20-1708-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

U.S. BANK NATIONAL ASSOCIATION,

Petitioner,

APPALOOSA INVESTMENT L.P.I. and PALOMINO MASTER LTD., APPALOOSA,

Respondent-Appellant,

v.

FEDERAL HOME LOAN MORTGAGE CORPORATION, "FREDDIE MAC", FEDERAL NATIONAL MORTGAGE ASSOCIATION, "FANNIE MAE", CWCAPITAL ASSET MANAGEMENT LLC, CWCAPITAL,

Respondents-Appellees,

PSW NYC PLLC,

Respondent.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR RESPONDENT-APPELLANT APPALOOSA INVESTMENT L.P. I AND PALOMINO MASTER LTD.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel states that (i) Respondent-Appellant Appaloosa Investment L.P. I has no parent corporation and no publicly held corporation owns 10% or more of its stock; and (ii) 100% of the stock of Respondent-Appellant Palomino Master Ltd. is held by Palomino Fund Ltd., a British Virgin Islands corporation.

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JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. On May 29, 2020, Appaloosa Investment L.P. I and Palomino Master Ltd. (collectively, "Appaloosa"), filed a timely Notice of Appeal from the Final Judgment entered by the United States District Court for the Southern District of New York (the "District Court") on April 30, 2020, which disposed of all parties' claims. The District Court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 and 12 U.S.C. § 1452(f) because the Federal Home Loan Mortgage Corporation ("Freddie Mac") is a party.

INTRODUCTION

This appeal seeks reversal of the District Court's compound errors of contract and procedural law. Appaloosa is an investor who purchased certificates in a trust that contained a pool of commercial mortgages. Among other things, the certificates entitled investors to be paid principal and interest collected on the underlying loans. Generally speaking, if any mortgage loan in the pool went into default, it would be foreclosed upon and the property would be sold to repay the loan. If the sale price was not sufficient to cover the unpaid principal, the investors would suffer losses.

To mitigate against those losses, the governing agreements provided that if another property held by the trust sold for a *gain*, the gain would be held in reserve and used to offset losses on other loans. In this way, investors received the benefits of diversification in the pool of loans in the trust. This contractual provision was known as the "Gain-on-Sale" clause, and it was plain and unambiguous.

In 2010, the largest loan held by the trust (and related trusts) went into default. It was a $3 billion mortgage loan that had been used to purchase a huge multifamily complex in New York City, known as the Peter Cooper Village & Stuyvesant Town ("Stuy Town"). After a prompt foreclosure in 2010, the property was held for five years until 2015, at which time a recovering real estate market and lower interest rates combined to produce a staggering $800 million gain on the sale. Despite the plain language of the agreement requiring that this gain be deposited in a reserve

account to offset losses, the administrative agent servicing the loan – CWCapital Asset Management LLC ("CWC" or the "Special Servicer") – took virtually all of the gains for itself, totaling more than $600 million. This seemingly absurd result – that a fee-paid administrator could get *a fee of over $600 million* and that investors would not benefit from the increase in value of property held for their benefit – was justified by CWC on the ground that unpaid "default interest" accrued on the multibillion unpaid principal of the loan for almost six years and that this vast sum was a "liquidation expense" incurred in connection with selling the property. As a result, an administrator that had no investment risk in the underlying loans or real estate received more than $600 million instead of those funds being paid to the investors who shouldered the entire investment risk from the moment when the trusts took ownership of the property.

The District Court misinterpreted the relevant documents in finding that the Special Servicer was permitted to retain this unprecedented gain. The first and most significant error committed by the District Court was a finding that the applicable trust agreement was ambiguous in the first place. It was not. The language of the Gain-on-Sale clause unambiguously required creation of a reserve account when the sale of property generated a gain, and required the servicers to deposit the "Gain-on-Sale Proceeds" into that reserve account. Gain-on-Sale Proceeds were defined as the sale proceeds minus the unpaid principal on the loan (and other specifically

defined amounts) and minus the expenses of liquidation. Liquidation expenses are expenses incurred in liquidating a property, such as brokerage fees and real estate transfer fees. In conformity with the plain language of the contract, the District Court should have calculated the gain on sale in accordance with the contractual definition and ordered that amount remitted to the reserve account to cover losses on other loans in the pool. However, the District Court was somehow persuaded that the plain meaning of "liquidation expenses" could be contorted to include allegedly accrued and unpaid default interest.

Rather than follow the plain meaning of the contract language, the District Court thus looked to the parties for extrinsic evidence. However, despite extensive discovery, no probative extrinsic evidence could be found. There was no correspondence or other written evidence that shed light on the drafting of the Gain-on-Sale provision. No one actually involved in drafting the language could be found. The lone relevant fact that emerged was that there was a "shelf" document that was used in every one of twenty-nine consecutive trusts created by Wachovia and that the Gain-on-Sale provisions were added in the fourth iteration. Appaloosa argued below that the only reasonable inference to be drawn from the insertion of the provision was the obvious one – that the Gain-on-Sale clause was added to give investors greater protection against the loss of principal by allowing gains in the portfolio to offset losses. CWC advanced the dubious position that the detailed

provision was added in order *to effect no change at all in the document*. The District Court agreed and drew that inference against the non-moving party in violation of the clear mandates of summary judgment.

CWC then convinced the District Court to move even further afield, arguing that the plain language could be ignored because administrators routinely pay themselves default interest before remitting gains to investors to offset losses. In support of this argument, CWC hired an "expert" – a lawyer for special servicers – who pored through the loss reports and announced that in nearly all cases the special servicers paid themselves default interest rather than remit gains to the trust. The District Court seized upon this study as evidence of "custom and practice" in the trade and the parties' "course of performance" that contradicted the clear language of the contract.

However, there were serious flaws in relying on that study as extrinsic evidence of custom and practice and course of performance. The loss reports were not public and investors were unaware of how proceeds were in fact being allocated. An analogy might be a claim by bank customers who discover they were charged undisclosed fees not permitted by the depositor contract. It would be no defense to such a claim to conduct a survey showing that banks routinely charge such fees. The banks' undisclosed collection of those fees does not constitute a contractual "custom and practice" evidencing the parties' intent when the account was opened.

Moreover, gains on the sale of trust-owned property are rare and usually so small that they do not gain the attention of investors. Further, even if such information were discovered – which it was not – and even if the amounts were significant – which they were not – disgruntled investors were unable to challenge such decisions unless they could rally a substantial percentage of other investors to join them. CWC's expert study also did not take into account whether the transactions he studied *involved contracts with a Gain-on-Sale provision*. Remarkably, the District Court relied on this flawed study rather than the language of the contract.

To convince the District Court to follow the plain language of the contract, Appaloosa submitted expert reports explaining the reasonable expectations of contracting parties in a securitized mortgage pool, like the one here. When the trust takes title to property, it is the investors who bear the risk of the property being liquidated for less than the outstanding amounts owed on the loan. Accordingly, investors are also the ones who should benefit from any appreciation in the value of the property. The Gain-on-Sale clause gives effect to those expectations by requiring a gain on sale to be reserved to offset losses. Gains on the sale of trust-owned properties are not expected to compensate loan administrators, like CWC. Instead, trust administrators are paid a fee for services rendered. And in the case of Stuy Town, that fee was expressly capped by a "Co-Lender Agreement" between the five trusts that held the Stuy Town loan. The court below improperly rejected

evidence of the reasonable expectations of the contracting parties, concluding that it was simply one person's belief about how loans "should" be repaid. This violated the fundamental principle that a contract be construed in light of the reasonable expectations of the parties. In drawing every inference in favor of CWC, the District Court likewise violated the procedural rules on summary judgment.

For these and other reasons set forth in greater detail below, these decisions must be reversed.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in denying Appaloosa's motion for judgment on the pleadings by finding that the Gain-on-Sale provision was ambiguous with respect to whether CWC was required to remit the approximately $820 million of Stuy Town sale proceeds for deposit into the trusts' reserve accounts to offset realized losses incurred by investors who put their capital at risk to fund the purchase of Stuy Town?

2. Did the District Court err when it ignored the plain language of the Co-Lender Agreement, which clearly and unambiguously limited CWC's compensation in connection with the special servicing of the Stuy Town loan to $45 million in special servicing fees and a $15 million liquidation fee?

3. Did the District Court err when it granted motions for summary judgment finding that the extrinsic evidence presented by CWC was relevant, admissible and so one-sided that no reasonable person could reject it? Relatedly, was it error for the District Court to repeatedly draw inferences in favor of the party moving for summary judgment?

4. Did the District Court err in denying Appaloosa's motion for partial summary judgment by finding that CWC was not required to reduce the amount of penalty interest it retained by approximately $67 million to pay outstanding interest on advances and additional trust fund expenses?

STATEMENT OF THE CASE

I. The Nature of the Case (Local Rule 28.1)

This dispute is about who is entitled to reap the benefits from the sale of a very large asset by a commercial mortgage-backed securities ("CMBS") trust. Are the investors in the trust entitled to that money to offset losses incurred on their investments? Or does the trust's Special Servicer – who managed the pooled loans without ever putting its own capital at risk – get to take the funds? Misconstruing both the governing contractual language and the so-called extrinsic evidence before it, the District Court (Hon. Katherine Polk Failla, U.S.D.J.) allowed the Special Servicer to keep over $600 million. That decision – embodied in two separate opinions – was wrong as a matter of law and should be reversed.

In this trust instruction proceeding commenced by the Trustee on December 17, 2015 (*see* A74-90),[1] Appaloosa challenges the District Court's March 9, 2018 Opinion and Order denying its motion for judgment on the pleadings (*see* SPA1-34), and the District Court's March 19, 2020 Opinion and Order granting CWC's motion for summary judgment, granting Freddie Mac's and the Federal National Mortgage Association's ("Fannie Mae" and, together with Freddie Mac, the "GSEs") motion

[1] Citations to "A" are to the parties' Joint Appendix, citations to "CA" are to the parties' Joint Confidential Appendix, and citations to "SPA" are to the parties' Joint Special Appendix.

for summary judgment, denying Appaloosa's motion for partial summary judgment, and denying the parties' respective motions to exclude each other's expert witnesses (*see* SPA35-161). For the reasons set forth herein, this Court should reverse the judgment below and remand to the District Court for entry of judgment in Appaloosa's favor or, alternatively, for a trial.

II. CMBS Are Designed to Meet the Expectations of Investors

CMBS provide an opportunity for investors to invest in a diversified pool of loans secured by commercial real estate properties. (*See* A6538.) Lending banks originate pools of loans and "securitize" them to pay investors different portions of the principal and interest generated by the loans assigned to the trust. Investors earn a return when the owners of the commercial properties make mortgage payments. The underlying properties serve as collateral for the loans that can be acquired by the trust and sold in the event that the borrower stops repaying the mortgage. (*See id.*)

The vehicles established to facilitate CMBS investments are securitized trusts, formed pursuant to Pooling and Servicing Agreements ("PSAs"). (*See* A2991.) Investors purchase "Certificates" issued by the trusts, thereby becoming parties to the PSA who are bound by its terms. (*See* A7907.) The Certificates issued to investors (who also are referred to as "Certificateholders") have varying degrees of risk and re-payment priorities. (*See* A6539.) Generally speaking, Certificates at the

top of the structure have the lowest level of risk, are paid back first and incur losses last, while those at the bottom have the highest level of risk, are paid back last and incur losses first. (*See id.*) Under the trust's distribution waterfall, cash flow cascades from the top to the bottom of the stack of Certificate tranches, while losses stack up in reverse order. (*See* A6538-39.)

CMBS loan pools are diversified in a number of respects, including by geography, loan size, loan terms, and type of asset. (A6538.) Diversification reduces risk because market conditions will affect different real estate assets differently. (*Id.*) For example, an office building in Texas may be negatively affected by a softening oil market while at the same time a hotel in New York is booming due to a surge in tourism. (*Id.*) To effectuate the diversification principle, when a trust-owned property is sold at a gain (often described in PSAs as "Gain-on-Sale Proceeds") the proceeds are used to offset losses on other loans in the pool. (*Id.*) The use of gains to offset losses reduces the overall risk of a pool of commercial mortgages. (*Id.*)

In historical lending, a bank would make a loan, retain that loan on its books, and then "service" the loan by collecting payments. However, when loans are pooled and sold to a trust, the loans are no longer owned by the bank but are owned and serviced by the trust. CMBS trusts retain a number of different administrative agents

to service the mortgages and distribute payments to CMBS investors, including the Trustee, Master Servicer, Special Servicer, and Paying Agent. (A6536.)

The Master Servicer collects borrowers' timely loan payments. (*See* A78.) However, when a borrower defaults, responsibility for servicing the loan passes to the Special Servicer. (A6536.) The Special Servicer seeks to maximize the value to the trust that can be extracted from a nonperforming loan. (A6549.) This may mean negotiating with the borrower to modify the terms of the loan (a "workout" or "modification") such that the borrower can resume making monthly payments. (A6536-37.) If a loan modification cannot be achieved, the Special Servicer may foreclose on the property or otherwise arrange for the trust to take ownership of the property (known as "real estate owned" or "REO"). (*Id.*) While a loan is in default, the Master Servicer "advances" payments of principal and interest to the trust as if the loan were still performing. The Special Servicer then liquidates the property to pay off the loan and pay back advances, and does not have to pay any advances or otherwise put any of its capital at risk. (A6539-40.)

In order to discourage borrowers from defaulting on their payment obligations, commercial loan agreements typically charge "default interest" – additional interest over and above the regular interest charged on the loan – during an ongoing event of default. When a borrower in default successfully negotiates a loan modification, the Special Servicer may collect a portion of the accrued default

interest as part of the modification. More often, however, when a loan goes into default the borrower loses the property and default interest is never paid.

The Special Servicer is paid a guaranteed fee for its administrative services and does not put its investment capital at risk. (A6539.) It receives a monthly "Special Servicing Fee" while the loan is in special servicing, a "Workout Fee" if the loan is successfully modified, or a "Liquidation Fee" if the loan is liquidated. (*See* A6539-40.) The Special Servicing Fee typically is a small percentage of the outstanding principal balance of the specially serviced loan. (*See, e.g.*, A2995.) The Workout Fee and Liquidation Fee typically are a small percentage of the amounts that the Special Servicer recovers for the trust through a modification or liquidation of the nonperforming loan. (*See, e.g.*, A2996.) As an incentive to achieve successful loan workouts, some PSAs may permit the Special Servicer to retain default interest that it ***actually collects from the borrower*** as additional servicing compensation. (*See, e.g.*, A2997.)

There are a relatively small number of Special Servicers in the United States, and they service trusts with a near-total lack of transparency to CMBS investors. (*See* A6475-80.) As a matter of practice, they provide investors with virtually no particularized information about their servicing of nonperforming loans. (*Id.*) Instead of such granular information, Certificateholders receive only monthly "remittance reports" created by the Paying Agents, which contain high-level

information about the status of specially serviced mortgage loans, but lack any detailed information about how the Special Servicer is allocating proceeds from property sales. (*Id.*)

III. The Stuy Town Senior Loan

Stuy Town is one of the largest pieces of commercial real estate in the United States. (*See* A6511.) In November 2006, Stuy Town was purchased for $5.4 billion. (*Id.*) To finance the purchase, the purchasers obtained a senior mortgage loan in the amount of $3 billion (the "Senior Loan"), and eleven mezzanine loans totaling $1.4 billion. (A2994.) The $3 billion loan was so large that it could not be securitized in a single CMBS trust and thus was broken into six separate notes assigned to five different trusts: (1) Wachovia Bank Commercial Mortgage Trust Series 2007-C30 (the "C30 Trust"); (2) COBALT CMBS Commercial Mortgage Trust 2007-C2; (3) Wachovia Bank Commercial Mortgage Trust Series 2007-C31; (4) ML-CFC Commercial Mortgage Trust 2007-5; and (5) ML-CFC Commercial Mortgage Trust 2007-6 (collectively, the "Trusts"). (*Id.*) To diversify, the Trusts held other commercial mortgages secured by varying types of commercial property in different locations. (*See* A6524.)

Each of the Trusts had its own governing PSA. Accordingly, to ensure consistent administration of the Senior Loan, they each entered into an intercreditor agreement – the "Co-Lender Agreement" – that superseded the individual trust's

PSA. (*See* A631-48.) Under the Co-Lender Agreement, the C30 Trust was designated as the "Lead Lender" for the Senior Loan, meaning that its agents would administer the loan. (A631.) The Co-Lender Agreement also unambiguously defined and limited the compensation that the Special Servicer could earn if the Senior Loan ever went into default.

To the extent it was not trumped by the Co-Lender Agreement, the C30 Trust was governed by its PSA (the "C30 PSA"), which was signed by Wachovia Commercial Mortgage Securities, Inc. as Depositor, Wachovia Bank, National Association as Master Servicer, CWC as Special Servicer, and Wells Fargo Bank, N.A., as Trustee. (*See* A321-629.)[2] Investors who purchased Certificates (and funded the C30 Trust) became parties to the C30 PSA and agreed to be bound by that contract's terms and obligations. (*See* A7907.) One such investor was Appaloosa, which purchased significant amounts of Certificates in each of the Trusts. (*See* A1615-18, A1672-75.)

IV. The Foreclosure of Stuy Town

In 2010, following notice of default and the borrowers' failure to cure, CWC accelerated the Senior Loan and obtained a foreclosure judgment. (A80.) However, the foreclosure sale never actually took place. (A80-81.) Over the next four years,

[2] U.S. Bank, National Association subsequently became Trustee of the C30 Trust, and Wells Fargo became the Master Servicer and Paying Agent. (*See* CA2727-28.)

real estate values improved, particularly for multifamily properties in New York, as interest rates came down and the economy recovered. (A6513-15.) In 2014, the borrowers gave a deed in lieu of foreclosure and Stuy Town became an REO property owned by the Trusts. (A81.)

V. Stuy Town Is Sold for an Enormous Gain

Benefiting from the rise in property values over the previous five years, in late 2015, CWC sold Stuy Town for over $5 billion. (*See* A6513-15.) The sale price was far in excess of the unpaid principal balance of the Senior Loan. (*See* A6512.) Once news of the sale was released, Appaloosa and others sought information from CWC about the allocation of proceeds, and particularly the gain on the sale. (*See* A9073, A2321-23.) CWC rejected these requests, allocated the sale proceeds – largely to itself – without investor knowledge or consent, and directed Wells Fargo how to distribute the funds.

Discovery revealed that the sale of Stuy Town generated $5,418,974,440.92 in proceeds. (A5321.) After payment of broker's fees and costs relating to litigation with the mezzanine lenders, $4,869,183,977.85 in net proceeds were left. (*Id.*) From those proceeds, the Master Servicer was reimbursed for over $700 million in advances it had made. (*Id.*) CWC was entitled to take $15 million from the proceeds as its Liquidation Fee. (*Id.*) Combined with the more-than $45 million it earned in Special Servicing Fees for servicing the Senior Loan between 2010 and 2015, CWC

legitimately received ***more than $60 million in compensation*** relating to Stuy Town. (*See id.*)

After the deduction of expenses, legitimate fees, the reimbursement of advances, and the payment of outstanding principal and interest owed, the REO disposition of Stuy Town resulted in a gain to the Trusts of $820,244,966.77. (A5321-22.) Under the plain terms of the C30 PSA, CWC should have remitted that amount to the Paying Agent for deposit into the Trusts' respective Gain-on-Sale Reserve Accounts to offset losses suffered by investors on other loans held by the Trusts. Instead, CWC improperly diverted ***$614,424,027.57 of the sale proceeds to itself***, purportedly as "Penalty Interest" that had supposedly accrued on the Senior Loan since 2010. (A5321.) CWC allocated a further $156,797,854.44 of the $820,244,966.77 gain as "Yield Maintenance Charges" (much of which the GSEs claim belong to them). (A5321-23.)[3] Those payments were contrary to the express, unambiguous language of the Gain-on-Sale provisions, and left only $49,023,084.76 of the $820,244,966.77 gain that CWC actually remitted to the Paying Agent for deposit into the Gain-on-Sale Reserve Accounts. (A5321.)

[3] Yield maintenance is paid by the borrower to compensate the lender for lost interest payments when a loan is paid off early by the borrower.

VI. The Trustee Seeks Judicial Instructions Concerning the Allocation of the Sale Proceeds

At Appaloosa's urging, on December 17, 2015, the Trustee filed a Petition for Instructions in Minnesota state court, seeking instructions concerning the proper interpretation of the C30 PSA with respect to the allocation of the Stuy Town sale proceeds. (*See* A74-90.) Soon after CWC's motion to dismiss the Petition was denied (*see* A67), Freddie Mac – which, along with Fannie Mae, had filed an objection to the Petition claiming entitlement to amounts allocated by CWC as Yield Maintenance Charges (*see* A724-33, A735-44) – removed the case to the U.S. District Court for the District of Minnesota, which subsequently transferred it to the District Court (*see* A65-72).

VII. The Parties File Cross-Motions for Judgment on the Pleadings

The parties cross-moved for judgment on the pleadings. (*See* A237-38, A748-49, A793-94.) Appaloosa argued that the governing contracts unambiguously required CWC to return the $615 million it had diverted to itself as default interest and the $157 million it had allocated as Yield Maintenance Charges to the Trusts for deposit into the Gain-on-Sale Reserve Accounts. (*See* A243-45.) Specifically, CWC was required to calculate any "Gain-on-Sale Proceeds" from the sale of the property, segregate those funds, and forward them to the Paying Agent for deposit into the Gain-on-Sale Reserve Accounts. (*See* A255-57.) "Gain-on-Sale Proceeds" are defined in the C30 PSA as "the excess of (i) Liquidation Proceeds of the

Mortgage Loan or related REO Property net of any related Liquidation Expenses, over (ii) the Purchase Price for such Mortgage Loan on the date on which such Liquidation Proceeds were received." (A371.) Because accrued and unpaid default interest and yield maintenance are not out-of-pocket expenses incurred in connection with the sale of the property, they did not qualify as Liquidation Expenses, were not included within the Purchase Price, and could not be deducted from the Liquidation Proceeds to be deposited into the Gain-on-Sale Reserve Accounts. (*See* A260-61.)

In March 2018, the District Court denied the parties' respective motions for judgment on the pleadings, holding that the C30 PSA was ambiguous. (*See* SPA1-34.) The parties proceeded to discovery.

VIII. The Parties Conduct Discovery but Virtually No Relevant Extrinsic Evidence Comes to Light

A. Fact Discovery

Fact discovery shed virtually no light on the drafting history of the various provisions of the C30 PSA. Not a single witness testified that he or she had personal knowledge of why the Gain-on-Sale provisions were included in the C30 PSA. The only fact that emerged on the drafting history was that the Gain-on-Sale provisions were added to the fourth iteration (the "C4" shelf) of Wachovia Bank's series of CMBS trusts. (CA2769.)

For example, CWC's President, David Iannarone, testified that he could not recall any negotiations concerning why the Gain-on-Sale provisions were added to

the PSAs, and when asked for his understanding of the Gain-on-Sale provisions, he testified that it was not something that he had looked at. (*See* A1878.) Wells Fargo's employees denied any responsibility for interpreting the C30 PSA and said they deferred to CWC in allocating sale proceeds. (*See e.g.*, A2127-28, A2137, A2155-56, A2218, A2227, A2240, A2243-44, A2256, A2261.)

Appaloosa's corporate representative, on the other hand, testified that, upon reading the Prospectus Supplement for the C30 Trust, Appaloosa understood that CWC's compensation was limited to the Special Servicing Fee, the Liquidation Fee, and the Workout Fee. (*See* A1777-78.) Further, when investors requested information concerning the allocation of proceeds from the sale of REO properties, those requests were either denied or ignored. (*See e.g.*, A9068-73; A2321-23.)

B. Expert Discovery

Appaloosa presented two affirmative experts, Ann Hambly, CRE and Michael Hartzmark, Ph.D., and one additional rebuttal expert, Andrew Berman. (*See* A2982-3009, A6471-99, A6501-6606, A6608-33, CA2809-45.) CWC presented two affirmative experts, Ronald Greenspan and Thomas Nealon (*see* CA178-216, CA218-305, CA307-26, CA328-71), both of whom are lawyers who have worked for or with special servicers for many years (*see* CA181, CA221). The GSEs presented one expert, Brian Olasov (*see* A7171-7223), but later disclaimed any reliance on his opinions.

Ann Hambly has over 35 years of experience in commercial real estate servicing. (A2987-88.) Hambly conducted an empirical analysis of publicly available information concerning the liquidation of REO properties and concluded that there is no industry custom and practice concerning how Penalty Interest is treated in the calculation of Gain-on-Sale Proceeds. (*See* A3000-01, A3005-06.) Hambly further opined, based on experience and her review of nearly one hundred PSAs drafted by the law firm that prepared the C30 PSA, that the industry standard definition of the term Liquidation Expenses as used in CMBS PSAs does not include Penalty Interest or Yield Maintenance Charges. (*See* A3004.) Finally, Hambly (along with Berman, who has more than 30 years of commercial real estate experience and extensive experience with CMBS) opined that the carefully constructed Gain-on-Sale Proceeds provisions in the C30 PSA were intended to enable Certificateholders to obtain the advantages of a diverse asset pool by offsetting losses with gains, and not as a mere "catchall" to capture funds left over after everything else was paid following an REO sale. (*See* A6486-87.)

Dr. Hartzmark is an economist with a Ph.D. from the University of Chicago who explained the reasonable expectations of the parties to financial instruments. He distinguished between those who take credit risk and expect to have returns based on the value of trust property, and those who are administrative service providers who work for a fixed fee, are not at risk for recovery of principal, and have no

financial interest in the value of real estate owned by the trust. (*See* A6531-54.) Dr. Hartzmark explained that the reasonable expectations of investors in a pool of commercial mortgage loans is not to award administrators, such as Special Servicers, gains on the sale of trust property as additional compensation, but rather for such gains to be held for the benefit of the investors who fund the enterprise and put their money at risk. (*Id.*) Dr. Hartzmark also studied multifamily properties in New York City and determined that Stuy Town's increase in value between 2010 and 2015 was attributable to general market price appreciation. (*See* A6512-16.)

IX. The Court Ignores the Plain Language of the Contracts and Grants CWC's and the GSEs' Motions for Summary Judgment

On March 19, 2020, the District Court granted CWC's and the GSEs' motions for summary judgment, denied Appaloosa's motion for partial summary judgment, denied Appaloosa's motion to exclude CWC's and the GSEs' experts, and denied as moot CWC's and the GSEs' motions to exclude Appaloosa's experts. (*See generally* SPA35-161.) The District Court ignored the plain language of the governing contracts and held that the extrinsic evidence submitted by the parties supported CWC's and the GSEs' interpretation of the C30 PSA. (*See* SPA79-138.) As discussed below, the District Court resolved factual disputes and repeatedly drew contested inferences in favor of the moving parties.

On April 30, 2020, the Clerk of the District Court entered the Final Judgment. (*See* SPA169-73.) Appaloosa timely filed this appeal on May 29, 2020. (A10000-01.)

SUMMARY OF THE ARGUMENT

The District Court erred in denying Appaloosa's motion for judgement on the pleadings, in granting CWC's and the GSEs' motions for summary judgment, and in denying Appaloosa's motion for partial summary judgment.

First, the District Court erred as a matter of law in refusing to enforce the plain language of the C30 PSA. The C30 PSA unambiguously provided that, upon the sale of an REO property, the Special Servicer had to calculate Gain-on-Sale Proceeds and remit those funds to the Paying Agent for deposit into the Gain-on-Sale Reserve Account to offset losses on other loans in the trust. Upon the sale of Stuy Town, the Special Servicer was required to remit the approximately $820 million in Gain-on-Sale Proceeds into the Gain-on-Sale Reserve Accounts for the benefit of CMBS investors. It should not have diverted $615 million to itself as Penalty Interest and $157 million to the GSEs as Yield Maintenance Charges.

Second, the District Court erroneously disregarded the plain language of the Co-Lender Agreement. Because of the enormous size of the Stuy Town Senior Loan, the Co-Lender Agreement capped the amount of compensation payable to CWC in connection with its special servicing of Stuy Town. Among other things,

the Co-Lender Agreement expressly enumerated the Special Servicer's compensation for Stuy Town to three categories of fees, none of which included Penalty Interest. Thus, even if the Gain-on-Sale provisions did not exist, in the case of Stuy Town, CWC was not permitted to pay itself $615 million in Penalty Interest.

Third, the District Court erred in granting CWC's and the GSEs' motions for summary judgment because it improperly resolved factual disputes, weighed the evidence on summary judgment, failed to draw all inferences in Appaloosa's favor, and drew critical inferences in favor of CWC and the GSEs. For example, to explain why the Gain-on-Sale provisions were added to the contract, there were two inferences that could be drawn: (1) that the language was intended to change the contract to give CMBS investors the benefits of a diversified loan pool – offsetting losses from the sale of real estate with gains from the sale of other property in the trust – as Appaloosa's experts opined; or (2) that the language was not intended to change the contract but simply to clarify that any money left over after everything else was paid (including Penalty Interest and Yield Maintenance Charges), would be deposited in the reserve account, as CWC's expert opined. The District Court impermissibly drew the inference against Appaloosa despite there being ample evidence in the record supporting the interpretation offered by Appaloosa to survive summary judgment. Indeed, the District Court improperly drew ***all*** inferences in CWC's and the GSEs' favor.

Fourth, the District Court erred in granting CWC's and the GSEs' motions for summary judgment because it improperly relied on evidence that was not probative of the contractual intent of the parties and did not qualify as extrinsic evidence admissible for purposes of contract interpretation. This so-called course of performance and industry custom and practice "evidence" consisted of a survey by a paid expert of distributions from other REO sales that generated a gain, but where amounts were allocated without consideration of the language of the underlying contracts, where the amounts in question were de minimis, and where the distributions were not publicly known. Moreover, the District Court gave literally no weight to the reasonable expectations of investors who put their money at risk and reasonably expected to reap the benefits of gains from the sale of property held by the trust.

Finally, the District Court erred in refusing to grant Appaloosa's motion for partial summary judgment. The C30 PSA unambiguously provided that Penalty Interest must be offset against interest on Advances and Additional Trust Fund Expenses. Thus, even if the Court were correct that CWC were entitled to collect Penalty Interest in connection with the sale of Stuy Town – which it was not – the amount of Penalty Interest awarded to CWC should have been reduced by $67 million.

STANDARD OF REVIEW

The standard of review for both motions for judgment on the pleadings and for summary judgment is *de novo*. *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003).

A motion for judgment on the pleadings "is appropriate where material facts are undisputed and where a judgment on the merits is possible merely by considering the contents of the pleadings" or the documents properly considered on such a motion. *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 (2d Cir. 1988). A motion for judgment on the pleadings is particularly appropriate in breach of contract cases involving legal interpretations of the obligations of the parties, so long as the contractual language at issue is unambiguous. *In re Trusteeships Created by Tropic CDO I Ltd.*, 92 F. Supp. 3d 163, 171 (S.D.N.Y. 2015). Summary judgment is also appropriate if the Court deems the contract language to be unambiguous as a matter of law. *Adirondack Transit Lines, Inc. v. United Transp. Union, Local 1582*, 305 F.3d 82, 85 (2d Cir. 2002).

However, if a court determines that a contract is ambiguous, the case typically must proceed to trial for resolution of factual disputes. *See Luitpold Pharm., Inc. v. Ed. Geistlich Sohne A.G. Fur Chemische Industrie*, 784 F.3d 78, 87–88 (2d Cir. 2015). On a motion for summary judgment, a court must "construe[] the evidence in the light most favorable to the non-moving party and draw[] all reasonable

inferences in its favor." *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 113 (2d Cir. 2005). For summary judgment to be granted on an ambiguous contract, "the evidence presented about the parties' intended meaning [must be] so one-sided that no reasonable person could decide the contrary . . . ." *Luitpold*, 784 F.3d at 88. Thus, summary judgment under such circumstances is the rare exception and not the rule.

ARGUMENT

I. The C30 PSA Unambiguously Required the Entirety of the Gain from the Sale of Stuy Town to Be Deposited into the Trusts' Reserve Accounts

The plain, unambiguous language of the C30 PSA entitled Appaloosa to judgment on the pleadings. The C30 PSA is governed by New York law, which has well-established principles governing judicial interpretation of contracts. Because "the best evidence of intent is the contract itself[,] if an agreement is complete, clear and unambiguous on its face, it must be enforced according to the plain meaning of its terms." *Hatalmud v. Spellings*, 505 F.3d 139, 146 (2d Cir. 2007). Whether or not a contract is ambiguous is a question of law for the Court, *Broder v. Cablevision Systems Corp.*, 418 F.3d 187, 197 (2d Cir. 2005), as is the correct construction of an unambiguous contract, *Adirondack Transit Lines*, 305 F.3d at 85. "[A] contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A.*, 626 F.3d 699, 729 n.14 (2d Cir. 2010). But "[l]anguage whose meaning is otherwise plain does not become ambiguous merely because the parties urge different interpretations in the litigation." *JA Apparel Corp. v. Abboud*, 568 F.3d 390, 396 (2d Cir. 2009). The "primary objective" in construing an agreement "is to give effect to the intent of the parties as revealed by the language of their agreement." *In re Motors Liquidation Co.*, 943 F.3d 125, 131 (2d Cir. 2019).

A. CWC Had an Unqualified Obligation to Segregate Gain-on-Sale Proceeds Following the Sale of an REO Property and Remit Them to the Paying Agent for Deposit in the Reserve Accounts

Section 3.04(e) of the C30 PSA required the Paying Agent to establish a Gain-on-Sale Reserve Account for the benefit of the Certificateholders whenever the C30 Trust recognized a gain on sale from a foreclosed property. Specifically:

> The Paying Agent . . . ***shall*** establish (upon notice from Special Servicer of an event occurring that generates Gain-on-Sale Proceeds) and maintain the Gain-on-Sale Reserve Account . . . on behalf of the Trustee for the benefit of the Certificateholders. The Gain-on-Sale Reserve Account ***shall be maintained as a segregated account, separate and apart from*** . . . ***other accounts*** of the Paying Agent. ***Upon the disposition of any REO Property . . . the Special Servicer will calculate the Gain-on-Sale Proceeds, if any, realized in connection with such sale and remit such funds to the Paying Agent for deposit into the Gain-on-Sale Reserve Account.***

(A449 §3.04(e) (emphasis added).)

Thus, when Stuy Town was sold in December 2015, CWC was required to determine whether any Gain-on-Sale Proceeds were realized from the sale and remit them to the Paying Agent to be deposited into the Trusts' Gain-on-Sale Reserve Accounts to offset losses on other loans. In doing so, it had to calculate Gain-on-Sale Proceeds in accordance with the C30 PSA's explicit definition of that term. *See Bank of N.Y. Tr. Co., N.A. v. Franklin Advisers, Inc.*, 726 F.3d 269, 279-80 (2d Cir. 2013) (holding that the issue of which proceeds are included within the calculation of the "Contingent Collateral Management Fee" was "conclusively resolved by the

definition" of that term in the Indenture). CWC's obligation upon the disposition of an REO Property to calculate the Gain-on-Sale Proceeds, segregate them from the other amounts realized from the sale, and forward them to the Paying Agent is express, mandatory, and unconditional. The Paying Agent must use Gain-on-Sale Proceeds to reimburse Certificateholders for Realized Losses previously incurred, in accordance with the waterfall contained in Section 4.01(*l*) of the C30 PSA, or hold them in reserve against future Realized Losses. (*See* A543.)

B. Any Unpaid and Accrued Penalty Interest on an REO Property Was Not Deductible from the Gain-on-Sale Proceeds

"Gain-on-Sale Proceeds" was unambiguously defined in Section 1.01 of C30 PSA as:

> [T]he excess of (i) Liquidation Proceeds of the Mortgage Loan or related REO Property net of any related Liquidation Expenses, over (ii) the Purchase Price for such Mortgage Loan on the date on which such Liquidation Proceeds were received.

(A371.) All cash proceeds received by CWC from the sale of Stuy Town were "Liquidation Proceeds" under the C30 PSA. "Liquidation Proceeds" was defined in Section 1.01 of the C30 PSA, in pertinent part, as:

> ***All cash amounts . . . received*** by the Master Servicer or the Special Servicer ***in connection with***: . . . (ii) the liquidation of a Mortgaged Property or other collateral

> constituting security for a Defaulted Mortgage Loan, through . . . ***REO Disposition*** . . . .[4]

(A377.) While not expressly defined in the C30 PSA, the plain and ordinary meaning of the term "Liquidation Expenses" (as confirmed by Hambly's empirical analysis) is expenses incurred in connection with the liquidation. (*See* A2999, A3004-05.) Examples include the costs of appraisals, attorneys' fees, and brokerage fees incurred in selling the property. (*Id.*) Therefore, the Special Servicer was required to segregate, for deposit into the Trusts' Gain-on-Sale Reserve Accounts, the cash received from the sale of Stuy Town less out-of-pocket expenses incurred in connection with consummating the sale, less the "Purchase Price" of the Senior Loan.

"Purchase Price" was defined in Section 1.01 of the PSA, in pertinent part, as:

> [A] cash price equal to the outstanding principal balance of such Mortgage Loan or REO Loan, as of the date of purchase, together with (a) all accrued and unpaid interest on such Mortgage Loan or REO Loan at the related Mortgage Rate . . . *plus* any accrued interest on P&I Advances made with respect to such Mortgage Loan, (b) all related and unreimbursed Servicing Advances *plus* any accrued and unpaid interest thereon, (c) any reasonable costs and expenses, including, but not limited to, the cost of any enforcement action, incurred by the Master Servicer, the Special Servicer or the Trust Fund in connection with any such purchase . . . and (d) any other Additional Trust Fund Expenses in respect of such Mortgage Loan (including any Additional Trust Fund

[4] An REO Disposition means the sale or other disposition of an REO Property. (A404 (definition of "REO Disposition").)

> Expenses previously reimbursed or paid by the Trust Fund but not so reimbursed by the related Mortgagor or other party or from Insurance Proceeds or condemnation proceeds or any other collections in respect of the Mortgage Loan or the related Mortgaged Property from a source other than the Trust Fund), ***or in the case of any Loan Pair, the purchase price specified in the related Intercreditor Agreement***; *provided* that the Purchase Price shall not be reduced by any outstanding P&I Advance.

(A399 (bold emphasis added).) A "Loan Pair" was defined in Section 1.01 as "[c]ollectively, any Co-Lender Loan and its related Companion Loan(s)" – which included the Stuy Town Senior Loan. (*See* A333-34, A378.)

Because the Senior Loan was a Loan Pair under the C30 PSA, the applicable purchase price was as defined in the Co-Lender Agreement. (*See* A333-34, A353, A378.) In turn, pursuant to Section 3(b) of the Co-Lender Agreement, because there is no evidence that CWC conducted a fair value determination for the Senior Loan at the time it went into default, the C30 PSA's definition of Purchase Price governed the calculation of Gain-on-Sale Proceeds. (A640.) Under that definition, the Purchase Price included the outstanding principal balance, all accrued and unpaid interest at the mortgage rate plus any accrued interest on principal and interest advances, servicing advances plus any accrued and unpaid interest thereon, any reasonable costs and expenses of an enforcement action, and any other "Additional Trust Fund Expenses." (A399.)

None of the components of the Purchase Price included Penalty Interest or Yield Maintenance Charges. Accrued interest (subdivision (a)) was limited to interest that had accrued at the "Mortgage Rate," which was the rate set forth in the mortgage documents. (*See id.*) "P&I Advances" are advances on principal and interest actually made by the servicer to the trust and have nothing to do with default interest. (*See* A549-52 § 4.03.) "Servicing Advances" (subdivision (b)) consist of hard, out-of-pocket expenses actually paid by the Special Servicer in administering an REO Property, which would not include default interest accruing against the borrower. (*See* A409-10.) The costs of an enforcement action to effectuate repurchase of the mortgage loan by its original seller (subdivision (c)) were irrelevant where the Purchase Price is being calculated for purposes of determining Gain-on-Sale Proceeds from the sale of an REO Property. (*See* A399.)

Finally, Additional Trust Fund Expenses (subdivision (d)) encompass a wide variety of actual out-of-pocket expenses paid by the C30 Trust, including the ordinary course Special Servicing Fees paid to the Special Servicer, but do not include Penalty Interest. (*See* A337-38, A412.) Indeed, although the definition of Additional Trust Fund Expenses included various expenses that may be withdrawn from the Certificate Account under Section 3.05(a), it ***excluded*** Section 3.05(a)(xii), (*see* A337-38), which allowed payment of "additional servicing compensation in accordance with Section 3.11(d) . . . ." (A453). Penalty Interest purportedly owed

to CWC as additional servicing compensation under Section 3.11(d) did not constitute an Additional Trust Fund Expense. As a result, Penalty Interest was not included in the Purchase Price for an REO Property, and neither were Yield Maintenance Charges.

Accordingly, upon the sale of Stuy Town, neither the Penalty Interest nor Yield Maintenance Charges should have been deducted from the Liquidation Proceeds for purposes of calculating the Gain-on-Sale Proceeds. CWC was obligated to remit the Gain-on-Sale Proceeds in strict conformity with the C30 PSA. It was not entitled to divert any portion of those proceeds to itself.

C. The District Court Erred in Finding Ambiguity in the Gain-on-Sale Provisions of the C30 PSA

The District Court erroneously determined that despite the plain language of the C30 Gain-on-Sale provisions, they were ambiguous in two respects. First, the District Court found that the C30 PSA was ambiguous as to whether Penalty Interest and Yield Maintenance Charges were a "Liquidation Expense" to sell an REO Property. (*See* SPA22-23.) Second, the District Court found that the C30 PSA was ambiguous as to whether Gain-on-Sale Proceeds were allocated from the sale proceeds prior to any Penalty Interest or Yield Maintenance Charges being retained

by the Special Servicer. (*See* SPA24-25.)[5] The contractual language reveals that no such ambiguities actually exist.

Liquidation Expenses are unambiguous. They plainly refer to the expenses one incurs to liquidate real estate. The ordinary English-language meaning of "expenses" as hard out-of-pocket costs is clear, and in context "liquidation" refers to the sale of the property that is generating the Liquidation Proceeds at issue. (A2999, A3004-05.) Putting these two terms together leads inexorably to the conclusion that "Liquidation Expenses" means expenses incurred in connection with the sale of the property – things like appraisal and attorneys' fees, title insurance, broker fees, etc. (*Id.*) Penalty Interest that has supposedly accrued on the loan before the REO Property was sold is not such an expense. (*Id.*) Neither are Yield Maintenance Charges. (*Id.*) Although the C30 PSA lacked an express definition of Liquidation Expenses, the plain meaning of the term was not ambiguous.

The structure of the C30 PSA supports the same conclusion. Additional Trust Fund Expenses – which are a component of the Purchase Price deducted from Liquidation Proceeds when calculating Gain-on-Sale Proceeds – include Special Servicing Fees paid to the Special Servicer, ***but do not include Penalty Interest***.

[5] The District Court identified a third perceived ambiguity – whether the definition of REO Loan applies to REO sales that result in Gain-on-Sale Proceeds – that is rendered moot by the resolution of the first two ambiguities in Appaloosa's favor. (*See* SPA25-27.)

(*See* A337-38, A398-399, A412, A453 (definition of Additional Trust Fund Expenses ***excludes*** Section 3.05(a)(xii), which allows payment of "additional servicing compensation in accordance with Section 3.11(d)," i.e., Penalty Interest).) It makes no sense for the C30 PSA to exclude Penalty Interest from the Purchase Price in the Gain-on-Sale Proceeds definition, while at the same time importing Penalty Interest into the same calculation *sub silentio* as a Liquidation Expense. Indeed, the fact that the C30 PSA has to treat the regular Special Servicing Fees as an Additional Trust Fund Expense – precisely because they are not an expense incurred in liquidating the property – makes clear that Penalty Interest is not a Liquidation Expense either. A contrary reading of the C30 PSA is simply not reasonable. *See Collins v. Harrison-Bode*, 303 F.3d 429, 433 (2d Cir. 2002).

Moreover, even if one needed extrinsic evidence to confirm the plain meaning of Liquidation Expenses, such evidence pointed clearly in the direction of its plain meaning. Appaloosa's industry expert demonstrated, based on experience and a review of 94 CMBS PSAs drafted during the same period by the same law firm that prepared the C30 PSA, that when Liquidation Expenses was expressly defined, it was in conformity with the plain meaning as the "customary, reasonable, out-of-pocket costs associated with the liquidation of the property," such as brokerage commissions, legal fees and conveyance taxes. (*See* A2999, A3004-05, A6469.18-24.) The out-of-pocket costs incurred in liquidating a property obviously do not

include accrued and unpaid Penalty Interest and Yield Maintenance Charges. (*See id.*)

The District Court nevertheless believed it was "unclear whether the parties intended for these provisions to require Gain-on-Sale Proceeds to be calculated and deposited in the dedicated account *before* the payment of Yield Maintenance Charges or Penalty Interest." (SPA24.) But the C30 PSA is not ambiguous about when Gain-on-Sale Proceeds have to be calculated. Sections 3.04(e) and 3.18(*l*) require that, upon the sale of an REO Property, Gain-on-Sale Proceeds must be calculated and segregated into the Gain-on-Sale Reserve Account ***before*** any Liquidation Proceeds are deposited in the Certificate Account. (*See* A449, A497-98.) The funds deposited into the Gain-on-Sale Reserve Account then flow through their uniquely defined distribution waterfall found in Article IV – Section 4.01(*l*). (*See* A543.) Accordingly, the District Court erred in denying Appaloosa's motion for judgment on the pleadings based on an erroneous legal determination that the plain language of the Gain-on-Sale provisions of the C30 PSA was ambiguous.

Further, the Special Servicer must calculate Gain-on-Sale Proceeds in accordance with the definition of that term. *See Bank of N.Y.*, 726 F.3d at 280. If the Special Servicer pays Penalty Interest or Yield Maintenance Charges out of Liquidation Proceeds and thereby reduces or eliminates the Gain-on-Sale Proceeds that belong to Certificateholders, then the Special Servicer has breached the C30

PSA's unambiguous terms. Any other reading effectively eliminates the Gain-on-Sale Proceeds provisions from the contract. *See Law Debenture Tr. Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 468 (2d Cir. 2010) (holding that a court must avoid interpretation of a contract that renders a provision superfluous). The timing issue identified by the District Court is a red herring.

II. The Co-Lender Agreement Prohibited CWC from Collecting Penalty Interest as Special Servicing Compensation in Connection with the Sale of Stuy Town

Even if the plain language of the Gain-on-Sale provisions did not control the outcome of this dispute – which they do – there is another reason why the District Court could not award CWC $615 million in Penalty Interest: the Co-Lender Agreement did not allow it.

The Co-Lender Agreement set forth the compensation that the Special Servicer "***shall be paid***" with respect to the Stuy Town Senior Loan. (*See* A636 § 2(c) (emphasis added).) Section 2(d) of the Co-Lender Agreement limited CWC's compensation for Stuy Town to just three categories of fee-based compensation: (1) a Special Servicing Fee based on a percentage of the loan amount; (2) if Stuy Town was liquidated, a Liquidation Fee capped at $15 million; and (3) if CWC turned the Senior Loan into a performing loan again, a Workout Fee capped at $15 million. (*See* A637.) The Co-Lender Agreement ***conspicuously did not include Penalty Interest*** as compensation payable to CWC for the special servicing of Stuy Town.

(*See id.*) The Co-Lender Agreement's omission of Penalty Interest indicates a clear intent to limit CWC's compensation in connection with its administration of Stuy Town. *See New York v. United Parcel Serv., Inc.*, 942 F.3d 554, 586 (2d Cir. 2019). This is consistent with the maxim of construction known as *expressio unius est exclusio alterius* – those expressly enumerated are intended to exclude others.

Importantly, Section 3.01(a) of the C30 PSA provided that in the event of a conflict between the C30 PSA and the Co-Lender Agreement, the Co-Lender Agreement governed (*see* A437), which means that the language of the Co-Lender Agreement trumped the language of the C30 PSA. *See GSO Coastline Credit Partners LP v. Glob. A&T Elecs. Ltd.*, 38 N.Y.S.3d 125, 127-28 (App. Div. 2016) (holding that terms of intercreditor agreement controlled over terms of indenture where intercreditor agreement included supremacy clause).[6] Under Section 3.11(d) of the C30 PSA, the Special Servicer could retain Penalty Interest only to the extent the Penalty Interest was actually collected from the borrower before that loan became REO. (*See* A477.)[7] The Co-Lender Agreement modified that default rule

[6] The Co-Lender Agreement is referred to in the C30 PSA specifically as the "Peter Cooper Village & Stuyvesant Town Pari Passu Intercreditor Agreement" or generically as an "Intercreditor Agreement." (*See* A374 (definition of "Intercreditor Agreement").)

[7] Under the C30 PSA, no default interest accrues on an REO Loan. (*See* A404 (REO Loan to be treated "without regard to the default"); *compare* A475-76 § 3.11(c) (explicitly including the terms "Specially Serviced Mortgage Loan" and "REO Loan" as loans with respect to which CWC is paid Special Servicing Fee and

with respect to Stuy Town, limiting CWC's percentage-based compensation in light of the enormous size of the loan. (*See* A637 § 2(d).) Because the Co-Lender Agreement controlled over the C30 PSA, CWC could not rely on Section 3.11(d) of the C30 PSA to retain any Penalty Interest in connection with Stuy Town.

The District Court erroneously determined that there was no conflict between the Co-Lender Agreement and the C30 PSA because the Co-Lender Agreement did not specifically exclude Penalty Interest. (*See* SPA116.) Not only was this drawing an inference against Appaloosa, but it entirely ignored Section 2(c) of the Co-Lender Agreement, which clearly and unambiguously provided that Section 2(d) of the Co-Lender Agreement sets forth the compensation that CWC "shall be paid" for specially servicing Stuy Town. (*See* A636.) The omission of Penalty Interest from the amounts that CWC "shall be paid" means that CWC shall not be paid Penalty Interest in connection with the special servicing of Stuy Town. *See New York*, 942 F.3d at 586.

This conclusion is confirmed by the District Court's observation that Section 2(d) of the Co-Lender Agreement requires the Special Servicing Fee, Liquidation Fee and Workout Fee to be split *pro rata* among the lenders, but says nothing about splitting Penalty Interest. (*See* SPA116.) The logical explanation for this contractual

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Liquidation Fee), *with* A477-78 § 3.11(d) (excluding term "REO Loan" and referring only to "Specially Serviced Mortgage Loan" as a loan with respect to which CWC can collect Penalty Interest).)

silence about how to allocate the payment of Penalty Interest among the lenders is that, with respect to Stuy Town no Penalty Interest was to be paid to the Special Servicer to begin with. Having gone to the trouble of specifying how to divide responsibility for paying the elements of the Special Servicer's Stuy Town-related compensation amongst themselves, one would have expected the Trusts to do the same with Penalty Interest if they intended the Special Servicer to be able to retain Penalty Interest as additional compensation for servicing the Senior Loan. They did not devise such an allocation because the Special Servicer is not entitled to Penalty Interest in connection with Stuy Town.

The District Court's reasoning that the Co-Lender Agreement was similarly silent on Gain-on-Sale Proceeds completely misses the mark. (*See* SPA116.) The Co-Lender Agreement provided that payments collected from Stuy Town were to be deposited and disbursed in accordance with the C30 PSA. (*See* A633 § 1(a), A636-37 § 2(c).) However, with respect to the Special Servicer's compensation, the Co-Lender agreement stated that Section 2(d) of the Co-Lender Agreement governed. (*See* A636 § 2(c).) Because Section 2(d) of the Co-Lender Agreement did not include Penalty Interest (*see* A637), CWC was not entitled to collect Penalty Interest.

The governing agreements evidenced a clear intent to limit CWC's special servicing compensation for Stuy Town to a reasonable, but still very significant,

amount of $60 million. The District Court committed reversible error in ruling that CWC was entitled to ten times that amount in additional compensation.

III. The District Court Improperly Weighed the Evidence on Summary Judgment, Failed to Draw All Inferences in Favor of the Non-Moving Party, and Drew Critical Inferences in Favor of the Moving Parties

Even assuming it correctly ruled that the C30 PSA was ambiguous, the District Court erred in granting summary judgment to CWC and the GSEs. On summary judgment, the District Court was required to view the evidence in the light most favorable to Appaloosa and draw *all reasonable inferences* in Appaloosa's favor. *Salahuddin v. Goord*, 467 F.3d 263, 273 (2d Cir. 2006). The District Court was not permitted to weigh conflicting evidence or make credibility determinations, but rather had to assess if there were genuine issues for trial. *Fischl v. Armitage*, 128 F.3d 50, 55 (2d Cir. 1997). Yet, at numerous crucial points in its analysis, the District Court simply chose to believe CWC's and the GSEs' evidence over Appaloosa's. In doing so, the District Court committed reversible error.

The most egregious example was the District Court's treatment of the dueling expert opinions concerning why the Gain-on-Sale provisions were added to the C4 PSA. (*See* SPA95-97.) There is no direct evidence anywhere in the record concerning the drafters' intent behind the Gain-on-Sale provisions in the C30 PSA. The C30 Trust was part of the "WBCMT" CMBS series, preceded by 28 other CMBS trusts sponsored by Wachovia Bank (there was no C13 trust). The Gain-on-

Sale provisions were first added to the PSA for the fourth WBCMT shelf – the C4 Trust – in 2003. (CA2769.) There were two inferences that could be drawn from that amendment: that it was intended to change the contract or was simply a clarification. Nealon's (CWC's expert) opinion was that the addition of the Gain-on-Sale provisions were not intended to change how Liquidation Proceeds are allocated under the priority of payments scheme in Section 3.02(b) of the C30 PSA (pursuant to which Penalty Interest and Yield Maintenance Charges are recognized at the fourth step), but simply as a catchall to clarify that any money left over from Liquidation Proceeds after everything else (including Penalty Interest and Yield Maintenance Charges) was paid under Section 3.02(b) went to Certificateholders as Gain-on-Sale Proceeds rather than the "residual" holder. (*See* CA193-95.)

Nealon's "opinion" suffers from numerous problems. To begin with, its sole factual basis is an inadmissible hearsay conversation Nealon supposedly had years ago with an unidentified Cadwalader attorney (*see* A2401-02), and accordingly should not even have been considered on summary judgment. *See Nora Beverages, Inc. v. Perrier Grp. of Am., Inc.*, 164 F.3d 736, 746 (2d Cir. 1998) ("On a summary judgment motion, the district court properly considers only evidence that would be admissible at trial."). Nealon had no first-hand knowledge of the circumstances surrounding the drafting of the C30 PSA. (*See* A2381, A2404.) No fact witness below could corroborate his opinion, because none had personal knowledge of how

or why the Gain-on-Sale provisions were added to the C4 PSA. Further, at his deposition, Nealon was unable to identify any provision in pre-C4 PSAs that required amounts left over from Liquidation Proceeds after all other obligations were satisfied to be paid over to the residual holder – meaning he could not show that the problem he claimed was the reason for adding the Gain-on-Sale provisions even existed. (*See* A2403-06.)

Nealon's theory also made no sense, as the obvious way to effectuate such a clarification would have been to add a step at the bottom of Section 3.02(b) of the C30 PSA to the effect that any funds left over after all other amounts were paid would be distributed to Certificateholders as Gain-on-Sale Proceeds. That the drafters (1) added a detailed definition of Gain-on-Sale Proceeds, (2) carefully delineated how they should be calculated, (3) adopted a calculation that clearly encompasses more than simply amounts left over after every step of Section 3.02(b) has been satisfied, and (4) required the Special Servicer to run that calculation and directed that the proceeds be segregated and deposited in a reserve account is fundamentally inconsistent with the notion that Gain-on-Sale Proceeds were intended merely as a catchall for leftover funds.

On the other hand, Appaloosa's experts – consisting of two CMBS experts (who, like Nealon, also testified from their experience) and a Chicago-trained economist – explained that the Gain-on-Sale provisions were intended to change the

legacy contract to give Certificateholders the benefits of a diversified loan pool by using gains to reimburse their realized losses. (*See, e.g.*, A2998, A6544.) No rational investor would expect to be subject to the downside risk of the trust owning property that could be liquidated for a loss only to see unexpected gains from the sale of the trust property paid to a service provider who is not bearing any investment risk. (*See* A6530, A6538.)

On summary judgment, Appaloosa was entitled to the inference that the Gain-on-Sale provisions were intended to amend the PSA and operated as written without the need to expressly modify the legacy Section 3.02(b) and the REO Loan definition. That those contractual provisions refer to Penalty Interest and Yield Maintenance Charges is irrelevant because after the PSA was amended to add the Gain-on-Sale provisions, proceeds from the disposition of an REO property would never reach those lower levels. There was no need to strike out the provisions to achieve some hypothetical standard of "perfect" draftsmanship. Appaloosa was entitled to have the inference on why the provision was added drawn in its favor. *Allianz Ins. Co.*, 416 F.3d at 113.

Furthermore, at the summary judgment stage, the District Court could not simply choose to believe one party's experts over another's. *See, e.g.*, *Scanner Techs. Corp. v. Icos Vision Sys. Corp., N.V.*, 253 F. Supp. 2d 624, 639 (S.D.N.Y. 2003). Yet that is exactly what the District Court did – it chose to accept the

inadmissible hearsay of CWC's expert over the opinions of Appaloosa's experts. Although the District Court "relied on two of the expert opinions offered by Nealon" (SPA154), it found Dr. Hartzmark's economic analysis "too attenuated from the contract interpretation issues at hand to be useful, and far outweighed by contemporaneous and other empirical evidence." (SPA160.) In turn, Hambly's opinion was "discounted" and Berman's "ascribed little significance." (SPA160-61.) Importantly, the District Court did not exclude any of Appaloosa's expert opinions as inadmissible. (*See* SPA161.) It simply chose not to believe them, which is not a permissible basis for granting summary judgment.

Nor is the District Court's treatment of the parties' dueling expert opinions the only example of its failure to adhere to the proper standard for evaluating summary judgment motions. Indeed, the District Court repeatedly drew debatable inferences ***against*** Appaloosa rather than ***in its favor***. (*See e.g.*, SPA107 n.36 (drawing inference that authors of an earlier article by Wells Fargo, which agreed with Appaloosa's interpretation of the C30 PSA, "clarified" their position in a later article despite no evidence one way or the other on that issue), SPA113 n.37 (criticizing Hambly and drawing inference that special servicers' listing of certain items as "liquidation expenses" in loss reports was based on whether those items qualified as "Liquidation Expenses" under the applicable PSAs even though the record on that point was disputed), SPA112 (dismissing documented instances of a

special servicer paying Gain-on-Sale Proceeds in lieu of Penalty Interest as an "aberration" rather than a disagreement as to the appropriate custom and usage even though there was no direct evidence on the point and competing inferences could be drawn from the evidence).) None of this was appropriate on summary judgment.

IV. The Extrinsic "Evidence" Relied on by the District Court Was Not Probative of the Contracting Parties' Intent

Discovery in this case did not identify anyone with personal knowledge of the intent of the contracting parties. Discovery likewise did not reveal any evidence of an actual course of performance between the parties or a commonly accepted industry custom and practice regarding the intended impact of a Gain-on-Sale provision in a PSA. In granting CWC's and the GSEs' motions for summary judgment, the District Court relied almost entirely on Ronald Greenspan, an attorney working for special servicers, who analyzed distributions in other transactions pursuant to other contracts that generated a gain on sale. (*See* SPA81-95.) However, Greenspan's analysis was deeply flawed on many levels, and did not establish either a course of performance or an industry custom and practice.

In order to establish a course of performance, "there must have been conduct by the one party expressly or inferentially claiming as of right under the doubtful provision, ***coupled with knowledge thereof and acquiescence therein***, express or implied, by the other." *Continental Cas. Co. v. Rapid-Am. Corp.*, 609 N.E.2d 506, 511 (N.Y. 1993) (emphasis added). This doctrine is grounded in the equities of

estoppel – if one contracting party knowingly accepts repeated performance by the other contracting party for a prolonged period of time, it cannot years later argue that the contract prohibits the other party's conduct. *See Old Colony Tr. Co. v. City of Omaha*, 230 U.S. 100, 118 (1913). Conversely, a few isolated incidents of prior performance are insufficient to constitute a course of performance. *See, e.g., Cherry River Music Co. v. Simitar Entm't, Inc.*, 38 F. Supp. 2d 310, 318 n.54 (S.D.N.Y. 1999) (three transactions over three-year period insufficient); *Nat'l Liab. & Fire Ins. Co. v. Mediterranean Shipping Co.*, No. 09-cv-6516, 2011 WL 723604, at *3 (S.D.N.Y. Feb. 22, 2011) (two prior engagements insufficient).

To establish industry custom and practice, the proponent must demonstrate a "general, uniform and unvarying" practice that is known throughout the industry. *Law Debenture*, 595 F.3d at 466. Industry custom and practice exists only if the practice is "fixed and invariable . . . ." *British Int'l Ins. Co. Ltd. v. Seguros La Republica, S.A.*, 342 F.3d 78, 84 (2d Cir. 2003). Knowledge by industry participants is an essential component to establishing industry custom and practice. The proponent of the evidence must establish "***that the party sought to be bound was aware of the custom***, or that the custom's existence was ***so notorious that it should have been aware of it***." *British Int'l*, 342 F.3d at 84 (emphasis added; *see also Reuters Ltd. v. Dow Jones Telerate, Inc.*, 662 N.Y.S.2d 450, 455 (App. Div. 1997) ("[O]nly publicly disseminated information about the practices of other parties in

the industry would be eligible to establish or disprove [industry custom and practice] . . . ."); *see, e.g.*, *Bernard Nat'l Loan Inv'rs, Ltd. v. Traditions Mgmt., LLC*, 688 F. Supp. 2d 347, 365 (S.D.N.Y. 2010) (defendants did not meet their burden of industry practice, even though they introduced "convincing evidence," because they did not establish that the practice was "fixed and invariable" or "so notorious" to have been known).

The theory behind both course of performance and industry custom and practice evidence is that conduct by parties, which is sufficiently transparent such that adverse parties whose interests are impacted can object to such conduct as inconsistent with the contract, can tell us something about the contracting parties' intent. If the affected parties universally acquiesce across a robust enough number of transactions, the inference is that the parties intended the conduct or practice to be consistent with the contract. But where the practice at issue is not consistently followed, or where it is not transparent such that persons with an interest in objecting to the practice have no opportunity to do so because they do not know what is occurring, then the link between conduct and contractual intent is severed.

The District Court's course of performance and industry custom and practice findings suffer from essentially the same flaws. *First*, CMBS investors did not know about the transactions that Greenspan opined comprise the supposed course of performance and industry custom and practice. The documents that were needed to

deduce that CWC and other Special Servicers were retaining Penalty Interest and distributing Yield Maintenance Charges from these transactions were not publicly available to investors. (*See* A6475-80.) This information – which was contained in the private "Realized Loss Reports" created by the Special Servicers and shared only with the Master Servicer/Paying Agent – was neither publicly available nor discernible from the limited information distributed to investors. (*See id.*) Moreover, when investors requested information concerning the allocation of proceeds from the sale of REO properties, those requests were either denied or ignored by the administrators. (*See, e.g.*, A9068-73.) The clandestine nature of the Special Servicers' conduct fatally undermines Greenspan's course of performance and industry custom and practice argument. *See Continental Cas. Co.*, 609 N.E.2d at 511; *British Int'l*, 342 F.3d at 84.

Additionally, prior to Stuy Town, the average amount of Penalty Interest taken by the Special Servicers was not significant enough to incentivize Certificateholder action, given the costs of litigation and the difficulty in complying with the C30 PSAs' no-action clauses. (*See, e.g.*, A623-24 § 11.03(c).) Prior to Stuy Town, CWC never before had taken more than $5 million in Penalty Interest. (A9044-45.) Stuy Town was a "black swan" event that put Certificateholders on notice of a huge gain on sale, and prior REO liquidations carried out in the dark simply cannot be considered proof of a well-accepted custom.

The District Court tried to mitigate this flaw in its reasoning by ruling that Certificateholders are not parties to the C30 PSA and that their lack of knowledge was therefore irrelevant. (*See* SPA86-88.) This was error because it ignores the plain language of the C30 PSA as well as the economics of the CMBS trust. When purchasing Certificates of the C30 Trust, investors expressly agreed to be bound by and become parties to the PSA. (*See, e.g.*, A7907 ("This Certificate is issued under and is subject to the terms, provisions and conditions of the [PSA], to which [a]greement the Holder of this Certificate ***by virtue of the acceptance hereof assents and by which such Holder is bound***." (emphasis added)).) Thus, Certificateholders are parties to the C30 PSA. *See Ocwen Loan Servicing, LLC v. Ohio Pub. Emps. Ret. Sys.*, No. 654586/2012, 2014 WL 769907, at *7 (N.Y. Sup. Ct. Feb. 18, 2014) (holding that Certificateholder "is clearly a party of the Amended PSA" because PSA stated that it "shall inure to the benefit of and ***be binding upon*** . . . Certificateholders and their respective successors and permitted assigns . . . ." (emphasis added)); *see also Highland Crusader Offshore Partners, L.P. v. Targeted Delivery Techs. Holdings, Ltd.*, 124 N.Y.S.3d 346, 352 (App. Div. 2020) ("It is a general principle that only the parties to a contract are bound by its terms."); *Victory State Bank v. EMBA Hylan, LLC*, 95 N.Y.S.3d 97, 101 (App. Div. 2019) (same); *Nat'l Survival Game of N.Y., Inc. v. NSG of LI Corp.*, 565 N.Y.S.2d 127, 128 (App.

Div. 1991) (same).[8] Indeed, the District Court held that Appaloosa was bound to the C30 PSA earlier in the case when it dismissed Appaloosa's cross-claim against CWC because Appaloosa failed to comply with the C30 PSA's no-action clause. *Matter of Pooling & Servicing Agreements*, 375 F. Supp. 3d 441, 448-54 (S.D.N.Y. 2019).

Certificateholders' party status is also consistent with the economic realities of CMBS transactions. The Certificateholders provided all of the financing to purchase the $3 billion Stuy Town Senior Loan. Without the Certificateholders, there would be no C30 PSA. That Certificateholders did not negotiate the Gain-on-Sale provisions directly is irrelevant, since the other parties to the agreement (such as the Trustee and the Special Servicer) did not do so either.

Second, the District Court gave CWC and the GSEs the benefit of all competing inferences to be drawn from the course of performance and custom and practice evidence, rather than to Appaloosa as the non-moving party. The District Court inferred from the course of performance and custom and practice evidence that CMBS Special Servicers' conduct in paying Penalty Interest and Yield Maintenance Charges ahead of Gain-on-Sale Proceeds merely reflected the

[8] The cases relied upon by the District Court are inapposite. (*See* SPA49-50 n.10.) In none of those cases did the court consider language similar to that contained in the Certificates at issue here, pursuant to which investors expressly assented and agreed to be bound to the terms of the C30 PSA. Although *CWCapital Cobalt VR Ltd. v. CWCapital Investments LLC*, Index No. 653277/2018 (N.Y. Sup. Ct. Aug. 20, 2019), involved the C30 PSA, this language was not brought to the court's attention by the parties in that case.

contracting parties' intent that Gain-on-Sale Proceeds serve as a "catchall" for any funds remaining after all amounts set forth in Section 3.02(b) are paid – just as Nealon opined. (*See* SPA76-77, SPA95-97.)

However, there is a reasonable opposing inference that can be drawn from this same evidence: the Special Servicers were completely indifferent to what the language of the governing PSAs meant and, despite that language, acted in a self-interested manner by paying themselves Penalty Interest ahead of recognizing Gain-on-Sale Proceeds because they knew they could get away with it. After all, the stakeholders with an interest in preventing such behavior – Certificateholders – had no idea what was happening because there was no transparency concerning how Special Servicers allocated proceeds from the sale of REO properties in CMBS deals. (*See* A6475-80, A9068-73.) The other stakeholders – such as the Trustees and Master Servicers – either were indifferent to this issue or benefited from the same self-interested behavior. (*See* A2137, A2149, A2155-56, A2218, A2240, A2261.) This inference is bolstered by evidence in the record that Special Servicers generally engaged in this self-interested conduct across CMBS trusts even though the relevant PSA language differed markedly from trust to trust. (*See* CA2802-03.) Testimonial evidence supported the claim that Special Servicers ignored the contractual language altogether, even language clearly inconsistent with the purported practice. (*See* A1878, A1973, A1976-77, A2086.) If the inference sought

by Appaloosa is credited, then the Special Servicers' alleged "practice" is not at all probative of the contracting parties' intent. To the contrary, it is merely evidence of systematic breaches of contract by self-interested parties who know that their counterparties lack the knowledge and often the ability (due to PSA no-action clauses) to police such behavior.

Finally, the District Court improperly brushed aside instances that contradicted Greenspan's findings and made clear that, to the extent there was a practice, it was not so invariable as to constitute custom and practice in the industry. (*See* SPA122-23.) Greenspan found two examples where Gain-on-Sale Proceeds were paid prior to, or to the exclusion of, Penalty Interest. (SPA122 n.41.) The District Court's finding that these examples were not sufficient to create a genuine issue for trial ignored binding precedent from this Court, which plainly states that a practice must be "general, uniform and unvarying" in order to constitute an industry custom and practice. *Law Debenture*, 595 F.3d at 466. Thus, the District Court's decision should be reversed and the case remanded for trial.

V. CWC Was Required to Repay the Outstanding Interest on Advances and Additional Trust Fund Expenses from any Penalty Interest It Collected

Even if the Court were correct that CWC was entitled to divert Penalty Interest to itself from the Stuy Town sale proceeds – which it was not – that amount should have been reduced by the $67 million in outstanding interest on Advances and Additional Trust Fund Expenses with respect to Stuy Town.

Under certain circumstances, the Master Servicer is required to advance particular amounts to the C30 Trust. (*See* A339 (definition of "Advance"), A388 (definition of "P&I Advance"), A409-10 (definition of "Servicing Advances"), A549-52 § 4.03.) The Master Servicer is entitled to charge the Trusts interest on the amounts advanced until they are reimbursed. (*See* A551-52 § 4.03(d).) In addition, certain servicing-related costs can be charged to the Trusts as Additional Trust Fund Expenses. (*See* A337-38 (definition of "Additional Trust Fund Expenses").)

The C30 PSA contains several provisions that, read together, unambiguously required the Special Servicer to use any Penalty Interest it received to first reimburse any interest on Advances or Additional Trust Fund Expenses (other than Special Servicing Fees, Workout Fees and/or Liquidation Fees) for which the Trusts had not previously been reimbursed before the transaction that resulted in the receipt of Penalty Interest. Under Section 3.05(a)(ix) of the PSA, the servicers' right to payment with respect to interest on Advances

> shall be satisfied (A) . . . ***first out of late payment charges and Penalty Interest collected on or in respect of the related Mortgage Loan . . . and REO Loan***, during the Collection Period in which such Advance is reimbursed . . . , and (B) ***to the extent that the late payment charges and Penalty Interest described in the immediately preceding clause (A) are insufficient***, but only at the same time or after such Advance has been reimbursed, ***out of general collections on the Mortgage Loans, Companion Loans and any REO Properties on deposit in the Certificate Account*** . . . .

(A453 § 3.05(a)(ix) (emphasis added).). The Collection Period means, "[w]ith respect to any Distribution Date, the period that begins on the twelfth day in the month immediately preceding the month in which such Distribution Date occurs . . . and ending on and including the eleventh day in the month in which such Distribution Date occurs." (A353 (definition of "Collection Period").)

Section 3.05(a)(ix) thus set forth a clear and unambiguous rule as to the source of funds that were to be used for the reimbursement of interest on Advances: Interest on Advances was to be paid ***first*** out of any Penalty Interest received during the Collection Period in which the Advance was reimbursed. Other funds collected in connection with the loan could be used to reimburse interest on Advances ***only if*** the Penalty Interest received during the relevant Collection Period was insufficient to cover the outstanding obligation.

Section 3.11(d) reinforces the reimbursement rule set forth in Section 3.05(a)(ix). Under Section 3.11(d), "the Special Servicer's right to receive late payment charges and Penalty Interest . . . shall be limited to the portion of such items that have not been applied to pay interest on Advances and property inspection costs in respect of the related Mortgage Loan . . . or Additional Trust Fund Expenses (other than Special Servicing Fees, Workout Fees and/or Liquidation Fees) pursuant to this Section 3.11(d)." (A477.) Indeed, the Special Servicer is obligated to remit to the Certificate Account the portion of Penalty Interest necessary to pay interest on

Advances and Additional Trust Fund Expenses that have not previously been reimbursed to the Trusts:

> To the extent the Master Servicer or the Special Servicer receives late payment charges or Penalty Interest on a Mortgage Loan for which interest on Advances or Additional Trust Fund Expenses (other than Special Servicing Fees, Workout Fees and/or Liquidation Fees) related to such Mortgage Loan and not previously reimbursed to the Trust Fund, the Special Servicer shall transfer to the Master Servicer for deposit in the Certificate Account . . . an amount equal to the lesser of (i) the amount of late payment charges or Penalty Interest received on such Mortgage Loan or (ii) the sum of the amount of interest paid to the Master Servicer on Advances related to such Mortgage Loan incurred since the Closing Date for which the Trust Fund has not been previously reimbursed and the amount of Additional Trust Fund Expenses (other than Special Servicing Fees, Workout Fees and/or Liquidation Fees) related to such Mortgage Loan since the Closing Date and not previously reimbursed to the Trust Fund. To the extent that the Special Servicer is not entitled to late payment charges or Penalty Interest pursuant to the immediately preceding sentence, the Special Servicer shall promptly transfer such late payment charges and Penalty Interest to the Master Servicer who shall deposit such late payment charges and Penalty Interest in the Certificate Account.

(A477 § 3.11(d).)

These sections of the C30 PSA collectively required that interest on Advances first be paid out of Penalty Interest received during the same Collection Period in which the Advances were reimbursed and that CWC as Special Servicer remit to the Certificate Account the portion of Penalty Interest that was sufficient to cover

unreimbursed interest on Advances as well as any Additional Trust Fund Expenses (other than Special Servicing Fees, Liquidation Fees and Workout Fees) that had not been previously reimbursed. Contrary to these express contractual provisions, CWC recognized $67.2 million in unreimbursed interest on Advances and Additional Trust Fund Expenses at the time of the Stuy Town sale but did not use any portion of the $615 million in Penalty Interest it ostensibly received to repay those amounts. (*See* A5321.) By failing to offset Penalty Interest against unreimbursed interest on Advances and Additional Trust Fund Expenses, CWC breached the unambiguous terms of the C30 PSA.

In denying Appaloosa's motion for partial summary judgment, the District Court agreed with CWC that Section 3.05(a)(ix) provides only that interest on Advances be paid first out of Penalty Interest already on deposit in the Certificate Account. (*See* SPA137.) This is doubly wrong. Section 3.05(a)(ix) unambiguously requires that interest on Advances be repaid "first out of late payment charges and Penalty Interest collected . . . during the Collection Period in which such Advance is reimbursed . . . ." (A453.) It does not say anything about whether or not that collected Penalty Interest must already have been deposited in the Certificate Account. (*See id.*) Moreover, Section 3.11(d) unambiguously required CWC to remit to the Certificate Account so much of the Penalty Interest it received as was

sufficient to cover the unreimbursed interest on Advances and Additional Trust Fund Expenses. (*See* A477.)

The District Court also held that, because there were sufficient funds realized from the sale of Stuy Town to cover interest on Advances, Additional Trust Fund Expenses and the full amount of purportedly accrued Penalty Interest, interest on Advances and Additional Trust Fund Expenses were "satisfied before CWC retained Penalty Interest . . . ." (SPA137.) But this argument ignores that Sections 3.05(a)(ix) and 3.11(d) must be read together. Section 3.05(a)(ix) establishes the rule that interest on Advances must first be repaid out of Penalty Interest and that other loan collections can only be used when insufficient Penalty Interest has been received to cover the obligation, while Section 3.11(d) imposes on the Special Servicer the obligation to transfer to the Certificate Account whatever portion of Penalty Interest it has received that is sufficient to pay outstanding interest on Advances (along with Additional Trust Fund Expenses). Taken together, these provisions preclude what CWC did here, which was to keep all of the Penalty Interest while using other portions of the Stuy Town sale proceeds to pay interest on Advances and Additional Trust Fund Expenses when there was sufficient Penalty Interest to cover these amounts. By doing what it did, CWC reimbursed the Trusts with their own money.

To state the same point a little differently, interest on Advances and Additional Trust Fund Expenses can only be "previously reimbursed" under the C30

PSA in a manner consistent with the C30 PSA's requirements – to wit, Penalty Interest received by the Special Servicer must be used to reimburse these amounts unless not enough has been received to do so. CWC cannot pay these amounts with other funds in violation of the C30 PSA and then claim there is nothing left to be reimbursed out of Penalty Interest. That turns the C30 PSA on its head. The District Court should have granted Appaloosa's motion for partial summary judgment as to this issue.

CONCLUSION

For the foregoing reasons, this Court should reverse the Final Judgment entered by the District Court and remand with instructions to enter judgment in Appaloosa's favor or, in the alternative, for a trial.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Fed. R. App. P. 32(a)(7)(B) and LR 32.1(a)(4)(A) because it contains 13,904 words, as determined by the word-count function of Microsoft Word 2020, excluding the parts of the brief exempted from that count.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2020 in 14-point Times New Roman font.

Dated: September 10, 2020

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