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March 28, 2022

Via NYSCEF
The Honorable Robert R. Reed
60 Centre Street, Room 691
New York, NY 10007

Re: *Ambac Assurance Corp. v. Countrywide Home Loans, Inc., et. al.,* Index No. 651612/2010

Dear Justice Reed:

We write in response to the Countrywide Defendants' letter dated March 24, 2022, which seeks a status conference pursuant to Commercial Division Rule 24 to discuss the impact of the Court of Appeals' decision in *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Cap., Inc.*, No. 11, 2022 WL 801440, at *2 (Mar. 17, 2022) ("*U.S. Bank*"). *See* NYSCEF No. 2248. Ambac disagrees that further motion practice is necessary, and otherwise has no objection to Countrywide's request for a status conference if the Court would find a conference helpful.

Countrywide's claim that the decision will have a "profound impact on this trial and will dramatically narrow the universe of loans for which Ambac can seek to recover" is hyperbolic and incorrect, and ignores multiple prior trial and appellate court rulings in this 12-year-old matter. For several reasons, the *U.S. Bank* decision will not have an impact on the scope of trial in this Action.

First, the *U.S. Bank* decision has no impact on the discovery prong of the repurchase protocol. There is no dispute that the repurchase protocol consists of two independent avenues: (i) notice and (ii) discovery. In rejecting Countrywide's prior attempt to limit the loans at issue in this Action, the First Department held that "regardless" of notice, the repurchase protocol "is also triggered with respect to any loans for which it can be shown that Countrywide, as originator, sponsor, and servicer of the loans, *discovered* the breaches." *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 179 A.D.3d 518, 521 (1st Dep't 2020) (emphasis added). In *U.S. Bank*, the Court of Appeals clearly stated that the issue of discovery "***is not before us*** and thus, we address only whether the complaint may be maintained . . . insofar as the trustee seeks recovery based upon the theory that it provided sufficient notice. . . ." *U.S. Bank,* 2022 WL 801440, at *3 n.2 (emphasis added).[1] Countrywide's efforts to import language from the decision relating to notice into a discussion of what the "discovery" prong requires should be rejected in the face of this unambiguous language.

[1] *See also id.* at *7 (concluding that "the trustee cannot seek recovery on those loans to the extent it asserts that DLJ's repurchase obligation was triggered by notice, ***as compared to independent discovery***.") (emphasis added).

Countrywide was the originator of approximately 85 percent of the loans in the 17 RMBS securitizations at issue in this Action (the "Securitizations"). NYSCEF No. 2170. This means that a Countrywide employee reviewed "every application, absolutely, and every credit exhibit associated with that application" for "every loan" Countrywide originated. *See id.* at 18.[2] The knowledge of every Countrywide employee or agent who reviewed the loans for origination (and/or acquisition) is imputed to Countrywide. *See Wilmington Tr. v. MC-Five Mile Com. Morg. Fin. LLC*, 171 A.D.3d 591 (1st Dep't 2019) ("knowledge of . . . defendant's agent[] is properly imputed to defendant"); *see also Assured Guar. Mun. Corp. v. DB Structured Prod., Inc.*, 44 Misc. 3d 1206(A) at *6 (Sup. Ct. N.Y. Cnty. 2014) (noting that the loan originator "cannot reasonably maintain that it lacked actual notice of nonconformance"). As such, Countrywide "discovered" breaches of the R&Ws both systemically and individually at the loan level. Unable to dispute Ambac's ability to satisfy the alternative discovery prong, Countrywide relies on the *U.S. Bank* decision to argue that "discovery" should be limited to "actual knowledge." However, *U.S. Bank* did not address "discovery," let alone the standard for discovery.[3]

Second, the *U.S. Bank* decision has no impact on Ambac's reimbursement claim, which is not subject to the notice or discovery pre-requisites to suit contained in the repurchase protocol. As an insurer, Ambac has an extra form of protection through contractual rights and remedies provided in the Insurance & Indemnity ("I&I") Agreements with Countrywide. Trustees do not have similar agreements, and as such, do not have such reimbursement rights. In addition to its repurchase claim, Ambac has alleged a separate reimbursement claim under Section 3.03(b) of the I&I Agreements. That section entitles Ambac to reimbursement for "any payment made under the Policy arising as a result of Countrywide's failure to substitute for or deposit an amount in respect of any defective Mortgage Loan." *See* NYSCEF 2137 at 18. In contrast, in *U.S. Bank*, the trustee plaintiff's claims arose entirely under the repurchase protocol, which was the trustee's "sole remedy." The trustee did not have any separate reimbursement claim. In 2017, the First Department held in this Action, that Ambac's I&I Agreements "make[] clear that the sole remedy provision [of the repurchase protocol] does not apply to such reimbursement claims." *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.,* 151 A.D.3d 83, 89 (1st Dep't 2017). As such, the *U.S. Bank* decision has no impact on Ambac's ability to recover on its reimbursement claim, and thus, no impact on the overall scope of this trial.

Third, Countrywide's argument that Ambac's post-suit notices should be disregarded ignores Countrywide's own culpability in refusing prior to suit to (i) provide Ambac with loan files and applicable guidelines for the vast majority of the loans, and (ii) repurchase all but a small

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[2] The evidence will also show that Countrywide underwrote or otherwise assessed each loan it acquired from correspondent lenders.

[3] The First Department has adopted the "knew or should have known" standard for discovery. *U.S. Bank Nat. Ass'n v. GreenPoint Mortg. Funding, Inc.*, 147 A.D.3d 79, 86 (1st Dep't 2016) (noting that defendant in RMBS breach of contract case discovered or became aware of the breaches if it "knew or should have known" of them); *see also Fixed Income Shares: Series M v. Citibank, N.A.*, 157 A.D.3d 541, 542 (1st Dep't 2018) ("discovery" of breaches does ***not*** require "actual knowledge"). Further, the First Department has held that evidence showing a defendant "was willfully blind" to a fact underlying a R&W breach "is evidence that defendant had knowledge" of it. *Wilmington Tr.*, 171 A.D.3d 591. Nothing in *U.S. Bank* alters the "knew or should have known" standard for discovery.

percentage of the defective loans that Ambac noticed to Countrywide. Ambac will prove at trial that it provided Countrywide with sufficient notice of breaches under the relevant contracts, and that Countrywide prevented Ambac from providing further notice by failing to timely provide Ambac with loan files, applicable guidelines, and other materials in Countrywide's sole possession. It is well-settled in New York that Countrywide "cannot rely on the failure of another to perform a condition precedent where [it] has frustrated or prevented the occurrence of the condition." *A.H.A. Gen. Const., Inc. v. New York City Hous. Auth.*, 92 N.Y.2d 20, 31 (1998) (internal quotation marks and citations omitted). Moreover, any additional pre-suit notices provided by Ambac would have been futile in the face of Countrywide's refusal to repurchase all but a small percentage of the defective loans that Ambac noticed for repurchase prior to suit. Ambac will also show at trial that Countrywide refused to repurchase loans that its own internal fraud and quality control divisions determined to be defective. *See Wender v. GA Glob. Markets, LLC*, 147 A.D.3d 663 (1st Dep't 2017) ("Because any written notice . . . would have been futile, [the] defendant was relieved of that obligation.").

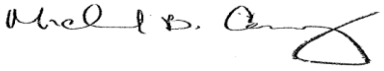
Finally, Countrywide's efforts to use *U.S. Bank* to attempt to overturn the law of the case and binding First Department precedent on sampling should be rejected. The trustee plaintiff in *U.S. Bank* was not seeking to establish liability and/or damages using sampling, and as such, the decision does not address sampling at all. In contrast, the First Department held in this case that "*[d]espite the language of the repurchase protocol*, RMBS plaintiffs like Ambac are entitled to introduce sampling-related evidence to prove liability and damages in connection with repurchase claims . . . ." *Ambac Assur. Corp.*, 179 A.D.3d at 521 (emphasis added). Sampling likewise remains an appropriate method of proof on Ambac's separate reimbursement claim, which is not subject to the "sole remedy" of repurchase and entitles Ambac to a direct monetary payment from Countrywide. Indeed, because there are over 375,000 loans in the Securitizations, reunderwriting and presenting evidence on each of these loans without sampling would be "incomprehensible and would reward the breaching party by making it virtually impossible for an aggrieved party to pursue a remedy." *See MBIA Ins. Corp. v. Credit Suisse Secs. LLC*, Index No. 603751/2009, 2020 WL 7041787, at *8 (Sup. Ct. N.Y. Cnty. Nov. 30, 2020) (adopting sampling for single transaction with 15,000 loans).

In sum, Countrywide is yet again trying to relitigate issues and derail trial in this 12-year-old matter. Countrywide has twice before filed unsuccessful motions in this Action concerning both "notice" and "sampling"—first on summary judgment in 2015, and then in "pre-trial" motions in 2018, which it lost and appealed, delaying trial for years. Now, with trial again on the horizon, Countrywide apparently seeks to file yet another round of pre-trial motions on these issues. For reasons discussed above, *U.S. Bank* does not alter the scope of trial in this case, and this long-running case should proceed to trial in September without further delay.[4]

Thank you for Your Honor's consideration of this submission. We are available at the Court's convenience for a status conference if the Court would find a conference helpful.

[4] Contrary to Countrywide's misleading quotes from an Ambac press release, Ambac's press release makes clear that "there remain other potential alternative paths to recovery for such breaching loans." NYSCEF 2250.

Respectfully submitted,



Michael B. Carlinsky

/s/ Harry Sandick
Harry Sandick

/s/ Mark C. Zauderer
Mark C. Zauderer

Cc: Counsel for Defendants Countrywide and Bank of America