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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Residential Funding Company, LLC and ResCap Liquidating Trust,

Plaintiffs,

v.

Quicken Loans, Inc., f/k/a Rock Financial Corporation,

Defendant,

Court File No. 27-CV-14-3111
The Honorable Ivy S. Bernhardson

Residential Funding Company, LLC,

Plaintiff,

v.

GSF Mortgage Corporation,

Defendant,

Court File No. 27-CV-14-4111

Residential Funding Company, LLC,

Plaintiff,

v.

Guaranteed Rate, Inc.,

Defendant.

Court File No. 27-CV-14-5216

These matters were heard before the Honorable Ivy S. Bernhardson, Judge of District Court, on November 10, 2016, at 9:00 a.m. in Courtroom 657 of the Hennepin County Government Center, 300 South 6th Street, Minneapolis, Minnesota, upon Defendants GSF Mortgage Corporation's,

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Guaranteed Rate, Inc.'s, and Quicken Loans Inc.'s Joint Motion for Partial Summary Judgment on Damages.

Lilit Asadourian, Esq.; Jason Hazelwood, Esq.; and Brian Sutherland, Esq., Reed Smith LLP, appeared on behalf of Defendants Guaranteed Rate, Inc. and GSF Mortgage Corporation.

Jeffrey B. Morganroth, Esq., Morganroth & Morganroth, PLLC, appeared on behalf of Defendant Quicken Loans, Inc.

David Elsburg, Esq.; Isaac Nesser, Esq.; and Yelena Konanova, Esq., Quinn Emanuel Urquhart & Sullivan LLP; Donald George Heeman, Esq., of Felhaber Larson; Michael V. Ciresi, Esq., Ciresi Conlin LLP; and Joshua Margolin, Esq. (via CourtCall) appeared on behalf of Plaintiffs Residential Funding Company, LLC and ResCap Liquidating Trust (collectively, "Plaintiff" or "RFC").

Based upon all the files, records, and proceedings herein, the Court enters the following:

ORDER

1. Defendants GSF Mortgage Corporation's, Guaranteed Rate, Inc.'s, and Quicken Loans Inc.'s Joint Motion for Partial Summary Judgment is hereby **granted**.

2. Plaintiff shall not be entitled to loan-level damages calculated pursuant to the repurchase provision of the Client Guide.

3. This Order does not preclude discovery regarding and consideration of loan-level losses if actually sustained by Plaintiff under the other remedial provisions of the Client Guide.

4. The memorandum that follows is incorporated herein.

BY THE COURT:

Dated: February 1, 2017

The Honorable Ivy S. Bernhardson
Judge of District Court

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MEMORANDUM OF LAW

I. BACKGROUND

Plaintiff Residential Funding Company, LLC ("RFC") entered into contracts with each of the Defendants in these cases to purchase residential mortgage loans which Defendants had originated and, in some instances, serviced. Under the contracts signed by the parties, including the terms of RFC's "Client Guide"[1], which was incorporated by reference into the parties' contracts, Defendants Quicken Loans, Inc. ("Quicken"), GSF Mortgage Corporation ("GSF"), and Guaranteed Rate, Inc. ("GRI") made certain representations and warranties regarding the quality of the loans they sold to RFC. The relevant representations and warranties concern, among other things, facts relating to borrowers' income, employment, and undisclosed debt, as well as the underlying properties' owner occupancy and appraisals. Under the terms of the Client Guide, any breaches of these representations and warranties constituted an "Event of Default." *See* Client Guide Section A208(3). In connection

[1] Several exemplary versions of the GMAC-RFC Client Guide are attached as exhibits to the First Amended Complaints in all three court files. In all versions presented to the Court, the relevant language of "Chapter 2A Representations, Warranties and Covenants," which includes sections on events of default (A208), remedies (A209), repurchase (A210), and indemnification (A212), is the same. *See, e.g.*, Quicken Am. Compl, Ex. B-1; GSF Am. Compl, Ex. D-1; GRI Am. Compl., Ex. B-1. One version filed with RFC's First Amended Complaint against GSF includes some additional text, none of which is pertinent to Defendants' motion for partial summary judgment on damages. Because the Court can find no meaningful difference among the versions of the Client Guide that have been filed in these cases, throughout this memorandum these various but virtually indistinguishable documents are referred to as the "Client Guide". In its submissions, RFC attempts to create an issue of fact with respect to the Client Guide, arguing that Defendants' motion is "based on contract terms that are unidentified and disputed." Pl.'s Br. at 6. RFC suggests that clarity is lacking with regards to what contract applies and asserts that there are numerous versions of the Client Guide which may be relevant to their breach of contract claim, and therefore the record is incomplete for the purposes of summary judgment. *Id.* at 6-8. The Court disagrees. The material facts are undisputed. In considering Defendants' motion, the Court must construe the relevant facts in a light most favorable to RFC, and in so doing the Court relies on the language of the exemplar Client Guides offered by RFC. The remedies provisions of the Client Guides are all substantively identical. RFC has failed to present even one version of the Client Guide which alters the repurchase provision referenced in this motion.

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with an Event of Default, RFC could exercise one or more remedies prescribed in the Client Guide or at law. *Id.* Section A209(A). One of the specified remedies available to RFC was "repurchase." *See id.* Section A210.

> The repurchase section of the Client Guide provides in relevant part as follows:
>
> If GMAC-RFC determines that an Event of Default has occurred with respect to a specific Loan, the Client agrees to repurchase the Loan … within 30 days of receiving a repurchase letter or other written notification from GMAC-RFC. …
>
> GMAC-RFC is not required to demand repurchase within any particular period of time, and may elect not to require immediate repurchase. However, any delay in making this demand does not constitute a waiver by GMAC-RFC of any of its rights or remedies.
>
> Where GMAC-RFC determines that repurchase of a Loan … is not appropriate, the Client shall pay GMAC-RFC all losses, costs and expenses incurred by GMAC-RFC … as a result of an Event of Default. This includes all reasonable attorneys' fees and other costs and expenses incurred in connection with enforcement efforts undertaken.
>
> Upon the Client's satisfaction of its repurchase obligation, GMAC-RFC will endorse the Note evidencing the Loan in blank and will deliver it and other pertinent Loan Documents to the Client. If GMAC-RFC acquired title to any of the real property securing the Loan pursuant to ta foreclosure sale and has not disposed of such property, it will transfer such property to the Client on a "quit claim" basis or … a "warranty deed" basis. However, if GMAC-RFC has disposed of the real property securing the Loan, the Loan Documents will not be returned to the Client unless requested.

Id. Section A210(A). Sections A210(B), (C), and (D) subsequently outline the "repurchase price" for a mortgage loan, home equity loan, and a "Servicing Released Loan," respectively.

In addition to the repurchase remedy defined under Section A210 of the Client Guide, RFC was entitled to indemnification "from all losses, damages, penalties, fines, forfeitures, court costs and reasonable attorneys' fees, judgments, and any other costs, fees and expenses resulting from an Event of Default." *Id.* Section A212. Under the terms of the indemnification provision, Defendants agreed to indemnify RFC against "any and all losses, damages, penalties, fines, forfeitures, judgments, and any other costs, fees and expenses (including court costs and reasonable attorneys'

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fees) incurred … in connection with any litigation or governmental proceedings…" *Id.* Defendants further agreed to indemnify RFC and "hold it harmless against all court costs, attorney's fees and any other costs, fees and expenses incurred by [RFC] in enforcing the Client Contract." *Id.*[2]

RFC was in the business of acquiring loans from lenders such as Defendants and then packaging those loans into residential mortgage-backed securities ("RMBS") trusts, or selling them to whole loan purchasers. Quicken Am. Compl. ¶¶ 2-3; GSF Am. Compl. ¶ 5; GRI Am. Compl. ¶¶ 2-3. Beginning in 2008, RFC became subject to a large number of claims and lawsuits by numerous parties, including RMBS trustees, investors, and insurers. Quicken Am. Compl. ¶¶ 7-8; GSF Am. Compl. ¶ 8; GRI Am. Compl. ¶¶ 7-8. These actions stemmed from allegations that the loans securitized by RFC "contained numerous defects and were rife with fraud and compliance problems."

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[2] Section A202(II) of the Client Guide, "Loan Securitization", mirrors the indemnification language in Section A212, but expressly refers to RFC's intent, and the Defendants' knowledge of such intent, to securitize and sell the loans:

> The Client recognizes that it is GMAC-RFC's intent to securitize some or all of the Loans sold to GMAC-RFC by the Client. The Client agrees to provide GMAC-RFC with all such information concerning the Client generally and, if applicable, the Client's servicing experience, as may be reasonably requested by GMAC-RFC for inclusion in a prospectus or private placement memorandum published in connection with such securitization.
>
> In addition, the Client will cooperate in a similar manner with GMAC-RFC in connection with any whole Loan sale or other disposition of any Loan sold to GMAC-RFC by the Client. The Client agrees to indemnify and hold GMAC-RFC harmless from and against any loss, damage, penalty, fine, forfeiture, court cost, reasonable attorneys' fees, judgment, cost, fee, expense, or liability incurred by GMAC-RFC as a result of any material misstatement in or omission from any information provided by the Client to GMAC-RFC; or from any claim, demand, defense or assertion against or involving GMAC-RFC based on or grounded upon, or resulting from such misstatement or omission or a breach of any representation, warranty or obligation made by GMAC-RFC in reliance upon such misstatement or omission.
>
> The Client further agrees to cooperate fully with GMAC-RFC, rating agencies, attorneys, bond insurers, purchasers of Loans or any other parties that may be involved in the sale or securitization of any Loan, including, without limitation, all cooperation as may be necessary in order to accommodate due diligence activity.

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Id. In 2012, facing a growing number of such lawsuits, RFC and certain of its affiliates filed for bankruptcy in the United States Bankruptcy Court of the Southern District of New York (Case No. 12-12020). *See* Quicken Am. Compl. ¶¶ 1, 8-10, 49, 67-78; GSF Am. Compl. ¶¶ 4, 9-11, 14; 56-70; GRI Am. Compl. ¶¶ 1, 8-10, 49-50, 65-75.

In the present actions, RFC is pursuing claims for breach of contract and indemnification against Defendants. *See* Quicken Am. Compl. ¶¶ 79-90; GSF Am. Compl. ¶¶ 62-70; GRI Am. Compl. ¶¶ 72-83. These claims arise from contracts signed by the parties in 1994 (Quicken), 2003 (GRI), and 2004 (GSF), all of which incorporate substantively identical versions of RFC's Client Guide. RFC alleges, essentially, that Defendants breached several of its extensive contractual representations and warranties upon which RFC relied as it passed on corresponding, but more limited representations and warranties to the RMBS Trusts and their investors. *See, e.g.*, Quicken Am. Compl. ¶ 36-45; GSF Am. Compl. ¶¶ 37-52; GRI Am. Compl. ¶¶ 36-45.

RFC states Defendants previously have conceded that certain of the loans they sold to RFC were materially defective and have already "paid certain sums to RFC to cover those defects." Quicken Am. Compl. ¶ 34; GSF Am. Compl. ¶ 35; GRI Am. Compl. ¶ 34. In the present actions, RFC is not seeking additional recovery on those loans. *Id.*

II. ISSUE BEFORE THE COURT

In their motion for partial summary judgment, Defendants assert that the Client Guide governing the parties' relationships limits RFC's damages. Specifically, Defendants argue that the Client Guide's repurchase provision authorizes only the remedy of repurchase, and that the damages formula provided in the Client Guide to ascertain an individual loan's repurchase price (Section A210(B), (C), (D)) is inapplicable where RFC does not (or cannot) seek repurchase of such a loan. The issue raised by Defendants is one of contract interpretation.

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III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the pleadings, discovery, and affidavits show that there are no genuine issues of material fact and that a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. The moving party has the burden of demonstrating the absence of a factual dispute. *Anderson v. State Dep't of Nat. Res.*, 693 N.W.2d 181, 191 (Minn. 2005). In ruling on a motion for summary judgment, courts must consider the evidence in the light most favorable to the non-moving party. *Vieths v. Thorp Finance Co.*, 232 N.W.2d 776, 778 (1975). The non-moving party "may not establish genuine issues of material fact by relying upon unverified or conclusory allegations, or postulated evidence that might be developed at trial." *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004).

IV. DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants move for summary judgment with respect to any loan-level damages RFC seeks under the repurchase provision of the Client Guide. The dispute boils down to whether RFC's sale of the at-issue loans to third parties renders recovery under the repurchase provision unavailable. Defendants argue that it does. RFC argues that the Client Guide's repurchase provision affords them relief even where, as is the case here, loans are not available for Defendants to repurchase. Because the Court concludes that the Client Guide imposes on Defendants a specific performance obligation to repurchase loans that RFC determines are deficient, and because the repurchase remedy is not available where there are no loans to repurchase, it grants Defendants' motion.

A. Legal Standards for Contract Interpretation and Breach of Contract Damages

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Absent ambiguity, the interpretation of a contract is a question of law, and thus appropriately brought before the Court for summary judgment.[3] *See Roemhildt v. Kristall Dev., Inc.*, 798 N.W.2d 371, 373 (Minn. App. 2011), review denied (Minn. July 19, 2011). The primary goals of contract interpretation are to determine and enforce the intent of the contracting parties. *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003). When interpreting a written instrument, "the intent of the parties is determined from the plain language of the instrument itself." *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). Contract terms are read in the context of the entire contract and should not be construed "so as to lead to a harsh and absurd result." *Brookfield Trade Ctr., Inc. v. Cnty. of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998) (citation omitted). Furthermore, courts must "interpret a contract in such a way as to give meaning to all of its provisions." *Id.*

Black-letter contract law limits damages on breach of contract claims to actual losses caused by the breach. Restatement (Second) of Contracts § 347 cmt. e. "Under a general allegation of damages resulting from a breach of contract, a plaintiff may recover those damages that naturally and necessarily result from the alleged breach." *Logan v. Norwest Bank Minnesota, N.A.*, 603 N.W.2d 659, 663 (Minn. Ct. App. 1999). Contractual remedies may be defined or limited by terms of the contract itself, and such provisions will be enforced if they are applicable. *See, e.g. Independent*

[3] RFC contends that summary judgment is inappropriate at this stage of litigation because expert discovery pertinent to damages remains unfinished. Pl.'s Br. at 10-12. The Court does not intend to preclude expert discovery as to loan-level losses. An appropriate measure of damages in these cases may very well require an analysis of loan-level losses – should RFC meet its burden on its breach of contract and indemnification claims, it is entitled under common law to its actual damages and under the Client Guide to "all losses, costs and expenses incurred … as a result of an Event of Default" (Section A210(A)) as well as various losses and damages listed under Section A212. In granting Defendants' motion for partial summary judgment, the Court does not limit analysis of damages at the loan level to the extent that such damages may have been incurred by RFC (the record is indeed incomplete so as to warrant such a holding). The Court merely finds that the plain text of the contract prohibits calculating loan-level losses under the repurchase provision, given that there are no loans for Defendants to repurchase from RFC at this point.

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Consol. School Dist. No. 24, Blue Earth County v. Carlstrom, 151 N.W.2d 784, 786 (Minn. 1967) ("Where parties stipulate what the consequences of a breach of agreement shall be, such stipulation, if reasonable, is controlling and excludes other consequences…")

Here, the Court must decide whether, notwithstanding RFC's sale of the loans underlying the parties' agreements, RFC is entitled to loan-level monetary damages calculated under the repurchase provision of the Client Guide. The Court finds that reading the repurchase provision to contemplate a remedy other than the actual specific performance it authorizes – repurchase of a loan – sits uneasily with other provisions of the Client Guide and is contrary to both the apparent intent of the parties and a common sense reading of the contract.

B. Language of the Repurchase Provision of the Client Guide

RFC's reading of the Client Guide's repurchase provision is that Section A210 permits recovery of loan-level losses pursuant to a repurchase price formula regardless of whether or not RFC incurred out-of-pocket losses.[4] Pl.'s Br. at 14. They argue that Defendants have not provided "a shred of evidence" in support of their contrary claim that Section A210 limits RFC to recovery of loan-level losses only where RFC owned the loan at the time of the loss. *Id.*[5] The only evidence required, however, is the Client Guide.

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[4] Throughout its brief, RFC repeatedly employs the phrase "Formula Payments" rather than "repurchase price" in reference to the relief at issue in this motion. In the Glossary to its brief RFC defines Formula Payments as "Payments calculated according to the formulas in Section A210(B), (C), or (D) of the Client Guide." The phrase "Formula Payments" appears nowhere in the Client Guide, however, while the heading of each of subsections A210(B), (C), and (D) begins with the phrase "Repurchase Price." Referencing "formula payments" throughout its brief, RFC presumably attempts to untether the relief it seeks under Sections A210 from the actual remedy authorizing use of such a formula: repurchase. The Client Guide is clear, however, that "formula payments" are only available in instances of repurchase.

[5] RFC also argues that Defendants improperly rely on RFC's Rule 26.01 disclosures in bringing this motion. This is not accurate. Receipt of the disclosures may have brought the controverted legal issue of loan-level losses to Defendants' attention, thereby motivating their efforts to bring the issue to the Court. They appropriately rely, however, on the pleadings, discovery, affidavits, and admissions on file, as is required under Minn. R. Civ. P. 56.03.

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Under the Client Guide, in the Event of Default, Defendants agreed "to repurchase the Loan … within 30 days of receiving a repurchase letter or other written notification from GMAC-RFC." Where RFC determined that repurchase was inappropriate, Section A210 of the Client Guide required Defendants to pay RFC "all losses, costs, and expenses *incurred by RFC … as a result of* an Event of Default." (Emphasis added.) The language is unambiguous. The first part of Section A210 addresses the repurchase remedy, and the third paragraph addresses situations in which repurchase is not appropriate. According to Black's Law Dictionary (10th ed. 2014), "repurchase" is "the act or an instance of buying something back or again." This definition coincides with common usage of the term. Where there is not "something" to buy "back or again," the opportunity to repurchase is unavailable. Where repurchase is unavailable, repurchase is for all practical purposes "not appropriate," triggering the latter portion of Section A210, which allows for recovery of losses actually incurred. More plainly: where repurchase is unavailable, RFC's recovery is limited to losses, costs and expenses it actually *incurred*, and the repurchase price formula is irrelevant to any calculation of damages to which it is entitled.[6]

C. The Language of the Indemnification Provisions of the Client Guide

The indemnification provisions of the contract support the above interpretation. The language of Sections A202(II) and A212 obligates Defendants to indemnify RFC against a long list of expenditures "resulting from an Event of Default." Section A202(II) expressly contemplates RFC's intent to securitize and sell the at-issue loans and is silent as to a repurchase remedy or a repurchase price formula. Under the "Loan Securitization" provision, Defendants were not required to

[6] RFC proffers extrinsic evidence suggesting that other correspondents paid RFC amounts equal to the repurchase price even where no actual repurchase of a loan occurred. *See* Nesser Decl., Ex. 21; Horst Decl. This evidence does not specify whether the loans it addresses were owned by RFC when payment was demanded, it does not relate to any of the Defendants in these cases, and it is thus entirely irrelevant. Furthermore, the plain language of the contract controls here, and the Court must not consider extrinsic evidence where a contract is unambiguous, as in this instance.

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repurchase or compensate RFC under a set formula, but to hold RFC harmless from any losses, et cetera, "incurred … as a result of any material misstatement or omission from any information" provided by Defendants to RFC; or from "any claim, demand, defense or assertion against or involving GMAC-RFC based on or grounded upon, or resulting from such misstatement or omission or a breach of any representation, warranty or obligation made by GMAC-RFC in reliance upon such misstatement or omission." Section A212 permits expansive recovery where RFC incurs losses and expenses "in connection with any litigation or governmental proceedings." *Id.* Finally, Defendants agreed to indemnify RFC and "hold it harmless against all court costs, attorney's fees and any other costs, fees and expenses incurred … in enforcing the Client Contract." *Id.* Relief under the indemnification provision is broad – the Court has no doubt that RFC will be made whole if it proceeds to recover damages consistent with the language of Section A212.[7]

Repurchase was one of several remedies to which the parties agreed, and it was a practical one to enforce when RFC held the at-issue loans or was contractually required to repurchase at-issue loans that it had sold to third parties. Where RFC did not own the loans, only the other bargained-for remedies of the Client Guide were available. Here, in a situation clearly anticipated by Sections A202(II) and A212, RFC no longer has any right, title, or interest in the at-issue loans. It was paid by third parties for the loans long before these actions were filed. The Client Guide, consistent with Minnesota contract law, precludes an assessment of damages exceeding the amount of actual losses and expenses that RFC has sustained. The appropriate relief, should RFC prevail in these actions, is damages for losses incurred on account of Defendants' alleged breaches of contract (Section A210) and losses for which RFC can seek indemnification under Sections A202(II) and A212.

[7] Presumably, one of RFC's concerns is that it faces a greater burden of proof where repurchase is no longer available – while the repurchase provision gives RFC the exclusive authority to determine whether an Event of Default has occurred and demand repurchase, the indemnification provision requires that RFC prove actual damages as well as causation.

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D. Case Law Cited by RFC is Distinguishable

To contradict the above analysis, RFC relies on several cases, all of which hold, to some extent or other, that monetary damages at the "repurchase price" are available where defective mortgage loans are not or cannot be repurchased. These opinions are instructive to the analysis of this Court, but all are distinguishable from the ones at hand and inapposite to the parties' present facts and circumstances.

The first case cited by RFC is *CitiMortgage, Inc. v. Chicago Bancorp, Inc.*, 808 F.3d 747 (8th Cir. 2015). In *CitiMortgage*, as in these cases, plaintiff purchased residential mortgage loans underwritten and originated by defendant, and the contract governing the parties' dealings included a cure or repurchase remedy in the event that plaintiff determined that a loan "did not conform to the terms of the contract." 808 F.3d at 749. The District Court for the Eastern District of Missouri granted summary judgment to plaintiff as to several loans, awarding plaintiff damages based on the contract's repurchase price formula. *Id.* Defendant appealed and the Eighth Circuit affirmed, holding that the formula in the parties' contract was the appropriate measure of damages under the circumstances. *Id.* at 749-50. The following circumstances of *CitiMortgage*, however, are distinctly inconsistent with the facts before this Court: (1) prior to filing its lawsuit, plaintiff had demanded repurchase of the defective loans and defendant had refused; and (2) plaintiff's claim for breach of contract did not stem from defendant's warranties or representations (as in the cases here), but from defendant's refusal to repurchase the at-issue loans when plaintiff made its demand. *Id.* at 749-51. Accordingly, the breach-of-contract damages available to CitiMortgage were different from those available to RFC. Had the defendant in *CitiMortgage* repurchased the loans when plaintiff made its initial demand, plaintiff would have recovered under the repurchase price formula in the parties' agreement. When defendant refused to repurchase the loans, thereby breaching the parties' contract, plaintiff was deprived of its recovery in the amount of the loans' repurchase price. Thus the logical calculation of

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damages involved applying the contract's repurchase price formula. Here, the pleadings make no indication that RFC demanded Defendants to repurchase any of the loans in question, or that Defendants refused any such demand. RFC's breach of contract claim hinges on alleged defects in Defendants' representations and warranties with respect to the loans it sold to RFC. Any future assessment of damages will be based on the losses RFC incurred on account of Defendants' breaches, not on the repurchase price formula.[8]

RFC also cites *Resolution Trust Corp. v. Key Financial Servs., Inc.*, 280 F.3d. 12 (1st Cir. 2002), in support of its position. In this Massachusetts case, the district court found that, as in *CitiMortgage*, defendant's failure to repurchase non-conforming loans from plaintiff constituted an independent breach of the parties' contract. *Id.* at 16. After years of litigation ensued on the issue of damages, judgment ultimately was entered in favor of plaintiffs in an amount equal to the loans' repurchase price. *Id.* at 18-19. Defendant appealed, arguing that, because repurchase was the "sole remedy" available to plaintiff under their agreement, plaintiff was not entitled to damages where repurchase was no longer available. *Id.* at 18. The First Circuit disagreed, upholding the damages award determined by the District Court and noting the following:

> Had [defendant] repurchased the loans at the time of the initial demand, the parties (and the district court) would not have been faced with the complicated question of how to deal with the numerous loans that subsequently went off-line. [Plaintiff] obviously would have preferred that [defendant] repurchase the loans back in 1989, rather than find itself trying to determine years later the amount of monetary damage resulting from [defendant's] failure to do so. A repurchase provision is designed to shift the risk to the selling party in the event that a dispute arises.

Id. Here, there is no such complicated question. Repurchase is not the sole remedy available to RFC under the Client Guide, and the Court need not determine "how to deal with" the allegedly non-

[8] If a repurchase demand was made by RFC while it still held one of the contested loans in this case and Defendants refused, the repurchase formula may indeed apply.

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conforming loans that were sold to third parties. Sections A210 (covering losses incurred on account of defendants' breaches of warranties and representations), A202(II) (Loan Securitization) and A212 (indemnification) afford opportunities for relief where the repurchase remedy is inapplicable. According to the record of these cases, RFC, unlike the plaintiffs in *CitiMortgage* and *Resolution Trust Corp*, never demanded that Defendants repurchase the at-issue loans. (It could not have, since RFC packaged and resold the loans prior to identifying their alleged deficiencies.) Accordingly, the repurchase price formula is an inappropriate means of calculating damages.[9]

Several other courts similarly conclude that repurchase price formulas may apply where a specific performance remedy is not available.[10] The cases at hand, however, do not necessitate such

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[9] RFC finally mentions an unpublished case from the Superior Court of New York County, *Nomura Asset Acceptance Corp. Alternative Loan Trust v. Nomura Credit & Capital, Inc.*, 2014 WL 2890341 at *7 (Sup. Ct. N.Y. Cnty. June 26, 2014). This case is distinguishable from *CitiMortgage* and *Resolution Trust Corp.* in that, based on the binding precedent of that jurisdiction, the court was foreclosed from finding that defendant's refusal to comply with a repurchase demand constituted an independent breach of contract. The court, using its equitable authority, nonetheless held that application of the repurchase price formula to establish monetary damages was appropriate. In so holding, the court reasoned that, because repurchase was the "sole remedy" available to plaintiff and yet specific performance of such a remedy was no longer available, a narrow reading of the contract would effectively reward defendant for refusing to repurchase. The court found that an interpretation of the contract that absolved defendants from liability upon expiration of the opportunity for repurchase established poor incentives and could not have been intended by the parties. *Nomura* is not relevant to the cases at hand because repurchase is not RFC's sole remedy under the Client Guide and because Defendants did not refuse a demand by RFC to repurchase the at-issue loans.

[10] *See, e.g., Bear Stearns Mortgage Funding Trust 2006-SL1 v. EMC Mortgage LLC*, 2015 WL 139731 at *17 (Del. Ch. Jan. 12, 2015) (refusing at the pleadings stage of litigation to enforce a narrow interpretation of a repurchase provision where repurchase was the exclusive remedy in the parties' contract); *but see Mastr Asset Backed Securities Trust 2006-HE3 v. WMC Mortgage Corp.*, 843 F. Supp. 2d 996, 1001 (D. Minn. 2012) (holding that "the sole remedy available to [plaintiff] is to seek cure, repurchase or substitution of the allegedly defective … mortgages" and, accordingly, plaintiff "may not recover additional remedies, including monetary damages"); *Mastr Asset Backed Securities Trust 2006-HE3 v. WMC Mortgage Corp.*, 2012 WL 4511065 at *6 (D. Minn. Oct. 1, 2012) (under the governing agreement, defendant could not be compelled to repurchase loans from plaintiff where the plaintiff no longer held title to the real property securing those loans); *First Place Bank v. Skyline Funding, Inc.*, 2011 WL 3273071 at *4 (N.D.Ill. July 27, 2011) (rejecting as "nonsensical" plaintiff's proposition that foreclosure did not alter its obligation to repurchase a mortgage loan and dismissing plaintiff's claim for breach of contract where defendant's alleged "breach" was refusal to repurchase a loan that plaintiff no longer owned).

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a holding. First, as mentioned above, unlike the plaintiffs in *CitiMortgage*, *Resolution Trust Corp*., and others, RFC does not allege that it demanded repurchase by Defendants and was refused. Second, RFC and Defendants smartly agreed to *several* non-exclusive and cumulative remedies should an Event of Default be identified, whereas in the cases cited by RFC, repurchase was the "sole remedy" in the parties' contracts, and where the sole remedy was eliminated, courts used their equitable powers to make plaintiffs whole. Finally, the procedural posture of these cases is distinct. The case law addressing repurchase provisions tends to presume that calculating damages where non-conforming loans have "gone off-line" (i.e., are no longer available for repurchase) is prohibitively complicated. Courts resort to using repurchase price formulas because there is often nothing better to use – a bargained-to formula seems better than grasping at straws. Here, though, the computation of actual damages is unlikely to be so elusive. Prior to filing its lawsuits against Defendants, RFC filed for bankruptcy and reached a Global Settlement Agreement resolving many claims it faced by investors, trustees, and insurers. During the bankruptcy proceeding, claims were made against RFC relating to the mortgages sold by Defendants and others that were placed in the RMBS trusts. These claims were all settled through the Global Settlement which was approved as of December 11, 2013. *See* Asadourian Decl. Ex. 8 at ¶ CC-MM (Order Confirming Second Amended Joint Chapter 11 Plan Proposed by Residential Capital, LLC, et al., and the Official Committee of Unsecured Creditors in *In re Residential Capital, LLC, et al*, No. 12-BK-12020(MG) (ECF No. 6065) (S.D.N.Y. Dec. 11, 2013). RFC and certain related debtors incurred an allowable claim of $7.091 billion to settle the claims by RMBS Trusts. Defendants' at-issue loans were included in those settled RMBS Trusts. Only the claims remain; the underlying mortgages are not available for repurchase. Accordingly, in the aftermath of the bankruptcy proceedings, in contrast to the plaintiffs in the cases it cites, RFC has meaningful data to work with as it seeks to prove and recover actual, ascertainable losses associated with its claims for breach of contract and indemnification.

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V. CONCLUSION

RFC no longer has any right, title, or interest in the at-issue loans in these cases. Repurchase is not available, and RFC tacitly acknowledges that by not seeking specific performance as a remedy in its breach of contract claims. Accordingly, the repurchase price formula, which served to define Defendants' monetary obligation were RFC to demand repurchase, is inapplicable. The repurchase price formula was established to shift costs to Defendants where loans owned by RFC (or loans RFC was required to repurchase from third party purchasers) were determined to be deficient. In exchange for a defective mortgage loan – including note, title, and other loan documents – RFC would recover under a set formula and be restored to the position it was in had Defendants not breached their representations and warranties. When RFC sold the loans, however, the costs were in effect shifted to third party purchasers of the loans, and any option for repurchase was extinguished. At this stage, RFC's recovery under the terms of Section A210 is limited to costs it actually incurred as a result of an event of default. The repurchase price formula has no bearing on the assessment of damages that RFC may have suffered in these cases. Defendants' motion for partial summary judgment as to damages is thus granted.

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