SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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HBK MASTER FUND L.P.,

Petitioner/Plaintiff,

- v -

NEWREZ LLC and DEUTSCHE BANK NATIONAL TRUST COMPANY, SOLELY IN ITS CAPACITY AS TRUSTEE FOR ARGENT SECURITIES INC. SERIES 2004-W5 TRUST,

Respondents/Defendants.

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INDEX NO. 656286/2023

MOTION DATE --

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 36, 39

were read on this motion to/for MISCELLANEOUS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion to/for DISMISS.

HBK Master Fund L.P. (HBK) initiated this hybrid plenary action and CPLR Article 77 proceeding for judicial instruction.[1] HBK is a holder of Class CE Certificates

[1] Hybrid actions such as this one are irregular. CPLR 103 (b) provides that "[a]ll civil judicial proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized"; this section does not authorize an action to be prosecuted as both a plenary action and a special proceeding. Hybrid plenary actions and CPLR Article 78 proceeding have been recognized. (*See Matter of Powell v City of NY*, 16 Misc 3d 1113[A], 2007 NY Slip Op 51409[U], *4 [Sup Ct, NY County 2007].) The court located one hybrid plenary action-CPLR Article 77 proceeding. (*One William St. Capital Mgt., LP v Educ. Loan Trust IV*, 2013 NY Slip Op 31977[U], *6 [Sup Ct, NY County 2013], *affd* 116 AD3d 512 [1st Dept 2014].) The court is guided by the approach used by other courts that encountered hybrid actions: "when a 'hybrid' proceeding-action is commenced, it must adequately set forth separate claims that would each be appropriately prosecuted either by plenary action or special proceeding. The court should, where possible, treat them according to the appropriate distinct procedures, whether for a plenary action or a special proceeding." (*Matter of*

issued by Argent Securities Inc. Series 2004-W5 Trust (Trust), a residential mortgage-backed securities trust. Defendant and respondent is NewRez LLC, the Trust's master servicer (NewRez or Master Servicer). Deutsche Bank National Trust Company, the Trust's trustee (Deutsche Bank or Trustee) is the nominal defendant and respondent.

This is a contract case. The Trust is governed by the pooling and servicing agreement (PSA). HBK alleges that NewRez, in exercising its option under the PSA to purchase the Trust's mortgage loans and foreclosed properties (Clean-Up Call), underpaid the Termination Price. Allegedly, NewRez improperly excluded from the Termination Price deferred amounts of principal of the mortgage loans, which deferred amounts were generated by the loan's modifications authorized by the federal Home Affordable Modification Program (HAMP). HBK alleges claims against NewRez for (i) breach of section 9.01 of the PSA by underpaying the Termination Price by at least $3.25 million and (ii) declaratory judgment declaring that per the PSA, the Termination Price includes the underpaid deferred amounts generated by the mortgage loans' modifications.

HBK also seeks judicial instructions pursuant to CPLR Article 77 instructing (i) Deutsche Bank and NewRez that the Termination Price includes deferred amounts generated by the mortgage loans' modifications, (ii) NewRez to deliver to the Trust an amount equal to its underpayment of the Termination Price plus statutory interest, and

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Powell, 2007 NY Slip Op 51409[U], *4 [Sup Ct, NY County 2007].) The court also noted, however, that "prudent practice suggests that the claims be brought in separate pleadings, so as to simultaneously commence a plenary action and" a special proceeding. (*Id*. at *4 n 2].)

(iii) Deutsche Bank to distribute the amount received from NewRez to outstanding certificateholders in accordance with the priority of payments set forth in the PSA.[2]

In motion sequence 001, HBK moves for judicial instructions sought in the verified complaint and petition.

In motion sequence 002, NewRez moves, pursuant to CPLR 3211 (a)(1) and (7), to dismiss the verified complaint and petition. HBK opposes the motion to dismiss and cross-moves, pursuant to CPLR 409, for an order granting the relief sought in the petition.

Deutsche Bank answered the petition and filed a brief in opposition to the cross-motion.

Background

Per the PSA, NewRez collects principal and interest payments in connection with the mortgage loans that are the Trust's assets, which collections are deposited into the Distribution Account maintained by Deutsche Bank; Deutsche Bank, in turn, distributes available Distribution Account funds and allocates Realized Losses, [3] if any, to the

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[2] HBK's request for "an Order to Show Cause designating the time and place when the respective parties in interest may be heard upon the matters set forth in this Petition, and that notice of the hearing be served in the manner specified in such Order to Show Cause" (NYSCEF Doc. No. [NYSCEF] 2, Verified Complaint and Petition [VCP] ¶ 58 [b]) was satisfied; an order to show cause was issued and a hearing was held on March 7, 2024. (NYSCEF 16, Order to Show Cause.)

[3] Realized Loss is defined as, "[w]ith respect to each Mortgage Loan as to which a Final Recovery Determination has been made, an amount (not less than zero) equal to (i) the unpaid Stated Principal Balance of such Mortgage Loan as of the commencement of the calendar month in which the Final Recovery Determination was made, plus (ii) accrued interest from the Due Date as to which interest was last paid by the Mortgagor through the end of the calendar month in which such Final Recovery Determination was made, calculated in the case of each calendar month during such period (A) at an annual rate equal to the annual rate at which interest was then accruing on such Mortgage Loan and (B) on a principal amount equal to the Stated Principal Balance of such Mortgage

certificateholders each month in accordance with an order of priority set forth the PSA. (*See* NYSCEF 2, VCP ¶¶ 10, 13; NYSCEF 3, PSA §§ 3.04 [f], 4.01, 4.04 [b] [at 90, 114-124, 130/183[4]].) Deutsche Bank, as Trustee, and NewRez, as Master Servicer, are parties to the PSA. (NYSCEF 2, VCP ¶ 41; *id*. at 2 n 1; NYSCEF 3, PSA at 1, 7/183.)

Pursuant to section 9.01 (b) of the PSA, NewRez is granted the Clean-Up Call option to purchase all of the Trust's mortgage loans and foreclosed properties at a contractually defined Termination Price if the Stated Principal Balance of the mortgage loans and foreclosed properties falls below 10% of the aggregate Stated Principal Balance of the mortgage loans at the inception of the Trust. (*See* NYSCEF 3, PSA § 9.1 [b] [at 166/183].) Pursuant section 9.01 (a) of the PSA, the Termination Price equals to greater of

> "(A) the aggregate fair market value of all of the assets of [the Trust] and (B) the sum of the Stated Principal Balance of the Mortgage Loans (after giving effect to scheduled payments of principal due during the related Due Period, to the extent received or advanced, and unscheduled collections of principal received during the related Prepayment Period) and the appraised fair market value of the [foreclosed properties] plus accrued interest through the end of the calendar

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Loan as of the close of business on the Distribution Date during such calendar month, plus (iii) any amounts previously withdrawn from the Collection Account in respect of such Mortgage Loan pursuant to Section 3.05(a)(v) and Section 3.12(c), minus (iv) the proceeds, if any, received in respect of such Mortgage Loan during the calendar month in which such Final Recovery Determination was made, net of amounts that are payable therefrom to the Master Servicer with respect to such Mortgage Loan pursuant to Section 3.05(a)(ii)." (NYSCEF 3, PSA § 1.01 [at 54/183].)

[4] NYSCEF pagination.

month preceding the month of the final Distribution Date and any unreimbursed Advances and Servicing Advances." (*Id*. § 9.1 [a] [at 165/183].)

The Stated Principal Balance of a mortgage loan is defined as "the outstanding principal balance of [a] Mortgage Loan as of the Cut-off Date, as shown in the Mortgage Loan Schedule" minus

(i) "the principal portion of each Monthly Payment due on a Due Date subsequent to the Cut-off Date, to the extent received from the Mortgagor or advanced by the Master Servicer and distributed [to certificateholders] pursuant to Section 4.01 on or before [the] date of determination,"

(ii) "all Principal Prepayments received after the Cut-off Date, to the extent distributed [to certificateholders] pursuant to Section 4.01 on or before [the] date of determination,"

(iii) "all Liquidation Proceeds and Insurance Proceeds applied by the Master Servicer as recoveries of principal in accordance with the provisions of Section 3.1 2, to the extent distributed [to certificateholders] pursuant to Section 4.01 on or before [the] date of determination" and

(iv) "any Realized Loss incurred with respect thereto as a result of a Deficient Valuation made during or prior to the Prepayment Period for the most recent Distribution Date coinciding with or preceding [the] date of determination." (*Id*. § 1.01 [at 66/183].)

"Deficient Valuation" is defined as "a valuation of the … Mortgaged Property by a court of competent jurisdiction in an amount less than the then outstanding Stated

Principal Balance of the Mortgage Loan, which valuation results from a proceeding initiated under the Bankruptcy Code." (*Id*. [at 26/183].)

NewRez exercised the Clean-Up Call on November 22, 2019 by delivering a purchase price. (NYSCEF 2, VCP ¶ 46.) At the time, the Trust held 473 outstanding mortgage loans and 2 outstanding foreclosed properties. (*Id*. ¶¶ 28-29.) Many of the outstanding mortgage loans had deferred principal balances which in total exceeded $3.25 million. (*Id*. ¶ 29.) The deferred balance originated from forbearance agreements entered following the 2008 financial crisis. (*See id*. ¶¶ 24, 29.) Specifically, "[b]y entering forbearance agreements, the servicers permitted borrowers to repay their loans on a schedule that reduced monthly payments to a manageable level based on the borrower's post-crisis income." (*Id*. ¶ 25.) Such "forbearance agreements did not *forgive* the borrower's obligation to repay the Mortgage Loan in full, including the full amount of the deferred balance. Rather, the borrower's obligation to pay the deferred balance was postponed until a later date." (*Id*.)

It is HBK's position that the deferred balance does not reduce the Stated Principal Balance of the mortgage loans under the PSA. (*Id*. ¶ 26.) HBK alleges that NewRez, however, improperly excluded at least $3.25 million of deferred balance of the mortgage loans from the Stated Principal Balance and thus paid the sum below the Termination Price required under the PSA. (*Id*. ¶ 31-32.) HBK alleges that had NewRez correctly calculated the Termination Price, "the additional $3.25 million (or more) in proceeds paid to the Trust would have been distributed first to the Class M-7 Certificates to complete their principal repayment and eliminate their $1.5 million Realized Loss and then … to pay principal and interest owed on the Class CE

Certificates." (*Id*. ¶ 35.) HBK alleges that more than a one-third of the underpaid amount of the Termination Price would have been distributed to the Class CE Certificates. (*Id*.)

Legal Standard

An Article 77 proceeding "may be brought to determine a matter relating to any express trust …." (CPLR 7701.)

> "Permissible uses of Article 77 are broadly construed to cover any matter of interest to trustees, beneficiaries or adverse claimants concerning the trust. Such proceedings are used by trustees to obtain instruction as to whether a future course of conduct is proper, and by trustees (and beneficiaries) to obtain interpretations of the meaning of trust documents." (*BlackRock Fin. Mgt. Inc. v Segregated Account of Ambac Assur. Corp.*, 673 F3d 169, 174 [2d Cir 2012] [internal quotation marks and citation omitted] [collecting New York cases].)

"[A] proceeding brought pursuant to CPLR 7701 is governed generally by CPLR [a]rticle 4" and "the same summary judgment standards that apply to actions are also applied to special proceedings brought under CPLR article 4." (*Matter of Bank of NY Mellon v BlackRock Fin. Mgt., Inc.*, 202 AD3d 465, 467 [1st Dept 2022], quoting Vincent C. Alexander, Prac Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 7701 at 6 [2008 ed], and *People by Abrams v D.B.M. Intl. Photo Corp.*, 135 AD2d 353, 355 [1st Dept 1987].)

On a CPLR 3211 (a) (1) motion to dismiss, the movant has the "burden of showing that the relied upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and citation omitted].) "A cause of action may be dismissed under CPLR 3211(a)(1) only where the documentary evidence utterly refutes [the] plaintiff's factual allegations,

conclusively establishing a defense as a matter of law." (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [internal quotation marks and citation omitted].) "The documents submitted must be explicit and unambiguous." (*Dixon v 105 West 75th St. LLC*, 148 AD3d 623, 626 [1st Dept 2017] [citation omitted].) Their content must be "essentially undeniable." (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019] [internal quotation marks and citation omitted].)

On a CPLR 3211 (a) (7) motion to dismiss, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted].) "[B]are legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].)

Discussion

The PSA

HBK argues that the Termination Price paid by NewRez did not comply with the terms of the PSA as the Stated Principal Balance used to calculate the Termination Price excluded the deferred balance of the outstanding mortgage loans.

The court shall interpret an ambiguous contract "according to the plain meaning of its terms." (*Masters v 14-22 Leonard St. Assocs., LLC*, 11 AD3d 380, 381 [1st Dept 2004] [citations omitted].) "Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument

and should be enforced according to its terms." (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007] [citations omitted], *rearg denied* 8 NY3d 993 [2007].) "Extrinsic evidence of a contract's meaning should only be considered if the contract is ambiguous." (*Matter of Wells Fargo Bank, N.A.*, 198 AD3d 156, 163 [1st Dept 2021] [citations omitted], *lv dismissed* 38 NY3d 998 [2022], *rearg denied* 38 NY3d 1179 [2022].)

Here, the unambiguous PSA dictates that any deferred principal be included in the calculation of the Termination Price. As stated, the PSA defines the Stated Principal Balance as the principal balance of a mortgage loan minus any principal payments distributed to certificateholders, any Liquidation Proceeds and Insurance Proceeds, and any Realized Losses caused by Deficient Valuation. (NYSCEF 3, PSA § 1.01 [at 66/183].) According to the plain meaning of the definition, the unforgiven deferred principal does not fall into any of the listed deductions from the principal balance of a mortgage loan. Thus, on the face of the unambiguous language of the PSA, the Stated Principal Balance, and thus the Termination Price, must include any amounts of the deferred principal. (*See e.g.* NYSCEF 32, *U.S. Bank National Association* at 2/4 [Sup Ct, NY County, Feb. 10. 2023, Borrok, J., Index. No. 652307/2022] [stating that by plain language of governing agreement which "defines Stated Principal Balance as the principal balance of the Mortgage Loan minus amounts distributed to Certificateholders and any Realized Losses on such Mortgage Loan," stated principal balance shall include deferred principal balances because "the Deferred Principal Balances are not Realized Losses" (citation omitted)].)

Given the unambiguous Stated Principal Balance definition, NewRez's analysis of how the three types of Realized Losses contemplated by the PSA are treated for the purposes of calculating the Stated Principal Balance is irrelevant. NewRez argues that the treatment of such Realized Losses provides strong evidence of how the parties would have treated the deferred principal. Any such evidence, however, is of no import. The court shall enforce the unambiguous Stated Principal Balance definition "according to the plain meaning of its terms." (*Masters*, 11 AD3d at 381.)[5]

Further, NewRez's reliance on extrinsic evidence to interpret the PSA is misplaced because the court cannot consider such evidence in interpreting the unambiguous Stated Principal Balance definition. That the definition does not list all of the items that are *not deducted* – such as the deferred principal – does not make the definition ambiguous. (*See Donohue v Cuomo*, 38 NY3d 1, 13 [2022] ["an ambiguity never arises out of what was not written at all, but only out of what was written so blindly and imperfectly that its meaning is doubtful" (internal quotation marks and citation omitted)]; *Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001] ["That the warrants [to purchase shares of stock of defendant corporation] do not address the contingency of a reverse stock split does not, of itself, create an ambiguity. An omission or mistake in a contract does not constitute an ambiguity and the question of whether an

[5] The court also notes that even if the court accepted NewRez's analysis of the Realized Losses, the analysis supports the court's conclusion. NewRez insists that per the PSA, all events that reduce the mortgage loans' outstanding principal balance also reduce the Stated Principal Balance. It is undisputed, however, that the deferred balance is not forgiven and thus, by NewRez's logic, it should not reduce the mortgage loans' outstanding principal balance.

ambiguity exists must be ascertained from the face of the agreement without regard to extrinsic evidence" (internal quotation marks and citation omitted)].)

Federal Preemption

NewRez argues that HBK's claims are preempted by the Emergency Economic Stabilization Act of 2008 (12 USC §§ 5201-5261) (EESA).

> "The Supremacy Clause of article VI of the US Constitution provides for federal preemption of state or local law where there is express or implied congressional intent for preemption. Express preemption is found in the plain language of a federal statute or regulation. There is implied preemption when either the Federal legislation is so comprehensive in its scope that it is inferable that Congress wished fully to occupy the field of its subject matter … or because State law conflicts with the Federal law. Conflict preemption arises when either compliance with both federal and local laws is physically impossible or when the local law stands as an obstacle to the accomplishment of the full congressional purposes and objectives." (*435 Cent. Park W. Tenant Assn. v Park Front Apts., LLC*, 164 AD3d 411, 413 [1st Dept 2018] [internal quotation marks and citations omitted].)

"Preemption can apply to all forms of state law, including civil actions based on state law." (*Farina v Nokia, Inc.*, 625 F3d 97, 115 [3d Cir 2010] [citation omitted].) "The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." (*Louisiana Pub. Serv. Commn. v Fed. Communication Commn.*, 476 US 355, 357 [1986] [citation omitted].)

EESA was enacted following the 2008 financial crisis "to immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States." (12 USC § 5201 [1].) Under EESA, the United States Department of the Treasury is authorized to promulgate HAMP, "a national mortgage modification program" which "provides eligible borrowers the opportunity to modify their first lien mortgage loans to make them more affordable."

(NYSCEF 24, HAMP Guidelines at 17/272.[6]) In sum, under HAMP, "servicers apply a uniform loan modification process to provide eligible borrowers with affordable and sustainable monthly payments for their first lien mortgage loans." (*Id*.) One such modification is deferral of mortgage loans' principal, which is at issue in this case.

NewRez relies on the HAMP Guidelines' section entitled "Accounting Treatment of Principal Forbearance," pursuant to which (i) "the servicer must report to the trustee or securities administrator any forborne [and deferred] principal as a realized loss," (ii) "the trustee or securities administrator must allocate any such reported principal as a realized loss to the trust," (iii) "the servicer must act consistent with the presumption that such allocation has occurred," and (iv) "[t]he reported forborne [and deferred] principal should be allocated as a realized loss such that, for purposes of calculating distributions to security holders, such forborne amount is no longer outstanding." (*Id*. at 138/272; *see also id*. at 135/272 ["If the loan is modified pursuant to [Principal Reduction Alternative], the principal reduction amount should be initially treated as non-interest-bearing principal forbearance"].) NewRez argues that thus, HBK's claim that the deferred principal cannot reduce the Stated Principal Balance is preempted.

NewRez's argument fails. The HAMP Guidelines state that the deferred principal at issue is treated as a realized loss as if the deferred amount is no longer outstanding "for purposes of calculating distributions to security holders." (*Id*. at 138/272 n 5.) This case, however, is not about how the deferred principal affects distributions to certificateholders. Instead, this case involves NewRez's purchase of the mortgage loans and foreclosed properties and how much NewRez shall pay for these assets. In

[6] NYSCEF pagination.

effect, NewRez attempts to broaden HAMP's directive by arguing that HAMP operates to exclude deferred principal amounts from the Termination Price. This court agrees with other courts that have rejected this argument. (*See* NYSCEF 32, *U.S. Bank National Association* at 2/4 [Sup Ct, NY County, Feb. 10. 2023, Borrok, J., Index. No. 652307/2022] [concluding that per pooling and servicing agreement, termination price shall include deferred principal and stating that "NRZ's argument based on the HEMP guidelines and otherwise simply fail as the amount was never forgiven"]; NYSCEF 34, *In Re Certain Residential Mortgage-Backed Securities Trust Subject to Optional Termination* at 11/12 [California Super Ct, Orange County, Aug. 4, 2023, Wilson, J., Index. No. 30-2021-01233435-PR-TR-CXC] ["The HAMP guidance provides that reported forborne principal is allocated as realized loss 'for purposes of calculating distributions to security holders'. [Respondent] has not pointed to any provision in the HAMP guidance that requires forborne principal to be allocated as realized losses for purposes of calculating the Call Price"].)[7]

[7] The court reviewed NewRez' Commercial Division rule 18 letter citing *Wells Fargo Bank, N.A. v All Respondents for this Special Proceeding*, 227 AD3d 597 (1st Dept 2024). *Wells Fargo Bank, N.A.* "reject[ed] [the] argument that unpaid deferred principal balances should be included in the contractual Overcollateralization Amount – specifically, as part of the aggregate mortgage loan balance. Treasury guidance requires treating the deferred principal as a Realized Loss 'such that, for purposes of calculating distributions to securityholders, such forborne amount is no longer outstanding.'" (*Wells Fargo Bank, N.A.*, 227 AD3d at 598.) *Wells Fargo Bank, N.A.* addressed overcollateralization which is "intended to provide limited protection to certificateholders by absorbing the certificate's share of losses from liquidated mortgage loans." (Index No. 2023-05665, NYSCEF 38, Prospectus Supplement at 83/542.) Overcollateralization is part of the mechanism of distributions to certificateholders. (*See id*.) *Wells Fargo Bank, N.A.* did not address the issue before this court, i.e. whether the deferred principal shall be included into the contractually defined price that the Master Servicer shall pay to purchase the Trust's assets.

Moreover, HBK's claims arise from the alleged underpayment of the Termination Price "do not erect an obstacle to the accomplishment and execution of Congress' objectives to offer mortgage relief to defaulting borrowers." (*Van Etten v Wells Fargo Bank*, NA, 2024 WL 808972, *2, 2024 US App LEXIS 4470, *3 [3d Cir, Feb. 27, 2024, No. 22-3179] [internal quotation marks and citation omitted] [finding that mortgagor's state law claims are not preempted "to the extent … premised" on servicer's "(i) failure to comply with its contractual commitments, or (ii) purported fraud, misrepresentations, or omissions in inducing her to enter into a HAMP modification"].) Accordingly, HBKs claims are not preempted.

The court likewise rejects NewRez's argument that it would have been impossible for NewRez to treat the deferred principal as no longer outstanding and yet include it in the Stated Principal Balance. Nothing prevents NewRez from treating the deferred principal as a realized loss for purposes of distributions throughout the life of the Trust and, upon exercising the Clean-Up Call, including the deferred principal in the Stated Principal Balance for the purposes of calculating the Termination Price.

Next, NewRez cites Helping Families Save Their Homes Act of 2009's (HFSTHA) provisions. HFSTHA provides that

> "Notwithstanding any other provision of law, whenever a servicer of residential mortgages agrees to enter into a qualified loss mitigation plan with respect to 1 or more residential mortgages originated before the date of enactment of [HFSTHA] [enacted May 20, 2009], including mortgages held in a securitization or other investment vehicle … to the extent that the servicer owes a duty to investors or other parties to maximize the net present value of such mortgages, the duty shall be construed to apply to all such investors and parties, and not to any individual party or group of parties." (15 USC § 1639a [a][1].)

HFSTHA also establishes a safe harbor for services which NewRez cites:

> "A servicer that is deemed to be acting in the best interests of all investors or other parties under this section shall not be liable to any party who is owed a duty under subsection (a)(1), and shall not be subject to any injunction, stay, or other equitable relief to such party, based solely upon the implementation by the servicer of a qualified loss mitigation plan." (15 USC § 1639a [b].)

The HAMP Guidelines clarify that the United States Department of the "Treasury has determined that each residential loan modification under HAMP … is a 'qualified loss mitigation plan,' as defined in the Servicer Safe Harbor" provision of HFSTHA. (NYSCEF 24, HAMP Guidelines at 27/272.)

As the issue here is not "the implementation by [NewRez] of a qualified loss mitigation plan," i.e. HAMP, NewRez cannot benefit from HFSTHA's safe harbor provision. (15 USC § 1639a [b].)

The Distribution Reports

NewRez argues that documentary evidence – here, the two last reports on distributions – conclusively establish that NewRez paid the full ending Stated Principal Balance as the Termination Price, i.e. $56,783,285.10 ($57,000,113.80 minus 216,828.70). (NYSCEF 31, Oct. 2019 Report at 10/30 [indicating "Ending Pool Stated Principal Balance" of $57,000,113.80]; NYSCEF 30, Nov. 2019 Report at 8/41 [indicating "Full Voluntary Prepayments" of principal of $216,828.70].)

As stated, however, the HAMP Guidelines prescribe that "[t]he reported forborne [and deferred] principal should be allocated as a realized loss such that, for purposes of calculating distributions to security holders, such forborne amount is no longer outstanding." (NYSCEF 24, HAMP Guidelines at 138/272 n 5; *see also id*. at 135/272.) Given the HAMP's direction to treat the deferred balance as no longer outstanding for

the purposes of distributions, the distribution reports do not conclusively establish that the full Termination Price was paid.

Waiver

NewRez next argues that HBK waived all claims based on the alleged miscalculation of the Stated Principal Balance by failing to object to the Trust's reporting for years.[8]

Even if the court accepts, without deciding, that HBK's failure to object to the Trust's reporting constitutes waiver under the PSA of any objections relating to such reporting, NewRez's argument fails in light of the PSA's provision stating that no previous waiver "shall extend to any subsequent or other default or Master Servicer Event of Default or impair any right consequent thereon except to the extent expressly so waived." (NYSCEF 3, PSA § 7.04 [at 156/183].) Here, the issue is not the reporting, but rather the alleged underpayment of the Termination Price.

Timeliness

NewRez argues that this action is untimely because the complained of conduct – the alleged miscalculation of Stated Principal Balance – occurred when the deferred principal amounts were removed from the calculation, which occurred from 2009 to 2016 when HAMP was in place. NewRez states that accordingly, all of the challenged calculations occurred within that time frame which is well outside of the longest-possible limitations period of six years.

[8] NewRez also premises its waiver argument on HBK's acceptance of distributions. HBK counters that it received no distributions between 2009 and 2019.

This argument is rejected. "[W]here the claim is for payment of a sum of money allegedly owed pursuant to a contract, the cause of action accrues when the [party making the claim] possesses a legal right to demand payment." (*Hahn Automotive Warehouse, Inc. v Am. Zurich Ins. Co.*, 18 NY3d 765, 770 [2012] [internal quotation marks and citations omitted].) Ultimately, the complained-of conduct is the underpayment of the Termination Price on November 22, 2019; the right to demand a payment of the full Termination Price arose upon the underpayment. (NYSCEF 2, VCA ¶ 32.) No argument is proffered that the action, which was filed on December 14, 2023, is untimely based on the November 22, 2019 or any later accrual date.

The No-Action Clause

Finally, in the reply brief, NewRez argues that a summary determination on the petition cannot be made as discovery is needed to determine whether HBK satisfied the written request requirements of the PSA's no-action clause, which states:

> "[n]o Certificateholder shall have any right by virtue of any provision of this Agreement to institute any suit, action or proceeding … under or with respect to this Agreement, unless … [i] the Holders of Certificates entitled to at least 25% of the Voting Rights shall have made written request upon the Trustee to institute such action, suit or proceeding in the name of the Trustee hereunder and shall have offered to the Trustee such reasonable indemnity as it may require against the costs, expenses and liabilities to be incurred therein or thereby, and [ii] the Trustee, for 15 days after its receipt of such notice, request and offer of indemnity, shall have neglected or refused to institute any such action, suit or proceeding." (NYSCEF 3, PSA § 11.03 [at 175/183].)[9]

[9] "[T]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." (*Azzopardi v Am. Blower Corp.*, 192 AD2d 453, 454 [1st Dept 1993] [internal quotation marks and citation omitted].) The court, however, has discretion to consider an argument made in a reply brief. (*See Eujoy Really Corp. v Van Wagner Communications LLC*, 22 NY3d 413, 422 [2013].) Here, given that HBK had an opportunity to address the no-action clause in its sur-reply brief, the court will consider the no-action clause.

HBK's pleading and submissions demonstrate that HBK made a request upon Deutsche Bank to institute an action against NewRez based on the alleged underpayment of the Termination Price, which request Deutsche Bank refused. (NYSCEF 2, VCP ¶¶ 36-37; NYSCEF 56, HBK Oct. 10, 2023 Letter; NYSCEF 57, Deutsche Bank Nov. 20, 2023 Letter.) NewRez argues, however, that neither the pleading nor the exhibits demonstrate that HBK was at the time "the Holder[] of Certificates entitled to at least 25% of the Voting Rights." (NYSCEF 3, PSA § 11.03 [at 175/183].) In response, HBK argues, in sum, that under the assumption that the deferred principal of at least $3.25 million is allocated to Class M Certificates which were allocated Realized Loss of $1.5 million and to New WAC Rate Carryovers, HBK as the holder of 100% of Class CE Certificates would receive at least $1.07 million, meaning that HBK's certificates comprise in excess of 40% of the Voting Rights. For the reasons discussed below, the court disagrees that discovery is needed to determine compliance with no-action clause. Based on the ambiguous no-action clause and documentary evidence, no issues of fact exist that HBK did not hold certificates entitled to at least 25% of the Voting Rights as the time of its October 10, 2023 demand.

"[G]enerally a no-action clause prevents minority securityholders from pursuing litigation against the issuer, in favor of a single action initiated by a Trustee upon request of a majority of the securityholders." (*Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 565 [2014] [citation omitted].) No-action clauses "serve … to protect issuers from the expense involved in defending [individual] lawsuits that are either frivolous or otherwise not in the economic interest of the corporation and its creditors … [and to] further protect[] against the risk of strike suits." (*Id*. [internal

quotation marks and citations omitted].) "[N]o-action clauses are to be construed strictly and thus read narrowly." (*Id*. at 560.) Indeed, "we read a no-action clause to give effect to the precise words and language used, for the clause must be 'strictly construed.'" (*Id*. [citation omitted].) "A contractual provision that is clear on its face must be enforced according to the plain meaning of its terms." (*Bank of New York Mellon v. WMC Mortgage, LLC*, 136 AD3d 1, 6 [1st Dept 2015] [internal quotations and citations omitted].)

Failure to comply with a no-action clause deprives plaintiff of standing to sue under an agreement. (*See Deer Park Rd. Mgt. Co., LP v Nationstar Mtge., LLC*, 233 AD3d 564, 565 [1st Dept 2024].) Termination of a trust does not excuse compliance with the no-action clause. (*STS Partners Fund, LP v Deutsche Bank Sec., Inc.*, 2016 NY Slip Op 31191[U], *17-18 [Sup Ct, NY County 2016] ["argument that the termination of the Trusts excuses compliance is without merit"], *affd* 149 AD3d 667, 668 [1st Dept 2017], *lv dismissed* 66 NYS3d 229 [2017]; *see also Deer Park Rd. Mgt. Co., LP*, 233 AD3d at 565 [dismissing action for failure to comply with no-action clause].[10])

As stated, under the PSA's no-action clause, a demand on the Trustee by "the Holders of Certificates entitled to at least 25% of the Voting Rights" is a condition precedent "to institute any suit, action or proceeding … under or with respect to" the PSA. (NYSCEF 3, PSA § 11.03 [at 175/183].) Neither party turns to the interpretation of the no-action clause. That is, however, where the court must begin, as compliance with the clause is at issue.

[10] Although the Appellate Division, First Department's opinion is silent on the issue, the complaint in the *Deer Park Rd. Mgt. Co., LP* action makes clear that the trust was terminated. (Index. No. 654474/2022, NYSCEF 1, Complaint ¶ 2.)

The PSA defines Voting Rights as "[t]he portion of the voting rights of all of the Certificates which is allocated to any Certificate." (*Id*. § 1.01 [at 71/183].) The Voting Rights are allocated as follows:

> "[w]ith respect to any date of determination, 98% of all Voting Rights shall be allocated among the holders of the Class A Certificates, the Mezzanine Certificates [including Class M-7 Certificates] and the Class CE Certificates in proportion to the then outstanding Certificate Principal Balances of their respective Certificates, 1% of all Voting Rights shall be allocated to the holders of the Class P Certificates and 1% of all Voting Rights shall be allocated among the holders of the Residual Certificates." (*Id*. § 1.01 [at 71/183]; *see id*. [at 39/183] [stating that Class M-7 Certificates is one type of Mezzanine Certificates].)

Certificate Principal Balance is defined as

> "[w]ith respect to each Class A Certificate, Mezzanine Certificate or Class P Certificate as of any date of determination, the Certificate Principal Balance of such Certificate on the Distribution Date immediately prior to such date of determination minus all distributions allocable to principal made thereon on such Distribution Date and, in the case of a Mezzanine Certificate, Realized Losses allocated thereto on such immediately prior Distribution Date plus, with respect to each Mezzanine Certificate, any increase in the Certificate Principal Balance of such Certificate pursuant to Section 4.01 due to the receipt of Subsequent Recoveries (or, in the case of any date of determination up to and including the first Distribution Date, the initial Certificate Principal Balance of such Certificate, as stated on the face thereof). With respect to each Class CE Certificate as of any date of determination, an amount equal to the Percentage Interest evidenced by such Certificate times the excess, if any, of (A) the then aggregate Uncertificated Balances of the REMIC I Regular Interests over (B) the then aggregate Certificate Principal Balances of the Class A Certificates, the Mezzanine Certificates and the Class P Certificates then outstanding." (*Id*. [at 17/183].)

As relevant here, the court turns to the Trust's termination procedure. The PSA instructs that the Master Servicer, upon electing to exercise the Clean-Up Call, "shall deliver to the Trustee for deposit in the Distribution Account not later than the last Business Day preceding the final Distribution Date on the Certificates an amount in immediately available funds equal to the above-described" Termination Price. (*Id*. § 9.1 [c] [at 166/183].) HBK alleges that NewRez delivered the funds on November 22, 2019

in consideration of all of the Trust's remaining assets. (*See* NYSCEF 2, VPA ¶¶ 29, 32.) Then, the Trustee, "[u]pon presentation of the Certificates by the Certificateholders on the final Distribution Date … shall distribute to each Certificateholder so presenting and surrendering its Certificates the amount otherwise distributable on such Distribution Date in accordance with Section 4.01 in respect of the Certificates so presented and surrendered." (NYSCEF 3, PSA § 9.1 [d] [at 166-167/183].) Deutsche Bank's November 25, 2019 report indicates that Deutsche Bank made distributions to certificateholders. (NYSCEF 30, Nov. 2019 Report at 3/41 [Current Period Distribution].)

> "[T]he respective obligations and responsibilities under this Agreement of the Depositor, the Master Servicer and the Trustee (other than the obligations … of the Master Servicer to provide for and the Trustee to make payments in respect of the REMIC I Regular Interests, the REMIC II Regular Interests or the Classes of Certificates as hereinafter set forth) shall terminate upon payment to the Certificateholders and the deposit of all amounts held by or on behalf of the Trustee and required hereunder to be so paid or deposited on the Distribution Date coinciding with or following"

the Master Servicer's exercise of the Clean-Up Call. (NYSCEF 3, PSA § 9.1 [a] [at 165/183].) Additionally, "[a]t the time of the making of the final payment on the Certificates, the Trustee shall distribute or credit, or cause to be distributed or credited, to the Holders of the Residual Certificates all cash on hand in the Trust Fund (other than cash retained to meet claims), and the Trust Fund shall terminate at that time." (*Id*. § 9.2 [a][iii] [at 167/183].)

Deutsche Bank's November 25, 2019 report indicates that as a result of the distributions, certain certificate classes' Principal Balance was reduced to zero. (NYSCEF 30, Nov. 2019 Report at 4/41 [Distribution to Date].) Class M-7 Certificates and Class CE Certificates, the only two certificate classes that were not repaid in full,

were allocated Realized Loss of $1.5 million and $22 million, respectively, also resulting in then-current Principal Balance of zero for these certificate classes. (*Id*.; *see* NYSCEF 3, PSA § 4.04 [b] [at 130/183] ["All Realized Losses on the Mortgage Loans shall be allocated by the Trustee on each Distribution Date"].)

The no-action clause prescribes that the demand on Deutsche Bank be made by "the Holders of Certificates entitled to at least 25% of the Voting Rights" (NYSCEF 3, PSA § 11.03 [at 175/183]) and that the Voting Rights be allocated among certificateholders "in proportion to the then outstanding Certificate Principal Balances of [the] respective Certificates." (*Id*. § 1.01 [at 71/183].) Here, the November 25, 2019 report demonstrates that no certificates had any outstanding Principal Balance (NYSCEF 30, Nov. 2019 Report at 4/41 [Distribution to Date]), including HBK's Class CE Certificates, and thus certificateholders no longer held any Voting Rights. Accordingly, HBK's demand made in October 2023 was not made by "the Holders of Certificates entitled to at least 25% of the Voting Rights." (NYSCEF 3, PSA § 11.03 [at 175/183].) HBK does not argue that it held the requisite amount of the Voting Rights on October 10, 2023, when it made the demand. Instead, HBK premises its argument on an assumption that if the underpaid deferred principal is distributed, HBK would hold over 40% of Voting Rights; this assumption is unsupported by the PSA's and the November 12, 2019 report.

As the condition of the no-action clause was not satisfied, this action fails. (*See ACE Sec. Corp. v DB Structured Prods., Inc.*, 112 AD3d 522, 523 [1st Dept 2013] [certificateholders lacked standing to sue sponsor where no-action clause "sets forth as a condition precedent to such an action that the certificate holders provide the trustee

with 'a written notice of default and of the continuance thereof'" and "'defaults' enumerated in the PSA concern failures of performance by the servicer or master servicer only. Thus, the PSA does not authorize certificate holders to provide notices of 'default' in connection with the sponsor's breaches of the representations" (citation omitted)], *affd* 25 NY3d 581 [2015]; *Walnut Place LLC v Countrywide Home Loans, Inc.*, 96 AD3d 684, 684 [1st Dept 2012] ["The court correctly held that plaintiff certificate holders' action is barred by the 'no-action' clause in the PSAs, which plainly limits certificate holders' right to sue to an 'Event of Default,' which, under section 7.01 of the PSAs, involves only the master servicer"].)

By its plain language, the no-action clause presumes that once the Certificate Principal Balances are reduced to zero, no demand compliant with the no-action clause can be made, and thus, certificateholders no longer "have any right by virtue of any provision of this Agreement to institute any suit, action or proceeding."[11] (NYSCEF 3, PSA § 11.03 [at 175/183].) The PSA includes no clause providing the certificateholders with the right to sue under the PSA once the Certificate Principal Balances are reduced to zero. The court cannot imply such a right. (*See Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 560 [2014] ["if parties to a contract omit terms … the inescapable conclusion is that the parties intended the omission. The maxim *expressio unius est exclusio alterius*, as used in the interpretation of contracts, supports precisely this conclusion" (citations omitted)]; Black's Law Dictionary [12th ed 2024] [*expressio*

[11] The court notes that "[t]here are claims which, by law, cannot be prohibited by a no-action clause, most notably claims against the trustee." (*Quadrant Structured Prods. Co., Ltd.*, 23 NY3d at 566 [citations omitted].) No argument is made that any such claims are at issue in this action.

unius est exclusio alterius is "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative"].)

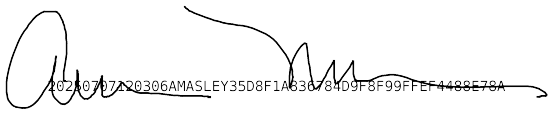
The court has considered the balance of the parties' arguments and finds that the arguments are either without merit or otherwise do not affect the outcome.

Accordingly, it is

ORDERED that motion sequence 001 for the judicial instructions sought in the verified complaint and petition is denied; and it is further

ORDERED that motion sequence 002 to dismiss the verified complaint and petition is granted, and the verified complaint and petition is dismissed in its entirety, with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendants; and it further

ORDERED that cross-motion is denied.



7/7/2025
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**		
		GRANTED		**DENIED**	X	**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**		**REFERENCE**