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

SYNCORA GUARANTEE INC.,	:	Index No.: 650042/09
Plaintiff,	:	IAS Part 3
	:	
-against-	:	Hon. Eileen Bransten
	:	
COUNTRYWIDE HOME LOANS, INC.,	:	**NOTICE OF APPEAL**
COUNTRYWIDE SECURITIES CORP.,	:	
COUNTRYWIDE FINANCIAL CORP., and	:	
BANK OF AMERICA CORPORATION,	:	
Defendants.		

PLEASE TAKE NOTICE that plaintiff Syncora Guarantee Inc. ("Syncora") hereby appeals to the Appellate Division of the Supreme Court of the State of New York, First Department, from part of the order of the Supreme Court of the State of New York, County of New York, made in this action by Hon. Eileen Bransten and entered in the New York County Clerk's Office on January 3, 2012 denying in part Syncora's motion for partial summary judgment.

Dated: New York, New York
January 5, 2012

DEBEVOISE & PLIMPTON LLP

By: /s/ Donald W. Hawthorne
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Appellants

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

SYNCORA GUARANTEE INC.,	:	Index No.: 650042/09
Plaintiff,	:	IAS Part 3
	:	
-against-	:	Hon. Eileen Bransten
	:	
COUNTRYWIDE HOME LOANS, INC.,	:	**PRE-ARGUMENT**
COUNTRYWIDE SECURITIES CORP.,	:	**STATEMENT**
COUNTRYWIDE FINANCIAL CORP., and	:	
BANK OF AMERICA CORPORATION,	:	
Defendants.		

Pursuant to Rule 600.17 of this Court, Syncora Guarantee Inc. hereby sets forth the following:

1. The title of the action is Syncora Guarantee Inc. v. Countrywide Home Loans, Inc., Countrywide Securities Corp., Countrywide Financial Corp., and Bank of America Corporation.

2. The full names of the parties are as stated in the title of the action set forth in "1." above.

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5. This is an appeal from an order of the Supreme Court of the County of New York, Bransten, J., entered in the New York County Clerk's Office on January 3, 2012. A copy of the notice of entry and order is attached hereto as Appendix A.

6. Plaintiff and Appellant Syncora Guarantee Inc. ("Syncora"), a monoline insurer, brought this action alleging claims of fraud, negligent misrepresentation, breach of contract, breach of the implied covenant of good faith and fair dealing, and indemnification with respect to two securitizations of pools of second-lien residential mortgages consisting of home equity lines of credit. Plaintiff filed an amended complaint against Countrywide Home Loans, Inc., Countrywide Securities Corporation, Countrywide Financial Corporation and Bank of America Corporation on May 6, 2010, which added claims with respect to three additional securitizations.

7. The Supreme Court of the State of New York, County of New York denied in part and granted in part Syncora's motion for partial summary judgment.

8. Plaintiffs seek the reversal of this order in part, to the extent that it denied Plaintiff's motion for summary judgment declaring that in order to establish that the inaccuracy of a representation and warranty "materially and adversely" affected Syncora's interest in the underlying mortgage loan and the loan is therefore subject to be put back, Syncora need only prove that Syncora's interest in the loan was materially and adversely affected at the time of the misrepresentation.

9. An action is pending before Justice Eileen Bransten in the Supreme Court of the State of New York, County of New York, under the caption MBIA Insurance Corporation v. Countrywide Home Loans, Inc., et al., Index No. 602825/08, in which MBIA Insurance Corporation ("MBIA") asserts claims based on the issuance of financial guaranty insurance policies on securitizations of residential mortgage loans. MBIA filed a motion for summary judgment on May 25, 2011. Justice Bransten granted in part and denied in part on January 3, 2012.

10. Another appeal is pending in this action. A notice of appeal, dated November 3, 2011 and attached hereto as Appendix B, was filed with the Appellate Division of the Supreme Court of the State of New York in and for the First Department appealing the order of Justice Eileen Bransten, dated and entered on October 31, 2011, denying Defendant Bank of America's motion to sever and consolidate successor liability claims. Plaintiff is represented by the firm Allegaert Berger & Vogel LLP in its claims against Bank of America.

Dated: New York, New York
January 5, 2012

DEBEVOISE & PLIMPTON LLP

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Appendix A

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

SYNCORA GUARANTEE INC., Plaintiff,	:	Index No.: 650042/09
	:	IAS Part 3
	:	Hon. Eileen Bransten
-against-	:	
	:	**NOTICE OF ENTRY OF ORDER**
COUNTRYWIDE HOME LOANS, INC., COUNTRYWIDE SECURITIES CORP., COUNTRYWIDE FINANCIAL CORP., and BANK OF AMERICA CORPORATION,	:	
Defendants.		

PLEASE TAKE NOTICE that annexed hereto is a true copy of an order duly entered in this action and filed in the Office of the Clerk of the County of New York on January 3, 2012.

Dated: New York, New York
January 5, 2012

DEBEVOISE & PLIMPTON LLP

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN Justice PART 3

Index Number : 650042/2009
SYNCORA GUARANTEE INC
vs.
COUNTRYWIDE HOME LOANS INC.
SEQUENCE NUMBER : 015
PARTIAL SUMMARY JUDGMENT

INDEX NO. 650042/09
MOTION DATE 10/6/11
MOTION SEQ. NO. 015

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 1
Answering Affidavits — Exhibits ____ | No(s). 2
Replying Affidavits ____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 1-3-2012

Eileen Branston J.S.C.
HON. EILEEN BRANSTEN

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

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

----------x

SYNCORA GUARANTEE INC.,

Plaintiff,

-against-

Index No.: 650042/09
Motion Date: 10/6/11
Motion Seq. No.: 015

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

Defendants.

----------x

PRESENT: HON. EILEEN BRANSTEN

Plaintiff Syncora Guarantee, Inc. ("Syncora") moves for partial summary judgment against defendants Countrywide Home Loans, Inc. ("CHL"); Countrywide Securities Corporation ("CSC") and Countrywide Financial Corporation ("CFC", and, with CHL and CSC, "Countrywide").

First, Syncora seeks judgment in the form of a declaration on its "put-back claims." Syncora Memo., pp. 3-4.[1] Syncora seeks a declaration that in order for it to prove its put-back claims it need establish only that a loan breached a representation or warranty in a way that materially and adversely affects "Syncora's interest in the related mortgage loan under Section 2.04(b) of the SSA" [Sales and Servicing Agreement] at the time the representation or warranty was made. Syncora also seeks a declaration that it need not show that the

[1] Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment ("Syncora Memo."). Syncora does not specify its "put-back claims."

allegedly non-compliant loan was non-performing and that Syncora need not show the cause of the loan's non-performance. *Id.*

Second, Syncora seeks judgment in the form of a declaration that in order for it to prove its fraud claim, Syncora is not required to show a causal link between the alleged fraud, misrepresentations by Countrywide, and claims payments or loan defaults. Syncora further argues that rescissory damages are an appropriate remedy for fraudulent inducement.

Third, Syncora seeks judgment in the form of a declaration that on its claim for fraud against Countrywide, Syncora need establish only that Countrywide's alleged misrepresentations induced Syncora to issue insurance policies on terms it would not have agreed to had Syncora known of the alleged misrepresentations and the true facts, and that Syncora need not show a causal connection between Countrywide's alleged misrepresentations and Syncora's claims payments made pursuant to Syncora's insurance policies.

Countrywide opposes.

BACKGROUND

Syncora brought this action on January 28, 2009 against the Countrywide defendants. On May 6, 2010, Syncora amended its complaint to add additional claims and Bank of America Corporation as a defendant. Syncora alleges that Countrywide fraudulently induced Syncora to insure five securitizations of mortgage loans originated by Countrywide: four

securitizations of home equity mortgage loans ("HELOCs") and one securitization of "closed-end seconds" ("CES") (together, the "Mortgage Loans").

Countrywide sold or conveyed the Mortgage Loans to trusts. The trusts, in turn, issued notes backed by the Mortgage Loans to investors. The investors were promised a return of principal with interest.

The rights and obligations of the parties to the Securitizations are set forth in contracts (the "Transaction Documents"). For the HELOC securitizations, the Transaction Documents provide for the transfer of the Mortgage Loans to a Countrywide affiliate who acted as the "depositor." This transfer was done pursuant to a "Purchase Agreements." Syncora Memo, pp. 2-3, n.3. The depositor then entered into a "Sale and Servicing Agreement" ("SSA") that transferred the loans to a trust established to hold the HELOCs as collateral and which further engaged CHL to service the Mortgage Loans. *Id.* For the CES securitization, the process was the same, but the Purchase Agreement and the Sales and Servicing Agreement were combined into one Pooling and Servicing Agreement ("PSA"). *Id.*

Syncora, for premiums received, insured that payments to the Securitizations' investors would be made. For each Securitization, Syncora issued an insurance policy and, pursuant to the insurance policy, issued a Financial Guaranty Insurance Policy (the "Insurance Policies"). Each Insurance Policy guarantees that should the payments received from the Mortgage Loans be insufficient to cover payments due under the Securities, Syncora would pay the shortfall.

Countrywide also issued Prospectuses and Supplemental Prospectuses in connection with each Securitization. Syncora alleges that Countrywide made representations and warranties in the Transaction Documents, Prospectuses and Supplemental Prospectuses which Syncora relied upon. Syncora alleges that Countrywide made misrepresentations in those representations and warranties, and that Syncora has been damaged as a result.

ANALYSIS

I. Standard of Law

CPLR 3212(e) provides, in relevant part, that "summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just."

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once such proof has been offered, to defeat summary judgment "the opposing party must show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman*, 49 N.Y.2d at 562. Syncora here moves on legal issues.

II. Arguments

A. Syncora's Claims for Put-Backs/Substitution

Syncora first moves for summary judgment in the form of a declaration that to prove a misrepresentation "materially and adversely" affects its interest in the underlying Mortgage Loan under Section 2.04 of the Sales and Servicing Agreement (SSA) and the loan is therefore allegedly subject to put-back, Syncora need only prove that Syncora's interest in the loan was materially and adversely affected at the time of the misrepresentation – the alleged inaccurate representation or warranty – and it need not prove either that a loan has defaulted or, if it has defaulted, the cause of the default.

Syncora supports its argument by first pointing to the HELOC Series 2006-D Sales and Servicing Agreement (SSA) § 2.04, which states, in relevant parts as quoted and relied upon by Syncora, that:

> If the substance of any representation or warranty in this Section made to the best of Sponsor's knowledge or as to which the Sponsor has no knowledge is inaccurate and the inaccuracy materially and adversely affects the interest of the Trust, the Noteholders or the Credit Enhancer [Syncora] in the related Mortgage Loan then, notwithstanding that the sponsor did not know the substance of the representation and warranty was inaccurate at the time the representation or warranty was made, the inaccuracy shall be a breach of the applicable representation or warranty.

Hawthorne Affirm.,[2] Ex. 7, HELOC Securitization Series 2006-D SSA, § 2.04(b). Section 2.04(d) states, again in relevant part:

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[2] Affirmation of Donald W. Hawthorne in Support of Order to Show Cause ("Hawthorne Affirm.").

> The cure for any breach of a representation and warranty relating to the characteristics of the Mortgage Loans in the related Loan Group in the aggregate shall be a repurchase of or substitution for only the Mortgage Loans necessary to cause the characteristics to comply with the related representation or warranty.

Id., § 2.04(d). Syncora further asserts Section 2.10 of the same SSA also supports its argument. *Id.*, p. 5. Section 2.10 directly refers to Mortgage Loans which are not in default or in danger of imminent default, stating, in relevant part, that:

> Notwithstanding any contrary provision of this Agreement, with respect to any Mortgage Loan that is not in default or as to which default is not imminent, no repurchase or substitution pursuant to Section 2.02, 2.03, 2.04, or 2.06 shall be made unless the party repurchasing or substituting delivers to the Indenture Trustee and Opinion of Counsel to the effect that the repurchase or substitution would not result in [tax implications].

Hawthorne Affirm., Ex. 7, SSA, § 2.10.

Syncora asserts that the plain language of this contract is conclusive evidence of the intent of the parties and is in clear support of its motion. Syncora further contends that its motion for summary judgment is supported by case law interpreting similar contract provisions, "universal insurance industry practice" and New York statutory and common law of insurance and breach of warranty. Syncora Memo., pp. 3-5.

Syncora argues that section 2.10 provides that a loan need not be in default to be repurchased, but only that an opinion be provided as to tax implications of the repurchase or substitution of the loan. Based upon this provision, Syncora states a repurchase pursuant to Section 2.04 is available whether or not the loan Syncora seeks to have repurchased is in

default or default is imminent, so long as a tax implication opinion is provided. Syncora asserts that because a loan may be put back without being in default, whether or not a loan materially and adversely affects Syncora's interest can therefore be determined without reference to whether or not the loan has defaulted, or whether a breach of a representation or warranty caused the loan to default.

Countrywide asserts that the plain language of the Transaction Documents controvert Syncora's argument, and that Syncora has merely selectively relied upon Section 2.10 of the HELOC Series 2006-D SSA, which is found in Transaction Documents in only two of the five securitizations at issue in this case. Countrywide asserts that the parties agreed that the quoted section 2.10 applied for a "handful" of the more than seventy representations and warranties in the Transaction Documents, and that for all other representations and warranties breach thereof must be shown to materially and adversely affect Syncora's interest in the loans. Countrywide asserts that this requires a showing of material harm that is not reached absent non-performance caused by or directly attributable to a Countrywide misrepresentation.

Countrywide counters Syncora's argument based upon Section 2.04(d) of the HELOC Series 2006-D Sales and Servicing Agreement by noting that Syncora's quoted language applies to breaches "in the related Loan Group in the aggregate," and not individually. Countrywide contends that repurchase or substitution of loans is necessary under section 2.04(d) only to the extent "necessary to cause the characteristics [of the Mortgage Loans in

the aggregate] to comply with the related representation or warranty." Countrywide Opp. Memo., p. 16; Hawthorne Affirm., Ex. 7, SSA, § 2.04(d). Countrywide argues that section 2.04(d) thus does not apply to individual loans, but only that, should loans be found to be in breach of a representation or warranty, then loans may be substituted or repurchased to fix the representations of the loan group as a whole. Countrywide Opp. Memo., p. 16.

Countrywide further argues that no repurchase obligation exists under the governing documents unless a misrepresentation and/or breach of warranty materially and adversely affects the interests of the insured or Syncora. Countrywide asserts that because the trusts, and not Syncora, own the Mortgage Loans, Syncora's interest in the loans is not affected "[u]nless and until a representation or warranty breach actually 'materially and adversely affects' Syncora by causing a loan to default–and forcing Syncora to pay more in claims . . . ." Countrywide Opp. Memo., p. 17. Countrywide concludes that until breach occurs, repurchase cannot be required. *Id.*

Syncora asserts in reply that the language of the governing documents make clear that Syncora's "interest" in the loans it insured was affected upon Countrywide's misrepresentations regarding the loans. Syncora states that these misrepresentations directly lead to a material and adverse affect on Syncora's risk in insuring the securitization. Syncora Reply Memo.,[3] pp. 4-7. Syncora contends that its interest in the loans may be affected prior

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[3] Reply Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment ("Syncora Reply Memo.").

to the loans' non-performance if Syncora's risk of loss materially increased as a result of Countrywide's misrepresentations. Syncora also argues that the HELOC SSA provides concrete basis for repurchase remedy for loans that were misrepresented but may not yet be in default. *Id.*

It is a well-established that a written agreement which is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. This court is obliged to interpret such a contract so as to give meaning to all of its terms. *See Excel Graphics Technologies, Inc. v. CFG/AGSCB 75 Ninth Ave., L.L.C.*, 1 A.D.3d 65, 69 (1st Dep't 2003).

Under New York law, upon motion for summary judgment based on contract, summary judgment is only appropriate where the language of the contract is unambiguous and reasonable minds could not differ as to its meaning. *Cf. State of New York v. Peerless Ins. Co.*, 108 A.D.2d 385, 390 (1st Dep't 1995). If the contract is reasonably susceptible of more than one interpretation, summary judgment is inappropriate. *NFL Enterprises LLC v. Comcast Cable Communications*, 51 A.D.3d 52, 58 (1st Dep't 2008).

The court finds that summary judgment is not here appropriate. Syncora bases its argument upon primarily upon the CWHEQ Revolving Home Equity Loan Trust, Series 2006-D, Sales and Servicing Agreement, and sections 2.04 and 2.10 therein. Syncora's Rule 19-a statement of material facts statement 19 states that the "SSAs specify a precondition to repurchase of Mortgage Loans 'not in default'" and cites to Section 2.10 of that SSA.

Syncora's Rule 19-a Statement,[4] statement 19. Countrywide asserts that a similar provision to the cited one is found in the Transaction Documents for only two other Securitizations, while a third contains similar language. Countrywide asserts that neither the provision nor similar language is found in the Transaction Documents for the two other Securitizations at issue, CWABS 2004-R SSA and the CWABS 2004-Q SSA. Countrywide's Rule 19-a Counter-Statement,[5] counter-statement 19. Based on this, and while not solely dispositive, issues of fact do arise whether Syncora's argument may be applied to all five securitizations at issue.

Syncora further argues that case law interpreting similar contract provisions, industry practice and New York statutory and common law lend support to its argument. The court disagrees. While the court may examine relevant law, Syncora's argument is based on the contracts in the Transaction Documents. For this court to resort to industry practice to determine the meaning of the argued provisions necessarily removes the issue from decision by summary judgment, as the contract is then not clear on its face. *State of New York v. Peerless Ins. Co.,* 108 A.D.2d at 390; *Credit Suisse Sec. (USA) LLC v Ask Jeeves, Inc.*, 24 Misc.3d 1241(A), *5 (N.Y. Sup. Ct., Aug. 20, 2009) (Bransten, J.).

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[4] Rule 19-a Statement in Support of Plaintiff's Motion for Partial Summary Judgment ("Syncora's Rule 19-a Statement").

[5] Countrywide's Rule 19-a Counter-Statement of Material Facts in Opposition to Plaintiff's Motion for Partial Summary Judgment ("Countrywide's Rule 19-a Counter-Statement").

Finally, this court finds that the applicable provisions of the SSA and the PSA are subject to varying interpretations regarding "interest" and affect on interest, as well as varying and equally valid interpretations of how the "aggregate" in SSA § 2.04(d) must be defined. The issue is therefore unripe for summary judgment. *NFL Enterprises LLC v. Comcast Cable Communications*, 51 A.D.3d at 58.

Syncora's motion for summary judgment that its claim for breach of the repurchase obligation is not limited to non-performing loans and that Syncora is not required to show that CHL's breach of the representations and warranties in the Transaction Documents caused the non-performance of the loan is denied. The court notes that it does not hold, by implication, that Syncora must show that a breach of a representation or warranty caused a loan's non-performance, or that Countrywide is not contractually obligated to repurchase misrepresented loans. The holding is limited solely to the to Syncora's burden of proof on its motion for summary judgment.

B. Syncora's Claims for Fraud and Breach of Warranty

Syncora second seeks a judgment in the form of a declaration that "whether an insurer is entitled to rescissory damages for fraudulent inducement of an insurance agreement is assessed as of the time that the contract is fraudulently induced, and that such a claim does not require any showing of a causal link between the fraud and particular claims payments or loan defaults." Syncora Memo., pp. 12-13.

Syncora also seeks a declaration that to succeed on its claim for breach of the Insurance and Indemnity Agreement, Syncora need only show that Countrywide made a statement that was untrue or misleading in a material way when it was made and Syncora is not required in proving its claim to show that any loans have defaulted, any connection between a misrepresentation and a subsequent loan default, or provide any evidence of any event subsequent to the misrepresentation. Syncora contends that the latter question hinges on an interpretation of the Insurance and Indemnity Agreement ("I&I"). Hawthorne Affirm., Ex. 11. Syncora contends that Section 2.01(k) of the I&I makes clear that the materiality of a misrepresentation made by Countrywide is measured at the time that the misrepresentation was made.

Section 2.01(k) of the I&I states, in relevant part:

> *Accuracy of Information.* Neither the Operative Documents nor other material information relating to the Mortgage Loans, the operations of Countrywide, the Issuer or the Depositor or the financial condition of Countrywide, the Issuer or the Depositor (collectively, the "Documents"), as amended, supplemented or superseded, furnished to the Insurer in writing or in electronic form by Countrywide, the Issuer or the Depositor contains any statement of a material fact which was untrue or misleading in any material respect when made.

Hawthorne Affirm., Ex. 11, Insurance and Indemnity Agreement, SWHEQ Revolving Home Equity Loan Trust, Series 2006-D ("I&I"), § 2.01(k).

Syncora's argument assumes that rescissory damages are appropriate. This issue is discussed below. In addition to case law, Syncora's asserts that its arguments are informed

by N.Y. Insurance Law §§ 3105 and 3106. Syncora's arguments on both its fraud and breach claims are considered together.

Countrywide, in opposition, contends that Syncora must establish that the claims payments it made pursuant to its issued policies were caused by Countrywide's alleged misrepresentations and not by another cause, including the economic downturn that began in late 2007. Countrywide further argues that N.Y. Insurance Law § 3105 does not apply to Syncora's common law claim for fraud, and New York Insurance Law §§ 3105 and 3106 do not provide for rescissory damage. Finally, in a footnote, Countrywide argues that Section 2.01(k) of the I&I does not apply as stated by Syncora. Countrywide asserts that Section 2.01(k) is limited by Section 2.01(m) of the I&I. Section 2.01(m) directs that:

> the remedy for any breach of a representation or warranty of Countrywide in Section 3.02 of the Purchase Agreement and in Section 2.04 of the Sales and Servicing Agreement and the remedy with respect to any defective Mortgage Loan or any Mortgage Loan as to which there has been a breach of representation or warranty under Section 3.02 of the Purchase Agreement shall be limited to the remedies specified in the Sales and Servicing Agreement.

Hawthorne Aff., Ex. 11. Countrywide argues that a claim for breach under Section 2.01(k) of the I&I is precluded by Section 2.01(m).

In reply, Syncora argues that Countrywide incorrectly ignores Section 2.01(m)'s clause stating that the "remedy" mentioned in the section is limited to "Section 3.02 of the Purchase Agreement and [] Section 2.04 of the Sales and Servicing Agreement." Syncora asserts that it moves for breach of Section 2.01(k) of the I&I, and therefore it is not limited to the remedies specified in the Sales and Servicing Agreement.

(a). Applicable Time to Prove Causation

Although posited slightly differently than the argument in *MBIA Insurance Corporation v. Countrywide, et al.*, Index No. 602825/2008 ("*MBIA v. Countrywide*"), a related case also before this court having arguments corresponding to those made in this matter by both plaintiff therein and Countrywide, defendants in both cases, the base issue before the court in this motion is when causation occurs in claims for insurance fraud and breach of representations and warranties. Syncora asserts in both its fraud and breach claims that causation occurred, and liability results, when Countrywide made misrepresentations that were material and which induced Syncora to issue financial guaranty insurance policies. Syncora asserts that had it known the true facts of the underlying Mortgage Loans, it may have either declined to issue its financial guaranty insurance policies or issued the policies on different terms. Syncora contends that it was denied the opportunity to examine the facts based on proper information, and, thus, all payments it has made pursuant to the policies result from Countrywide's alleged misrepresentations.

Countrywide argues that N.Y. Insurance Law §§ 3105 and 3106 do not provide for damages, but only that Syncora may avoid the insurance contracts should Syncora prove a material misrepresentation was made. Countrywide argues that Syncora, having chosen to seek damages for all payments it has or will make pursuant to the Insurance Policies, must prove that its claims payments were directly and proximately caused by Countrywide's alleged misrepresentations. Countrywide further argues that New York law does not allow for rescissory damages.

(i.) *The First Department Decision of June 30, 2011*

As a preliminary matter, Countrywide asserts that the First Department has held in *MBIA v. Countrywide* that Syncora must prove that Countrywide's alleged misrepresentations were the direct and proximate cause of Syncora's purported losses. Countrywide Opp. Memo., p. 6-7. This court, however, finds that Countrywide has misinterpreted the First Department's June 30, 2011 decision with regard to causation. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc., et al.*, 87 A.D.3d 287 (1st Dep't 2011). Countrywide's quote of the First Department is not a direction, but is a rejection of Countrywide's contention that MBIA's fraud claim should be dismissed for failure to plead a causal link between Countrywide's alleged misrepresentations and MBIA's alleged damages. The First Department held that MBIA's pleading sufficiently alleged loss causation to avoid Countrywide's motion to dismiss, as "it was foreseeable that MBIA would suffer losses as a result of relying on Countrywide's alleged misrepresentations about the mortgage loans." *Id.* at 296. The First Department further held that "[i]t cannot be said, on this pre-answer motion to dismiss, that MBIA's losses were caused, as a matter of law, by the 2007 housing and credit crisis." *Id.* The court did not hold that MBIA's claims payments must be shown to have been directly caused by Countrywide's alleged misrepresentations.

(ii.) *N.Y. Insurance Law §§ 3105 and 3106*

Syncora asserts that its claims are informed by New York Insurance Law Sections 3105 and 3106. New York Insurance Law § 3105, titled "Representations by the insured", states, in pertinent part:

> (a) A representation is a statement as to past or present fact, made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof. A misrepresentation is a false representation, and the facts misrepresented are those facts which make the representation false.
>
> (b)(1) No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract.

Section 3106, titled "Warranty defined, effect of breach", states, again in pertinent part:

> (a) In this section "warranty" means any provision of an insurance contract which has the effect of requiring, as a condition precedent of the taking effect of such contract or as a condition precedent of the insurer's liability thereunder, the existence of a fact which tends to diminish, or the non-existence of a fact which tends to increase, the risk of the occurrence of any loss, damage, or injury within the coverage of the contract. The term "occurrence of loss, damage, or injury" includes the occurrence of death, disability, injury, or any other contingency insured against, and the term "risk" includes both physical and moral hazards.
>
> (b) A breach of warranty shall not avoid an insurance contract or defeat recovery thereunder unless such breach materially increases the risk of loss, damage or injury within the coverage of the contract. If the insurance contract specified two or more distinct kinds of loss, damage or injury which are within its coverage, a breach of warranty shall not avoid such contract or defeat recovery thereunder with respect to any kind or kinds of loss, damage or injury other than the kind or kinds to which such warranty relates and the risk of which is materially increased by the breach of such warranty.

Syncora bases its claims on New York common law as informed and influenced by these sections. Syncora asserts that to prevail on its claims for fraud and breach of the Insurance and Indemnity Agreement, Syncora must show that a material misrepresentation

induced it to issue a policy that, had it known of the misrepresentation, it would not have issued or would have issued on different terms. Syncora argues that if the misrepresentation materially increased its risk of loss, no requirement of a causal link between the breach of warranty and subsequent claim payment need be shown. Further, under N.Y. Insurance Law §§ 3105 and 3106, Syncora contends that rescission of the Insurance Polices would be appropriate. However, as rescission is allegedly not here possible, Syncora seeks rescissory damages. The first issue that must be decided is the relevant time period for causation.

(iii.) *Causation*

Syncora posits common law claims for fraud and breach of warranty. The court finds that in this insurance context, with Syncora as an insurance company and Countrywide as an applicant for insurance, the claims are properly informed by New York common law and Insurance Law Sections 3105 and 3106.

Both New York common law and Insurance Law are clear that a material misrepresentation made at the time an insurance policy is being procured may lead to a policy being rescinded and/or avoided. *See BW Sportswear, Inc. v. Those Certain Underwriters at Lloyd's of London*, 32 Misc. 3d 1245(A), *2 (N.Y. Sup. Ct., N.Y. County 2011) (Oing, J.) citing *Kiss Construction NY, Inc. v. Rutgers Casualty Ins. Co.*, 61 A.D.3d 412 (1st Dep't 2009); N.Y. Ins. Law § 3105. This corresponds to a standard claim for fraud, in which fraud is complete when a misrepresentation is made that induces a party to take action and that party suffers damages as a result. *See, e.g., Eurycleia Partners, LP v. Seward & Kissel, LLP,*

12 N.Y.3d 553, 559 (2009). This time frame further corresponds to Syncora's claim for breach of Section 2.01(k) of the I&I. The court therefore finds that no basis in law exists to mandate that Syncora establish a direct causal link between the misrepresentations allegedly made by Countrywide and claims made under the policy.

In order to prove its claims for fraud and breach of warranty, Syncora must prove all elements of its claims. *Small v. Lorillard Tobacco Co., Inc.*, 94 N.Y.2d 43, 57 (1999) (fraud); *Ainger v. Michigan General Corp.*, 476 F. Supp. 1209, 1223-24 (S.D.N.Y. 1979) (discussing breach of warranty). Of particularly importance here, Syncora must prove that Countrywide made misrepresentations that were material to its decisions to issue the Insurance Policies.

In order to show materiality, as defined by N.Y. Insurance Law § 3105(b) and case law, Syncora must show that it relied on Countrywide's alleged misrepresentations in that the alleged statements induced Syncora to take action which Syncora might otherwise not have taken, or would have taken in a different manner: "The question in such case is not whether the company might have issued the policy even if the information had been furnished; the question in each case is whether the company has been induced to accept an application which it *might otherwise have refused.*" *Greer v. Union Mutual Life Ins. Co.*, 273 N.Y. 261, 269 (1937) (emphasis in original); *Interested Underwriters at Lloyd's, Subscribing to Policy of Insurance No. 707/NP 2641G v. H.D.I. III Associates*, 213 A.D.2d 246, 247 (1st Dep't 1995). "For purposes of determining materiality, there need not be a

causal connection between the misrepresented condition and the loss suffered." *Greene v. United Mutual Life Insurance Co.*, 38 Misc. 2d 728, 730–31 (N.Y. Sup. Ct., Bronx County 1963), *aff'd*, 23 A.D.2d 720 (1st Dep't 1965).

Syncora must prove for its fraud claim that it issued the Insurance Policies on representations made in the policies' applications, and that it would not have done so or would have issued the policies on different terms had the alleged misrepresentations not been made. Similarly, Syncora must prove for its breach of warranty claim that Countrywide's alleged misrepresentations materially increased Syncora's risk of loss. *See Star City Sportswear, Inc. v. The Yasuda Fire & Marine Insurance Company of America*, 1 A.D.3d 58, 62 (1st Dep't 2003); N.Y. Insurance Law § 3106(b).

Syncora must then prove that it was damaged as a direct result of the material misrepresentations. Upon reaching its burden of proof for each claim, Syncora must then prove the amount of its damages.

The question therefore next turns to whether Syncora's claim for rescissory damages is valid in this instance, or if, having chosen to inform its claims as per New York Insurance Law, Syncora is limited to rescission.

(iv.) *Rescission versus Rescissory Damages*

Countrywide asserts that under N.Y. Insurance Law Sections 3105 and 3106, Syncora may only seek to rescind or avoid the Insurance Policies. Syncora contends that to void or rescind the Insurance Policies would be unfair to the Trusts, and is prohibited by binding

contract. Thus, Syncora moves for recognition that it may recover its alleged economic injury through rescissory damages.

Though traditionally directed toward breach of contract and tort, elementary damages theory is instructive to the case at bar.

Compensatory damages are intended to make the victim of wrongdoing whole. The damages are to place the wronged victim in the same position as it was prior to the wrongdoing, without providing the recovery of any windfall. *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 489 (2007); *New York City Economic Development Corporation v. T.C. Foods Import and Export Co., Inc.*, 11 Misc.3d 1087(A), *3 (N.Y. Sup. Ct., Queens Co. 2006) (Weiss, J.); *see* 4 N.Y. Prac., Com. Lit. in New York State Courts § 46:2 (3d ed.) ("Whether arising from a breach of contract or a tort, compensatory damages are intended to compensate the injured party for its losses caused by the breach or tortious conduct. Compensatory damages "proceed from a sense of natural justice" to repair the losses caused to one by the wrong of another.").

Rescissory damages, while not often used in New York, are far from an unknown form of relief. Rescissory damages are an established remedy where rescission, the voiding of a contract, may not be a valid form of relief. As the Delaware chancery court stated in 2003: "Rescissory damages are designed to be the economic equivalent of rescission in a circumstance in which rescission is warranted, but not practicable. A solid body of case law so holds." *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 855 A.2d 1059, 1072

(Del. Ch. 2003) string citing, *inter alia*, *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1144-47 (Del. Ch. 1994); *see also Telstra Corp Ltd. v. Dynegy, Inc,* Civ.A. 19369, 2003 WL 1016984, at *8 (Del. Ch. Mar, 4, 2003) (holding against granting rescissory damages, but stating that "[a]t equity, rescissory damages should only be awarded where the 'equitable remedy of rescission is impractical' but otherwise warranted.") (citation omitted).

Countrywide asserts that several courts applying New York law have held that rescissory damages are not available in this state. Countrywide cites *Raymond Weil S.A. v. Theron*, 585 F. Supp. 2d 473, 488 (S.D.N.Y. 2008) and *Grace v. Rosenstock*, 228 F.3d 40, 50 (2d Cir. 2000) in support of its argument. Countrywide Opp. Memo., p. 8. The court finds that, while the cited cases do not grant rescissory damages, the cases do not hold against their availability. In *Raymond Weil*, the Southern District of New York court held that the contract in question was "no longer operative," and therefore plaintiff was "not entitled to the recessionary damages" it sought. Rather, plaintiff may have been entitled, upon proof, to compensatory damages. *Raymond Weil S.A,* 585 F. Supp. 2d at 488. In *Grace*, the Second Circuit court held that New York law does not authorize "rescissory damages for a freeze-out merger as to which a dissenting shareholder had a right of appraisal." *Grace*, 228 F.3d at 50. Neither situation is applicable to the case at bar. Instead, the court holds that the Delaware test to determine the appropriateness of rescissory damages is applicable.

Here, rescission is warranted, but impractical. First, to rescind the Insurance Policies would be to harm the policies' beneficiaries, the Noteholders, and may lead to greater economic harm. Second, rescission is further impractical, if not impossible under the governing Transaction Documents. See Hawthorne Affirm., Ex 9 at p. A-4, Ex. 10 at p. A-4 (Insurance Policies providing that Syncora "shall unconditionally and irrevocably pay" under the policies). Based upon the impracticability of rescission, and the fact that rescissory damages are the financial equivalent of rescission, *see, e.g., St. Clair Shores General Employees Retirement System v. Eibeler,* 745 F. Supp. 2d 303, 315 (S.D.N.Y. 2010); *Outdoor Life Network, LLC v. EMTA Corp.,* No. 2:06-CV-00463 JWS, 2006 WL 3834287, *5 (D. Ariz. December 29, 2006); *In re MAXXAM, Inc.*, 659 A.2d 760, 775 n.15 (Del. Ch. 1995), the court holds that rescissory damages are appropriate in this instance under persuasive case law and this court's power to award relief. *See* CPLR 3017(a) and case law, *supra.*

Syncora seeks rescissory damages in the amount that it has been required to pay pursuant to the Insurance Policies, less premiums Syncora received under the policies. The court notes that, should Syncora prove its case, rescissory damages minus premiums received will make Syncora whole without providing a windfall. Rescissory damages, if found warranted, will thus serve the goal of damages theory and justification. *See also Equitable Life Assur. Soc. of U.S. v. Kushman,* 276 N.Y. 178, 184 (1937) ("Damages may be recovered as incident to an action in equity for a rescission.").

Syncora has, relevant to this motion, made claims for fraud and breach of warranty. Syncora bases both claims upon alleged misrepresentations made by Countrywide that purportedly cause Syncora to enter into the Insurance Policies and were in violation of stated representations and warranties. It is without basis in case law to require Syncora to provide a causal link between the alleged misrepresentations and payments made pursuant to the policies. The elements of the claims are well-established and make no such holding; it is well-settled that it is upon the misrepresentation that induces action resulting in damages that fraud or breach occurs. *See supra.* Further, the court finds that rescissory damages may make Syncora whole for any wrongdoing which it is able to prove. The court therefore grants Syncora's motion for partial summary judgment seeking a declaration regarding its burden of proof on its claims for fraud and breach of representation and/or warranty.

ORDER

Accordingly, it is hereby

ORDERED that Syncora Guarantee Inc.'s motion for partial summary judgment is granted to the extent that Syncora Guarantee Inc. ("Syncora") must establish for its claim of fraud that misrepresentations by the defendant(s) induced Syncora to issue insurance policies on terms to which it otherwise would not have agreed and Syncora is not required to establish a direct causal link between defendant(s) misrepresentations and Syncora's claims payments made pursuant to the insurance policies at issue; and it is further

ORDERED that Syncora Guarantee Inc.'s motion for partial summary judgment is granted to the extent that Syncora must establish for its claim for breach of the Insurance Agreement against Countrywide Home Loans, Inc. ("CHL") that CHL's breach of warranties in the issued insurance policies' transaction documents increased the risk profile of the issued insurance policies and Syncora is not required to establish a direct causal connection between proven warranty breaches by CHL and Syncora's claims payments made pursuant to the insurance policies at issue; and it is further

ORDERED that Syncora Guarantee Inc.'s motion for partial summary judgment is granted to the extent that Syncora Guarantee Inc. may seek rescissory damages upon proving all elements of its claims for fraud and breach of representation and/or warranty; and it is further

ORDERED that Syncora Guarantee Inc.'s motion for partial summary judgment is otherwise denied.

This constitutes the decision and order of the court.

Dated: New York, New York
January 3, 2012

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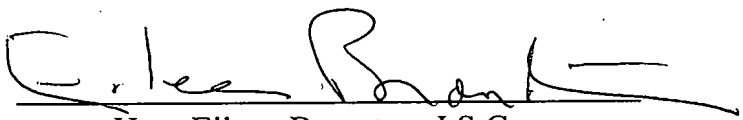

Hon. Eileen Bransten, J.S.C.

Appendix B

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

SYNCORA GUARANTEE, INC.,

Plaintiff,

-against-

COUNTRYWIDE HOME LOANS, INC., COUNTRYWIDE SECURITIES CORP., COUNTRYWIDE FINANCIAL CORP., COUNTRYWIDE HOME LOANS SERVICING, L.P. (N/K/A BANK OF AMERICA, N.A., SUCCESSOR BY *DE JURE* MERGER TO BAC HOME LOANS SERVICING, L.P.), and BANK OF AMERICA CORP.,

Defendants.

Index No. 650042/2009

IAS Part 3 (Bransten, J.)

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Defendant Bank of America Corporation ("BAC") hereby appeals to the Appellate Division, First Department, from the Decision and Order of the Honorable Eileen Bransten, Supreme Court of the State of New York, New York County, dated October 31, 2011, and from each and every part thereof, denying BAC's motion to sever and consolidate identical pending successor-liability claims. The Order was entered on October 31, 2011.

Dated: November 3, 2011

O'MELVENY & MYERS LLP

/s/ Jonathan Rosenberg

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Countrywide Securities Corp., Countrywide Financial Corp.,
and Countrywide Home Loans Servicing, L.P. (n/k/a Bank of America, N.A., successor by de jure merger to BAC Home Loans Servicing, L.P.)

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

----------x

SYNCORA GUARANTEE INC.,

Plaintiff,

-against-

Index No.: 650042/09
Motion Date: 10/5/11
Motion Seq. No.: 012

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

Defendants.

----------x

The following papers, numbered 1 to 3, were read on this motion to sever and consolidate.

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

Cross-Motion: ☐ Yes X No

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

11/1/11

Dated: October 31, 2011

Hon. Eileen Branstein J.S.C.

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

Check One: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

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

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

----------x

SYNCORA GUARANTEE INC.,

Plaintiff,

-against-

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

Defendants.

Index No.: 650042/09
Motion Date: 10/5/11
Motion Seq. No.: 012

----------x

PRESENT: HON. EILEEN BRANSTEN

In motion sequence number 012, defendant Bank of America Corporation ("BAC") moves to sever and consolidate allegedly identical successor liability claims asserted against it by plaintiff Syncora Guarantee Inc. ("Syncora") and plaintiffs in three other cases pending in this court: *MBIA Insurance Corp. v. Countrywide Home Loans, et al.*, Index No. 602825/2008 ("*MBIA*"); *Financial Guaranty Insurance Co. v. Countrywide Home Loans, et al.*, Index No. 650736/2009 ("*FGIC*"); and *Ambac Insurance Corp., et ano v. Countrywide Home Loans, Inc. et al.*, Index No. 651612/2010 ("*Ambac*," together with the instant matter, ("*Syncora*"), the "Monoline Actions").[1]

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[1] The court has carefully considered all arguments in this matter. Due to the overlapping arguments and effect of BAC's motion herein, to the extent that this motion is not affected by the parties' stay, this decision is largely based upon the reasoning stated in this court's decision upon BAC's same motion in *MBIA*, *supra*, dated October 31, 2011.

MBIA is the first-filed of the Monoline Actions, and leads the other cases in completing discovery. *Syncora, FGIC* and *Ambac* follow, respectively, in terms of filing dates.

BACKGROUND

The facts are discussed only as pertinent to the instant motion.

This is an action for fraud and breach of contract (the "primary liability claims") against Countrywide Home Loans, Inc. ("CHL"), Countrywide Securities Corp. ("CSC") and Countrywide Financial Corporation ("CFC", and, together with CHL and CSC, the "Countrywide defendants") and for successor and vicarious liability against Bank of America Corporation.[2]

Syncora bases its primary liability claims on alleged misrepresentations made by Countrywide in connection with five securitizations of mortgage loans. Four securitizations involved Home Equity Lines of Credit ("HELOC"): Revolving Home Equity Loan Asset Backed Notes, Series 2004-Q ("2004-Q"), the Revolving Home Equity Loan Asset Backed Notes, Series 2004-R ("2004-R"), Revolving Home Equity Loan Asset Backed Notes, Series 2005-K ("the 3 2005-K Series"), Revolving Home Equity Loan Asset Backed Notes, Series 2006-D ("the 2006-D Series," and collectively with the other three HELOC securitizations

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[2] Affirmation of Jonathan Rosenberg, Esq., in Support of Defendant Bank of America Corporation's Motion to Sever the Successor Liability Claims in *Ambac*, *FGIC* and *Syncora* and Consolidate Identical Successor-Liability Claims Pending in Four Actions Before This Court ("Rosenberg Affirm."), Ex. 3 ("Amended Complaint").

the "HELOC securitizations"). The fifth is a securitization of close-end seconds, the Home Equity Loan Asset Backed Certificates, Series 2006-S7 ("2006-S7," and collectively with the HELOC securitizations, the "securitizations").

Countrywide is alleged to have created the securitizations by aggregating thousands of mortgage loans that it and its subsidiaries originated and selling them to trusts. The trusts then issued notes and certificates backed by the loans (the "notes").

Syncora insured the securitizations, thereby allegedly increasing the notes' saleability. Syncora guaranteed to holders of the securitization-based notes that they would receive timely payments of interest and principal, and that Syncora would make up any shortfall between the principal balance of the insured obligations and the principal balance of the mortgage loans that the trusts used as collateral. *See* Amended Complaint, ¶¶ 1-10.

On May 6, 2010, Syncora filed the Amended Complaint. Therein, Syncora added, *inter alia*, a cause of action alleging successor and vicarious liability against BAC (the "successor liability claim"). Amended Complaint, ¶¶ 136-46. Syncora alleges that BAC's purchase of Countrywide on July 1, 2008, constituted a merger. *Id.*, *see also* ¶ 23.

Syncora alleges that BAC acquired CFC and the other Countrywide defendants in July of 2008, (Amended Complaint, ¶ 137), and that CFC was merged into Red Oak Merger Corporation, a wholly owned BAC subsidy, to form "a combined company." *Id.* BAC is alleged to have assumed CFC's and CHL's debts and liabilities. *Id.*, ¶¶ 138-41. Further, Syncora alleges that BAC has assumed CFC and the Countrywide defendants' obligations under agreements relating to the securitizations. *Id.*, ¶ 142-43.

Facts Relevant to all Monoline Actions in BAC's Motion to Sever and Consolidate

Plaintiffs in each of the Monoline Actions assert a claim against BAC for successor liability.[3] BAC contends, and plaintiffs generally do not contest, that each Monoline Action plaintiff asserts very similar bases for their successor liability claim.[4]

Each Monoline Action plaintiff asserts that, upon BAC's July 1, 2008 acquisition of Countrywide, BAC became Countrywide's successor-in-interest. Plaintiffs contend that BAC must therefore bear joint and several liability for Countrywide's alleged wrongdoing. Plaintiffs' assertions are first based on an alleged *de facto* merger between BAC and Countrywide and the allegation that BAC assumed all of Countrywide's liabilities. *See* BAC Memo., pp. 4-5.[5] Each plaintiff additionally bases its successor liability claim on Countrywide's merger into a wholly owned BAC subsidiary that was created for the sole purpose of facilitating BAC's Countrywide acquisition. Amended Complaint, ¶ 137; BAC

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[3] Rosenberg Affirm., Exs. 1 (*MBIA* Amended Complaint, ¶¶ 200-07), 2 (*Ambac* Complaint, ¶¶ 204-10), 3 (*Syncora* Amended Complaint, ¶¶ 136-46), 4 (*FGIC* Amended Complaint, ¶¶ 466-72).

[4] *See* Plaintiff's Opposition to Defendant Bank of America Corporation's Motion to Consolidate Identical Successor Liability Claims Pending in Four Actions Before This Court ("MBIA Opp. Memo. (038)"); Memorandum of Law In Opposition to Defendant Bank of America Corporation's Motion to Sever and Consolidate the Successor Liability Claims Against Bank of America ("Syncora Opp. Memo."); Plaintiff FGIC's Opposition to Defendant Bank of America's Motion to Sever and Consolidate the Successor Liability Claim ("FGIC Opp. Memo."); and Plaintiff's Memorandum in Opposition to Motion to Sever and Consolidate ("Ambac Opp. Memo.").

[5] Defendant Bank of America Corporation's Memorandum of Law In Support of its Motion to Sever the Successor Liability Claims in *Ambac*, *FGIC* and *Syncora* and Consolidate Identical Successor Liability Claims Pending in Four Actions Before This Court ("BAC Memo.").

Memo., Ex. A (chart of the Monoline Actions' complaints' allegations in support of their claims against BAC for successor liability). Further, each plaintiff argues their respective successor liability claim on the transfer of assets from CFC's subsidiaries to BAC subsidiaries (Amended Complaint, ¶ 138); public statements of BAC representatives (Amended Complaint, ¶¶ 136, 143); allegations that BAC discharged or assumed pre-merger Countrywide liabilities (Amended Complaint, ¶ 138, 141); and BAC's rebranding of "legacy" Countrywide businesses with BAC trade names. Amended Complaint, ¶ 139; BAC Memo., pp. 5-6 (citing to specific paragraphs of each Monoline Action), Ex. A.

BAC also asserts that the Monoline Action plaintiffs' primary liability claims against the Countrywide defendants are divorced from plaintiffs' claim against BAC for successor liability. Whereas plaintiffs assert claims against the Countrywide defendants for breach of contract, breach of the implied covenant of good faith and fair dealing and fraud (BAC Memo., p. 9, n.30), plaintiffs assert against BAC only a claim for successor liability.

BAC argues that the evidence differs between the primary and successor liability claims, with little if any overlap. Evidence pertaining to the primary liability issue will focus upon Countrywide and the securitizations, including representations about the loans, and the loans themselves, which underlie the securitizations. Evidence relevant to the successor liability claim will involve only whether and to what extent BAC assumed Countrywide's liabilities.

BAC contends that, because the Monoline Actions' successor liability claims are so similar, "discovery on all four claims will be identical." BAC Memo., p. 6. BAC states that Plaintiffs, with the exception of Syncora, have requested many, if not all, of the same documents pertaining to Countrywide's merger into BAC and the continuing operation of Countrywide. *See* BAC Memo., pp. 6-8, n.16 (detailing MBIA's, FGIC's and Ambac's document requests to BAC). BAC has produced or may produce the same document universe to all four plaintiffs. *See* Transcript of October 5, 2011, p. 11 ("MBIA, Ambac and FGIC all have exactly the same set of successor liability documents from Bank of America at this point."). BAC has further answered eighteen MBIA interrogatories and fifteen MBIA requests for admission, and has agreed to answer interrogatories from the other Monoline Action plaintiffs. *Id.*, p. 51.

The Monoline Action plaintiffs note that while the evidence proving or disproving the primary and successor liability claims may differ, it does not necessarily follow that discovery on the two types of claims is completely divergent and will only stem from different sources. It is without question that current BAC employees were formerly involved with Countrywide. MBIA, for instance, has alleged that BAC witnesses, for whom BAC seeks by this motion to postpone deposition, have information relevant to both the primary- and successor liability claims. *See* Transcript of October 5, 2011, pp. 27-28. BAC aptly argues against MBIA's contention, claiming that the plaintiffs merely seek to confuse the

issue of disparate discovery between the primary and successor-liability claims. *Id.*, p. 52. Ultimately, the possible overlap will be determined upon further discovery and deposition questioning.

Syncora, unlike the other Monoline Actions plaintiffs, has stipulated with BAC to stay discovery on its successor liability claim against BAC. *See* Rosenberg Affirm, Ex. 9 (the "Stipulation"). The court so-ordered the Stipulation on July 20, 2011. Therein, the parties stayed all discovery and proceedings relating to Syncora's successor liability claim. *Id.*, ¶ 1. The Stipulation provides for specific end points, determined by particular occurrences. *Id.*, ¶ 5. Importantly, the agreement states that "the Stay [the Stipulation] may only be modified or terminated by further order of the Court upon motion and good cause shown or by agreement of the parties." *Id.*, ¶ 7.

ANALYSIS

I. Standards of Law

Pursuant to CPLR § 602(a):

> [w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Consolidation is generally favored by the courts where common issues of law and/or fact exist, unless the party opposing consolidation demonstrates that consolidation will prejudice a substantial right. *Amcan Holdings, Inc. v. Torys LLP*, 32 A.D.3d 337, 339 (1st

Dep't 2006) citing *Amtorg Trading Corp. v. Broadway & 56th St. Assocs.*, 191 A.D.2d 212, 213 (1st Dep't 1993). "The mere fact that a case may be somewhat delayed by such consolidation" does not alone bar the consolidation. *Amtorg Trading Corp.*, 191 A.D.2d at 213. The decision to consolidate, however, rests soundly in the discretion of the trial court. *Amcan Holdings, Inc.*, 32 A.D.3d at 339.

CPLR § 603 states that:

> In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others.

As with consolidation, severance rests in the sound discretion of the trial court. *See Seay v. Stateside Const. Corp.*, 282 A.D.2d 268, 268 (1st Dep't 2001).

II. Arguments

BAC, in its omnibus memorandum of law in support of its motion to sever and consolidate, argues that consolidation of the Monoline Actions' successor liability claims will promote judicial economy and the interests of justice. BAC asserts that all four claims in the separate actions turn on common legal theories and issues of fact, and, thus, that one trial thereon will prevent undue burden on the court and will guard against the possibility of inconsistent verdicts. BAC further contends that consolidation of the successor liability claims will neither prejudice plaintiffs nor unduly delay trial on the successor-liability issue.

Importantly, while BAC asserts that "Syncora has sensibly agreed to stay all proceedings in its successor-liability claim against BAC," (BAC Memo., p. 10), BAC also

acknowledges that is must move to set aside the Stay to allow severance and consolidation. BAC Reply Memo., p. 17.

Syncora asserts that BAC's motion should be denied upon the parties' stay of Syncora's successor liability claim. Syncora further argues that BAC has not shown that severance would promote convenience or avoid prejudice. Finally, Syncora contends that consolidation must be denied as it would cause Syncora significant prejudice.

1. The Stipulation Remains in Effect

BAC does not address the Stipulation in full. Rather, BAC first requests, in a footnote in its moving memorandum of law, that the court lift the stay for the limited purposes of considering the instant motion and, if the court were to grant severance and consolidation, to allow *Syncora* to proceed at the same pace and with the other Monoline Actions. BAC Memo., p. 6, n.15. BAC addresses the Stipulation with greater specificity in its memorandum of law in reply.[6]

BAC is correct that this court has the ability and power to control the calendar before it. *Headley v. Noto*, 22 N.Y.2d 1, 4 (1968) ("It is well recognized that the power to control its calendar is a vital consideration in the administration of the courts."). However, stipulations between the parties are held all but sacrosanct. Only where there is cause

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[6] Defendant Bank of America Corporation's Reply Memorandum of Law in Further Support of its Motion to Sever the Successor-Liability Claims in *Ambac*, *FGIC* and *Syncora* and Consolidate Identical Successor-Liability Claims Pending in Four Actions Before This Court ("BAC Reply Memo.").

sufficient to invalidate a contract, such as fraud, collusion, mistake, accident, or some other ground of the same nature, will a party be relieved from the consequences of a stipulation made during litigation. *Hallock v. State of New York*, 64 N.Y.2d 224, 230 (1984); *Matter of Frutiger*, 29 N.Y.2d 143, 150 (1971). The court also has the power to relieve a party from the terms of a stipulation upon a showing of good cause. *Matter of Frutiger*, 29 N.Y.2d at 149-50. "Good cause" may be found even in the absence of proof of "fraud, collusion, mistake, accident, or some other ground of the same nature." *Id.* As the Court of Appeals made plain in *Frutiger*, good cause to change the stipulation may be found "if it appears that either party has inadvertently, inadvisably, or improvidently entered into an agreement which will take the case out of the due and ordinary course of proceeding in the action, and in doing so may work to his prejudice." *Id.*, quoting *Van Nuys v. Fitsworth*, 57 Hun 5, 10 N.Y.S. 507 (1890).

BAC has made no allegations nor put forward any proof of circumstances providing sufficient reason under applicable case law to remove Syncora and BAC from the agreed-upon and so-ordered stipulation. *Hallock*, 64 N.Y.2d at 230. To the contrary, BAC has stated that the Stipulation is reasonable and sensible. BAC Memo., p. 6, 10.

Further, as per the terms of the Stipulation, the parties' stay on Syncora's successor-liability claim "may only be modified or terminated by further order of the Court upon motion and good cause shown or by agreement of the parties." Stipulation, ¶ 7. The parties have not agreed to modify the Stipulation. The court reads paragraph seven to require not

simply any motion, but a motion to lift the stay, and good cause shown therefor. BAC agrees with this reading by acknowledging that if the court were to grant severance and consolidation, it would *then* move to lift the stay. BAC Memo, p. 8. The court finds that the Stipulation mandates reversal of BAC's proposed procedure – the stay must first be lifted to before severance and consolidation may be granted.

For the above reasons, the Stipulation remains in effect, and BAC's motion to sever Syncora's successor-liability claim and consolidate the claim with those in the other Monoline Actions is denied. Should BAC or Syncora wish to change the Stipulation, the parties may do so by agreement or by motion to this court.

The court notes that, but for the Stipulation, it has found reason for discovery to move forward in the Monoline Actions' claims against BAC for successor liability, and has held in abeyance the issue of severance and consolidation of the successor liability claims for trial. *See* Order of October 31, 2011, *MBIA Insurance Corp. v. Countrywide Home Loans, et al.*, Index No. 602825/2008. Were it not for the Stipulation, it is likely that, for the same reasons in the *MBIA* decision, the same would hold true here. While the court would encourage discovery on the successor liability claim in this action to go forward, as by agreement of the parties, it may not here force the parties to take such action.

ORDER

Accordingly, it is hereby

ORDERED that Bank of America Corporation's to motion sever and consolidate the successor liability claims in this matter and in *MBIA Insurance Corporation v. Countrywide Home Loans, et al.*, Index No. 6502825/2008, *Financial Guaranty Insurance Co. v. Countrywide Home Loans, et al.*, Index No. 650736/2009 and *Ambac Insurance Corp., et ano v. Countrywide Home Loans, Inc. et al.*, Index No. 651612/2010 is denied as to plaintiff Syncora Guarantee Inc.

This constitutes the decision and order of the court.

Dated: New York, New York
October 31, 2011

ENTER

Hon. Eileen Bransten, J.S.C.