IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LNR PARTNERS, LLC, solely in its Capacity as Special Servicer,	)	
Plaintiff,	)	
	)	Civil Action No. 8472-VCP
v.	)	
C-III ASSET MANAGEMENT LLC,	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: September 3, 2013
Supplemental Submission: February 7, 2014
Date Decided: March 31, 2014

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PARSONS, Vice Chancellor.

This action arises from a dispute between two companies that service commercial real estate mortgage loans. The dispute relates to which of the two companies is the rightful troubled loan servicer, or "special servicer," for a commercial mortgage securitization trust. The defendant has been acting as the trust's special servicer. The plaintiff asserts that it has been properly designated by its affiliate, a substantial investor in the trust, to replace the defendant in that role. The defendant maintains that the plaintiff's affiliate lacks the authority to designate the trust's special servicer and that the affiliate's attempted designation, therefore, was ineffectual.

In its complaint, the plaintiff alleges that the defendant has breached its obligations under the trust agreement by refusing to cooperate in transitioning the special servicer role to the plaintiff. The plaintiff seeks a declaratory judgment that it is the trust's rightful special servicer and a decree of specific performance requiring the defendant to comply with its obligations under the trust agreement.

The defendant has moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim, on the grounds that the plaintiff lacks standing. The defendant has since dropped its challenge to the Court's jurisdiction. Concurrent with its opposition to the defendant's motion to dismiss, the plaintiff moved for summary judgment on the grounds that the trust agreement is unambiguous and it is entitled to the relief it seeks as a matter of law.

This Memorandum Opinion reflects my rulings on these motions. For the reasons that follow, I deny both the defendant's motion to dismiss and the plaintiff's motion for summary judgment.

I. BACKGROUND[1]

A. The Parties

Plaintiff, LNR Partners, LLC ("LNR Partners"), is a Florida limited liability company that specializes in commercial real estate mortgage loan servicing. LNR Partners is a successor by statutory conversion to LNR Partners, Inc.[2] LNR Partners is also an affiliate of nonparty LNR Securities Holdings, LLC ("LNR Securities"), which is an investor in the securitization trust to which this dispute relates.

Defendant, C-III Asset Management, LLC ("C-III"), is a Delaware limited liability company that is engaged in the same line of business as LNR Partners. C-III is an affiliate of nonparty C3 Initial Assets, LLC ("C3 Initial Assets"), which is, or was until recently, also an investor in the securitization trust.

B. Facts

1. The Citigroup Commercial Mortgage Trust 2006-C5

At issue in this case are certain loan servicing rights to the pool of commercial mortgage loans held by the Citigroup Commercial Mortgage Trust 2006-C5 ("CGCMT 2006-C5" or the "Trust"). CGCMT 2006-C5 is a securitization trust that issues

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1 Unless otherwise noted, the facts set forth in this Memorandum Opinion are undisputed and are drawn from the operative complaint and from the affidavits, exhibits, and other evidence submitted to the Court. Because the complaint is verified, it constitutes part of the factual record for purposes of LNR Partners' motion for summary judgment. *See Jackson Walker L.L.P. v. Spira Footwear, Inc.*, 2008 WL 2487256, at *1 n.4 (Del. Ch. June 23, 2008); *Weber v. Kirchner*, 2003 WL 23190392, at *3 (Del. Ch. Dec. 31, 2003).

2 Compl. Ex. C at 1.

commercial mortgage-backed securities ("CMBS"). The Trust is governed by a pooling and servicing agreement dated November 1, 2006 (the "PSA"), which is over 300 pages long and contains over 100 pages of definitions.[3] The PSA is governed by New York law.[4] Concurrent with execution of the PSA, the Trust issued CMBS "Certificates,"[5] which represent beneficial ownership interests in the pool of mortgage loans held by the Trust. The Certificates were backed by commercial real estate mortgage loans with an aggregate principal value of $2,238,772,692.[6]

a. Allocation of distributions and losses to Certificateholders

Investors in the Trust, or "Certificateholders," are entitled to receive monthly distributions from the cash flows generated by the Trust's underlying pool of commercial mortgage loans, to the extent of available funds.[7] The Certificates issued by the Trust are arranged in 27 tranches, or "Classes," which have differing levels of seniority, ranging progressively from most senior to most junior.[8] Distributions are made to Certificateholders in the most senior Class first, until all required payments of principal

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3 PSA (attached to the complaint as Exhibit A).

4 PSA § 11.04.

5 PSA §§ 2.06–2.07.

6 PSA at 3.

7 PSA § 4.01.

8 PSA at 3.

or accumulated interest have been made.[9] Certificateholders in the next most senior Class are paid next, and so on as to the remaining Classes, in "waterfall" fashion, until there are no funds left to distribute.

Under certain circumstances, the Classes will suffer "Realized Losses." Losses, as defined by the PSA, are realized when the amount ultimately recovered on one of the Trust loans is less than the amount owed on the loan plus the expenses incurred in obtaining the recovery.[10] For example, Realized Losses will accrue if a property underlying one of the loans in the Trust pool is foreclosed upon and sold for less than the amount owed on the loan plus the costs of foreclosure.

Because Certificateholders in the most subordinate outstanding Class are the last in line to receive distributions, they are the first to be affected by Realized Losses. Specifically, Realized Losses reduce the underlying loan principal that one or more Classes of Certificates is ultimately entitled to receive—*i.e.*, the "Class Principal Balances"—in reverse order of seniority.[11] In that regard, Realized Losses are first applied to the most junior outstanding Class until its Class Principal Balance has been reduced to zero. They are then applied to the next most junior Class in the same manner, and so on as to the remaining Classes, until all Realized Losses have been allocated.[12] If

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9 PSA § 4.01.

10 PSA § 1.01 (definition of "Realized Loss").

11 PSA § 4.04.

12 *Id.*

the Class Principal Balance for a given Class has been fully eroded by Realized Losses, that Class is "out of the money" and is no longer entitled to receive distributions from the Trust.[13]

b. Administration of troubled loans by the Special Servicer

The PSA bifurcates the administration, or servicing, of performing and nonperforming, or troubled, Trust loans.[14] Performing loans are administered by a Master Servicer. Nonperforming loans, by contrast, are administered by a Special Servicer. Nonperforming loans include, among others, loans for which there has been a default or material payment deficiency, loans to borrowers who have been declared bankrupt or insolvent, or loans secured by property that has become subject to foreclosure proceedings.[15]

Once a mortgage loan qualifies as nonperforming under the PSA, the Master Servicer transfers the loan to the Special Servicer.[16] The Special Servicer is broadly authorized to take whatever actions it deems necessary or desirable to maximize the recovery on a troubled loan.[17] Among other options at its disposal, the Special Servicer

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13 PSA § 4.01.

14 PSA §§ 1.01 (definition of "Specially Serviced Mortgage Loan"), 3.01(a).

15 PSA § 1.01.

16 PSA § 3.21(a).

17 PSA § 3.01(b).

can negotiate a modification, extension, or early payoff of the loan, foreclose on the property securing the loan, or sell the loan.[18]

In executing their duties, the Master Servicer and the Special Servicer are obliged to abide by a contractually defined "Servicing Standard."[19] Under that standard, the Master Servicer and the Special Servicer are required to service and administer the mortgage loans for which they are responsible:

> in the same manner in which, and with the same care, skill, prudence and diligence with which, such Master Servicer or the Special Servicer, as the case may be, generally services and administers similar mortgage loans with similar borrowers and/or similar foreclosure properties, as applicable, (i) for other third parties, giving due consideration to customary and usual standards of practice of prudent institutional commercial mortgage loan servicers servicing and administering mortgage loans and/or foreclosure properties for third parties, as applicable, or (ii) held in its own portfolio, *whichever standard is higher* . . . .[20]

As compensation for its work on behalf of the Trust, the Special Servicer is paid a monthly special servicing fee.[21] The Special Servicer also is entitled to liquidation and workout fees, which are based on the Special Servicer's efforts as to specific nonperforming loans.[22]

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18 PSA §§ 3.01, 3.18, 3.20.

19 PSA § 1.01.

20 *Id.* (emphasis added).

21 PSA § 3.11(c).

22 *Id.*

c. The Controlling Class

As noted previously, Realized Losses are applied in reverse order of seniority, with new Realized Losses reducing first the Class Principal Balance of the most junior Class whose Class Principal Balance has not yet been fully eroded. Thus, the most junior Class with a positive Class Principal Balance will be the first to suffer from the realization of additional losses. For this reason, most pooling and servicing agreements, including the PSA, designate the Class inhabiting or soon to be inhabiting the most junior outstanding position the "Controlling Class" and provide it with certain special authority, discussed *infra*.[23]

Under the PSA, the Controlling Class is defined as "the most subordinate . . . outstanding Class of Sequential Pay Certificates, that has a Class Principal Balance that is greater than 25% of the Original Class Principal Balance thereof."[24] Thus, the Controlling Class is the most junior Class that has greater than 25% of its original Class Principal Balance remaining. Once the Class Principal Balance of the Controlling Class drops below 25% of its original value, the next most junior Class becomes the new Controlling Class.

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[23] *See* Jason H.P. Kravitt and Robert E. Gordon, *Securitization of Financial Assets* § 16.02 ("While the first loss class in a CMBS transaction has the most credit risk in the transaction, the first loss class usually is the class (the "controlling class") that has the right to control certain matters with respect to the mortgage pool and has certain other rights.")

[24] PSA § 1.01.

The Controlling Class has certain contractually established representatives, including the "Majority Controlling Class Certificateholder" and the "Controlling Class Representative." The PSA defines the "Majority Controlling Class Certificateholder" as:

> any single Holder . . . of Certificates . . . entitled to greater than 50% of the Voting Rights allocated to the Controlling Class; *provided*, *however*, that if there is no single Holder . . . of Certificates entitled to greater than 50% of the Voting Rights allocated to such Class, then the Majority Controlling Class Certificateholder shall be the single Holder . . . of Certificates with the largest percentage of Voting Rights allocated to such Class.[25]

Thus, the Majority Controlling Class Certificateholder is the majority holder of the Voting Rights allocated to the Controlling Class or, if there is no such majority holder, the plurality holder of those Voting Rights. Under the PSA, the "Controlling Class Representative" is defined simply as "[t]he representative designated as such by the Majority Controlling Class Certificateholder."[26]

d. The Controlling Class's control over the Special Servicer

The actions of the Special Servicer have a significant influence on when and to what extent losses on the mortgages underlying the Trust will be realized. For this reason, the PSA enables the Controlling Class, via its representatives and Certificateholders, to exercise control over the Special Servicer in various ways. There are two primary means for the Controlling Class to exert its influence.

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[25] *Id.*

[26] *Id.*

First, the Controlling Class can influence the Special Servicer through the Controlling Class Representative, to which the PSA gives a qualified veto power over the conduct of the Special Servicer.[27] Specifically, the Controlling Class Representative, by filing an objection in writing, can prevent the Special Servicer from taking any of a list of actions enumerated in Section 6.11(a) of the PSA. The listed actions include, among others: (1) foreclosing upon a mortgage property; (2) modifying the principal terms of a Trust mortgage loan; (3) selling property owned by the Trust for less than the purchase price; (4) releasing collateral, or accepting substitute collateral, for a Trust mortgage loan; or (5) accepting an assumption agreement releasing a mortgagor from liability under a Trust mortgage loan. The Controlling Class Representative also is authorized to "direct the Special Servicer to take, or to refrain from taking, such other actions . . . as the Controlling Class may deem advisable."[28] The Special Servicer is entitled to disregard, however, any direction or objection that would cause it "to violate any applicable law, [or] any provision of [the PSA]," or that would require it "to act, or fail to act, in a manner which in the reasonable judgment of . . . the Special Servicer is not in the best interest of the Certificateholders or is inconsistent with the Servicing Standard."[29]

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27 PSA § 6.11(a).

28 *Id.*

29 *Id.*

Second, Certificateholders in the Controlling Class that meet certain requirements may designate a person to serve as Special Servicer, thereby replacing the existing Special Servicer. Specifically, Section 6.09(a) of the PSA provides 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 . . . to serve as Special Servicer hereunder and to replace any existing Special Servicer without cause or any Special Servicer that has resigned or otherwise ceased to serve in such capacity . . . .

Thus, the power to designate the Special Servicer (the "Designation Power") is vested in "the Holder or Holder of the Certificates evidencing a majority of the Voting Rights allocated to the Controlling Class." The precise definition of "Voting Rights" in the context of this provision is, therefore, crucial to determining who is entitled to exercise the Designation Power and is the major point of dispute between the parties.

The PSA defines "Voting Rights," in relevant part, as follows:

> The portion of the voting rights of all of the Certificates which is allocated to any Certificate. At all times during the term of this Agreement, 100% of the Voting Rights shall be allocated . . . . [T]he Voting Rights shall be allocated among the various Classes of the Principal Balance Certificates in proportion to the respective Class Principal Balances of such Classes of Certificates; [Proviso 1] provided that, solely for the purpose of determining the respective Voting Rights of the various Classes of Principal Balance Certificates, the aggregate Appraisal Reduction Amount allocated to the respective Classes of the Principal Balance Certificates in accordance with Section 4.04(d) shall be treated as Realized Losses with respect to the calculation of the Certificate Principal Balances thereof; and [Proviso 2] provided, further, 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 Controlling Class 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.[30]

The Voting Rights definition includes the term "Percentage Interest." A Certificate's Percentage Interest is roughly equal to the percentage of the Class Principal Balance corresponding to that Certificate.[31] The Voting Rights definition also makes reference to the "Appraisal Reduction Amount." The Appraisal Reduction Amount reflects the extent to which a given mortgage loan is underwater because the value of the real estate securing the loan is insufficient to ensure its repayment. It is approximately equal to the amount by which the balance owed on a mortgage loan exceeds 90% of the appraised value of the underlying collateral.[32] Appraisal Reduction Amounts, which represent as-of-yet unrealized losses, are assessed when a loan becomes subject to a "Required Appraisal."[33] A Required Appraisal is triggered, among other circumstances, when a loan becomes delinquent, the loan's payment terms are lowered by the Special Servicer, or the borrower of a loan declares bankruptcy.[34] Under Section 4.04(d) of the PSA, Appraisal Reduction Amounts are distributed to the Classes in reverse order of

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30 PSA § 1.01.

31 PSA § 1.01 (definition of "Percentage Interest").

32 PSA § 1.01 (definition of "Appraisal Reduction Amount").

33 *Id.*

34 PSA § 1.01 (definition of "Required Appraisal Trust Mortgage Loan").

seniority (from most junior to most senior), up to the amount of each Class's Class Principal Balance. The aggregate Appraisal Reduction Amount for the Trust mortgages is referred to in this Memorandum Opinion as the "ARA."

2. C-III Replaces LNR Partners as Special Servicer

LNR Partners, Inc. was the original Special Servicer of CGCMT 2006-C5 and began serving as Special Servicer for the Trust at its inception in November 2006.[35] At some later point, LNR Partners, Inc. underwent a statutory conversion to become LNR Partners, LLC (the Plaintiff).[36] Because it is not apparent from the record precisely when that conversion occurred, I refer to LNR Partners, Inc. and LNR Partners, LLC collectively as "LNR Partners" for purposes of this subsection.

LNR Partners served as Special Servicer for the Trust continuously from November 2006 until late 2012.[37] On October 25, 2012, C3 Initial Assets, an affiliate of C-III, notified LNR Partners and the trustee of CGCMT 2006-C5 (the "Trustee") that it had become the Trust's Majority Controlling Class Certificateholder.[38] C3 Initial Assets had attained that position due to its ownership of a majority of the Certificates in Class G,

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35 Compl. ¶ 41; PSA at 1; *id.* § 1.01 (definition of "Special Servicer").

36 Compl. Ex. C at 1.

37 Compl. ¶ 41.

38 Compl. Ex. B.

which was the Trust's Controlling Class at the time.[39] In the Notification, C3 Initial Assets, citing Section 6.09(a) of the PSA and its status as Majority Controlling Class Certificateholder, terminated LNR Partners as Special Servicer and designated C-III as the replacement Special Servicer.[40]

The PSA provides that a "resigning Special Servicer shall cooperate with the Trustee and the replacement Special Servicer in effecting the termination of the resigning Special Servicer's responsibilities and rights."[41] After receiving the October 25, 2012 termination notice from C3 Initial Assets, LNR Partners cooperated in transferring its Special Servicer rights and responsibilities to C-III.[42] LNR Partners and C-III also executed a customary fee-sharing agreement for Special Servicing work that LNR Partners had commenced before being terminated.[43] The appointment of C-III as Special Servicer became effective on November 9, 2012.[44]

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39 *See* Erbstein Aff. ¶¶ 6, 9–10. In October 2012, C3 Initial Assets owned its Certificates in Class G indirectly through its controlling interest in an entity that is not a party to this litigation. *See id.*; Compl. ¶ 45, Ex. B.

40 Compl. Ex. B.

41 PSA § 6.09(a).

42 Erbstein Aff. ¶ 7.

43 Compl. Ex. C.

44 Erbstein Aff. ¶ 8.

3. LNR Securities Attempts to Re-Designate LNR Partners as Special Servicer

In January 2013, LNR Partner's affiliate, LNR Securities, obtained ownership of a majority of the Certificates in Class G—the Controlling Class—and therefore replaced C3 Initial Assets as the Majority Controlling Class Certificateholder.[45] On January 11, 2013, LNR Securities provided notification to C-III and the Trustee that it had become "the Holder of the Certificates evidencing a majority of the Voting Rights allocated to the Controlling Class."[46] LNR Securities' notice further indicated that it was terminating C-III as Special Servicer and was designating LNR Partners as C-III's replacement.

After receiving the January 11, 2013 notice from LNR Partners, the Trustee sent a notification letter to various rating agencies, namely, Moody's Investor Services, Inc. ("Moody's") and Fitch, Inc. ("Fitch") (collectively, the "Rating Agencies"). That letter disclosed that "the Holders of Certificates evidencing a majority of the Voting Rights allocated to the Controlling Class have designated LNR Partners, LLC to serve as the Special Servicer."[47] Under the PSA, one of the prerequisites to an entity serving as Special Servicer is receipt by the Trustee of confirmation from the Rating Agencies that the appointment of that entity as Special Servicer would not result in a credit downgrade

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45 *Id*. ¶ 10. LNR Securities initially acquired these certificates indirectly, by taking over the controlling interest in the nonparty entity referred to *supra* in note 39. *Id.* LNR Securities later purchased the Class G Certificates from the nonparty entity and now holds them in its own name. Compl. ¶ 49 n.2.

46 Compl. Ex. F.

47 Compl. Ex. G.

of any of the Classes of Certificates in the Trust.[48] I note, however, that no such rating agency confirmation (or "RAC") is required from Fitch for entities that are "rated at least 'CSS2' by Fitch as a special servicer," as is LNR Partners.[49] Thus, in the same letter, the Trustee requested from Moody's, but not from Fitch, a RAC to verify that LNR Partners' appointment would not result in a credit downgrade.[50]

4. C-III Asserts that LNR Securities Lacks the Designation Power and Refuses to Resign

After receiving the January 11, 2013 termination notice from LNR Securities, C-III asserted that LNR Securities lacked the authority to terminate C-III and to designate a replacement Special Servicer.[51] C-III does not appear to have disputed that LNR Securities held a majority of the Certificates in the Controlling Class.[52] As previously noted, however, under Section 6.09(a) of the PSA, the Designation Power is vested in "the Holder or Holders of the Certificates evidencing a majority of the *Voting Rights* allocated to the Controlling Class." C-III argued that, for purposes of Section 6.09(a), the ARA must be taken into account when calculating the Voting Rights that are allocated to the Controlling Class.[53] According to C-III, when the ARA properly is considered, LNR

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48 PSA § 6.09(a).

49 Ascher Supplemental Transmittal Aff. Exs. C, D.

50 Compl. Ex. G.

51 Erbstein Aff. ¶ 13.

52 *See* Compl. ¶ 64.

53 Erbstein Aff. ¶ 13.

Securities and the Controlling Class had no Voting Rights, and LNR Securities, therefore, was not entitled to exercise the Designation Power.[54]

Based on its interpretation of the PSA, C-III refused to recognize LNR Partners as a properly designated replacement Special Servicer. In addition, C-III declined to negotiate a fee-sharing agreement with LNR Partners, which, at the time, was a precondition to Moody's issuing a RAC.[55] LNR Partners also alleges, and C-III has not disputed, that C-III refused to transfer to LNR Partners the special servicing working files and the cash amounts held in the accounts administered by the Special Servicer,[56] the latter of which the PSA specifically requires a terminated Special Servicer to transfer, within two days, to its designated replacement.[57]

C. Procedural History

On April 12, 2013, LNR Partners commenced this action by filing a verified complaint (the "Complaint") against C-III. The Complaint asserts two causes of action. The first is for C-III's alleged breach of the PSA through its failure to cooperate with LNR Partners in its efforts to replace C-III as Special Servicer. To remedy C-III's alleged breach, LNR Partners seeks a decree of specific performance requiring C-III to comply with its obligations under the PSA. The second cause of action asserted in the

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54 *Id.*

55 *Id.* ¶¶ 19, 22.

56 Compl. ¶ 62.

57 PSA § 6.09(a).

Complaint is for a declaratory judgment that LNR Partners is the rightful Special Servicer of the Trust.

On May 21, 2013, C-III moved to dismiss the Complaint under Court of Chancery Rules 12(b)(1) and 12(b)(6). On June 28, 2013, LNR Partners filed a motion for summary judgment, concurrent with its opposition to C-III's motion to dismiss. After full briefing on those motions, I heard oral argument on them on September 3, 2013.

On January 30, 2014, counsel for LNR Partners submitted a letter notifying the Court that certain contractual prerequisites to LNR Partners assuming the role of Special Servicer had now been fulfilled, including the issuance of a RAC from Moody's.[58] Sometime after the filing of this action, Moody's modified its RAC policy so that execution of a fee-sharing agreement between the incoming and outgoing Special Servicers was no longer a necessary prerequisite to the issuance of a RAC.[59] Under the new policy, a RAC also could be issued if a prospective Special Servicer agreed to indemnify the relevant trust for any losses that might result from disputes as to fee splits in the absence of a fee-sharing agreement.[60] After LNR Partners learned of this new policy, it agreed to provide such an indemnification, and Moody's issued a RAC.[61] The issuance of the Moody's RAC enabled LNR Partners to fulfill several other contractual

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58 Docket Item ("D.I.") No. 34.

59 Erbstein Aff. ¶¶ 22–23.

60 *Id.*

61 *Id.* ¶¶ 24, 27–28.

prerequisites to becoming Special Servicer, including obtaining an opinion of counsel confirming that its appointment would be in compliance with the PSA.[62]

On the same day LNR Partners submitted its letter to the Court, C-III filed a motion for a temporary restraining order. C-III's motion sought to prevent LNR Partners from unilaterally changing the status quo ante and taking over the role of Special Servicer, while the pending motions to dismiss and for summary judgment still were *sub judice*. After full briefing, I heard argument on C-III's motion for a temporary restraining order on February 7, 2014.

At that oral argument, the parties agreed to resolve the motion for a temporary restraining order by extending the expiration date of a previously stipulated status quo order until such time as the Court issued its ruling on the pending motions for dismissal and summary judgment.[63] Under the resulting amended status quo order, C-III remains the acting Special Servicer, but is precluded from taking certain enumerated actions without first obtaining LNR Partners' written agreement.[64] The order also precludes C-III from paying itself fees for work performed as Special Servicer after January 27, 2014. Instead, the fees to which the Special Servicer otherwise would be entitled are to be recorded by C-III, with the question of who is entitled to the fees to be determined later by agreement of the parties or by order of the Court.

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62 *See* Erbstein Aff. ¶¶ 31–36, Ex. 10.

63 TRO Arg. Tr. 28, 36.

64 D.I. No. 49.

Thus, the only motions currently before the Court are C-III's motion to dismiss and LNR Partner's motion for summary judgment. C-III's motion for a temporary restraining order and LNR Partners' supplemental submissions in January and early February 2014 related at least tangentially to the pending motion for summary judgment, and the operative status quo order depends to some extent on the resolution of that motion. As a result, I have considered some of the additional evidence and argument of counsel presented in late January and February in addressing the two pending motions.

D. Parties' Contentions

C-III initially sought dismissal of this action both under Court of Chancery Rule 12(b)(1), because the Court lacked subject matter jurisdiction, and under Rule 12(b)(6), because LNR Partners lacked standing to bring its claims. After C-III itself requested equitable relief in the form of a temporary restraining order in January 2014, however, C-III withdrew its challenge to the subject matter jurisdiction of this Court.[65] The sole remaining basis for C-III's motion to dismiss, therefore, is its assertion that LNR Partners lacks standing. In that regard, C-III argues that LNR Partners lacks standing to bring a claim for breach of the PSA or to seek specific performance of that agreement because LNR Partners is neither a party to the PSA nor an intended third party beneficiary. According to C-III, because LNR Partner's non-viable breach of contract claim provides the predicate for its declaratory judgment claim, the latter claim also fails. For these

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[65] TRO Arg. Tr. 5 (C-III's counsel responding to question regarding whether subject matter jurisdiction is still at issue by acknowledging that "we're not pressing the jurisdiction argument at this point.").

reasons, C-III argues that both causes of action asserted in the Complaint should be dismissed.

In opposing C-III's motion to dismiss, LNR Partners argues that, under the PSA, it has standing to bring its claims. Specifically, LNR Partners contends that it has standing to enforce the PSA either as a "successor" Special Servicer and, therefore, a party to the PSA, or as one of the PSA's enumerated third party beneficiaries. Thus, LNR Partners urges the Court to deny C-III's motion to dismiss.

In support of its motion for summary judgment, LNR Partners maintains that its interpretation of the PSA is the only reasonable interpretation of the agreement and that the PSA is, therefore, unambiguous. In that regard, LNR Partners argues that C-III's interpretation of the PSA conflicts with the relevant contractual language, would lead to absurd results, and is inconsistent with the course of performance of the parties to the PSA. LNR Partners further asserts that, under its interpretation of the PSA, it is entitled to the relief it seeks as a matter of law.

In opposition to LNR Partner's motion for summary judgment, C-III contends that the PSA is either ambiguous or unambiguously supports C-III's proposed interpretation. Specifically, C-III argues that LNR Partner's interpretation of the PSA is inconsistent with the language of the agreement and violates several canons of construction. C-III thus asserts that, if its motion to dismiss is denied, genuine issues of material fact exist that would preclude the Court from granting summary judgment.

Initially, C-III also opposed LNR Partner's motion on the grounds that, even if LNR Partner's interpretation of the PSA were correct, LNR Partners would not be

entitled to serve as Special Servicer because it failed to satisfy certain contractual preconditions to serving in that position, including obtaining a RAC from Moody's. As discussed *supra*, however, due to a change in Moody's policies, LNR Partners eventually was able to obtain a RAC from Moody's.[66] This also enabled LNR Partners to fulfill the other contractual preconditions that C-III originally asserted had not been satisfied, including obtaining an opinion of counsel confirming that LNR Partners' appointment as Special Servicer would comply with the PSA.[67] Thus, C-III has conceded that LNR Partners no longer is precluded from becoming Special Servicer due to its failure to satisfy those preconditions.[68]

II. ANALYSIS

A. Motion to Dismiss[69]

For purposes of a motion to dismiss under Court of Chancery Rule 12(b)(6), the Court will "assume the truthfulness of the well-pled allegations of the complaint"[70] and

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66 *See supra* notes 58–61 and accompanying text.

67 *See* D.I. No. 34; Erbstein Aff. ¶¶ 31–36, Ex. 10.

68 TRO Arg. Tr. 5–6 (C-III's counsel responding to question regarding whether the contractual preconditions are still at issue by conceding that "we do not think, at this time—as distinguished from previously—there is an issue on the conditions, because we now have the Moody's agency confirmation.").

69 Unless otherwise noted, the facts referenced in this section are drawn exclusively from the well-pled allegations of the Complaint, and from the PSA and other documents attached to the Complaint as exhibits, and are presumed true for the purposes of C-III's motion to dismiss.

70 *Superwire.com, Inc. v. Hampton*, 805 A.2d 904, 908 (Del. Ch. 2002) (citing *Solomon v. Pathe Commc'ns Corp*., 672 A.2d 35, 38 (Del. 1996)).

afford the plaintiff "the benefit of all reasonable inferences."[71] If the well-pled allegations in the complaint would entitle the plaintiff to relief under any "reasonably conceivable" set of circumstances, the Court must deny the motion to dismiss.[72] The Court, however, need not "accept conclusory allegations unsupported by specific facts."[73] Moreover, failure to plead an element of a claim precludes entitlement to relief and, therefore, is grounds to dismiss that claim.[74] Nonetheless, the Court must "accept even vague allegations as 'well pleaded' if they give the opposing party notice of the claim."[75] Generally, on a motion to dismiss under Rule 12(b)(6), the Court will consider only the complaint and the documents integral to or incorporated by reference into it.[76]

In its motion to dismiss, C-III challenges LNR Partners' standing to assert a claim for breach of contract. Under New York law, which governs the PSA,[77] the general rule

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71 *Id.* (quoting *In re USACafes, L.P. Litig.*, 600 A.2d 43, 47 (Del. Ch. 1991)) (internal quotation marks omitted).

72 *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011); *see also Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 813 n.12 (Del. 2013).

73 *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

74 *See Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 972 (Del. Ch. 2000) (Steele, V.C., by designation).

75 *Cent. Mortg.*, 27 A.3d at 535.

76 *See Allen v. Encore Energy P'rs*, 72 A.3d 93, 96 n.2 (Del. 2013).

77 PSA § 11.04. *See Postorivo v. AG Paintball Hldgs., Inc.*, 2008 WL 343856, at *4 (Del. Ch. Feb. 7, 2008) ("[C]onsistent with the Restatement and well-settled Delaware precedent, because the [agreement] designates New York law and

is that "privity or its equivalent [is] a predicate for imposing liability for nonperformance of contractual obligations."[78] Nevertheless, "an obligation rooted in contract may engender a duty owed to those not in privity when . . . the subject matter of a contract is intended for the benefit of others."[79] Thus, in order to maintain a cause of action for breach of contract under New York law, the plaintiff typically must be either a party to the contract or an intended third party beneficiary.[80] Similarly, under Delaware law, "only parties to a contract and intended third party beneficiaries may enforce the contract terms."[81]

C-III argues that LNR Partners lacks standing to assert its cause of action for breach of contract because LNR Partners is neither a party to nor a third party beneficiary of the PSA. C-III asserts that LNR Partners is not a party to the PSA because it is not the Special Servicer of the Trust, and that is the only one of the PSA's enumerated

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neither party challenges the applicability of that designation, I analyze the issues presented under New York law.")

78 *Van Vleet v. Rhulen Agency Inc.*, 578 N.Y.S.2d 941, 943 (N.Y. App. Div. 1992).

79 *Id.*

80 *See Logan-Baldwin v. L.S.M. Gen. Contractors, Inc.*, 942 N.Y.S.2d 718, 722 (N.Y. App. Div. 2012) (denying summary judgment on breach of contract claim where "plaintiffs raised a triable issue of fact whether they were intended third-party beneficiaries of the contract"); *Marino v. Dwyer-Berry Constr. Corp.*, 597 N.Y.S.2d 466, 467 (N.Y. App. Div. 1993) (granting motion to dismiss breach of contract claim where contractual privity did not exist and "the fundamental requirements for a finding of intended third-party beneficiary status [we]re not present").

81 *Bromwich v. Hanby*, 2010 WL 8250796, at *2 (Del. Super. July 1, 2010) (citing *Smith v. Mattia*, 2010 WL 412030 (Del. Ch. Feb. 1, 2010)).

contractual parties that LNR Partners potentially could be. In that regard, Defendant notes that the crux of LNR Partner's breach of contract claim is that C-III improperly has blocked LNR Partners from becoming the Special Servicer. According to C-III, that fact in itself constitutes an admission that LNR Partners is not currently the Special Servicer. C-III avers that LNR Partners also is not a third party beneficiary of the PSA because the PSA includes an exclusive list of the contract's third party beneficiaries and that list does not include putative Special Servicers such as Plaintiff.

LNR Partners disputes C-III's contentions and argues that it has standing under the PSA as a party to the contract or, alternatively, as a third party beneficiary. LNR Partners notes that the PSA's definition of Special Servicer specifically includes "any successor special servicer appointed as herein provided."[82] LNR Partners asserts that it is a properly designated "successor" Special Servicer and thus qualifies as a party to the PSA. Plaintiff avers, moreover, that the only reason it is not currently the acting Special Servicer is because C-III has failed to perform its obligations under the PSA and that the law precludes C-III from benefitting from its own failure to perform. In the alternative, LNR Partners contends that it qualifies as a third party beneficiary under the PSA. In that regard, Plaintiff notes that the section of the PSA that addresses third party beneficiaries specifically states that the agreement will inure to the benefit of the parties' "successors and assigns."[83] LNR Partners argues that, even if it does not qualify as a direct party to

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82 PSA § 1.01.

83 PSA § 11.09.

the PSA, it nonetheless would fit within the successors and assigns category of third party beneficiaries.

For the reasons that follow, I conclude that LNR Partners has pled facts from which it is at least reasonably conceivable that LNR Partners could show that it has standing to enforce the PSA, either as a party to the PSA or as a third party beneficiary. I consider these two possibilities in turn.

1. Standing As a Party to the Contract

The parties to the PSA are the Depositor, the Master Servicer, the Special Servicer, the Trustee, and the Certificate Administrator.[84] It is undisputed that LNR Partners is not the Depositor, Master Servicer, Trustee, or Certificate Administrator. Thus, whether LNR Partners is a contractual party depends upon whether it qualifies as a Special Servicer under the PSA. The PSA defines "Special Servicer" as "LNR Partners, Inc., its successor in interest, or *any successor special servicer appointed as herein provided*."[85] As the Trust's original Special Servicer, Plaintiff's predecessor entity, LNR Partners, Inc., is included in the definition of Special Servicer. Plaintiff has conceded, however, that LNR Partners, Inc. is no longer the Special Servicer, and Plaintiff has not argued that it has standing based on its predecessor's inclusion in the Special Servicer definition. Rather, LNR Partners argues that it qualifies as a Special Servicer because it is a "successor special servicer appointed" in accordance with the PSA.

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84 PSA at 1.

85 PSA § 1.01 (emphasis added).

Specifically, LNR Partners alleges that, in January 2013, LNR Partners' affiliate, LNR Securities, became the holder of a majority of the Certificates in the Trust's Controlling Class. In that capacity, LNR Partners avers that LNR Securities was entitled to designate the Trust's Special Servicer and that it exercised that authority to terminate C-III as Special Servicer and to appoint LNR Partners as the replacement Special Servicer, through a notification letter dated January 11, 2013. As discussed in greater detail in my ruling *infra* on LNR Partners' motion for summary judgment, the PSA is ambiguous as to whether LNR Securities possessed the Designation Power at the relevant time. Drawing all reasonable inferences in favor of Plaintiff, however, I assume for purposes of this motion to dismiss that LNR Securities held the Designation Power and properly designated LNR Partners as Special Servicer pursuant to Section 6.09(a) of the PSA. At a minimum, it is conceivable that LNR Partners will be able to show that based on the allegations in the Complaint.

C-III argues, however, that even if LNR Partners properly was designated as Special Servicer by LNR Securities, it never became a "successor" Special Servicer because it never actually took over the Special Servicer position. In that regard, C-III notes that LNR Partners' breach of contract claim is premised on the allegation that LNR Partners has been precluded improperly from becoming Special Servicer, which C-III asserts is an admission that LNR Partners never became the "seated" Special Servicer.

It may be true that LNR Partners never took over as the seated, or acting, Special Servicer, but I conclude, nonetheless, that C-III's argument is without merit. Section 6.09(a) of the PSA provides that a "resigning Special Servicer shall cooperate with the

Trustee and the replacement Special Servicer in effecting the termination of the resigning Special Servicer's responsibilities and rights hereunder." Once C-III received a termination notice and LNR Partners properly was designated as the replacement Special Servicer, this provision arguably imposed a contractual duty on C-III to cooperate in enabling LNR Partners to take over as Special Servicer.[86] The well-pled allegations in the Complaint support a reasonable inference that, apart from the dispute over who holds the Designation Power, which turns on provisions that I find ambiguous, the only reason LNR Partners had not become the "seated" Special Servicer, as of the time the Complaint was filed, was due to C-III's failure to comply with its contractual obligation under Section 6.09(a) to cooperate. Among other things, C-III's refusal to cooperate in negotiating and executing a fee-sharing agreement with LNR Partners initially precluded LNR Partners from obtaining a RAC from Moody's, which was a contractual prerequisite to LNR Partners being able to take over as Special Servicer. LNR Partners' inability to

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[86] C-III argues that, under the PSA, an outgoing Special Servicer's duty to cooperate with a properly designated replacement Special Servicer is triggered only "once the new Special Servicer has been seated and the old Special Servicer has 'resigned.'" Reply Br. in Supp. of Mot. to Dismiss 21. At least one reasonable interpretation of PSA Section 6.09(a), however, is that the duty to "cooperate . . . *in effecting the termination* of the resigning Special Servicer's responsibilities and rights" arises as soon as the replacement Special Servicer has been properly designated. Under this interpretation, the outgoing Special Servicer's duty to cooperate would include an obligation to cooperate with the replacement Special Servicer's efforts to fulfill the contractual preconditions to it becoming the seated Special Servicer, such as obtaining any necessary RAC. On a motion to dismiss, all reasonable inferences must be drawn in favor of the nonmoving party; therefore, I adopt LNR Partners' interpretation of the outgoing Special Servicer's duty to cooperate for purposes of this motion.

obtain a Moody's RAC also prevented it from satisfying other prerequisites, including obtaining an opinion of counsel confirming that its appointment would fully comply with the PSA.

It is an established principle of New York law "that a party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition."[87] Here, C-III effectively is attempting to rely on the non-occurrence of certain conditions precedent to LNR Partners becoming the seated Special Servicer to deny it standing as a Special Servicer. Drawing all reasonable inferences in favor of LNR Partners, however, it was C-III's own breach of its contractual obligations that frustrated the occurrence of these conditions precedent and prevented LNR Partners from replacing it. Under these circumstances, I find that it is likely New York law would preclude C-III from denying LNR Partners' standing to sue as a party under the PSA and thereby benefitting from its own failure to perform. Thus, for purposes of its motion to dismiss, C-III has failed to demonstrate that LNR Partners lacks standing as a party to the PSA.[88]

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87 *Kooleraire Serv. & Installation Corp. v. Bd. of Ed. of City of New York*, 268 N.E.2d 782, 784 (N.Y. 1971); *see also A.H.A. Gen. Constr., Inc. v. New York City Hous. Auth.*, 699 N.E.2d 368, 374 (N.Y. 1998) (noting that it is "well-settled . . . that a party cannot insist upon a condition precedent, when its non-performance has been caused by himself"); 13 *Williston on Contracts* § 39:17 (4th ed., rev. vol. 2013) ("[I]f one party to a contract prevents the happening or performance of a condition precedent that is part of the contract, the condition precedent is eliminated").

88 This conclusion is based on the facts alleged in the Complaint and related documents as of the time this action was filed on April 12, 2013. If I consider the

2. Standing As a Third Party Beneficiary

Alternatively, even if, for standing purposes, LNR Partners did not qualify as a party to the PSA at the time it filed suit, I find that it is at least reasonably conceivable that it qualified as a third party beneficiary. Under New York law, "a third party is an intended . . . beneficiary of a contract 'if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.'"[89] "In determining whether the parties intended to benefit the third party, a court should consider the circumstances surrounding the transaction as well as the actual language of the contract."[90]

Section 11.09 of the PSA, entitled "Successors and Assigns; Beneficiaries," provides:

> The provisions of this Agreement shall be binding upon and inure to the benefit of the respective successors and assigns of the parties hereto, and all such provisions shall inure to the benefit of the Certificateholders. . . . No other person,

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supplemental information submitted by LNR Partners more recently in further support of its motion for summary judgment, it is even more clear that LNR Partners is a successor Special Servicer. Indeed, as previously noted, apart from C-III's ongoing contention that LNR Partners was not properly designated by LNR Securities as Special Servicer, C-III now concedes that the contractual preconditions to LNR Partners becoming the Special Servicer have been satisfied. *See supra* note 68 and accompanying text.

89 *Levin v. Tiber Hldg. Corp.*, 277 F.3d 243, 248 (2d Cir. 2002) (quoting Restatement (Second) of Contracts § 302 (1979)).

90 *Bayerische Landesbank, N.Y. Branch v. Aladdin Capital Mgmt. LLC*, 692 F.3d 42, 52 (2d Cir. 2012) (internal quotation marks omitted).

> including, without limitation, any Mortgagor, shall be entitled to any benefit or equitable right, remedy or claim under this Agreement; provided that (i) each B-Noteholder is an intended third-party beneficiary hereunder with respect to those provisions of this Agreement that affect its interest in the related A/B Loan Combination and its rights under the related Co-Lender Agreement, (ii) each Mortgage Loan Seller is an intended third-party beneficiary hereunder with respect to those provisions of this Agreement that affect its rights and obligations under the related Mortgage Loan Purchase Agreement, and (iii) the Outside Master Servicer in respect of the Outside Serviced Trust Mortgage Loan shall be a third-party beneficiary to this Agreement with respect to its rights as specifically provided for herein and under the related Co-Lender Agreement.

C-III asserts this section of the PSA explicitly limits the intended third party beneficiaries of the PSA to: (1) Certificateholders; (2) B-Noteholders; (3) Mortgage Loan Sellers; and (4) the Outside Master Servicer. According to C-III, because LNR Partners brings this action solely in its capacity as a claimed successor Special Servicer, it does not fall into any of these enumerated categories and cannot qualify as an intended third party beneficiary under the PSA. In making this argument, however, C-III wholly disregards the very first clause of Section 11.09, which provides that "[t]he provisions of this Agreement shall be binding upon and inure to the benefit of the respective *successors and assigns of the parties hereto*." The subsequent sentence, beginning "No other person," applies equally to the "successors and assigns" of the parties to the PSA, which would include the Special Servicer, and to Certificateholders, without differentiating between them. Thus, a reasonable inference is that both groups are intended to be third party beneficiaries under the PSA.

As discussed previously, C-III argues that LNR Partners failed to qualify as a party to the PSA due to the non-occurrence of certain conditions precedent to it becoming a seated Special Servicer. Although I find C-III's argument unpersuasive for the reasons previously stated, even if C-III were correct, it is reasonably conceivable that LNR Partners nonetheless would qualify as a successor or assign of the Special Servicer for purposes of being a third party beneficiary.

The extension of third party beneficiary rights to "successors and assigns" of the parties, including the Special Servicer, reasonably can be interpreted as being broader than the extension of definitional Special Servicer status to "any successor special servicer *appointed as herein provided* [*i.e.*, in accordance with the PSA]."[91] The "appointed as herein required" language could be construed as requiring a properly designated Special Servicer to fulfill all of the prerequisites to becoming the seated or acting Special Servicer before it will be a "Special Servicer" for purposes of the PSA. The section of the PSA addressing third party beneficiaries does not include this language, however, and I find it reasonable to infer that the drafters of the PSA intended a properly designated Special Servicer to have third party beneficiary status, as the successor or assign of a contracting party, even before it fulfilled all of the conditions precedent to taking over as Special Servicer.

As noted previously, Section 6.09(a) of the PSA provides that a "resigning Special Servicer shall cooperate with the Trustee and the replacement Special Servicer in

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91 *Compare* PSA § 11.09, *with* PSA § 1.01 (definition of "Special Servicer").

effecting the termination of the resigning Special Servicer's responsibilities and rights hereunder." The outgoing Special Servicer's contractual duty arising from this provision arguably comes into being as soon as the Certificateholders entitled to exercise the Designation Power properly have designated the replacement Special Servicer, even if the remaining conditions precedent, such as obtaining a RAC from Moody's, have not yet been satisfied.[92] Under New York law, "[w]here performance is to be rendered directly to a third party under the terms of an agreement, that party must be considered an intended beneficiary."[93] Thus, a terminated Special Servicer's obligation to cooperate in transferring its responsibilities and rights to a designated replacement Special Servicer, such as LNR Partners, is compelling evidence that a designated replacement Special Servicer qualifies as a third party beneficiary under the PSA.

For the foregoing reasons and on the basis of the facts alleged in the Complaint, I find that it is likely LNR Partners had standing to sue under the PSA, at the time the Complaint was filed, as either a contractual party or a third party beneficiary. I also note that a contrary result would lead to the peculiar outcome that a terminated Special Servicer could breach its contractual obligations in order to prevent its designated

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92 *See supra* note 86.

93 *Flickinger v. Harold C. Brown & Co.*, 947 F.2d 595, 600 (2d Cir. 1991) (quoting *Cauble v. Mabon Nugent & Co.*, 594 F. Supp. 985, 991 (S.D.N.Y. 1984)); *see also Levin*, 277 F.3d at 249 (holding that a third party was a third party beneficiary where the contract "specially included [the third party] as a direct beneficiary" and a contract signatory "rendered performance of its obligations directly to [the third party]").

replacement from taking over and, in so doing, deprive its replacement of standing to sue for that breach. It is highly unlikely that the drafters of the PSA intended this counter-intuitive result.

Thus, C-III has failed to demonstrate that LNR Partners could not have standing to pursue the claims that it asserts in its Complaint under any reasonably conceivable set of circumstances. I therefore deny C-III's motion to dismiss.

B. Motion for Summary Judgment

Summary judgment is appropriate if the moving party demonstrates, based on the record before the Court, that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[94] When considering a motion for summary judgment, the evidence and the inferences drawn from the evidence are to be viewed in the light most favorable to the nonmoving party.[95]

LNR Partners' motion for summary judgment concerns the proper interpretation of the PSA. Under New York law, which governs the PSA,[96] "[t]he construction and interpretation of an unambiguous written contract is an issue of law within the province of the court, as is the inquiry of whether the writing is ambiguous in the first instance."[97]

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94 Ct. Ch. R. 56(c). *See Twin Bridges L.P. v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007).

95 *GMG Capital Invs., LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d 776, 779 (Del. 2012); *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

96 *See supra* note 77.

97 *Estate of Hatch by Ruzow v. Nyco Minerals Inc.*, 666 N.Y.S.2d 296, 298 (N.Y. App. Div. 1997).

When a contract is unambiguous, "the intent of the parties must be found within the four corners of the contract,"[98] and extrinsic evidence should not be considered.[99] For these reasons, summary judgment is the appropriate means for resolving disputes as to the interpretation of an unambiguous contract governed by New York law.[100]

By contrast, under New York law, "interpretation of ambiguous contract language is a question of fact,"[101] for which the Court may consider extrinsic evidence.[102] Where a contract is ambiguous and the Court must rely on extrinsic evidence to resolve its meaning, summary judgment generally is not appropriate unless "the moving party's record is not *prima facie* rebutted so as to create issues of material fact."[103] In other

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98 *In re Coudert Bros.*, 487 B.R. 375, 389 (S.D.N.Y. 2013) (quoting *Howard v. Howard*, 740 N.Y.S.2d 71 (N.Y. App. Div. 2002)).

99 *JA Apparel Corp. v. Abboud*, 568 F.3d 390, 397 (2d Cir. 2009); *Alexander & Alexander Servs., Inc. v. These Certain Underwriters at Lloyd's, London, England*, 136 F.3d 82, 86 (2d Cir. 1998).

100 *Concord Real Estate CDO 2006-1, Ltd. v. Bank of Am. N.A.*, 996 A.2d 324, 330 (Del. Ch. 2010), *aff'd*, 15 A.3d 216 (Del. 2011).

101 *Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 232 F.3d 153, 158 (2d Cir. 2000).

102 *JA Apparel Corp.*, 568 F.3d at 397; *Alexander & Alexander Servs., Inc.*, 136 F.3d at 86.

103 *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232–33 (Del. 1997). Although the PSA is governed by New York law, the applicable standard for granting summary judgment is procedural, not substantive, in nature and is therefore governed by Delaware law. *See MPEG LA, L.L.C. v. Dell Global B.V.*, 2013 WL 812489, at *3 (Del. Ch. Mar. 6, 2013) ("[A]s a general rule in Delaware, when the law of a foreign state is applied to substantive issues, the law of Delaware is usually applied to procedural issues.") (quoting *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1994 WL 317557, at *4 (Del. Super. Apr. 15, 1994)).

words, consistent with the general standard on a motion for summary judgment that requires the moving party to demonstrate the absence of a genuine issue of material fact, "summary judgment may not be awarded if the language is ambiguous and the moving party has failed to offer uncontested evidence as to the proper interpretation."[104]

Under New York's approach to contract construction, "[t]he primary objective of a court in interpreting a contract is to give effect to the intent of the parties as revealed by the language of their agreement."[105] The "words and phrases [in a contract] should be given their plain meaning, and the contract should be construed so as to give full meaning and effect to all of its provisions."[106]

New York follows the general rule that a contract is not ambiguous merely because the parties disagree as to its meaning.[107] Rather, contract language is ambiguous if it is "capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement."[108] By contrast, no ambiguity exists where the contract language has "a definite and precise

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104 *GMG Capital Invs., LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d 776, 784 (Del. 2012).

105 *Compagnie Financiere*, 232 F.3d at 157.

106 *Olin Corp. v. Am. Home Assurance Co.*, 704 F.3d 89, 99 (2d Cir. 2012) (quoting *LaSalle Bank Nat'l Ass'n v. Nomura Asset Capital Corp.*, 424 F.3d 195, 206 (2d Cir. 2005)) (internal quotation marks omitted).

107 *Metro. Life Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990).

108 *Olin Corp.*, 704 F.3d at 99 (quoting *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1192 (2d Cir. 1996)).

meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion."[109]

The central issue remaining in this litigation is whether, under the PSA, LNR Securities had the authority to designate LNR Partners to replace C-III as Special Servicer. In that regard, since the filing of the Complaint, C-III has conceded that the other preconditions to LNR Partners becoming Special Servicer have been satisfied.[110] Thus, if LNR Securities' designation of LNR Partners as Special Servicer was valid, then LNR Partners would be the Trust's rightful Special Servicer and would be entitled to relief on its claims against C-III. If, on the other hand, LNR Securities did not have the authority to designate LNR Partners as Special Servicer, then LNR Partners' claims against C-III, as currently framed in the Complaint, would fail.

In support of its motion for summary judgment, LNR Partners argues that its proposed interpretation of the PSA—according to which LNR Securities was entitled to exercise the Designation Power to appoint it as Special Servicer—is the only reasonable interpretation of the agreement and that the PSA is, therefore, unambiguous. For this reason, LNR Partners asserts that it is entitled to the relief it seeks as a matter of law.

In opposition, C-III contends that the PSA is either ambiguous or unambiguously supports C-III's proposed interpretation, pursuant to which LNR Securities did not

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109 *Law Debenture Trust Co. of New York v. Maverick Tube Corp.*, 595 F.3d 458, 467 (2d Cir. 2010) (quoting *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2d Cir. 1989)) (internal quotation marks omitted).

110 *See supra* note 68.

possess the Designation Power at the relevant time. C-III thus asserts that a genuine issue of material fact remains in this case and the motion for summary judgment should be denied.

In this section, I first consider whether the PSA is ambiguous by comparing and assessing the parties' competing interpretations of the provisions relevant to this dispute. I ultimately conclude that the PSA is ambiguous and that it is unclear whether LNR Securities was entitled to designate LNR Partners as Special Servicer. I then consider whether the extrinsic evidence of record is sufficient to resolve the PSA's ambiguity as a matter of law and conclude that it is not. I therefore deny LNR Partners' motion for summary judgment.

1. The PSA is Ambiguous

a. Relevant provisions

Section 6.09(a) of the PSA vests the power to designate the Special Servicer in "the Holder or Holders of the Certificates evidencing a majority of the *Voting Rights* allocated to the Controlling Class." Thus, the proper interpretation of "Voting Rights" is fundamental to this dispute. In Section 1.01 of the PSA, "Voting Rights" are defined, in relevant part, as follows:

> The portion of the voting rights of all of the Certificates which is allocated to any Certificate. At all times during the term of this Agreement, 100% of the Voting Rights shall be allocated . . . . [T]he Voting Rights shall be allocated among the various Classes of the Principal Balance Certificates in proportion to the respective Class Principal Balances of such Classes of Certificates; [Proviso 1] provided that, solely for the purpose of determining the respective Voting Rights of the various Classes of Principal Balance Certificates, the

> aggregate Appraisal Reduction Amount allocated to the respective Classes of the Principal Balance Certificates in accordance with Section 4.04(d) shall be treated as Realized Losses with respect to the calculation of the Certificate Principal Balances thereof; and [Proviso 2] provided, further, 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 Controlling Class 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.[111]

As discussed in greater detail in the following sections, the parties have widely divergent views as to the correct interpretation and practical implications of these provisions. C-III maintains that, after the aggregate Appraisal Reduction Amount, or ARA, is taken into account, the Controlling Class has no Voting Rights. According to C-III, there are, therefore, no Certificateholders with a majority of the *Voting Rights* allocated to the Controlling Class. As a consequence, C-III contends that there are no Controlling Class Certificateholders qualified to exercise the Designation Power, including LNR Securities, which it concedes holds a majority of the Certificates in the Controlling Class.[112]

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111 PSA § 1.01.

112 In the briefing on the pending motions, the parties occasionally seemed to use the term "the Certificates in a Class" as if it corresponded to an equivalent Percentage Interest and the holder of a majority of the Certificates in a Class would also, therefore, be the holder of Certificates evidencing a majority of the Percentage Interests in that Class. The Court thus understands the phrase "the majority of the Certificates in the Controlling Class" to be a shorthand reference to the majority of

By contrast, LNR Partners contends that, regardless of the ARA, the Controlling Class does have Voting Rights, at least for purposes of determining the Controlling Class Certificateholders entitled to exercise the Designation Power. LNR Partners asserts that LNR Securities therefore holds "Certificates evidencing a majority of the Voting Rights allocated to the Controlling Class" and was entitled to exercise the Designation Power to appoint LNR Partners as Special Servicer. I consider, in turn, C-III's and LNR Partners' proposed interpretations of Section 6.09(a) and the Voting Rights definition.

b. C-III's proposed interpretation

The PSA's definition of Voting Rights states that "Voting Rights shall be allocated among the various Classes of the Principal Balance Certificates in proportion to the[ir] respective Class Principal Balances."

C-III argues that Proviso 1 of the Voting Rights definition, which follows that initial language, simply means that the ARA will be taken into account for purposes of determining Voting Rights—*i.e.*, the ARA will be treated like Realized Losses that reduce the Class Principal Balances. In that regard, according to C-III, the phrase in Proviso 1 "for the purpose of determining the respective Voting Rights of the various classes of Principal Balance Certificates" should be read to mean for the purpose of determining the Voting Rights *corresponding to* the various classes of Principal Balance Certificates. C-III avers that the word "solely" preceding that phrase in Proviso 1 merely

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the Percentage Interests evidenced by the Certificates in the Controlling Class. For the sake of brevity, the Court adopts the same shorthand reference.

clarifies that the ARA is considered only when calculating Class Principal Balances of the Certificates to determine Voting Rights, and is not considered when calculating the Class Principal Balances for other purposes called for in the Agreement, such as to determine the monetary distributions to which each Class or Certificateholder is entitled.[113]

Invoking the Latin maxim *inclusio unius est exclusio alterius* (the inclusion of one is the exclusion of another), C-III contends that Proviso 2 of the Voting Rights definition specifies the only three circumstances under which the ARA will not be considered for purposes of calculating Voting Rights, namely, when determining the Controlling Class, the Controlling Class Representative, or the Majority Controlling Class Certificateholder. Because Proviso 2 does not list determining who holds the Designation Power as a determination for which the ARA will not be considered, C-III argues that the ARA must be taken into account when calculating Voting Rights for that purpose.

The Designation Power, established in Section 6.09(a) of the PSA, is vested in "the Holder or Holders of the Certificates evidencing a majority of the Voting Rights allocated to the Controlling Class." C-III emphasizes that, after the ARA is taken into account, the current Controlling Class loses its entire outstanding Class Principal Balance and thus is not entitled to any Voting Rights. Specifically, the outstanding Class Principal Balance of Class G, the Controlling Class, is approximately $18 million, while

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[113] *See* PSA § 4.01.

the ARA is currently over $83 million.[114] Thus, if the ARA is treated like Realized Losses for purposes of calculating Voting Rights, as C-III contends it should be, then the ARA is sufficient to eliminate the Controlling Class's remaining Class Principal Balance. Because Voting Rights are allocated to the Classes in proportion to their Class Principal Balances, if the Class Principal Balance of the Controlling Class is reduced to zero, then it will not be entitled to any Voting Rights.

Thus, according to C-III, no one currently holds "Certificates evidencing a majority of the Voting Rights allocated to the Controlling Class." C-III contends, therefore, that no Controlling Class Certificateholders presently can exercise the Designation Power, including LNR Securities, which owns a majority of the Certificates in the Controlling Class.[115] For this reason, C-III asserts that LNR Securities' attempt to designate LNR Partners as Special Servicer was ineffectual and that LNR Partners has no right to replace it.

C-III notes that if the PSA's drafters had wanted to avoid this result, they could have vested the Designation Power in one of the parties named in Proviso 2 of the Voting Rights definition, such as the Majority Controlling Class Certificateholder or the Controlling Class Representative. C-III contends that the fact that the drafters chose not to do this indicates that they intended the ARA to be considered for purposes of determining who could exercise the Designation Power.

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114 Unell Aff. ¶ 4.

115 Erbstein Aff. ¶ 10.

C-III also contends that its proposed interpretation makes sense in terms of the structure and economics of the PSA. C-III characterizes the ARA as losses "in the pipeline."[116] C-III argues that it is sensible for the Controlling Class to lose the Designation Power when the ARA is larger than the Controlling Class's outstanding Class Principal Balance, because these circumstances indicate that the current Controlling Class shortly will be out of the money. If the Controlling Class keeps the Designation Power under these circumstances, C-III suggests that the Controlling Class would be tempted to appoint a Special Servicer who would avoid making necessary write-downs to keep the Controlling Class in power, to the detriment of the other Classes. C-III also notes that losing the Designation Power does not leave the Controlling Class helpless to protect its interests, as the Majority Controlling Class Certificateholder retains the right to appoint the Controlling Class Representative,[117] who has a qualified veto power over the Special Servicer.[118]

Thus, C-III asserts that its proposed interpretation is supported by both the text and purpose of the PSA.

c. LNR Partners' proposed interpretation

In contrast to C-III, LNR Partners contends that the Voting Rights definition distinguishes between the calculation of the Voting Rights of the various Classes in

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116 Defs.' Opening TRO Br. ¶ 29.

117 PSA § 1.01 (definition of "Controlling Class Representative").

118 PSA § 6.11(a).

proportion to one another, on the one hand, and the calculation of the Voting Rights within a single Class, on the other.

In that regard, LNR Partners emphasizes that Proviso 1 of the Voting Rights definition specifies that the ARA is considered "solely" when determining the "*respective* Voting Rights of the *various* Classes." According to LNR Partners, this means the ARA is considered only when calculating the Voting Rights of the various Classes in relation to one another, such as for purposes of a deal-wide vote across all of the Classes. LNR Partners points out the difference between this approach and a subsequent clause of the Voting Rights definition that provides that for Voting Rights "allocated to a Class," the allocation "among such Certificateholders" is in proportion to the Certificateholders' "Percentage Interests"—that is, roughly speaking, in proportion to the percentage of the Class Principal Balance held by each Certificateholder.[119] LNR Partners underscores that this clause makes no mention of the ARA and asserts that it implies, when read in conjunction with Proviso 1, that the ARA is not considered when calculating the Voting Rights within a single Class.

Because PSA Section 6.09(a) addresses the authority of Certificateholders within a single Class—namely, the Controlling Class—to exercise the Designation Power, LNR Partners maintains that the ARA was not intended to be considered for calculating the Voting Rights referenced in that section. If the ARA is not considered, then the Controlling Class has a positive outstanding Class Principal Balance and, consequently,

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[119] *See* PSA § 1.01 (definition of "Percentage Interest").

has a positive allocation of Voting Rights. LNR Partners therefore asserts that LNR Securities, as the holder of a majority of the certificates in the Controlling Class,[120] is also the "Holder . . . of the Certificates evidencing a majority of the Voting Rights allocated to the Controlling Class" and is entitled to exercise the Designation Power. On that basis, LNR Partners contends that LNR Securities properly exercised its authority to designate LNR Partners as Special Servicer and that it is entitled to replace C-III.

LNR Partners also argues that it makes sense, in terms of the structure and economics of the PSA, for the ARA to be considered in allocating Voting Rights across the various Classes as part of a deal-wide vote, but not when calculating votes within a single Class. LNR Partners notes that the PSA provides for deal-wide votes to decide, for example, whether to declare or waive an event of default on one of the Trust's underlying loans.[121] This vote determines whether the loans will be liquidated and the proceeds distributed to the outstanding Certificateholders. If the ARA (which represents appraised losses that have not yet been realized) is sufficient to offset the Controlling Class's remaining interest in the Trust, then the Certificateholders in the Controlling Class would receive nothing in a liquidation in that situation. Under those circumstances, LNR Partners acknowledges that it makes sense for the Controlling Class not to have a say in

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120 Erbstein Aff. ¶ 10.

121 *See* PSA § 7.01(b) ("Holders of Certificates entitled to at least 25% of the Voting Rights" can declare an event of default); PSA § 7.04 ("Holders representing at least 66 2/3% of the Voting Rights allocated to the Classes of Certificates affected by any Event of Default" can waive an event of default).

deciding whether to declare or waive an event of default because, if it did, it could hold out and prevent more senior, fully collateralized holders from protecting their interests.

By contrast, LNR Partners contends that it would not make sense for the ARA to be considered when determining which Certificateholders in the Controlling Class have the power to designate the Special Servicer. Proviso 2 of the Voting Rights definition specifies that the ARA will not be considered when determining the Controlling Class or various of its contractually defined representatives. In that regard, LNR Partners argues that if the ARA were considered for purposes of determining which Certificateholders within the Controlling Class are entitled to exercise the Designation Power, the purpose of Proviso 2 would be substantially undermined because the Controlling Class could be deprived of its most essential authority. LNR Partners further asserts that the very reason why the Controlling Class is given the Designation Power in the first place is because it has the greatest incentive to minimize the realization of potentially avoidable unrealized losses, which is the Special Servicer's primary purpose. For this reason, LNR Partners avers that a Controlling Class's right to replace the Special Servicer does and should terminate only when it loses its status as the Controlling Class. That occurs when the Class Principal Balance of the Controlling Class drops below 25% of its original value, but that would be the result of Realized Losses, not appraised losses that have yet to be realized.[122]

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[122] *See* PSA § 1.01 (definitions of "Controlling Class" and "Class Principal Balance").

For these reasons, LNR Partners, similarly to C-III, asserts that its proposed interpretation is supported by both the text and the purpose of the PSA.

d. The PSA is ambiguous as to who may exercise the Designation Power

Having reviewed the contractual interpretations proposed by the two sides, I find each to be plausible. As discussed below, however, I also find each interpretation to be potentially problematic. Ultimately, therefore, I conclude that neither proposed interpretation is clearly correct and that the PSA is ambiguous.

Regarding C-III's proposed interpretation, one factor that makes it less persuasive is that it leads to questionable practical consequences that do not appear to be acknowledged in the PSA. According to C-III, when the ARA is larger than the outstanding Class Principal Balance of the Controlling Class, then the Controlling Class has no Voting Rights for purposes of determining who may exercise the Designation Power. Thus, under those circumstances, C-III contends that no Certificateholders within the Controlling Class will be entitled to exercise the Designation Power because none will qualify as holding a majority of the Voting Rights in the Controlling Class. Section 6.09 of the PSA, which addresses the Designation Power, directly or indirectly mentions "the Holder or Holders of the Certificates evidencing a majority of the Voting Rights allocated to the Controlling Class" over ten times. Yet, it never mentions the possibility of such Holder or Holders not existing due to the Controlling Class not having any Voting Rights. If the drafters had intended to create a system in which the Controlling Class could lose the Designation Power because the ARA eliminated its Voting Rights,

one would expect that possibility to be mentioned at least once in the relevant section, but it is not.

C-III's proposed interpretation also has consequences that arguably are absurd. The original Class Principal Balance of Class G, the current Controlling Class, was approximately $21 million;[123] the current ARA is over $83 million.[124] According to C-III's interpretation, if, as here, the ARA is larger than the original Class Principal Balance of a Controlling Class, no Certificateholders of that Controlling Class ever will be able to exercise the Designation Power. This is because that Class will not be entitled to Voting Rights at any point during its tenure as the Controlling Class. Importantly, barring special circumstances such as the resignation of the Special Servicer, the PSA vests the Designation Power exclusively in the Certificateholders of the Controlling Class.[125] Thus, if they cannot exercise the Designation Power to replace the Special Servicer, no one can.

One of the consequences of C-III's interpretation, therefore, is that a previously appointed Special Servicer, including one appointed by Certificateholders who no longer have any interest in the Trust, could remain in power indefinitely. Even though the Special Servicer is constrained somewhat by the contractually defined Servicing Standard

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123 Erbstein Aff. Ex. 4.

124 Unell Aff. ¶ 4.

125 *See* PSA § 6.09(a).

and the Controlling Class Representative's qualified veto power,[126] the Special Servicer still has broad discretion regarding how to deal with the nonperforming loans held by the Trust.[127] It seems unlikely, therefore, that the drafters of the PSA intentionally created a Designation Power that could lapse indefinitely in this manner, resulting in the possible permanent entrenchment of a previously designated Special Servicer.

LNR Partners' interpretation of the PSA, unlike C-III's, averts the arguably absurd result of the Designation Power lapsing indefinitely. According to LNR Partner's interpretation, the ARA is not considered when calculating Voting Rights for purposes of determining who may exercise the Designation Power. Thus, under that interpretation, the holder or holders of a majority of the Certificates in the Controlling Class always are entitled to exercise the Designation Power.

Despite producing an outcome that appears more reasonable, LNR Partners' interpretation of the PSA also is problematic. As an initial matter, the clause of the Voting Rights definition to which LNR Partners cites regarding how Voting Rights are calculated within a Class does not appear to stand for the proffered proposition—*i.e.*, that the Voting Rights of a single Class are calculated without reference to the ARA. That clause states that "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." Based on the Court's best reading, this clause

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126 PSA §§ 1.01 (definition of "Servicing Standard"), 6.11(a).

127 *See supra* notes 17–18 and accompanying text.

merely seems to address how Voting Rights that have already been allocated to a Class should be further allocated among the Class's Certificateholders—"in standard proportion to the[ir] Percentage Interests." The clause appears to be equally relevant to determining how Voting Rights allocated to Classes for deal-wide votes will be distributed to those Classes' Certificateholders as it is to determining how Voting Rights allocated to a single Class will be distributed.

This apparent misreading is not fatal, however, to the bifurcated approach to the calculation of Voting Rights that LNR Partners asserts is required by the PSA. Under that approach, the ARA is considered when calculating the Voting Rights of the various Classes in proportion to one another but not when calculating the Voting Rights within a single Class. Rather, LNR Partners' interpretation arguably is supported by other parts of the Voting Rights definition, including by Proviso 1 and the clause directly preceding it. The clause preceding Proviso 1 states: "Voting Rights shall be allocated among the various Classes of the Principal Balance Certificates in proportion to the respective Class Principal Balances of such Classes of Certificates." Class Principal Balances typically are calculated without reference to the ARA,[128] so this language can be interpreted as creating a default rule that Voting Rights are allocated without consideration of the ARA.

Proviso 1 then states that "solely for the purpose of determining the respective Voting Rights of the various Classes of Principal Balance Certificates, the [ARA] . . . shall be treated as Realized Losses with respect to the calculation of the Certificate

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[128] *See* PSA § 1.01 (definition of "Class Principal Balance").

Principal Balances." LNR Partners' interpretation of Proviso 1, which I find textually plausible, is that it provides that the ARA is only taken into account when calculating the Voting Rights of the various Classes in proportion to one another. Under this interpretation, the determination of Voting Rights within a single Class would not be subject to Proviso 1 and, instead, arguably would be subject to the default rule established by the preceding clause, pursuant to which the ARA would not be considered in allocating Voting Rights. Thus, LNR Partners' proposed interpretation remains plausible, despite its questionable reading of one of the subsequent clauses in the Voting Rights definition.

Another undesirable feature of LNR Partners' proposed interpretation is that it appears to violate at least one canon of construction, namely, the presumption against surplusage. As previously noted, in New York, a "contract should be construed so as to give full meaning and effect to all of its provisions."[129] In that regard, an interpretation that "has the effect of rendering at least one clause superfluous or meaningless . . . is not preferred and will be avoided if possible."[130] According to LNR Partners, even if Proviso 2 is ignored, Proviso 1 of the Voting Rights definition and the other clauses within that definition are sufficient to establish that the ARA is only considered when calculating the Voting Rights of the various Classes in proportion to one another. Proviso 2 specifies

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129 *Olin Corp. v. Am. Home Assurance Co.*, 704 F.3d 89, 99 (2d Cir. 2012) (quoting *LaSalle Bank Nat'l Ass'n v. Nomura Asset Capital Corp.*, 424 F.3d 195, 206 (2d Cir. 2005)) (internal quotation marks omitted).

130 *Id.*

that the ARA "shall not reduce the Class Principal Balance of any Class for purposes of determining the Controlling Class, the Controlling Class Representative or the Majority Controlling Class Certificateholder." LNR Partners' interpretation, however, appears to render Proviso 2 superfluous, because the determinations it enumerates do not involve calculating Voting Rights across multiple Classes, but rather involve, at most, calculating the Voting Rights within the single Controlling Class.

In that regard, however, I also note that even under C-III's interpretation, the inclusion of Controlling Class and Controlling Class Representative in Proviso 2 is superfluous. Both parties agree that, pursuant to Proviso 1 of the Voting Rights definition, the only circumstances under which the ARA is deducted from Class Principal Balances is when calculating Voting Rights (although LNR Partners further restricts those circumstances to the calculation of Voting Rights across multiple Classes). Yet, the determination of the Controlling Class and the Controlling Class Representative does not require calculating Voting Rights.[131] Thus, even according to C-III's interpretation of the Voting Rights definition, it is superfluous for Proviso 2 to specify that the ARA would not be considered for purposes of determining the Controlling Class and Controlling Class Representative.

C-III also alleges that LNR Partners' proposed interpretation violates the canon of *inclusio unius est exclusio alterius*. In that regard, C-III notes that Proviso 2 of the

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131 *See* PSA § 1.01 (definitions of "Controlling Class" and "Controlling Class Representative").

Voting Rights definition expressly lists three circumstances under which the ARA is not to be considered for purposes of calculating Voting Rights, namely, when determining the Controlling Class, the Controlling Class Representative, or the Majority Controlling Class Certificateholder. That list does not include determining the Certificateholders within the Controlling Class entitled to exercise the Designation Power. Thus, under the *inclusio unius* canon, C-III argues that the Court should infer, by negative implication, that the drafters of the PSA intended for the ARA to be taken into account when calculating Voting Rights to determine who is entitled to exercise the Designation Power.

At this relatively early stage of this litigation, however, I do not accord much weight to the *inclusio unius* canon. The force of the *inclusio unius* canon depends upon context and carries the greatest weight when the language or structure of the contract itself suggests that what was included in a list was intended to be exclusive. For example, in *Uribe v. Merchants Bank of New York*,[132] the New York Court of Appeals applied *inclusio unius* where the relevant contractual provision stated "[t]he safe is leased *solely* for the purpose of keeping securities, jewelry, valuable papers, and precious metals *only*."[133] Similarly, in *Two Guys from Harrison-N.Y., Inc. v. S.F.R. Realty Associates*,[134] the New York Court of Appeals applied *inclusio unius* only after concluding that the title of the paragraph at issue "indicate[d] that it was intended to be a comprehensive

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132 91 N.Y. 2d 336 (1998).

133 *Id.* at 338, 340–41 (emphasis added).

134 63 N.Y. 2d 396 (1984).

treatment of that subject."[135] Due to the absence of language suggestive of exclusivity in Proviso 2, such as "solely" or "only," the *inclusio unius* canon is not conclusive on the question of exclusivity. Indeed, the fact that "solely" was used in Proviso 1, but not in Proviso 2, arguably indicates that the drafters did not intend Proviso 2 to be exclusive. Therefore, at this stage of the proceedings, I assign minimal weight to C-III's *inclusio unius* argument.

For the foregoing reasons, I conclude that both sides' proposed interpretations of the PSA, while plausible, are problematic. Specifically, C-III's interpretation leads to consequences that do not appear to be contemplated by the PSA and arguably are absurd. LNR Partners' interpretation would produce consequences that appear more reasonable, but it is not clearly supported by the text of the contract. Moreover, both interpretations do violence, to varying degrees, to one or more canons of construction. Faced with two plausible but problematic interpretations of the PSA and no clear basis to conclude one is superior to the other, I am unable to say that either proposed interpretation is the only reasonable interpretation of the contract. I therefore find that the PSA lacks "a definite and precise meaning, unattended by danger of misconception,"[136] and conclude that the contract is ambiguous.

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135 *Id.* at 403–04.

136 *Law Debenture Trust Co. of New York v. Maverick Tube Corp.*, 595 F.3d 458, 467 (2d Cir. 2010) (citations and internal quotation marks omitted).

2. The Extrinsic Evidence Does Not Resolve the Ambiguity As a Matter of Law

Once a contract has been deemed ambiguous, the Court "may consider extrinsic evidence to ascertain the parties' intent at the formation of the contract."[137] LNR Partners filed its motion for summary judgment at an early stage of this litigation, concurrent with its opposition to C-III's motion to dismiss. Thus, the factual record has yet to be developed fully and contains only limited extrinsic evidence relevant to the proper interpretation of the PSA. I find that the extrinsic evidence currently before the Court is insufficient to resolve the ambiguity in the PSA as a matter of law.

To undermine C-III's proposed interpretation of the PSA and support its own, LNR Partners relies most significantly on extrinsic evidence related to the course of performance of the agreement. In the fall of 2012, C3 Initial Assets appointed C-III to be Special Servicer, and C-III asserted its right to assume that position, on the grounds that C3 Initial Assets had become the Majority Controlling Class Certificateholder.[138] Then, as now, however, if the ARA were taken into account in determining the Voting Rights of the Controlling Class, the Controlling Class would not have had any Voting Rights.[139] Thus, according to C-III's present interpretation of the contract, C3 Initial Assets would not have qualified as the holder of the Certificates "evidencing a majority of the Voting Rights allocated to the Controlling Class" and thus would not have had the Designation

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137 *Olin Corp. v. Am. Home Assurance Co.*, 704 F.3d 89, 99 (2d Cir. 2012).

138 Compl. Ex. B.

139 Erbstein Aff. ¶ 15, Ex. 4.

Power.[140] Yet LNR Partners, the Trustee, C3 Initial Assets, and C-III itself treated C3 Initial Assets' designation as binding under the PSA and permitted C-III to be appointed Special Servicer.[141] LNR Partners asserts that this course of performance directly contradicts C-III's proposed interpretation of the agreement and proves that the parties did not intend the ARA to be considered for purposes of determining who has the Designation Power.

When questioned on this subject at oral argument on C-III's related motion for a temporary restraining order, counsel for C-III effectively conceded that, according to the interpretation of the PSA that C-III now advances, C3 Initial Assets did not have the power to designate C-III as Special Servicer when it did.[142] Counsel for C-III argued,

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[140] *See* PSA § 6.09(a). One implication of this circumstance is that if the Court ultimately determines that C-III's interpretation of the PSA is correct, LNR Partners may be able to challenge the validity of C-III's installation as Special Servicer in November 2012. LNR Partners has not directly asserted such a claim in this litigation, however, nor has it briefed the issue of whether, if C-III's interpretation of the contract ultimately is found to be correct, the initial appointment of C-III as Special Servicer could be deemed void retroactively and, if so, what the consequences would be—*e.g.*, whether the role of Special Servicer would revert back to LNR Partners, or whether the Trustee would be entitled to designate a replacement. C-III, therefore, has not had the occasion to assert any affirmative defenses it might have to an improper installation claim, including, for example, acquiescence or waiver. For these reasons, I express no opinion as to the validity of C-III's appointment as Special Servicer on LNR Partners' pending motion for summary judgment. Instead, I have considered evidence of the circumstances surrounding C-III's appointment solely as course of performance evidence relevant to the proper interpretation of the PSA.

[141] *See, e.g.*, Erbstein Aff. ¶ 7; Compl. Ex. C.

[142] *See* TRO Arg. Tr. 19–25.

however, that C3 Initial Assets' mistaken assertion of its right to exercise the Designation Power resulted from an unintentional error. Specifically, counsel suggested that C3 Initial Assets incorrectly had assumed that the PSA, like many pooling and servicing agreements, simply vested the Designation Power in the Majority Controlling Class Certificateholder.[143] C3 Initial Assets was the Majority Controlling Class Certificateholder when it appointed C-III as Special Servicer,[144] and it referenced that status as its basis for exercising the Designation Power in its contemporaneous communications with LNR Partners and the Trustee.[145]

According to counsel for C-III, it was only later that C-III realized that, under the PSA, the Designation Power actually is vested in the "the Holder or Holders of the Certificates evidencing a majority of the Voting Rights allocated to the Controlling Class."[146] Counsel attributed the failure of C3 Initial Assets and C-III to realize their mistake earlier to the length and complexity of the PSA.[147] Counsel emphasized, however, that C-III's initial error does not contradict its current interpretation of how Voting Rights are calculated for purposes of the Designation Power, because neither C3

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143 *Id.* at 22.

144 *See* Erbstein Aff. ¶¶ 6, 10; Compl. ¶ 45.

145 Compl. Ex. B.

146 *See* TRO Arg. Tr. 23.

147 TRO Arg. Tr. 22.

Initial Assets nor C-III ever claimed that the former held a majority of the Voting Rights in the Controlling Class.[148]

To counter LNR Partners' suggestion that this course of performance demonstrates, among other things, that the Trustee has endorsed LNR Partners' interpretation of the PSA, C-III submitted an email chain between C-III and the Trustee. In that regard, C-III sent an email to the Trustee on January 30, 2013, informing it of C-III's interpretation of the relevant provisions of the PSA and requesting that it suspend a previously issued letter acknowledging LNR Securities' designation of LNR Partners as Special Servicer.[149] Corporate counsel for the Trustee responded as follows:

> We are in receipt of your email . . . and are aware of the divergent positions being asserted by the various parties. As I informed you yesterday, the Trustee was unaware of this litigation as neither party, either LNR or C-III, deemed it advisable to notify U.S. Bank, in its capacity as Trustee about the pending action. As I stated yesterday, we are reviewing the matter and we are not in a position to make any determination until we have had an adequate opportunity to review the Trustee's obligations and rights with respect to this matter.[150]

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148 *Id.* at 24–25.

149 *See* Jenkins Transmittal Aff. Ex. A. Exhibit A to the Jenkins Transmittal Affidavit, as recorded in the docket, mistakenly excludes the content of the email from C-III's counsel to the Trustee. *See* D.I. No. 46. Counsel for C-III provided the Court and opposing counsel with a complete copy of the relevant correspondence at argument on C-III's motion for a temporary restraining order.

150 Jenkins Transmittal Aff. Ex. A.

The record contains no later communications on this subject from the Trustee. C-III argues that the response quoted above indicates, at a minimum, that the Trustee has not yet made a substantive determination as to the contract construction issue being disputed in this litigation. Thus, C-III submits that any past actions taken by the Trustee should not be viewed as providing any confirmation of LNR Partners' proposed interpretation of the PSA.

Having reviewed the somewhat truncated record before me, I find that the course of performance evidence submitted by LNR Partners may support its interpretation of the PSA. If the Trustee, the parties to this litigation, and their affiliates had applied, in the fall of 2012, the interpretation of the PSA that C-III presently advances, C3 Initial Assets' designation of C-III as Special Servicer would have been deemed ineffectual, and C-III would not have been permitted to become Special Servicer. On the other hand, the parties' course of performance under the PSA in the fall of 2012 comports with LNR Partners' interpretation of the PSA.

Nonetheless, I cannot say that all the relevant evidence on this issue is undisputed or that it is conclusive, as a matter of law, as to the proper construction of the contested provisions of the PSA. On a motion for summary judgment, the evidence and the inferences drawn from the evidence are to be viewed in the light most favorable to the nonmoving party.[151] C3 Initial Assets invoked its status as the Majority Controlling

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[151] *GMG Capital Invs., LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d 776, 779 (Del. 2012); *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).

Class Certificateholder in its notification letter terminating LNR Partners as Special Servicer and appointing C-III to that role. Viewing that evidence in the light most favorable to C-III, it ultimately may support a finding that C3 Initial Assets mistakenly believed that the Designation Power was vested in the Majority Controlling Class Certificateholder, not that C3 Initial Assets held the view that the ARA is not to be considered when calculating Voting Rights for purposes of the Designation Power. Moreover, one plausible inference that can be drawn from the Trustee's response to counsel for C-III's correspondence, quoted *supra*, is that the Trustee previously had not focused on the question at issue in this litigation and only perfunctorily approved C-III's designation—and later LNR Partners' re-designation—as Special Servicer.

Finally, I note that the purpose of contract construction is to effectuate the intention of the contracting parties at the time the contract was executed.[152] While the proffered evidence as to the course of performance of the parties to the PSA six years after its execution may be probative of the drafters' original intent, I do not consider it conclusive under the circumstances of this case. Moreover, the Court would benefit from further development of the evidence regarding, among other things, the negotiation of the PSA, the broader implications of each parties' interpretation for the Trust and its Certificateholders, and customary drafting practices for pooling and servicing agreements, including, in particular, as they relate to the provisions at issue in this case.

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[152] *Evans v. Famous Music Corp.*, 807 N.E.2d 869, 872 (N.Y. 2004) ("It is well settled that our role in interpreting a contract is to ascertain the intention of the parties at the time they entered into the contract").

For the foregoing reasons, I conclude that genuine issues of material fact exist as to the proper interpretation of the relevant PSA provisions. I therefore deny LNR Partners' motion for summary judgment.

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, C-III's motion to dismiss and LNR Partner's motion for summary judgment are denied. The stipulated status quo order approved by the Court on February 12, 2014, which was set to expire upon the issuance of this ruling, is hereby extended by ten days. The parties are to confer and advise the Court, within ten days, whether they agree to keep the existing status quo order in place pending further order of the Court, stipulate to a new proposed status quo order, or are unable to agree on an appropriate status quo order going forward. I further direct the parties, in that same time frame, to confer and submit a proposed schedule for a prompt trial on the merits of this action.

IT IS SO ORDERED.