

**CWCapital Cobalt VR Ltd. v CWCapital Invs. LLC**

2026 NY Slip Op 30160(U)

January 13, 2026

Supreme Court, New York County

Docket Number: Index No. 653277/2018

Judge: Andrea Masley

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

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CWCAPITAL COBALT VR LTD.,

Plaintiff,

- v -

CWCAPITAL INVESTMENTS LLC, and CWCAPITAL
ASSET MANAGEMENT LLC,

Defendants.

INDEX NO. 653277/2018

MOTION DATE --

MOTION SEQ. NO. 027 031

DECISION + ORDER ON
MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 027) 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 1049, 1055, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1236, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1260, 1261, 1276, 1278, 1279, 1322, 1324, 1527, 1528, 1536, 1553, 1555

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 031) 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1056, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1118, 1119, 1237,

1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1323, 1534, 1535, 1554

were read on this motion to/for

PARTIAL SUMMARY JUDGMENT

Motions sequence numbers 027 and 031 are consolidated for disposition.<sup>1</sup>

Plaintiff CWCapital Cobalt Vr Ltd. (Cobalt) brings this action for breach of contract, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and unjust enrichment against defendants CWCapital Investments LLC (CWCI) and CWCapital Asset Management LLC (CWCA, and collectively CW or defendants) in connection with a 2007 collateralized debt obligation (the Vr CDO) for which Cobalt was the issuer, CWCI was the collateral manager, and CWCA was the special servicer.

In motion sequence number 027, defendants move for summary judgment dismissing the amended complaint in its entirety. (NYSCEF Doc. No. [NYSCEF] 603, Notice of Motion.)

In motion sequence number 031, Cobalt moves for summary judgment on its first cause of action for breach of contract against CWCI. (NYSCEF 938, Notice of Motion.)

The court's prior decisions in this action provide a detailed background of the dispute. As such, additional background information will be provided only where necessary. The court presumes familiarity with the case and adopts all capitalized terms as used in the court's prior decisions.

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<sup>1</sup> Having granted motion sequence number 032, Cobalt's motion "to supplement its summary judgment briefing to include three fee-sharing agreements, the Anthracite Agreements, governing agreements and offering materials for the Anthracite CDO Issuers, and March 2008 Moody's Investor Services Report" (NYSCEF 1583, Notice of Entry), the court considers these documents on these motions.

## Analysis

Pursuant to CPLR 3212 (b), “[t]o obtain summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012] [internal quotation marks and citations omitted]). “Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” (*Id.* [internal quotation marks and citation omitted].) “[F]acts must be viewed in the light most favorable to the non-moving party” and the movant’s “[f]ailure to make [a] prima facie showing . . . requires a denial of the motion, regardless of the sufficiency of the opposing papers.” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citations omitted].) “Mere conclusory assertions, devoid of evidentiary facts, are insufficient [to raise an issue of fact], as is reliance upon surmise, conjecture or speculation. Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted.” (*Madeline D'Anthony Enters., Inc.*, 101 AD3d at 609 [internal quotation marks and citations omitted].) “It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof).” (*Vega*, 18 NY3d at 505 [citation omitted].)

## I. Standing

CW contends that it is entitled to summary judgment dismissing the entire action because the Appellate Division, First Department held that “Cobalt’s license [to exercise all of its rights pursuant to the CMA] was revoked” upon the occurrence of an Event of Default on June 30, 2017. (*CWCapital Invs. LLC v CWCapital Cobalt VR Ltd.*, 182 AD3d 448, 450 [1st Dept 2020]). As such, CW argues, Cobalt had no right to bring this action. To the extent that Cobalt claims to have standing pursuant to a claim license agreement dated November 28, 2017 (the CLA), CW contends that this license was also automatically revocable and was revoked upon the occurrence of subsequent Events of Default.

Cobalt counters that under the plain language of the CLA, the claim license does not automatically terminate upon the occurrence of an Event of Default. Cobalt also contends that all defaults were cured at the time it commenced this action in June 2018. (See NYSCEF 1263, Cobalt’s Reply MOL [mot. seq. no. 031] at 4, *citing* NYSCEF Doc Nos. 1265-1267, 1268-1270 [explaining that Cobalt cured the June 2017 default and later interest payment shortfalls with large interest distribution before June 2018].) Lastly, Cobalt argues that, even if its license was revoked at some time after commencement of this action and the right to act under the CMA transferred back to the Trustee, Cobalt, as the original party to the litigation, could continue the action pursuant to the Claim License Agreement, which is consistent with CPLR 1018, and the Trustee will be bound by the courts’ final determination and, thus, its participation is not required.

“The fundamental rule of contract interpretation is that agreements are construed in accord with the parties’ intent, and [t]he best evidence of what parties to a written agreement intend is what they say in their writing.” (*Banco Espírito Santo, S.A. v Concessionária Do Rodoanel Oeste S.A.*, 100 AD3d 100, 106 [1st Dept 2012] [internal quotation marks and citations omitted].)

Here, by its plain language, the CLA is not automatically revocable.

Pursuant to the Indenture, Cobalt “grant[ed] to the Trustee. . . a continuing lien on, and security interest in, all the property of the Issuer,” including the “Issuer’s rights under the [CMA].” (NYSCEF 827, Indenture, Granting Clause at 1-2.) Cobalt’s rights under the CMA include “the right . . . to take any legal action upon the breach of an obligation of the Collateral Manager” and “the right to do any and all other things.” (*Id.* § 15.01 [a].) The Trustee, then, granted Cobalt “a license to exercise all of [Cobalt’s] rights pursuant to the [CMA].” (*Id.*) This license would “be automatically revoked upon the occurrence of an Event of Default.” (*Id.*)

The CLA does not contain any similar automatic revocation language. In the whereas clauses, the CLA acknowledges that: (1) Cobalt has notified the Trustee of its intention “to initiate litigation (the ‘Litigation’) . . . to enforce the Issuer’s rights under the [CMA]”; (2) pursuant to section 15.01 of the Indenture, Cobalt’s license to exercise its rights under the CMA is “deemed to be automatically revoked upon the occurrence of an Event of Default”; and (3) the Trustee informed Cobalt of an Event of Default that occurred in June 2017 that remained uncured at the time of the CLA’s execution (NYSCEF 754, CLA at 1). The CLA then states that “[t]he Trustee hereby grants the Issuer a license to exercise the Issuer’s rights under the [CMA] to initiate the Litigation

and pursue claims against the Collateral Manager and certain other parties (other than the Trustee), without further notice or consent of the Trustee” and that the Trustee “agrees to be bound by the final determination” of the Litigation. (*Id.*)

The parties’ intent that the CLA remain effective regardless of the existence of an Event of Default, is evident from the plain language of the CLA. Had the parties intended otherwise, they would have so provided, as they did in the Indenture. (See *Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 560 [2014] [(e)ven where there is ambiguity, if parties to a contract omit terms—particularly, terms that are readily found in other, similar contracts—the inescapable conclusion is that the parties intended the omission.”].) Contrary to CW’s contentions, the CLA neither “refers only to a revocable license” nor “expressly incorporates the Indenture’s terms.” (NYSCEF 1260, CW’s Reply MOL [mot. seq. no. 027] at 4 n 7). Instead, the CLA takes note of section 15.01 of the Indenture and its “automatically revoked” language, as well as the existence of an uncured Event of Default, and grants a license to pursue the Litigation “without further notice or consent of the Trustee.” (NYSCEF 754, CLA at 1).

To the extent that CW contends that “the Indenture only gave the Indenture Trustee the ability to grant an automatically revocable license” and that the “CLA was thus also revocable,” (NYSCEF 1118, CW’s MOL in Opp [mot. seq. no. 031] at 21 n 13; see also NYSCEF 1260, CW’s Reply MOL [mot. seq. no. 027] at 4 [contending that the “Trustee could not convey more than it had—the right to grant a revocable license”]), defendants misapprehend the Indenture. Pursuant to section 15.01, Cobalt assigned to the Trustee “all of [its] estate, right, title and interest in, to and under the [CMA].” (NYSCEF 827, Indenture § 15.01 [a] [emphasis added].) There is no limitation on this

assignment except that it terminates “[u]pon the retirement of the Notes and the release of the Collateral from the lien of this Indenture.” (*Id.* § 15.01 [c].) Upon termination, Cobalt’s rights under the CMA automatically reverted to Cobalt, thereby limiting the Trustee’s license by making it automatically revocable upon an Event of Default. (*Id.*) As the Trustee holds all rights in and under the CMA, it is free to license those rights on whatever terms it deems appropriate.

Accordingly, Cobalt has standing to pursue this action.

## **II. Ratification and Estoppel**

CW contends that it is entitled to summary judgment dismissing the amended complaint in its entirety, because the Vr CDO had been managed the same way for a decade preceding this action without complaint from Cobalt or any Noteholder. Moreover, an officer of Cobalt certified annually that Cobalt had reviewed CWCI’s actions and found no default. Accordingly, CW argues that, because Cobalt had full knowledge of CWCI and CWCA’s actions and failed to complain, while the Vr CDO accepted substantial benefits from CWCI and CWCA’s actions, Cobalt waived its claims and implicitly ratified CWCI and CWCA’s actions.

Cobalt responds that CW’s estoppel and ratification defenses are barred by the CMA’s broad no-waiver provision. Additionally, Cobalt points out that its annual Officer’s Certificates are not evidence that Cobalt knew about, or accepted, CWCI’s misconduct, because CWCI’s breach of the CMA is not included in the definition of an Event of Default.

Cobalt’s claims are not barred by ratification and estoppel. The CMA provides that “[n]o failure or delay on the part of any party hereto to exercise any right or remedy

under this Agreement shall operate as a waiver thereof, and no waiver shall be effective unless it is in writing and signed by the party granting such waiver.” (NYSCEF 946, CMA § 18 [j].) Contrary to CW’s contentions, the annual Officer’s Certificate does not operate as a written waiver or approval of CWCI’s conduct. The Officer’s Certificate states that, “[p]ursuant to Section 7.12 of the Indenture,” Cobalt’s officer “does certify that: (i) [h]aving made reasonable inquiries of the Collateral Manager, and to the best of the knowledge, information and belief of the Issuer there did not exist. . . any Default; and (ii) [t]he Issuer has complied with all of its obligation.” (NYSCEF 618, 2016 Officer’s Certificate; NYSCEF 617, 2013 Officer’s Certificate; NYSCEF 619, 2010 Officer’s Certificate). The Indenture defines “Default” as “[a]n event or circumstance that is. . .an Event of Default.” (NYSCEF 827, Indenture at 10.) “Event of Default” is defined as events “specified in Section 5.01.” (*Id.* at 13.) Section 5.01 describes various Events of Default, all having to do with the Issuer’s obligations under the Indenture. (*Id.* § 5.01.) Meanwhile, section 7.12 of the Indenture, requiring the annual Officer’s Certificate, is concerned with “the fulfillment of a material obligation of the Co-Issuers under this Indenture.” (*Id.* § 7.12). Thus, the annual Officer’s Certificate has nothing to do with CWCI’s fulfillment of its obligations under the CMA and does not operate as a written waiver of Cobalt’s claims. Accordingly, “[t]here is no merit to defendants’ waiver and estoppel arguments in view of the ‘no waiver’ provision in the [] agreement and their failure to show detrimental reliance on anything plaintiff said or did.” (*Antonini v Petito*, 96 AD3d 446, 447 [1st Dept 2012] [citation omitted].)

### **III. Cobalt and CW's Motions for Summary Judgment on the Fee-Sharing Claim**

Cobalt contends that it is entitled to summary judgment on its fee-sharing claim because CWCI agreed that it would act “in a manner consistent with the practices and procedures then in effect followed by reasonable and prudent institutional managers of national standing relating to assets of the nature and character” of Cobalt’s CMBS bonds (NYSCEF 946, CMA § 1 [r]), and CWCI breached this obligation by failing to enter into fee-sharing agreements with CWCA, despite such agreements becoming prevalent in the CMBS industry by 2011 or 2012. Cobalt also argues that CWCI’s defenses are meritless as a matter of law.

CW contends that it is entitled to summary judgment dismissing the claim because: (1) CWCI managed the Vr CDO exactly as it managed other CDOs, none of which entered into fee-sharing agreements; (2) fee-sharing was not contemplated by the CMA; (3) fee-sharing was not permitted because the Vr CDO had to comply with Statement of Financial Accounting Standards No. 140 (SFAS 140), as promulgated by the Financial Accounting Standards Board (FASB), and to maintain its qualifying special purpose entity (QSPE) status; (4) a fee-sharing agreement created a material risk of tax consequences that were prohibited by the Indenture and the CMA; (5) fee-sharing was contrary to the static nature of the Vr CDO; (6) negotiating a fee-sharing agreement would have violated the Indenture; (7) CDOs, in general, as an industry practice, do not enter fee-sharing agreements; (8) affiliates do not share fees; and (9) CWCI owed a duty to Noteholders to retain CWCA. In addition, CW contends that the claim fails because it seeks consequential damages, which the CMA prohibits, and because CWCI cannot be held liable under the CMA’s exculpatory clause unless it engages in conduct

that is in bad faith, willful or grossly negligent, of which there is no evidence. Finally, CW contends that, even if the claim survives, it must be dismissed to the extent it is concerned with the Stuy Town Trusts, because Cobalt lacked sufficient Voting Rights to replace CWCA as a special servicer and, therefore, lacked the leverage to demand fee-sharing.

A cause of action for breach of contract requires a plaintiff to demonstrate “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages.” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010].)

The interpretation of an unambiguous contract is a question of law for the court (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 192 [1st Dept 1995]), as is the determination of whether a contract is ambiguous (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]). “[A] contract is ambiguous when read as a whole, [it] fails to disclose its purpose and the parties’ intent, or when specific language is susceptible of two reasonable interpretations.” (*Georgia Malone & Co., Inc. v E&M Assoc.*, 163 AD3d 176, 185 [1st Dept 2018] [internal quotation marks and citations omitted].) “Ambiguity is determined within the four corners of the document; it cannot be created by extrinsic evidence . . . and, therefore, extrinsic evidence may be considered only if the agreement is ambiguous.” (*Brad H. v City of New York*, 17 NY3d 180, 186 [2011] [internal quotation marks and citations omitted]; see also *Matter of Bank of N.Y. Mellon v BlackRock Fin. Mgt., Inc.*, 202 AD3d 465, 466 [1st Dept 2022] [“where a contract is clear and unambiguous, a party’s course of conduct could not change its meaning”].) “[S]ilence does not equate to contractual ambiguity.” (*Greenfield v Philles Records*, 98

NY2d 562, 573 [2002] [citations omitted].) “Even where a contingency has been omitted, [the court] will not necessarily imply a term since courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.” (*Reiss v Fin. Performance Corp.*, 97 NY2d 195, 199 [2001] [internal quotation marks and citations omitted].) Courts are “extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include.” (*ACE Sec. Corp. Home Equity Loan Trust, Series 2006-SL2 v DB Structured Products, Inc.*, 25 NY3d 581, 597 [2015], quoting *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004].)

“[W]hen parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms.” (*Vermont Teddy Bear Co.*, 1 NY3d at 475 [internal quotation marks and citation omitted]; see also *Banco Espírito Santo, S.A.*, 100 AD3d at 106.) The court “appl[ies] this rule with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople.” (*Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 7 [1st Dept 2012] [citations omitted].)

To effectuate its intended purpose, the writing must be read as a whole, as its “meaning . . . may be distorted where undue force is given to single words or phrases.” (*Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003] [internal quotation marks and citation omitted].) Additionally, “courts must construe contracts in a manner which gives effect to each and every part, so as not to render any provision meaningless or without force or effect.” (*Western & S. Life Ins. Co. v U.S. Bank N.A.*,

209 AD3d 6, 13 [1st Dept 2022] [internal quotation marks and citations omitted].)

Lastly, “a contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties.”

(*Greenwich Capital Fin. Prods., Inc. v Negrin*, 74 AD3d 413, 415 [1st Dept 2010]

[internal quotation marks and citation omitted].)

#### **A. The CMA’s Standard of Care**

The parties dispute the meaning of section 1 of the CMA and the obligations it imposed on CWCI in managing the Vr CDO.

Cobalt contends that CWCI, in its role as CCR with the power to appoint and terminate the special servicer pursuant to section 1(r) of the CMA, was required to act “in a manner consistent with the practices and procedures then in effect followed by reasonable and prudent institutional managers of national standing relating to assets of the nature and character” of Cobalt’s CMBS certificates. (NYSCEF 946, CMA § 1 [r].) Cobalt insists that this standard is not based on the conduct of other CDO collateral managers only, but, more broadly, on the conduct of institutional managers of CMBS investments. Thus, Cobalt contends that CWCI breached its obligations under the CMA by failing to use its control rights to negotiate fee-sharing agreements for Cobalt’s benefit, as was the practice in the CMBS industry.

CW counters that comparing CWCI’s conduct to institutional managers of CMBS controlling class positions is problematic, because, while the Vr CDO held CMBS certificates that held controlling class positions, CWCI was not a CMBS CCR. CW claims that when CWCI acted as CCR for the Vr CDO’s CMBS certificates, it acted on behalf of the Vr CDO’s Noteholder and since all its duties were tied to the Vr CDO

Notes, “[d]ivorcing CWCI’s obligations as Collateral Manager from the Vr CDO, as Cobalt suggests, would lead to all manner of absurd outcomes.” (NYSCEF 1118, CW’s MOL in Opp [mot. seq. no. 031] at 26.) Additionally, CW argues that because the CMA obligates CWCI to manage the Vr CDO in the same manner as its other investments and because CWCI never entered into a fee-sharing agreement, its failure to do so for Cobalt did not breach the CMA. Lastly, CWCI argues that section 1(r) is irrelevant because it “concerns rights granted to ‘the Holder of any Class of Notes,’ which Cobalt indisputably is not.” (*Id.* at 27-28.) Instead, CWCI urges that section 1(c) is the relevant CMA provision. Pursuant to section 1(c), CWCI claims, its only duty with respect to the CMBS Trusts was to appoint a CCR who would, in turn, exercise the approval rights granted to the CCR by the CMBS PSAs.<sup>2</sup>

Pursuant to the plain language of the CMA, CWCI’s obligations in managing the Vr CDO are not so narrowly circumscribed.

In pertinent part, the CMA provides that the “Collateral Manager is hereby appointed as the Issuer’s exclusive agent to provide the Issuer with certain services in relation to the Collateral,” including:

“(r) exercising or waiving the rights, if any, of the Holder of any Class of Notes to (i) appoint or act as the ‘controlling class representative’ or ‘directing holder’ or ‘operating advisor’ or in similar capacity to terminate and/or appoint the special servicer or direct or consent to actions of the special servicer or the master servicer to the extent permitted by the applicable Underlying Instrument (‘Control Rights’), or (ii) with respect to any Collateral Debt Security, the right to vote on, consent to or approve certain

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<sup>2</sup> Section 1(c) provides, in pertinent part, that the Collateral Manger will “tak[e] action . . . with respect to the Issuer’s exercise of any rights . . . or remedies in connection with the Collateral Debt Securities and Eligible Investments, as provided in the related Underlying Instruments, to the extent such rights have not been waived by a prior holder thereof.” (NYSCEF 946, CMA §1 [c].)

matters with respect to such Collateral Debt Security and/or the related Underlying Instrument ('Voting Rights') on behalf of the Noteholders and the Trustee and, as it deems necessary, directing the Trustee with respect to the exercise or waiver of such Control Rights or Voting Rights on behalf of the Noteholders." (NYSCEF 946, CMA § 1 [r].)

It further provides that:

"The Collateral Manager shall perform its obligations hereunder and under the Indenture with reasonable care and in good faith, using a degree of skill and attention no less than that which it (a) exercises with respect to comparable assets that it manages for itself and (b) exercises with respect to comparable assets that it manages for others, and in a manner consistent with the practices and procedures then in effect followed by reasonable and prudent institutional managers of national standing relating to assets of the nature and character of the Collateral Debt Securities and Eligible Investments, except as expressly provided in this Agreement and in the Indenture." (*Id.*)

The CMA's plain language requires CWCI to use the same "degree of skill and attention" as it uses with comparable assets that it manages for itself and others **and** to act "in a manner consistent with the practices and procedures then in effect followed by reasonable and prudent institutional managers of national standing relating to assets of the nature and character of the Collateral Debt Securities and Eligible Investments." (*See Sasson v TLG Acquisition LLC*, 127 AD3d 480, 481 [1st Dept 2015] [explaining that the use of the conjunctive "and" instead of "or" required the inclusion of all three named individuals listed in the defined term].) In other words, regardless of how CWCI handles other assets under its care, if its practices do not comport with those of "reasonable and prudent institutional managers of national standing," then it is in breach of the CMA. Therefore, the fact that CWCI never entered into fee-sharing agreements for any of the CDOs it managed is not dispositive of this claim.

Additionally, in determining whether CWCI met its contractual obligations, nothing in this provision requires the court to limit the scope of its review to "the

practices and procedures” of CDO managers. Rather, the court must consider the practices of “institutional managers . . . relating to assets of the nature and character of the Collateral Debt Securities,” which term is defined to include “CMBS bonds” (NYSCEF 827, Indenture at 9; see *a/so* NYSCEF 946, CMA at 1 [(c)apitalized terms used (in the CMA) but not otherwise defined . . . shall have the respective meanings ascribed thereto in the Indenture”).) Indeed, CW’s own expert states that “[a] substantial amount of the Collateral held by Issuer is composed of CMBS Certificates.” (NYSCEF 719, Mayo Expert Rep at 6.) To the extent that the Vr CDO structure limits CWCI’s ability to mimic the practices of CMBS managers, the court addresses these limitations separately below.

CW also misinterprets CWCI’s obligations under section 1(r). First, CW merely cites the Indenture’s definition of “Holder” in support of its contention that section 1(r) is irrelevant because it “concerns rights granted to ‘the Holder of any Class of Notes,’ which Cobalt indisputably is not.” (NYSCEF 1118, CW’s MOL in Opp [mot. seq. no. 031] at 27-28.)<sup>3</sup> The definition does not elucidate CW’s point (see NYSCEF 827,

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<sup>3</sup> The court notes that this position is contrary to the position that CWCI took on summary judgment in its related action against Cobalt. There, CWCI identified section 1(r) as one of the provisions demonstrating that CWCI had “the exclusive power and authority to appoint or act as the CCR or Directing Holder.” (See *CWCapital Investments LLC v CWCapital Cobalt VR Ltd.*, Sup Ct, NY County, Index No. 652092/2018, NYSCEF 613, CWCI’s Brief at 22.) Having prevailed on its motion in the related action (see *id.*, NYSCEF 998, Decision and Order [mot. seq. no. 026]), it may not now take a position that is contrary to its previous position merely because its interests have changed. (*D & L Holdings, LLC v RCG Goldman Co., LLC*, 287 AD2d 65, 71 [1st Dept 2001] [“doctrine of judicial estoppel is intended to prevent abuses of the judicial system by which a party obtains relief by maintaining one position, and later, in a different action, maintains a contrary position” (citation omitted)].) Because the motions for summary judgment were pending in both actions at the same time, the parties did not know that CWCI had prevailed on its argument in the related action at the time the court was considering these motions.

Indenture at 15 [“Holder”: with respect to any Note, the person in whose name such Note is registered in the Note Register and, with respect to any Preferred Share, the person or entity in whose name such Preferred Share is registered in the share register maintained by the Share Registrar”) and, in any event, CW’s own expert states that the “Issuer is a Majority Holder of Controlling Class Certificates in some of the CMBS Trusts,” (NYSCEF 719, Mayo Expert Rep at 9.) Second, this argument is contrary to the plain language of the CMA. Built into section 1(r) is the understanding that Cobalt may not have any control rights for CWCI to exercise on its behalf. That is why the provision states that CWCI will exercise these rights “if any” and “to the extent permitted by the applicable Underlying Instrument” (*i.e.* the PSAs). Therefore, to the extent that Cobalt was the majority holder of controlling class certificates and the relevant PSA gave such a holder the rights to appoint the special servicer, CWCI had to “perform [this] obligation[] . . . with reasonable care and in good faith, . . . in a manner consistent with the practices and procedures then in effect followed by reasonable and prudent institutional managers of national standing.” (NYSCEF 946, CMA § 1 [r].)

Accordingly, nothing in the CMA’s standard-of-care language forecloses Cobalt’s fee-sharing claim.

#### **B. Whether Fee-Sharing was Contemplated by the CMA**

CW contends that there was no duty to negotiate fee-sharing agreements and that CWCI’s failure to do so cannot give rise to breach of contract claim, because: (1) fee-sharing did not exist in 2007 when the CMA was executed; (2) no language in the CMA requires CWCI to enter into fee-sharing agreements; and (3) the CMA expressly prohibits CWCI from taking any action unless required by the CMA or Indenture.

Cobalt responds that CWCI breached section 1 of the CMA and that none of the provisions it now relies on prohibit it from negotiating fee-sharing agreements.

The CMA requires that CWCI carry out its duties “in a manner consistent with the practices and procedures then in effect followed by reasonable and prudent institutional managers of national standing relating to assets of the nature and character of the Collateral Debt Securities and Eligible Investments.” (NYSCEF 946, CMA § 1 [r].) To the extent that Cobalt demonstrates that fee-sharing agreements had become the industry standard and were not otherwise prohibited by the Vr CDO transaction documents, then CWCI will have breached the CMA. That fee-sharing agreements did not exist and so could not have been contemplated by the parties when they entered the CMA is not dispositive. The CMA requires CWCI to comply “with the practices and procedures *then in effect*.” (*Id.* [emphasis added].) It is, therefore, no defense that industry practices changed. As the First Department noted, “CWCI had a contractual obligation to manage the CMBS trust assets on an ongoing basis.” (*CWCapital Cobalt VR v CWCapital Invs. LLC*, 195 AD3d 12, 20 [1st Dept 2021] [rejecting the dissent’s characterization of the CMA as a “a one-time decision, on a specific contract date, to delegate management to CWCI”].)

Nor do any of the cited CMA provisions prohibit CWCI from negotiating such agreements.

Contrary to CW’s contentions, section 13(a) does not require CWCI to “use all commercially reasonable efforts to ensure no action is taken by it,” unless such action is expressly provided for in the CMA or the Indenture. (See NYSCEF 946, CMA § 13.) Rather, the section requires CWCI to avoid actions “which the Collateral Manager

knows or reasonably should know” would: (i) adversely affect Cobalt under applicable law; (ii) not be permitted under Cobalt’s organizational documents; (iii) require Cobalt to register as an investment company under the Investment Company Act; (iv) violate the Indenture; (v) adversely affect Cobalt’s noteholders (other than as permitted or required under the CMA and the Indenture); or (vi) “cause the Issuer to be treated as engaged in a United States trade or business for United States federal income tax purposes or would otherwise have a materially adverse United States federal or state income tax effect on the Issuer.” (NYSCEF 946, CMA § 13 [a].) To the extent that CW claims that fee-sharing would have risked several of these consequences, the court addresses these arguments separately below.

Next, section 12(a) merely limits CWCI’s obligations to “the services called for from the Collateral Manager hereunder and under the Indenture in the manner prescribed herein and therein.” (*Id.* § 12 [a].) The CMA lists exercising Cobalt’s control rights and appointing the special servicer among CWCI’s duties and requires CWCI to manage Cobalt’s assets in a manner consistent with “practices and procedures then in effect.” (*Id.* § 1 [r].) Therefore, section 12(a) does not prohibit CWCI from using Cobalt’s control rights to negotiate fee-sharing agreement if such use of control rights was “consistent with the practices and procedures then in effect.” (*Id.* § 1.)

Section 8(b) provides that “the Collateral Manager shall not be obligated to pursue any specific investment strategy or opportunity that may arise with respect to the Collateral Debt Securities.” (*Id.* § 8 [b].) CW does not explain how fee-sharing constitutes an “investment strategy.” Fee-sharing does not require CWCI to invest funds in the hope of a return on that investment. It simply seeks a share of the fees the

special servicer receives from the CMBS Trusts. Therefore, this provision is inapplicable.

Lastly, simply because section 8(b) (ii) permits CWCA to earn fees for acting as a special servicer (see *id.*), does not mean that CWCI was prohibited from renegotiating those fees.

To the extent that CWCI relies on *IKB Intl., S.A. v Wells Fargo Bank, N.A.* (40 NY3d 277, 287 [2023]), where the Court of Appeals declined to “[r]ead[] the challenged language to impose an implicit duty,” that case is inapposite. The agreement at issue there contained “numerous contractual provisions expressly limiting the trustee’s duties to ‘only such duties as are specifically set forth in this Agreement’ and prohibiting the imposition of implied duties.” (*Id.* at 287-88.) No such language appears in the CMA.

For the foregoing reasons, these CMA provisions do not bar the fee-sharing claim.

### C. QSPE Status

CW contends that negotiating or entering into fee-sharing agreements is not permitted, because the CMA and the Indenture require CWCI to comply with SFAS 140 and prohibit CWCI from taking any action that would cause Cobalt to lose its QSPE treatment. CW argues that to qualify as a QSPE, an entity must be “brain dead” and run on “auto-pilot,” meaning that “the permitted activities Cobalt (and by extension CWCI) could engage in are significantly limited and must be specified in legal documents that established the SPE or create the beneficial interests.” (NYSCEF 1118, CW’s MOL in Opp [mot. seq. no. 031] at 35-36.) CW reasons that because nothing in the CMA or the Indenture requires or permits CWCI to negotiate and enter fee-sharing

agreements and, moreover, because such conduct is not a servicing activity inherent in the assets held by Cobalt under SFAS 140, CWCI could not pursue such agreements. CW also argues that the 2009 changes to SFAS 140, eliminating the concept of QSPE for purposes of financial reporting under generally accepted accounting principles in the United States (GAAP), did not change any of the relevant contractual provisions in the Indenture and the CMA. CW insists that CWCI continued to be constrained by these contractual provisions because they explicitly incorporate the concept of a QSPE. Moreover, CW argues, the parties' intentions to retain the QSPE limitations were made clear when they amended the Indenture in April 2010 and retained the relevant contractual restrictions. Finally, CW points out that "QSPE" has a meaning outside of GAAP. It claims that QSPE status is also a proxy for a static CDO and that, as such, investors expected the collateral manager to continue to comply with QSPE limitations.

Cobalt responds that the governing documents do not obligate parties to adhere to the conditions in SFAS 140, rather, they require that no action be taken that would cause Cobalt "not to be treated as a qualifying special purpose entity under SFAS 140." (NYSCEF 827, Indenture § 7.11 [a] [xv]; NYSCEF 946, CMA § 13 [a].) Cobalt thus argues that because the 2009 amendment to SFAS 140 eliminated QSPE status, no action could cause Cobalt not to be treated as a QSPE. Cobalt also points out that because the Indenture's definition of "SFAS 140" includes amendments, the parties are required to comply with the version of SFAS 140 then in effect and no amendment to the governing documents is necessary. Cobalt also argues that CW can provide no coherent purpose in construing the relevant CMA and Indenture provisions to require adherence to obsolete QSPE requirements. Lastly, Cobalt contends that, even if the

pre-2009 version of SFAS 140 governed, nothing about a fee-sharing agreement would have caused Cobalt's QSPE status to change, as "a QSPE was permitted to hold 'servicing rights' and to make 'decisions inherent in servicing'" (NYSCEF 939, Cobalt's MOL [mot. seq. no. 031] at 23 n 3, quoting NYSCEF 984, SFAS 140 ¶¶ 35, 39.)

In pertinent part the CMA provides that the Collateral Manager shall exercise the Issuer's Control Rights and Voting Rights,

*"provided, that the Collateral Manager shall only exercise Control Rights and Voting Rights that qualify as 'servicing activities' under generally accepted accounting principles in the United States and the Collateral Manager shall not exercise any Control Rights or Voting Rights to the extent that the exercise thereof by the Collateral Manager would cause the Issuer to lose its status as a 'qualifying special purpose entity' under generally accepted accounting principles in the United States."* (NYSCEF 946, CMA § 1 [r].)

Under "Obligation of Collateral Manager," the CMA also states as follows:

*"The Collateral Manager further agrees not to take any action hereunder, pursuant to the Indenture or with respect to any Underlying Instrument that would be deemed not to be an exercise of servicing rights under paragraph 35 of the Statement of Financial Accounting Standards No. 140 ('SFAS 140') or otherwise cause the Issuer not to be treated as a qualifying special purpose entity under SFAS 140."* (*Id.* § 13 [a].)

The Indenture contains similar language, providing, in relevant part, that "[t]he Issuer . . . will not: . . .(xv) take any action that could cause the Issuer or Co-Issuer not to be treated as a qualifying special purpose entity under SFAS 140." (NYSCEF 827, Indenture § 7.11 [a] [xv].) Additionally, the Indenture defines "SFAS 140" as "Statement of Financial Accounting Standards No. 140, as promulgated and amended from time to time by the FASB." (*Id.* at 25.)

The Offering Memorandum ("OM") reiterates these provisions. (See NYSCEF 625, OM at 14-15, 55, 62, 73.)

Prior to 2009, to qualify as a QSPE pursuant to paragraph 35 of the SFAS 140, an entity's "permitted activities" had to be "significantly limited" and "entirely specified in the legal documents that established the SPE or created the beneficial interests in the transferred assets that it holds." (NYSCEF 984, SFAS 140 ¶ 35 [listing QSPE criteria].) A QSPE was permitted to hold "[s]ervicing rights related to financial assets that it holds" (*id.* ¶ 35 [c] [4]), provided that "holding the asset or instrument does not involve its holder in making decisions other than the decisions inherent in servicing" (*id.* ¶ 39).<sup>4</sup>

In June 2009, FASB issued Statement of Financial Accounting Standards No. 166 (SFAS 166), titled "Accounting for Transfers of Financial Assets an Amendment of FASB Statement No. 140." (NYSCEF 985, SFAS 166.) SFAS 166 states that it "amends FASB Statement No. 140" and "removes the concept of a qualifying special purpose entity from Statement 140." (*Id.* at FAS166-4.) Additionally, it provides that "[p]aragraphs 34 and 35, as amended, 36–39, 40, as amended, and 41–46, their related footnotes, and their related headings are deleted because of the removal of the qualifying special-purpose entity concept." (*Id.* at FAS166-24.) FASB explains that SFAS 166 "improves financial reporting by eliminating . . .the exceptions for qualifying special purpose entities from the consolidation guidance." (*Id.* at FAS166-3.) SFAS

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<sup>4</sup> SFAS 140 explains that "[s]ervicing of mortgage loans, credit card receivables, or other financial assets commonly includes, but is not limited to, collecting principal, interest, and escrow payments from borrowers; paying taxes and insurance from escrowed funds; monitoring delinquencies; executing foreclosure if necessary; temporarily investing funds pending distribution; remitting fees to guarantors, trustees, and others providing services; and accounting for and remitting principal and interest payments to the holders of beneficial interests in the financial assets. Servicing is inherent in all financial assets; it becomes a distinct asset or liability only when contractually separated from the underlying assets by sale or securitization of the assets with servicing retained or separate purchase or assumption of the servicing." (NYSCEF 984, SFAS 140 ¶ 61.)

166 became effective “as of the beginning of each reporting entity’s first annual reporting period that begins after November 15, 2009.” (*Id.* at FAS166- 44.)

Here, pursuant to the plain language of the CMA and Indenture, CWCI is obligated to: (1) limit its exercise of control rights to activities that qualify as servicing rights under paragraph 35 of SFAS 140; and (2) take no actions that would cause Cobalt not to be treated as a QSPE. (See NYSCEF 827, Indenture § 7.11 [a] [xv]; NYSCEF 946, CMA §§ 1 [r], 13 [a].) Upon the removal of the concept of QSPE and the deletion of paragraphs 35 and other related paragraphs from SFAS 140, no action taken by CWCI would breach these obligations. CWCI’s contention, that the issuance of SFAS 166 did not change the obligations of the parties to comply with the CMA and the Indenture, is contrary to the plain language of these agreements and CWCI’s own evidence of the parties’ intentions in forming Cobalt as a QSPE.

The Indenture makes clear that all references to “SFAS 140” are to the most current version of the statement. (See NYSCEF 827, Indenture at 25.) Additionally, the CMA and the Indenture are unambiguous: the parties intended for Cobalt to “be *treated*” as QSPE rather than simply maintain the appearance of one. (NYSCEF 827, Indenture §§ 6.01 [e], 6.19, 7.11 [a] [xv]; NYSCEF 946, CMA § 13 [a] [emphasis added].) While the parties may not have anticipated the elimination of the QSPE concept, this does not render the Indenture or the CMA ambiguous. (See *Greenfield*, 98 NY2d at 573.)

Nor is any ambiguity created by the parties’ retention of the QSPE provisions when amending the Indenture after the issuance of SFAS 166. (See NYSCEF 648, Redline of Indenture at 226, §7.11 [a] [xv].) The retention of the QSPE limitations following the issuance of SFAS 166 cannot serve as evidence of the parties’ intention to

retain the QSPE form, when they also retained the definition of SFAS 140 that incorporates amendments to the statement. (See NYSCEF 827, Indenture at 25 [defining SFAS 140 as “Statement of Financial Accounting Standards No. 140, as promulgated *and amended from time to time by the FASB*” (emphasis added)].) As the parties did not amend the definition of SFAS 140, the court will not rewrite the parties’ agreements for them. (See *ACE Sec. Corp.*, 25 NY3d at 597; see also *Reiss*, 97 NY2d at 199.)<sup>5</sup>

Even assuming there was some ambiguity on the issue, CW’s own evidence demonstrates that Cobalt was created as a QSPE to achieve specific accounting purposes. It repeatedly emphasizes that “Cobalt, as Issuer, was structured by Cadim and CWCI as a QSPE to avoid consolidation of the underlying CMBS assets held by the CDO onto Cadim’s books.” (NYSCEF 936, CW’s MOL [mot. seq. no. 027] at 12.) David Wolin, Skadden, Arps, Slate, Meagher & Flom LLP’s (Skadden) lead attorney working on the issuance of the Vr CDO who “drafted all of the offering and transactional documents for the Vr CDO” (NYSCEF 607, Wolin aff ¶ 6), explains that, in addition to the avoidance of US taxation, the “critically important factor[] that drove the structuring of the Vr CDO” was “ensuring that the Vr CDO conformed with FASB 140 so that the accounting result that Cadim wanted to achieve by re-securitizing its debt through the Vr CDO could in fact be achieved and not placed at risk going forward.” (*Id.* ¶ 9.) He states that the “multiple references to FASB 140 [were inserted] in the Vr CDO Documents” because “it was critical that the QSPE structure of the Issuer remained

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<sup>5</sup> Contrary to CWCI’s view of the matter (see NYSCEF 1118, CW’s MOL in Opp [mot. seq. no. 031] at 38 n 27), SFAS 166 is unequivocally “an Amendment of FASB Statement No. 140.” (NYSCEF 985, SFAS 166 at FAS166-1.)

intact and was not put at any risk.” (*Id.* ¶ 10.) If the issuer failed to maintain its QSPE status though the term of the Vr CDO, Wolin explains, then “there would be a serious risk that the sale treatment of FASB 140 would be lost and the assets of the Issuer would revert back to the transferor (Cadim) on its balance sheet, causing significant financial harm.” (*Id.* ¶ 12.) Charles Spetka, who was President of CWCI and CWCA at the time the Vr CDO was created, states that “CWCI and Cadim worked with [Skadden] and Deloitte to structure and document the Vr CDO” and that he “ha[s] personal knowledge about [the CDO’s] purpose and intent, as well as its operation from 2007 until 2013 when [he] left CW.” (NYSCEF 605, Spetka affirmation, ¶¶ 2, 3, 10. ) Spetka confirms that “[a]voiding consolidation of the Vr CDO on Cadim’s financial statements was a driving force behind the structure of the Vr CDO, which was accomplished by forming the Issuer as a qualified special purpose entity.” (*Id.* ¶ 10; see also NYSCEF 894, COBALT Vr Transaction Update at CW0523157 [stating “Cobalt Vr will be structured as a QSPE to achieve off balance sheet treatment for accounting purposes.”].) Once SFAS 166 was issued, the rationale for maintaining QSPE status no longer existed. (See NYSCEF 876, Jeffrey Ellis tr at 225:14-22 [explaining that after SFAS 166 removed the concept of QSPE from SFAS 140 and “for purposes of applying US GAAP, . . . the consolidation analysis wouldn’t recognize a QSPE”].) CW fails to offer anything to support a reasonable expectation of why Cobalt would continue to function as a QSPE once the concepts was eliminated and offered no accounting benefits.

To the extent that CW contends that investors understood QSPE to be a proxy for a static CDO and would expect such a fundamental change to the Vr CDO structure

to come in the form of amendments to the CMA and the Indenture pursuant to the provided mechanisms (see NYSCEF 946, CMA § 18 [d]; NYSCEF 827, Indenture § 8.02), this ignores the fact that the Vr CDO documents incorporate amendments to SFAS 140. (See *Ashwood Capital, Inc.*, 99 AD3d at 6 [stating that “a court looks to the objective meaning of contractual language, not to the parties' individual subjective understanding of it.”].) The court addresses CW’s remaining arguments concerning the static nature of the Vr CDO separately below.

Lastly, to the extent that CWCI offers extensive expert testimony on how the CMA and Indenture should be interpreted and the impact of SFAS 166 (see NYSCEF 713, Ellis Corrected Expert Rep ¶¶ 55, 85; NYSCEF 917, Ellis Rebuttal Expert Rep ¶¶ 14-16; NYSCEF 740, Richard Marin tr 347:1-17, 351:7-357:9; NYSCEF 932 Marin Rebuttal Expert Rep ¶¶ 9-10; NYSCEF 916, Dolan Rebuttal Expert Rep ¶¶ 6, 9, 15-18), “expert witnesses should not be called to offer opinion as to the legal obligations of parties under a contract,” as that is an issue for the court. (*Good Hill Master Fund L.P. v Deutsche Bank AG*, 146 AD3d 632, 637 [1st Dept 2017] [internal quotation marks and citations omitted].)

Having determined that upon the “remov[al] [of] the concept of a qualifying special purpose entity from Statement 140” (NYSCEF 985, SFAS 166 at FAS166-4) and the deletion of the attendant paragraphs setting forth the criteria for QSPE status (*id.* at FAS166-24), there was no activity that would not be deemed to be an exercise of servicing rights under paragraph 35 of SFAS 140 or that would cause Cobalt not to be treated as a QSPE under SFAS 140, the court does not address whether negotiating a

fee-sharing agreement would have qualified as permitted servicing activity under the pre-2009 SFAS 140.

Accordingly, to the extent that defendants contend that they are entitled to summary judgment dismissing the first cause of action based on the provisions of the CMA and the Indenture requiring CWCI to comply with FSAS 140, the motion is denied.

#### **D. Taxation**

CW contends that under the Indenture and the CMA, the Issuer is prohibited from engaging in activities that would subject it to U.S. taxes. According to defendants, fee-sharing created a material risk that Cobalt would become subject to taxation in three discreet ways. First, the act of negotiating fee-sharing agreements itself ran a material risk of exposing Cobalt to a finding that it was conducting a U.S. trade or business (USTB), subjecting it to U.S. taxation. Second, Cobalt could be viewed as engaged in USTB through CWCA's activities because CWCI's exercise of control over CWCA, through threat of termination, together with its oversight of CWCA as CCR and their common ownership, could have given rise to an implied agency relationship. Finally, CWCI argues that event if fee-sharing did not result in income effectively connected to USTB, the income from fee-sharing would have been subject to an income tax on foreign companies that receive certain types of U.S. source passive income known as "FDAP" (fixed, determinable, annual or periodic) income. CW adds that CWCI could not have risked negotiating a fee-sharing agreement because, as a condition precedent to the issuance of the Notes, Cobalt delivered to the Trustee an opinion from Skadden (the Skadden Tax Opinion), stating that Cobalt would not be subject to USTB. (See NYSCEF 827, Indenture §§ 3.01 [c], 7.09 [d]; NYSCE 990, Skadden Tax Opinion.) CW

explains that in the “will-level opinion setting imposed here by the Skadden Tax Opinion, there must be primary affirmative authority stating that CWCI can take a particular action without creating a risk of imputing USTB to Cobalt.” (NYSCEF 1118, CW’s MOL in Opp [mot. seq. no.031] at 47.) CW argues that, as there was no such authority for fee-sharing agreements under the circumstances, CWCI could not take the risk.

Cobalt responds that CW fails to identify the requisite considerable, continuous, and regular activity that fee-sharing would require of Cobalt that would lead to a finding of a USTB. Cobalt also challenges CW’s implied agency argument, as CWCI, in its capacity as CCR, does not have general control over the special servicer’s actions. Additionally, Cobalt argues that all the factors CW identifies as contributing to a finding of agency between Cobalt and CWCA—the ability to replace the special servicer, oversight powers and common ownership—existed at the time Skadden issued its opinion. As concerns the Skadden Tax Opinion, Cobalt contends that the opinion merely acknowledges that the Indenture and CMA “place certain restrictions on the Issuer’s and the Collateral Manager’s activities” (NYSCEF 990, Skadden Tax Opinion at 5) and that it does not specify any conduct that would be a violation of those provisions. To the extent that the fees collected would be subject to taxation as FDAP, Cobalt argues that the negative consequences of a withholding tax could have been remedied with gross-up payments (i.e. payments that cover the full amount of any such withholding tax on an after-tax basis). Alternatively, Cobalt argues, FDAP can be avoided through a fee discount or waiver agreement. Lastly, Cobalt contends that the claim that Cobalt could not accept income from special servicing fees fails to account for

Indenture's definitions of "Interest Proceeds" and "Principal Proceeds," each of which expressly includes income from fees.

The Indenture provides, in pertinent part, that the Issuer "will not . . . take any action or engage in any activity (directly or through the Collateral Manager or other agent) which would subject it to United States federal, state or local income tax."

(NYSCEF 827, Indenture § 7.11 [a] [xi].) The CMA contains a similar provision, requiring the Collateral Manger to

"use all commercially reasonable efforts to ensure that no action is taken by it, and shall not intentionally or with reckless disregard take any action, which the Collateral Manager knows or reasonably should know. . . (vi) would cause the Issuer to be treated as engaged in a United States trade or business for United States federal income tax purposes or would otherwise have a materially adverse United States federal or state income tax effect on the Issuer." (NYSCEF 946, CMA § 13 [a].)

There are two sets of tax rules that apply to foreign corporations investing in the United States. (See NYSCEF 989, Yale Expert Rep ¶ 45; NYSCEF 719, Mayo Expert Rep at 16.)

The first applies if a foreign corporation is engaged in USTB. If there is a USTB, then net income effectively connected with the USTB is subject to the same taxes as that of a U.S. corporation. (Internal Revenue Code [26 USC] § 882; see *also* NYSCEF 989, Yale Expert Rep ¶ 45; NYSCEF 719, Mayo Expert Rep at 16.) The Internal Revenue Code does not provide a comprehensive definition of USTB. Instead, it states that USTB "includes the performance of personal services within the United States at any time within the taxable year," but excludes a number of activities. (26 USC § 864 [b]). As relevant here, USTB does not include "[t]rading in stocks or securities for the taxpayer's own account, whether by the taxpayer or his employees or through a resident

broker, commission agent, custodian, or other agent, and whether or not any such employee or agent has discretionary authority to make decisions in effecting the transactions,” so long as the taxpayer is not “a dealer in stocks or securities” (the “Securities Trading Safe Harbor” or “STSH”). (26 USC § 864 [b] [2] [A] [ii].)

The Treasury Regulations explain that for purposes of the STSH, “a dealer in stocks or securities is a merchant of stocks or securities, with an established place of business, regularly engaged as a merchant in purchasing stocks or securities and selling them to customers with a view to the gains and profits that may be derived therefrom.” (26 CFR 1.864-2 [c] [2] [iv] [a].) The regulations clarify that “[p]ersons who buy and sell, or hold, stocks or securities for investment or speculation, irrespective of whether such buying or selling constitutes the carrying on of a trade or business, . . . are not dealers.” (*Id.*)

The regulations also state that “trading in stocks or securities” means “effecting of transactions in the United States in stocks or securities.” (26 CFR 1.864-2 [c] [1].) “Securities” is defined as “any note, bond, debenture, or other evidence of indebtedness, or any evidence of an interest in or right to subscribe to or purchase any of the foregoing.” (26 CFR 1.864-2 [c] [2] [i] [c] [2].) The regulation further explains that “the effecting of transactions in stocks or securities includes buying, selling (whether or not by entering into short sales), or trading in stocks, securities, or contracts or options to buy or sell stocks or securities, on margin or otherwise, for the account and risk of the taxpayer, and any other activity closely related thereto (such as obtaining credit for the purpose of effectuating such buying, selling, or trading).” (*Id.*)

Additionally, the regulations provide that “[t]he volume of stock of security transactions effected during the taxable year shall not be taken into account in determining under

this subparagraph whether the taxpayer is engaged in trade or business within the United States.” (*Id.*)

Whether a foreign person is engaged in USTB “requires an examination of the facts in each case.” (*Higgins v C.I.R.*, 312 US 212, 217 [1941].) The analysis can be summed up as follows:

“Regular and continuous activities directed at income or profit are, by definition, activities of a trade or business. If those activities are conducted in the United States and are outside the judicially created exception for investment and the statutory safe harbor for trading, then the activities are those of a U.S. trade or business.” (*Ya Global Invs., v Commissioner of Internal Revenue*, 161 TC 173, 200 [2023].)

The second set of rules applies to income received by a foreign corporation that is not effectively connected to USTB. Under this set of rules, a 30 percent withholding tax is applied on the gross amount “received from sources within the United States by a foreign corporation as –interest . . . , dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income,” i.e. FDAP. (26 USC § 881 [a] [1]; 26 CFR §1.881-2 [b] [1]; see *also* NYSCEF 989, Yale Expert Rep ¶¶ 46-47; NYSCEF 719, Mayo Expert Rep at 16, 27.) “Specific items of fixed or determinable annual or periodical income are enumerated in section 881 (a) (1) . . . , but other items of fixed or determinable annual or periodical gains, profits, or income are also subject to the tax.” (26 CFR §1.881-2 [b] [1].) The regulations further clarify when an FDAP payment is made.

“A payment is considered made to a person if that person realizes income whether or not such income results from an actual transfer of cash or other property. For example, realization of income from cancellation of debt results in a deemed payment. A payment is considered made when the amount would be includible in the income of the beneficial owner under the U.S. tax principles

governing the cash basis method of accounting. A payment is considered made whether it is made directly to the beneficial owner or to another person for the benefit of the beneficial owner (e.g., to the agent of the beneficial owner). Thus, a payment of income is considered made to a beneficial owner if it is paid in complete or partial satisfaction of the beneficial owner's debt to a creditor." (26 CFR § 1.1441-2 [e] [1].)

The Internal Revenue Code defines "gross income" broadly as "all income from whatever source derived" not otherwise excluded. (26 USC § 61 [a]; see *also Commissioner of Internal Revenue. v Glenshaw Glass Co.*, 348 US 426, 429-430 [1955].) Income is attributable to the taxpayer where there is "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." (*Glenshaw Glass Co.*, 348 US at 431.)

As a preliminary matter, to the extent that CW seeks to frame the feasibility of fee-sharing agreements as something that depends on the existence of primary authority to support a will-level tax opinion, this is not supported by the transaction documents.<sup>6</sup> While the issuance of the Notes was dependent on the delivery of the Skadden Tax Opinion to the Trustee (see NYSCEF 827, Indenture § 3.01 [c]) and Cobalt "agree[d] to comply in all material respects with all requirements applicable to it set forth in any Opinion of Counsel obtained pursuant to any provision of this Indenture" (*id.* §7.09 [d]), the Skadden Tax Opinion does not contain any such "requirements." It merely opines that Cobalt will not be treated as engaging in USTB, so long as it complies with the restrictions set forth in the transaction documents (i.e. the Indenture, the CMA, the OM, etc.), because it will be protected by the STSH. (See NYSCE 990,

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<sup>6</sup> It is undisputed that the Skadden Tax Opinion is a "will" level opinion, which indicates near certainty and is typically supported by primary authority. (See NYSCEF 719, Mayo Expert Rep at 20; NYSCEF 1060, Mayo Rebuttal Expert Rep at 3; NYSCEF 989, Yale Expert Rep ¶ 16; NYSCEF 749, Ethan Yale tr at 144:8-15.)

Skadden Tax Opinion at 3-6.) Thus, to the extent that Cobalt “may not engage in activities beyond those contemplated by the Skadden Tax Opinion” (NYSCEF 719, Mayo Expert Rep at 9), this is because of the limitations built into the Indenture and the CMA.

CW fails to demonstrate, prima facie, that fee-sharing would have resulted in USTB income. It is, nonetheless, entitled to summary judgment dismissing the fee-sharing claim to the extent such agreements would have resulted in income from FDAP.

First, CW fails to demonstrate that the mere negotiation of the fee-sharing agreements would have resulted in a finding that Cobalt was engaged in “[r]egular and continuous activities directed at income or profit.” (*YA Global Invs., LP*, 161 TC at 200.) None of the evidence CW cites—the report of its tax expert, Daniel Mayo, cases cited in Mayo’s report and the testimony of Cobalt’s expert—supports this conclusion.

Mayo explains that “[n]egotiation is a personal service that can give rise to a USTB under §864 (b), and it is considered a core lending activity in the context of loan originations, which is why many tax guidelines generally prohibit funds from negotiating the terms of a loan.” (NYSCEF 1060, Mayo Rebuttal Expert rep at 9-10). He cites to an article that interprets IRS guidelines to mean that “non-dealer lending activities are protected unless the foreigner interacts substantively with borrowers by soliciting and negotiating with them,” because “[t]he IRS appears to believe that soliciting and negotiating with borrowers is a personal service” and “[t]he regular performance of personal services within the United States generally is a U.S. trade or business.” (*Id.* at 9 n 18, citing Jason Schwartz & Alissa Kalinowski, *Rationalizing Lending Authorities*, Tax Notes Federal, Vol 172, No. 1, at 69 [July 5, 2021].) At no point does Mayo

address the fact that negotiating a fee-sharing agreement with CWCA would not involve any interactions with the borrower, much less substantive ones.

The tax cases that CW relies on as demonstrating that “negotiating instruments g[ives] rise to USTB” (NYSCEF 1118, CW’s MOL in Opp [mot. seq. no. 031] at 44, citing NYSCEF 719, Mayo Expert Rep at 17 n 61) involve extensive activities in the United States, either directly or through an agent, well beyond the proposed activity at issue here. Indeed, these cases indicate that courts look for activities that are “beyond the scope of mere ownership of property and the receipt of income,” activities that are “considerable, continuous, and regular.” (*De Amodio v Commissioner of Internal Revenue*, 34 TC 894, 906 [TC 1960], *affd* 299 F2d 623 [3d Cir 1962] [finding USTB where taxpayer negotiated leases, collected rent, and paid taxes and insurance through his agent]; *Lewenhaupt v Commissioner of Internal Revenue*, 20 TC 151, 163 [TC 1953], *affd* 221 F2d 227 [9th Cir 1955] [finding USTB where foreign individual’s agent managed and operated the petitioner’s real properties, which included “executing leases and renting the properties, collecting the rents, keeping books of account, supervising any necessary repairs to the properties, paying taxes and mortgage interest, insuring the properties, executing an option to purchase the [one] property, and executing the sale of [another] property”]; *Pinchot v Commissioner of Internal Revenue*, 113 F2d 718, 719 [2d Cir 1940] [finding that taxpayer, who through her agent managed real estate for profit, engaged in USTB because this “required regular and continuous activity of the kind which is commonly concerned with the employment of labor; the purchase of materials; the making of contracts; and many other things which come within the definition of business”]; *see also Continental Trading, Inc. v Commissioner of Internal*

*Revenue*, 265 F2d 40, 45 [9th Cir 1959] [finding that “isolated and noncontinuous” transactions that were “dictated not by a business objective but purely by a desire to save taxes,” not a USTB].)

CW claims that negotiating a fee-share agreement would involve the sort of regular and continuous activity that gives rise to USTB, because CWCI would have to:

“at a bare minimum, (1) evaluate whether and how to pursue these agreements; (2) approach the special servicer and successfully demand a fee share agreement; (3) negotiate the terms of each bespoke fee share agreement with the special servicer; (4) document those terms in a written agreement; and (5) ensure that the special servicer complied with the agreements.” (NYSCEF 1118, CW’s MOL in Opp [mot. seq. no. 031] at 44; see also NYSCEF 991, Daniel Mayo tr at 190:3-192:9, 295:3-299:9 [testifying that even negotiating a single fee-share agreement on behalf of one trust could give rise to USTB because of the solicitation, negotiation and on-going monitoring involved].)

CW argues that these activities, undertaken across 31 CMBS trusts where CWCI was a CCR, would have required significant work and would have run a material risk of constituting USTB. (See NYSCEF 1060, Mayo Rebuttal Expert Rep at 9.) However, CW never explains how these activities would be substantively different from CWCI’s existing responsibilities as Collateral Manager. (See NYSCEF 946, CMA §§ 1, 13; see also NYSCEF 637, C30 PSA § 6.11 [enumerating actions the special servicer may not take upon CCR’s written objection and providing that the CCR may “direct the Special Servicer to take, or to refrain from taking, such other actions as the Controlling Class Representative may deem advisable”].)

Lastly, CW claims that “Cobalt’s own tax expert agreed” that negotiating fee-sharing agreements would have resulted in USTB. (NYSCEF 1118, CW’s MOL in Opp [mot. seq. no. 031] at 44, citing NYSCEF 749, Ethan Yale tr at 224:20-225:1.) However, Cobalt’s expert made no such concession. He explained that “one [collateralized loan

obligation] going to its special servicer and asking for a fee-sharing arrangement would be not close to the threshold” for “considerable, continuous, and regular.” (NYSCEF 749, Ethan Yale tr at 225:1-14.) He further stated that Cobalt’s negotiation of 31 fee-sharing agreements had a low risk of involving it in USTB, which risk could be reduced to “de minimis” if a single agreement was used across the 31 trusts. (*Id.* at 280:13-20.)

Defendants next contend that leveraging CWCI’s power to appoint the special servicer to force CWCA to share servicing fees with Cobalt would cause taxing authorities to view CWCA as Cobalt’s agent. They argue that, as CWCA is engaged in USTB, this would cause Cobalt to be engaged in USTB through imputation of CWCA’s activities. According to Mayo, “[t]he special servicer could have been viewed as an agent of Issuer because of Issuer’s exertion of control over it by using the threat of termination to demand a share of its ongoing business income.” (NYSCEF 719, Mayo Expert Rep at 26.) He explains that “[s]uch control, along with common ownership and CWCI’s involvement in or oversight of the special servicers’ U.S. business activities as CCR, could have given rise to an implied agency relationship.” (*Id.*)

However, all of the factors that defendants contend would lead to imputation—Cobalt’s right to appoint and replace a special servicer and its right to direct and consent to actions of the special servicer, as well of CW’s common ownership—existed in 2007, when Cobalt’s tax counsel at Skadden determined that Cobalt “will not be subject to U.S. federal income tax on its net income.” (NYSCEF 990, Skadden Tax Opinion at 6; see *also id.* at 2 [stating that, “(i)n connection with rendering this opinion,” Skadden reviewed, among other things, the OM, the Indenture and the CMA]; see *also* NYSCEF 946, CMA §1 [r] [providing that CWCI will exercise the rights of CCR “to

terminate and/or appoint the special servicer or direct or consent to action of the special servicer”]; NYSCEF 625, OM at 61 [explaining that the Collateral Manage will exercise the CCR’s Control Rights].) All CW offers in support of its contention is speculation that Skadden did not seriously consider the possibility that CWCI would terminate its affiliate as special servicer. (See NYSCEF 1118, CW’s MOL in Opp [mot. seq. 031] at 46-47, 47 n 36; see also NYSCEF 991, Daniel Mayo tr at 127:12-131:11 [acknowledging that the OM describes CWCI exercising Control Rights on behalf of Cobalt and that Skadden considered the OM when it issued its opinion, but insisting that Skadden would have known that CWCI was not going to terminate its affiliate].)

Additionally, none of the authorities CW relies on support the contention that exercising Cobalt’s control rights to extract a share of the servicing fees would lead to a finding of agency.

CW points to *YA Global Invs., LP* (161 TC at 181-182), where the Tax Court concluded “[t]he distinction between an agency relationship and one of service provider and recipient turns not on the ability . . . [to] give interim instructions.” Interim instructions differ from the ability to set the parameters of the relationship between a service provider and a recipient, in that the principal can control its agent’s actions. (See *id.* at 182.) CW contends that there was “a material risk that the IRS would determine that CWCI’s fee sharing demands would constitute such ‘interim instructions,’ thereby imputing CWCA’s USTB activities to Cobalt.” (NYSCEF 1118, CW’s MOL in Opp [mot. seq. 031] at 45-46.) However, as CWCI would not be controlling the manner that CWCA performed its special servicer responsibilities, it is unclear how a demand for payment, even accompanied by a threat of termination, is evidence of agency. What

is more, while CWCI has some ability to direct and consent to CWCA's actions (see NYSCEF 946, CMA §1 [r]; NYSCEF 637, C30 PSA §§ 6.09, 6.11), CWCA acts "on behalf of the Trustee, for the benefit of the Certificateholders" and, in doing so, it must comply with the Servicing Standard, regardless of CWCI's instructions (NYSCEF 637, C30 PSA §§ 3.01 [a], 6.11 [a]; see *id.* at 80-81 [defining "Servicing Standard"].)

The authorities that CW's tax expert relies on to support his opinion that using CCR control rights to demand a share of CWCA's fees would lead to a finding of agency, are equally inapt. First, Mayo relies on "the leading case of *InverWorld, Inc. v. Commissioner*" (see NYSCEF 719, Mayo Expert Rep at 24 [discussing *InverWorld, Inc. v. Commissioner of Internal Revenue*, 71 TCM (CCH) 3231 (TC 1996)].) However, during deposition, Mayo admitted that none of the factors *InverWorld, Inc.* identifies as giving rise to agency are present in this case. (See NYSCEF 991, Daniel Mayo tr at 225:17-226:2.) Additionally, Mayo relies on two memoranda from the Office of Chief Counsel of the IRS. (See NYSCEF 719, Mayo Expert Rep at 26.) He claims that the first of these demonstrates that the "IRS took an expansive view of agency in what appears to be an attempt to crack down on strategies developed by offshore funds and lenders that use intermediaries to lend into the United States" (*id.* at 24); and the "IRS was ready to aggressively pursue cases where foreign entities were engaged in originating loans in the United States and trying to avoid being subject to taxation in the United States through the use of evasive tax planning strategies." (*id.* at 25). He does not explain how this is relevant to Cobalt, as none of the parties claim that Cobalt is a lender. Mayo does not draw any parallels between the facts considered in that memorandum and the court does not find any to be apparent. (See *id.* at 24-25; see

also Office of Chief Counsel IRS' Memorandum on *Lending in the United States by Foreign Persons Giving Rise to Effectively Connected Income*, No. AM2009-010 [September 22, 2009].) The second IRS memorandum that Mayo relies on also deals with a set of facts dissimilar to the ones in this action. (See NYSCEF 719, Mayo expert rep at 25-26; Office of Chief Counsel IRS' Memorandum on *Trade or Business Within the United States for Purposes of Sections 864(b) and 882*, No. 201501013 [September 5, 2014].) Moreover, this memorandum is entirely unhelpful for determining if CWCA would have been treated as Cobalt's agent, as agency was not in dispute. (See CCA 201501013 at 3, 12 [stating that, pursuant to a management agreement, "Fund appointed Fund Manager as Fund's agent and irrevocable attorney-in-fact" and that "Fund Manager, acting as Fund's agent, conducted all aspects of Fund's business," and, as such, those activities "were attributable to Fund for purposes of sections 864 (b) and 882"].)

For the foregoing reasons, to the extent that defendants contend that fee-sharing would have resulted in a finding of a USTB, which would subject Cobalt to U.S. taxes in violation of the Indenture, defendants fail to make a prima facie showing.

However, section 7.11(a)(xi) of the Indenture is not solely concerned with taxes on net income from a USTB, but also taxes on gross income from FDAP.<sup>7</sup> Cobalt does not claim otherwise. Tellingly, Cobalt's papers never quote the provision, interpret it, or

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<sup>7</sup> Notably, had the parties intended to ensure only that the Issuer was not "treated as engaged in a trade or business within the United States for U.S. federal income tax purposes or otherwise subject . . . to U.S. federal income tax on a *net income basis*," they knew how to do so. (NYSCEF 827, Indenture § 3.02 [b] [vii] [emphasis added]; see also *id.* at 13 [defining "Eligible Investment"].) The language in section 7.11(a)(xi) of the Indenture is, therefore, intentionally broader. (See *Quadrant Structured Prods. Co., Ltd.*, 23 NY3d at 560.)

explain why entering into fee-sharing agreements that result in FDAP income, requiring a United States withholding tax to be applied, would not violate section 7.11(a)(xi). (See *generally* NYCEF Doc Nos. 939, 1263, 1219.) Instead, Cobalt attempts to sidestep section 7.11(a)(xi) altogether.

First, Cobalt claims that a number of the Indenture's provisions expressly contemplate that Cobalt may incur a withholding tax subject to "gross-up" payment and that these provisions "directly contradict the idea that receipt of FDAP income would violate the Indenture." (See NYSCEF 1263, Cobalt's Reply MOL [mot. seq. no. 031] at 24.) All provisions that Cobalt cites are inapposite. The first requires that prior to the issuance of the Notes, co-Issuers provide a certificate pledging to the Trustee that the Collateral Debt Securities included in the Collateral meet certain criteria, including that

"it does not have a coupon or other payments that are subject to U.S. or foreign withholding tax, unless the issuer of such Collateral Debt Securities is required to make 'gross-up' payments pursuant to the related Underlying Instruments that cover the full amount of any such withholding tax on an after-tax basis (including any tax on such additional payments)." (NYSCEF 827, Indenture § 3.02 [b] [vii].)

The second provision that Cobalt cites is the definition of a "Withholding Tax Event" (*id.* at 28), which triggers a "Tax Redemption" (*id.* at 27). Under the "Tax Redemption" provision, "[i]f a Withholding Tax Event occurs, a Majority of the Preferred Shareholders may elect to direct the Issuer to redeem all of the Notes in whole" (NYSCEF 827, Indenture § 9.02), thereby "unwind[ing] the whole CDO transaction" (NYSCEF 719, Mayo Expert Rep at 27). In pertinent part, the Indenture defines a "Withholding Tax Event" to include the "withhold[ing] from any payment under any Collateral Debt Security to the Issuer for or on account of any tax for whatever reason," where the obligor is not required to make a gross-up payment to the Issuer "to ensure

that the net amount actually received by the Issuer . . . will equal the full amount that the Issuer would have received had no such deduction or withholding been required.” (NYSCEF 827, Indenture at 28.) Finally, Cobalt relies on the definition of “Eligible Investments,” which identifies five types of “obligations and securities” that may be included in the Collateral, provided that, among other things, “payments thereon are not subject to withholding taxes . . . unless the payor is required to make ‘gross-up’ payments that indemnify the Issuer for the full amount of such withholding taxes.” (*Id.* at 12-13; *see also id.*, Granting Clause at 1.) These provisions merely demonstrate that the possibility of withholding taxes was contemplated when the parties determined what could be included in the Collateral. As Cobalt does not claim that fee-sharing agreements constitute an Eligible Investment or a Collateral Debt Security,<sup>8</sup> these provisions do not conflict with the Indenture’s prohibition against the Issuer engaging in activities that would subject it to income tax. Put another way, the issue is not whether *any* FDAP income would violate the Indenture; the issue is whether Cobalt was permitted to take actions that would result in additional income that would be subject to withholding taxes. Pursuant to section 7.11 (a)(xi) of the Indenture, Cobalt was not.

To further its gross-up payment argument, Cobalt next points to a fee-sharing agreement between CWCA and another fund manager, where CWCA agreed to make gross-up payments to address FDAP concerns. Cobalt argues that “CW determined that it could enter into fee-sharing agreements with funds structured, like Cobalt, as

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<sup>8</sup> In fact, Cobalt’s expert explains that “the fee-sharing payment is not related to a ‘Collateral Debt Security’ . . . held by Cobalt. It is simply a payment to Cobalt of a portion of the special servicer’s fees received for the services it performed.” (NYSCEF 1065, Yale Rebuttal Expert Rep ¶ 50.)

foreign pass-through entities without triggering the dire tax and accounting consequences CWCI now claims prevented such agreements with Cobalt.” (NYSCEF 1219, Cobalt’s MOL in Opp [mot. seq. no. 027] at 25.) Specifically, in 2014, CW engaged in discussions with DW Investment Management LP (DW) regarding the appointment of CWCA as the special servicer for the funds DW managed in exchange for a share of CWCA’s special servicing fees. In these discussions, CW repeatedly voiced its concerns over withholding obligations on any fee-sharing payments to a foreign entity. (See NYSCEF 968, July 16, 2014 Email from CW to KPMG [seeking advice on withholding requirements]; NYCEF 988, October 22, 2014 Email from KPMG to CW [explaining why DW’s proposed characterizations of fee-sharing payments, which would potentially avoid withholding obligations, are inapplicable and that, “(g)iven the breadth of the definition of FDAP,” income from fee-sharing would likely be FDAP and payment would be U.S. sourced].) The fee-sharing agreement that Cobalt points to as the ultimate agreement reached (see NYSCEF 1219, Cobalt’s MOL in Opp [mot. seq. no. 027] at 25, citing NYSCEF 969; see *also* NYSCEF 989, Yale expert rep at 18 n 12, citing CW0570043, §7)<sup>9</sup> includes a provision that “if the withholding agent shall be required by applicable law. . . to deduct any withholding taxes from such payments,” he shall make the necessary deductions and make the payment to the relevant tax authority and the payment to the fund shall be increased to equal the “sum it would have received had no such deduction occurred.” (NYSCEF 969, 2015 Fee-Sharing

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<sup>9</sup> While Yale states that it was his “understand[ing]” that CWCA entered into fee-sharing agreement with DW’s funds and “did not withhold for FDAP, and agreed to increase its fee-share percentage if the income were determined to be subject to FDAP withholding” (NYSCEF 989, Yale expert rep at 18 n 12), nothing in the record supports the statement that CWCA “did not withhold for FDAP.”

Agreement Between CWCA and Redacted Fund ¶ 7.) As such, CWCA's dealings with DW do not advance Cobalt's position that FDAP income was not a matter of concern for CW. In any event, the relevance of that arrangement is dubious as there is nothing in the records about the U.S. tax restrictions imposed on the funds DW managed.

Ultimately, while a gross-up payment may have made Cobalt whole for any withholding tax imposed, it would not have changed the fact of its breach in incurring a tax liability.

Cobalt next points to the Indenture's definitions of "Interest Proceeds" and "Principal Proceeds" as contrary to defendants' position that Cobalt "could only accept principal and interest from the underlying CMBS Trusts and could not receive special servicer fees" without risk of subjecting itself to U.S. taxes. (NYSCEF 1219, Cobalt's MOL in Opp [mot. seq. no. 027] at 25.) This argument ignores the plain language of the Indenture. Neither definition refers to fees from servicing the underlying distressed loans owned by the CMBS Trusts.<sup>10</sup> Rather these definitions are concerned with fees that may be payable to the Issuer in connection with the Collateral Debt Securities, Eligible Investments and Impaired Securities (i.e. impaired Collateral Debt Securities) (see NYSCEF 827, Indenture at 16 [defining "Interest Proceeds" to include "all amendment and waiver fees, all late payment fees, all commitment fees and all other fees and commissions received during such Due Period *in connection with such Collateral Debt Securities and Eligible Investments*" (emphasis added)], at 21-22 [defining "Principal Proceeds" to include "all fees and commissions received during such Due Period *in connection with Impaired Securities* and the restructuring or default of

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<sup>10</sup> PSAs provide for special servicing fees. (See e.g. NYSCEF 637, C30 PSA § 3.11 [providing for "Servicing Compensation"].)

such Collateral Debt Securities and Eligible Investments. . .” (emphasis added)], at 15 [defining “Impaired Security”].) As such, the fees contemplated by these provisions have no relevance to the fee-sharing payments from a special servicer at issue here.

For the foregoing reasons, Cobalt’s broad, negative covenant, not to “take any action or engage in any activity (directly or through the Collateral Manager or other agent) which would subject it to United States federal, state or local income tax” (NYSCEF 827, Indenture § 7.11 [a] [xi]), unambiguously applies to *any* U.S. income taxes, including withholding taxes on gross income from FDAP.

Cobalt is silent as to whether income from a fee-sharing agreement would constitute FDAP. Its tax expert, Ethan Yale, only acknowledges that “some industry participants concluded that this type of income may be FDAP” to further his view that it would not be considered income effectively connected to a USTB. (NYSCEF 989, Yale Expert Rep at 18 n 12.) However, Cobalt admits that in the absence a USTB, a foreign corporation must pay a withholding tax on any income it receives from sources in the United States. (See *id.* ¶¶ 46-47.) Therefore, regardless of CW’s ability to demonstrate that fee-sharing would have involved Cobalt in a USTB, to the extent fee-sharing would have resulted in FDAP, this would have subjected Cobalt to U.S. income tax in violation of the Indenture. (See Indenture, 7.11 [a] [xi]) and CWCI’s obligations under the CMA (see NYSCEF 946, CMA §§ 1 [k], 13 [a] [vi].)<sup>11</sup>

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<sup>11</sup> Notably, CW’s tax expert also posits that “the imposition of U.S. withholding tax in excess of the 3% threshold would have allowed the equity holders to unwind the whole CDO transaction through a Tax Redemption, which would result in a multi-billion-dollar obligation for CWCI and Issuer.” (NYSCEF 719, Mayo Expert Rep at 28.) For the reasons set forth in Yale’s rebuttal expert report, the payment of a withholding tax on income from fee-sharing would not have been a Withholding Tax Event that could trigger a Tax Redemption. (See NYSCEF 1065, Yale Rebuttal Expert Rep ¶¶ 47-51.)

However, withholding on FDAP is required only to the extent there is gross income (see 26 CFR §1.881-2 [b] [1]) and Cobalt contends that income could have been avoided by negotiating a fee-waiver/reduction on the special servicer fees that CMBS trusts pay CWCA. Yale explains that this reduction would then be “paid dollar-for-dollar through the trust waterfall,” with the controlling class certificateholders benefiting under certain circumstances, with “more senior certificateholders . . . receiv[ing] the benefit of the fee waiver” in other instances and, assuming the benefits of the fee-waiver “reached the controlling class certificates at all,” where Cobalt did not hold 100 percent of the outstanding controlling class certificates, the benefit would be shared by all controlling class certificateholders, not just Cobalt. (NYSCEF 1065, Yale Rebuttal Expert Rep ¶ 59.) According to Yale, under this structure there is no income on which a withholding tax may be applied, because the only consideration provided by CWCA is a reduction in fees it charges the CMBS trusts and a reduction in price is not income. (*Id.*)

CW’s expert responds that regardless of how the fee-share is structured, it would still have been viewed as income for tax purposes because, “[t]he IRS and courts. . . take a substance over form approach to taxation and most likely would treat the fee waiver as a direct payment from the special servicer to the subordinate certificateholder, which . . . would have created a material risk of taxation.” (NYSCEF 719, Mayo Expert Rep at 31, see also *id.* at 31 n 104, citing 26 CFR 1.301-1 [h] [explaining that under IRS regulations, whether a corporation “distribute(s) \$20 of cash to its shareholder or . . . sell(s) property worth \$100 to its shareholder for \$80,” there was a “transfer of \$20 by

the corporation to the shareholder”].) Defendants do not elaborate further or provide any additional authority for this proposition.

While “[t]he Supreme Court has long held that substance rather than form determines tax consequences” (*Bank of N.Y. Mellon Corp. v Commissioner of Internal Revenue*, 801 F3d 104, 113 [2d Cir 2015] [internal quotation marks and citations omitted]), it is unclear how a fee-waiver agreement would be different only in form from a fee-sharing agreement. In a fee-sharing agreement, CWCA would be making a direct payment to Cobalt of a portion of its earned servicing fees. Under a fee-waiver arrangement, CWCA would merely forgo fees it is otherwise entitled to under its PSAs with the CMBS Trusts. This situation is not analogous to a forgiveness of debt or the corporation transferring property to its shareholder for less than its value. In those situations, there is “undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.” (*Glenshaw Glass Co.*, 348 US at 431.) None of that would be the case here, as any payment received by the CMBS Trusts is uncertain of ever benefiting Cobalt.

Moreover, CW’s claim that a fee-waiver agreement raises the same tax concerns as a fee-sharing agreement is belied by the record. Cobalt points to “a defaulted loan on a property known as Southdale Mall,” where the special servicer was C-III Asset Management LLC (“C-III”). (NYSCEF 939, Cobalt’s MOL [mot. seq. no. 031] at 15.) In that instance, in exchange for CWCI’s approval of the loan extension, C-III sent a portion of its servicing fees to CWCI in February 2012. (See NYSCEF 978, Email Thread Re Southdale Mall at CW0523307-09; NYSCEF 661, 2012 Email Thread Re Southdale Mall Fee at CW0523314.) This allegedly triggered internal concerns about

the permissibility of such income (NYSCEF 748, Daniel Warcholak tr at 228:13-19 [testifying that the fee “was reviewed internally by compliance, by our legal, and . . . the answer is you cannot insert foreign cash flows of things that would otherwise blow the tax status for this vehicle”]) and CWCI returned the fee to sender in March 2012 (see NYSCEF 661, 2012 Email Thread Re Southdale Mall Fee at CW0523312.) However, in an email dated May 11, 2012, C-III’s managing director informed CWCI that, although C-III was entitled to a monthly Workout Fee under the subject PSA because “[t]he approval by the Controlling Class Holder was conditioned upon the Borrower paying the Special Servicing Compensation associated with the restructure,” the borrower paid the modification fee, C-III “waived its right to receive a Workout Fee from the Trust,” and the borrower would pay the monthly Servicing Fee until the loan was returned to the Master Servicer. (NYSCEF 978, Email Thread Re Southdale Mall at CW0523306; see NYSCEF 951, Thomas Nolan tr at 234-237 [confirming that this was the arrangement ultimately reached].) Tom Nolan, CWCI’s Chief Credit Officer who also served as the CCR for the Vr CDO until 2014 (see NYSCEF 951, Thomas Nolan tr at 45:9-21, 316:18-21), was asked if this arrangement with C-III was impermissible or problematic in any way. He stated that “[t]he way it worked out, it was a better outcome to our client” (*id.* at 217:1-7) and that “[i]t enhanced the client” (*id.* at 238:5-12). As such, it appears that CWCI successfully negotiated a fee-waiver agreement on Cobalt’s behalf, without concerns about tax consequences.

In sum, CW demonstrates that if fee-sharing did not result in USTB, then the income from fee-sharing would be taxed as FDAP. In either case, this would have subjected Cobalt to U.S. income tax in violation of the Indenture and CWCI’s obligations

under the CMA. Therefore, to the extent the first cause of action is based on a direct fee-sharing arrangement between CWCA and Cobalt, CW's motion for summary judgment is granted and that portion of the action is dismissed. However, because CW fails to demonstrate that fee-waiver agreements would have the same tax consequences, that portion of the claim remains viable.<sup>12</sup>

#### **E. Static Nature of the Vr CDO**

CW insists that the static nature of the Vr CDO was not only essential to maintaining QSPE status and avoiding tax consequences, but that it meant that no new collateral could be added and that the only source of funds available to the Vr CDO for distribution to the Noteholders was the payments of principal and interest on the underlying CMBS bonds. CW claims that this was disclosed in all the marketing materials and that this was the expectation of institutional investors like PIMCO. CW argues that fee-sharing agreements, even agreements to waive or reduce fees, would constitute new collateral and so could not be added. In addition, CW contends that the static nature of the Vr CDO limited CWCI's role to administrative and monitoring functions.

Cobalt responds that the Indenture's definition of "Collateral" is broad enough to permit the inclusion fee-sharing agreements and the income from them. In addition,

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<sup>12</sup> The parties did not brief whether fee-waiver agreements are customary in the CMBS industry. The court notes that Cobalt will have to demonstrate this as part of its breach of contract claim at trial because, while defendants do not dispute that fee-sharing was prevalent in the CMBS industry, they do not concede that this form of fee-sharing was customary. (See *e.g.* NYSCEF 954, Nealon Expert Rep at 33 [stating that fee-waiver agreements are "extraordinarily rare and is not the custom and practice in the industry" and that "CWCA does not enter into fee share agreements that provide for a waiver of its special servicing fees"].)

Cobalt contends that the Indenture expressly contemplates Cobalt's receipt of fees related to its Collateral and, as such, income is included in the definitions of "Interest Proceeds" and "Principal Proceeds." In any event, Cobalt argues, while a static collateral portfolio may limit the collateral manager's ability to sell the CDO's CMBS bonds or to purchase new ones, it does not prevent the collateral manager from maximizing the value of the CMBS bonds under its management.

As discussed above, the fees included in "Interest Proceeds" and "Principal Proceeds" are concerned with fees that may be payable in connection with the Collateral Debt Securities and Eligible Investments and have no relationship to fees generated from servicing the underlying loans. However, while fee-sharing agreements are not expressly contemplated by the Indenture, nothing about the Vr CDO's static nature prevents Cobalt from entering such agreements.

The OM and other marketing materials for the Vr CDO provide that the Collateral will remain static (i.e. there will be no trading of the underlying securities), with "[p]ayments of interest on and principal of the Notes . . . [coming] solely from the proceeds of the Collateral in accordance with the Priority of Payments." (NYSCEF 625, OM at 10; see also NYSCEF 654, 2007 CDO Preliminary Summary Information Term Sheet at 1 [describing the Vr CDO as a "\$ 3.43 billion static commercial real estate repackaging of certain CMBS and CDO investments held by [Cassie]" and stating that there will be no ramp-up or reinvestment period, as "(t)he underlying collateral . . . will be static"]; NYSCEF 655, 2007 Cobalt Vr Marketing Pitchbook at 11 [stating that "COBALT Vr will be a fully funded, static pool with no discretionary trading."]; NYSCEF 638, 2007 Fitch Structured Credit Presale Report at 1, 3 [describing the "Deal Type" as

a “(s)tatic cash flow repackaging,” with no ramp up or reinvestment periods and stating that “(t)he payments on the Cobalt Vr notes will be made directly from distributions received on the underlying CMBS and CRE CDO securities”].) However, as a fee-waiver agreement would not alter the Vr CDO’s CMBS bond composition, it is unclear how negotiating fee-waiver agreements would subvert the expectations of investors. Moreover, the principal and interest payments on the underlying CMBS bonds would continue to be the sole source of income, CWCI would have simply acted to maximize that income by negotiating reduced servicing fees.

While it may be argued that a fee-waiver agreement would constitute additional Collateral (see NYSCEF 740, Richard Marin tr at 128:5-21, 130:8-132:6, 317:13-320:11; NYSCEF 727, Mark Buono tr at 409:16-410:20), CW does not point to any provision in the Indenture or the CMA that would be violated as a result. The definition of “Collateral” merely describes all the property in which Cobalt is granting the Trustee a security interest and is broad enough to encompass fee-sharing agreements and the income they generate. (See NYSCEF 827, Indenture at 2 [defining collateral to include “instruments” and “all proceeds of the foregoing”].)

Similarly, while the roles of the Issuer and the Collateral Manger are limited under the CMA and the Indenture, aside from the specific applicable provisions discussed elsewhere in this decision, nothing about the static nature of the Vr CDO prevents CWCI from entering a fee-waiver agreement on Cobalt’s behalf.

For the foregoing reasons, CW fails to demonstrate that the static nature of the Vr CDO requires summary judgment dismissal of the first cause of action for breach of contract.

## F. Additional Indenture Provisions

The parties dispute whether sections 7.09, 7.11(b) and 7.15 of the Indenture prohibit Cobalt from entering into fee-sharing agreements.

As concerns section 7.09, the Appellate Division, First Department, has already explained that this provision “prohibits Cobalt from ‘contract[ing] with other Persons . . . for the performance of actions or obligations to be performed by [Cobalt] under the indenture.’” (*CWCapital Invs. LLC*, 182 AD3d at 451.) Thus, where Cobalt is not contracting for the performance of *its* duties under the Indenture, there is no violation of section 7.09(b). (*Id.* [holding, in a related action, that Cobalt’s appointment of Carbolic as CCR did not violate section 7.09(b), because “Cobalt has no obligation under the indenture to perform the role of CCR”].) Here, because the fee-sharing agreement would not require the special servicer to perform any of Cobalt’s duties under the Indenture, it would not violate section 7.09(b).

Nor would a fee-sharing agreement violate section 7.15. CW’s contention that this section “merely recognizes” that “[a]fter [the] issuance [of the Notes and Preferred Shares], the Issuer’s role is essentially complete” (NYSCEF 1118, CW’s MOL in Opp [mot. seq. no. 031] at 51), ignores the plain language of the provision. The provision does not stop at: “Co-Issuers shall not engage in any business or activity other than issuing and selling the Notes pursuant to this Indenture.” Instead, the section goes on to describe the business that Cobalt is permitted to engage in with respect to the Collateral and this includes “activities which are necessary, required, or advisable” in connection with “owning, holding . . . and otherwise dealing with the Collateral Debt Securities.” (NYSCEF 827, Indenture § 7.15.) To the extent that defendants contend

that a fee-sharing agreement was not “advisable” because it would have led to ruinous tax or balance sheet consolidation issue in violation of sections 7.11(a)(xi) and (xv), these arguments have already been addressed. What is more, section 7.15 expressly provides that “Co-Issuers *shall be permitted to enter into any additional agreements* not expressly prohibited by Section 7.11 (a).” (NYSCEF 827, Indenture § 7.15 [emphasis added].) Except for sections 7.11 (a)(xi) and (xv), discussed above, CW does not point to any other subsections of 7.11(a) that would be violated.

Lastly, section 7.11(b) prohibits Cobalt from “enter[ing] into or engag[ing] in any business with respect to any part of the Collateral except as expressly permitted or required by this Indenture and the [CMA].” (Id. § 7.11 [b].) This provision would not be violated, as section 7.15 permits Cobalt to enter into agreements not prohibited by section 7.11(a). Nor does section 7.11(b) require that “entering into fee-sharing agreements” be expressly enumerated as a permitted activity, as the Indenture describes Cobalt’s permitted business activities in terms broad enough to encompass fee-sharing. (See *id.* § 7.15.)

For the foregoing reasons, these sections of the Indenture do not require dismissal of the first cause of action for breach of contract.

### **G. Industry Customs and Practice**

CW contends that the first cause of action must be dismissed because “the record developed in the case establishes that ***no CDO has ever accepted fee-sharing income.***” (NYSCEF 936, CW’s MOL [mot. seq. no. 027] at 33.) Specifically, CW points to the fact that no expert witnesses could identify a CDO that had fee-sharing agreements, and CWCI’s experiences managing other CDOs, including ones that had

been previously managed by other collateral managers, had never involved entering into fee-sharing agreements. CW claims that this is consistent with the practices of every CDO manager known to CWCI.

Cobalt responds that CWCI fails to identify any competent evidence that CDO collateral managers failed to obtain fee-sharing agreements for similarly situated commercial real estate. On the contrary, Cobalt argues, the evidence demonstrates that such fee-sharing occurred. Cobalt points to the fee-waiver CWCI obtained for Cobalt in connection with the Southdale Mall loan modification. It also points to evidence that CWCA shared a modification fee with another CDO issuer, RAIT Preferred Funding II Ltd. (RAIT). Lastly, Cobalt points to fee-sharing agreements (the Anthracite Agreements) between Midland, as special servicer, and BlackRock Financial Management Inc. (BlackRock), as Collateral Manager/Collateral Administrator for Anthracite CDO I Ltd., Anthracite CDO II Ltd., Anthracite CDO III Ltd., Anthracite 2004-HY1 Ltd., Anthracite 2005-HY2 Ltd., and Anthracite 2006-HY3 Ltd. (collectively, the Anthracite CDO Issuers).

Having decided that nothing in the CMA's standard-of-care requires the court to limit the scope of its review to the practices of CDO managers, whether other CDOs participated in fee-sharing is not dispositive of the claim. In any event, the evidence does not support CW's contention that "***no CDO has ever accepted fee-sharing income.***" (NYSCEF 936, CW's MOL [mot. seq. no. 027] at 33.)

CW's proffered industry evidence suffers from numerous deficiencies and does not demonstrate that CDO issuers did not engage in fee-sharing once fee sharing became prevalent. For example, CWCI points to the 26 CDOs that it manages (see

NYSCEF 675, 2015 CWCI Portfolio Management Policy and Procedures Guide [CWCI's Policy and Procedures] at CW0593817-18 [listing assets under management]), none of which fee-shared (see NYSCEF 748, Warcholak tr at 242:21-244:6.) CWCI emphasizes the CDOs that it acquired from Gramercy, G-Force and Sorin, as well as the six CREST CDOs that were managed by Structured Credit Partners as examples of CDOs that had been managed by third parties and also did not enter into fee-sharing agreements. (See *id.*; NYSCEF 675, CWCI's Policy and Procedures at CW0593816.) The Gramercy CDOs (GKKK 2005-1, GKK 2006-1, and GKK 2007-1) were acquired in 2013. (See NYSCEF 675, CWCI's Policy and Procedures at CW0593818-819; see also NYSCEF 1272, January 31, 2013 Business Wire Article.) It is unclear when CWCI took over management of the other CDOs. Testimony establishes only that these acquisitions occurred "through . . . 2013" (NYSCEF 748, Warcholak tr at 243:18–21) and CWCI's Policy and Procedures show assets under management starting in January 2012. As it is undisputed that fee-sharing did not become prevalent until 2011 or 2012 (see NYSCEF 954, Nealon Expert Rep at 30; NYSCEF 709, Berman Expert Rep ¶ 20), to the extent these CDOs were managed by third parties before fee-sharing became prevalent, their practices prove nothing. In addition, while CWCI states generally that "[t]hese B-Piece CDOs are overwhelmingly identical to [the Vr] CDO" (NYSCEF 1118, CW's MOL in Opp [mot. seq. no. 031] at 59), it offers no evidence that during the time that fee-sharing became prevalent, these CDOs were able to replace the special servicers for the underlying loans. In the absence of such evidence, the lack of fee-sharing agreements by these CDOs do not demonstrate that CDOs generally did not engage in fee-sharing.

Similar deficiencies are present in CW's evidence of the practice of LNR Partners, LLC (LNR), which had at least 6 CDOs. (See NYSCEF 741, Nealon tr at 72:4-21.) CW claims that LNR, as the collateral manager and CCR of the CDOs, never entered into a fee share agreement with a special servicer or received fee income. In support, defendants rely on the expert report of Thomas Nealon, former Vice-Chairman and Director of Legal Affairs for LNR. (NYSCEF 954, Nealon Expert Rep at 1.) Nealon explains how "LNR re-securitized its portfolio of B-pieces in a series of CDOs issued in the early 2000s," and how it "would sell the senior classes of notes in the CDOs and retain the bottom tranches." (*Id.* at 25.) Nealon explains that "LNR never entered into fee share agreements with the LNR CDOs for which it served as CCR." (*Id.* at 26.) However, Cobalt points out that at least two of LNR's CDOs expressly waived all control rights (see NYSCEF 1003, 2005 Indenture for LNR's CDO § 7.20; NYSCEF 1004, 2006 Indenture for LNR's CDO § 7.20) and that two others did not hold any material controlling class positions when fee-sharing agreements became prevalent, with one being liquidated by August 2011 following an event of default (see NYSCEF 1006, August 11, 2011 Fitch Ratings), and the other, according to Cobalt, losing four of its five control positions by December 2011 and the last one in May 2012 (see NYSCEF 1013, Berman Rebuttal Expert Rep ¶ 25 n 43.) Neither side provides details about the two remaining LNR CDOs. In any event, it appears that LNR did enter into fee-sharing agreements where there was a non-affiliated CCR, as "LNR routinely included provisions in its fee share agreements with the new CCR that specifically excluded loans where there was no right to replace LNR as special servicer by the new CCR." (NYSCEF 954, Nealon Expert Rep at 26-27.)

To demonstrate that Hyperion, “as the collateral manager and CCR of the CDOs [that it created,] never entered into a fee share agreement with a special servicer or received fee income” (NYSCEF 1118, CW’s MOL in Opp [mot. seq. no. 031] at 58), CW relies on the expert report of John Dolan. Dolan states that “while [he] was at Hyperion none of the CDOs that [he] managed had fee-share agreements, and during this time [he] never heard of any CDO receiving fee income from a special servicer.” (NYSCEF 711, Dolan Expert Rep ¶ 89.) However, he “served as Chief Investment Officer . . . of Hyperion . . . from 1998 to 2007” (*id.* ¶ 4), years before fee-sharing existed.

Similarly, to support the proposition that “GMAC as the collateral manager and CCR of the CDOs [that GMAC created] never entered into a fee share agreement with a special servicer or received fee income,” CW relies on the affirmation of Charles Spetka and deposition testimony of Thomas Nolan. (NYSCEF 1118, CW’s MOL in Opp [mot. seq. no. 031] at 58.) Spetka states that “during [his] tenure at GMAC Commercial Mortgage Corporation (‘GMAC’), . . . at no time was there any fee sharing with GMAC’s CDOs and GMAC never fired its affiliate special servicer.” (NYSCEF 605, Spetka aff ¶ 9.) However, Spetka “joined CW Financial Services in 2003. . . [and he] remained at CW until 2013, when [he] joined Fortress Investment Group,” where he remained until 2021. (*id.* ¶ 2.) As such his tenure at GMAC significantly predated the advent of fee-sharing and his statement about GMAC’s practices during his time there are irrelevant. Nolan also left GMAC for CW Financial Services in 2003. (See NYSCEF 951 Nolan at 39:2-13; see *also id.* at 36:14-39:1 [explaining that GMAC did not create CDOs while he was there].)

The court will not continue to delve into the deficiencies of CW's evidence, as, in any event, Cobalt presents evidence that CDOs did engage in fee-sharing.

First, Cobalt points to the fee-waiver obtained in connection with the Southdale Mall loan extension. CW argues that this does not serve as evidence of a fee-waiver, because the borrower paid the fee. This is a distinction without a difference. The CMBS trust, despite being contractually obligated to pay the fee, did not pay it because CWCI conditioned the approval of the loan extension "upon the Borrower paying all the Special Servicing Compensation associated with the restructure." (NYSCEF 978, Email Thread Re Southdale Mall at CW0523306.) Moreover, Nolan admitted, that this "was a better outcome" for Cobalt and that it "enhanced" Cobalt. (See NYSCEF 951, Nolan tr at 217:1-7, 238:5-12.)

Cobalt also presents evidence that CWCA shared a modification fee with RAIT in connection with a loan to purchase and develop a property known as One Congress Street (the One Congress Street Loan). The One Congress Street Loan was divided into two parts: a \$190,000,000 Note A held by the C30 Trust and a \$18,500,000 Note B held by RAIT. In 2013, CWCA negotiated a modification of the One Congress Street Loan. As consideration, the borrower paid a modification fee. (See NYSCEF 1061, RAIT's Amended Complaint in Unrelated Action [RAIT complaint] ¶¶ 6, 60; NYSCEF 1001, Notice of Modification.) The notice of the modification contains a summary of the terms and conditions and provides as follows concerning the "Modification Fee":

"Borrower shall pay Special Servicer a modification fee equal to 1.00% of the unpaid principal balance of the Loan, in an amount equal to \$2,085,000 (the '**Modification Fee**'). . . . Special Servicer shall pay Note B Lender \$185,000 of the Modification Fee . . . .The Modification Fee shall be in lieu of any workout or other special servicing fees of any kind or

nature whatsoever (collectively, the '**Special Servicing Charges**') now or hereafter due or payable in connection with the Loan Modification and no Special Servicing Charges will be assessed in connection with the Loan Modification." (NYSCEF 1001, Notice of Modification at 5/21 [NYSCEF pagination].)

CW insists that this is not evidence that CWCA waived and shared fees with RAIT. It contends that CWCA merely received its 1% modification fee as the special servicer on Note A, while RAIT received its proportionate 1% fee as the Note B Lender. However, this view of the transaction is not supported by the evidence before the court. Defendants mistakenly assume that CWCA was acting as special servicer for Note A only and that the borrower made a direct payment to RAIT, as the Note B lender. However, both Note A, as a "Mortgage Loan" held by the C30 Trust, and Note B, as a "Companion Loan" held by RAIT, are serviced and administered in accordance with [the C30 PSA]. (NYSCEF 637, C30 PSA, Preamble at 4-5; see *id.* at 3, § 1.01; NYSCEF 1001, Notice of Modification at 1 [stating that the RAIT is being notified of modification "in its capacity as Companion Holder of the One Congress Street Subordinate Companion Loan"].) As such, CWCA was entitled to the special servicing fees specified in the C30 PSA. (See NYSCEF 637, C30 PSA § 3.11 [c].) Indeed, RAIT acknowledges that it was obligated to compensate CWCA under the C30 PSA and that the Modification Fee was paid in lieu of that obligation. (See NYSCEF 1061, RAIT complaint ¶ 60 [stating that "(t)his modification fee was explicitly 'in lieu of any workout or special servicing fees of any kind or nature whatsoever' otherwise payable from RAIT to CWCapital under the Operative Agreements at that time or thereafter"].)

CW also contends that CWCA did not waive any fees, but merely accepted payment from the borrower instead of the CMBS Trusts. (NYSCEF 1118, CW's MOL in

Opp [mot. seq. no. 031] at 34 n 23.) As already explained, this is a distinction without a difference. To the extent CWCA does not require the CMBS Trusts to pay the fees, whether due to CWCA' waiver of the obligation or receipt of payment from another source, the CMBS Trusts receive a benefit.

Lastly,<sup>13</sup> Cobalt submits the Anthracite Agreements, which consist of a letter of agreement, dated February 11, 2011 (NYSCEF 1287, Letter of Agreement), and subsequent amendments to that agreement, dated April 1, 2014, July 9, 2014 and July 10, 2014 (see NYSCEF 1288, April 1, 2014 Letter of Agreement; NYSCEF 1289, July 9, 2014 Letter Agreement; NYSCEF 1311, July 10, 2014 Letter of Agreement.) The Anthracite Agreements state that: (1) the six Anthracite CDO Issuers “own[ed] the majority of the Controlling Class or the subordinate class of Certificates or similar certificates [of the underlying CMBS trusts] and so [were] the Directing Certificate Holder (‘DCH’) with the right and power to select or elect and appoint the Controlling Class Representative . . . under the related [CMBS] Pooling and Servicing Agreement”; (2) the Anthracite CDO Issuers appointed BlackRock “to act as [their] collateral manager or collateral administrator and to also act as the CCR under their respective PSAs with the right and power to exercise all of the rights of the [Anthracite CDO

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<sup>13</sup> Notably, Cobalt also purports to present evidence that CWCA shared fees generated by the auction of commercial real estate assets from multiple CMBS trusts in which the CDO issuer, ACAS CRE CDO 2007-1, Ltd. (ACAS), owned controlling class positions. However, as evidence that CWCA agreed to share fees with ACAS, Cobalt submits only a 24-page spreadsheet. It appears to be a record of sales from an online auction platform and one of the columns is labeled “ACAS Share of Buyer’s Premium.” However, Cobalt offers no explanation concerning the data presented, nor does it state when, by whom, or for what purpose this spreadsheet was created. It merely cites to the document and relies on the court to discern its probative value. (See NYSCEF 939, Cobalt’s MOL [mot. seq. no. 031] at 34, citing NYSCEF 1002 [CW0375699].) The court declines to do so.

Issuers], in [their] capacity as DCH, under the respective PSAs”; and (3) BlackRock, in its capacity as the collateral manager for the Anthracite CDO Issuers, entered into fee-sharing agreements with its affiliate special servicer, Midland, “[i]n connection with continuing the retention of Midland . . . as the current Special Servicer under the applicable PSA,” with “Midland agree[ing] to pay the [Anthracite CDO Issuers] a portion of its fees.” (NYSCEF 1287, February 11, 2011 Letter of Agreement at 1.)

To the extent that CW contends that the July 10, 2014 Amendment to the February 2011 fee-share shows that Midland agreed to share its fees with BlackRock, not the Anthracite CDOs, this is contrary to the plain language of the document, which provides in pertinent part that:

“BlackRock, Anthracite CDO and GE-C3 agree that all fees and compensation from Midland to which the parties are entitled pursuant the Fee Sharing Agreement shall be shared as follows: Thirty percent (30%) to GE-C3 and seventy percent (70%) to Anthracite CDO. The parties shall direct Midland to *disburse directly [to] GE-C3 and Anthracite CDO*, their respective percentages of the fees and compensation due pursuant to the Fee Sharing Agreement.” (NYSCEF 1311, July 10, 2014 Letter of Agreement at 3/5 [NYSCEF pagination] [emphasis added].)

CW’s additional submissions also fail to refute the existence of fee-sharing between Midland and the Anthracite CDO Issuers. First, CW claims that “BlackRock was sued by the Anthracite bankruptcy trustee for breach of fiduciary duty premised on allegations that BlackRock engaged in self-dealing and self-interested conduct by wrongly retaining fees from the structured vehicles that it managed including the Anthracite CDOs.” (NYSCEF 1316, CW’s MOL in Opp [mot. seq. no. 032] at 11, citing NYSCEF 1313, BlackRock Adversary Complaint.) Even assuming this characterization is true, it, at best, demonstrates that BlackRock wrongfully failed to remit payment to the

Anthracite CDO Issuers as required under the Anthracite Agreements. CW next claims that “BlackRock’s public securities filings with the SEC state that it retained fees.” (*Id.*, citing NYSCEF 1310, 2015 BlackRock Brochure for Form ADV at 40.) However, the document in question merely provides that “BlackRock Clients may have the opportunity to choose to engage . . . other commercial services of . . . another BlackRock Investment Adviser, other members of the BlackRock Group or a PNC Affiliate” and, in that case, “relevant BlackRock entities or PNC Affiliates will be entitled . . . to assess and retain fees and other amounts that they receive in connection with such products and services.” (NYSCEF 1310, 2015 BlackRock Brochure for Form ADV at 39-40.)

To the extent that defendants contend that the Anthracite CDOs may not be used to establish industry custom and practice (see NYSCEF 1316, CW’s MOL in Opp [mot. seq. no. 032] at 15-19), Cobalt does not seek to do so. It offers the Anthracite Agreements simply to refute defendants’ contention that CDOs do not engage in fee-sharing. (See NYSCEF 1327, Cobalt’s Reply MOL [mot. seq. no. 032] at 12.) Similarly, while the parties spend a great deal of time comparing and contrasting the structure of the Anthracite CDOs to the Vr CDO (see *id.* at 9-16 [arguing that the Anthracite CDOs had all of the same restrictions as the Vr CDO and yet were able to participate in fee-sharing]; NYSCEF 1316, CW’s MOL in Opp [mot. seq. No. 032] at 12-14 [arguing that the Anthracite CDO Issuers were qualified REIT subsidiaries and, as such, were not subject to the same tax and non-consolidation concerns as the Vr CDO]), as Cobalt does not offer the Anthracite Agreements to assist in contractual interpretation and neither side claims that reference to industry practice is necessary to interpret the CMA or the Indenture, these distinctions are of little significance here. Lastly, regardless of

their admissibility, the Anthracite Agreements are sufficient to raise an issue of fact as to whether CDOs engage in fee-sharing. (See *Long v Taida Orchids, Inc.*, 117 AD3d 624, 625 [1st Dept 2014] [“the court may consider the inadmissible evidence insofar as it is not the sole basis for plaintiff’s opposition to summary judgment” (citations omitted)]; 70 *Pinehurst Ave. LLC v RPN Mgt. Co., Inc.*, 123 AD3d 621, 621 [1st Dept 2014] [“we have long held that otherwise inadmissible evidence may be considered to *defeat* an application for summary judgment” (citation omitted)].)

Accordingly, defendants are not entitled to summary judgment dismissing the first cause of action for breach of contract on the ground that CDOs do not engage in fee-sharing.

#### **H. CWCA and CWCI’s Affiliation**

CW contends that the fee-sharing claim must be dismissed because when the CCR and the special servicer are affiliates, there is no rationale to share fees.

Cobalt responds that when the investors, like Cobalt and its noteholders, are unaffiliated with the special servicer, a fee-sharing agreement makes sense because the fees shared leave the special servicer’s corporate family and create an actual economic benefit for the certificateholder.

CW fails to demonstrate, *prima facie*, that “fee sharing is not done between affiliated entities such as CWCI and CWCA.” (NYSCEF 936, CW’s MOL [mot. seq. no. 027] at 39, NYSCEF 1118, CW’s MOL in Opp [mot. seq. no. 031] at 57 n 45.)

First, CW points to the testimony of Cobalt’s CMBS expert, Andrew Berman, stating that “if there is a complete unity of interest between the remaining CDO noteholder and the special servicer, then . . . whether there’s a fee share or not, it

wouldn't make a difference.” (NYSCEF 936, CW's MOL in Opp [mot. seq. no. 027] at 39, quoting NYSCEF 725 Berman tr at 183:6-11; NYSCEF 1118, CW's MOL in Opp [mot. seq. no. 031] at 57 [same].) Berman explains that, where there is complete unity of interest among the remaining certificateholders and the special servicer, all income flows to the same pocket. (See NYSCEF 725, Berman tr at 98:8- 99:2, 109:18-110.) CW, however, makes no attempt to demonstrate that such complete unity of interest existed during all relevant times (i.e. starting six years prior to commencement of this action on June 28, 2018. (See *CWCapital Cobalt VR Ltd.*, 195 AD3d at 20 [finding that the fee-sharing claim was not time-barred, but noting “that application of the continuing wrong doctrine only avails Cobalt of claims that arose within six years of the commencement of the action”].) Instead, CW claims that “Strategic, the affected noteholder, has never ‘request[ed] that CWCA share fees.’” (NYSCEF 936, CW's MOL [mot. seq. no. 027] at 39, quoting NYSCEF 606, Strategic aff ¶ 12.) While Strategic “owned the A-2 Notes until selling them in August 2016” and “indirectly owns CWCA” (NYSCEF 834, Jarcho Expert Rep ¶ 71; see also NYSCEF 606, Strategic aff ¶¶ 2-3, 8, 24), Strategic was not the sole remaining Noteholder during the relevant period (see NYSCEF 937, CW's Statement of Material Facts [mot. seq. no. 027] ¶ 211 [stating that “PIMCO and Och-Ziff previously owned the A-1 Notes in the Vr CDO from 2012 (for PIMCO) and 2009 (for Och-Ziff), which were fully paid off in April 2016, approximately four (4) months before the purchase of the A-2 Notes”]; NYSCEF 834, Jarcho Expert Rep ¶ 70 [explaining that “CWCI had a fiduciary duty to all the Noteholders, not just the A-2 Noteholders” and that, “in addition to PIMCO, the A-1 Notes were owned by different institutional investors, including: Goldman Sachs & Co., Depfa Bank plc, M.H.

Davidson & Co and affiliates, ChapelGate Credit Opportunity Master Fund Limited, and Five Mile,” with the A-1 Notes being paid off in April 2016].)

CW also contends that “[t]he retention of affiliate special servicers was common to CMBS CDOs of this vintage and a well-known industry practice observable in 77% of CMBS structures.” (NYSCEF 936, CW’s MOL [mot. seq. no. 027] at 31.) It is not clear that CW’s evidence supports this statement. The 77% figure is taken from Berman’s expert report (see *id.*, citing NYSCEF 709, Berman Expert Rep ¶ 43), quoting a 2012 article stating that “[t]hree firms, LNR, CWCAM, and C-III, dominate the legacy special servicing market and are named special servicer for 77% of the domestic [CMBS trusts] by outstanding balance.”). Berman makes no statement concerning the affiliation of these special servicers to the CMBS structures in question. (See *id.* ¶¶ 34-48.) The remainder of CW’s citations to the record (see NYSCEF 936, CW’s MOL [mot. seq. no. 027] at 31) largely discuss how the affiliation between the CCR and the special servicer developed from the power of B-piece buyers, which purchased the first-loss class of CMBS trusts and, as a result, “exerted enormous influence on lender underwriting behavior.” (NYSCEF 716, Lanigan Expert Rep ¶¶ 12-13 [explaining how the CMBS market develop and how B-piece buyers led to the emergence of the “concept of a ‘Directing Holder’ or CCR”]; see NYSCEF 954, Nealon Expert Rep at 24-25; NYSCEF 951, Nolan tr at 31:12-34:4.) While some of the citations support the proposition that affiliation between the CCR and the special servicer was not uncommon (see e.g. NYSCEF 725, Berman tr at 64:9-15; NYSCEF 708, Nealon Rebuttal Expert Rep at 1-2), even CW’s expert admits that “fee share agreements between special servicers and *third-party* CCRs had become common in the industry by 2011.” (NYSCEF 954, Nealon

Expert Rep at 30 [emphasis added].) Here, CWCI is not the CCR in its own right. It is acting as agent for the holder of the control rights, Cobalt. (See CMA § 1 [r].)<sup>14</sup> That Cobalt is a pass-through entity makes no difference. As already explained, the Noteholders were a diverse set of investors, with only Strategic having any affiliation to CWCI and CWCA.

Lastly, the inability of any witness to identify a single instance of a CDO collateral manager terminating an affiliated special servicer, does not demonstrate that fee-sharing did not occur. (See NYSCEF 936, CW's MOL [mot. seq. 027] at 31-32.) Moreover, Cobalt demonstrates that, where only the collateral manager and the special servicer are affiliated, and the control rights are held by another party, as was the case with the Anthracite Agreements, fee-sharing did occur. (See NYSCEF 1293, Anthracite CDO I's Offering Memo at 2, 16 [identifying BlackRock as the "Collateral Administrator" and Midland as the special servicer and disclosing that "Midland is under common control with the Collateral Administrator"]; NYSCEF 1294, Anthracite CDO II's Offering Memo at 2, 19 [same]; NYSCEF 1295, Anthracite CDO III's Offering Memo at 2, 20 [same]; NYSCEF 1296, Anthracite 2004-HY1's Offering Memo at 3, 12 [same]; NYSCEF 1297, Anthracite CRE CDO 2006-HY3's Offering Memo at 3, 30 [same]; NYSCEF Doc Nos. 1287, 1288, 1289, 1311, Anthracite Agreements.)

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<sup>14</sup> Notably, according to James Finkel, Cobalt's expert in CDOs, "CWCA told Fitch that 'its position [was] more akin to Midland as being a 3rd party servicer, unlike C-III and LNR who do own positions' in the controlling class of CMBS trusts for which they are appointed special servicer." (NYSCEF 1014, Finkel Rebuttal Expert Rep ¶ 51.) The court is unable to locate in the record the document that Finkle is quoting, as he cites only the Bates number. (See *id.* at 19 n 38.) As such, the court only notes this potential admission without drawing any conclusions.

Accordingly, CW is not entitled to summary judgment dismissal of the first cause of action for breach of contract based on CWCI and CWCA's affiliation.

### **I. CWCI's Duty to Noteholders to Retain CWCA as Special Servicer**

The parties next dispute whether CWCI had a duty to investors to retain CWCA as the special servicer.

CW fails to demonstrate that, as a matter of law, that CWCI had a duty to retain CWCA as the special servicer.

First, defendants contend that "[s]ince the A-1 Noteholders were fully repaid, the A-2 Noteholders' expectations inform CWCI's duty under the CMA." They argue that "A-2 Noteholder [Strategic] agreed at all relevant times not to terminate CWCA as special servicer and maintains to this day that it saw no basis for CWCA's termination." (NYSCEF 936, CW's MOL [mot. seq. no 027] at 31, citing NYSCEF 632, Securities Purchase Agreement between Cadim and Strategic § 7.2, and NYSCEF 606, Strategic aff ¶¶ 9, 13, 25-27.) While Strategic agreed, when purchasing the A-2 Notes, not to "direct, or join or acquiesce in any direction, to terminate or remove the related special servicer," (NYSCEF 632, Securities Purchase Agreement § 7.2), as already discussed, Strategic was not the sole Noteholder during the relevant period and, as CW's expert acknowledges, "CWCI had a fiduciary duty to all the Noteholders, not just the A-2 Noteholders." (NYSCEF 834, Jarcho Expert Rep ¶ 70.) CW also contends that, "had CWCI implemented a discretionary termination of CWCA, . . . [Strategic] would have been obligated to intervene to reinstate CWCA." (NYSCEF 936, CW's MOL [mot. seq. no. 027] at 31.) However, Strategic's contractual obligations are not at issue. CWCI had the ability to terminate CWCA pursuant to the transaction documents (NYSCEF

946, CMA § 1 [r]; see also NYSCEF 625, OM at 30, 61 [stating that the CCR's control rights include "the right to appoint and replace the special servicer"]) and its duty was to all of the Noteholders.

Next, CW argues that the Vr CDO marketing materials repeatedly stated that CWCA would be the special servicer and disclosed the affiliation between CWCA and CWCI. According to defendants, the relationship was also viewed as a deal strength—because of "CW's integrated platform" and CWCA's status as "best in class special servicer"—and, as a result, CWCI had a duty to investors to retain CWCA. (NYSCEF 936, CW's MOL [mot. seq. no. 027] at 32.) While CWCA's role was fully disclosed and may have been viewed as a deal strength (see NYSCEF 625, OM at 28, 30, 70-71; NYSCEF 638, 2007 Fitch PreSale Report at 2; NYSCEF 654, 2007 CDO Term Sheet at 1; NYSCEF 655, 2007 Pitchbook at 6-7, 12), nothing in these documents establishes that "Cobalt and each investor *agreed* to CWCA's position," such that had "CWCI unilaterally decided to terminate CWCA without cause (or even threaten to terminate CWCA to extract money). . . , CWCI would have breached its duties to the CDO Noteholders." (NYSCEF 936, CW's MOL [mot. seq. no. 027] at 14 [emphasis added].)

The OM merely discloses CWCA's role as special servicer and affiliation to CWCI and that this is a risk factor and a potential conflict of interest. (NYSCEF 625, OM at 28, 30.) While Cobalt acknowledges and consents to this conflict under section 8(b) of the CMA, this is "*provided, however*, that nothing contained in this Section 8 shall be construed as altering or limiting the duties of the Collateral Manager set forth in this Agreement or in the Indenture nor the requirement of any law, rule or regulation applicable to the Collateral Manager." (NYSCEF 946, CMA § 8.) Similarly, while the

CMA permits CWCI's affiliates to perform services for the CDO, including as special servicer, and to be paid for such services, this is "*provided*, that, with respect to such services, the Collateral Manager is not acting as an agent for the Issuer." (*Id.* § 8 [b] [ii].) Ultimately, nothing in the OM or the CMA requires CWCI to retain CWCA as a special servicer. Indeed, the OM and CMA make clear that CWCI retains the ability to "to terminate and/or appoint the special servicer or direct or consent to actions of the special servicer." (*Id.* § 1 [r]; see also NYSCEF 625, OM at 30, 61.) Thus, terminating CWCA would not have been "contrary to CWCI's contractual commitments to the Noteholders and to investor expectations." (NYSCEF 936, CW's MOL [mot. seq. no. 027] at 31.)

Lastly, Daniel Warcholak, CWCI's Managing Director (NYSCEF 748, Warcholak tr at 7:6-12, 53:3-13), explains that CWCI's "job is to maximize value to the clients" and that "one of the primary ways that [it] do[es] that . . . is [through] an integrated platform." (*Id.* at 134:9-15.) While this may have been the case at the deal's inception, CWCI had a "responsibility to act in Cobalt's best interest on an ongoing basis," as was "the purpose for which Cobalt retained CWCI to act as controlling class representative." (*CWCapital Cobalt VR Ltd.*, 195 AD3d at 20.) Thus, to the extent industry practices changed and the value of Cobalt's assets could have been maximized by leveraging CWCI's control rights to negotiation fee-waiver agreements with CWCA, CWCI had a duty to do so.

Accordingly, CW is not entitled to summary judgment dismissal of the first cause of action for breach of contract based on CWCI's duty to retain CWCA.

## J. Exculpatory Clause

CW contends that the first cause of action should be dismissed pursuant to the CMA's exculpatory clause, as there is no evidence that CWCI's failure to negotiate fee-sharing agreements with CWCA "constitut[es] bad faith, willful misconduct or gross negligence in the performance of, or reckless disregard of, the duties of the Collateral Manager [under the CMA] and under the terms of the Indenture." (NYSCEF 946, CMA § 12.) On the contrary, defendants argue, "[t]he evidence reflects careful, thoughtful, and deliberate conduct by CWCI that was informed by the advice of in-house counsel and compliance officers, complied with the CMA, and was consistent with CDO investor expectations." (NYSCEF 936, CW's MOL [mot. seq. no. 027] at 24-25.)

Cobalt responds that CWCI was aware that special servicers of CMBS trusts began fee-sharing in 2011 and that CWCA had a practice of entering into fee-sharing agreements with controlling class certificateholders. Cobalt points out that CWCI even negotiated a fee-waiver for Cobalt's benefit with an unaffiliated special servicer, C-III. Cobalt argues that it was relying on CWCI to protect its interests and that CWCI's conduct caused it significant losses. Cobalt also argues that CWCI's conduct violated its own policies and procedures and that CWCI's justifications for its actions are pretextual. As such, Cobalt argues, CWCI's conduct was willful or grossly negligent or, at the very least, this is an issue of fact.

"New York law generally enforces contractual provisions absolving a party from its own negligence." (*Colnaghi, USA v Jewelers Protection Servs., Ltd.*, 81 NY2d 821, 823 [1993] [citations omitted].) Here, CWCI can be held liable only to the extent that its "acts or omissions constituting bad faith, willful misconduct or gross negligence in the

performance of, or reckless disregard of, the duties of the Collateral Manager hereunder and under the terms of the Indenture.” (NYSCEF 946, CMA § 12.) Gross negligence “is conduct that evinces a reckless disregard for the rights of others or ‘smacks’ of intentional wrongdoing.” (*Colnaghi, USA*, 81 NY2d at 823-824 [citation omitted].) In the context of a limitation-of-liability provision, “willful misconduct” refers to “conduct similar in nature to the . . . ‘gross negligence’ with which it [is] joined.” (*MUFG Union Bank, N.A. v Axos Bank*, 196 AD3d 442, 444 [1st Dept 2021] [internal quotation marks and citation omitted].)

Here, CW attempts to demonstrate that CWCI acted in good faith when it concluded that Cobalt was not allowed to fee-share. It points to testimony of CWCI employees, stating that they did not believe fee-sharing was permitted because CWCI had an obligation to safeguard Cobalt’s QSPE status and to avoid tax consequences. (See e.g. NYSCEF 748, Warcholak tr at 227:11-229:6, 281:21-282:5 [discussing Southdale Mall and that it was determined that foreign cash flow could not go into the Vr CDO because it would “blow” the tax status and would not comply with SFAS 140]; NYSCEF 734, Iannarone tr at 315:10-317:9 [testifying that fee-sharing agreements would have blown tax status]; NYSCEF 730, Frank tr at 151:18-19 [stating that “CDO documents prevented the CDO from accepting fees”].) CW insists that the employees’ “understanding was backed up by their action” (NYSCEF 936, CW’s MOL [mot. seq. no. 027] at 36), referring to CWCI’s return of the Southdale Mall modification fee. According to CW, the feasibility of accepting the fee was duly considered after Warcholak learned that C-III would share the modification fee and queried if it was possible to “get the extension fee to the bonds?” (NYSCEF 659, 2011 Email Thread Re Southdale Mall.)

CW claims that “Wacholak consulted with CW in-house counsel Chaim Gottesman and compliance officer Jill Hyde” (NYSCEF 936, CW’s MOL [mot. seq. no. 027] at 36; see *also* NYSCEF 660, February 8, 2012 Meeting Invite [Gottesman inviting Nolan, Malysa, Warcholak, and Hyde to a 30 min meeting regarding Southdale Mall]; NYSCEF 658, February 13, 2012 Meeting Invite [Hyde inviting Gottesman, Warcholak, Nolan, and Malysa to a 30 minute “follow up on Southdale Mall”]; NYSCEF 669, Warcholak’s Invite Acceptance) and returned the fee to C-III (see NYSCEF 661, Email thread Re Southdale Mall Fee at CW0523312), after which “no other fee share agreement was ever considered” (NYSCEF 936, CW’s MOL [mot. seq. no. 027] at 37.)

Even assuming this is sufficient to meet CW’s burden (*cf Blue Water Envtl., Inc. v Inc. Vil. of Bayville, N.Y.*, 44 AD3d 807, 810 [2d Dept 2007] [stating that, “(o)n a motion for summary judgment, a defendant seeking to dismiss a cause of action to recover damages arising from a delay bears the initial burden of demonstrating prima facie that none of the exceptions to the [exculpatory ‘no claim for delay’ clause] are present” (citation omitted)]), Cobalt submits sufficient evidence to raise an issue of fact as to whether CWCI’s conduct was grossly negligent.

First, Cobalt points out that, following the return of the fee, CWCI conditioned the approval of the modification upon the borrower paying C-III’s servicing fees and C-III “waived its right to receive a Workout Fee from the Trust.” (NYSCEF 978, Email Thread Re Southdale Mall at CW0523306.) The CCR for the Vr CDO described this arrangement as beneficial for Cobalt. (See NYSCEF 951, Nolan tr 217:1-7; 238:5-12.) Nonetheless, Cobalt notes, CWCI did not investigate the possibility of obtaining a similar waiver from CWCA (see NYSCEF 748, Warcholak tr at 280:8-12, 282:14-284:2,

287:19-288:8, 289:5-19; NYSCEF 951, Nolan tr at 262:19-263:3, 268:4-18; NYSCEF 734, Iannarone tr at 350:5-351:8) and never requested that CWCA share its fees with Cobalt (see NYSCEF 730, Frank tr at 151:2-11; NYSCEF 951, Nolan tr at 241:5-243:9, 247:7-248:11; NYSCEF 748, Warcholak tr at 277:18-21).

What is more, Cobalt submits evidence that CWCA did fee share with other clients and that CWCI was aware of this. (See NYSCEF 734, Iannarone tr at 271:13-272:12, 277-278:6; 280:12-20; 283:11-21 [testifying about fee-sharing agreements that CWCA entered with one client]; NYSCEF 748, Warcholak tr 240:2-242:20 [stating that he knew that CWCA started fee-sharing because funds were asking for it]; NYSCEF 730, Frank tr at 18:17-19:1 [stating that, if a fee-share was requested by a client, it would be brought up at a regular senior management meeting headed by Iannarone and that he became aware of fee-sharing at these meeting].)

Additionally, Cobalt points out that CWCI's Policy and Procedures state that "CWCI seeks to maximize recovery for its clients by taking a proactive approach to managing its transactions," including "assesses[ing] CDO triggers and rights, monitor[ing] hedge agreements for opportunities, and evaluat[ing] possible investments to enhance value." (NYSCEF 675, CWCI's Policy and Procedures at CW0593814.) Should "CWCI . . . be called upon to make a decision in the context of where a Client is the holder of the controlling class in a CMBS transaction," CWCI's Policy and Procedures provides as follows:

"CWCI's policy is to act in accordance with any specific requirements of the relevant advisory agreement that may be in place and to comply with any requirement of the applicable transaction documents. Notwithstanding this policy, where CWCI acts as a proxy on behalf of its Clients, its policy is to exercise the proxy vote in the best interests of

the Client taking into consideration all relevant factors including, without limitation, acting in a manner that CWCI believes will maximize the economic benefits to the Client (taking into consideration the Client's investment objective and risk profile). In the unlikely event that CWCI believes that there is a potential conflict of interest between the interest of the Client and CWCI in connection with a proxy vote that it is exercising on behalf of a Client, CWCI will review the matter to ensure that the Client's interests are placed ahead of any interest that CWCI may have in connection with the vote." (*Id.* at CW0593937.)

Cobalt also points out that pursuant to CWCI's Policy and Procedures, the Controlling Class Representative Sub-Committee (CCR Subcommittee) is "responsible for exercising the rights of CWCI as controlling class representative to the extent that any class of CMBS . . . directly held by the CDOs is the 'controlling class' of the related CMBS series." (*Id.* at CW593825.) Among other things, CWCI's Policy and Procedures require the CCR Subcommittee to "independently determine" whether to grant consent to special servicer requests "with respect to the mortgage loans included in the related CMBS." (*Id.*) David Iannarone, who served as president of CWCI and CWCA from 2013 to 2019 (NYSCEF 734, Iannarone tr 70:15-72:22), was one of two members of the CCR Subcommittee. Ken Frank was the second member. (See NYSCEF 675, CWCI's Policy and Procedures at CW0593825.) CWCI's Policy and Procedures further provide that disputes between the two members are to be resolved by the full Management Committee, consisting of Iannarone, Frank, Warcholak, and Nolan. However, barring a timely objection from the other member, "the vote of one voting member shall be the act of the [CCR Subcommittee]." (*Id.*)

Cobalt claims that despite the fact that "every decision made by CWCI was either made by the same individual responsible for running CWCA, or someone who

answered to him” (NYSCEF 1263, Cobalt’s Reply MOL [mot. seq. no. 031] at 10), CWCI never reviewed the “potential conflict of interest between the interest of the Client and CWCI.” (NYSCEF 675, CWCI’s Policy and Procedures at CW0593937.) Indeed, it is undisputed that no one at CWCI saw that there was a conflict between Cobalt’s interests and CWCA’s (see NYSCEF 1260, CW’s Reply MOL [mot. seq. no. 027] at 7 [citing testimony of CWCI witnesses that they did not see a conflict].)<sup>15</sup>

CW contends that simply because a corporate officer holds roles at multiple entities does not demonstrate a conflict of interest and cannot be grounds for sustaining gross negligence. (See NYSCEF 1260, CW’s Reply MOL [mot. seq. no. 027] at 6-9.) While defendants are correct to point out that the Court of Appeals has found that holding positions in multiple entities “does not . . . alone suffice to render [a] transaction[] void,” the Court has also recognized that “[t]he dual position . . . making the unprejudiced exercise of judgment . . . more difficult, should lead the courts to scrutinize these transactions with care.” (*Everett v Phillips*, 288 NY 227, 236-37 [1942].) CW’s other cited case, in support of its proposition that dual positions are not enough to demonstrate a conflict of interest, serves it no better. There, the court held that where there was no suggestion that a director “possessed any decision-making authority or otherwise exerted any level of control,” “[t]he mere fact that [he] sat on the boards of two

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<sup>15</sup> Cobalt also claims that Iannarone’s presence on the CCR Subcommittee “violated CWCI’s policies and procedures which included specific procedures for addressing conflicts of interest that were never followed or adhered to.” (NYSCEF 1219, Cobalt’s MOL in Opp [mot. seq. no. 027] at 51, citing NYSCEF 675, CWCI’s Policy and Procedures at CW0593902.) However, Cobalt is citing to the “Code of Ethics” applicable to “all Personal Accounts of all Access Persons.” (*Id.*) An “Access Person” is defined as a CWCI employee “who in relation to Clients . . . has access to non-public information.” (*Id.* at CW0593915.) As such, this Ethic Code’s procedures for addressing conflicts are inapplicable to this case.

companies on opposite sides of a transaction [did] not establish that the transaction was self-interested.” (*In re Cred Inc.*, 650 BR 803, 831 [Bankr D Del 2023], *affd* 658 BR 783 [D Del 2024].) Here, Iannarone was President of CWCI and CWCA and sat on the CCR Subcommittee. While defendants claim that there is no evidence that CWCA was involved in any of CWCI’s decisions, they do not demonstrate otherwise. “Defendant[s] cannot meet [their] prima facie burden by pointing to perceived gaps in plaintiff’s proof.” (*Vazquez v 3M Co.*, 177 AD3d 428, 429 [1st Dept 2019] [affirming denial of motion for summary judgment to dismiss the punitive damages claim, where defendant argued that the plaintiff failed to “identified any evidence showing that (the defendant) engaged in the type of egregious conduct required to support an award of punitive damages.”].) Moreover, CWCI’s Policy and Procedures required CWCI to undertake a review of “potential conflict of interest,” not just actual ones. (NYSCEF 675, CWCI’s Policy and Procedures at CW0593937.)

To sum up, Cobalt presents evidence that: (1) CWCI obtained “a better outcome” that “enhanced” Cobalt in 2012 (NYSCEF 951, Nolan tr at 217:1-7, 238:5-12), when a non-affiliated special servicer was involved; (2) CWCI never considered the possibility of a similar arrangement with CWCA, even though CWCI knew that CWCA fee-shared and despite CWCI’s policy to “exercise the proxy vote in the best interests of the Client” and to “maximize the economic benefits to the Client” (NYSCEF 675, CWCI’s Policy and Procedures at CW0593937); and (3) individuals making decisions for CWCI were also involved in making decisions for CWCA and, contrary to CWCI’s policy, the potential conflict was never examined. Moreover, Cobalt claims that CWCA collected over \$800 million in fees (NYSCEF 979, Freed Second Corrected Expert Rep ¶ 45) and that the

failure to obtain a fee waiver agreement, assuming a share of “50% of all fees received by the special servicer during the time that Cobalt held the controlling class certificates, Cobalt would have received . . . a total of an additional \$173.0 million” (*id.* ¶ 62).

Viewing the evidence in the light most favorable to the nonmoving party (*Vega*, 18 NY3d at 503), this is sufficient to raise an issue of fact as to whether CWCI’s failure to obtain fee-sharing agreements was gross negligence. (See S.A. *De Obras y Servicios, COPASA v Bank of Nova Scotia*, 170 AD3d 468, 472-73 [1st Dept 2019] [finding an issue of fact as to whether the defendant’s conduct was grossly negligent based on evidence that the defendant disregarded its own policies]; *cf Tillage Commodities Fund, L.P. v SS&C Tech., Inc.*, 151 AD3d 607, 608 [1st Dept 2017] [sustain a breach of contract claim where the plaintiff sufficiently alleged that defendant’s conduct was grossly negligent “insofar as it failed to comply with basic cybersecurity precautions and actively disregarded its own policies as well as obvious red flags”]; *Internationale Nederlanden (U.S.) Capital Corp. v Bankers Trust Co.*, 261 AD2d 117, 122-23 [1st Dept 1999] [sustaining breach of contract claim based on allegations of gross negligence, where “minor errors of form could have drastic consequences,” the defendant “was well aware that millions of dollars were at stake” and “(t)he essence of the agreement . . . was that (the plaintiff) relied on (the defendant) to stand in (plaintiff’s) stead . . . and to protect (plaintiff’s) rights”]; see also *Elbayoumi v TD Bank, N.A.*, 185 AD3d 786, 788-789 [2d Dept 2020] [affirming denial of summary judgment where “(t)he evidence submitted by the bank did not eliminate triable issues of fact as to whether it was grossly negligent or committed willful misconduct”].)

## K. Damages Limitation

CW contends that it is entitled to summary judgment, because Cobalt seeks consequential damages, which are barred by section 12(a) of the CMA. CW argues that the damages sought are consequential because Cobalt is seeking to recover lost profits from collateral business arrangements, i.e. additional revenue that it could have obtained from fee-sharing agreements with CWCA, a non-party to the CMA. Additionally, as fee-sharing did not exist in 2007, CW contends that fee-sharing could not have been contemplated by the parties to the CMA and cannot be considered the essence of the contract. As such, CW insists, the damages Cobalt seeks do not flow directly from the breach.

Cobalt responds that its damages are direct and recoverable, because they will put Cobalt in the same position that it would have occupied had CWCI performed as promised—to maximize the value of Cobalt’s assets, consistent with the practices and procedures of CMBS managers of national standing—and they flow directly from CWCI’s breach. In any event, Cobalt argues, even if the damages are consequential, such damages are permitted given CWCI’s gross negligence. Finally, Cobalt argues that the question of whether the damages are consequential or direct should be reserved for trial.

Damages are either general or consequential, based on whether they “directly flow from the breach.” (*Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799, 805 [2014] [internal quotation marks and citation omitted].) “Lost profits may be either general or consequential damages, depending on whether the non-breaching party bargained for such profits, and they are the direct and immediate fruits of the contract.”

(*Id.* at 806 [internal quotation marks and citations omitted].) Consequential damages, which stem from “collateral business arrangements,” are recoverable only if “(1) it is demonstrated with certainty that the damages have been caused by the breach, (2) the extent of the loss is capable of proof with reasonable certainty, and (3) it is established that the damages were fairly within the contemplation of the parties.” (*Id.* [internal quotation marks and citations omitted].)

“The distinction between general and special contract damages is well defined but its application to specific contracts and controversies is usually more elusive.” (*Id.* at 805-806 [internal quotation marks and citation omitted]). Therefore, “a case-specific approach is appropriate, requiring a court “to look at the contract in its entirety to determine the probable consequences that will befall a non-breaching party.” (*IS Chrystie Mgt. LLC v ADP, LLC*, 205 AD3d 418, 419-20 [1st Dept 2022], quoting *Biotronik A.G.*, 22 NY3d at 808 n 5].)

Here, the CMA expressly excludes consequential damages. In pertinent part, the CMA provides that CWCI “shall have no liability” except for “acts or omissions constituting bad faith, willful misconduct or gross negligence.” (NYSCEF 946, CMA § 12 [a].) Section 12(a) also provides that “[t]he Issuer agrees that the Collateral Manager shall not be liable for any consequential, special, exemplary or punitive damages hereunder.” (*Id.*) If the latter sentence appeared on its own, an “exclusion for willful conduct or gross negligence [would] be implied.” (*IS Chrystie Mgt. LLC*, 205 AD3d at 419.) However, the limitation on damages appears in conjunction with the exculpatory clause. Read as a whole, section 12(a) provides that: (1) there can be no liability without gross negligence; and (2) that liability will not include consequential damages.

The public policy rule prohibiting parties from immunizing themselves against their own gross negligence, “applies only to exculpatory clauses or provisions that limit liability to a nominal sum. The rule does not apply to contractual limitations on remedies that do not immunize the breaching party from liability for its conduct.” (*Matter of Part 60 Put-Back Litig.*, 36 NY3d 342, 349 [2020].) As section 12(a) neither exculpates gross negligence nor limits recovery to nominal damages, Cobalt “cannot render it unenforceable through allegations of gross negligence.” (*Id.*) Thus, consequential damages are not available under the CMA.

Defendants’ contention—that Cobalt seeks losses for collateral business arrangements, because CWCA is not a party to the CMA—misunderstands the key distinction between general and consequential damages. It is not the case that “lost . . . profits can never be general damages simply because they involve a third-party transaction.” (*Biotronik A.G.*, 22 NY3d at 808.) Rather, the distinction focuses on the “essence of the contract” and whether “lost profits resulting from a breach would be the natural and probable consequence of that breach.” (*Id.* at 808-09 [internal quotation marks and citations omitted] [concluding that lost profits were “the natural and probable consequence” of the breach, because “the very essence of the contract” was based on the understanding that plaintiff would resell defendant’s goods].) Here, the essence of the CMA is that CWCI will undertake various duties on Cobalt’s behalf, including exercising Cobalt’s control rights “in a manner consistent with the practices and procedures then in effect followed by reasonable and prudent institutional managers of national standing.” (NYSCEF 946, CMA § 1.) To the extent these practices included negotiating fee-waiver agreements, the damages Cobalt seeks are the natural and

probable consequence of CWCI's breach. (see *Latham Land I, LLC v TGI Friday's, Inc.*, 96 AD3d 1327, 1332 [3d Dept 2012] [finding that plaintiff sought to recover direct damages, because "the loss asserted . . . (was) the very essence of the contract between the parties—i.e., the diminution in value of the actual property defendant promised to improve and lease" (tiation omitted)].)

To the extent CW contends that because the parties could not have contemplated fee-sharing at the time they entered the CMA, fee-sharing cannot be considered "the essence of the contract," this ignores that CWCI had a "responsibility to act in Cobalt's best interest on an ongoing basis" (*CWCapital Cobalt VR Ltd.*, 195 AD3d at 20) and to do so "in a manner consistent with the practices and procedures *then in effect.*" (NYSCEF 946, CMA § 1 [emphasis added].) As such, it is no defense that industry practices changed.

Accordingly, CW is not entitled to summary judgment dismissal of the first cause of action for breach of contract based on the CMA's prohibition on consequential damages. However, it is not clear that fee-waiver agreements were an industry standard (see *supra* at 48 n 12.) As such, whether the damages sought constitute actual of consequential damages is reserved for trial.

#### **L. Appraisal Reduction**

To the extent that Cobalt's fee-sharing claim seeks to recover a portion of the fees CWCA earned in connection with Stuy Town, CW contends that it is entitled to summary judgment dismissing that portion of the claim for an additional reason. CW argues that, as of November 2010, appraisal reductions in the C30 Trust eliminated Cobalt's "Voting Rights," without which the CCR could not replace CWCA as the special

servicer under the C30 PSA. CW reasons that because Cobalt contends that CWCI's ability to replace the special servicer gave it the leverage to negotiate a fee-sharing agreement with CWCA, without this leverage, this portion of the claim fails. CW acknowledges that the Co-Lender Agreement provides that the special servicer can be removed by a majority of CCRs for the Stuy Town Trusts. However, CW contends that this does not conflict with the C30 PSA but merely adds another prerequisite for replacing the special servicer.

Cobalt responds that: (1) the Co-Lender Agreement controls over the C30 PSA on the issue of replacing the special servicer and that, pursuant to this agreement, Cobalt had the ability to replace CWCA; (2) even if the C30 PSA controlled, the language makes clear that because of the manner in which Voting Rights are allocated to the controlling class, Cobalt, as the holder of over 50% of the Controlling Class certificates, could appoint the special servicer; and (3) in practice, CWCA and other special servicers have entered into fee-sharing agreements with parties that purportedly lacked Voting Rights under identical or substantially similar PSA provisions. To the extent that Cobalt lost the ability to replace CWCA as special servicer for the Stuy Town Trusts because it could appoint the CCR for only two of the five trusts by April 2014, Cobalt contends that the fee-sharing claim is, nonetheless, viable because: (1) had CWCI done its job, a fee-sharing agreement would have been in place years earlier and this agreement would have continued until another holder could replace CWCA; and (2) Cobalt could have secured the cooperation of another CCR for the Stuy Town Trust, such as Prosir Capital Management LP, to replace CWCA.

A brief review of the relevant background is helpful here to fully understand these arguments.

In 2006, private equity investors financed the purchase of Stuy Town with two tiers of loans: (1) a \$3 billion senior loan (the Senior Loan) and (2) eleven mezzanine loans totaling \$1.4 billion. The Senior Loan was evidenced by six promissory notes (Note A-1 through Note A-6), which were split across five CMBS trusts, the Stuy Town Trusts (see NYSCEF 716, Lanigan Expert Rep ¶¶ 30, 31; NYSCEF 715, Greenspan Expert Rep at 17; NYSCEF 870, Co-Lender Agreement, recitals.)<sup>16</sup> Each of the Stuy Town Trusts had its own PSA, which governed the creation of the trust and laid out the rights and obligations of the depositor, master servicer, special servicer, and trustee over the pools of securitized mortgage loans in the trust. (See e.g. NYSCEF 637, C30 PSA.) The Stuy Town Trusts also entered into the Co-Lender Agreement to govern their rights and obligations with respect to the portions of the Senior Loan evidenced by their respective notes (the Loans). (See NYSCEF 870, Co-Lender Agreement.)

The Co-Lender Agreement designates the holder of Note A-1 as the “Lead Lender” and the holders of the remaining notes as the “Co-Lenders.” The Lead Lender and its “Master Servicer” and “Special Servicer” (together, Servicers) are granted the authority and responsibility of servicing and administering the Loans, consistent with terms of the Co-Lender Agreement and the “Pooling Agreement.” The Co-Lender Agreement defined “Servicers” and “Pooling Agreement” as the Lead Lender’s PSA and

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<sup>16</sup> The Stuy Town Trusts consisted of the C30 Trust, COBALT CMBS Commercial Mortgage Trust 2007-C2, ML-CFC Commercial Mortgage Trust 2007-5, Wachovia Bank Commercial Mortgage Trust 2007-C31, and ML-CFC Commercial Mortgage Trust 2007-6. (NYSCEF 715, Greenspan Expert Rep at 17 n 50.)

the servicers who are party to that PSA. C30 Trust was the Lead Lender. (See *id.* at 1-3, §§ 2, 4; NYSCEF 716, Lanigan Expert Rep ¶¶ 32-33; NYSCEF 715, Greenspan Expert Rep at 17-18; NYSCEF 190, AC at 49 n 42, 54 n 51.)

The Co-Lender Agreement provides that the Loans are to be serviced “as a single loan,” pursuant to the terms of the C30 PSA. (NYSCEF 870, Co-Lender Agreement § 2 [c] [(i)t is intended . . . that the Loans shall, consistent with and subject to the provisions of this Agreement and the Pooling Agreement, be serviced by the Servicers, as a single loan”]; see *id.* § 4 [(e)ach Co-Lender hereby confirms that it has been provided with the Pooling Agreement and acknowledged and agrees to be bound by all the terms of the Pooling Agreement”]; see *also* NYSCEF 637, C30 PSA at 4-5 [“each of the Companion Loans . . . will be serviced and administered in accordance with this Agreement]; at 3-4 [defining Companion Loans to include the Stuy Town Loans].) In the event of an inconsistency between the Co-Lender Agreement and the C30 PSA, both agreements provide that the terms of the Co-Lender Agreement will control. (NYSCEF 870, Co-Lender Agreement § 4; NYSCEF 637, C30 PSA § 3.01 [a].)

The Co-Lender Agreement also provides:

“Each Lender agrees that any decision to be made with respect to the Loans which requires the approval of the majority of holders of the controlling class of a Securitization (with respect to each Securitization, a ‘Controlling Class Representative’) shall be made by the Controlling Class Representative of the Securitization related to Note A-1 after consultation with the Controlling Class Representatives of each other Securitization. . . . Notwithstanding anything contained herein to the contrary, the Master Servicer or Special Servicer, on behalf of the Lead Lender shall not comply with any direction provided by the Controlling Class Representative of the Securitization related to Note A-1 if such direction would (i) require or cause the Master Servicer or Special Servicer, as applicable, to violate any applicable law, (ii) be inconsistent with the Servicing Standard (as defined in the Pooling Agreement), (iii) require or cause the Master Servicer or Special Servicer to violate the provisions of this Agreement or the Pooling Agreement relating to the REMIC provisions of the Code, (iv) require or

cause the Master Servicer or Special Servicer to violate any other provisions of this Agreement or the Pooling Agreement, (v) require or cause the Master Servicer or Special Servicer to violate the terms of the Loan, (vi) expose any mortgage loan seller or any party to the Pooling Agreement or their affiliates, officers, directors, employees or agents to any claim, suit or liability, or (vii) materially expand the scope of any servicer's responsibilities under the Pooling Agreement.

The Special Servicer may be removed as the Special Servicer for the Loans any time, with or without cause, but only with the consent of a majority of the Controlling Class Representatives. Any successor special servicer shall meet the requirements set forth in the Pooling Agreement. Any such appointment shall be subject to the receipt of Rating Agency Confirmations with respect to each Securitization." (NYSCEF 870, Co-Lender Agreement §2 [j].)

The C30 PSA provides, in pertinent part that:

"The Holder or Holders of the Certificates evidencing a majority of the Voting Rights allocated to the Controlling Class may at any time and from time to time designate a Person meeting the requirements set forth in Section 6.04 (including, without limitation, Rating Agency confirmation) to serve as Special Servicer hereunder and to replace any existing Special Servicer or any Special Servicer that has resigned or otherwise ceased to serve as Special Servicer. . . . Such Holder or Holders may also select a Controlling Class Representative that may advise and direct the Special Servicer and whose approval is required for certain actions, as described herein." (NYSCEF 637, C30 PSA § 6.09.)

The C30 PSA defines the "Controlling Class" as the class of certificates "(i) which bears the latest payment priority and (ii) the Class Principal Balance of which is greater than 25% of the Original Class Principal Balance thereof." (*Id.* at 32.) The C30 PSA also provides that "[t]he Holders . . . of Certificates representing more than 50% of the Class Principal Balance of the Controlling Class shall be entitled . . . to select . . . or to replace an existing Controlling Class Representative." (*Id.* § 3.25 [a].) Further, the C30 PSA defines "Voting Rights" as:

"The portion of the voting rights of all of the Certificates which is allocated to any Certificate. . . . Ninety-six percent (96%) of the Voting Rights shall be allocated among the Class A-1, Class A-2, Class A-3, Class A-PB, Class A-4, Class A-1A, Class A-M, Class A-MFL, Class A-J, Class B, Class C, Class D, Class E, Class F, Class G, Class H, Class J, Class K, Class L, Class M, Class N, Class O, Class

P and Class Q Certificates in proportion to the respective Class Principal Balances of their Certificates (which proportion shall be calculated as equal to the product of 96% and a fraction, the numerator of which is equal to the aggregate Certificate Balance of the related Class of Certificates (adjusted as provided in the immediately succeeding provisos) and the denominator of which is equal to the aggregate Certificate Balances of all Classes of Certificates referenced above, determined as of the Distribution Date immediately preceding such time); *provided* that solely for the purpose of determining the Voting Rights of the Classes of Sequential Pay Certificates, the aggregate Appraisal Reduction Amount (determined as set forth herein) shall be treated as Realized Losses with respect to the calculation of the Certificate Principal Balances thereof; *provided, further,* however, the aggregate Appraisal Reduction Amount shall not reduce the Class Principal Balance of any Class for purposes of determining the Controlling Class, the Controlling Class Representative or the Majority Subordinate Certificateholder. . . . Voting Rights allocated to a Class of Certificateholders shall be allocated among such Certificateholders in standard proportion to the Percentage Interests evidenced by their respective Certificates.” (*Id.* at 91.)

The Appraisal Reduction Amount reflects the extent to which a mortgage loan exceeds the value of the property securing the loan and approximates the future losses for the CMBS trust. (See *id.* at 9-10 [defining “Appraisal Reduction Amount”; see *also* NYSCEF 715, Greenspan Expert Rep at 12 [explaining how the Appraisal Reduction Amount is calculated].) The Appraisal Reduction Amount is allocated to the classes of certificates in reverse order of seniority, starting with the most junior, up to the amount of each class’s Class Principal Balance before applying it to the next most subordinate class. (NYSCEF 637, C30 PSA § 4.04 [d].)

In November 2009, in anticipation of a default, the Senior Loan was transferred to special servicing and CWCA, as the special servicer for the C30 Trust assumed special servicing responsibilities. (See NYSCEF 716, Lanigan Expert Rep ¶ 35; NYSCEF 715, Greenspan Expert Rep at 17-18.)

On November 12, 2010, an Appraisal Reduction Amount of \$403,905,120.30 was applied to the C30 Trust. At the time, Cobalt held the majority of Classes L through S,

which had an aggregate outstanding class principal balance of \$213,712,430.15.47. (See NYSCEF 715, Greenspan Expert Rep at 13; NYSCEF 827, Indenture at Sch. A-5; NYSCEF 869, C-30 Trust Distribution Date Statement at 2, 5 [showing that on Nov. 12, 2010, Class L through Class S had an aggregate outstanding principal balance of \$213,712,430.15 and that the Appraisal Reduction Amount was \$403,905,120.30].)

Until January 2014, CWCI was the CCR for three of the five Stuy Town Trusts—C30 Trust, COBALT CMBS Commercial Mortgage Trust 2007-C2, and ML-CFC Commercial Mortgage Trust, Series 2007-5. (See NYSCEF, Indenture at Sch. A-4, Sch. A-5; NYSCEF 993, ML-CFC Mortgage Trust, Series 2007- 5 Monthly Statement at 2 [showing that on Feb. 14, 2014, due to realized losses, control passed from Class H, held by Cobalt, to Class F].)

Based on the unambiguous provisions of the C30 PSA and the Co-Lender Agreement, CWCI's position as CCR for the majority of the Stuy Town Trusts did not give CWCI the ability to remove CWCA as the special servicer for the Loans and Cobalt lost the necessary Voting Rights to replace CWCA on November 12, 2010.

First, Cobalt's proposed reading of the C30 PSA—that the “holder or holders of over 50% of the Controlling Class certificates may appoint the special servicer,” because the definition of “Voting Rights” provides that “the Controlling Class is determined without consideration of appraisal reductions and, among the Controlling Class, the majority is determined by the percentage of certificates held” (NYSCEF 939, Cobalt's MOL [mot. seq. no. 031] at 29)—is contrary to the plain language of the agreement. The C30 PSA unambiguously creates different requirements for the appointment of a CCR and a special servicer. Whereas “[t]he Holders . . . of

Certificates representing more than 50% of the Class Principal Balance of the Controlling Class” designate the CCR (NYSCEF 637, C30 PSA § 3.25), only the holders of “Certificates evidencing majority of the Voting Rights allocated to the Controlling Class” may designate the special servicer (*id.* § 6.09). Cobalt’s proposed interpretation ignores this distinction and renders the “majority of the Voting Rights allocated to the Controlling Class” language superfluous. (*See Western & S. Life Ins. Co.*, 209 AD3d at 13.) Had the parties intended for the holders of the majority of the Controlling Class certificates to appoint the special servicer, they would have so provided. (*See Quadrant Structured Prods. Co., Ltd.*, 23 NY3d at 560.)

Moreover, the C30 PSA makes clear that appraisal reduction is to be treated as a realized loss in “determining the Voting Rights of the Classes of Sequential Pay Certificates” (i.e. the certificates held by Cobalt). (NYSCEF 637, C30 PSA at 91 [defining “Voting Rights”].) <sup>17</sup> Voting Rights are allocated to each of these classes “in proportion to the respective Class Principal Balances of their Certificates,” which is represented by a fraction, the numerator of which is “is equal to the aggregate Certificate Balance of the related Class of Certificates” and the denominator of which is “the aggregate Certificate Balances of all Classes of Certificates.” (*Id.*) However, the numerator must be adjusted downwards by treating “the aggregate Appraisal Reduction Amount . . . as Realized Losses with respect to the calculation of the Certificate Principal Balances.” (*Id.*) In this way, it is possible that the Appraisal Reduction

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<sup>17</sup> “Sequential Pay Certificates” are defined to include Classes L through S (NYSCEF 637, C30 PSA at 79), which were held by Cobalt (see NYSCEF 715, Greenspan Expert Rep at 12; NYSCEF 827, Indenture at Sch. A-5.)

Amount reduces the Certificate Principal Balances to zero, leaving a class without any Voting Rights.

To the extent that the definition of “Voting Rights” provides that “the aggregate Appraisal Reduction Amount shall not reduce the Class Principal Balance of any Class for purposes of *determining* the Controlling Class, the Controlling Class Representative or the Majority Subordinate Certificateholder” (*id.* [emphasis added]), contrary to Cobalt’s contention, this does not exempt the Controlling Class from reappraisal of its Class Principal Balance for purposes of determining its Voting Rights. The exemption from reappraisal only applies to “determining” the listed categories. Once the Controlling Class is determined, Voting Rights are allocated to the class pursuant to the formula provided. Thus, if the application of the Appraisal Reduction Amount to a class’s Class Principal Balance reduces the balance to zero, there are no Voting Rights to distribute to the class, regardless of its Controlling Class status.

Cobalt’s contention that to permit the controlling class to lose voting rights “would lead to the absurd result that no certificateholder could appoint or remove a special servicer, because no Controlling Class certificateholder would have Voting Rights and no certificateholder with Voting Rights would be in the Controlling Class” (NYSCEF 1263, Cobalt’s Reply MOL [mot. seq. no. 031] at 27), is likewise unpersuasive. First, while courts should eschew interpretations that “produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties” (*Greenwich Capital Fin. Prods., Inc.*, 74 AD3d at 415 [internal quotation marks and citation omitted]), that is not the case here. As already explained, the language is unambiguous. As such, it can hardly be contrary to the parties’ reasonable

expectations that the majority certificateholder of the Controlling Class cannot designate the special servicer. Nor is this outcome absurd or commercially unreasonable. That no holder of the Controlling Class certificates may have the necessary Voting Rights to replace the special servicer does not leave a distressed loan without a special servicer. The existing special servicer merely continues in its role and continues to be bound to act in accordance with the Servicing Standard. (See NYSCEF 637, C30 PSA § 3.01 [a], at 80-81 [defining “Servicing Standard”].) Moreover, the majority certificateholder of the Controlling Class retains the ability to appoint a CCR, which provides a check on the special servicer’s ability to take certain actions. Specifically, the C30 PSA provides that “the Special Servicer will not be permitted to take any of the [enumerated] actions,” if the CCR objects in writing. These actions include, among other things: (1) foreclosure upon a property; (2) modification of a material term of a mortgage loan; (3) sale of REO property; and (4) acceptance of substitute or additional collateral or release of material collateral. (*Id.* § 6.11 [a].) The CCR may also “direct the Special Servicer to take, or to refrain from taking, such other actions as the Controlling Class Representative may deem advisable or as to which provision is otherwise made in this Agreement.” (*Id.*) As CW points out, this “delineation between consulting and termination rights makes sense because [Appraisal Reduction Amount] adjustments reflect anticipated future changes to principal bond balances. Removing appointment rights from a bondholder class which will be ‘out of the money’ prevents control manipulation” (NYSCEF 1260, CW’s Reply MOL [mot. seq. no. 027] at 23 n 29), such as by retaining a special servicer who would avoid making necessary write-downs to maintain the existing controlling class. In any event, parties’ failure to specify the desired outcome for every eventuality does not

render the agreement ambiguous. (See *Reiss*, 97 NY2d at 199; *Greenfield*, 98 NY2d at 573.)

CW demonstrates that as of November 12, 2010, an Appraisal Reduction Amount for the C30 Trust eliminated the Voting Rights of Cobalt's certificates. (See NYSCEF 715, Greenspan Expert Rep at 13; NYSCEF 827, Indenture at Sch. A-5; NYSCEF 869, C-30 Trust Distribution Date Statement at 2, 5.) Accordingly, CWCI lost the ability to replace CWCA as special servicer (see NYSCEF 637, C30 PSA § 6.09) before fee-sharing became prevalent (see NYSCEF 954, Nealon Expert Rep at 30; NYSCEF 709, Berman Expert Rep ¶ 20).

Next, Cobalt contends that because the "Co-Lender Agreement plainly states that '[t]he Special Servicer may be removed as the Special Servicer for the Loans any time, with or without cause, but only with the consent of the majority of the Controlling Class Representatives'" and "does not reference the C30 PSA for appointing or removing the Special Servicer for the Loans[,] . . . only the Co-Lender Agreement governs appointment and removal of the special servicer for the Stuy Town loan." (NYSCEF 1263, Cobalt's Reply [mot. seq. no. 031] at 26, quoting NYSCEF 870, Co-Lender Agreement § 2 [j].) This proposed interpretation is contrary to the Co-Lender Agreement, when read as a whole and in conjunction with the C-30 PSA. (See *1471 Second Corp. v NAT of NY Corp.*, 162 AD3d 449, 450 [1st Dept 2018] ["agreements executed at substantially the same time and related to the same subject matter are regarded as contemporaneous writings and must be read together as one" (internal quotation marks and citations omitted)]; *Greenwich Capital Fin. Prods., Inc.*, 74 AD3d at 415 ["a contract should not be interpreted to produce a result that is absurd,

commercially unreasonable or contrary to the reasonable expectations of the parties” (internal quotation marks and citation omitted)].)

First, absent from this proposed interpretation is any method for the appointment of a new Special Servicer for the Loans. The C30 PSA makes provisions for the *replacement of the existing* special servicer when the controlling class has sufficient Voting Rights, pursuant to section 6.09. It also provides for the Trustee to fill the void should the special servicer resign or be terminated due to the occurrence of an Event of Default (see NYSCEF 637, C30 PSA §§ 6.04, 7.01, 7.02), “*provided, however*, in the case of a resigning or terminated Special Servicer, such appointment shall be subject to the rights of the Holders of Certificates evidencing a majority of the Voting Rights allocated to the Controlling Class to designate a successor pursuant to Section 6.09.” (*Id.* § 7.02.) The C30 PSA makes no provision for the appointment of a special servicer upon its removal by a vote of the Co-Lenders pursuant to the Co-Lender Agreement. In other words, under Cobalt’s interpretation, the \$3 billion-dollar Senior Loan is left without a special servicer.

Moreover, contrary to Cobalt’s contention that the Co-Lender Agreement makes no reference to the C30 PSA for appointment or removal of the Special Servicer, the Co-Lender Agreement provides, in the sentence immediately following the removal language, that the successor special servicer must meet the requirements of the C30 PSA. (See NYSCEF 870, Co-Lender Agreement § 2 [j] [(a)ny successor special servicer shall meet the requirements set forth in the Pooling Agreement”].)

CW’s proposed interpretation, to treat the Co-Lender Agreement’s termination language as an additional prerequisite for the removal of the special servicer, avoids the

commercially unreasonable result of the Loans going without a special servicer and is consistent with the parties' expectations that the Loans would be serviced as a single loan by the Lead Lender's special servicer pursuant to the C30 PSA. (See *id.* §§ 2 [c], 4.) It is also consistent with the plain language of the Co-Lender Agreement. Section 2(j) provides that "any decision to be made with respect to the Loans which requires the approval of the majority of [Controlling Class Representatives] shall be made by the Controlling Class Representative of the [C30 Trust] after consultation with the Controlling Class Representatives of [the other Stuy Town Trusts]." (*Id.* § 2 [j].) Therefore, whether to remove the special servicer for the Loans would be a decision made and initiated by the CCR for the C30 Trust. In so doing, it would follow the provisions of the C30 Trust for the replacement of the special servicer. This is also consistent with the language of the Co-Lender Agreement, which makes clear that the replacement special servicer must meet the requirement of the C30 PSA and the Co-Lenders' "agree[ment] to be bound by all of the provisions of the Pooling Agreement." (*Id.* § 4.) Only upon satisfying the provision of the C30 Trust would the CCR for the C30 Trust seek the "consent of a majority of the Controlling Class Representatives" (*id.* § 2 [j]), which without it could not replace the special servicer. Under this interpretation, no violence is done to the language of either the C30 PSA or the Co-Lender Agreement.

As the court finds that these agreements are susceptible to only one commercially reasonable reading that "gives effect to each and every part, so as not to render any provision meaningless or without force or effect" (*Western & S. Life Ins. Co.*, 209 AD3d at 13 [internal quotation marks and citations omitted]), the court finds that no ambiguity exists. Accordingly, the court does not consider extrinsic evidence of how

CWCA and other market participants behaved under PSAs with terms identical or similar to that of the C30 PSA (see *Brad H.*, 17 NY3d at 186). Additionally, regardless of whether CWCA would have honored CWCI's appointment of a replacement special servicer, it cannot be said that CWCI breached a contractual duty to Cobalt when it failed to exercise a right it did not have.

Cobalt's remaining arguments are without merit. As Cobalt lost the necessary Voting Rights to replace CWCA as special servicer for the Loans in 2010, before fee-sharing became prevalent, CWCI could not have negotiated a fee-sharing agreement before it lost the ability to replace CWCA. Similarly, having concluded that the vote of the majority of the CCRs was not sufficient to replace CWCA, merely gaining the cooperation of another CCR, when CWCI was CCR for two of the five Stuy Town Trusts, would not have served Cobalt's purpose.

For the foregoing reasons, Cobalt cannot demonstrate that it could have replaced CWCA as the special servicer and CW is entitled to summary judgment dismissing the Stuy Town portion of the fee-sharing claim.

Accordingly, Cobalt's motion for summary judgment is denied. CW's motion for summary judgment is granted to the extent of dismissing those portions of the first cause of action for breach of contract that seek a share of the special servicing fees CWCA earned in connection with Stuy Town and damages in connection with fee-sharing, rather than fee-waiver agreements.

#### **IV. CW's Motion for Summary Judgment Dismissing the Remaining Claims**

As a preliminary matter, CW contends that all the breach of contract claims (Counts II, III, and VIII) should be dismissed because CWCI was precluded from

actively managing the CDO, based on the provisions of the Indenture and the CMA. (See NYSCEF 936, CW's MOL [mot. seq. no. 027] at 26-30.) The court, having already rejected these arguments, does not revisit them and denies CW's summary judgment motion to the extent it is premised on these same grounds.

**A. The Stuy Town Settlement Claims (Third, Fifth, Sixth, and Seventh Causes of Action)**

CW contends that because CWCI had no control over the Stuy Town Settlement, there can be no breach for failing to reject it and the third, fifth, sixth, and seventh causes of action must be dismissed. Additionally, CW argues that, while CWCI had the right to object to the sale of Stuy Town because the sale was in the best interest of the Stuy Town Trusts, CWCA would have simply overridden CWCI's objection as contrary to the servicing standard. Moreover, CW contends, the evidence demonstrates that the Stuy Town Trusts recovered more than they would have under any alternative approach suggested by Cobalt. As such, the claims must be dismissed for lack of damages.

Cobalt counters that CWCI had a right to be involved in the Stuy Town Settlement because the C30 PSA gives the CCR the right to object to the sale of REO property as well as the authority to "direct the Special Servicer to take, or to refrain from taking, such other actions as the [CCR] may deem advisable." (NYSCEF 637, C30 PSA § 6.11 [a].) Cobalt contends that since the settlement was premised on the sale of Stuy Town, CWCI could have withheld consent to prevent the allegedly unfair settlement. Cobalt argues that whether through the objection, direction, or replacement mechanism, CWCI had the ability to prevent an inequitable Stuy Town Settlement but chose not to do so. Lastly, Cobalt disputes that CWCA could have overridden CWCI's objection or direction. According to Cobalt, CWCA violated the servicing standard by prioritizing the

payment of its penalty interest over recovery to the certificateholders. At the very least, Cobalt argues, whether CWCA's conduct was consistent with maximizing certificateholders' recoveries, without regard to its fees, requires substantial weighing of evidence and determinations of witness credibility, none of which can be done on summary judgment.

Parties also dispute whether the claims must be dismissed under the CMA's exculpatory clause and prohibition on consequential damages.

Having already concluded that CWCI lost the right to replace the special servicer in 2010, the court does not revisit those arguments. Nonetheless, issues of fact require denial of CW's motion for summary judgment.

The CMA requires the Collateral Manager to "tak[e] action. . .with respect to the Issuer's exercise of any rights . . . or remedies in connection with the Collateral Debt Securities . . . as provided in the related Underlying Instruments . . .or tak[e] any other action with respect to Collateral Debt Securities . . . which the Collateral Manager determines is in the best interests of the Noteholders." (NYSCEF 946, CMA § 1 [c].) The C30 PSA provides that the special servicer is not "permitted to take any of the following actions as to which the Controlling Class Representative has objected," including "any actual or proposed sale of an REO Property." (NYSCEF 637, C30 PSA §§ 6.11 [a], 6.11 [a] [iii].) The CCR may also "direct the Special Servicer to take, or to refrain from taking, such other actions as the [CCR] may deem advisable." (*Id.* § 6.11 [a].) However,

"no such advice or direction, and no objection . . . may . . . cause the Special Servicer to act, or fail to act, in a manner which in the reasonable judgment of the Special Servicer is not in the best interests of the Certificateholders" and the Special Servicer is required to disregard the direction or objection of the CCR if

“such direction and or objection causes . . . the Special Servicer to violate the Servicing Standard.” (*Id.*)

In pertinent part, “Servicing Standard” is defined as

“the servicing and administration of the Mortgage Loans . . . and the Companion Loans . . . with a view to the maximization of the recovery on such Mortgage Loan on a net present value basis and the best interests of the Certificateholders and the Trust Fund . . . and (c) without regard to . . . (iii) the right of . . . the Special Servicer . . . to receive compensation or other fees for its services rendered pursuant to this Agreement.” (*Id.* at 80-81.)

CW attempts to demonstrate that a CCR has no role in settlement discussions by pointing to: (1) the list of servicing actions to which the CCR has the right to object, which does not include settlement of litigation (*see id.* § 6.11 [a]); (2) the testimony of fact witnesses that, as CCRs, they had no role in settlement discussions (*see* NYSCEF 735, Iannarone tr vol 2 at 385:4-9, 509:8-14 [stating that “CCR’s don’t have the right to approve settlements” and that under the C30 PSA, CWCI, as CCR, had no role in the Stuy Town Settlement]); NYSCEF 730, Frank tr at 170:9-14, 176:17-19 [stating that he was neither consulted regarding the settlement terms nor asked to sign off on the settlement after the fact]; NYSCEF 951, Nolan tr at 316:8-12 [stating that he had no recollection of being asked to approve settlements during his time as CCR]); and (3) Nealon’s expert report, stating that, “[i]n [his] experience, CCRs rarely get involved in settlement discussions, nor are they required to approve them” and that “(c)laims—and their resolution via settlement—are dealt with routinely by the special servicer in the course of managing the litigation and servicing and working out the defaulted mortgage loan” (NYSCEF 954, Nealon Expert Rep at 72).

However, it is not clear that CWCI’s view of its role with respect to the Stuy Town Settlement was mandated by the C30 PSA or that this was the industry practice. First,

while the settlement of litigation is not among the items CCR was entitled to object to, the CCR was also permitted to “direct the Special Servicer . . . as the [CCR] may deem advisable.” (NYSCEF 637, C30 PSA § 6.11 [a].) Second, Cobalt’s experts insist that the Stuy Town Settlement departed from industry norms. Martin Lanigan, Cobalt’s CMBS industry expert, explains that, in his experience:

“the mandate and leverage held by a CCR is such that even if a particular servicing action is not listed in the PSA as one that expressly requires the CCR’s approval (or conversely allows for the CCR’s denial of the special servicer’s action), if that action would have material consequences for the controlling class certificateholders, the CCR will be fully informed and exercise oversight over that servicing action.” (NYSCEF 716, Lanigan Expert Rep ¶ 19.)

He states that he would expect a “CCR [to] ensure and require that it is fully informed and acting on an unconflicted basis” and that he “would have expected the record to include clear documentation explaining specifically the reasons why the CCR approved the sale of Stuy Town on its terms.” (*Id.* ¶¶ 79, 85.) He further states that “[t]he absence of such documentation—especially contemporaneous documentation *preceding* the execution of the settlement agreement requiring the sale of Stuy Town—is itself inconsistent with [his] understanding of CMBS industry standards for CCRs, and [his] experience as a CCR.” (*Id.* ¶ 8.) He also provides that:

“In a further departure from industry norms, the CCR was only asked for formal approval *after* the settlement was executed. The executed settlement agreement required a sale of Stuy Town, directed how that sale was to take place, and allocated the proceeds of the sale. It was thus inextricably linked with the asset sale of Stuy Town, which the CCR has the right to approve. In those circumstances, a CCR should have provided informed, timely, unconflicted and well-documented input into the settlement before it was executed.

In sum, despite the fact that this was one of the largest commercial real estate sales in years, and the largest award of default interest from a CMBS asset ever, there was no unconflicted party at the table protecting Cobalt’s interests and acting to mitigate or prevent CWCA from taking action that effectively traded

away proceeds that could have gone to certificateholders and instead was used to protect CWCA's own default interest." (*Id.* ¶¶ 89-90.)

In addition, Cobalt's CDO expert, Peter Smith, opines that "[a] collateral manager is expected to actively monitor the settlement of litigation involving a significant asset in the underlying CMBS trusts, especially where the resolution of the litigation might require the sale of the asset." (NYSCEF 1015, Smith Rebuttal Expert Rep ¶ 65.)

Therefore, there is a question of fact as to whether CWCI, as CCR, had a role in the settlement negotiations.

Next, CW contends that there was no basis for CWCI to conclude that CWCA funded the Stuy Town Settlement by misappropriating funds belonging to the Stuy Town Trusts, because "[i]t is uncontroverted that all expenses associated with the [Stuy Town] Settlement and Stuy Town Sale were paid for and distributed in the ordinary course out of sale proceeds from the Property. (NYSCEF 936, CW's MOL [mot. seq. no. 027] at 46, citing NYSCEF 865, Excerpted Stuy Town Realized Loss Report.) This misconstrues Cobalt's theory of the case. Cobalt alleges that in negotiating the Stuy Town Settlement, CWCA prioritized securing the entirety of the penalty interest that it was due over "maximization of the recovery . . . and the best interests of the Certificateholders." (NYSCEF 637, C30 PSA at 80-81; see NYSCEF 1219, Cobalt's MOL in Opp [mot. seq. no. 027] at 33-36.) Similarly, Judge Failla's determination that CWCA was entitled to payment of the penalty interest ahead of gain-on-sale proceeds and that CWCA's calculations of the amount of penalty interest was correct (*see In re Trusts Established under the Pooling & Servicing Agreements*, 2020 WL 1304400, \*40, 2020 US Dist LEXIS 47847, \*119-120 [SD NY, Mar. 19, 2020, No. 17 Civ 1998 (KPF)], *affd in part, revd in part sub nom. Appaloosa Inv. L.P.I. v Fed. Home Loan Mtge. Corp.*,

2022 WL 2720520, 2022 US App LEXIS 19424 [2d Cir, July 14, 2022, No. 20-1708]), does not dispose of the issue. Cobalt is not contending that either of these decisions were improper. Rather, Cobalt claims that the manner in which the Stuy Town Settlement prioritized payments of the sale proceeds was contrary to the servicing standard and that had CWCI acted as a loyal CCR should, it would have never permitted this.

Additionally, CW contends that for the settlement to have been improper, Cobalt would have to show a breach of CWCA's duties to the Stuy Town Trusts. CW claims that as no claim for breach of the C30 PSA has ever been asserted against CWCA in connection with the Stuy Town Settlement, none can be asserted now because it is time-barred. However, because Cobalt is not suing CWCA for breach of the C30 PSA, the timeliness of such a claim is beside the point.

CW also argues that had CWCI objected to the sale of Stuy Town, CWCA had a contractual obligation to override such objection because the sale was in the Stuy Town Trusts' best interests. Nealon opines that the sale "was without question consistent with the servicing standard" because, it achieved a full recovery to the Stuy Trusts and a \$50 million gain-on-sale, and "[t]he property was well known in the industry as hemorrhaging cash and having a vast array of problems, including lawsuits, environmental concerns, political intervention, and tenant/rent control issues" and the sale "avoided a number of significant risks associated with the property and shifted them onto Blackstone." (NYSCEF 954, Nealon Expert Rep at 73-74.) He concludes that "[a] CCR being confronted with these enormous risks would never have rejected the \$5.3 billion sale to Blackstone" and that, in any event, it "would have been a breach of the servicing

standard for CWCA to listen to such an objection, and CWCA would have been obligated to invoke and apply the servicer override.” (*Id.* at 75-76.)

Indeed, there is no dispute that Stuy Town’s sale to Backstone for \$5.4 billion was for the best possible price. (See NYSCEF 738 Lanigan tr at 305:12-17, 343:12-18; NYSCEF 828, Cobalt’s Responses and Objections to Defendants Third Set of Interrogatories at 35 [“Cobalt’s claims in this case do not depend upon a contention that Stuy Town could have been sold for a price greater than the approximately \$5.4 billion that was paid in December 2015”].) It is also true that the sale resulted in the full recovery on the Senior Loan, plus nearly \$50 million in gain-on-sale proceeds. (NYSCEF 865, Excerpted Stuy Town Realized Loss Report.) However, CW once again misconstrues Cobalt’s position. Cobalt’s issue is not with the sale, but with the settlement that determined how the proceeds from that sale would be distributed. Cobalt’s position is that, even if CWCI could not have objected to the sale, CWCI should have used its “general right to direct . . . to drive the settlement discussions.” (NYSCEF 1219, Cobalt’s MOL in Opp [mot. seq. no. 027] at 31.) Lanigan explains that “in the case of a settlement where a contingent requirement of the settlement is a sale of a given asset, the CCR has the right to make known that such sale will be vetoed.” (NYSCEF 716, Lanigan Expert Rep ¶ 9.) As CW acknowledges, the Stuy Town Settlement’s “terms did not include the sale of Stuy Town to a buyer, and it contained no price.” (NYSCEF 1260, CW’s Reply MOL [mot. seq. no. 027] at 19.) While this may mean that “[t]here was nothing for CWCI as CCR to approve” (*id.*), there was also nothing for CWCA to veto. Thus, CWCA’s ability to override CWCI’s objection to the

sale of Stuy Town to Blackstone does not resolve whether CWCI breached its duty to Cobalt by failing to object to the settlement.

CW next argues that the evidence demonstrates that the Stuy Town Trusts, and by extension Cobalt, suffered no damages. Specifically, CW's expert on the real estate finance industry, Ronald Greenspan opines that the Stuy Town Trusts recovered more than they would have, had CWCA followed any alternative approach suggested by Cobalt. (See NYSCEF 715, Greenspan Expert Rep at 21-30.) As pertinent here, he opines that the Mezzco Plaintiffs' initial settlement offer (the Mezzco Offer), which CWCA rejected, was not in the Vr CDO's best interest. He explains that:

"The Mezzco Offer was worse for the VR CDO compared to the [Stuy Town] Settlement because the [Stuy Town] Settlement included a priority payment of \$4.725B with a split of additional proceeds, guaranteeing that the [Senior] Loan was paid in full and ensuring an equivalent or better outcome in comparison to the Mezzco Offer (which guaranteed proceeds of \$4.525B, capped at \$4.725B)." (*Id.* at 29.)

Cobalt responds that the Mezzco Plaintiffs sought to recover on their loans ahead of CWCA's claimed penalty interest and amounts that, absent the DIL Transaction, would have been payable to the Stuy Town Trusts on the Mezzanine 1-3 Loans (totaling \$300 million), whereas CWCA focused on protecting its recovery of the entire \$615 million in penalty interest it expected to receive upon the sale of Stuy Town. (See NYSCEF 1219, Cobalt's MOL in Opp [mot. seq. no. 027] at 13-14.) Cobalt points to the Mezzco Plaintiffs' initial offers, which ensured the repayment of the Senior Loan, excluding only CWCA's penalty interest. (See NYSCEF 1158, August 20, 2015 Email from McKnight to Iannarone, et al [describing the Mezzco Plaintiffs' opening offer, in which the first tranche, consisting of \$4.1 billion, is used to repay the "1st mortgage" and tranches 2-5 are split among payments to the Mezzco Plaintiffs and payments of

“default interest”]; NYSCEF 1160, September 10, 2015 Email from McKnight to Iannarone, et al [showing that the amount owed on the Senior Loan, including \$167 million of yield maintenance but excluding \$621 million in default interest, was approximately \$4.1 billion]; NYSCEF 1124, McKnight tr at 147:1-9 [agreeing to the description of Mezzco Plaintiff’s September 8, 2015 offer as “everything is getting paid under the senior loan documents except for the last \$200 million of penalty/interest before amounts are going to be shared with (Mezzco Plaintiffs)”].)

Cobalt also points to evidence that CWCA was never willing to surrender any portion of its penalty interest, even if it meant that a larger portion of proceeds from the sale, after repayment of the senior loan and penalty interest, was paid to the Mezzco Plaintiffs. (See NYSCEF 862, September 2, 2015 Email Thread Re Mezzco Litigation Settlement [explaining the Mezzco Plaintiffs’ position that CWCA’s penalty interest must be “at risk” to “make sure (CWCA was) properly incentivized to get the highest price on a sale” and that CWCA would be firm in refusing anything but a full payment of all obligations in connection with the Senior Loan]; NYSCEF 1159, September 10, 2015 Email from McKnight to Iannarone, et al [reporting that the Mezzco Plaintiffs indicated that if they agree to the first \$5 billion going to repay the senior loan, they would need the “vast majority” of the upside and that McKnight had asked if this meant that they were “finally over the edge and realized the trust was sacred to us”]; NYSCEF 1124, McKnight tr 146:4-149:11 [discussing what he meant by “the trust was sacred to us” and agreeing that the difference between the earlier and the later proposals was the inclusion of the penalty interest in the repayment of the senior loan].)

Under the Stuy Town Settlement, CWCA and the Mezzco Plaintiffs agreed to the following split of the sale proceeds: (1) the first \$4.725 billion would be paid to the Stuy Town Trusts to cover amounts owed on the senior loan and CWCA's \$615 million penalty interest claim; (2) the next \$350 million would be paid 90% to the Mezzco Plaintiffs and 10% to the Stuy Town Trusts; (3) the next \$300 million would be paid 75% to the Mezzco Plaintiffs and 25% to the Stuy Town Trusts and (4) anything remaining would be split evenly between Stuy Town Trusts and the Mezzco Plaintiffs. (See NYSCEF 861, Stuy Town Settlement Agreement at CW0362024.)

Examining the course of negotiations and the ultimate outcome (see NYSCEF 716, Lanigan Expert Rep ¶¶ 53-75), Lanigan observes that CWCA

“held firm to its refusal to agree to any attachment point that would not cover the full amount due and owing on the first mortgage— including its hundreds of millions of dollars of default interest—but was willing to trade away far more of the gain on sale proceeds in exchange for protection of its default interest.” (*Id.* ¶ 71).

He further states that following the sale of Stuy Town, the Mezzco Plaintiffs “received over \$500 million, which was recorded on the Realized Loss Report as ‘Other Selling Expenses’,” while “only \$49,672,388.15 went to gain-on-sale proceeds, which was split among the Trusts.” (*Id.* ¶ 75.) Lanigan concludes that, in this way, the Mezzco Plaintiffs “recovered a vastly disproportionate amount of what would have been gain on sale proceeds, effectively jumping ahead of the Mezz 1–3 interests to which they should have been junior, while [CWCA] preserved every dollar of its default interest.” (*Id.*)

Greenspan disputes Lanigan's conclusions that the entirety of the settlement negotiations “only dealt with CWCA's default interest.” (NYSCEF 707, Greenspan Rebuttal Expert Rep at 48.) He states that this assertion “mathematically does not

make any sense because Lanigan ignores or is unaware of the fact that yield maintenance is paid *pari passu* with default interest in the [C30 Trust] waterfall.” (*Id.*) Greenspan claims that “[i]t is not possible to payoff the entirety of amounts owed to certificateholders without paying off everything that is due and owing, including default interest and yield maintenance, because they are on the same line/priority in the waterfall.” (*Id.*) In other words, CW claims that because penalty interest (i.e. default interest) and yield maintenance (i.e. a prepayment penalty “to compensate the holder for reinvestment losses”) occupy the same priority in the distribution, it was impossible for CWCA to pay out one without the other, and so in securing the penalty interest, CWCA was securing yield maintenance. (See NYSCEF 637, C30 PSA at 61, 91-92 [defining “Penalty Interest” and “Yield Maintenance”]; see *a/so* NYSCEF 735, Iannarone tr vol 2 at 464:10-14 [explaining that because “(p)enalty interest . . . was *pari-passu* with yield maintenance (,) . . . to get yield maintenance paid, you had to collect 100 percent on the -- on the note”].)

While penalty interest and yield maintenance do share the same priority and must be paid before gain-on-sale (see NYSCEF 637, C30 PSA § 3.02 [b]; *Appaloosa Inv. L.P.I.*, 2022 WL 2720520 at \*3, 2022 U.S. App. LEXIS 19424 at \*7 [affirming the holding that “Penalty Interest and Yield Maintenance must be paid prior to Gain-on-Sale Proceeds” under the C30 PSA]), the payment of one, does not depend on the payment of the other. The C30 PSA provides that “the Special Servicer, with regard to a Specially Serviced Mortgage Loan . . . may waive any Penalty Interest or late payment charge in connection with any payment on a Mortgage Loan or Companion Loan.” (NYSCEF 637, C30 PSA § 3.02 [a].) Therefore, regardless of its priority in the C30

waterfall, CWCA had the ability to waive penalty interest and, therefore, was free to negotiate a lower recovery of its penalty interest to secure a larger gain-on-sale distribution for the certificateholders. Therefore, whether Cobalt suffered damages is an issue of fact.

Lastly, CW contends that CWCA had no obligation to contribute its own proceeds to the Stuy Town Settlement because CWCA had no liability to settle. CW insists that the C30 Trust was obligated to pay to resolve the Mezzco Claims because, absent a finding of negligence, CWCA is indemnified for any action it takes as special servicer. (See *id.* § 6.03 [providing indemnification except as to “any loss, liability or expense: . . . incurred by reason of willful misfeasance, bad faith or negligence in the performance of obligations or duties hereunder”].) As there has never been a negligence allegation, much less a court finding, “with respect to CWCA’s performance of its duties vis-à-vis the [Stuy Town] Settlement and Stuy Town Sale” (NYSCEF 936, CW’s MOL [mot. seq. no. 027] at 50), CW argues that the C30 Trust was contractually obligated to pay all Stuy Town Settlement costs.

In his expert opinion, Nealon explains that because “[e]nforcing the rights of the trust-lender under the mortgage loan documents and defending claims filed against the trust and trust parties is a critically important role for the special servicer[,] . . . the special servicer is the party most commonly named in any lawsuit involving a CMBS trust.” (NYSCEF 954, Nealon Expert Rep at 46.) He states that “the entire CMBS industry understands and accepts the fact that the special servicer cannot be personally liable for any claims against it or legal expenses relating to its work as a special servicer absent a finding by a court of willful misfeasance, bad faith, or negligence.” (*Id.* at 48.)

Nealon adds that in his experience “[a]s LNR’s Chief Legal Officer[,] . . . all settlements of CMBS litigation provide for a general release of all trust parties, including the special servicer” and “LNR has never been asked by a CCR to contribute its own funds to the settlement of a litigation in which it was named as a defendant.” (*Id.*) Because CWCA was named as a defendant in the Mezzco Litigation based on its conduct as the special servicer, Nealon opines that “[t]he notion that CWCA should have contributed to a settlement . . . is fundamentally at odds with express contractual rights of the special servicer in every CMBS securitization and well-established custom and practice in the industry.” (*Id.* at 50.)

Cobalt’s expert responds as follows:

“Given the benefits to CWCA of securing the payment of default interest and obtaining a release and the transfer of gain-on-sale proceeds to [Mezzco Plaintiffs] in the settlement, I would have expected that the CCR would have at least raised the issue that CWCA compromise some portion of its default interest, especially considering its magnitude. At minimum, given the obvious deleterious impact on the controlling class certificateholders of the entire settlement coming from trust funds with CWCA not contributing its own money in consideration of that release, I would have expected the record to include clear documentation explaining specifically the reasons why the CCR approved the sale of Stuy Town on its terms, how an unbiased assessment was made and the conclusion reached that any contribution by CWCA to reimburse collective settlement costs was neither appropriate nor necessary.” (NYSCEF 716, Lanigan Expert Rep ¶ 85.)

Even assuming that CWCA’s conduct in connection with the Mezzco Litigation was indemnifiable, this does not resolve the issue of whether it was proper for it to retain the entirety of the penalty interest, while negotiating away noteholders’ gain-on-sale proceeds, particularly as the Stuy Town Settlement eliminated the risk of a judgment reducing its penalty interest. Viewing the facts in the light most favorable to Cobalt (see *Vega*, 18 NY3d at 503), whether CWCA’s retention of the entire penalty

interests was contrary to industry standards and whether CWCI was able and required to intervene raise issues of fact.

Finally, neither the exculpation clause nor the prohibition on consequential damages requires dismissal.

CW concedes that CWCI was not involved in the negotiation of the Stuy Town Settlement. (NYSCEF 936, CW's MOL [mot. seq. no. 027] at 44.) The parties present conflicting expert opinions about whether this was in keeping with industry customs and practices. (See NYSCEF 954, Nealon Expert Rep at 72; NYSCEF 716, Lanigan Expert Rep ¶¶ 19, 85, 89-90; NYSCEF 1015, Smith Rebuttal Expert Rep ¶ 65.) To the extent that CWCI's conduct represented a complete departure from industry standards, this raises an issue of fact as to whether its conduct was in bad faith, willful or grossly negligent. (See *S.A. De Obras y Servicios, COPASA*, 170 AD3d at 474 [holding that whether the defendant had been grossly negligent was an issue of fact for the jury, where parties provided conflicting expert opinions about whether defendant's conduct "represented an 'extreme departure' from industry standards"].)

As with the fee-sharing claim, if Cobalt can demonstrate that CWCI's failure to oversee and direct CWCA during settlement negotiations was contrary to industry norms for a CCR, then the damages would flow directly from the breach, rather than from a collateral business arrangement between Cobalt and a third-party.

For the foregoing reasons, to the extent CW seeks summary judgment dismissing the third cause of action, the motion is denied. To the extent CW seeks summary judgment dismissing the fifth, sixth, and seventh causes of action on these grounds, the motion is likewise denied.

## B. Independent Grounds for Dismissal of the Fifth, Sixth, and Seventh Causes of Action

CW contends that the fifth cause of action must be dismissed because any fiduciary duty that CWCI owed Cobalt or the Noteholders is defined and circumscribed by the CMA. CW argues that as CWCI had no right, let alone a duty, to review or approve a CMBS Trust litigation settlement, there can be no breach. Without an underlying breach of fiduciary duty, CW contends, the aiding and abetting claim against CWCA (the sixth cause of action) must be dismissed as well. In addition, CW argues that CWCA cannot be liable for aiding and abetting merely for acting in accordance with its contractual rights and duties to the C30 Trust. Lastly, CW contends that CWCA cannot be unjustly enriched by retaining funds it was contractually entitled to retain under the C30 PSA.

Cobalt responds that CWCI's absence from settlement negotiations constitutes the breach of fiduciary duty and that CWCA can be liable for aiding and abetting that breach because its conduct was integral to the breach. Cobalt explains that "it is the disloyal act of allowing CWCA to negotiate a settlement that treated Certificateholders unfairly that resulted in CWCI's primary breach." (NYSCEF 1219, Cobalt's MOL in Opp [mot. seq. no. 027] at 48.) As for the unjust enrichment claim, Cobalt argues that CWCA was enriched by avoiding a reduction of its penalty interest and that this benefit came from the gain-on-sale proceeds payable to certificateholders. Cobalt contends that "Judge Failla's decision five years later adopting CWCA's calculation of interest in a subsequent challenge by a different party [does not] eliminate the unfair benefit that CWCA received when it caused the Stuy Town Trusts to bear the cost of protecting CWCA's penalty interest against the [Mezzco Plaintiffs'] challenge." (*Id.* at 49.) Cobalt

further argues that “CWCA’s contractual right to collect penalty interest as additional servicing compensation does not, and cannot, shield CWCA from liability for its inequitable conduct and abuse of trust in negotiating the Stuy Town Settlement years before that right was adjudicated.” (*Id.*)

The parties also dispute whether the breach of fiduciary duty claim against CWCI and the aiding and abetting breach of fiduciary duty and unjust enrichment claims against CWCA must be dismissed as duplicative of the breach of contract claim.

CW offers the same arguments on this motion as it did on its motion to reargue. (*Compare* NYSCEF 936, CW’s MOL [mot. seq. no. 027] at 53-54, *with* NYSCEF 339, Decision and Order [mot. seq. no. 006] at 5.) In the decision on CW’s motion to reargue, this court explained why it did not view these claims as duplicative. (NYSCEF 339, Decision and Order [mot. seq. 006] at 9-10.) The court stands by that reasoning.

As the court has already determined that whether CWCI should have played a role in the Stuy Town Settlement is an issue of fact, CW is not entitled to dismissal of the breach of fiduciary duty claim. Nor is it entitled to dismissal of the aiding and abetting claim based on a lack of an underlying breach. Nonetheless, the sixth cause of action should be dismissed.

To prevail on an aiding and abetting breach of fiduciary duty claim, plaintiff must demonstrate: “(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach.” (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003] [citations omitted].) “A person knowingly participates in a breach of fiduciary duty only when he or she provides ‘substantial assistance’ to the primary violator. Substantial

assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur.” (*Id.* at 126 [internal citations omitted].) Here, Cobalt does not explain how anything CWCA did enabled the alleged breach to occur. In fact, its framing of the issue – that “it is the disloyal act of allowing CWCA to negotiate a settlement that treated Certificateholders unfairly that resulted in CWCI’s primary breach” (NYSCEF 1219, Cobalt’s MOL in Opp [mot. seq. no. 027] at 48)—makes clear that Cobalt takes issue with CWCI’s failure to take affirmative steps to stop CWCA’s conduct, rather than with CWCA’s conduct in supporting CWCI’s breach. Accordingly, the sixth cause of action is dismissed. (*cf Kaufman*, 307 AD2d at 126 [noting that the defendant’s conduct in assisting the primary breacher was “not an unusual activity for those in the business of commercial real estate development, hardly constitute[d] assisting in a breach of fiduciary duty by itself.”].)

The unjust enrichment claim (the seventh cause of action) must also be dismissed. A claim for unjust enrichment requires a showing that the other party was enriched, at plaintiff’s expense, and “that it is against equity and good conscience to permit the other party to retain what is sought to be recovered.” (*Georgia Malone & Co., Inc. v. Rieder*, 19 NY3d 511, 516, [2012] [internal quotation marks and citation omitted].) It “is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff.” (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012].) Here, C30 PSA sets forth CWCA’s duties to the certificateholders and the C30 Trust, CWCA’s compensation, and the appropriate course of conduct in the event of CWCA’s

breach. (See NYSCEF 637, C30 PSA §§ 1.01 [defining “Servicing Standard”], 3.01 [providing for “Administration of the Mortgage Loans”], 3.11 [providing for “Servicing Compensation”], 7.01 [a] [iv], [b] [providing for remedy available to “Holders of Certificates entitled to at least 25% of the Voting Rights,” in the event of a default by the Special Servicer, including any failure by the special servicer to perform any of its obligations under the C30 PSA], 11.03 [c] [providing that “(n)o Certificateholder shall have any right by virtue of any provision of this Agreement to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement or any Mortgage Loan” unless various prerequisites are first met].)

Therefore, to the extent that CWCA “negotiate[d] a settlement agreement that prioritized CWCA’s recovery of penalty interest over maximizing Certificateholder recoveries—breaching CWCA’s Servicing Standard obligations under the C30 PSA” (NYSCEF 1219, Cobalt’s MOL in Opp [mot. seq. no. 027] at 47), “there was no unjust enrichment because the matter is controlled by contract.” (*Goldman v Metro. Life Ins. Co.*, 5 NY3d 561, 572 [2005] [citation omitted]; see also *Scarola Ellis LLP v Padeh*, 116 AD3d 609, 611 [1st Dept 2014] [dismissing the unjust enrichment claim where an “agreement squarely cover(ed) the very subject matter of the unjust enrichment claim”].) To the extent Cobalt is barred from pursuing a claim for breach of the C30 PSA, due to the lapse of time or inability to satisfy the C30 PSA’s prerequisites for bringing suit, “an unjust enrichment claim cannot remedy the defects.” (*Corsello*, 18 NY3d at 791.)

For the foregoing reasons, CW’s motion for summary judgment is granted to the extent of dismissing the sixth and seventh causes of action.

### C. The Affiliate Broker Claim (Second Cause of Action)

CW argues that the second cause of action must be dismissed because the evidence demonstrates that: (1) it was CMBS industry practice for special servicers to use affiliated entities as co-brokers to assist in asset dispositions; (2) CWCI did not control the selection of brokers and cannot be in breach of the CMA for not doing so; and (3) Cobalt incurred no damages due to CWCA's use of REDS.

Cobalt counters that: (1) CWCA's use of REDS was not in keeping with industry norms, as REDS simply performed the functions usually performed by the special servicer; (2) CWCI had the power to prevent REDS's appointment because CWCI had the authority to object to any proposed sale of any defaulted loan or REO Property by CWCA and could have used this leverage to prevent kickback to REDS; and (3) Cobalt suffered damages because third-party brokers remitted a portion of their commissions to REDS, which did not perform any additional services, instead of to the CMBS Trusts.

The parties also dispute whether the claim must be dismissed under the CMA's exculpatory clause and prohibition on consequential damages.

CW demonstrates, prima facie, that the special servicer was charged with retaining brokers and that the CCRs was not involved in this process. It points to the testimony of its expert that "the CCR does not typically get involved in the selection of brokers, nor is there any right to approve the broker in the PSA." (NYSCEF 954, Nealon Expert Rep at 45; see e.g. NYSCEF 637, C30 PSA § 6.11.) Jim Shevlin, the President of REDS and previously the CCR for ACAS for approximately ten years (NYSCEF 745, Shevlin tr at 16:1-18:10, 53:21-54:17), also testified that "[t]he CCR does not have the right to pick a broker," that the "decision lies solely with the special

servicer,” and that he has “never seen [] a CCR complain about a broker selection and wanting to replace a servicer as a result of that.” (*Id.* at 86:6-16, 87:7-9.) Moreover, Cobalt’s expert could not cite any example of a CCR directing the special servicer about broker fees. (See NYSCEF 738, Lanigan tr at 496:13-497:14 [stating that, while a CCR “would have had the right to consult on” the broker fee, he “didn’t see any documentation along those lines” and had no example of a CCR behaving in that way].)

In opposition, Cobalt points only to section 6.11(a)(iii) of the C30 PSA and claims that CWCI had the “authority to object to any proposed sale of any defaulted loan or REO Property by CWCA that involved a kickback to REDS.” (See NYSCEF 1219, Cobalt’s MOL in Opp [mot. seq. no. 027] at 42.) However, Cobalt offers nothing to demonstrate that it was industry practice for a CCR to use its ability to veto sales to direct the special servicer in its retention of brokers. On the contrary, Cobalt acknowledges that the “sale of foreclosed upon assets owned by the CMBS trust” was among the “special servicer’s core responsibilities.” (*Id.* at 16, citing NYSCEF 637, C30 PSA § 3.16 [a] [(t)he Special Servicer, on behalf of the Trust Fund, shall sell any such REO Property as soon as practicable in accordance with the Servicing Standard”].)

Cobalt also claims that “where CWCA acted as special servicer for CMBS trusts with an unconflicted, third-party CCR, CWCA shared these REDS fees 50-50 with that third-party CCR or, at the very least, rebated a portion of the REDS fees to the impacted CMBS trust.” (NYSCEF 1219, Cobalt’s MOL in Opp [mot. seq. no. 027] at 18.) However, Cobalt fails to provide any supporting evidence. Cobalt relies on: (1) a spreadsheet that purports to show fee splits with ACAS and Triange in columns labeled “ACAS Share of Buyer’s Premium” and “Triangle Share of Buyer’s Premium”

(NYSCEF 1002); and (2) another spreadsheet containing CWCA's "2019 Dispositions & Capital Placement Activity Snapshot" (NYSCEF 1145), which purports to show that CWCI never negotiated similar concessions on any Cobalt-controlled trust.

The court has already discussed the evidentiary shortcomings of the first spreadsheet. (*See* n 13, *supra*.) In any event, at best, the spreadsheet demonstrates that ACAS and Triangle received a share of the "Buyer's Premium." This is not evidence that they received a portion of the buyer's premium that REDS would have otherwise received. As CW's expert on broker fees and online auction fees, Matthew Tarshis, explains, the "buyer's premium" is uniformly set at 5% of the total purchase price, is paid by the buyer and is how "[a]uction platforms are compensated . . . for listing the property on the platform and providing a central depository of information for potential buyers." (NYSCEF 721, Tarshis Expert Rep at 6.) Tarshis further explains that for certain sales, "a portion of the buyer's premium [would be] rebated back to the applicable CMBS trust." (*Id.* at 3; *see* NYSCEF 745, Shevlin tr at 45:2-6 [stating that regardless of the platform used, there was never a trust rebate for deals under \$5 million].) Cobalt also presents evidence that a "trust receives its full rebate before REDS is paid." (NYSCEF 712 Dwyer Expert Rep at 20.) Thus, that ACAS and Triangle received a portion of the buyer's premium is not, without more, evidence of unconflicted CCRs negotiating better terms. Without any context for the information contained in this spreadsheet, the court is left with nothing but "surmise, conjecture or speculation," which are insufficient to raise an issue of fact. (*Madeline D'Anthony Enters., Inc.*, 101 AD3d at 609 [internal quotation marks and citation omitted].)

The second spreadsheet fares no better. It contains a record of auctions conducted in 2019 and the resulting income is recorded in the column labeled “CW Share Platform Fee (\$)” (NYSCEF 1145, 2019 Spreadsheet.) There is no indication whether any seller received a rebate or whether any of the properties listed were held by Cobalt-controlled trusts or otherwise.

Ultimately, while Cobalt may be able to demonstrate that CWCA’s use of REDS breached CWCA’s obligation to the certificateholders under the pertinent PSAs, Cobalt fails to raise an issue of fact as to whether CWCI’s failure to intervene breached its obligations under the CMA.

Based on the foregoing, the court does not address the parties’ remaining contentions and summary judgment is granted to the extent of dismissing the second cause of action.

#### **D. The FVP Options Claim (Eight Cause of Action)**

CW contends that discovery has now established that the OM’s waiver language applies to block any claim Cobalt has involving the FVP Options because the evidence demonstrates that FVP Options were waived prior to the closing of the CDO to ensure Cobalt’s QSPE status.

In opposition, Cobalt contends that CWCI has not produced any instrument evidencing this waiver, and that CW’s witnesses have testified that they were not aware of one. Cobalt contends that: (1) this absence of an instrument contrasts with other instruments executed at signing that irrevocably waived other purchase options; and (2) the waiver of the FVP Options at inception is inconsistent with CWCI’s continued execution of asset-by-asset waivers of Cobalt’s FVP Options. According to Cobalt, CW offers

nothing but hearsay evidence about Cobalt's waiver of the FVP Option and that, at a minimum, CWCI's subsequent waivers of the FVP Options raise genuine disputes of material fact as to whether Cobalt's FVP Options were waived at inception.

The parties also dispute whether the claim must be dismissed under the CMA's exculpatory clause and prohibition on consequential damages.

In pertinent part, the OM provides:

"In connection with each Underlying Series, the Control Rights with respect to each of the Underlying CMBS Series, CDO Series and the CM Series, that constitute a purchase right or a redemption right with respect to each of the assets of such Underlying Series have been irrevocably waived by the applicable Seller. The Issuer is prohibited from exercising any Control Rights in a manner which would not be deemed to be an exercise of servicing rights under paragraph 35 of SFAS 140 or otherwise cause the Issuer not to be treated as a qualifying special purpose entity under SFAS 140." (NYSCEF 625, OM at 62.)

In reversing dismissal of this claim, the Appellate Division, First Department, found that "it [was] premature to hold . . . that the waiver language applies to block any claim Cobalt has involving the options," because:

"even if the offering memorandum's description of Cadim's contractual waiver of purchase or redemption rights would unambiguously encompass FVP Options, it [was] not clear from the record that this waiver provision was intended to pass from Cadim to Cobalt. Indeed, it [was] possible that the operative language in the offering memorandum was intended to be a waiver of any rights Cadim might have *retained* after selling the certificates to Cobalt. This notion [was] bolstered by the fact that CMBS trustees continued to issue to CWCI, as Cobalt's appointed controlling class representative, notices that were sent only to FVP Option holders. In other words, the trusts' actions suggest that they believed that Cobalt had FVP Options." (*CWCapital Cobalt VR Ltd.*, 195 AD3d at 20-21 [1st Dept 2021].)

CW now presents evidence that resolves this ambiguity in the OM. It demonstrates, prima facie, that waiver of Cobalt's FVP Options was necessary to enable the Vr CDO to meet QSPE requirements contained in the CDO documents. First, David Wolin, Skadden's lead counsel who drafted the CDO documents, including

the OM (NYSCEF 607, Wolin aff ¶ 6), states that “to satisfy Deloitte’s requirements for the Vr CDO to qualify as a QSPE, it was required that the Issuer have no right to exercise [FVP Options] in the underlying CMBS trusts. To establish that the Issuer had no such right, the sellers of the CMBS and CDO investments to the Issuer irrevocably waived the right to exercise [FVP Options]. This waiver was expressly disclosed in the [OM].” (*Id.* ¶ 14.) Wolin adds:

“I know with certainty that, in order to meet Deloitte’s QSPE requirements, Cadim (and the other sellers) irrevocably waived its right to exercise [FVP Options] when it sold the CMBS and CDO investments to the Vr CDO, and that this was done so that the Issuer in receiving such collateral likewise did not have those rights.” (*Id.* ¶ 15.)

Charles Spetka, who was President of CWCI and CWCA at the time the Vr CDO was created (NYSCEF 605, Spetka aff ¶¶ 2, 3), states that “CWCI and Cadim worked with [Skadden] and Deloitte to structure and document the Vr CDO” and that he “ha[s] personal knowledge about [the CDO’s] purpose and intent, as well as its operation from 2007 until 2013 when [he] left CW.” (*Id.* ¶¶ 3, 10.) According to Spetka, “[a]voiding consolidation of the Vr CDO on Cadim’s financial statements was a driving force behind the structure of the Vr CDO, which was accomplished by forming the Issuer as a [QSPE],” which, in turn, “required that all [FVP Options] related to the underlying CMBS trusts be irrevocably waived prior to the Vr CDO’s issuance,” and that “[t]his waiver was disclosed to investors in the [OM].” (*Id.* ¶ 10.) To further demonstrate that it was the understanding of the parties involved that QSPE status required waiver of the FVP Options, CW submits an email thread between a CW employee and Spetka, dated February 16, 2007. (NYSCEF 657.) Attached to the email is an accounting memo containing “management’s proposed treatment of [another CDO issuer], a Cayman

Islands exempted company, as a qualified special purpose entity under FASB 140.” (*Id.* at CW0523210.) In pertinent part, the memo states that “[m]anagement believes [the entity] will be a QSPE,” because its “permitted activities will be significantly limited,” and addresses Deloitte’s concerns regarding maintaining QSPE status by ensuring the issuer irrevocably waives, among other things, its rights to redeem defaulted assets. (*Id.* at CW0523210-CW0523212.) Additionally, CW’s accounting expert opines that “Cobalt was not permitted to exercise or market fair value purchase options due to it being established as a QSPE.” (NYSCEF 713, Ellis Corrected Expert Rep ¶¶ 71-78.)

In opposition, Cobalt seeks to raise an issue of fact as to whether there was a waiver at inception by pointing to the lack of a separate instrument and CWCI’s issuance of notices in connection with the assignment of FVP Options to its affiliates, each stating, in pertinent part, that “[t]he undersigned hereby provides notice that it will not exercise any right relating to the purchase of Mortgage Loan . . . or the assignment or transfer of the purchase option relating to such Mortgage Loan pursuant to [the pertinent section] of the Pooling and Servicing Agreement.” (NYSCEF 1163, Notice Related to June 6, 2013 Purchase Option; NYSCEF 1164, Notice Related to July 26, 2013 Purchase Option; NYSCEF 1149, Notice Related to July 30, 2014 Purchase Option; NYSCEF 1150, Notice Related to September 10, 2013 Purchase Option; NYSCEF 1151, Email with Attached Notice.) CW claims that these notices were necessary to close the transactions and are consistent with CWCI’s understanding that it could not execute FVP Options on the Vr CDO’s behalf because that right had been waived at inception. (See NYSCEF 730, Frank tr at 185:20-187:14 [testifying that under the CDO document the “the ability of the noteholders to exercise a right of

purchase had been waived” and each notice “was in effect just an affirmation that it did not have that right”]; NYSCEF 727, Buono tr at 379:3-21 [explaining that the notices were “belt and suspenders”]; NYSCEF 951, Nolan tr at 285:2-4 [explaining that he provided the notices, “(b)ecause (Cobalt) had waived all of its rights in these (FVP Options)”]; NYSCEF 748, Warcholak tr at 343:17-345:6 [same].) Normally, whether these notices are waivers or mere notices of a previous waiver would constitute an issue of fact. (See *e.g. Federal Ins. Co. v North Am. Specialty Ins. Co.*, 83 AD3d 401, 403 [1st Dept 2011] [finding that “it is for the finder of fact to determine whether the documents establish a deliberate plan . . . or merely reflect discussions of the consequences of a valid indemnity claim”].) However, to find so here, would ignore the OM and the parole evidence CW offers to dispel the ambiguity of the OM’s waiver language.

In opposition, Cobalt has offered nothing to show how it could have retained its FVP Options given its QSPE status at inception. Cobalt merely challenges the admissibility of Wolin and Spetka’s statements, arguing that neither purports to have past experience with QSPEs or to have any independent knowledge of what was required to qualify as a QSPE in 2007. Additionally, Cobalt claims that Wolin’s sole support for his claim that the FVP Options were irrevocably waived, that “Deloitte advised [Skadden] that they would not have concluded that the Issuer was a QSPE or complied with FASB 140” without such a waiver (NYSCEF 607, Wolin aff ¶ 15), is inadmissible hearsay. Cobalt also argues that Spetka does not claim to have any personal knowledge of the drafting of any transaction documents other than the CMA (see NYSCEF 605, Spetka aff ¶ 3) and offers nothing but a conclusory statement that

“[t]o be a QSPE, it was required that all fair value purchase options related to the underlying CMBS trusts be irrevocably waived prior to [Cobalt’s] issuance” (*id.* ¶ 10). However, Wolin’s testimony is not being offered to establish the truth of Deloitte statement, but to demonstrate Wolin’s state of mind in drafting the OM. As such, it is admissible. (See *Bergstein v Bd. of Educ.*, 34 NY2d 318, 324 [1974] [“where a witness’ state of mind is relevant, the witness may testify to out-of-court statements made by others which would indicate circumstantially what the witness believed at that time” (citation omitted)]; *People v Matthews*, 16 AD3d 135, 137 [1st Dept 2005].) Similarly, Spetka states that he was involved in the creation of the Vr CDO and as such knows the purpose for which it was formed. (See NYSCEF 605, Spetka aff ¶¶ 3, 10.) In any event, the following remains undisputed: (1) Cobalt was created as a QSPE; and (2) *at inception*, to qualify for QSPE status, Cobalt had to irrevocably waive its FVP Options. As Cobalt fails to raise an issue of fact on either point,<sup>18</sup> this resolves the ambiguity of the OM’s waiver language. (See *Madeline D’Anthony Enters., Inc.*, 101 AD3d at 609.) Therefore, CW’s motion for summary judgment is granted to the extent of dismissing the eighth cause of action.

Based on the foregoing, the court does not address the parties’ remaining contentions.

Accordingly, it is hereby ordered

ORDERED that motion sequence 027 for summary judgment is granted, in part, dismissing the first cause of action to the extent it relates to the Stuy Town Loans and

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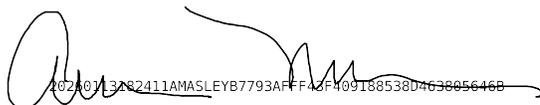
<sup>18</sup> Cobalt merely contends that the elimination of the QSPE concept freed Cobalt from QSPE limitations. (see NYSCEF 1219, Cobalt’s opposition brief on motion 027 at 26; NYSCEF 986, Boudouris expert rep ¶¶ 22-26).

seeks damages for the absence of fee-sharing rather than fee-waiver agreements, the second cause of action, the sixth cause of action, the seventh cause of action, and the eighth cause of action; and it is further

ORDERED that those causes of action are severed and the remaining portion of the first cause of action, as well as the third and fifth causes of action are continued; and it is further

ORDERED that motion sequence 031 for summary judgment is denied; and it is further

ORDERED that counsel are directed to appear for a pre-trial conference on February 19, 2026, at 9:30 AM. Parties shall review the court's trial procedures and speak to their clients and witnesses about their availability in April, May or June 2026 or 2027 for trial. Motions in limine must be filed by March 6, 2026 unless a 2027 trial date is selected.



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1/13/2026  
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE