of the 15 transactions here, which provided that, "with respect to any HELOC that is not in default or as to which default is not reasonably foreseeable, no repurchase or substitution pursuant to Sections 2.02, 2.03, or 2.04 shall be made unless [EMC] delivers to . . . the Note Insurer" an opinion of counsel concerning the tax implications of repurchase. *Id.* at *17. The court held that "the plain language of that provision makes clear that the parties intended Syncora to have a repurchase remedy even if there is no defaulting loan." *Id.* at *17-18. The court noted in support the general rule of contract construction that the court "should not find the language ambiguous on the basis of the interpretation urged by one party, where that interpretation would strain the contract language beyond its reasonable and ordinary meaning." *Id.* at *18 (quoting *Fed. Ins. Co. v. Am. Home Assurance Co.*, 639 F.3d 557, 568 (2d Cir. 2011).[14]

The court further noted that "at least one New York court has enforced repurchase provisions where representations and warranties as to the quality of defaulting loans were breached, regardless of whether the breach caused the default." *Id.* at *18 (citing *La Salle Bank N.A. v. Nomura Asset Capital Corp.*, No. 0603339/2003, 2006 N.Y. Misc. LEXIS 9296, at *70 (N.Y. Sup. Ct., Sept. 8, 2006), *aff'd in part*, 846 N.Y.S.2d 95 (1st Dep't 2007) (court found "nothing in the MLPSA that requires the plaintiff to show a causal link between the breach and the requirement that the defendants (the Sellers of the Mortgage Loans) either repurchase the loans . . . or [] cure the breach in all material respects.")). Other courts have likewise rejected attempts to impose extra-contractual conditions on a plaintiff's repurchase remedy. *See, e.g.*, *Resolution Trust Corp. v. Key Fin. Servs.*, 280 F.3d 12, 17 n.11 (1st Cir. 2002) (under New York law, evidence of injury to plaintiff was irrelevant to plaintiff's ability to invoke repurchase remedy); *Morgan Guar. Trust Co. v. Bay View Franchise Mortg. Acceptance Co.*, No. 00 Civ. 8613, 2002 WL 818082, at *15 (S.D.N.Y. Apr. 30, 2002) (enforcing repurchase remedy due to material breach of warranties without even discussing whether the loan had gone into default);

[14] Once again, although the court noted that a provision of the I&I reinforced this conclusion (*id.* at 9), the opinion makes clear that Section 2.05(a) by itself provided a sufficient basis for the conclusion. *Id.* at 10.

Orrix Capital Mkts., LLC v. Love Funding Corp., No. 04 Civ. 9890, 2005 WL 2582177, at *7 (S.D.N.Y. Oct. 11, 2005) (same). As one federal court recently explained:

> Evidence regarding the post-securitization market meltdown is relevant only if Plaintiff asserts material and adverse effects occurred after the securitization closing date. So long as Plaintiff asserts material and adverse effects as of the closing date, evidence regarding the post-securitization market conditions is inadmissible.

Wells Fargo Bank, N.A. v. LaSalle Bank N.A., No. Civ-08-1125-C, 2011 WL 1303949, at *8 (W.D. Okla. Apr. 1, 2011). Likewise, in this action, MBIA asserts that Countrywide's misrepresentations regarding the loans underlying the Securitizations breached Countrywide's repurchase obligations as of the closing date, and that, upon this showing, Countrywide must repurchase such loans.

C. Countrywide's Witnesses Have Testified That Countrywide Repurchased Performing Loans

Countrywide's witnesses have testified that, at least before it became apparent just how many of Countrywide's loans had breached representations and warranties and would have to be repurchased, Countrywide itself agreed that it was contractually obligated to repurchase breaching loans even if they had not defaulted. Thus, for example, Rod Williams, Managing Director in Countrywide's Credit Risk Management group, testified that loans that had received an SUS rating[15] but were still performing at the time that they were referred to Countrywide's investor audit division would be repurchased, sometimes even without waiting for a repurchase demand. Sheth Aff. Ex. 105, at 141:4-141:16. According to Mr. Williams, Countrywide would repurchase such loans if they "thought they had breached a contract, and so that it was felt there was an obligation"—specifically, "a legal, contractual obligation." *Id.* at 142:20-143:8. Moreover, "[t]hat policy started before [he] came into [his] role and continued," and "was still in effect when [he] left" in January of 2008. *Id.* at 143:7-11; 23:14-24:4.

[15] *See supra* II.B.

Mr. Williams and another Countrywide witness, Countrywide's former Chief Risk Officer, John McMurray, also testified that, after Countrywide began to receive substantially more repurchase requests in 2005, it put stricter rules for approving a repurchase request in place. *Id.* at 607:11-18; Sheth Aff. Ex. 181, at CWMBIA0011062276; Ex. 153, at 85:10-86:20. The "central tenet" of these stricter rules was that, to qualify for repurchase, a loan must have defaulted, the default must be directly attributable to a material breach by a CFC employee, and the breach must have resulted in a material loss. *Id.* Ex. 153 at 87:9-20, 89:19-90:7; Ex. 182. However, Mr. McMurray testified that the new requirements were more "aspirational" than mandatory, *id.* Ex. 153, at 87:19-20; that his recollection is that Countrywide repurchased performing loans both before and after the new requirements were put into place, *id.* at 88:21-89:10; and that Countrywide was attempting to build the new requirements into new contracts it was entering into, *id.* at 94:17-95:20—which it clearly did not do with MBIA.

Similarly, Michael Schloessman, the current President of Countrywide Home Loans, Inc. who was the head of Countrywide's Representations and Warranties Group (formerly the Workout Strategies Group) for approximately three years,[16] testified that performing loans may be repurchased, albeit only after a heightened ("Tier 3 or 4") level of review. *See id.* Ex. 161, at 1026:8-12 ("Q. By contrast, for currently performing loans approvals would be made only at the level of tier 3 or tier 4? . . . A. Yes. That's my understanding."). Mr. Schloessman explained that "if we were being asked to buy back a loan that was currently performing . . . we believed that it was prudent to require more seasoned and senior level awareness before approving it. *Not that we wouldn't.* But that we wanted greater governance around those repurchases." *Id.* at 1137:2-9 (emphasis added). To the same effect, Countrywide's Senior Loan Review Manager, Ms. Karen Jewett, testified that a loan "does not have to be in default" to be repurchased. *Id.* Ex. 183, at 310:3-19.

[16] *See id.* Ex. 159, at 33:5-34:5; Ex. 161, at 830:13-831:13.

Accordingly, MBIA respectfully submits that summary judgment on this issue is warranted, and that the Court should issue a declaration that, on its claim for breach of CHL's repurchase obligations under the Insurance Agreements, MBIA need establish only that a loan breached a representation or warranty in a way that materially and adversely affects MBIA's interests, and that it need not further show that the defective loan was non-performing or that the non-performance was caused by Countrywide's breaches of representations and warranties.

II. COUNTRYWIDE ACKNOWLEDGED THAT CERTAIN LOANS IN THE SECURITIZATIONS SHOULD BE REPURCHASED

A. Countrywide Failed To Repurchase Mortgage Loans Recommended For Repurchase By Its Own Expert

Countrywide was contractually obligated to repurchase defective loans when it became aware of, or discovered such loans.[17] Here, although Countrywide's own loan-review expert, Ms. Karen S. Godfrey, recommended that [redacted] loans in the Random Samples be repurchased, Countrywide failed to repurchase all but one of those loans. Aff., Ex. 68, at 6-7, 55-56. Ms. Godfrey acknowledged that Countrywide should repurchase [redacted] mortgage loans in the Random Samples on the grounds that (i) she could not demonstrate Mr. Butler's loan-level findings to be incorrect; and (ii) these [redacted] loans experienced their first serious delinquency within the first two years after origination.[18] *Id.* at 6, n.4; *see also* Ex. 112. Because CHL has not come forward with any evidence justifying its failure to repurchase these loans, and in fact has conceded that they should be repurchased, this Court should grant summary judgment that CHL breached its contractual obligations relating to [redacted] of these [redacted] loans. As noted earlier, when the rate of loans that Ms. Godfrey recommended for repurchase is extrapolated across the Securitizations, there are an estimated [redacted] loans with a total original principal balance ("OPB") of [redacted].

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[17] *See* Sheth Aff. Ex. 48, at § 2.04(d) (obligation to repurchase triggered upon becoming aware of a defective loan or upon discovery of a defective loan); Ex. 51, at § 2.03(f) (obligation to repurchase triggered upon discovery of a defective loan).

[18] Ms. Godfrey's suggestion that the timing of a serious delinquency or default is relevant to whether an actionable breach of the repurchase obligation has occurred, is legally incorrect and factually unsupported. Supra, Section I.

B. Countrywide Refused To Repurchase Mortgage Loans That It Rated SUS

In each of the Securitizations, CHL represented and warranted that each mortgage loan included in the Securitizations was underwritten in accordance with CHL's underwriting guidelines. *Id.* Ex. 33, at § 3.02(xxxvi); Ex. 34, at § 3.02(xxxviii); Ex. 35-41, at § 3.02(a)(37); Exs. 51-56, at § 2.03(b)(45). CFC's CQC Department was responsible for conducting reviews of samples of loans funded each month to determine whether loans originated by the production divisions were underwritten in accordance with Countrywide's underwriting guidelines.[19] In Countrywide's words, "[CQC] regularly independently audits a minimum percentage of closed loans each month to insure all closed loans meet or exceed Countrywide, investor, regulatory agency and overall industry quality standards." *Id.* Ex. 99, at CWMBIA0011001654. Loans reviewed by the CQC Department generally received one of four ratings: (i) severely unsatisfactory, (ii) high risk; (iii) document deficiency; and (iv) acceptable risk. *Id.* at CWMBIA0011001655.

The worst rating that CQC could assign a loan was "severely unsatisfactory" or "SUS." *Id.* In fact, a loan that had been rated as such by the CQC Department was found to violate underwriting guidelines <u>and</u> pose a "[s]evere underwriting risk with limited or no compensating factors." *Id.* The SUS rating also applied to "loans with fraud," and loans for which "[d]ocuments that [were] necessary to approve the loan [were] missing, incomplete, or fraudulent."[20] Countrywide also recognized the increased credit risk associated with SUS loans in that it acknowledged that "[t]he probability of default is unacceptably high" for SUS loans. *Id.* Countrywide further acknowledged that an SUS loan would "result in repurchase if/when

[19] *Id.* Ex. 101, at 18:14-20:6 (purpose of quality control was to "audit loans that were originated by the production divisions...from a credit standpoint" and the "majority of [the] audits were full underwriting," that is, "the underwriter in QC would take the loan and they would completely re-underwrite it, as if they were starting from scratch and a decision had never been made on the loan."); Ex. 105, at 86:14-91:6 (determining "whether those loans [selected for quality control review] were originated in accordance with the company's underwriting guidelines" was "a component of the review.").

[20] *Id.*; *see also id.* Ex. 104, at 472:13-16; Ex. 100, at CWMBIA-G0000103497 (SUS loans have "critical underwriting or documentation errors or contains fraud. Loan approval is clearly not justified...[and] documentation in the file does not support the underwriting decision.").

investor becomes aware of issue(s)," and that, "[i]f reviewed, there is an unacceptably high probability of fallout, indemnification or repurchase." *Id.* Ex. 217, at CWMBIA0013058780. Moreover, assigning a loan an SUS rating indicates that Countrywide itself believes that it may have a legal obligation to repurchase the loan suffering from such defects under the Transaction Documents. *See id.* Ex. 104, at CWMBIA-G0000077880-81 (testimony by Countrywide Senior Executive that loans rated SUS did not meet investor requirements and thus, could be the subject of a repurchase demand that would in most instances be approved for repurchase).

It is undisputed that the CQC Department determined that [redacted] mortgage loans in the Securitizations were rated "Severely Unsatisfactory." *Id.* Exs. 97, 108. Despite the representation and warranty ensuring that each loan in the Securitizations adhered to CHL's underwriting guidelines, and CFC's own knowledge that each of the [redacted] SUS-rated loans did not adhere to Countrywide's underwriting guidelines and had an unacceptable level of credit risk, Countrywide improperly included these loans in the Securitizations. Moreover, in 2008, before it knew that Countrywide's CQC Department had determined these loans to be SUS, MBIA requested that Countrywide repurchase 97 of these [redacted] loans. *Id.* Exs. 97, 108. Despite Countrywide's determination that such loans failed to comply with underwriting guidelines and posed severe underwriting risk with limited or no compensating factors, Countrywide failed to repurchase 90 of these 97 loans. *Id.* Accordingly, this Court should grant summary judgment that CHL breached its contractual obligations relating to [redacted] of these [redacted] loans.

III. IT IS UNDISPUTED THAT CHL BREACHED REPRESENTATIONS AND WARRANTIES IN THE TRANSACTION DOCUMENTS AND THAT SUCH BREACHES MATERIALLY AND ADVERSELY AFFECTED MBIA'S INTERESTS IN THE AFFECTED LOANS

Against the standard addressed in Section I above, MBIA must establish that: (i) CHL breached the representations and warranties in the Transaction Documents; and (ii) such breach materially and adversely impacted MBIA's interests in the affected loan. Here, it is undisputed that CHL breached certain representations and warranties in the Transaction Documents by including numerous mortgage loans in the Securitizations where: (i) there was no appraisal of the mortgaged property by a qualified appraiser; (ii) the income of the borrower was materially misrepresented and constituted a default under the mortgage or mortgage note; (iii) the MLS contained materially false and incorrect information regarding CLTV ratio, documentation program, loan purpose, piggyback status, FICO score, occupancy status, and lien status; (iv) the loan file was missing certain legal documents that were required to be contained in the loan file; and (v) the CLTV ratio of the mortgage loan exceeded 100%. Further, as to materiality, the documents produced in discovery and the binding admissions of Countrywide witnesses confirm beyond dispute that violations of these representations and warranties meaningfully and substantially increase the credit risk associated with the loan, and as such, have a material and adverse impact on MBIA's interest in the loan.

A. It Is Undisputed That CHL Breached Its Representation And Warranty To Obtain An Appraisal From A Qualified Appraiser

An appraisal is a report prepared by a licensed appraiser who inspects the property and records numerous details about it and then looks at similar properties that have sold recently in the same general geographic area. *Id.* Ex. 112, at 830:5-833:8 (testifying that an appraisal contains a "great deal of information," including a description of the property, such as the number of rooms, square footage, among others); *see also* Ex. 67, at 16-17. The purpose of the appraisal is to determine the value of the collateral property.

CHL represented and warranted to MBIA that an appraisal of the value of the mortgaged property was obtained from a "qualified appraiser" prior to approving a mortgage loan application.[21] In this action, Countrywide has conceded that this representation and warranty

[21] More specifically, the HELOC Securitizations contain the following representation and warranty: "[b]efore the approval of the Mortgage Loan application, an appraisal of the related Mortgaged Property was obtained from a qualified appraiser, duly appointed by the Sponsor, who had no interest, direct or indirect, in the Mortgaged Property or in any loan secured by the Mortgaged Property, and whose compensation is not affected by the approval or disapproval of the Mortgage Loan." *See, e.g., id.* Ex. 34, at § 3.02(a)(52)); *see also* Exs. 35-41. Countrywide made a similar representation and warranty for the CES Securitizations which provided that: "[p]rior to the approval of the Mortgage Loan application, an appraisal of the related Mortgaged Property was obtained from a qualified appraiser, duly appointed by the originator, who had no interest, direct or indirect, in the Mortgaged Property or in any loan made on the security thereof, and whose compensation is not affected by the approval or

requires an appraisal by a licensed and duly qualified appraiser. *Id.* Ex. 113, at 507:13-508:18 (testimony of Countrywide senior executive that the appraisal requirement would be satisfied by obtaining an appraisal that was performed by a duly qualified, licensed appraiser, and the absence of any glaring errors in the appraisal); Ex. 103, at 1031:12-1032:6 (testimony by Countrywide that an appraisal is a form that is completed by a licensed appraiser).

1. Hundreds Of Mortgage Loans In The Random Samples Did Not Contain An Appraisal From A Qualified Appraiser

In spite of this representation and warranty by CHL, there are 1,423 mortgage loans in the Random Samples that do not contain an appraisal of the related mortgaged property from a qualified appraiser.[22] Butler Aff., Ex. 1. When extrapolated to the Securitizations, this defect is estimated to affect 94,066 mortgage loans with an OPB of $4,481,609,914. Cowan Aff., Ex. 1. At most, the 1,423 mortgage loans contained an alternate form of valuation such as a "stated value" valuation, a valuation returned by an automated valuation model ("AVM"), or a property valuation update. None of these alternative forms of valuation constitute an appraisal by a qualified appraiser as required by the representation and warranty in the Transaction Documents. For example, in a stated value valuation, there is no appraisal performed by a qualified appraiser. Rather, the borrower simply provides his or her own estimate of the property's value with little to no independent verification of that stated value by Countrywide. Sheth Aff. Ex. 112, at 843:14-845:12; Ex. 114, at 219:3-221:3 ("it's essentially when you ask a borrower how much his house is worth. And that's your form of appraisal."). Similarly, an AVM does not consist of an on-site inspection of the property by a licensed appraiser, and does not rely upon an

disapproval of the Mortgage Loan; such appraisal is in a form acceptable to Fannie Mae and Freddie Mac." *Id.* Ex. 51, at § 2.03(b)(46)); *see also id.* Exs. 51-56.

[22] MBIA's re-underwriting expert found many other types of appraisal-related defects during his re-underwriting review. For purposes of this motion, MBIA has included only those findings where there was no appraisal in the file by a qualified appraiser. In addition, MBIA's re-underwriting expert reviewed the approximately 3,000 loans that were reviewed by the third-party due diligence firms retained by Countrywide prior to the closing of the Securitizations (the "Due Diligence Sample"). There are at least another 700 loans in the Due Diligence Sample that are missing an appraisal by a qualified appraiser. Butler Aff., Ex.12.

appraiser's input at all.[23] Instead, an AVM uses an electronic database to gather public records information in determining property valuations.[24] In fact, many of the details describing the property, the neighborhood in which the property is located, and the comparables are not contained in an AVM valuation.[25] Likewise, it is uncontested that a "property valuation [is] less extensive than a full-blown residential mortgage appraisal," *id.* Ex. 112, at 845:13-846:6, and was generally used by Countrywide's appraisal management company, LandSafe, to "update[] the value when an appraisal was over 120 days old," *id.* Ex. 103, at 1033:19-23. Indeed, Countrywide's CLD guidelines describe "Property Valuations" and "Property Valuation Updates," as "AVM appraisal result[s]."[26]

In addition, it is uncontested that three mortgage loans in the Random Samples had an appraisal that was performed by an unlicensed appraiser. Butler Aff. Ex. 1. All appraisers must be licensed by the state in which they appraise property, and they have different designations and requirements based on the organization that sponsors the appraiser.[27] An inactive license may be an indication of an appraiser that has not complied with appraiser requirements or an appraiser who has been disciplined and is no longer licensed to be an appraiser. Sheth Aff. Ex. 67, at 121. Thus, CHL's failure to obtain appraisals from licensed appraisers breaches the representation and warranty relating to appraisals.

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[23] *Id.* Ex. 117, at CWMBIA-G0000087252, CWMBIA-G0000087345 (AVM "[d]oesn't replace the appraiser since this is database information only and a completely automated product.").

[24] *Id.* Ex. 117, at CWMBIA-G0000087252, CWMBIA-G0000087345; Ex. 114, at 219:3-221:3 (describing AVM as a "statistical model that's estimating the market value of a property.").

[25] *Id.* Ex. 112, at 837:17-839:16 (a full appraisal has "substantially more information" on it compared to an AVM, which is based on information in a database and not based on physical inspection of the property)); Ex. 103, at 1031:12-1034:25 (a full appraisal is conducted by a licensed appraiser who physically inspects the property, whereas an AVM is based on an electronic database and does not require a physical inspection of the property by a licensed appraiser).

[26] *Id.* Ex. 118, at CWMBIA0008726806.

[27] *Id.* Ex. 119, at CWMBIA-G0000050307. *See also id.* Ex. 103, at 1031:20-1032:6.

2. Failure To Obtain An Appraisal From A Qualified Appraiser Increases The Credit Risk Of The Loan

Countrywide has acknowledged that the lack of an appraisal from a qualified appraiser increases the credit risk associated with the affected loan, and thus, materially and adversely affects MBIA's interest in that loan. The importance of an appraisal to assessing the value of the mortgaged property is undisputed. Countrywide's CQC Department would rate a loan "severely unsatisfactory" if the appraisal is missing.[28] Countrywide's Technical Manual ("CTM")—which provided guidance to underwriters on the mechanics of underwriting mortgage loans—further highlights the importance of appraisals noting that "[a]ppraisals must be carefully underwritten to ensure the value and marketability of the collateral property are valid and supported."[29] The CTM also states that Countrywide "is responsible to its investors for the quality of appraisals used to support the value of a security property."[30]

There can be no dispute that alternative forms of valuation do not contain the level of detail and quality of information provided by an appraisal, and are not performed by a qualified appraiser. As such, they do not satisfy the representation and warranty regarding appraisals. Indeed, senior executives from Countrywide recognized, for example, that stated-value and AVM valuations did not comply with the representation and warranty in the securitization transaction documents relating to appraisals. *Id.* Ex. 198; Ex. 116, at 121:11-14 (testimony by Countrywide senior executive that "an AVM isn't completed by a licensed appraiser, so if . . . [the representation and warranty] says it's a licensed appraiser, AVM doesn't fit.").[31] Moreover,

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[28] *Id.* Ex. 187 (loan audit database shows loans [redacted] and [redacted] were rated "severely unsatisfactory" because both were missing appraisals).

[29] *Id.* Ex 120, at CWMBIA-G0000051670.

[30] *Id.* Ex. 119, at CWMBIA-G0000050309; *see also* Ex. 122.

[31] Even after realizing that the inclusion of stated-value loans breached the representation and warranty relating to appraisals, Countrywide did nothing to revise the representations and warranties or the disclosures in the Prospectus Supplements. *Id.* Ex. 123, at 110:15-111:7.

executives from CSC and CHL's Secondary Marketing Division recognized that mortgage loans originated using such valuations may need to be repurchased.[32]

Countrywide not only stressed the importance of the appraisal to determining the value of the mortgaged property, but it also recognized the importance of the appraisal being performed by a licensed appraiser. For example, the CTM also provides that the appraiser must be "state licensed/certified."[33] Indeed, Countrywide's own loan review expert explained the rationale of the requirement that the appraiser be licensed when she testified that "in general there are some benefits of using a licensed appraiser that relate to what is behind the license; that is a demonstrated level of knowledge, experience and professionalism, and adherence to code of ethics." *Id.* Ex. 112, at 841:4-14. Moreover, Countrywide recognized that it could submit repurchase demands to third party originators and correspondent lenders if they sold loans to Countrywide that did not contain an appraisal performed by a licensed appraiser.[34]

Given the importance of an appraisal performed by a qualified appraiser to valuing the mortgaged property, there can be no dispute that the absence of such an appraisal had a material and adverse impact on MBIA's interest in the affected mortgage loan.

B. It Is Undisputed That CHL Breached Its Representation And Warranty That No Default Exists Under The Mortgage Loan Or Mortgage Note

The HELOC Securitizations contain a representation and warranty stating that "no default exists under any applicable Mortgage Note or applicable Mortgage Loan and no event that, with the passage of time or with notice and the expiration of any grace or cure period,

[32] *Id.* Ex. 124, at CWMBIA0009830773 (statement by CSC executive suggesting that it needed "to look at having CHL buy back all stated value loans."); *id.* at CWMBIA0009830772 (statement by CHL Secondary Marketing executive that Countrywide "may end up having to repurchase all loans with stated values"); *id.* Ex. 125 (executive in Secondary Marketing Division raising concerns that continuing to include stated value loans in the securitizations would require revisions to be made to Countrywide's disclosures and representations and warranties).

[33] *Id.* Ex. 119, at CWMBIA-G0000050307 ("Appraisers must be state-licensed/certified as required by the provisions of Title IX of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) of 1989")); Ex. 103, at 1031:12-1034:25 ("appraisers are licensed in some form").

[34] *Id.* Ex. 118, at CWMBIA0008726791 ("[FIRREA] requires appraiser licensing or certification. All loans, therefore, sold to Countrywide must contain an appraisal by an appraiser licensed or certified under appropriate laws. Loans may be subject to repurchase if the appraiser does not meet the licensing requirements.").

would constitute a default under any applicable Mortgage Note or Mortgage Loan has occurred and been waived." *See, e.g., id.* Ex. 39, at § 3.02(a)(36)); *see also* Exs. 33-38, 40-41. The Home Equity Credit Line Agreement and Disclosure Statements (or HELOC Agreement) contained in the mortgage loan files typically provide that the lender may take a number of actions in reaction to the borrower being "in default of any material obligation of this Agreement, such as my important obligations listed in paragraph 12 below," which include a promise that the borrower has "not made and will not make any misrepresentation in connection with my Account whether in my application, in this Agreement, or in the Mortgage."[35] Thus, a borrower's misrepresentations as to income, for example, would constitute a "default" under the Mortgage Note or Mortgage Loan, and thus, would breach the no-default representation and warranty.

1. <u>Hundreds of Loans In The Random Samples Breached The No-Default Representation And Warranty</u>

Based on MBIA's review of the documents obtained in response to approximately 1,700 subpoenas it issued to employers and accountants requesting verification of the income provided by the borrower in his or her loan application, at least 626 mortgage loans[36] in the Random Samples contained a misrepresentation of income.[37] When extrapolated across the HELOC Securitizations, it is estimated that 40,379 loans with an OPB of $2,641,313,479 suffer from misrepresentations of income. Cowan Aff., Ex. 1. Countrywide has offered no substantive rebuttal to these factual findings. Indeed, Countrywide's only response to these findings is its expert's blanket assertion that MBIA improperly relied on documents that were not available to

[35] *See, e.g., id.* Ex. [redacted], HELOC Agreement for Loan No. [redacted], at CWMBIA-D0012998918, CWMBIA-D0012998919.

[36] The Countrywide Technical Manual specified that if the verified income is less than the income entered into CLUES by more than 5% or the resulting DTI changes by two percent or more, the "user must update the income and resubmit the file to CLUES." As such, for purposes of this motion, MBIA has narrowed the findings of its re-underwriting expert to those loans where income provided by the borrower in the loan application was greater than the verified income from the subpoenaed documents by five percent or more, or where the DTI increased by two percent or more. *See id.* Ex. 128, at CWMBIA0013089824.

[37] In addition, there are at least another 19 loans in the Due Diligence Sample where the borrower misrepresented his income. Butler Aff. Ex.13.

the underwriter at the time of origination. *Id.* Ex. 68, at 29. Even if true, such an observation is irrelevant to a breach of the no-default representation and warranty.

Moreover, Countrywide itself has recognized that [redacted].[38] Countrywide's loan review expert was unable to contest that such loans should be repurchased. In fact, she readily admitted that she had not reviewed the representations and warranties in the Transaction Documents and was not able to offer an opinion on whether the mortgage loans in the Random Samples complied with such representations and warranties. *Id.* at 100:21-101:5, 140:13-141:14.

Additionally, in discovery, Countrywide produced a spreadsheet [redacted] Accordingly, CHL's inclusion of loans in the HELOC Securitizations which contained misrepresentations of income breaches the no-default representation and warranty.

2. Misrepresentations Of Income Increase The Credit Risk Of The Loan

There can be no dispute that a misrepresentation of income increases the credit risk of the impacted loan, and as such, materially and adversely affects MBIA's interest in the loan.[39]

[38] *Id.* Ex. 128 (agreeing to repurchase 231 loans with an unpaid principal balance of approximately $23 million requested for repurchase from monoline companies based on misrepresentation of income); *see also*, *id.* Ex. 129 (agreeing to repurchase Loan No. [redacted] where the repurchase demand was based on "[e]xisting default on loan when transferred to Trust due to borrower misrepresentation regarding its income during the origination of the loan," and Countrywide's internal comments state that it concurs with this finding that the borrower misrepresented their income).

[39] *See Id.* Ex. 187, at 101:19-103:24 (testifying that it was a concern that income is misstated on the loan application); Ex. 116, at 193:4-196:13 (agreeing that (i) part of underwriting decision is based on the borrower's income; (ii) "a discrepancy between what the borrower states his income to be and his actual income...would then affect the borrower's likelihood of being able to repay that loan"; and (iii) if the "income is far less than what [the borrower] actually stated," that "increases the credit risk because it makes it more likely that the borrower is not going to be able to repay that loan"); 252:8-254:3 (agreeing that it would be a material finding where "at origination a loan -- a borrower who has an income that is ...less than what he actually states his income to be, that that is a situation where the credit risk would be increased"); Ex. 188, at 234:10-235:12 (inflated income leads to "severely

Given the importance of income in assessing credit risk, there can be no serious dispute that misrepresentations of income have a material and adverse impact on MBIA's interest in the affected mortgage loan through increased credit risk.

C. It Is Undisputed That CHL Breached Its Representation And Warranty To Provide True And Correct Information In The MLS

The MLS is a listing of the mortgage loans included in a particular securitization at closing and the credit characteristics of each of those loans, including but not limited to, CLTV ratio, documentation program, loan purpose, piggyback flag, borrower's credit score, occupancy status, and lien status. *See id.* Ex. 132, at 478:20-479:17. CHL represented and warranted that the information contained in the MLS was true and correct in all material respects.[40] The information contained in the MLS enables entities such as investors, rating agencies, and monoline bond insurers such as MBIA, to assess the credit risk associated with the pool of loans in a given securitization without the need to review the loan origination files for each of the underlying mortgage loans.[41] *Id.* Ex. 67, at at 123-24.

A violation of the representation and warranty relating to the accuracy of the MLS negatively affects any party to the Securitization who relies on the MLS to assess the credit characteristics of the pool of loans included in the securitization. *Id.* Ex. 176, at 191:20-192:7 (testimony by Countrywide executive that the MLS should be correct because it was used by investors to understand the elements of the pool of loans). If the information summarized in the MLS differs from the information contained in the loan origination files, the MLS will not

unsatisfactory" finding). Even Countrywide's experts agree that the income of the borrower is a predictor of loan performance. *Id.* Ex. 165, at 18 (using borrower income in the form of debt-to-income ratio as a predictor of loan performance).

[40] In the HELOC Securitizations, CHL provided that, "[a]s of the Closing Date the Mortgage Loan Schedule is correct in all material respects." *See, e.g., id.* Ex. 39, at § 3.02(a)(4); *see also id.* Exs. 33-38, 40-41. Similarly, CHL represented in the CES Securitizations that, "[t]he information set forth on the Mortgage Loan Schedule with respect to each Initial Mortgage Loan is true and correct in all material respects as of the Closing Date and is true and correct in all material respects as of the Subsequent Transfer Date with respect to the related Subsequent Mortgages." *See id.* Ex. 51, at § 2.03(b)(7); *see also id.* Exs. 52-56.

[41] It was standard securitization practice to receive an MLS at closing that was substantially similar to the pre-closing loan tapes that were used by the bond insurers to perform due diligence on the securitization. *Id.* Ex. 67, at 127; *see* Ex. 218, at 53.

accurately reflect the true credit risk associated with the mortgage loans included in a securitization. Such deviations between the information on the MLS and the loan origination files concerning the credit characteristics of the mortgage loans have a material and adverse effect on MBIA's interests because it has insured a pool of loans with a different credit risk profile than what was represented to it on the MLS. Indeed, CSC witnesses have acknowledged that providing accurate information in MLS is a "serious legal obligation." *See id.* Ex. 132, at 401:18-404:15.

1. The MLS Contain Materially False And Incorrect Information For Hundreds Of Mortgage Loans In The Random Samples

MBIA's re-underwriting review has revealed that the MLS contained materially false and incorrect information concerning at least 1,416 unique mortgage loans in the Random Samples. *See* Butler Aff. Exs. 3-9. More specifically as reflected in Exhibits 3-9 of the Butler Affidavit: (i) at least 238 mortgage loans had a higher CLTV ratio than was represented on the MLS; (ii) at least 185 mortgage loans were originated under a lesser documentation program than was represented on the MLS; (iii) at least 541 mortgage loans were refinances or cash-out refinances but were represented to be purchase loans on the MLS; (iv) at least 599 mortgage loans were piggyback loans but were represented to be stand-alone second liens on the MLS; (v) at least 20 mortgage loans had FICO scores that were materially lower than represented on the MLS; (vi) at least 12 mortgage loans were second homes or investment properties but were represented to be owner-occupied properties on the MLS; and (vii) at least 4 mortgage loans had a materially incorrect lien type represented on the MLS.[42] *Id.* When extrapolated across the Securitizations, it is estimated that there are 111,591 loans with an OPB of $7,123,893,500 where the MLS contains materially false and incorrect information.[43] Cowan Aff., Ex. 1.

[42] In addition, there are at least another 678 loans in the Due Diligence Sample where the MLS is not true and correct. Butler Aff., Exs.14-19.

[43] More specifically, it is estimated that (i) at least 15,250 mortgage loans with an OPB of $955,572,578 had a higher CLTV ratio than was represented on the MLS; (ii) at least 12,734 mortgage loans with an OPB of $725,492,470 were originated under a lesser documentation program than was represented on the MLS; (iii) at least 36,197 mortgage loans with an OPB of $2,601,462,378 were refinances or cash-out refinances but were represented

There can be no dispute that CHL breached the MLS representation and warranty, particularly given that Countrywide's loan review expert has withdrawn the portions of her report responding to these findings. *See* Sheth Aff. Ex. 148.

2. False And Incorrect Information On The MLS Increases The Credit Risk Of The Affected Loans

It is undisputed that each of these data fields contained on the MLS is relevant to the determination to approve the loan for funding and the assessment of the credit risk associated with a loan. As such, materially false and incorrect information on the MLS regarding each of these data fields resulted in the loan having greater credit risk than what was represented to MBIA. As such, a breach of the representation and warranty relating to the accuracy of the MLS materially and adversely impacted MBIA by causing it to insure a pool of loans that had greater credit risk than was represented.

(a) *Loans With Higher CLTV Ratios Have Increased Credit Risk*

The CLTV ratio is the ratio of total loan amount secured by a given property to the value of that property.[44] It is undisputed that the CLTV ratio was one of the criteria used by Countrywide to approve and price loans. Countrywide's underwriting guidelines specified the maximum CLTV ratio allowed under the published guidelines. Sheth Aff. Ex. 151, at CWMBIA-G0000048173-74 (specifying maximum CLTV of [95 percent]). Moreover, the CTM specified that loans that fell outside the CLTV limits set forth in the published guidelines had to be approved through a Divisional Structured Loan Desk or the Secondary Structured Loan Desk. *Id.* Ex. 152. In addition, Countrywide's internal rate sheets and pricing schedules confirm that

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to be purchase loans on the MLS; (iv) at least 45,264 mortgage loans with an OPB of $2,717,155,922 were piggyback loans but were represented to be stand-alone second liens on the MLS; (v) at least 1,109 mortgage loans with an OPB of $64,624,106 had FICO scores that were materially lower than represented on the MLS; (vi) at least 760 mortgage loans with an OPB of $29,276,655 were second homes or investment properties but were represented to be owner-occupied properties on the MLS; and (vii) at least 278 mortgage loans with an OPB of $30,309,392 had a materially incorrect lien type represented on the MLS. Cowan Aff., Ex. 1.

[44] For example, a property with a value of $100,000 with a first mortgage of $50,000 and a second mortgage of $25,000 has an aggregate mortgage balance of $75,000, and, thus, a CLTV of $75,000/$100,000 or 75 percent.

loans with higher CLTV ratios were deemed to be riskier and, thus, had higher interest rates. *Id.* Ex. 149, at CWMBIA0009213256.

The CLTV ratio is an important factor in assessing the credit risk associated with a loan.[45] Indeed, loans with higher CLTV ratios meant that the borrower had less equity[46] in the property, and thus, if there was a default, there would be a greater likelihood of loss.[47] Countrywide's internal default and pre-payment models used CLTV ratios to project and estimate the likelihood of defaults and pre-payments. *Id.* Ex. 160, at 460:7-462:9 (testimony by managing director of CSC's Transaction Management Group); Ex. 155, at 44:1-9 (one of the inputs to Countrywide's loss model was loan-to-value ratios). Countrywide's own experts agree that CLTV ratios are "relevant predictors of loan performance" in that "a borrower has less of an incentive to repay a loan when the equity in the home declines below the outstanding loan balance and is therefore more likely to default." *Id.* Ex. 158, at 1-2.

As such, where the actual CLTV exceeds the CLTV on the MLS, such inaccuracies have a material and adverse impact on MBIA's interests because it insured Securitizations with pools of loans that had greater credit risk than what was represented to it.

(b) *Loans Originated Under Reduced Documentation Programs Have Increased Credit Risk*

The documentation program was one of the criteria used by Countrywide to approve and price loans. The documentation program specifies the level of documentation required to

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45 *Id.* Ex. 156, at 127:10-16 (Countrywide's former Chief Production Officer testifying that CLTV was one of the factors to consider in assessing the credit risk of a loan); Ex. 157, at 21:15-22:2 (testimony by senior executive in Countrywide's Credit Risk Management Division that loan-to-value ratio could affect credit quality of a loan).

46 Equity is defined as one minus the CLTV ratio, adjusted for house price changes. *Id.* Ex. 158, at 1.

47 *See supra* III.E; *see also* Sheth Aff. Ex. 153, at 48:10-49:8 (Countrywide's former Chief Risk Officer testifying that CLTV is one of the most important drivers of delinquency and default); Ex. 102, at 579:8-580:18 (Countrywide's EVP of the CQC Department explaining that there is a higher risk of loss on a loan with a higher loan-to-value); Ex. 150, at 257:17-258:3 (executive from Countrywide's Secondary Marketing Division testifying that if CLTV was understated, the risk of the loan would also be understated); Ex. 156, at 126:9-128-18 (testimony by Countrywide's former Chief Production Officer that CLTV ratios were positively correlated with likelihood of delinquency and default); Ex. 105, at 126:22-129:1 (testimony by managing director in Countrywide's Credit Risk Management Department that loans with higher CLTV ratios have higher incidences of default historically).

originate, underwrite, and approve a particular mortgage loan. Countrywide's published guidelines varied by the level of documentation required to approve the loan. *Id.* Ex. 173 (maximum CLTV and maximum loan/line amount depend in part on documentation type). In addition, Countrywide's rate sheets illustrate the negative correlation between the level of documentation required and interest rate charged on a loan, further confirming the increased credit risk associated with reduced documentation loans.[48]

The documentation program is one of the key indicators of the credit risk associated with a given loan.[49] Countrywide's internal default and pre-payment models used documentation type to project and estimate the likelihood of defaults and pre-payments. *Id.* Ex. 160, at 460:7-462:9 (testimony by managing director of CSC's Transaction Management Group). Furthermore, Countrywide's own experts agreed that documentation program is a factor used in predicting loan performance. *Id.* Ex. 165, at 18-19 (using documentation type as a variable to predict loan performance); Ex. 166, at 25 (loan documentation type is a loan characteristic that may be relevant for assessing risk and explaining default); Ex. 158, at 1 (including documentation program as "another indicator of credit quality" because "[a]cademic research has shown that loans with less than full documentation are more likely to default than fully documented loans.").

Thus, all else being equal, a loan originated under a reduced documentation program has a greater credit risk, and thus higher risk of delinquency and default than a loan originated under a full documentation program. As such, where the actual documentation program under which the loan was originated is less rigorous than the documentation program specified on the MLS,

[48] *Id.* Exs. 162-163 (demonstrating pricing adjustments specific to reduced documentation mortgage loans); *see also* Ex. 150, at 136:11-17; 163:13-16 (testimony by senior executive in Countrywide's Secondary Marketing Division that a reduced documentation loan would generally have a higher interest rate charged than a full documentation loan, all other things being equal); Ex. 164, at 234:22-235:9 (testimony by senior Countrywide executive that interest rate or fees charged to borrower would have been higher on a reduced documentation loan than on a full documentation loan).

[49] *See, e.g., id.* Ex. 153, at 48:10-49:8 (testimony by Countrywide's Chief Credit Risk Officer that the level of documentation was one of the four most important drivers of delinquency and default)); Ex. 150, at 32:3-14 (documentation type is a "major" risk characteristic); Ex. 156, at 126:9-128-18 (testimony by Countrywide's former Chief Production Officer that documentation levels were a factor he would consider in assessing risk); Ex. 105, at 126:22-127:5 (testimony by managing director in Countrywide's Credit Risk Management Department that loans with limited documentation programs have higher incidences of default historically).

such inaccuracies have a material and adverse impact on MBIA's interests in that it insured Securitizations secured by loan pools that had greater credit risk than what was represented.

(c) *Loans That Are Cash-Out Refinances Have Increased Credit Risk*

The loan purpose indicates the reason the borrower applied for the loan, and may include categories such as purchase, refinance, and cash-out refinance. *See id.* Ex. 167, at 326:16-327:5. A purchase loan is one where the borrower obtained the loan to purchase residential property. *Id.; see also id.* Ex. 67, at 129. A refinance is a mortgage loan that is obtained to lower the interest rate and/or extend the term of the loan with the result that the borrower's monthly payment is reduced. *Id.* A cash-out refinance is when the borrower takes out a new mortgage at an amount that exceeds the existing balance on the current mortgage to refinance the original mortgage and receive additional cash for other use. *Id.*

Like the other factors discussed above, loan purpose is also an important indicator of the credit risk associated with a given loan. A purchase loan is the least risky while a cash-out refinance is the most risky, all else equal.[50] Countrywide's own experts also acknowledged that refinances and cash-out refinances have greater credit risk than purchase loans. *Id.* Ex. 165, at 18; Ex. 154, at 229:3-231:11 (using loan purpose as a predictor of loan performance and recognizing that a refinance or a cash-out refinance generally had a higher probability of delinquency).

As such it is undisputed that misrepresentations as to loan purpose can increase the credit risk of a loan. Accordingly, where the actual loan purpose is a cash-out refinance but the MLS reflects a purchase loan or a refinance, such inaccuracies have a clear material and adverse

[50] *Id.* Ex. 115, at 490:22-491:3 ("generally the loans that are cash out refinance transactions have a higher propensity to default than, say, a purchase transaction."); Ex. 153, at 244:9-245:1 (testimony by Countrywide's former Chief Risk Officer that loan purpose was among the key drivers of serious delinquencies and defaults for HELOCs and fixed rate second liens); Ex. 132, at 142:18-142:22; 143:21-144:12 (loan purpose was a "critical" factor to make a decision regarding the credit quality of a loan); Ex. 156, at 126:9-128-18 (testimony by Countrywide's former Chief Production Officer that loan purpose was correlated with likelihood of delinquency and default).

impact on MBIA's interests because it insured Securitizations with pools of loans that had greater credit risk than what was represented to it.

(d) *Loans That Are Piggybacks Have Increased Credit Risk*

A piggyback loan is a second mortgage that is closed concurrently with the first mortgage. *Id.* Ex. 168, at 226:31-227:21; *see also* Ex. 67, at 131. In a piggyback loan, the first mortgage covers 80% of the value of the property, while the second mortgage covers 10%, 15% or even the remaining 20% of the value of the home. *See id.* Ex. 169, at 533:2-534:8). Piggyback loans are used by lenders to allow the borrower to acquire or refinance a home with less than a 20 percent down payment (or equity) but without the necessity of carrying private mortgage insurance. *Id.* at 533:7-535:23; Ex. 213, at 87:19-88:5. As a result, piggyback loans have higher CLTV ratios than stand-alone seconds.

For the same reasons set forth above in Section III.C.2.(a) regarding higher CLTV ratios, piggyback loans have greater credit risk than stand-alone second liens because the borrower has less equity in the property and the resulting CLTV is higher. Indeed, Countrywide's internal rate sheets and pricing schedules confirm that pricing adjustments were made to piggyback loans to compensate for the additional credit risk and higher cumulative losses associated with the loan. *Id.* Exs. 162-163. Moreover, multiple Countrywide witnesses acknowledged the increased credit risk associated with piggyback loans due to the fact that the CLTV ratios were close to or at 100%, and equity was the biggest driver of credit performance in any credit model.[51]

As such, there is no dispute that a piggyback loan carries a greater risk of loss than a stand-alone second lien. Accordingly, where the loan is actually a piggyback loan but the MLS reflects that it is a stand-alone second lien, such inaccuracies have a material and adverse impact

[51] *Id.* Ex. 169, at 533:7-535:23 (testifying that piggyback loans were a "concern" and agreeing that they represented a higher risk); Ex. 170, at 78:11-14, 82:24-84:3 (testimony by Countrywide senior executive responsible for modeling that a piggyback loan has greater credit risk than a stand-alone second); Ex. 171 (Countrywide added "piggyback" flag to the second lien scorecard in or about 2007 to account for increased credit risk associated with piggyback loans).

on MBIA's interests because it insured Securitizations with pools of loans that had greater credit risk than what was represented to it.

(e) *Loans Made To Borrowers With Lower FICO Scores Have Increased Credit Risk*

The borrower's credit score was one of the criteria used by Countrywide to approve and price loans. Countrywide's underwriting guidelines specified the requirements for approval, including maximum CLTV ratio, maximum loan/line amount, title requirements, and the acceptable credit history, based on the credit score of the borrower. *Id.* Ex. 151 (categorizing credit score as Gold, Preferred, and Flex, based on borrower's credit score). In addition, Countrywide's internal rate sheets and pricing schedules confirm that loans made to borrowers with lower credit scores received a pricing adjustment to compensate for the additional credit risk and higher cumulative losses associated with the loan.[52]

The borrower's credit score is used to assess a borrower's ability to repay a mortgage, and thus, is an important factor in assessing the credit risk associated with a loan.[53] Countrywide's own experts similarly acknowledged the role of the borrower's credit score in predicting the borrower's ability to repay the loan, and thus, the likelihood of default. *Id.* Ex. 112, at 824:6-826:6 (FICO is "one factor that is often used" to "predict a borrower's ability to

[52] *Id.* Ex. 149, at CWMBIA0009213254–66; *see also* Ex. 172, at 267:5-20 (testimony from Countrywide's former Chief Operating Officer that FICO score was a risk-based characteristic that would affect the pricing of a loan); Ex. 150, at 138:10-17 (testimony from senior executive of Countrywide's Secondary Marketing Division that as the borrower's credit score decreases, the interest rate increases).

[53] *Id.* Ex. 156, at 127:10-13 (testimony from Countrywide's former Chief Production Officer that he would consider credit score when "determining or assessing the risk of the loan"); Ex. 157, at 21:15-22:2 (testimony by senior executive in Countrywide's Credit Risk Management Division that credit score could affect credit quality of a loan). All other things equal, the higher the borrower's credit score, the stronger the borrower's credit, based on past repayment history, utilization of credit, available credit, and other factors. In contrast, the lower the borrower's credit score, the greater the credit risk associated with the loan. *Id.* Ex. 174, at 216:5-14 (" the lower the FICO score, the riskier the transaction."); Ex. 153, at 48:10-49:8 (testimony by Countrywide's former Chief Risk Officer that FICO was among the most important drivers of serious delinquencies and defaults for HELOCs and fixed rate second liens); Ex. 105, at 126:22-127:8 (testimony by managing director in Countrywide's Credit Risk Management Department that loans with lower FICO scores have higher incidences of default historically); Ex. 156, at 126:9-128:18 (testimony by Countrywide's former Chief Production Officer that FICO scores correlated with likelihood of delinquency and default); Ex. 160, at 460:7-462:9 (testimony by managing director of CSC's Transaction Management Group that FICO scores were used by Countrywide's internal models to project and estimate the likelihood of default and pre-payment).

pay in the future" and "pretty much the industry standard for most lenders as one part of their total assessment."); Ex. 158, at 1 ("All else equal, a borrower with a higher FICO score is more creditworthy and is therefore less likely to default or become delinquent on loan payments."); Ex. 154, at 71:25-72:3 (agreeing that there is a general consensus that FICO score affects loan performance).

As such, it is undisputed that loans with lower FICO scores have a greater risk of loss than loans with higher FICO scores all else equal, and thus, false and incorrect information regarding the borrower's FICO score can affect the credit risk associated with a mortgage loan. Accordingly, where the actual FICO score is less than the FICO score reflected on the MLS, such inaccuracies have a material and adverse impact on MBIA's interests because it insured Securitizations with pools of loans that had greater credit risk than what was represented to it.[54]

(f) *Loans Secured By Non-Owner Occupied Properties Have Increased Credit Risk*

Occupancy type refers to one of three categories: (i) owner-occupied; (ii) second homes or vacation homes; and (iii) investment properties. *See id.* Ex. 175. In owner-occupied properties, the borrower will live in the house as a primary residence. *Id.* Second or vacation homes are those homes which are occupied on a part-time basis by the borrower. Investment properties are properties where the borrower is buying a house to rent it out as an investment and does not intend to occupy the house.

The borrower's occupancy status was one of the criteria used by Countrywide to approve and price loans. Countrywide's underwriting guidelines indicate that the requirements for approval, including CLTV ratio, FICO score, loan amount/line amount, documentation type, and

[54] Both the pricing sheets and the Loan Program Guides categorize FICO scores into three or four buckets. Throughout the time period from 2004 to 2007, the Loan Program Guides and the pricing schedules categorized FICO scores into the following buckets: (i) "Gold Credit Score" as greater than or equal to 700; (ii) "Preferred Credit Score" as greater than or equal to a 660 but less than 700; (iii) "Flex Credit Score" as greater than or equal to 620 but less than 660. At some times during the relevant time period, Countrywide also had a bucket called "Expanded Credit Score" which included credit scores of greater than or equal to 580. *Id.* Exs. 162, 163, 173. For purposes of this motion, MBIA has narrowed the findings of its expert to those loans where the FICO score represented to MBIA fell into one bucket but the actual FICO score fell into a lower bucket.

permissible property type, vary depending on the occupancy status of the borrower. *Id.* Ex. 151. In addition, Countrywide's internal rate sheets and pricing schedules confirm that pricing adjustments were made to loans made to borrowers in non-owner occupied properties to compensate for the additional credit risk and higher cumulative losses associated with the loan. *Id.* Ex. 149, at CWMBIA0009213254–66.

The occupancy status is one of the indicators of the credit risk associated with a given loan. *Id.* Ex. 153, at 48:10-49:8 (owner occupancy is one of the four most important drivers of delinquency and default)). All else being equal, an owner-occupied loan has a lower risk of delinquency and default than a second-home or investment property because borrowers are less likely to walk away from a home they live in.[55] Countrywide's experts also agreed that investment properties, in contrast, have a higher risk of default and delinquency because the borrowers are more likely to stop payment on a property that they do not live in. *See id.* Ex. 158, at 2-3; *see also id.* Ex. 165, at 19; Ex. 154, at 73:2-5 (agreeing that borrowers are more likely to default on properties that are underwater when the property is not a primary residence), at 226:23-227:3 (acknowledging higher probability of delinquency on a second home than a primary residence).

As such it is undisputed that misrepresentations as to occupancy status can increase the credit risk of a loan. Accordingly, where the actual occupancy status is non-owner occupied but the MLS reflects a status of owner-occupied, such inaccuracies have a material and adverse impact on MBIA's interests because it insured Securitizations with pools of loans that had greater credit risk than what was represented to it.

[55] *Id.* Ex. 105, at 126:22-127:5 (testimony by managing director in Countrywide's Credit Risk Management Department that non-owner occupied loans have higher incidences of default historically); Ex. 160, at 460:7-460:25 (testimony by managing director of CSC's Transaction Management Group that occupancy status was used by Countrywide's internal models to project and estimate the likelihood of default and pre-payment).

(g) *Loans With Lower Priority Lien Positions Have Increased Credit Risk*

The lien position is another characteristic used to assess the credit risk of a loan. *See id.* Ex. 157, at 19:23-22:7 (testimony by senior executive in Countrywide's Credit Risk Management Division that lien position could affect credit quality of a loan); Ex. 216, at 512:14-513:1 (testimony by Countrywide's former Chief Operating Officer that lien position could affect credit risk associated with a loan). As one of Countrywide's experts explained, "[a]ll else equal, a second-lien loan is more likely to experience losses than a first-lien loan because the second-lien lender has a lower repayment priority in the event of a liquidation of the collateral property. That is, if a borrower defaults and the property is sold, the first lien is paid in full before the second lien is paid." *Id.* Ex. 158, at 2.

Here, four loans in the Random Samples were found to be third liens. As such, these loans had greater credit risk because in the event of a liquidation, they will be paid, if at all, after the priority liens. There can be no dispute that the lien position affects the risk of loss on a loan, and that where the actual lien position is greater than what is reflected on the MLS, such inaccuracies have a material and adverse impact on MBIA's interests because it insured Securitizations with pools of loans that had greater credit risk than what was represented to it.

D. It Is Undisputed That CHL Breached Its Representation And Warranty To Include All Required Documents In The Mortgage Loan Files

The HELOC Securitizations contain a representation and warranty providing that "[a]s of the Closing Date . . . the Mortgage File for each Mortgage Loan contains each of the documents specified to be included in it." *See, e.g.*, *id.* Ex. 39, at § 3.02(a)(13); *see also id.* Exs. 33-38, 40-41. The Transaction Documents define the "Mortgage File" to include (i) "the original Mortgage Note," (ii) "an original Assignment of Mortgage," (iii) "the original recorded mortgage with evidence of recording on it," (iv) "if applicable, the original of each intervening assignment needed for a complete chain of title," (v) "a title policy for each Mortgage Loan with a Credit limit in excess of $100,000 or a copy of the lender's title policy or a printout of the electronic equivalent and all riders thereto," (vi) "the original of any guaranty executed in connection with the Mortgage Note," (vii) "the original of each assumption," and (viii) "any security agreement."[56]

1. The Mortgage Loan Files For Hundreds Of Mortgage Loans In The HELOC Securitizations Are Missing Required Documents

Despite CHL's representation and warranty that the Mortgage File would be complete, MBIA's re-underwriting review has revealed that 460 loans in the Random Samples were missing one or more required legal documents from the Mortgage Loan Files. Butler Aff. Ex. 10.[57] When extrapolated across the HELOC Securitizations, it is estimated that there are 32,815 mortgage loans with an OPB of $2,088,490,077 that suffer from this defect. Cowan Aff. Ex. 1. Countrywide has offered no substantive rebuttal to these findings. Indeed, its expert's only response is the admittedly unsupported assertion that the fact that the documents are no longer in the file does not mean that they were not there at the time of origination. Sheth Aff. Ex. 68.[58] Exhibit 10 to the Butler Affidavit summarizes the findings relating to CHL's breach of this representation and warranty in the HELOC Securitizations. It is particularly telling that such a high number of loans in the Random Samples were missing critical documents even though Countrywide attempted to "cure" such document deficiencies through the first lien files and subservicing portal.

2. Missing Legal Documents Increase The Credit Risk Associated With The Mortgage Loan

The absence of these legal documents from the loan origination file increases the credit risk associated with the mortgage loan by impairing the lender's ability to foreclose on the

[56] *See, e.g., id.* Ex. 64, at 21; *see also* Exs. 57-62, 65-66.

[57] In addition, there are at least another 283 loans in the Due Diligence Sample that are missing one or more required legal documents from the Mortgage Loan Files. *Id.* Ex. 20.

[58] Countrywide's expert readily conceded that neither she nor her team had undertaken any investigation to determine whether the missing documents were present in the loan file at the time of origination. *Id.* Ex. 112.

mortgage loan. As has been widely publicized in the recent press[59] and recognized by Countrywide, a lender cannot foreclose on a mortgage loan without the required legal documents in the Mortgage File. *See id.* Ex. 176, at 13-14; *see also id.* Ex. 177, at 394:17-396:2.

Countrywide's CQC Department recognized the increased credit risk associated with loans with such missing documents by requiring an SUS rating for such loans. For example, if a loan was found to be missing the mortgage note, the final title insurance policy, the deed of trust, a copy of the second lien mortgage, or the HELOC agreement, that loan would be rated as "severely unsatisfactory" during Countrywide's internal quality control audit.[60] Such a SUS rating subjects the loan to repurchase under Countrywide's internal standards because, among other things, a SUS rating means that the loan has an "unacceptably high probability of fallout, indemnification or repurchase" and "[t]he probability of default is unacceptably high." *See supra* II.B.

Countrywide's Correspondent Lending Division ("CLD"), which was responsible for purchasing loans from third party originators and correspondent lenders, also recognized the importance of a complete loan file containing all required legal documents. The CLD Seller's Manual "contains the delivery documentation requirements for most loans purchased by Countrywide."[61] Section 2.7 provides that the "[t]he original Note must be included in the loan file and must include . . . [s]ignature of all borrowers, exactly as typed on the Note; and "[a]ll

[59] *See, e.g., id.* Ex. 189 (Congressional Oversight Panel, November Oversight Report: Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation (November 16, 2010) at 25 ("If, during the securitization process, required documentation was incomplete or improper, then ownership of the mortgage may not have been conveyed to the trust. ...The trust in this situation may be unable to enforce the lien through foreclosure because only the owner of the mortgage and the note has the right to foreclose. If the owner of the mortgage is in dispute, no one may be able to foreclose until ownership is clearly established."); *see also id.* at 12 ("faced with revelations that robo-signers had signed tens of thousands of foreclosure documents without actually verifying the information in them, Bank of America announced on October 8, 2010, that it would freeze foreclosure sales in all 50 states until it could investigate and address the irregularities.")).

[60] *Id.* Ex. 102, at 503:12-24 (Countrywide's Vice President of Investor Audit explaining a loan file that was missing the deed of trust, the home equity credit line agreement, or the second mortgage would be rated by as "severely unsatisfactory" or "SUS" by the Quality Control Department because "the loan wouldn't really be valid."); 504 (discussing "severely unsatisfactory" rating for loans with missing mortgage notes); 504 (discussing "severely unsatisfactory" rating for loans with missing title insurance policy).

[61] *Id.* Ex. 178.

applicable Note addendums." *Id.* Ex. 178, at CWMBIA0008728401. That same section further provides that "the loan file must include a copy of the Deed of Trust/Mortgage . . . includ[ing] a copy of any appropriate, completely executed riders." *Id.* at CWMBIA0008728403. It further states that "[t]he Deed of Trust/Mortgage must be completely filled in, signed by a notary, and include the notary stamp with an expiration date . . . [and that] [a]ll information in the Deed of Trust/Mortgage must be complete and correct." *Id.* Similarly, Section 5.6 pertains to title insurance, and states that "Sellers must submit a title insurance to Countrywide for every loan funded."[62] It further explains the importance of title insurance in protecting owners against loss if title to a property is imperfect, and to evidence ownership of a property and its lawful possession." *Id.*

Accordingly, there can be no dispute that CHL's failure to include the required legal documents in the Mortgage File increased the credit risk of the affected loan by impairing the lender's ability to foreclose on the loan, and thus materially and adversely impacted MBIA's interest in the affected loan by increasing the likelihood of default and ultimate loss on the loan.

E. It Is Undisputed That CHL Breached Its Representation And Warranty Not To Include Any Loans In The Securitizations With A CLTV Greater Than 100%

The Transaction Documents for both the CES and HELOC Securitizations contain a representation and warranty that no mortgage loan included in the Securitization has a combined loan-to-value ("CLTV") ratio in excess of 100%.[63] There are 60 mortgage loans in the Securitizations where the MLS attached to the closing documents reflect a CLTV greater than 100%. In addition, there are 10 mortgage loans in the Random Samples where the findings of MBIA's re-underwriting expert that the recalculated CLTV is greater than 100% is indisputable.

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[62] *Id.* Ex. 179, at CWMBIA0008725761.

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

Butler Aff. Ex. 11.[64] Attached as Exhibit 11 to the Butler Affidavit is a summary of the ten loans in the Random Samples where it is undisputed that the re-calculated CLTV exceeds 100%. When extrapolated to the Securitizations, it is estimated that there are 509 mortgage loans with an OPB of $31,653,156 that have CLTVs over 100%.

For the reasons set forth above in Section III.C.2.(a), there can be no question that the CLTV ratio is one of the key factors used to assess the credit risk on a given loan. All things equal, loans with higher CLTV ratios have greater credit risk because there is less borrower equity in the mortgaged property and also less of a cushion between the value of the collateral and the loan balance.[65] In addition, a loan that has a CLTV ratio greater than 100% means that the borrower has no equity in the mortgaged property and owes more than the value of the property. If a loan with CLTV at 100% (or higher) defaults and is foreclosed upon, a loss necessarily results. *Id.* Ex. 102, at Tr. 576:18-580:18 ("a property[] financed at a 100 percent" that defaults and is foreclosed upon will definitely result in a loss). Countrywide's own witnesses have testified that a loan with a CLTV ratio in excess of 100% have greater credit risk than a loan with a CLTV ratio of 100%.[66] Accordingly, it is undisputed that CHL's inclusion of mortgage loans in the Securitizations that had CLTV ratios greater than 100% breached CHL's representation and warranty that no such loans would be included in the Securitizations, and such

[64] In addition, there are at least 16 loans in the Due Diligence Sample where it is undisputed that the re-calculated CLTV exceeds 100%. *Id.* Ex. 21.

[65] *See, e.g., id.* Ex. 101, at Tr. 357:18-24 (high LTV loans are a high-risk category); 576:18-579:14 ("a lower LTV typically you would think have a less of a risk of a loss in the event of a default than a higher LTV loan"); Ex. 153, at 48:10-49:8 (CLTV among the most important drivers of delinquency and default); 61:17-62:7 ("my personal view is that leverage [*i.e.*, CLTV] matters. ...how many times does that lesson have to be relearned?"); 239:11-245:10 (providing CLTV and other information to investors to show importance of CLTV to loan performance); Ex. 150, at 32:3-14 (CLTV is one of the "major" risk characteristics); 163:4-9 ("The risk component of pricing would be higher with the higher CLTV."); 265:2-12 ("CLTV...is a key risk metric"); Ex. 155, at 96:8-19 (high LTV or CLTV would produce a higher rate of delinquent loans defaulting)); *see also* Ex. 154, at 192:12-16 (positive coefficient for CLTV indicates that as CLTV rises, delinquencies and defaults increase); Ex. 67, at 126-28.

[66] *Id.* Ex. 116, at 258:5-24 (testimony by Countrywide senior executive that "a loan with a CLTV of 101.1 has a greater credit risk than a loan with a CLTV of 100, all other things being equal."); 258:23-4 ("all things being equal, a loan with a CLTV of 110 has a greater credit risk than a loan with a CLTV of 100.").

breaches had a material and adverse impact on MBIA's interests in such loans because such loans had greater credit risk than represented to MBIA.

IV. CHL'S BREACHES SHOULD BE EXTRAPOLATED FROM THE RANDOM SAMPLES TO THE SECURITIZATIONS

This Court has ruled that MBIA may present evidence in this action on the basis of a statistically valid random sample of loans, and moreover found that MBIA's proposed sampling methodology to be scientifically accepted, valid, and reliable under the *Frye* standard. *Id.* Ex. 201, at 12. Not only have Defendants failed to provide this Court with an alternative sampling methodology, but they have not contested MBIA's methodology for sample selection and extrapolation.[67] Here, with the exception of the [redacted] loans in the Securitizations that Countrywide rated as "severely unsatisfactory," and the [redacted] loans in the Securitizations where [redacted], the remaining categories of breaches of CHL's representations and warranties arise out of the mortgage loans in the Random Samples. It is undisputed that 54.1% percent of the mortgage loans in the Random Sample breached one or more of the representations and warranties described in this motion.[68] Because there is no dispute that each of these Random Samples was randomly selected and is thus, representative of the population of loans in each Securitization, Sheth Aff. Ex. 180, Ex. 154, at 60:2-61:15, the undisputed breach rate can be extrapolated from each of the Random Samples to each Securitization. Cowan Aff. ¶ 8.

[67] *Id.* Ex. 202; Ex. 154, at 60:2-61:15 (One of Countrywide's experts testified that MBIA's sampling expert did "not introduce any biases or errors into the sample" and that the sampling procedure and extrapolation are "correct.").

[68] Exhibit 1 to the Cowan Affidavit illustrates the breach rate by number of loans and dollars for each of the following categories for each of the Random Samples: (i) loans recommended for repurchase by Countrywide's loan review expert that CHL failed to repurchase; (ii) loans that breached the representation and warranty concerning appraisals; (iii) loans that breached the representation and warranty concerning no-defaults; (iv) loans that breached the representation and warranty concerning the accuracy of the MLS; (v) loans that breached the representation and warranty that the Mortgage File was complete; and (vi) loans that breached the representation and warranty that no loans had CLTV ratios exceeding 100%. Mortgage loans that fall into more than one breach category are de-duplicated from the total calculations.

Exhibit 1 to the Cowan Affidavit illustrates the extrapolated breach rate by number of loans and dollars for each of these undisputed categories of breaches for each of the Securitizations. Based on Dr. Cowan's uncontested extrapolation methodology, a total of 217,765 loans in the Securitizations with an OPB of $12,775,826,328 breached one or more of the representations and warranties described in this motion. This represents 56.0% of the loans in the Securitization by number of loans, and 54.1% of the loans by dollars—figures that demonstrate that an overwhelming number of the loans in the Securitizations are defective.

V. CHL HAS REPUDIATED ITS REPURCHASE OBLIGATIONS

Under New York law, anticipatory breach occurs "when a party repudiates contractual duties prior to the time designated for performance and before all of the consideration has been fulfilled, [and] the repudiation entitles the nonrepudiating party to claim damages for total breach." *Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 462-63 (1998) (internal quotation marks and citations omitted). A repudiation can be evidenced by "a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach." *Id.* (internal quotation marks and citations omitted). A repudiation can also be evidenced by "a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach." *Id.* (citations omitted); *see also Computer Possibilities Unlimited, Inc. v. Mobil Oil Corp.*, 301 A.D.2d 70, 78 (1st Dep't 2002) (developer repudiated agreement with franchisor by entering into a secret agreement with distributor that made it impossible for developer to perform its obligation to franchisor).

Here, the nominal percentage of loans that CHL has agreed to repurchase reveals its unmistakable repudiation of its contractual repurchase obligations. MBIA's re-underwriting expert concluded that 96.8% of the loans in the Random Samples did not comply with the representations and warranties in the Transaction Documents. Sheth Aff. Ex. 67. Indeed, for over 50% of the loans in the Random Samples, the breaches of the representations and warranties are so far beyond any reasonable dispute that summary judgment can be granted on these papers. Yet incredibly, CHL has agreed to repurchase only a mere 4.51% of the 13,607 loans MBIA has requested be repurchased.[69] *Id.* Exs. 67, 97, 98. Even more telling is that, as to those categories of loans where CHL itself identified defective loans—the [redacted] loans that it rated as "Severely Unsatisfactory," the [redacted], and the [redacted] loans that its own expert recommended for repurchase—CHL refused to repurchase all but a minuscule number of such loans. *Id.* Exs. 97, 107, 108. When the nominal number of CHL's repurchases is contrasted with the huge volume of defective loans, there can be no question that CHL's conduct clearly demonstrates its intent to repudiate its repurchase obligations.

Moreover, even as to the few hundred loans in the Securitizations which CHL eventually agreed to repurchase, it dragged out its approval of such repurchases over a period of period of 6 to 18 months—far beyond the 90 days CHL had to repurchase these loans under the Transaction Documents. Rather than respond to MBIA's repurchase demands in a timely manner, [redacted] During this time while Countrywide shirked its contractual obligations and its repurchase approvals trickled in, MBIA dutifully complied with its contractual obligations under its unconditional and irrevocable Insurance Policies and made hundreds of millions of dollars in payments.[70] Glehan Aff. ¶ 8; Sheth Aff. Exs. 214, 215.

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[69] Defendants' recent settlements with other monoline insurers indicate that they are approving significantly more than five percent of repurchase demands. Sheth Aff. Ex. 184 (referencing April 2011 settlement with Assured Guaranty ("Assured") for $1.6 billion, of which $1.1 billion was in consideration of Assured's release of repurchase claims for mortgage loans underlying eight securitizations of second liens); Ex. 185 (referencing July 2012 settlement with Syncora Holdings Ltd. ("Syncora") for $375 million in connection with claims, including repurchase claims arising out of 14 securitizations of first and second liens).

[70] Such claims payments have only increased and have now reached well in excess of $2 billion dollars.

Worse yet, Countrywide[71] deliberately designed and orchestrated a strategy to frustrate the repurchase process, both before MBIA commenced this litigation and continuing through the present. Countrywide's overarching goal in responding to repurchase demands was to reduce exposure and limit losses to the company, rather than adhere to its contractual repurchase obligations.[72] In implementing that goal, when Countrywide evaluated such repurchase demands, it did not perform a good faith analysis of the loan but rather employed a [redacted].[73] Countrywide also invented new standards and requirements for repurchase approvals even though such standards and requirements were not contained in the Transaction Documents.[74] Rather than evaluate each loan submitted for repurchase to determine whether it complied with the representations and warranties, Countrywide limited its review of loans to only those defects identified in the repurchase request and ignored any other defects it uncovered during its review that were not cited in the repurchase demand.[75]

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71 As evidenced by its involvement in the repurchase process, BAC is also liable under a theory of successor liability for its role in frustrating MBIA's repurchase rights.

72 [redacted]

73 [redacted]

74 For example, although Countrywide often refused to repurchase loans that had not defaulted, its own witnesses have testified that a monetary default is not a prerequisite for repurchase. *See supra*, Section I.C.

75 [redacted]

In addition, Countrywide [redacted]. Michael Schloessmann, who was the head of Countrywide's Representations and Warranties Group was forced to admit that "[redacted]. Countrywide further imposed multiple levels of executive review to approve a repurchase request but allowed staff underwriters to deny a repurchase request.[76] As such, Countrywide's creation and implementation of a process designed to frustrate the repurchase remedy further illustrates its intent to repudiate its repurchase obligations.

Finally, documents recently produced in discovery reveal that Countrywide continues to deny legitimate repurchase requests in bad faith. Countrywide has refused to repurchase loans even where it agrees with the factual basis for the repurchase request and recognizes that the repurchase claim is strong. For example, for Loan Nos [redacted] and [redacted], CHL concurred with MBIA that the actual CLTV exceeded the maximum CLTV set forth in the published guidelines but nonetheless refused to repurchase the loans. *See id.* Ex. 186, at BACMBIA-X0000016389, BACMBIA-X000016407. Similarly, CHL refused to repurchase loans that were missing appraisals despite the plain language of the representation and warranty requiring appraisals by qualified appraisers. *See id.* Ex. 191, at Schedule A, Row 82 (refusing to repurchase Loan No. [redacted] where the repurchase demand was based on, *inter alia*, a missing appraisal, and the only form of valuation in the file was a stated-value valuation). There are

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76 [redacted]

countless other examples where CHL rated the strength of the repurchase claim by MBIA as strong, indicated that it agreed with the factual basis for the repurchase demand in its internal comments, but nonetheless refused to repurchase the loan.[77] By refusing to repurchase these defective loans as required under the Transaction Documents, CHL has evinced its intent to repudiate its contractual repurchase obligations.

VI. THE BREACHES DESCRIBED HEREIN ARE SO SIGNIFICANT AS TO JUSTIFY RESCISSORY DAMAGES

As a general rule, contractual rescission is permitted for a breach that substantially defeats the purpose of the contract.[78] This Court has previously held that rescissory damages are available whenever rescission is warranted but impracticable, and that rescissory damages are appropriate in this action. Sheth Aff. Ex. 192, at 17-18 (holding that should MBIA prove its case, rescissory damages minus premiums received will make MBIA whole without providing a windfall). Under both common law and New York Insurance Law, rescission is warranted if the misrepresentations or breach of warranty were material—that is, if the insurer would not have issued the policy had it been aware of them or would only have issued it on different terms. Where the evidence concerning the materiality is clear and substantially uncontradicted, the question is a matter of law for the court to decide. *Id.*; *see also Star City Sportswear, Inc. v. Yasuda Fire & Marine Ins. Co. of Am.*, 1 A.D.3d 58, 62 (1st Dep't 2003) *aff'd*, 2 N.Y.3d 789,

[77] *See e.g.*, *id.* Ex. 191, at Schedule A, Row 106 (refusing to repurchase Loan No. [redacted] where repurchase demand was submitted based on, *inter alia*, the DTI ratio exceeding guidelines, Countrywide rated the claim strength as strong, and Countrywide's internal comments indicated that the "DTI is 53% and exceeds guidelines but no approved exception found in file."); Schedule D, Row 3 (refusing to repurchase Loan No. [redacted] where repurchase demand was submitted based on unreasonable stated income, Countrywide rated that the claim strength as strong, and Countrywide's internal comments indicated that it agreed "that the stated income is not supported"); Schedule D, Row 5 (refusing to repurchase Loan No. [redacted] where repurchase demand was submitted based on excessive DTI, Countrywide rated the claim strength as strong, and Countrywide's internal comments indicated that it agreed "that DTI exceeded program guidelines"); Schedule D, Row 17 (refusing to repurchase Loan No. [redacted] where repurchase demand was submitted based on excessive CLTV, DTI, and unreasonable stated income, Countrywide rated the claim strength as strong, and Countrywide's internal comments indicated that it agreed that CLTV and DTI exceeds guidelines and that stated income cannot be supported).

[78] *Wiljeff v. United Realty Mgt. Co.*, 82 A.D.3d 1616, 1617 (4th Dep't 2011); *RR Chester, LLC v. Arlington Bldg. Corp.*, 22 A.D.3d 652, 654 (2d Dep't 2005) (quoting *Callanan v. Keeseville, Ausable Chasm & Lake Champlain R.R. Co.*, 199 N.Y. 268, 284 (N.Y. 1910)).

814 N.E.2d 425 (2004) ("a breach of warranty that materially increases the insurer's risk of loss within the meaning of Insurance Law § 3106 (b) precludes coverage as a matter of law"); *M. Fabrikant & Sons, Inc. v. Overton & Co. Customs Brokers, Inc.*, 209 A.D.2d 206, 207 (1st Dep't 1994) (same).

Here, the evidence is overwhelmingly supportive of MBIA's claim for rescissory damages. The magnitude of the undisputed breaches of representations and warranties is very high, far beyond any threshold of materiality as a matter of law: over 54.1% of the loans in the Random Samples, over 56.0 % of the loans in the Securitizations based on an uncontested extrapolation methodology, and over 47.2% of the loans in the Due Diligence Sample. Moreover, these figures are alone more than sufficient but it is worth noting that these are just the incontestably material breaches; the true rate of material breaches is far higher as evidenced by the findings of Mr. Butler in his expert report. Equally, CHL's absolute repudiation of the repurchase obligation separately warrants an award of rescissory damages.[79]

CONCLUSION

For the reasons set forth above, this Court should grant MBIA's motion for summary judgment.

[79] Alternatively, this Court should order Defendants to pay contract damages for its breaches arising out of the admittedly defective loans in the Random Samples and the Due Diligence Sample, and the extrapolated percentage of loans in the Securitizations based on the undisputed breach rate in the Random Samples. To the extent that the Court seeks additional information regarding the calculation of these damages after the resolution of this motion, MBIA respectfully reserves its right to present evidence in further support of its damages calculations based on the Court's rulings.

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Respectfully submitted,

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