To Be Argued By:
STEVEN F. MOLO
Time Requested: 30 Minutes

APL-2019-00127
New York County Clerk's Index No. 652877/2014

Court of Appeals

STATE OF NEW YORK

IN RE: PART 60 PUT-BACK LITIGATION

DEUTSCHE BANK NATIONAL TRUST COMPANY, solely in its capacity as Trustee of the MORGAN STANLEY ABS CAPITAL I INC. TRUST 2007-NC4,

Plaintiff-Respondent,

—against—

MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS LLC, as Successor-by-Merger to MORGAN STANLEY MORTGAGE CAPITAL INC., and MORGAN STANLEY ABS CAPITAL I INC.,

Defendants-Appellants.

BRIEF FOR PLAINTIFF-RESPONDENT

STEVEN F. MOLO
ROBERT K. KRY
LAUREN M. WEINSTEIN
LAUREN F. DAYTON
MOLOLAMKEN LLP
430 Park Avenue
New York, New York 10022
Telephone: (212) 607-8160
Facsimile: (212) 607-8161

Attorneys for Plaintiff-Respondent

October 15, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice for the Court of Appeals of the State of New York, Deutsche Bank National Trust Company ("DBNTC"), solely in its capacity as Trustee of the Morgan Stanley ABS Capital I Inc. Trust 2007-NC4, certifies that DBNTC is a wholly-owned subsidiary of Deutsche Bank Holdings, Inc., which is a wholly-owned subsidiary of Deutsche Bank Trust Corporation, which is a wholly-owned subsidiary of DB USA Corporation, which is a wholly-owned subsidiary of Deutsche Bank AG, a publicly held banking corporation organized under the laws of the Federal Republic of Germany.

No publicly held company owns 10% or more of Deutsche Bank AG's stock. The Trust, which is formed under the laws of the State of New York, has issued mortgage-backed securities that are eligible for public trading. Certain holders of those securities are believed to be publicly traded corporations.

STATUS OF RELATED LITIGATION

Proceedings before the IAS court in this case remain pending. No. 652877/2014 (Sup. Ct. N.Y. Cnty.). The IAS court stayed expert discovery pending this Court's decision in *Deutsche Bank National Trust Co., solely in its capacity as Trustee of Securitized Asset Backed Receivables LLC Trust 2007-BR1 v. HSBC Bank USA, N.A.*, APL-2018-00169 (to be argued Oct. 17, 2019).

The Certificate Insurer for this Trust, the Financial Guaranty Insurance Company, initiated its own proceedings relating to this Trust, *Financial Guaranty Insurance Co. v. Morgan Stanley ABS Capital I Inc.*, No. 652914/2014 (Sup. Ct. N.Y. Cnty.). Those proceedings are ongoing.

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

QUESTIONS PRESENTED 4

STATEMENT OF THE CASE 5

I. Background 5

A. Morgan Stanley's Contractual Obligations 6

B. Morgan Stanley's Breaches of Its Obligations 8

C. The SEC's Findings of Fraud and Deceit 9

II. Proceedings Below 11

A. The Motion Court's Ruling 11

B. The Appellate Division's Ruling 12

ARGUMENT 15

I. The Appellate Division Correctly Held That Morgan Stanley's Gross Negligence and Willful Misconduct Could Render the Sole Remedy Clauses Unenforceable 15

A. Sole Remedy Clauses Are Unenforceable Against Claims of Gross Negligence and Willful Misconduct Whether They Purport To Eliminate Liability or Merely Limit Relief 16

B. Whether the Repurchase Remedy Will Make the Trust Whole Cannot Be Determined on the Pleadings 20

C. The Trustee Adequately Alleges Willful Misconduct and Gross Negligence 28

D. The Public Policy Exception Is Not Limited to Independently Tortious Conduct 33

E. *Ambac* and *Nomura* Are Inapposite 37

II. The Appellate Division Correctly Held That Morgan Stanley's Fraudulent Conduct Authorizes Punitive Damages 40

A. This Court Lacks Jurisdiction To Review Morgan Stanley's Principal Argument 41

B. Morgan Stanley's Misconduct Was Directed to Both Certificateholders and the Trustee...42

C. Morgan Stanley's Misconduct Was Egregious 44

III. The Trustee Is Entitled To Recover Attorney's Fees 47

A. The Pooling and Servicing Agreement Clearly Implies an Intent To Permit Recovery of Attorney's Fees in Repurchase Litigation 47

B. Other Provisions of the Pooling and Servicing Agreement Do Not Support a Contrary Interpretation 52

CONCLUSION 56

TABLE OF AUTHORITIES

Page(s)

CASES

Abacus Fed. Sav. Bank v. ADT Sec. Servs., Inc.,
18 N.Y.3d 675 (2012) .... *passim*

A.H.A. Gen. Constr., Inc. v. N.Y.C. Hous. Auth.,
92 N.Y.2d 20 (1998) 25, 27

Altshuler Shaham Provident Funds, Ltd. v. GML Tower, LLC, 21 N.Y.3d 352 (2013) 41, 42

Ambac Assurance Corp. v. Countrywide Home Loans, Inc.,
31 N.Y.3d 569 (2018) 37, 38, 51

Ambac Assurance Corp. v. Countrywide Home Loans Inc.,
No. 2019-26, 2019 WL 4418885
(1st Dep't Sept. 17, 2019) .... *passim*

Ambac Assurance Corp. v. Countrywide Home Loans, Inc.,
No. 651612/2010, 2015 WL 6471943
(Sup. Ct. N.Y. Cnty. Oct. 22, 2015) 23

Ambac Assurance Corp. v. EMC Mortg. Corp.,
No. 08 Civ. 9464, 2009 WL 734073
(S.D.N.Y. Mar. 16, 2009) 26

Ambac Assurance Corp. v. First Franklin Fin. Corp.,
No. 651217/2012, 2013 WL 3779636
(Sup. Ct. N.Y. Cnty. July 18, 2013) 46

Assured Guar. Mun. Corp. v. DB Structured Prods., Inc.,
No. 650705/2010, 2014 WL 3282310
(Sup. Ct. N.Y. Cnty. July 3, 2014) 23

Assured Guar. Mun. Corp. v. Flagstar Bank, FSB,
920 F. Supp. 2d 475 (S.D.N.Y. 2013) 23

Assured Guar. Mun. Corp. v. UBS Real Estate Sec., Inc.,
No. 12 Civ. 1579, 2012 WL 3525613 (S.D.N.Y. Aug. 15, 2012)......................26

Banc of Am. Sec. LLC v. Solow Bldg. Co. II, LLC,
47 A.D.3d 239 (1st Dep't 2007) 18

Bank of N.Y. Mellon v. WMC Mortg., LLC,
53 Misc. 3d 967 (Sup. Ct. N.Y. Cnty. Sept. 7, 2016).................................19, 32

Bank of N.Y. Mellon v. WMC Mortg., LLC,
No. 12 Civ. 7096, Dkt. 323 (S.D.N.Y. Aug. 18, 2015) 21

Bath & Hammondsport R. Co. v. N.Y. State Dep't of Envtl. Conservation, 73 N.Y.2d 434 (1989) 52

Bingham v. N.Y.C. Transit Auth., 99 N.Y.2d 355 (2003) 41, 42

Breed, Abbott & Morgan v. Hulko, 74 N.Y.2d 686 (1989) 49, 50

Cirillo v. Slomin's Inc., 196 Misc. 2d 922
(Sup. Ct. Nassau Cnty. 2003) 18

Cohn v. Goldman, 76 N.Y. 284 (1879)..41

Colnaghi, U.S.A. v. Jewelers Prot. Servs.,
81 N.Y.2d 821 (1993)..16

Cuenca v. Harris & Harris, Ltd., No. 16-CV-05385,
2017 WL 1196922 (N.D. Ill. Mar. 31, 2017) 48

D.H. Blair & Co. v. Gottdiener,
462 F.3d 95 (2d Cir. 2006) 48

De Vera v. 243 Suydam, LLC, No. 3532/2016,
2018 WL 3998190 (Sup. Ct. N.Y. Cnty. Apr. 24, 2018) 50

Deutsche Alt-A Sec. Mortg. Loan Trust, Series 2006-OA1 v. DB Structured Prods., Inc., 958 F. Supp. 2d 488
(S.D.N.Y. 2013)...19, 32

Deutsche Bank Nat'l Trust Co., as Trustee for the Morgan Stanley ABS Capital I Inc. Trust 2006-WMC2 v. WMC Mortg., LLC, No. 12 Civ. 933, 2014 WL 1289234 (D. Conn. Mar. 31, 2014) 19, 33

Deutsche Bank Nat'l Trust Co., as Trustee for the Morgan Stanley ABS Capital I Inc. Trust 2007-HE6 v. Decision One Mortg. Co., No. 2013 L 5823, 2013 WL 6284438 (Ill. Cir. Ct. Nov. 19, 2013) 19, 32

Deutsche Bank Nat'l Trust Co. as Trustee for the Morgan Stanley Structured Trust I 2007-1 v. Morgan Stanley Mortg. Capital Holdings LLC, 289 F. Supp. 3d 484 (S.D.N.Y. 2018) ....*passim*

Deutsche Bank Nat'l Trust Co. as Trustee for the Morgan Stanley Structured Trust I 2007-1 v. Morgan Stanley Mortg. Capital Holdings LLC, 97 F. Supp. 3d 548 (S.D.N.Y. 2015) 26, 32

Deutsche Bank Nat'l Trust Co. v. WMC Mortg., LLC, No. 3:12-CV-1699, 2014 WL 3824333 (D. Conn. Aug. 4, 2014)......................23

Di Perna v. Am. Broad. Cos., 200 A.D.2d 267 (1st Dep't 1994)............................50

*E*Trade Fin. Corp. v. Deutsche Bank AG*, No. 05 Civ. 902, 2008 WL 2428225 (S.D.N.Y. June 13, 2008) 18

Elonis v. United States, 135 S. Ct. 2001 (2015) 53

Empire One Telecomms., Inc. v. Verizon N.Y., Inc., 26 Misc. 3d 541 (Sup. Ct. Kings Cnty. 2009) 18

Fed. Hous. Fin. Agency v. JPMorgan Chase & Co., No. 11 Civ. 6188, 2012 WL 6000885 (S.D.N.Y. Dec. 3, 2012) 23

Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc., 104 F. Supp. 3d 441 (S.D.N.Y. 2015) 23, 29

Fin. Guar. Ins. Co. v. Morgan Stanley ABS Capital I Inc., 164 A.D.3d 1126 (1st Dep't 2018) 26

Food Pageant, Inc. v. Consol. Edison Co., 54 N.Y.2d 167 (1981) 16

Gross v. Sweet, 49 N.Y.2d 102 (1979) 16

Home Equity Mortg. Trust Series 2006-1 v. DLJ Mortg. Capital, Inc., No. 156016/2012, 2019 WL 138634 (Sup. Ct. N.Y. Cnty. Jan. 9, 2019) 23

Homeward Residential, Inc. v. Sand Canyon Corp., No. 12 Civ. 5067, 2017 WL 5256760 (S.D.N.Y. Nov. 13, 2017) 23

Hooper Assocs., Ltd. v. AGS Computers, Inc., 74 N.Y.2d 487 (1989) 47, 49, 50, 52

HSH Nordbank AG v. Barclays Bank PLC, No. 652678/2011, 2014 WL 841289 (Sup. Ct. N.Y. Cnty. Mar. 3, 2014) 46

Kalisch-Jarcho, Inc. v. City of New York, 58 N.Y.2d 377 (1983) 16, 29, 33

LaSalle Bank N.A. v. Capco Am. Securitization Corp., No. 02 Civ. 9916, 2005 WL 3046292 (S.D.N.Y. Nov. 14, 2005) 49

Lindlots Realty Corp. v. Suffolk County, 278 N.Y. 45 (1938) 42

Mass. Mut. Life Ins. Co. v. DB Structured Prods., Inc., No. Civ. A. 11-30039, 2015 WL 3964560 (D. Mass. June 19, 2015) 23

MASTR Adjustable Rate Mortg. Trust 2006-OA2 v. UBS Real Estate Sec. Inc., No. 12-CV-7322, 2015 WL 764665 (S.D.N.Y. Jan. 9, 2015) 23

MASTR Asset Backed Sec. Trust 2006-HE3 v. WMC Mortg., LLC, 983 F. Supp. 2d 1104 (D. Minn. 2013) 19, 32

MASTR Asset Backed Sec. Trust 2006-HE3 ex rel. U.S. Bank N.A. v. WMC Mortg. Corp., No. Civ. 11-2542, 2012 WL 4511065 (D. Minn. Oct. 1, 2012) 21

MBIA Ins. Co. v. Residential Funding Co., LLC,
No. 603552/2008, 2009 WL 5178337
(Sup. Ct. N.Y. Cnty. Dec. 22, 2009) 47

MBIA Ins. Corp. v. Countrywide Home Loans, Inc.,
105 A.D.3d 412 (1st Dep't 2013) 26

MBIA Ins. Corp. v. Countrywide Home Loans, Inc.,
No. 602825/2008, 2010 WL 5186702
(Sup. Ct. N.Y. Cnty. Dec. 22, 2010) 23

MBIA Ins. Corp. v. Morgan Stanley, No. 29951-10,
2011 WL 11556446 (Sup. Ct. Westchester Cnty. May 26, 2011) 46

Mencher v. Weiss, 306 N.Y. 1 (1953) 28

Merrill ex rel. Merrill v. Albany Med. Ctr. Hosp.,
71 N.Y.2d 990 (1988) 42

Metro. Life Ins. Co. v. Noble Lowndes Int'l, Inc.,
84 N.Y.2d 430 (1994) 17, 35, 36

Morgan Stanley Mortg. Loan Trust 2006-13ARX v.
Morgan Stanley Mortg. Capital Holdings LLC,
143 A.D.3d 1 (1st Dep't 2016) 18, 32

Mun. Capital Appreciation Partners I, L.P. v. Page,
No. 00 Civ. 8138, 2002 WL 483510
(S.D.N.Y. Mar. 19, 2002) 49

N.Y. Univ. v. Cont'l Ins. Co., 87 N.Y.2d 308 (1995) 13, 40

Matter of N.Y.C. Asbestos Litig., 89 N.Y.2d 955 (1997) 29, 33

Matter of N.Y.C. Asbestos Litig., 142 A.D.3d 408 (1st Dep't 2016) 50

Nomura Home Equity Loan, Inc., Series 2006-FM2 v.
Nomura Credit & Capital, Inc., 30 N.Y.3d 572 (2017) 37, 38

Nomura Home Equity Loan, Inc. v. Nomura Credit &
Capital, Inc., 133 A.D.3d 96 (1st Dep't 2015) ....*passim*

Pfizer, Inc. v. Stryker Corp., 348 F. Supp. 2d 131 (S.D.N.Y. 2004) 50

Royal Park Invs. SA/NV v. U.S. Bank N.A.,
No. 14 Civ. 2590, 2018 WL 3350323
(S.D.N.Y. July 9, 2018) 23

RTC Mortg. Trust 1995-S/N1 v. J.I. Sopher & Co.,
No. 96 Civ. 4992, 1998 WL 132815
(S.D.N.Y. Mar. 24, 1998) 50

Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409 (2001)...........................27

Sommer v. Fed. Signal Corp., 79 N.Y.2d 540 (1992) ....*passim*

Soroof Trading Dev. Co. v. GE Fuel Cell Sys., LLC,
842 F. Supp. 2d 502 (S.D.N.Y. 2012) 18

Sword Line v. United States, 230 F.2d 75 (2d Cir. 1956).......................................53

Syncora Guar. Inc. v. EMC Mortg. Corp.,
No. 09 Civ. 3106, 2011 WL 1135007
(S.D.N.Y. Mar. 25, 2011) 23, 26

Telaro v. Telaro, 25 N.Y.2d 433 (1969)...41

Turkish v. Kasenetz, 27 F.3d 23 (2d Cir. 1994)...17, 18

U.S. Bank N.A., as Trustee for the MASTR Adjustable Rate Mortg. Trust 2006-OA2 v. UBS Real Estate Sec. Inc.,
No. 12-CV-7322, 2016 WL 4690410 (S.D.N.Y. Sept. 6, 2016) 23, 24

U.S. Bank N.A. v. DLJ Mortg. Capital, Inc.,
140 A.D. 3d 518 (1st Dep't 2016) 14

U.S. Bank N.A. v. DLJ Mortg. Capital, Inc., No. 650369/2013,
2018 WL 6809404 (Sup. Ct. N.Y. Cnty. Dec. 27, 2018) 21

United States ex rel. Casa Redimix Concrete Corp. v. Luvin Constr. Corp., No. 00 Civ. 7552, 2001 WL 506227
(S.D.N.Y. May 14, 2001)..50

United States v. Litos, 847 F.3d 906 (7th Cir. 2017) 33

United States v. Ng Lap Seng, 934 F.3d 110 (2d Cir. 2019) 53

W. & S. Life Ins. Co. v. Bank of N.Y. Mellon, No. A1302490, 2017 WL 3392856 (Ohio C.P. Aug. 4, 2017)..23

Walker v. Sheldon, 10 N.Y.2d 401 (1961)...44, 45

OTHER AUTHORITIES

Black's Law Dictionary (10th ed. 2014)...48

Stacy Cowley, *Morgan Stanley To Pay California $150 Million over Mortgage Crisis Claims*, N.Y. Times, Apr. 26, 2019 46

Fed. Hous. Fin. Agency, *FHFA Announces $1.25 Billion Settlement with Morgan Stanley* (Feb. 7, 2014), https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-$1-25-Billion-Settlement-With-Morgan-Stanley.asp..46

Svea Herbst-Bayliss, *Morgan Stanley Settles Massachusetts Subprime Loan Probe*, Reuters, June 24, 2010...46

Ill. Office of Attorney General, *Madigan Announces $22.5 Million Morgan Stanley Settlement* (Feb. 11, 2016), http://www.illinoisattorneygeneral.gov/pressroom/2016_02/20160211.html 46

I.R.S. Priv. Ltr. Rul. 112666-16...28

I.R.S. Priv. Ltr. Rul. 113051-15...28

Arthur Karger, *Powers of the New York Court of Appeals* (3d ed. 2005) 41, 42

Oxford English Dictionary (2d ed. 1989) 48

Kerri Ann Panchuk, *Morgan Stanley Agrees To Pay $7.2 Million To Settle Nevada MBS Dispute*, HousingWire, Sept. 27, 2011 46

Nathaniel Popper, *Morgan Stanley To Pay $3.2 Billion over Flawed Mortgage Bonds*, N.Y. Times, Feb. 11, 2016..46

Restatement (Second) of Contracts (1981) 29

U.S. Dep't of Justice, *Morgan Stanley Agrees To Pay $2.6 Billion Penalty in Connection with Its Sale of Residential Mortgage Backed Securities* (Feb. 11, 2016), https://www.justice.gov/opa/pr/morgan-stanley-agrees-pay-26-billion-penalty-connection-its-sale-residential-mortgage-backed 45

U.S. Dep't of Justice, Settlement Agreement (Feb. 11, 2016), https://www.justice.gov/opa/file/823671/download..46

PRELIMINARY STATEMENT

At the height of the frenzy to make residential mortgage loans, Morgan Stanley acquired over 5,000 loans from a now-defunct mortgage originator and bundled them into the Morgan Stanley ABS Capital I Inc. Trust 2007-NC4 (the "Trust"). Morgan Stanley knew those loans were defective – indeed, it knew that borrowers had *already begun* defaulting on their mortgages. But Morgan Stanley knowingly misrepresented key characteristics of the loans anyway to line its own pockets. Its strategy was successful: Morgan Stanley offloaded the loans to the Trust, collected its fees, and let the investors foot the bill.

Morgan Stanley's conduct was so egregious that it drew the attention of the Securities and Exchange Commission. An SEC investigation revealed that Morgan Stanley knowingly misrepresented the number of delinquent loans in the offering documents it used to market the securitization. The SEC found that Morgan Stanley made misleading public disclosures that "operated . . . as a *fraud or deceit upon purchasers*." A500 (emphasis added). Concluding that "Morgan Stanley misled investors in the NC4 transaction," the SEC ordered it to pay nearly $300 million in civil penalties, disgorgement, and interest. A499-501.

Despite knowing just how bad these loans were, Morgan Stanley made extensive representations and warranties about their good quality. It backed up those representations and warranties with a promise to repurchase any materially

breaching loans. When the Trustee learned that the vast majority of the loans were in breach – including *every single loan* in a sample of over 800 loans that a consultant had analyzed – it invoked that repurchase obligation, identifying defective loans and demanding repurchase. Morgan Stanley refused to repurchase all but a handful of breaching loans, causing the Trust to suffer losses of over $495 million.

The Trustee then filed this lawsuit, seeking a range of remedies. Although the governing agreements include so-called "sole remedy" clauses that purport to limit the Trustee's remedies to cure or repurchase, the Trustee urged that the clauses were not enforceable due to Morgan Stanley's gross negligence and willful misconduct. The Appellate Division agreed. It also held that the Trustee could pursue punitive damages and attorney's fees.

This Court should affirm. Well-established New York public policy holds that "a party may not insulate itself from damages caused by grossly negligent conduct." *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 554 (1992). Contrary to Morgan Stanley's arguments, that principle applies whether a provision purports to eliminate liability or merely deny complete relief. The Appellate Division correctly held that "the actual effect of the sole remedy clause in making the investors whole cannot be ascertained" at this stage of the litigation. A525.

The Court should also affirm the Appellate Division's ruling on punitive damages. As the SEC found, Morgan Stanley committed a "fraud or deceit upon purchasers" by knowingly misrepresenting delinquency rates in its offering documents. A500. That egregious tortious conduct – directed at both certificateholders and the Trustee – supports a claim for punitive damages.

Finally, the Trustee may recover its attorney's fees. The contract permits the Trustee to recover "all costs and expenses . . . relating to . . . the Trustee's enforcement of the repurchase obligation." A165. The way the Trustee "enforce[s]" the repurchase obligation is through repurchase litigation against Morgan Stanley. The contract thus clearly permits recovery of attorney's fees.

QUESTIONS PRESENTED

1. Does New York public policy prohibit a defendant from shielding itself from the consequences of its own gross negligence or willful misconduct where a contractual provision denies the plaintiff complete relief but stops short of limiting damages to a nominal sum?

2. Did the Appellate Division correctly hold that it could not determine on the pleadings whether the sole remedy clauses in the governing contracts would deny the Trustee complete relief?

3. Does the Complaint adequately allege that Morgan Stanley acted with gross negligence or willful misconduct?

4. May the Trustee maintain a claim for punitive damages where the Complaint alleges that Morgan Stanley engaged in egregious tortious conduct directed at the Trustee and certificateholders by fraudulently misrepresenting the delinquency rates of mortgage loans in the Trust?

5. May the Trustee recover attorney's fees and litigation expenses incurred in enforcing Morgan Stanley's repurchase obligation where the governing contract permits the Trustee to recover "all costs and expenses . . . relating to . . . the Trustee's enforcement of the repurchase obligation"?

STATEMENT OF THE CASE

I. BACKGROUND

This case involves one of the last two subprime residential mortgage-backed securitizations Morgan Stanley sponsored before the housing market collapsed. A493. After New Century, a mortgage loan originator, filed for bankruptcy, Morgan Stanley purchased many of its loans at a public auction. A50 ¶4; A52 ¶14. In exchange for substantial fees, Morgan Stanley sold 5,337 of the loans – purportedly worth over $1.05 billion – to the MSAC 2007-NC4 Trust. A49-50 ¶2.

The securitization was effected through a series of transactions. First, Morgan Stanley Mortgage Capital Holdings LLC ("MSMCH") – the Sponsor – conveyed the loans to an affiliate, Morgan Stanley ABS Capital I Inc. ("MSAC") – the Depositor – through a Representations and Warranties Agreement ("RWA"). A52-53 ¶¶14-16; A84; A435. MSAC and the Trustee then entered into a Pooling and Servicing Agreement ("PSA") that created the MSAC 2007-NC4 Trust and conveyed the loans to the Trust. A53 ¶¶17-18; A101. The Trust issued certificates that Morgan Stanley sold to the investing public, advertising them in offering documents that touted the quality of the loans. A53 ¶19; A493. Morgan Stanley sponsored, issued, and underwrote the entire transaction. A493.[1]

---

[1] MSMCH, MSAC, and their affiliates are referred to collectively as "Morgan Stanley."

A. Morgan Stanley's Contractual Obligations

In the RWA, MSMCH made a series of representations and warranties designed to reassure investors that the loans met certain minimum standards of quality. MSMCH represented that, as of the Trust's Closing Date, unless otherwise explicitly disclosed, "no payment required under [a] Mortgage Loan has been 30 days or more Delinquent at any time since the origination of the Mortgage Loan." A441 ¶(b). MSMCH further represented that neither it, nor any other party to its knowledge, committed any "fraud, error, omission, misrepresentation, negligence or similar occurrence with respect to a Mortgage Loan." A442 ¶(g). It also made many other representations regarding borrowers' ability to repay and the value of the properties. A441-47.

In the PSA, MSAC conveyed its right to enforce those representations and warranties to the Trustee. A171, 173 §2.01(a). Separately, MSAC promised to provide "prompt written notice" if it discovered a material breach. A178 §2.03(f); A182 §2.07. For its part, the Trustee made clear that its "policy and intention . . . [was] to acquire only Mortgage Loans meeting the requirements set forth in this Agreement." A176 §2.01(c).

To back up its representations and warranties, Morgan Stanley promised to cure or repurchase any materially breaching loan within 60 days of notice or discovery of the breach. The RWA provides:

> Within sixty (60) days of the earlier of either discovery by or notice to the Sponsor of any breach of a representation or warranty which materially and adversely affects the value of the Mortgage Loans . . . the Sponsor shall cure such breach in all material respects and, if such breach cannot be cured, the Sponsor shall, . . . within sixty (60) calendar days of the Sponsor's receipt of request . . . repurchase such Mortgage Loan at the Repurchase Price.

A437-38 § 4(a); *see also* A178 § 2.03(g). "Repurchase Price" is defined to include the unpaid principal balance and interest on the loan as well as "all costs and expenses . . . relating to . . . the Trustee's enforcement of the repurchase obligation." A165.

The RWA and PSA both contain so-called "sole remedy" clauses purporting to limit the Trustee's remedies to cure or repurchase. The RWA states that "the obligation of the Sponsor . . . to repurchase . . . a Mortgage Loan in breach of a representation or warranty . . . constitutes the sole remedy . . . with respect to such breach." A439 § 4(c). The PSA similarly provides:

> [T]he obligation . . . of the Sponsor under the Representations and Warranties Agreement to cure, repurchase or substitute any Mortgage Loan as to which a breach of a representation and warranty has occurred and is continuing, shall constitute the sole remedies . . . available to Certificateholders . . . or the Trustee on their behalf.

A180 § 2.03(q).

Those contractual arrangements enabled Morgan Stanley to sell the loans' future cash flows to certificateholders in exchange for substantial fees at each step of the process. A53-54 ¶21. Certificateholders, however, would only receive

those cash flows if borrowers repaid their loans or if property values were sufficient to cover any default. *Id.* Certificateholders thus relied critically on Morgan Stanley's representations and warranties – and its attendant repurchase obligation – in deciding to invest. A494.

B. Morgan Stanley's Breaches of Its Obligations

As the Trust's losses began to mount, investors undertook investigations that revealed staggering rates of breaches throughout the Trust. A58-59 ¶35. In 2011, the Financial Guaranty Insurance Company ("FGIC"), the Certificate Insurer for the Trust, retained a private consulting firm to analyze a sample of at least 800 loans in the Trust. *Id.* That analysis revealed breaches in *every single loan reviewed* – an astounding *100% breach rate*. *Id.*

Those breaches concerned key characteristics of the mortgage loans. For example, while Morgan Stanley represented that there was no known "fraud, error, omission, misrepresentation, negligence or similar occurrence" on the part of any "party involved in the origination of [a] Mortgage Loan," A442 ¶(g), the firm's analysis revealed pervasive misrepresentations of borrower income, debt obligations, employment status, occupancy status, and property values, A64-71 ¶¶43-57. Those misrepresentations concealed the risk that many borrowers would never be able to repay the loans, threatening significant losses to the Trust.

Between 2011 and 2014, the Trustee and FGIC notified Morgan Stanley of at least 1,000 specific breaches, and Morgan Stanley discovered many others on its own. A58-61 ¶35; A74 ¶68. But Morgan Stanley refused to repurchase all but a few loans. A73-74 ¶67; A74 ¶69. As a result, the Trust has suffered damages of over $495 million, about half of the Trust's original loan balance. A51 ¶6.

C. The SEC's Findings of Fraud and Deceit

At the same time the Trustee and FGIC were notifying Morgan Stanley of breaches, the SEC was investigating Morgan Stanley's wrongdoing in connection with this same Trust. On July 24, 2014, the SEC issued an Order Instituting Cease-and-Desist Proceedings against Morgan Stanley relating to this and one other trust. A492. The SEC found that, "[i]n the midst of . . . adverse market conditions, Morgan Stanley misrepresented in the offering documents the current or historical delinquency status of certain loans." A493. It did so even though "updated payment information was available to Morgan Stanley a week before the transaction closed." A497. Those "misleading public disclosures," the SEC concluded, "operated . . . as a *fraud or deceit upon purchasers*." A493, 500 (emphasis added).

In its public offering documents, Morgan Stanley represented that only 41 loans in the Trust were "more than 30 days but less than 60 days Delinquent." A497. The SEC found that those representations "materially understated current

delinquencies," and that Morgan Stanley knew it. A500. "Morgan Stanley received updated remittance data a week prior to closing" that "showed that delinquencies as of that date were materially higher than what Morgan Stanley disclosed." A497. Contrary to Morgan Stanley's representations, "133 loans were 30 days delinquent, and 42 loans were 60 days delinquent" – more than *four times* what Morgan Stanley reported. A498. Actual and projected losses on those loans were over $21 million. *Id.* The SEC found that, based on the information Morgan Stanley had when it issued the offering documents, "Morgan Stanley knew or should have known that the disclosures concerning current and historical delinquencies were *materially inaccurate* and would *mislead purchasers*." A494 (emphasis added).

That misstatement of delinquency data was not a minor technical error. The data was "information that investors would have considered important in deciding whether to invest in the [Trust]" because it "helps enable [investors] to assess the likelihood that borrowers will be able to repay their mortgage loans and, as a result, whether investors will suffer losses on, or will recover and profit from, their investments." A494, 500. Delinquency data was particularly significant for this Trust because the securitization occurred "against a backdrop of rising borrower delinquencies and unprecedented distress in the subprime market." A493.

The SEC concluded that Morgan Stanley had made "misleading public disclosures" that "operated . . . as a *fraud or deceit upon purchasers*." A493, 500 (emphasis added). "Morgan Stanley *misled investors in the NC4 transaction*," depriving them of information necessary to make an informed decision about whether to invest. A499 (emphasis added). The SEC found Morgan Stanley liable for violating the securities laws and ordered it to pay *nearly $300 million* in civil penalties, disgorgement, and pre-judgment interest. A500-01.

II. PROCEEDINGS BELOW

A. The Motion Court's Ruling

On January 23, 2015, the Trustee filed suit to enforce Morgan Stanley's repurchase obligation. A49. Count One alleges that Morgan Stanley is liable for breaches of representations and warranties. A75-77 ¶¶72-88. Count Two alleges breaches of its obligation to cure or repurchase breaching loans. A78-81 ¶¶89-106. And Count Three alleges that MSAC is liable for breaches of its obligation to notify the Trustee of material breaches. A81-82 ¶¶107-115. The Trustee sought compensatory and punitive damages, specific performance of the repurchase obligation, declaratory relief, and attorney's fees and costs. A82-83.

Morgan Stanley moved to dismiss only a few of the Trustee's claims. A42. The motion court granted the motion in part and denied it in part. A25. The court held that the Trustee's remedies were limited to repurchase because the

Complaint's allegations were not sufficient to support a finding of gross negligence. A27. The court dismissed the punitive damages claim on the ground that "an independent claim of fraud is not pleaded." A28. Finally, the court held that the Trustee was not entitled to recover its attorney's fees, because the PSA's language permitting recovery of "all costs and expenses . . . relating to . . . the Trustee's enforcement of the repurchase obligation" was not sufficiently clear to permit recovery of such fees. A29; A165.

B. The Appellate Division's Ruling

The Appellate Division reversed. A1; A515.

With regard to the sole remedy clauses, the Appellate Division observed that, typically, "contractual provisions that limit or negate the liability of a party to a contract are enforceable." A521 (quoting *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 554 (1992)). That principle does not apply, however, where a defendant acted with gross negligence or willful misconduct. A522. "It is the public policy of this State . . . that a party may not insulate itself from damages caused by grossly negligent conduct." *Id.* (quoting *Sommer*, 79 N.Y.2d at 554).

Consistent with those principles, the Appellate Division held that "the complaint's allegations of pervasive, knowing breaches of the representations and warranties on multiple grounds as to the quality of loans throughout the pool sufficiently plead gross negligence to render the sole remedy clause of the parties'

agreements unenforceable." A525. The astonishing 100% breach rate that FGIC's consultant discovered showed that the breaches were "more pervasive and egregious" than in other RMBS cases. A524.

The Appellate Division rejected Morgan Stanley's argument that the sole remedy clauses were enforceable *even if* it was grossly negligent because the repurchase remedy would make the Trust whole. A525. "[A]t this stage of the case," the court ruled, "the actual effect of the sole remedy clause in making the investors whole cannot be ascertained." *Id.*

The Appellate Division also reinstated the claim for punitive damages. A525-26. A demand for punitive damages, it explained, "is properly made in a breach of contract action if all of the following elements are sufficiently pleaded: '(1) defendant's conduct must be actionable as an independent tort; (2) the tortious conduct must be of an egregious nature; (3) the egregious conduct was directed to plaintiff; and (4) it must be part of a pleaded pattern directed at the public generally.'" A525 (quoting *N.Y. Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 316 (1995)) (alteration omitted). Those requirements were met here.

The SEC's findings that Morgan Stanley "knowingly misrepresented in the offering documents the delinquency rates of the loans . . . to induce the investing public . . . to buy the certificates that defendants knew did not meet their representations of quality and were therefore likely to cause significant losses"

were "sufficient to allege a fraud claim against defendants" and "satisf[ied] the first, second and fourth elements of a demand for punitive damages." A525-26. Although Morgan Stanley did not dispute the third element – that "the egregious conduct was directed to the plaintiff" – the Appellate Division found that requirement met too because Morgan Stanley's "misrepresentations . . . materially and adversely affected the Trustee's, as well as the certificateholders', interests in the mortgage loans." A526-27.

Finally, the Appellate Division reversed the denial of attorney's fees. The court had recently held in *U.S. Bank N.A. v. DLJ Mortgage Capital, Inc.*, 140 A.D. 3d 518 (1st Dep't 2016), that a provision requiring a defendant to "promptly reimburse . . . the Trustee for any actual out-of-pocket expenses reasonably incurred by . . . the Trustee in respect of *enforcing the remedies* for such breach" evinced an "unmistakable intent" to permit recovery of attorney's fees. *Id.* at 519 (emphasis added). Morgan Stanley conceded that the Appellate Division's ruling in *DLJ Mortgage* was equally applicable here, where the PSA entitles the Trustee to recover "all costs and expenses . . . relating to . . . the Trustee's enforcement of the repurchase obligation." A165; A527.

ARGUMENT

I. THE APPELLATE DIVISION CORRECTLY HELD THAT MORGAN STANLEY'S GROSS NEGLIGENCE AND WILLFUL MISCONDUCT COULD RENDER THE SOLE REMEDY CLAUSES UNENFORCEABLE

Mere months before the housing market collapsed, Morgan Stanley purchased a pool of mortgage loans at a public auction from a bankrupt originator and then packaged and resold the loans to the public despite knowing of flagrant breaches. This was no average RMBS securitization – it was the worst of the worst. FGIC's pre-filing investigation revealed an incredible *100% breach rate*. A58-59 ¶35. And the SEC imposed sanctions of *nearly $300 million* after finding that Morgan Stanley's knowing misrepresentations about the quality of the loans operated as a "*fraud or deceit upon purchasers*." A500 (emphasis added).

Morgan Stanley now seeks to avoid paying full compensation by hiding behind the sole remedy clauses in the securitization agreements. But longstanding New York public policy precludes a party from insulating itself from the consequences of its own gross negligence or willful misconduct. That principle applies whether a provision purports to eliminate liability or merely deny the plaintiff complete relief. And whether the sole remedy provisions will provide complete relief in this case cannot be determined at this early stage.

A. Sole Remedy Clauses Are Unenforceable Against Claims of Gross Negligence and Willful Misconduct Whether They Purport To Eliminate Liability or Merely Limit Relief

This Court has repeatedly held that "it is New York's public policy that a party cannot 'insulate itself from damages caused by grossly negligent conduct.'" *Abacus Fed. Sav. Bank v. ADT Sec. Servs., Inc.*, 18 N.Y.3d 675, 683 (2012) (quoting *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 554 (1992)); *see also Colnaghi, U.S.A. v. Jewelers Prot. Servs.*, 81 N.Y.2d 821, 823 (1993); *Kalisch-Jarcho, Inc. v. City of New York*, 58 N.Y.2d 377, 384-85 (1983); *Food Pageant, Inc. v. Consol. Edison Co.*, 54 N.Y.2d 167, 172-73 (1981); *Gross v. Sweet*, 49 N.Y.2d 102, 106 (1979). "[T]he law frowns upon contracts intended to exculpate a party from the consequences of [its] own negligence," and "such agreements are subject to close judicial scrutiny." *Gross*, 49 N.Y.2d at 106. Consequently, "exculpatory clauses and liquidated damages clauses in contracts are not enforceable against allegations of gross negligence." *Abacus*, 18 N.Y.3d at 683.

Morgan Stanley does not dispute that general principle. But it claims the rule does not apply unless a contract purports to "*eliminate* liability or limit it to a *nominal sum*." Morgan Stanley Br. at 19 (emphasis added). In Morgan Stanley's view, so long as a contract provides a remedy that is more than "nominal," parties are free to contract away their liability for gross negligence as they see fit. That is not the law. This State's public policy prohibits parties from insulating themselves

from the consequences of their own gross negligence or willful misconduct, whether they purport to eliminate liability or merely limit its scope.

This Court's own precedents make that clear. In *Abacus*, this Court stated that "exculpatory clauses *and liquidated damages clauses* in contracts are not enforceable against allegations of gross negligence." 18 N.Y.3d at 683 (emphasis added). The Court phrased the rule that way even though liquidated damages clauses need not and frequently do not limit damages to a nominal sum.

Similarly, in *Metropolitan Life Insurance Co. v. Noble Lowndes International, Inc.*, 84 N.Y.2d 430 (1994), this Court analyzed a contractual limitation of liability under the public policy framework even though the provision merely excluded "consequential damages" and did not purport to eliminate liability or limit it to a nominal sum. *Id.* at 438. Indeed, the plaintiff there recovered more than $204,000 *despite enforcement* of the provision. *Id.* at 433-34. If New York's public policy came into play only where a provision limited liability to a nominal sum, the Court's analysis would have been wholly unnecessary.

Other courts interpret this Court's precedents the same way. In *Turkish v. Kasenetz*, 27 F.3d 23 (2d Cir. 1994), the Second Circuit rejected the argument that the public policy rule "applies only to clauses that completely exempt a party from liability, not to those that limit liability." *Id.* at 28. The court noted that the defendants could not "cite a single case that supports their argument" and that "the

rationale behind the doctrine . . . applies equally to the limitation of liability and to the exclusion of liability." *Id.* Many other courts agree.[2]

Courts have applied that rule to RMBS sole remedy provisions for years. In *Morgan Stanley Mortgage Loan Trust 2006-13ARX v. Morgan Stanley Mortgage Capital Holdings LLC*, 143 A.D.3d 1 (1st Dep't 2016) ("*13ARX*"), *appeal withdrawn*, 32 N.Y.3d 1001 (2018), for example, the First Department rejected the argument that, because a sole remedy clause does not "completely insulate [the defendant] from liability, the gross negligence exception to enforcement does not apply." *Id.* at 9. "[W]hether the sole remedies clauses in these contracts will *make the investors whole*," it explained, "cannot be ascertained at this stage of the litigation." *Id.* (emphasis added); *see also Deutsche Bank Nat'l Trust Co. as Trustee for the Morgan Stanley Structured Trust I 2007-1 v. Morgan Stanley Mortg. Capital Holdings LLC*, 289 F. Supp. 3d 484, 501 (S.D.N.Y. 2018) ("*MSST*") (explaining that "a party need not completely (or effectively) exculpate

---

[2] *See Banc of Am. Sec. LLC v. Solow Bldg. Co. II, LLC*, 47 A.D.3d 239, 241, 245-46 (1st Dep't 2007) (clause limiting sole remedy to specified forms of relief); *Empire One Telecomms., Inc. v. Verizon N.Y., Inc.*, 26 Misc. 3d 541, 550-52 (Sup. Ct. Kings Cnty. 2009) (applying rule to clause excluding "lost profits"); *Cirillo v. Slomin's Inc.*, 196 Misc. 2d 922, 939 (Sup. Ct. Nassau Cnty. 2003) ("[C]lauses limiting the amount of damages are treated the same as exculpatory clauses in general, that is, both are . . . unenforceable against claims of gross negligence."); *Soroof Trading Dev. Co. v. GE Fuel Cell Sys., LLC*, 842 F. Supp. 2d 502, 515 (S.D.N.Y. 2012) (clause excluding "indirect, incidental, exemplary or consequential damages"); *E*Trade Fin. Corp. v. Deutsche Bank AG*, No. 05 Civ. 902, 2008 WL 2428225, at *27 (S.D.N.Y. June 13, 2008) (similar).

itself from liability to 'insulate' itself from damages in a way that contravenes public policy").[3]

Morgan Stanley cites no authority to the contrary. It points to cases where this Court has applied the public policy rule to provisions that *did* eliminate liability or limit it to a nominal sum. Morgan Stanley Br. at 20-21; *see, e.g.*, *Sommer*, 79 N.Y.2d at 554 (rule "applies equally to contract clauses purporting to exonerate a party from liability and clauses limiting damages to a nominal sum"). But none of those cases suggests that the principle is *limited* to those scenarios.

Nor is there any good reason to impose such a limitation. The rationale for the public policy rule is that a party should not be permitted to "insulate itself from damages caused by grossly negligent conduct." *Abacus*, 18 N.Y.3d at 683. A clause that leaves a plaintiff with an incomplete but more than nominal remedy still offends that policy because it still allows the defendant to shield itself from the full consequences of its grossly negligent acts.

---

[3] *See also Bank of N.Y. Mellon v. WMC Mortg., LLC*, 53 Misc. 3d 967, 977-78 (Sup. Ct. N.Y. Cnty. Sept. 7, 2016); *MASTR Asset Backed Sec. Trust 2006-HE3 v. WMC Mortg., LLC*, 983 F. Supp. 2d 1104, 1115 (D. Minn. 2013); *Deutsche Bank Nat'l Trust Co., as Trustee for the Morgan Stanley ABS Capital I Inc. Trust 2007-HE6 v. Decision One Mortg. Co.*, No. 2013 L 5823, 2013 WL 6284438, at *5 (Ill. Cir. Ct. Nov. 19, 2013); *Deutsche Bank Nat'l Trust Co., as Trustee for the Morgan Stanley ABS Capital I Inc. Trust 2006-WMC2 v. WMC Mortg., LLC*, No. 12 Civ. 933, 2014 WL 1289234, at *18-19 (D. Conn. Mar. 31, 2014); *Deutsche Alt-A Sec. Mortg. Loan Trust, Series 2006-OA1 v. DB Structured Prods., Inc.*, 958 F. Supp. 2d 488, 500-01 (S.D.N.Y. 2013).

In short, there is no merit to Morgan Stanley's position that contractual limitations on liability are unenforceable against claims of gross negligence or willful misconduct only where they completely eliminate liability or limit it to a nominal sum. Rather, the relevant question is simply whether the contractually specified remedy will make the plaintiff whole.

B. Whether the Repurchase Remedy Will Make the Trust Whole Cannot Be Determined on the Pleadings

The Appellate Division held that, "at this stage of the case, the actual effect of the sole remedy clause in making the investors whole cannot be ascertained." A525. That conclusion was correct for several reasons.[4]

1. As the Appellate Division explained, the repurchase remedy may not make the Trust whole because there may be situations where "monetary damages may be required in lieu of specific performance." A525. That possibility precludes a definitive ruling about the remedy's adequacy at this stage.

One context where this issue arises is where a loan has been foreclosed upon or otherwise liquidated. RMBS sponsors have argued that a liquidated loan cannot be "repurchased," on the theory that the loan no longer exists. The substantial

[4] Contrary to Morgan Stanley's suggestion, the Trustee never "acknowledge[d]" in its pleadings that the repurchase remedy would "make[] the Trust whole." Morgan Stanley Br. at 21 (quoting A50 ¶3). The Complaint argues that Morgan Stanley *promised* to "make the Trust whole by repurchasing or curing Mortgage Loans." A50 ¶3. That is not an admission that repurchase will always have that effect.

majority of courts have rejected that meritless argument. *See, e.g.*, *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 133 A.D.3d 96, 107 (1st Dep't 2015), *aff'd as modified*, 30 N.Y.3d 572 (2017). But at least one court accepted it. *See MASTR Asset Backed Sec. Trust 2006-HE3 ex rel. U.S. Bank N.A. v. WMC Mortg. Corp.*, No. Civ. 11-2542, 2012 WL 4511065, at *6 (D. Minn. Oct. 1, 2012).

In other cases, RMBS sponsors have argued that the repurchase price for a liquidated loan is zero or a nominal sum. Again, most courts have rejected that meritless argument. *See, e.g.*, *U.S. Bank N.A. v. DLJ Mortg. Capital, Inc.*, No. 650369/2013, 2018 WL 6809404, at *13 (Sup. Ct. N.Y. Cnty. Dec. 27, 2018). But at least one court accepted it. *See Bank of N.Y. Mellon v. WMC Mortg., LLC*, No. 12 Civ. 7096, Dkt. 323, at 16 (S.D.N.Y. Aug. 18, 2015).

This Court has not yet resolved those issues. If the repurchase protocol were interpreted to deny a complete remedy for breaching loans – whether because certain loans could not be repurchased, because they could be repurchased only for a nominal or incomplete sum, or for any other reason – it would plainly implicate New York's public policy.

Morgan Stanley asserts that the repurchase remedy's applicability to liquidated loans is no longer in doubt because the First Department rejected the sponsor's contrary argument in *Nomura*, and this Court "did not disturb the Appellate Division's holding regarding liquidated loans." Morgan Stanley Br. at

22-23. But as Morgan Stanley acknowledges, the appellant in that case did not even raise the issue before this Court. *Id.* at 23 n.8. This Court thus did not decide the issue. What matters is not whether the issue is currently pending before this Court, but whether it is an open question that a party could raise in the future. Because this Court has not yet decided the issue, the Appellate Division correctly held that "the actual effect of the sole remedy clause in making the investors whole cannot be ascertained" at this stage. A525.

2. The repurchase remedy may prove inadequate for other reasons as well. The sheer scale of Morgan Stanley's breaches may render it impracticable to afford remedies on a loan-by-loan basis.

Morgan Stanley sold 5,337 mortgage loans to the Trust and made 34 separate representations and warranties. A49-50 ¶2; A441-47. According to an initial review of over 800 loans, *every single loan* in the sample was in breach. A58-59 ¶35. Attempting to afford remedies for all breaches throughout the Trust on a loan-by-loan basis would place a severe burden on the court's time and resources, if it were feasible at all.

Recognizing those burdens, most courts have allowed RMBS plaintiffs to prove liability and damages through sampling. *See, e.g.*, *Ambac Assurance Corp. v. Countrywide Home Loans Inc.*, No. 2019-26, 2019 WL 4418885, at *1 (1st Dep't Sept. 17, 2019) ("RMBS plaintiffs . . . are entitled to introduce sampling-

related evidence to prove liability and damages in connection with repurchase claims.").[5] Some, however, have not.[6] This Court has not yet decided the issue.

Where courts have insisted on loan-by-loan remedies, the obstacles have been insurmountable. For example, in *U.S. Bank N.A., as Trustee for the MASTR Adjustable Rate Mortgage Trust 2006-OA2 v. UBS Real Estate Securities Inc.*, No. 12-CV-7322, 2016 WL 4690410 (S.D.N.Y. Sept. 6, 2016), the court conducted a bench trial and then ruled on a few illustrative loans, but held that it could not "effectively and timely address[ ]" the remainder because it lacked the "resources."

---

[5] *See also Home Equity Mortg. Trust Series 2006-1 v. DLJ Mortg. Capital, Inc.*, No. 156016/2012, 2019 WL 138634, at *8-9 (Sup. Ct. N.Y. Cnty. Jan. 9, 2019); *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, No. 651612/2010, 2015 WL 6471943, at *4 (Sup. Ct. N.Y. Cnty. Oct. 22, 2015); *Assured Guar. Mun. Corp. v. DB Structured Prods., Inc.*, No. 650705/2010, 2014 WL 3282310, at *6 (Sup. Ct. N.Y. Cnty. July 3, 2014); *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, No. 602825/2008, 2010 WL 5186702, at *4, 6 (Sup. Ct. N.Y. Cnty. Dec. 22, 2010); *MSST*, 289 F. Supp. 3d at 504-05; *Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc.*, 104 F. Supp. 3d 441, 499 n.83 (S.D.N.Y. 2015); *Assured Guar. Mun. Corp. v. Flagstar Bank, FSB*, 920 F. Supp. 2d 475, 512 (S.D.N.Y. 2013); *Fed. Hous. Fin. Agency v. JPMorgan Chase & Co.*, No. 11 Civ. 6188, 2012 WL 6000885 (S.D.N.Y. Dec. 3, 2012); *Syncora Guar. Inc. v. EMC Mortg. Corp.*, No. 09 Civ. 3106, 2011 WL 1135007, at *4-5 (S.D.N.Y. Mar. 25, 2011); *Deutsche Bank Nat'l Trust Co. v. WMC Mortg., LLC*, No. 3:12-CV-1699, 2014 WL 3824333, at *9 (D. Conn. Aug. 4, 2014); *Mass. Mut. Life Ins. Co. v. DB Structured Prods., Inc.*, No. Civ. A. 11-30039, 2015 WL 3964560, at *10 (D. Mass. June 19, 2015).

[6] *See, e.g.*, *MASTR Adjustable Rate Mortg. Trust 2006-OA2 v. UBS Real Estate Sec. Inc.*, No. 12-CV-7322, 2015 WL 764665, at *12 (S.D.N.Y. Jan. 9, 2015), *recon. denied*, 2015 WL 797972 (S.D.N.Y. Feb. 25, 2015); *Homeward Residential, Inc. v. Sand Canyon Corp.*, No. 12 Civ. 5067, 2017 WL 5256760 (S.D.N.Y. Nov. 13, 2017); *Royal Park Invs. SA/NV v. U.S. Bank N.A.*, No. 14 Civ. 2590, 2018 WL 3350323, at *1 (S.D.N.Y. July 9, 2018); *W. & S. Life Ins. Co. v. Bank of N.Y. Mellon*, No. A1302490, 2017 WL 3392856, at *3 (Ohio C.P. Aug. 4, 2017).

Id. at *121-22. The court appointed a master to make findings, and provided for the appointment of "additional masters" to assist the Lead Master. *Id.* More than three years later, that process still has not concluded. Moreover, the court's rejection of sampling denied the Trustee any remedy for certain loans whose loan files were missing. *Id.* at *75.

Where a contractually specified remedy is so impractical that it effectively denies the plaintiff complete relief, New York's public policy against insulating a party from its own grossly negligent conduct is squarely implicated. The court reached precisely that conclusion in *MSST*: "Given that [the Trustee] has alleged that as many as *93%* of the loans in the Trust are in breach . . . , [the sole remedy provision] would present a significant restriction on [its] otherwise available remedies . . . , both from a practical and an economic standpoint." 289 F. Supp. 3d at 501. "[L]oan-by-loan re-underwriting and analysis is impracticable given the scope of the alleged breach in this action." *Id.* at 502.

Morgan Stanley insists that "prov[ing] . . . breaches on a loan-by-loan basis . . . is simply what the contract between these sophisticated parties provides." Morgan Stanley Br. at 25-26. But even if that were true, it is irrelevant. The whole point of the public policy rule is that limitations on remedies are not enforceable against claims of gross negligence or willful misconduct, *regardless* of

what the contract "provides" – and regardless of the sophistication of the parties. *See, e.g.*, *Abacus*, 18 N.Y.3d at 680 (federal bank suing alarm company).

Morgan Stanley's reliance on *A.H.A. General Construction, Inc. v. New York City Housing Authority*, 92 N.Y.2d 20 (1998), is similarly unavailing. That case held only that the public policy rule does not apply to mere "conditions precedent to suit or recovery." *Id.* at 30-31. Sole remedy clauses are not "conditions precedent." They are a limitation on the *remedies* a trustee can obtain for breach. *See MSST*, 289 F. Supp. 3d at 501 (sole remedy clause is "easily distinguishable" from the condition precedent in *A.H.A.* because "it tightly limits the types of remedies available . . . and creates real barriers to recovery").

Because this Court has not yet addressed whether an RMBS sole remedy provision permits a trustee to prove liability and damages through sampling, and because a negative answer to that question would mean that the provision would leave the Trustee with an incomplete remedy, the adequacy of the repurchase remedy cannot be determined at this stage.

3. The Trustee also seeks additional remedies such as rescission and rescissory damages. A77 ¶87. Those remedies are particularly appropriate given the sheer extent of the breaches in the Trust.

The First Department has refused to permit those remedies in RMBS cases.[7] But other courts have disagreed.[8] And once again, this Court has not yet addressed the issue. If the Trustee has an otherwise viable claim for rescission or rescissory damages, but the sole remedy clauses foreclose that relief, New York public policy would prohibit Morgan Stanley from invoking those clauses to shield its own grossly negligent or willfully wrongful conduct.

4. Finally, even apart from the specific examples described above, the Appellate Division's more general observation about the posture of this case is a sufficient basis to affirm its decision.

Citing the highly deferential "standard applicable on a pre-answer motion to dismiss," the Appellate Division observed that, "at this stage of the case, the actual effect of the sole remedy clause in making the investors whole cannot be ascertained." A524-25. That ruling was grounds to deny Morgan Stanley's motion, even absent a specific reason to doubt the repurchase remedy's efficacy. Nothing in this Court's precedents requires a motion court to speculate at the very

---

[7] *See Fin. Guar. Ins. Co. v. Morgan Stanley ABS Capital I Inc.*, 164 A.D.3d 1126, 1128 (1st Dep't 2018); *Nomura*, 133 A.D.3d at 108; *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 105 A.D.3d 412, 413 (1st Dep't 2013).

[8] *See, e.g.*, *Deutsche Bank Nat'l Trust Co. as Trustee for the Morgan Stanley Structured Trust I 2007-1 v. Morgan Stanley Mortg. Capital Holdings LLC*, 97 F. Supp. 3d 548, 556-57 (S.D.N.Y. 2015); *Assured Guar. Mun. Corp. v. UBS Real Estate Sec., Inc.*, No. 12 Civ. 1579, 2012 WL 3525613, at *7 (S.D.N.Y. Aug. 15, 2012); *Ambac Assurance Corp. v. EMC Mortg. Corp.*, No. 08 Civ. 9464, 2009 WL 734073, at *2 (S.D.N.Y. Mar. 16, 2009); *Syncora*, 2012 WL 2326068, at *10.

outset of a case whether a contractual remedy will make the plaintiff whole. At this early stage, there is often simply no way to predict what impediments may arise. *See Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 415 (2001) ("Whether [a remedy] would adequately compensate plaintiffs for loss . . . is a matter to be resolved at a later stage, not on a motion to dismiss the complaint.").

Morgan Stanley asserts that speculation into the sole remedy clauses' "actual effect" is unnecessary because the parties did not "*inten[d]* to exculpate Morgan Stanley in any way." Morgan Stanley Br. at 24-25 (emphasis added). Precedent does not support that focus on the parties' intent. This Court determines the enforceability of limitations of liability based on their effect, not their intent. *See, e.g.*, *Abacus*, 18 N.Y.3d at 683 (holding that "liquidated damages clauses in contracts are not enforceable against allegations of gross negligence" without inquiring into intent).[9]

That approach makes sense. Often, parties will disagree over whether a provision was "intended" to limit a party's liability. Making enforceability turn on the parties' intent would launch courts on an uncertain and often imponderable inquiry. That is why contract law generally disfavors intent-based standards. *See,*

---

[9] *A.H.A.* is not to the contrary. That case did not address any question of intent or effect. It merely mentioned clauses "intended to absolve or exculpate . . . from liability" in the course of contrasting exculpatory clauses with "conditions precedent to suit or recovery." 92 N.Y.2d at 30-31. As already explained, sole remedy clauses are not conditions precedent.

e.g., *Mencher v. Weiss*, 306 N.Y. 1, 7 (1953) ("[T]he manifestation of a party's intention rather than the actual or real intention is ordinarily controlling.").

Even if intent mattered, the issue could not be resolved on the pleadings. A fully developed record may well show that Morgan Stanley *did* intend the sole remedy clauses to restrict its liability. After all, the purpose of a "sole remedy" clause, practically by definition, is to limit the other party's *remedies*. And while Morgan Stanley may not have intended to "exculpate" itself entirely, Morgan Stanley Br. at 24-25, New York's public policy is not limited to such clauses, as explained above. Even if intent mattered, therefore, it would not support reversal in this case.[10]

C. The Trustee Adequately Alleges Willful Misconduct and Gross Negligence

Morgan Stanley asserts that the Trustee has not alleged "the type of conduct necessary to invoke the public policy exception." Morgan Stanley Br. at 31. But the Complaint amply alleges gross negligence and willful misconduct.

---

[10] Morgan Stanley's assertion that the sole remedy clauses were designed to preserve the Trust's REMIC status under federal tax law is not a basis for reversal. Morgan Stanley Br. at 10-13. The IRS has ruled that monetary payments in lieu of repurchase do not defeat an RMBS trust's REMIC status. *See* I.R.S. Priv. Ltr. Rul. 113051-15, at 12-13 (Oct. 5, 2015) (concluding in connection with Bank of New York Mellon / Countrywide settlement that "the receipt of an Allocable Share of the Settlement Payment" would not "cause the [Trust] to fail to meet [REMIC] requirements"); I.R.S. Priv. Ltr. Rul. 112666-16, at 11 (Sept. 7, 2016) (similar).

Gross negligence is conduct that "smacks of intentional wrongdoing." *Kalisch*, 58 N.Y.2d at 385. Such conduct "can be explicit, as when it is fraudulent, malicious," or in "bad faith." *Id.* But conduct can also "smack[] of intentional wrongdoing . . . when *as in gross negligence, it betokens a reckless indifference to the rights of others*." *Id.* (emphasis added); *see also Sommer*, 79 N.Y.2d at 554 ("reckless disregard for [a counterparty's] rights"); *Restatement (Second) of Contracts* § 195(1) (1981). A party is grossly negligent if it acts with "disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome." *Matter of N.Y.C. Asbestos Litig.*, 89 N.Y.2d 955, 956-57 (1997).

The Complaint alleges precisely that sort of conduct here. The NC4 Trust was one of the last two subprime residential mortgage-backed securitizations Morgan Stanley sponsored before the housing market collapsed in 2007. A493. Morgan Stanley acquired the loans at a public auction from a mortgage originator that had already filed for bankruptcy. A50 ¶4; A52 ¶14. The risk of serious problems with these loans – and the need for careful due diligence to verify their quality – must have been readily apparent to Morgan Stanley.

As Sponsor of the securitization, Morgan Stanley conducted due diligence on the loans and had extensive access to the loan files and other information. A54 ¶23; *see Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc.*, 104 F. Supp. 3d

441, 463 (S.D.N.Y. 2015) (sponsors "have access to information about individual loans, including the loan files," as well as "access to information about loan performance from the loan's servicers"). From that due diligence, Morgan Stanley "must have known (or at least should have known)" about the loans' poor quality. A64 ¶44. For many loans, Morgan Stanley ignored "[r]ed flags" that "would have indicated . . . that the borrower misrepresented" key information. A68-69 ¶52. Yet Morgan Stanley recklessly gave the loans a clean bill of health, making 34 separate representations and warranties about their quality. A49-50 ¶2; A441-47.

When FGIC retained a private consulting firm to analyze a sample of more than 800 loans in the Trust, the firm found that *every single loan* was in breach of one or more representations and warranties – including representations about such crucial matters as borrower income, employment, occupancy status, and other debts. A58-61 ¶35; A64-71 ¶¶44-57. That 100% breach rate is astounding, even measured by the low bar of RMBS securitizations.

Finally, the SEC's findings of fraud and deceit show that Morgan Stanley was not just grossly negligent, but willfully deceptive as well. In its public offering documents touting the quality of the loans, Morgan Stanley represented that only 41 loans were delinquent. A497. In reality, information that Morgan Stanley had received showed that the real number was more than *four times* that amount. A497-98. "As a result, Morgan Stanley filed offering documents that

materially understated current delinquencies." A500. Its disclosures "operated . . . as a *fraud or deceit* upon purchasers." *Id.* (emphasis added).

Morgan Stanley thus *knowingly deceived* certificateholders about information critical to their investment decisions. As the SEC explained, the delinquency data was "important information to investors" because, without it, they could not "assess the likelihood that borrowers will be able to repay their mortgage loans and, as a result, whether investors will suffer losses on, or will recover and profit from, their investments." A499-500. Morgan Stanley nonetheless refused to update its delinquency reports or substitute performing loans for the delinquent ones. *Id.* Instead, it sat on its hands and watched the losses mount.

Morgan Stanley argues in a footnote that, because it misrepresented delinquency rates for only "approximately three percent of the loans in the Trust," its fraudulent misrepresentations were no big deal. Morgan Stanley Br. at 37 n.11. But the SEC obviously did not share that cavalier assessment when it publicly condemned Morgan Stanley's conduct and imposed nearly *$300 million* in sanctions. A500-01.

The allegations here are far more damning than ones this Court has found adequate in other cases. In *Abacus*, for example, a bank sued an alarm company for breach of contract following a burglary. 18 N.Y.3d at 681. Citing allegations that "defendants had knowledge – for weeks, if not months – that [their] equipment

had been malfunctioning" but failed to investigate or warn anyone, the Court found the allegations of gross negligence sufficient. *Id.* at 683-84. "[O]n this record," the Court held, "plaintiffs have alleged the type of conduct that smacks of intentional wrongdoing and evinces a reckless indifference to the rights of others." *Id.* at 684. Likewise here, Morgan Stanley sold the Trust a pool of loans rife with defects and lied about their quality in its offering documents. Morgan Stanley knew full well about the problems but failed to notify anyone. Instead, it simply stood by as investor losses piled up.

In other RMBS cases, courts have found allegations of gross negligence sufficient on far less egregious facts. In *Nomura*, the First Department held the allegations sufficient where "45% of the loans reviewed in a forensic sampling" were in breach. 133 A.D.3d at 106-07. "[T]he sheer volume of defective loans" supported an inference of gross negligence. *Id.* at 106. Likewise, in *13ARX*, the First Department held that allegations that "more than half of the loans later reviewed by plaintiff's forensic analysts revealed rampant breaches" were "sufficient to withstand dismissal." 143 A.D.3d at 8. Other courts have agreed.[11]

---

[11] *See, e.g.*, *Bank of N.Y. Mellon*, 53 Misc. 3d at 977-78; *MSST*, 289 F. Supp. 3d at 500; *Deutsche Bank Nat'l Trust Co., as Trustee for the Morgan Stanley Structured Trust I 2007-1*, 97 F. Supp. 3d at 557; *Deutsche Alt-A Sec. Mortg. Loan Trust, Series 2006-OA1*, 958 F. Supp. 2d at 500-01; *MASTR Asset Backed Sec. Trust 2006-HE3*, 983 F. Supp. 2d at 1115; *Deutsche Bank Nat'l Trust Co., as Trustee for Morgan Stanley ABS Capital I Inc. Trust 2007-HE6*, 2013 WL 6284438, at *5;

Morgan Stanley's reckless and indeed knowingly wrongful conduct "smacks of intentional wrongdoing." *Kalisch*, 58 N.Y.2d at 385. Morgan Stanley acted with "conscious indifference" to the likelihood that the loans would never be repaid and that the Trust and investors would lose hundreds of millions of dollars as a result. *Asbestos Litig.*, 89 N.Y.2d at 956-57. The Complaint's allegations are more than adequate to permit these claims to proceed beyond the pleading stage.

D. The Public Policy Exception Is Not Limited to Independently Tortious Conduct

Despite its egregious track record of reckless and knowingly wrongful conduct, Morgan Stanley argues that the sole remedy clauses are enforceable because the public policy exception applies only to "conduct that breaches a duty separate from the express terms of the contract." Morgan Stanley Br. at 31. In other words, according to Morgan Stanley, although New York public policy precludes a defendant from insulating itself from a *tort claim for gross negligence*, this case is different because Morgan Stanley merely breached its contractual obligations in a *grossly negligent manner*. That argument is squarely contrary to

---

Deutsche Bank Nat'l Trust Co., as Trustee for Morgan Stanley ABS Capital I Inc. Trust 2006-WMC2, 2014 WL 1289234, at *18-19; *see also United States v. Litos*, 847 F.3d 906, 908 (7th Cir. 2017) (bank was "reckless" in approving loans to "people who knowing or doubting their ability ever to repay them would misrepresent their assets and earning power" and in "clos[ing] its eyes to how phony these loan applications were, because it expected to turn around and sell the mortgages to a hapless [investor]").

this Court's decision in *Abacus*. And it is unavailing in any event because the Trustee *has* alleged the breach of an independent tort duty.

In *Abacus*, this Court held that an exculpatory clause was unenforceable even though the complaint did *not* adequately allege a claim in tort. The Court explained that "exculpatory clauses and liquidated damages clauses in contracts are not enforceable against allegations of gross negligence." 18 N.Y.3d at 683. And "the allegations in the amended complaint sufficiently allege[d] . . . gross negligence." *Id.* Nonetheless, the Court *also* concluded that "the complaint did not allege conduct that would give rise to separate liability in tort." *Id.* at 684 (emphasis added). Specifically, "the allegations that a breach of contract occurred as a result of gross negligence does not give rise to a duty independent of the contractual relationship." *Id.* at 684-85.

Morgan Stanley's theory is irreconcilable with that decision. This Court expressly rejected the *Abacus* plaintiff's tort claim. 18 N.Y.3d at 684. But it nonetheless voided the sole remedy clause because the defendant breached its contractual obligations in a grossly negligent manner. *Id.* at 683. Those holdings foreclose Morgan Stanley's theory that New York public policy bars enforcement of exculpatory clauses only where there is an independent tort duty.

Morgan Stanley tries to distinguish *Abacus* on the ground that "the nature of the services provided by [the] contract" – *i.e.*, security-alarm services – "g[ave]

rise to an ongoing duty of care," which the defendant "fail[ed] to fulfill . . . in a grossly negligent manner." Morgan Stanley Br. at 35. But this Court expressly held that the contract "d[id] not give rise to a duty independent of the contractual relationship." *Abacus*, 18 N.Y.3d at 684-85. The case thus defies Morgan Stanley's theory that the public policy rule applies only where conduct "breaches a duty separate from the express terms of the contract." Morgan Stanley Br. at 31.

Moreover, Morgan Stanley's distinction makes no sense. Whether a contract imposes an ongoing duty of care (as in *Abacus*) or a duty to make representations and warranties that are accurate as of a specific date (as here), the public policy implications are the same: Contracting parties may not limit their liability when they fail to comply with those contractual duties in a grossly negligent manner. If anything, the fact that Morgan Stanley promised without qualification that its representations and warranties would be accurate, whereas the *Abacus* defendant merely promised to exercise due care, makes Morgan Stanley's grossly negligent discharge of its contractual duties more blameworthy, not less.

Metropolitan Life does not support Morgan Stanley's view either. That case interpreted a contractual limitation of liability that *expressly exempted* "willful acts." 84 N.Y.2d at 438. This Court "conclude[d] that the term willful acts as used in this contract was intended by the parties to subsume conduct which is tortious in nature." *Id.* "As thus defined," the Court held, "limiting defendant's liability

for consequential damages to injuries to plaintiff caused by intentional misrepresentations, willful acts and gross negligence does not offend public policy." *Id.* Nothing in that passage interpreting a particular contract term suggests that the public policy rule applies only where there is an independent tort.

Morgan Stanley claims that *Metropolitan Life* "drew a distinction between breaches of contract – even those that are intentional and motivated by the breaching parties' financial self-interest – and breaches that are 'tortious in nature.' " Morgan Stanley Br. at 33. But the distinction *Metropolitan Life* actually drew was between "truly culpable, harmful conduct" such as "intentional misrepresentations, willful acts and gross negligence," on the one hand, and "merely intentional nonperformance of the Agreement motivated by financial self-interest," on the other. 84 N.Y.2d at 438. The decision below is fully consistent with that distinction: Morgan Stanley committed "pervasive, knowing breaches of the representations and warranties on multiple grounds" that amounted to "gross negligence." A525.

Even if the public policy rule were limited to independent torts, that would not help Morgan Stanley. As the court explained below, the Complaint alleges "that [Morgan Stanley] knowingly misrepresented in the offering documents the delinquency rates of the loans held in the Trust; that [it] did so in order to induce the investing public . . . to buy the certificates that [it] knew did not meet their representations of quality and were therefore likely to cause significant losses to

investors; and that the certificateholders purchased the securities in justifiable reliance on the misrepresentations, causing the Trust, and consequently the certificateholders, to suffer $495 million in losses." A526. Those allegations plead independently tortious conduct – specifically, fraud.

E. *Ambac* and *Nomura* Are Inapposite

Morgan Stanley invokes this Court's decisions in *Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572 (2017), and *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569 (2018). But as the Appellate Division explained, those cases are inapposite. Neither case addressed the gross negligence exception. While the Trustee will ultimately have to prove its gross negligence allegations at trial, those allegations are more than sufficient to proceed beyond a motion to dismiss.

In *Nomura*, a trustee sued an RMBS sponsor for "pervasive breaches of the representations made as to the mortgage loans." 30 N.Y.3d at 577-78, 582. The contract provided that the repurchase protocol was the sole remedy for any "breach of the representations and warranties *contained in Section 8*." *Id.* at 579 (emphasis added). But the contract also contained, *in Section 7*, a "No Untrue Statement" provision representing that the agreement did not "contain any untrue statement of material fact." *Id.* at 578-79. Seeking to avoid the sole remedy clause, the trustee argued that the "pervasive and material misrepresentations" violated the No Untrue

Statement provision. *Id.* at 580. This Court disagreed, reasoning that the claims were "grounded in 'misrepresentations and omissions with respect to the Mortgage Loans'" and that the sole remedy provision therefore applied. *Id.* at 582, 584.

In *Ambac*, a certificate insurer sued an RMBS sponsor for breaches of representations and warranties. 31 N.Y.3d at 576. The contract contained a sole remedy provision that applied to representations and warranties regarding the individual loans. *Id.* Seeking to avoid that clause, the insurer alleged breaches of "transaction-level" representations and warranties. *Id.* at 576-77, 581-82. This Court held that the "transaction-level" claims were still based on the same factual allegations underpinning the "loan-level breaches," and that the sole remedy clause therefore applied. *Id.* at 582-83.

Neither of those cases has any relevance here. The plaintiffs in those cases made no allegations of gross negligence, and the Court never addressed whether the sole remedy clauses would be unenforceable on that basis. The cases addressed only the proper construction of the securitization agreements and whether the sole remedy provisions extended to the particular claims asserted. Here, the issue is not whether the sole remedy provisions *apply*, but whether they are *enforceable* in light of Morgan Stanley's gross negligence. That is a different issue.

That *Nomura* and *Ambac* were not swayed by allegations of "pervasive" breaches (Morgan Stanley Br. at 27) does not mean those allegations are irrelevant

here. *Nomura* and *Ambac* held, as a matter of contract interpretation, that the applicability of the sole remedy clauses in those cases did not turn on whether the breaches were sporadic or pervasive. By contrast, the pervasiveness of the breaches is obviously relevant to whether Morgan Stanley acted in a reckless or knowingly wrongful manner when it made representations and warranties about the quality of the loans, refused to repurchase all but a handful, and lied to investors in its offering documents. Morgan Stanley's abysmal 100% breach rate is uniquely probative to those issues.

Accepting the Trustee's position in this case will not effectively reverse the outcome in *Nomura* or *Ambac*. The Trustee is not seeking a rule that mere allegations of pervasive breaches automatically invalidate a sole remedy clause. Rather, an unusually high breach rate is simply one fact a court may consider in deciding whether a complaint raises a sufficient inference of gross negligence to survive a motion to dismiss. To avoid the sole remedy clauses on that basis, the Trustee will ultimately have to prove to the court's satisfaction that Morgan Stanley acted in a grossly negligent or willfully wrongful manner. The pervasive breaches will simply be one piece of evidence among many to consider. The question at this stage is only whether the claim should proceed beyond the pleading stage. Under this Court's precedents, it should.

II. THE APPELLATE DIVISION CORRECTLY HELD THAT MORGAN STANLEY'S FRAUDULENT CONDUCT AUTHORIZES PUNITIVE DAMAGES

Morgan Stanley acquired thousands of mortgage loans that it knew had serious defects that drastically increased the risk they would never be repaid. It offloaded the loans to the Trust in exchange for substantial fees. And it misrepresented the loans' key characteristics to induce the public to invest in the Trust. As the SEC found, "Morgan Stanley misled investors in the NC4 transaction" by making "misleading public disclosures" that "operated . . . as a *fraud or deceit upon purchasers*." A493, 498-500 (emphasis added). That is exactly the kind of conduct that supports an award of punitive damages.

Punitive damages are available for breach of contract where "(1) [the] defendant's conduct [is] actionable as an independent tort; (2) the tortious conduct [is] of [an] egregious nature . . . ; (3) the egregious conduct [is] directed to plaintiff; and (4) it [is] part of a pattern directed at the public generally." *N.Y. Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 316 (1995). Morgan Stanley's primary argument is that punitive damages are unavailable because its fraudulent conduct was directed at certificateholders, not the Trustee. Morgan Stanley Br. at 39-40. But this Court lacks jurisdiction to review that argument because Morgan Stanley never raised it below. Waiver aside, the argument has no merit. Morgan Stanley engaged in a fraudulent scheme directed at *both* certificateholders *and* the Trustee. Its egregious conduct is more than sufficient to authorize punitive damages.

A. This Court Lacks Jurisdiction To Review Morgan Stanley's Principal Argument

Morgan Stanley's primary argument in this Court is that punitive damages are not available under the third *New York University* requirement because its fraudulent conduct was directed only at certificateholders, not the Trustee. Morgan Stanley Br. at 38-39. This Court lacks jurisdiction to address that argument because Morgan Stanley failed to raise it below.

For over a century, the law has been clear that "questions not raised at the trial court . . . will not be heard on appeal" in this Court. *Cohn v. Goldman*, 76 N.Y. 284, 287 (1879). This Court has steadfastly adhered to that rule. *See, e.g.*, *Altshuler Shaham Provident Funds, Ltd. v. GML Tower, LLC*, 21 N.Y.3d 352, 361 n.4 (2013); *Bingham v. N.Y.C. Transit Auth.*, 99 N.Y.2d 355, 359 (2003); *Telaro v. Telaro*, 25 N.Y.2d 433, 439 (1969); Arthur Karger, *Powers of the New York Court of Appeals* § 17:1, at 589-91 (3d ed. 2005).

Morgan Stanley did not raise this argument below. In the motion court, Morgan Stanley made only a perfunctory one-page argument that the allegations "are of the same kind as in the various RMBS cases before this Court . . . [and] can[not] transform a breach of contract claim into a claim of 'tortious conduct.' " Mem. in Supp. of Mot. To Dismiss, No. 652877/2014, Doc. No. 24, at 7 (Sup. Ct. N.Y. Cnty. filed Mar. 9, 2015). In the Appellate Division, Morgan Stanley disputed only the first, second, and fourth *New York University* requirements,

urging that the Complaint failed to allege a tort, that any fraud was not egregious, and that there was no pattern of misconduct aimed at the public. Morgan Stanley Br. at 25-29 (1st Dep't filed Aug. 10, 2016). Morgan Stanley never argued that the claim failed because its conduct was not directed to the Trustee.

That the Appellate Division chose to address the issue anyway is beside the point. A526-27. The Appellate Division may, "in the exercise of its 'interests of justice' jurisdiction, always reach an issue not preserved at Supreme Court." *Altshuler Shaham*, 21 N.Y.3d at 361 n.4. But this Court "lacks power to review unpreserved issues *even where the Appellate Division has chosen to do so*." *Id.* (emphasis added); *see also Merrill ex rel. Merrill v. Albany Med. Ctr. Hosp.*, 71 N.Y.2d 990, 991 (1988). This Court therefore lacks jurisdiction to address this argument.[12]

B. Morgan Stanley's Misconduct Was Directed to Both Certificateholders and the Trustee

In any event, Morgan Stanley's argument fails on the merits. Morgan Stanley's misconduct was directed to *both* certificateholders *and* the Trustee.

---

[12] This Court has recognized a limited exception for unpreserved arguments that "could not have been avoided by factual showings or legal countersteps." *Bingham*, 99 N.Y.2d at 359; *see* Karger, *supra*, §§ 17:1-7. That exception does not apply here. Had Morgan Stanley raised its argument below, the Trustee could have sought to obviate or cure any deficiency by amending the Complaint. *See, e.g.*, *Lindlots Realty Corp. v. Suffolk County*, 278 N.Y. 45, 52 (1938) (exception did not apply because "if plaintiff had not been disarmed and lulled into inaction . . . th[e] record might . . . have contained some further evidence bearing upon [the issue]").

Morgan Stanley made the same misrepresentations about delinquency rates to both certificateholders and the Trustee. Morgan Stanley represented and warranted to the Trustee in the securitization documents that, except as specifically disclosed, no payments due under the mortgage loans were more than 30 days delinquent. A441 ¶(b); A61-63 ¶¶37-42. That was the same fraudulent representation about delinquency rates that Morgan Stanley made to certificateholders in the offering documents. A497. Morgan Stanley's misrepresentations about delinquency rates were thus part of an overall fraudulent scheme directed at both the investing public *and* the Trustee.

The Trustee was an indispensable target of that scheme. Morgan Stanley acquired the defective mortgage loans at a bankruptcy auction and sold them *to the Trust*. A52-53 ¶¶14-18. *The Trust* then issued certificates that Morgan Stanley marketed and sold to investors. A53-54 ¶¶19, 21. Morgan Stanley knew that the Trustee's "policy and intention . . . [was] to acquire only Mortgage Loans meeting the requirements set forth in this Agreement." A176 §2.01(c). Thus, without Morgan Stanley's misrepresentations to the Trustee, its scheme to defraud investors never could have succeeded.

As the Appellate Division explained, "defendants' misrepresentations . . . materially and adversely affected the Trustee's, as well as the certificateholders', interests in the mortgage loans in question." A526-27. The Trustee thus

"sufficiently alleged . . . that defendants' egregious conduct was 'directed to' it." A527. Those allegations authorize punitive damages.

C. Morgan Stanley's Misconduct Was Egregious

Morgan Stanley's only other argument against punitive damages is that its conduct was not sufficiently egregious because its misrepresentations related to only "three percent of the loans in the Trust." Morgan Stanley Br. at 40. Morgan Stanley's attempt to trivialize its fraudulent conduct is just one more example of its refusal to take responsibility for its role in the mortgage crisis. The Complaint's allegations are more than adequate to describe "egregious" misconduct.

This Court has made clear that "there may be a recovery of exemplary damages in fraud and deceit actions where the fraud . . . is gross and involves high moral culpability." *Walker v. Sheldon*, 10 N.Y.2d 401, 405 (1961). That perfectly describes Morgan Stanley's actions. Morgan Stanley made "misleading public disclosures" about a topic that was critically relevant to investors in assessing the likelihood that the mortgage loans would ever be repaid. A493-94, 500. The delinquency data was particularly significant because the securitization occurred "against a backdrop of rising borrower delinquencies and unprecedented distress in the subprime market." A493. Despite having received "updated payment information," Morgan Stanley published false data that "operated . . . as a *fraud or deceit upon purchasers*." A497, 500 (emphasis added).

While Morgan Stanley attempts to downplay its fraud as involving only "three percent of the loans in the Trust," Morgan Stanley Br. at 40, that is hardly the only relevant metric. Morgan Stanley's misrepresentation was not just a slight exaggeration – the true delinquency rates were more than *four times* what Morgan Stanley claimed. A498. On those loans alone, the actual and projected losses were over $21 million. *Id.* More importantly, investors may well have thought that those alarming defaults cast the overall quality of the loan pool in a much different light. The SEC obviously did not share Morgan Stanley's dismissive attitude: It sanctioned Morgan Stanley nearly *$300 million* for this misconduct.

In *Walker*, this Court found the "egregiousness" standard satisfied where the defendant merely made false representations to induce an author to pay $1,380 for a publishing contract. 10 N.Y.2d at 403, 406. The fraud was "not an isolated transaction" but integral to the defendant's business. *Id.* at 406.

Here too, Morgan Stanley's fraud was no isolated misstep. Morgan Stanley has paid the U.S. Department of Justice $2.6 billion to resolve mortgage-backed securities claims involving nearly 250 different securitizations, including this one.[13] Morgan Stanley settled securities fraud claims with the Federal Housing

[13] *See* U.S. Dep't of Justice, *Morgan Stanley Agrees To Pay $2.6 Billion Penalty in Connection with Its Sale of Residential Mortgage Backed Securities* (Feb. 11, 2016), https://www.justice.gov/opa/pr/morgan-stanley-agrees-pay-26-billion-

Finance Agency for $1.25 billion.[14] At least five states have settled similar claims against Morgan Stanley in the last few years.[15]

If the policies underlying punitive damages awards apply to a publishing house that merely bilked an aspiring author out of $1,380, they certainly apply to a financial institution that played a starring role in the national mortgage crisis that brought a major sector of the American economy to its knees. Courts in other RMBS cases alleging fraud have "repeatedly declined to strike the punitive damages claims." *HSH Nordbank AG v. Barclays Bank PLC*, No. 652678/2011, 2014 WL 841289, at *21 (Sup. Ct. N.Y. Cnty. Mar. 3, 2014) (collecting cases).[16] There is no basis for a different result here.

---

penalty-connection-its-sale-residential-mortgage-backed; Settlement Agreement ¶ 1 & Annex 2 (Feb. 11, 2016), https://www.justice.gov/opa/file/823671/download.

[14] *See* Fed. Hous. Fin. Agency, *FHFA Announces $1.25 Billion Settlement with Morgan Stanley* (Feb. 7, 2014), https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-$1-25-Billion-Settlement-With-Morgan-Stanley.aspx.

[15] *See* Stacy Cowley, *Morgan Stanley To Pay California $150 Million over Mortgage Crisis Claims*, N.Y. Times, Apr. 26, 2019; Nathaniel Popper, *Morgan Stanley To Pay $3.2 Billion over Flawed Mortgage Bonds*, N.Y. Times, Feb. 11, 2016; Ill. Office of Attorney General, *Madigan Announces $22.5 Million Morgan Stanley Settlement* (Feb. 11, 2016), http://www.illinoisattorneygeneral.gov/pressroom/2016_02/20160211.html; Kerri Ann Panchuk, *Morgan Stanley Agrees To Pay $7.2 Million To Settle Nevada MBS Dispute*, HousingWire, Sept. 27, 2011; Svea Herbst-Bayliss, *Morgan Stanley Settles Massachusetts Subprime Loan Probe*, Reuters, June 24, 2010.

[16] *See also Ambac Assurance Corp. v. First Franklin Fin. Corp.*, No. 651217/2012, 2013 WL 3779636, at *15 (Sup. Ct. N.Y. Cnty. July 18, 2013) (loan originator's "systematic fraud and total disregard of the represented underwriting guidelines" satisfied *Walker*); *MBIA Ins. Corp. v. Morgan Stanley*, No. 29951-10, 2011 WL

III. THE TRUSTEE IS ENTITLED TO RECOVER ATTORNEY'S FEES

Finally, the Trustee's claim for attorney's fees is solidly grounded in the governing agreement. Although New York law presumes that parties are "responsible for their own attorney's fees," parties are free to alter that presumption where the intent to shift fees is "clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances." *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491-92 (1989). The relevant provision here satisfies that standard.

A. The Pooling and Servicing Agreement Clearly Implies an Intent To Permit Recovery of Attorney's Fees in Repurchase Litigation

The PSA entitles the Trustee to recover the "Repurchase Price" for any materially breaching loan. A437-38 §4(a). That term is defined to include "all costs and expenses . . . relating to . . . the Trustee's *enforcement* of the repurchase obligation." A165 (emphasis added). The method by which the Trustee "enforce[s]" the repurchase obligation is by prosecuting repurchase litigation like this suit. The contract thus "clearly implie[s]" an intent to shift attorney's fees within the meaning of *Hooper*, 74 N.Y.2d at 491-92.

11556446, at *3, 7 (Sup. Ct. Westchester Cnty. May 26, 2011) (denying motion to strike punitive damages claim based on allegations that "Morgan Stanley made misrepresentations as to the quality of the underlying mortgage loans"); *MBIA Ins. Co. v. Residential Funding Co., LLC*, No. 603552/2008, 2009 WL 5178337, at *4 (Sup. Ct. N.Y. Cnty. Dec. 22, 2009) ("premature" to strike punitive damages claim "premised on allegations that [loan originator] misrepresented various statistics and other existing facts about the underlying mortgage loans").

The plain meaning of the term "enforce" refers to legal proceedings like this suit. To "enforce" a contractual obligation is "to compel a person to pay damages for not complying with (a contract)." *Black's Law Dictionary* 645 (10th ed. 2014); *see also Oxford English Dictionary* 245 (2d ed. 1989) (defining "enforce" as "[t]o compel the observance of (a law)"). Courts thus routinely construe the term to refer to legal proceedings. *See, e.g.*, *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 104 (2d Cir. 2006) ("The use of the word 'enforce' . . . is significant. To enforce is '[t]o give force or effect to.' Black's Law Dictionary (8th ed. 2004). Because '[a]rbitration awards are not self-enforcing,' they must be given force and effect by being converted to judicial orders by courts . . . ."); *Cuenca v. Harris & Harris, Ltd.*, No. 16-CV-05385, 2017 WL 1196922, at *2 (N.D. Ill. Mar. 31, 2017) ("[I]t doesn't take a legal dictionary to understand that one of the means by which a creditor may 'enforce' an obligation to pay a debt is through a lawsuit.").

The PSA itself confirms that understanding. In a section entitled "*Enforcement* of Obligations for Breach of Mortgage Loan Representations," it provides that "[t]he Trustee shall pursue such *legal remedies* available to the Trustee with respect to such breach under the Representations and Warranties Agreement, as may be necessary or appropriate to *enforce* the rights of the Trust with respect thereto." A182 § 2.07 (emphasis added).

Because the Repurchase Price definition specifically refers to costs and expenses of enforcement, it necessarily permits recovery of attorney's fees and other litigation expenses. Those are the principal – if not sole – costs and expenses a party incurs in litigating an action. It would make no sense to authorize recovery of the costs and expenses of litigation but then drain the provision of essentially all meaning by excluding the paradigmatic fees and expenses that make up those costs. Courts have thus long interpreted provisions authorizing recovery of "enforcement" costs to permit recovery of attorney's fees.[17]

Morgan Stanley argues that the Trustee may not recover attorney's fees because the Repurchase Price definition does not "expressly reference[ ]" attorney's fees. Morgan Stanley Br. at 43. But New York law does not require an explicit reference to convey the parties' clear intent.

In *Breed, Abbott & Morgan v. Hulko*, 74 N.Y.2d 686 (1989), for example, this Court held that an indemnification clause that did not expressly mention "attorney's fees" was nonetheless sufficient to shift such fees. *Id.* at 687. "[I]f this agreement did not include plaintiff law firm's 'legal expenses,'" the Court

---

[17] *See, e.g.*, *LaSalle Bank N.A. v. Capco Am. Securitization Corp.*, No. 02 Civ. 9916, 2005 WL 3046292, at *6 (S.D.N.Y. Nov. 14, 2005) (agreement permitting "recovery of 'any expenses arising out of the enforcement of the repurchase obligation'" satisfied *Hooper*); *Mun. Capital Appreciation Partners I, L.P. v. Page*, No. 00 Civ. 8138, 2002 WL 483510, at *9 (S.D.N.Y. Mar. 19, 2002) ("The term 'all collection and enforcement costs' . . . includes attorneys' fees.").

explained, "it is difficult, if not impossible, to ascertain for what it was that the parties had agreed to indemnify the [plaintiff]." *Id.* This Court specifically reaffirmed that ruling in *Hooper*. 74 N.Y.2d at 493. And *Hooper* itself requires only that a contract "clearly *impl[y]*" an intent to shift attorney's fees – a formulation that by its terms requires only an *implication*, not an explicit statement. *Id.* at 491-92 (emphasis added).

Other courts regularly find contract provisions sufficient to permit recovery of attorney's fees, even absent an express mention of such fees. In *Matter of New York City Asbestos Litigation*, 142 A.D.3d 408 (1st Dep't 2016), for example, the court found that a clause providing for "indemnification . . . for 'all losses, damages, claims, liens and encumbrances . . . arising out of or in any way connected with the work'" was sufficient, even without an express reference to attorney's fees. *Id.* at 410 (citing *Breed*). Similar examples abound.[18]

---

[18] *See Di Perna v. Am. Broad. Cos.*, 200 A.D.2d 267, 270 n.3 (1st Dep't 1994) (attorney's fees authorized even though contract "d[id] not provide specifically for the indemnification of counsel fees"); *De Vera v. 243 Suydam, LLC*, No. 3532/2016, 2018 WL 3998190, at *7 (Sup. Ct. N.Y. Cnty. Apr. 24, 2018) (agreement "to indemnify and hold harmless" authorized attorney's fees); *Pfizer, Inc. v. Stryker Corp.*, 348 F. Supp. 2d 131, 146 (S.D.N.Y. 2004) ("Since the Agreement provides indemnity for a party's costs, this may be read as an intent to cover attorney's fees."); *United States ex rel. Casa Redimix Concrete Corp. v. Luvin Constr. Corp.*, No. 00 Civ. 7552, 2001 WL 506227, at *4 (S.D.N.Y. May 14, 2001) (contract authorizing "collection expenses" entitled plaintiff to seek attorney's fees because "litigation is a frequent and foreseeable means of collection"); *RTC Mortg. Trust 1995-S/N1 v. J.I. Sopher & Co.*, No. 96 Civ. 4992,

Morgan Stanley urges that, before filing suit, the Trustee must comply with the PSA's "extrajudicial Repurchase Protocol." Morgan Stanley Br. at 47. That requirement does not support Morgan Stanley's interpretation. The Repurchase Price definition refers to the Trustee's "*enforcement* of the repurchase obligation" – not merely the submission of repurchase demands. A165 (emphasis added). The parties would not rationally have phrased the provision in terms of "enforcement" if they meant to cover only the limited costs of making repurchase demands while excluding the millions of dollars in legal fees and other litigation expenses the Trustee would incur actually *enforcing* Morgan Stanley's obligations.

This Court's decision in *Ambac* does not support a contrary conclusion. The contract there entitled the certificate insurer to recover "charges, fees, costs and expenses . . . including reasonable attorneys' . . . fees and expenses, in connection with . . . the enforcement, defense or preservation of any rights in respect of any of the Operative Documents." 31 N.Y.3d at 577, 584. This Court held that that provision did not clearly authorize recovery of attorney's fees *in suits between the contracting parties* because the fee provision was "susceptible to third-party claims." *Id.* at 584. That case thus addresses a different issue: whether a provision that explicitly refers to attorney's fees authorizes fee-shifting in disputes between

---

1998 WL 132815, at *6 (S.D.N.Y. Mar. 24, 1998) ("Although . . . [the provision] does not use the words 'attorneys' fees,' it is 'unmistakably clear' from the language that the intent is to include attorneys' fees.").

the contracting parties or instead merely provides for indemnification of fees incurred defending against third-party claims.

No such issue arises here. The obligation to repurchase breaching mortgage loans falls squarely on Morgan Stanley. A437-38 § 4(a) (providing that "*the Sponsor* shall . . . repurchase such [breaching] Mortgage Loan at the Repurchase Price" (emphasis added)); A178 § 2.03(g) (similar). Thus, "costs and expenses . . . relating to . . . the Trustee's enforcement" of that obligation necessarily involve suits against Morgan Stanley. A165.

The only reasonable interpretation of the Repurchase Price definition is that it provides for recovery of attorney's fees and other litigation expenses incurred in repurchase litigation against Morgan Stanley. The provision thus satisfies *Hooper*.

B. Other Provisions of the Pooling and Servicing Agreement Do Not Support a Contrary Interpretation

Morgan Stanley points to other provisions of the PSA that refer to "attorney's fees," "counsel fees," or "legal fees," claiming that "when the parties intended to refer to attorney's fees or legal fees, they did so explicitly." Morgan Stanley Br. at 41, 44. Those other provisions do not support its interpretation.

Morgan Stanley invokes the doctrine of *expressio unius est exclusio alterius*. Morgan Stanley Br. at 44. But courts do not mechanistically apply that canon in the face of other clear indications of the parties' intent. *See, e.g.*, *Bath & Hammondsport R. Co. v. N.Y. State Dep't of Envtl. Conservation*, 73 N.Y.2d 434,

437-38, 441 (1989) (canon could not defeat provision's "plain language"); *Sword Line v. United States*, 230 F.2d 75, 75 (2d Cir. 1956) ("[T]he old Latin maxim *expressio unius* cannot be stressed to defeat the very obvious intent of the parties."). Moreover, while the disparate inclusion or exclusion of terms in different provisions may indicate intentional differences in meaning, that canon is not helpful where there are multiple reasonable explanations for the differences in phrasing. *See, e.g.*, *Elonis v. United States*, 135 S. Ct. 2001, 2008 (2015) (party "t[ook] this *expressio unius est exclusio alterius* canon too far" where there was another reasonable explanation for the difference in phrasing); *United States v. Ng Lap Seng*, 934 F.3d 110, 124 (2d Cir. 2019) (declining to rely on canon where "statutory context" explained difference in phrasing).

That is the situation here. For one thing, the parties may have thought it necessary to mention "attorney's fees," "counsel fees," or "legal fees" in other provisions precisely because the scope of those provisions would otherwise be ambiguous. For example, Section 8.05 of the PSA provides that the Trustee "shall be indemnified by the Trust Fund against any loss, liability, or expense (including reasonable attorney's fees) resulting from any error in any tax or information return prepared by the Master Servicer." A241 § 8.05. Without specifying that the Trustee could recover attorney's fees, that provision could reasonably be read to include only whatever additional tax liability the Trustee incurred. *See id.*

That is not the case with the Repurchase Price definition. There is no ambiguity about what "costs and expenses" are associated with "the Trustee's enforcement of the repurchase obligation." A165. Because that provision unambiguously encompasses legal fees incurred in repurchase litigation, there was no reason to add a superfluous reference to attorney's fees.

For another thing, the parties may well have phrased the Repurchase Price definition in terms of "costs and expenses . . . relating to . . . the Trustee's enforcement of the repurchase obligation" to *narrow* its scope compared to other provisions. A165. Had the definition permitted the Trustee to recover its "attorney's fees" generally, the provision would be much broader, permitting the Trustee to recovery attorney's fees whether or not incurred in "enforc[ing]" the repurchase obligation.

Because there are several explanations for why the contract uses different terms in different places, Morgan Stanley's canon adds nothing to the analysis. Indeed, the very fact that other provisions use *three different terms* – "attorney's fees," "counsel fees," or "legal fees" – undermines any inference that the contract uses consistent terminology throughout.

The plain language of the Repurchase Price definition covers attorney's fees because those fees are the paradigmatic example of "costs and expenses . . . relating to . . . the Trustee's *enforcement* of the repurchase obligation," and

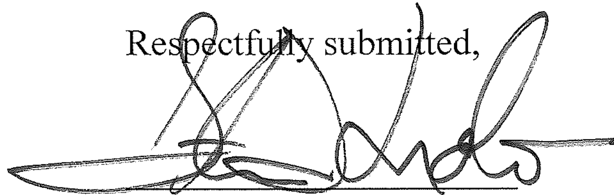
construing the definition to exclude those fees would essentially drain it of all practical effect. A165 (emphasis added). Nothing in Morgan Stanley's canon of construction justifies disregarding that plain and unambiguous meaning.

CONCLUSION

For the foregoing reasons, the Appellate Division's decision should be affirmed.

October 15, 2019
New York, New York

Respectfully submitted,



Steven F. Molo
Robert K. Kry
Lauren M. Weinstein
Lauren F. Dayton
MoloLamken LLP
430 Park Avenue
New York, New York 10022
Telephone: (212) 607-8160
Facsimile: (212) 607-8161
smolo@mololamken.com

Attorneys for Plaintiff-Respondent

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

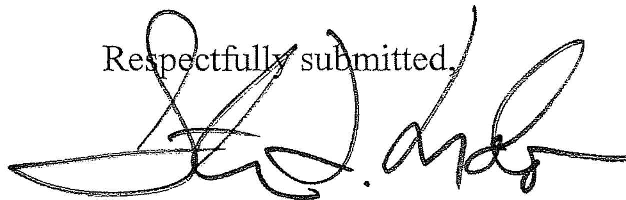
Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of the statement of the status of related litigation, the corporate disclosure statement, the table of contents, the table of authorities, and the statement of questions presented required by subsection (a) of this section, and any addendum containing material required by § 500.1(h) is 13,234.

October 15, 2019
New York, New York

Respectfully submitted,



Steven F. Molo
Robert K. Kry
Lauren M. Weinstein
Lauren F. Dayton
MOLOLAMKEN LLP
430 Park Avenue
New York, New York 10022

Attorneys for Plaintiff-Respondent