581

Court of Appeals

STATE OF NEW YORK

Index No. 651338/13

DEUTSCHE BANK NATIONAL TRUST COMPANY, solely in its capacity as Trustee of SECURITIZED ASSET BACKED RECEIVABLES LLC TRUST 2007-BR1,

Plaintiff-Respondent,

—against—

BARCLAYS BANK PLC,

Defendant-Appellant.

Index No. 652001/13

DEUTSCHE BANK NATIONAL TRUST COMPANY, solely in its capacity as Trustee of HSI ASSET SECURITIZATION CORPORATION TRUST 2007-NC1,

Plaintiff-Respondent,

—against—

HSBC BANK USA, NATIONAL ASSOCIATION,

Defendant-Appellant.

MEMORANDUM OF LAW IN OPPOSITION TO DEUTSCHE BANK NATIONAL TRUST COMPANY'S MOTION FOR LEAVE TO APPEAL

NICHOLAS J. BOYLE
DAVID RANDALL J. RISKIN
WILLIAMS & CONNOLLY LLP
650 Fifth Avenue, Suite 1500
New York, New York 10019
Telephone: (202) 434-5000
Facsimile: (202) 434-5029

725 12th Street, N.W.
Washington, DC 20005

MICHAEL O. WARE
MAYER BROWN LLP
1221 Avenue of the Americas
New York, New York 10020
Telephone: (212) 506-2500
Facsimile: (212) 262-1910

Counsel for HSBC Bank USA, National Association

JEFFREY T. SCOTT
JONATHAN M. SEDLAK
ANDREW H. REYNARD
COLIN A. CHAZEN
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Telephone: (212) 558-4000
Facsimile: (212) 558-3588

Counsel for Barclays Bank PLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND CONSTITUTIONS

OTHER AUTHORITIES

Defendants-Appellants HSBC Bank USA, National Association and Barclays Bank PLC respectfully oppose Plaintiff-Respondent Deutsche Bank National Trust Company's ("DBNT") motion for leave to appeal the First Department's unanimous decision (the "Decision") dismissing DBNT's complaints as untimely.

PRELIMINARY STATEMENT

The Decision is correct and does not warrant Court of Appeals review. In assessing where DBNT's contract claims accrued under both the straightforward plaintiff-residence rule of *Global Financial Corp.* v. *Triarc Corp.*, 93 N.Y.2d 525 (1999), and the multi-factor test from *Maiden* v. *Biehl*, 582 F. Supp. 1209 (S.D.N.Y. 1984), the First Department came to the logical conclusion that the claims accrued in California, principally because DBNT is a California resident administering trusts—whose assets, owned by DBNT, encumber predominantly California properties—in California. The First Department then applied California's limitations law, correctly finding that DBNT's claims were untimely. Nothing about those holdings warrants this Court's review.

In its attempt to persuade the Court otherwise, DBNT invokes the language of appellate review, casting the Decision as encompassing "novel" questions of law raising issues of "public importance" that "conflict" with prior Court of Appeals cases. Not so. As another trustee plaintiff represented at the recent hearing before the IAS Court on which DBNT relies: The First Department "did not

change the law at all." (May 24, 2018 Hr'g Tr. 45:11-12.)[1]

* * * * *

The Decision Does Not Encompass a Novel Question of Law. The essential question the First Department answered—where a claim brought by an out-of-state plaintiff accrues—is routine. And in resolving it, the First Department broke no new legal ground: Under *Global Financial*, as well as under the *Maiden* analysis that DBNT itself advocated, the outcome was the same: DBNT's claims accrued in California. DBNT does not articulate a different legal standard the First Department should have applied in its CPLR 202 analysis. Rather, DBNT merely asks this Court to apply the same legal principles the First Department used to the same set of facts before the First Department, but to reach a different result. That is not a question of law; it is a fact-specific analysis best left to the lower courts.

Even if the Court were to look beyond this jurisdictional deficiency, the "novel" question DBNT poses misconstrues the law. DBNT asks the Court to address where claims brought by a residential mortgage-backed securities ("RMBS") trustee suing *in a representative capacity* accrue. (Br.3.)[2] But long-settled trust law, and DBNT's own admissions, establish that a trustee bringing a suit relating to assets held in trust, as here, does not sue in a representative capacity.

---

[1] The hearing transcript is Exhibit 1 to the Affirmation of David Randall J. Riskin.

[2] "Br." refers to DBNT's brief in support of its motion for leave to appeal before this Court.

The Decision Does Not Raise Issues of Public Importance. DBNT protests that the Decision upends the expectations not only of RMBS trustee plaintiffs, but also of New York investors generally. But the Decision does not change CPLR 202's long-standing notice to out-of-state plaintiffs: a foreign limitations regime will govern their claims if they accrue outside of New York and the foreign limitations period is shorter than New York's. And no evidence supports DBNT's vastly exaggerated pronouncements about the Decision's effects.

DBNT does not identify a single RMBS case on which the Decision has dispositive effect. In fact, DBNT contends that there are factual distinctions among the RMBS cases it says may be affected—further underscoring the factual, rather than legal, basis for the Decision. And DBNT has relied on that position to argue that the Decision does not foreclose other RMBS cases it has brought. Rather than provide evidence for its public-import argument, DBNT laments that "[s]everal [RMBS] actions were stayed pending the outcome of" its motion for leave to appeal, purportedly "wreak[ing] havoc" on the pretrial schedule of the Part 60 RMBS cases. (Br.4.) But common-sense, court-ordered stays—the effects of which the IAS Court undoubtedly took into account before granting them—are not a basis for this Court's review.

DBNT's secondary argument—that the Decision is important because it defeats the expectations of parties who "look to the courts of this State to . . . apply

CPLR 202 in a consistent, fair, and predictable manner" (Br.22)—rests on two fundamental misapprehensions. *First*, that the Decision frustrates the expectations of investors who, by including New York choice-of-law clauses in their contracts (as here), expect New York limitations periods to govern. But this Court has held that absent an express statement, choice-of-law clauses do not encompass limitations periods. Thus, a New York choice-of-law clause is not, by itself, a signal that contracting parties intended to select New York's limitations periods—only that they intended New York's well-developed body of *substantive* law to govern. *Second*, that the First Department's application of CPLR 202 was unpredictable. This is news to DBNT, who correctly observed in another RMBS contract case that "[t]he existence of [the] New York borrowing statute was not a mystery . . . ." (May 24, 2018 Hr'g Tr. 17:17-18.) All out-of-state plaintiffs were, and remain, on notice that CPLR 202 applies to their claims that accrued outside of New York. The Decision affirmed that long-standing principle.

The Decision Does Not Conflict with the Court's Precedents. DBNT's argument that the Decision conflicts with *Global Financial* and *ACE Securities Corp.* v. *DB Structured Products, Inc.* (*ACE III*), 25 N.Y.3d 581 (2015), is audacious: DBNT told the First Department that *Global Financial* is "inapposite" to, and *ACE III* "has no bearing" on, these actions. (NC1 Answering.26, 47; BR1 An-

swering.25.)[3] And it is wrong. Under *Global Financial* and *ACE III*, DBNT's claims accrued in California at closing. So too under the Decision.

As a fallback, DBNT contends that the First Department contravened CPLR 202 by applying only "parts of California law in deciding the timeliness of these actions." (Br.40.) This misreads the Decision: the First Department applied all relevant California law in its timeliness analysis, concluding, under that law, that DBNT's claims were untimely. That California-law holding is not "important" for the New York courts, let alone an issue for this Court's review.

For these, and other, reasons, the Court should deny DBNT's motion for leave to appeal.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

These actions arise from two RMBS transactions securitizing predominately California mortgages offered by California mortgage originators, and administered by a California-based trustee, DBNT, from an office in California. (NC1.23, 66, 350, 534, 863; BR1.29, 119, 121, 207, 443.)[4] DBNT alleges that HSBC and Barclays, the transactions' sponsors, breached representations and warranties made about the mortgage loans securitized in those transactions.

---

[3] "NC1 Br.," "NC1 Answering.," and "NC1 Reply." refer to the opening, answering, and reply briefs, respectively, in HSBC's appeal (No. 652001/2013). "BR1 Answering." and "BR1 Reply." refer to the answering and reply briefs, respectively, in Barclays' appeal (No. 651338/2013).

[4] "NC1." refers to HSBC's record on appeal. "BR1." refers to Barclays' record on appeal.

A. The California Trusts at Issue

As to HSBC, DBNT's allegations concern the HSI Asset Securitization Corporation Trust 2007-NC1 ("NC1 Trust"), which closed on June 5, 2007. As to Barclays, DBNT's allegations concern the Securitized Asset Backed Receivables LLC Trust 2007-BR1 ("BR1 Trust"), which closed on April 12, 2007. (The NC1 Trust and BR1 Trust together are the "Trusts.") Each Trust is governed by a Pooling and Servicing Agreement ("PSA"). Among other things, the PSAs obligate DBNT to administer the Trusts. (NC1.66; BR1.100.) By the PSAs' operation, the Trusts' assets were "assign[ed] to" DBNT. (NC1.98; BR1.119.) Accordingly, the PSAs provide that DBNT is the legal owner of the Trusts' assets and thus has "all the right, title, and interest" to those assets. (NC1.93-94, 96; BR1.119.)[5]

The assets owned by DBNT are mortgage loans. The mortgage loans predominantly secure California properties, as compared to properties in any other state. For the NC1 Trust, 32.1% of mortgage loans by principal balance are secured by California properties; only 7% are secured by New York properties. (NC1.534.) DBNT may hold the mortgage notes underlying the loans for the NC1 Trust in California, Minnesota, or Utah (but not New York). (NC1.96.) For the BR1 Trust, 32.2% of the mortgage loans by principal balance are secured by Cali-

[5] The PSAs reflect well-settled trust law. A trust is not a distinct legal entity. *See* I Austin Wakeman Scott et al., *The Law of Trusts*, § 2.3 (3d ed. 1967). It is a set of legal relationships with respect to property, *see, e.g.*, Restatement (Third) of Trusts § 2 (Am. Law Inst. 2003), and it cannot hold or own property, *see Berardino* v. *Ochlan*, 2 A.D.3d 556, 557 (2d Dep't 2003).

fornia properties; only 5.5% are secured by New York properties. (BR1.443.) DBNT holds the mortgage notes for the BR1 Trust in California. (BR1.121.) Income is distributed from the mortgage loans to the Trusts' beneficiaries, each of whom holds certificates denoting investment in the Trusts. (NC1.63; BR1.141-47.) The beneficiaries are thus known as "Certificateholders."

B. DBNT's Claims Against HSBC and Barclays

Under the PSAs, DBNT, as trustee, has the right to bring an action relating to the assets that it holds in trust. (NC1.98; BR1.207-10.) For more than five years after the transactions closed, DBNT remained silent. Then, in December 2012 and April 2013, DBNT sent letters to Barclays and HSBC, respectively, alleging that the Trusts' mortgage loans breached the representations and warranties Defendants had made. (BR1.40; NC1.917-36.) In those letters, DBNT demanded that Defendants repurchase the allegedly breaching loans. (BR1.307-311; NC1.917-36.) DBNT's demands arose from substantively similar provisions called "repurchase protocols" in the NC1 Trust PSA and the BR1 Trust "Barclays Representation Agreement," a contract incorporated into the BR1 Trust PSA. (NC1.98; BR1.207-10.)

The repurchase protocols obligate DBNT to give Defendants notice of any loans that allegedly breach representations or warranties and provide Defendants an opportunity to cure or repurchase those loans. (NC1.98; BR1.207-10, 259.)

Only after that notice and opportunity may DBNT bring suit asserting breached representations and warranties. (NC1.98; BR1.259.) The BR1 Trust repurchase protocol also contains an "accrual clause," which states that any cause of action "shall accrue" upon discovery, or demand under the repurchase protocol. (BR1.259.) The NC1 Trust PSA does not have an accrual clause.

Although the repurchase protocol procedure was available to DBNT since the transactions' closings in 2007, DBNT waited until the six-year anniversary of the closings to file suit against Defendants: DBNT brought suit against Barclays on April 12, 2013; it brought suit against HSBC on June 5, 2013. DBNT brought both actions in New York. It was not obligated to do so, however, as neither PSA contains a forum-selection clause.

C. The IAS Court Denies Defendants' Motions to Dismiss

Defendants moved to dismiss DBNT's complaints, arguing, among other things, that DBNT's claims were untimely under California's applicable four-year limitations period. Defendants explained that under CPLR 202, because DBNT is a California resident, its claims accrued in California. And under California law, those claims were untimely because, although they arose in 2007, DBNT did not file suit until six years later.

Addressing that argument, the IAS Court correctly observed that, in cases involving purely economic loss, as here, a claim typically accrues where the plain-

tiff resides, which is where the economic impact of any loss is sustained. (IAS Court Ruling 2-3.)[6] It traced this rule to *Global Financial*, which recognized that CPLR 202 was "designed to add clarity to the law and to provide the certainty of uniform application to litigants." (IAS Court Ruling 3 (internal quotation marks omitted).) The IAS Court also correctly explained that "only in extremely rare cases" can a court deviate from the plaintiff-residence rule and "consider all relevant factors in determining where the loss is felt." (IAS Court Ruling 3 (internal quotation marks omitted).)

Nevertheless, the IAS Court found the plaintiff-residence rule inapplicable. (IAS Court Ruling 3-4.) Citing exclusively federal cases, and applying law formulated before *Global Financial*, the IAS Court stated that DBNT's California residence was "not a reliable indicator of the place where the injury occurred." (IAS Court Ruling 4.) Instead, it applied a multi-factor test purportedly derived from *Maiden* to determine where DBNT's claims accrued. (IAS Court Ruling 3-6.) Although Defendants explained that even under *Maiden*—assuming it applied—DBNT's claims accrued in California, the IAS Court disagreed. (IAS Court Ruling 5-6.) Despite the presence of numerous factors pointing to California, the IAS Court principally relied on two factors the *Maiden* court did not consider: (i) the

[6] The IAS Court's ruling is Exhibit A to the Affirmation of David B. Hennes in Support of Motion for Leave to Appeal to the Court of Appeals.

transaction contracts' choice-of-law clauses selected New York law, and (ii) the Trusts were established under New York law. (IAS Court Ruling 4-5.) On that basis, the IAS Court found that California's limitations regime did not apply. (IAS Court Ruling 6.) Defendants appealed that holding.[7]

D. The First Department Unanimously Holds that DBNT's Claims Are Untimely

The First Department unanimously reversed the IAS Court's partial denial of Defendants' motions to dismiss, holding that DBNT's claims accrued in California under CPLR 202 and were untimely under California's applicable four-year statute of limitations. (Decision 3-5.)[8]

The First Department determined that it "need not decide" whether *Global Financial*'s plaintiff-residence rule or *Maiden*'s multi-factor test controlled this action because both yielded the same outcome: "the injury/economic impact was felt in California and the claims are thus deemed to have accrued there." (Decision 3-4.) There being no dispute that DBNT's claims accrued in California under the plaintiff-residence rule, the First Department moved directly to the multi-factor test DBNT advocated. (Decision 4.) The court explained that at least five facts point-

[7] The IAS Court dismissed DBNT's additional claims for breach of contractual duties to notify and repurchase and anticipatory repudiation. (IAS Court Ruling 6-11.) DBNT did not appeal those rulings.

[8] The Decision is Exhibit E to the Affirmation of David B. Hennes in Support of Motion for Leave to Appeal to the Court of Appeals.

ed to a California accrual: (i) DBNT administers the Trusts from California; (ii) the Trusts comprise mortgage loans originated by California lenders; (iii) the mortgage loans predominantly encumber California properties; (iv) the Trusts' PSAs contemplate that the mortgage notes may be maintained in California (but not in New York); and (v) the Trusts are subject to California's tax regime. (Decision 4-5.) The First Department specifically rejected DBNT's argument that other factors pointed to a New York accrual: the PSAs had New York choice-of-law clauses, Defendants allegedly decided in New York what loans to include in the Trusts, and the beneficiaries' certificates of interest were held in New York. (Decision 4-5 & nn.2, 4.) The court found these factors "irrelevant" to determining where the alleged injury had occurred. (Decision 4-5 & nn.2, 4.)

Having concluded that DBNT's claims accrued in California, the First Department then held that California's four-year statute of limitations for breach of contract barred the claims. The court explained that DBNT's claims accrued when the transactions closed—April 12, 2007 (BR1) and June 5, 2007 (NC1)—but that DBNT did not bring suit within the applicable limitations period. (Decision 5-6.)

The First Department rejected DBNT's arguments that California's statute of limitations was tolled. (Decision 6.) Citing California law, the court explained that because DBNT "fail[ed] to demand cure or repurchase until after the expiration of four years from the original breach," the statute of limitations could not be

"extend[ed]." (Decision 6.) The result was the same under New York law: "the contractual provisions for demand under the repurchase protocol are not conditions precedent to suit for a preexisting breach" and thus did not toll the limitations period. (Decision 6.) Finally, the First Department explained that California's discovery rule did not "save[]" DBNT's claims. (Decision 6.) "[T]he record establishes that plaintiff reasonably could have discovered the alleged breaches within the limitation period, based on information in the prospectuses, the underwriting and default information it received after the closing." (Decision 6.)

The First Department directed the Clerk to "enter judgment for defendant[s] dismissing the complaint[s]." (Decision 2.)

* * * * *

DBNT thereafter sought leave from the First Department to appeal the Decision to this Court. The First Department unanimously denied DBNT's motion.

STANDARD OF REVIEW

The Court's jurisdiction is limited to questions of law. N.Y. Const. art. VI, § 3(a), (b)(4). And a decision of law merits review only if the issues presented "are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." 22 NYCRR § 500.22(b)(4). The issues here do not satisfy the controlling standard.

ARGUMENT

I. THE FIRST DEPARTMENT'S DECISION PRESENTS NO NOVEL QUESTION OF LAW REQUIRING REVIEW.

The First Department's unanimous Decision does not address any novel question of law. The core question the court considered is the same question courts address every time an out-of-state plaintiff brings suit in New York: what state supplies the controlling statute of limitations? In resolving that question, the First Department did not deviate from *Global Financial*'s usual plaintiff-residence rule. Instead, it correctly held that, under *Global Financial*, as well as under the multi-factor *Maiden* test DBNT advocated, the outcome was the same: DBNT's claims accrued in California, were subject to California's statute of limitations for breach of contract, and were untimely under that limitations regime. (Decision 3-6.) As another RMBS trustee plaintiff correctly observed at the May 24, 2018 hearing before the IAS Court on which DBNT relies in its motion: "[T]he First Department did not announce any new test" and "did not change the law at all." (May 24, 2018 Hr'g Tr. 45:7-8, 11-12.)[9] This case is inappropriate for Court of Appeals review. *Cf. Cuomo* v. *Long Island Lighting Co.*, 71 N.Y.2d 349, 354 (1988) (explaining that New York courts do not issue advisory opinions).

[9] That trustee plaintiff was HSBC, which, directed by certificateholders, has sued transaction sponsors in a number of RMBS breach-of-contract cases wholly separate from these actions. Counsel for HSBC at the May 24 hearing is plaintiffs' liaison counsel for all RMBS breach-of-contract actions. (May 24, 2018 Hr'g Tr. 43:4-5, 65:11-12.)

A. DBNT does not object to the legal principles the First Department applied—because the court, in fact, followed the very approach DBNT sought. Rather than articulating a legal test it believes should apply in these circumstances, DBNT instead asks the Court simply to apply the same multi-factor test the First Department used, to the same set of facts the First Department considered, but to reach a different result that is favorable to DBNT. (Br.27-28.) That DBNT may disagree with how the First Department applied the test for which DBNT advocated to the facts of these cases is not a question of law; it is a case- and fact-specific analysis that the lower courts regularly undertake and that is appropriately left to them.[10] "All" the First Department did "was apply *Maiden* . . . to the specific factors at issue in" the cases before it. (May 24, 2018 Hr'g Tr. 45:10-11.)

The IAS Court understood the Decision the same way, observing that it would be "fairly easy to address on a detailed factual basis" the Decision's effect on other cases. (May 24, 2018 Hr'g Tr. 15:14-15.) Were this Court to act each time a lower court considers and applies case-specific factors, it would run counter to the Court's constitutionally commanded limited jurisdiction and waste judicial resources. N.Y. Const. art. VI, § 3(a), (b)(4); *see also People* v. *Baumann & Sons Buses, Inc.*, 6 N.Y.3d 404, 406 (2006) ("[T]his Court, as a court of limited jurisdic-

[10] As shown below, DBNT's challenges to the First Department's *Maiden* analysis are both irrelevant and incorrect. *See* Part III.A, *infra*. More generally, the interpretation of a 33-year-old federal district court opinion is not the type of "novel" legal question that warrants review.

tion, may, with few exceptions, consider only questions of law.").

B. DBNT has not come close to identifying a "novel" question for review. DBNT's asserted "novel" question asks "where a cause of action accrues for purposes of CPLR 202 when the claim is brought by a nonresident representative plaintiff." (Br.26.) That question is legally untenable. Under long-settled trust law, a trustee suing in an action relating to the subject matter of a trust, as here, does not sue in a representative capacity. *Toronto Gen. Trust Co.* v. *Chi., Burlington & Quincy R.R. Co.*, 123 N.Y. 37, 44-45 (1890) (suit to "recover" trust property or for "damages thereto . . . would not have been in a representative capacity").

As a matter of law, and under the PSAs' express terms, a trustee, acting as trustee, owns the assets held in trust. *See Henning* v. *Rando Mach. Corp.*, 207 A.D.2d 106, 110 (4th Dep't 1994) (citing 106 N.Y. Jur. 2d *Trusts* §§ 7, 16); (NC1.93-94, BR1.119 (PSAs state that DBNT is the legal owner of trust assets)). Although DBNT attempts to downplay its legal ownership by saying that it "holds nothing more than 'bare legal title'" to the assets held in trust (Br.29 n.22), that itself is an admission of its legal ownership. So too was its statement as trustee in a federal RMBS contract case that it "is the holder and owner of the [trust's assets], as well as of all of the rights relating to the [assets]." (NC1.1133.)[11] As "the legal

[11] DBNT's "real-party-in-interest" argument (Br.28-29) underscores that it brings suit on its own behalf. DBNT's own authority confirms that a trustee is a "real party in interest" in cases involv-
(footnote continued)

owner of the property," DBNT brings suit "in [its] own right." *Toronto Gen.*, 123 N.Y. at 45. DBNT's argument that it "brings these lawsuits not on its own behalf" (Br.29 & n.22) ignores entirely this controlling law.

In representative-capacity cases, by contrast, the cause of action does not accrue in favor of the party bringing suit. For example, in a shareholder-derivative action, the shareholder "has no claim of his own," and instead "enforce[s] a right of a corporation." *Korn* v. *Merrill*, 403 F. Supp. 377, 383 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 310 (2d Cir. 1976) (Br.24 n.21). Similarly, a bankruptcy trustee prosecutes claims that accrued in favor of the bankrupt entity. *See In re Adelphia Commc'ns Corp.*, 365 B.R. 24, 51 (Bankr. S.D.N.Y. 2007) (Br.24 n.21); *see also ACE Sec. Corp.* v. *DB Structured Prods., Inc.*, 29 N.Y.S.3d 139, 145 (N.Y. Sup. Ct., N.Y. Cty. 2016) (RMBS trustee is not "akin to a bankruptcy trustee"). That DBNT is the party who holds the cause of action (and in whose favor the cause of action accrues) by virtue of its (admitted) legal ownership of the assets held in trust distinguishes it from the plaintiffs in the representative-capacity case law it cites.[12]

(*footnote continued*)
ing the trust's assets because it holds "legal" or "equitable" title to the claim and a "beneficial interest in the cause of action." 82 N.Y. Jur. 2d Parties § 34 (2018). When DBNT claimed in a federal RMBS contract action that, as trustee plaintiff, it was a real party in interest (NC1.1133), it represented that it held title to the claim and an interest in that cause of action.

[12] DBNT intimates that *2002 Lawrence R. Buchalter Alaska Trust* v. *Philadelphia Financial Life Assurance Co.*, 96 F. Supp. 3d 182 (S.D.N.Y. 2015) (Br.24 n.21), and *Appel* v. *Kidder, Peabody & Co. Inc.*, 628 F. Supp. 153 (S.D.N.Y. 1986) (Br.24 n.21.), were trust cases reflecting its repre-
(*footnote continued*)

The "novel" legal question on which DBNT predicates its motion for leave to appeal, then, is not "novel" at all—it lacks any legal basis whatsoever.

Nor does DBNT confront the fact that its representative-capacity argument conflicts with the basis for its motion. DBNT states that it brings these suits "in a representative capacity to redress economic injury sustained by investors in the Trusts—the Certificateholders." (Br.29.) And as DBNT states elsewhere in its brief, claims brought by a representative plaintiff accrue where the injured party resides. (Br.24 n.21.) Thus, by DBNT's reasoning, because the Certificateholders suffered "injury," DBNT's claims would accrue where each Certificateholder resides. That is what it argued in opposition to HSBC's first motion to dismiss:

> Where, as here, *a trustee asserts a claim on behalf of trust beneficiaries*, the ultimate impact of the injury at issue is not felt by the trustee, and so does not necessarily accrue where the trustee resides or where the corpus of the trust is located . . . . Instead, *the injury is felt by the trust's beneficiaries and accrues where they reside* . . . .
>
> *Deutsche Bank Nat'l Trust Co.* v. *HSBC Bank USA, Nat'l Ass'n*, No. 652001/2013 (N.Y. Sup. Ct., N.Y. Cty. Mar. 3, 2014) [Doc. 22], at 8 (emphases omitted and added).

But that is not what DBNT argues now. Instead, DBNT now speaks of the injury accruing where the Trusts are located. (*E.g.*, Br.31.) That DBNT runs from the outcome its flawed representative-capacity theory compels is no surprise: fix-

---

(*footnote continued*)
sentative-capacity theory. But neither case adopted DBNT's legally erroneous position.

ing accrual where each Certificateholder resides is unworkable, as the First Department recognized. (Decision 4.) Thus, even were the Court to credit DBNT's representative-capacity theory (it should not), the theory would point to a different accrual analysis from the one DBNT now advances—and one DBNT has forsaken and not put before the Court.

II. THE FIRST DEPARTMENT'S DECISION RAISES NO ISSUES OF PUBLIC IMPORTANCE REQUIRING REVIEW.

The Decision does not present issues of "public importance" because the First Department did not adopt a *per se* rule addressing where claims accrue for purpose of CPLR 202; did not alter the existing rule that CPLR 202 applies to claims brought by non-New-York plaintiffs such as DBNT; and applied the specific facts of these actions to a legal test DBNT itself pressed. In an effort to create an issue of public importance, DBNT asserts that the Decision "upends settled expectations and creates significant uncertainty." (Br.16.) But DBNT does not provide evidence supporting that proposition, and no record facts support it.

A. That the Decision purportedly "upends settled expectations" is nothing but DBNT's *ipse dixit*. All plaintiffs, including RMBS trustees, were on notice that, when a non-resident brings suit in New York, "CPLR 202 requires . . . courts to 'borrow' the Statute of Limitations of a foreign jurisdiction where a nonresident's cause of action accrued, if that limitations period is shorter than New York's." *Global Fin.*, 93 N.Y.2d at 526. The Decision does not alter this long-

standing rule. Trustee plaintiffs could have sought to circumvent CPLR 202 by suing outside of New York—which they were free to do given the absence of forum-selection clauses in RMBS transaction documents. *See, e.g.*, NC1.40-262 (PSA); BR1.78-306 (PSA). But having chosen to litigate in New York, those plaintiffs knew that, if they resided outside of New York, CPLR 202 controlled.

Indeed, DBNT's protest that the Decision "upends" the "settled expectations" of RMBS trustee plaintiffs rings hollow when another RMBS trustee recognized that "the First Department did not announce any new test" and "did not change the law at all" (May 24, 2018 Hr'g Tr. 45:7-8, 11-12), and when *DBNT itself*, in a separate RMBS breach-of-contract action, conceded that "[t]he existence of [the] New York borrowing statute was not a mystery" (May 24, 2018 Hr'g Tr. 17:17-18). Whether RMBS plaintiffs misapplied existing law (or even misapprehended what the law is) is not a basis for Court of Appeals review.

DBNT nevertheless speculates that until "the Decision, parties to RMBS transactions widely understood that the New York statute of limitations applied." (Br.17.) This argument is incompatible with RMBS plaintiffs' own positions. Although DBNT suggests that the fact RMBS trustees largely waited until the six-year anniversary of a transaction's closing date before bringing suit illustrates their belief that New York's limitations regime applied (Br.17), DBNT's own actions belie this conjecture. DBNT argued below that it sat on its hands for years because

it believed—wrongly—that it had no obligation or ability to discover the allegedly breaching loans until 2012 (BR1) or 2013 (NC1). (BR1 Answering.5; NC1 Answering.4.) But "the record establishes that [DBNT] reasonably could have discovered the alleged breaches within the limitation period." (Decision 6.) And DBNT's speculation as to other plaintiffs' beliefs is unpersuasive when, by DBNT's admission, 29% of trustees (12 of 42) filed RMBS breach-of-contract suits *after* the expiration of the New York limitations period DBNT asserts plaintiffs "widely understood" to apply. (Br.18.)

B. DBNT overstates the number of cases the Decision potentially affects, beginning with the RMBS cases currently before the IAS Court. DBNT speculates that the Decision could affect "more than three dozen other RMBS cases pending in Supreme Court" (Br.3), but it does not identify a single case that must be dismissed because of the Decision. In fact, DBNT contends that there are "factual distinctions among" the RMBS cases (Br.21), undermining that speculation. Based on those purported distinctions, DBNT itself argued that the Decision does *not* affect other RMBS cases that it has brought. (Statement, *Deutsche Bank Nat'l Trust Co.* v. *Barclays Bank PLC*, No. 651957/2013 (N.Y. Sup. Ct., N.Y. Cty. Jan. 24, 2018) [Doc. 158]; May 24, 2018 Hr'g Tr. 26:21-24 (DBNT: the Decision "stands as precedent only for cases where properties are exclusively or predominantly located in a particular foreign state, and that is just not the facts here").)

Instead of identifying a single case on which the Decision would have dispositive effect, DBNT merely observes that defendants have sought contested discovery stays in twelve RMBS cases. (Br.19-20 & n.16.) That is true, but irrelevant. Although defendants in those cases have indicated that they intend to make (or renew) statute-of-limitations arguments, DBNT recognizes that, in the majority of them, defendants long ago pleaded statute-of-limitations defenses. (Br.20.) Plaintiffs, in other words, have been on notice that the claims were subject to dismissal on limitations grounds. It is thus hard to see how defendants' signal that they intend to make statute-of-limitations arguments could "upend[] settled expectations." (Br.16.)[13] That DBNT believes the stay motions have "wreaked havoc on coordinated pretrial schedules" (Br.4) is an argument against any stays, not an argument that the Decision presents issues of public importance. And even in the instances where the IAS Court has granted interim stays pending the result of DBNT's motion, those stays—which are the logical result of the IAS Court managing its docket to preserve judicial resources—are hardly problematic, let alone of "public importance." In any event, denial of DBNT's motion would resolve any logistic "uncertainty" attendant to the stay motions. (Br.20.)

C. For DBNT, the Decision does not simply affect RMBS cases, but also

[13] DBNT has identified three RMBS cases where the defendants did not preserve a statute-of-limitations defense, but now seek leave to add one. (Br.20.) Even if the Decision was the catalyst for the proffered amendments, 3 out of 42 cases (7%) hardly reflects an issue "of utmost public importance." (Br.20.)

thousands of other unnamed cases addressing myriad other matters. This too is a vast overstatement. *First*, DBNT asserts that "the public import of the Decision extends . . . to representative claims generally." (Br.24.) But as demonstrated above (pp.15-16, *supra*), a trustee bringing an action relating to the subject matter of a trust does not sue in a representative capacity. *Toronto Gen.*, 123 N.Y. at 45. Thus DBNT's arguments predicated on its erroneous conclusion that RMBS trustees are representative plaintiffs (*e.g.*, Br.23-24, 30-38) miss the mark.[14]

Second, DBNT suggests that the Decision could affect cases where the governing contract contains a New York choice-of-law clause. (Br.17, 23.) For DBNT, parties to contracts selecting New York law, as the contracts do here, "unambiguously" believe that New York limitations periods will apply to their claims. (Br.5, 23-25.) DBNT offers no support for this supposedly widespread belief, and it is directly contrary to New York law.

Absent an "express" statement setting forth the parties' intent to do so, New York courts will not interpret a choice-of-law clause to encompass statutes of limi-

[14] For example, DBNT speculates that the Decision may affect claims held by bondholders. (Br.23-24.) Its theory appears to be that bond issuances use indenture trustees "who serve . . . functions similar to those that" DBNT serves. (Br.23.) No evidence supports DBNT's supposition. DBNT has not pointed to a single contract from those issuances, and thus it is not clear, among other salient issues, whether the indenture trustee sues in a representative capacity (distinguishing it from these actions) or whether the contracts detail that the trustee holds the assets and the claim. Nor does DBNT address the fact that indenture trustees may be trustees to statutory trusts, which, unlike the common-law trusts at issue here, can sue and be sued in their own name. *See Nat'l Credit Union Admin. Bd. v. U.S. Bank Nat'l Ass'n*, No. 14-cv-9928, 2015 WL 2359295, at *4 (S.D.N.Y. May 18, 2015). The Court should not credit DBNT's unsupported argument about the purportedly vast consequences of the Decision.

tations. *Portfolio Recovery Assocs., LLC* v. *King*, 14 N.Y.3d 410, 416 (2010). Thus, that a contract—be it an RMBS contract, a bond issuance, or some other contract—selects New York law says nothing, by itself, about whether the contracting parties intended to adopt New York's limitations periods. In fact, given *Portfolio Recovery*, if a standard New York choice-of-law clause signals anything, it signals that the parties did *not* intend to include New York's limitations periods. For that reason, any belief that including a New York choice-of-law clause in a contract selects New York's limitations periods would be unreasonable.[15]

In fact, as DBNT's own authority recognizes (Br.22), parties are likely to include New York choice-of-law clauses in contracts to take advantage of New York's well-developed *substantive* law. *See IRB-Brasil Resseguros, S.A.* v. *Inepar Invs., S.A.*, 20 N.Y.3d 310, 314-16 (2012). The Decision does nothing to "frustrate[]" New York's encouragement of that choice (Br.25) because it has nothing to say about that choice. After the Decision, "sophisticated commercial parties" that "select New York law to govern their agreements" will still find that New York

[15] The choice-of-law clauses in the PSAs here both elect New York "substantive" law (BR1.174; NC1.172); statutes of limitations "are considered 'procedural.'" *Portfolio Recovery*, 14 N.Y.3d at 416. Putting aside the fact that DBNT did not even mention the case below, that, among other reasons, is why *2138747 Ontario Inc.* v. *Samsung C&T Corp.* (Br.17)—which involves a choice-of-law clause not limited to New York "substantive" law—does not aid DBNT and has no bearing on this case. *See 2138747 Ontario Inc.* v. *Samsung C&T Corp.*, 144 A.D.3d 122, 125-28 (1st Dep't 2016). DBNT also contends that the clauses' reference here to New York "remedies" incorporates New York's limitations periods. (Br.17 n.12.) But whatever weight DBNT wants to place on the term "remedies," it cannot overcome the clauses' restriction to "substantive" New York law.

law applies to claims arising from their agreements (Br.25), consistent with New York General Obligations Law § 5-1401. And those parties that want to be certain that New York's limitations periods will apply can still draft their contracts to achieve that outcome. For these reasons, that "contracting parties overwhelmingly select New York law to govern their agreements" (Br.23) by no means makes the Decision one of public importance warranting this Court's review.[16]

D. DBNT finally contends that the Decision presents issues of public importance because the Court must provide "guidance" as to whether "the plaintiff-residence rule or the multi-factor test applies." (Br.21 (internal quotation marks omitted).) But given that DBNT overstates the potential effects of the Decision, its demand for "guidance" is misplaced. Indeed, these actions are a poor vehicle for Court of Appeals review because the First Department found that following *Global Financial* yields the same result as using *Maiden*'s multi-factor analysis. DBNT's claims are time-barred whether the plaintiff-residence rule DBNT rejected or the multi-factor test DBNT advocated for applies. Any guidance from the Court on the appropriate legal test, then, would not affect these actions' outcomes.

Moreover, despite its demand for "guidance," DBNT fails to articulate what factors the First Department *should* have considered to resolve definitively the is-

[16] That is to say nothing of the fact that this issue is not even before the Court. Both the First Department and the IAS Court held that the choice-of-law clauses in the PSAs here do not select New York's six-year limitations period for contract (Decision 4; IAS Court Ruling 2), and DBNT has not presented this issue for review (Br.6).

sue of where a cause of action accrues—indeed, it simply says that courts should consider "all relevant factors." (Br.29 (internal quotation marks omitted).) But such a vague test would necessarily introduce the very uncertainty into each accrual analysis that DBNT contends this Court should seek to prevent through its "guidance." Indeed, the only approach that would ensure the "consistent, fair, and predictable" outcomes that DBNT purports to pursue (Br.22) is *Global Financial*'s plaintiff-residence rule; yet DBNT is not advocating for that result.

DBNT's criticism also ignores that the Decision *adds* clarity to the law, in multiple respects. For example, it recognized that a beneficiary-residence test is unworkable in RMBS repurchase cases. (Decision 4.) It also identified factors for determining where claims brought by the trustee of an RMBS trust accrue, if a multi-factor test applies. (Decision 3-5.) And it discarded factors, such as the location of the trust certificates and where "each defendant selected the . . . mortgages to be pooled," that are not relevant to that question. (Decision 4-5 nn.2, 4.) Future courts are well-armed to analyze where claims brought by a non-New York RMBS trustee accrues. Conservation of judicial resources counsels in favor of awaiting the possible (but by no means certain) case where the *Global Financial* and *Maiden* analyses point to different accrual jurisdictions.[17] This is not that case.

[17] That the two accrual analyses may raise questions about how they apply to fact patterns not presented here (Br.22 n.20) further confirms why the Court should not review the Decision.

III. THE FIRST DEPARTMENT'S DECISION DOES NOT CONFLICT WITH PRIOR DECISIONS.

A. The First Department's Decision Does Not Conflict with *Global Financial* or *ACE III*.

DBNT characterizes the Decision as a "sharp departure from this Court's borrowing statute jurisprudence." (Br.15.) Yet eleven pages later, DBNT reports that "no New York appellate court prior to the Decision appears to have directly addressed" the question at issue here. (Br.26.) This internally inconsistent "conflict" DBNT manufactures is not grounds for Court of Appeals review.

1. DBNT's primary conflict argument—that the Decision contradicts *Global Financial* and *ACE III*—is *chutzpah*: DBNT told the First Department that *Global Financial* is "inapposite" (NC1 Answering.26; BR1 Answering.25), and that *ACE III* "has no bearing" on these matters (NC1 Answering.47). Of course: Under those cases, DBNT's claims accrued in California when the transactions closed. The Decision reached the same conclusion, rendering it consistent with *Global Financial* and *ACE III* and demonstrating that DBNT's newly minted conflict does not exist.

Putting that aside, DBNT argues that the Decision conflicts with *Global Financial* because the First Department "suggest[ed]" that the "plaintiff's place of residence *always* controls," whereas under *Global Financial*, "the place of injury *usually* is where the plaintiff resides." (Br.30 (internal quotation marks omitted).)

This picayune criticism misreads the Decision; the First Department explained that "the general rule" is that a claim accrues where the plaintiff resides. (Decision 3.) Even assuming the First Department misstated *Global Financial*, it went on to find that DBNT's claims accrued in California under *Maiden* as well. (Decision 4-5.)

2. Although DBNT frames the Decision as contradicting two of this Court's cases, DBNT's real argument is much more pedestrian: the Decision misapplied *Maiden* to the facts here. DBNT's complaint is that the "First Department should have geared any *Maiden* analysis to determining the location of the injury giving rise to the claims here," which DBNT says occurred where the Trusts were located. (Br.32; *see* Br.31 (injury "fell to the Trusts"); Br.24 (same).) But that is what the First Department did: "[E]ven under the multi-factor test, we find that the injury/economic impact was felt in California and the claims are thus deemed to have accrued there." (Decision 4.) That DBNT disagrees with how the First Department applied a fact-bound, 33-year-old federal district court decision does not satisfy 22 NYCRR § 500.22(b)(4) and does not warrant review. In any event, DBNT's specific challenges to the First Department's holding that under *Maiden*'s test, the Trusts suffered injury in California, are irrelevant and misplaced.

First, DBNT argues that the First Department contravened *ACE III* because the court considered "pre-" and "post-securitization factors" in its *Maiden* analysis, even though *ACE III* held that an RMBS contract claim accrues at the time of secu-

ritization, *i.e.*, a transaction's closing. (Br.33.) But the factors DBNT criticizes—the location of the loan originator and the properties securing the loans; where the Trusts are administered; where the mortgage notes are held; and where the Trusts may pay taxes—were all true at the transactions' closings. They were detailed in the Trusts' governing documents, which were executed at the closings, and in the offering documents for the securitization, which accompanied the closing. And they were characteristics of DBNT and the assets held in trust at the time of securitization. They are not "pre-" or "post-securitization."

Second, DBNT contends that the factors informing the First Department's *Maiden* analysis were "unmoored from . . . the injuries suffered as a result of the breaches of Representations and Warranties." (Br.33.) DBNT paints the "injury" the Trust suffered as the "false" "Representations and Warranties." (Br.30; *see also* Br.10 (describing the "injury" as "the falsity of the warranties").) Thus DBNT says that the First Department should not have considered that the allegedly impaired Trust assets (the mortgage notes) (i) were originated by California originators, (ii) encumber predominantly California properties, (iii) are administered by a California trustee, and (iv) are held outside New York; or that (v) the Trusts' governing contracts contemplate the payment of taxes only in California because they have "no bearing on the place of injury." (Br.33.) DBNT is wrong on both counts.

The alleged falsity of the representations and warranties is not an injury; it is

the alleged *cause* of injury. Instead, as DBNT recognizes elsewhere in its brief (Br.29), any injury is the economic loss—impairment of the assets held in trust—*resulting* from Defendants' allegedly false representations and warranties. As a result of DBNT's argument that any "injury . . . fell to the Trusts" (Br.30-31), the First Department rightly considered factors relating to the Trust's location (where it is administered and where it pays taxes, if any) and specifically to the assets held in trust (who originated the mortgage notes, where the properties that the notes secure are located, and where the notes are held). (Decision 4-5.) *Maiden*, in fact, specifically analyzed many of the factors DBNT now criticizes the First Department for considering. 582 F. Supp. at 1218 (considering where the trust's assets are located, where the trust's activities take place, and where the trust pays taxes). Having presented *Maiden* as the appropriate accrual test, DBNT cannot now complain that the First Department followed its analysis. Nor can DBNT cherry pick the factors a court should consider based on those that yield the outcome it wants.

Indeed, if the law regarding an alleged "injury" for accrual purposes were as DBNT would have it, *Global Financial* itself would have been decided differently. There, the plaintiff contended that the longer New York statute of limitations should apply because, similar to DBNT's argument here, the contract at issue "was negotiated, executed, substantially performed and breached" in New York. 93 N.Y.2d at 528. The Court disagreed, finding that the injury was suffered—and the

breach-of-contract claim accrued—"where the plaintiff resides and sustains the economic impact of the loss." *Id.* at 529. So too here. Regardless of where Defendants' alleged breaches occurred, under DBNT's conception the alleged "injury . . . fell to the Trusts" (Br.30-31) where they were located—in California.[18]

Third, DBNT criticizes the First Department for allegedly "fail[ing] to consider certain factors that are particularly instructive": (i & ii) the Trusts are formed under, and governed by, New York law; (iii) the Trust certificates (not the assets) are located in New York; and (iv) Defendants made investment decisions in New York. (Br.35.) The First Department hardly "failed to consider" these factors: DBNT argued their relevance on appeal (NC1 Answering.36-37; BR1 Answering.40-41), and the court pointedly rejected each of them (Decision 4-5 & nn.2, 4).

The First Department correctly rejected as irrelevant the fact that the Trusts are governed by New York law. (Decision 4.) As demonstrated above (pp.22-24, *supra*), absent an express statement that a choice-of-law clause encompasses statutes of limitations, such a clause is irrelevant for statute-of-limitations purposes. *Portfolio Recovery*, 14 N.Y.3d at 416. And given New York's "well-developed

[18] Consistent with CPLR 202's language and intent, courts in New York routinely find claims accruing in locations other than where the alleged cause of the injury occurred. *See, e.g.*, *Commerzbank AG* v. *Deutsche Bank Nat'l Trust Co.*, 234 F. Supp. 3d 463, 469-70 (S.D.N.Y. 2017); *Deutsche Zentral-Genossenschaftsbank AG, N.Y. Branch* v. *Citigroup, Inc.*, 998 N.Y.S.2d 306 (table), 2014 WL 4435991, at *1 (N.Y. Sup. Ct., N.Y. Cty. Sept. 8, 2014); *Stichting Pensioenfonds ABP* v. *Credit Suisse Gr. AG*, 38 Misc. 3d 1214(A), 2012 WL 6929336, at *2-*3 (N.Y. Sup. Ct., N.Y. Cty. Nov. 30, 2012).

system of commercial jurisprudence," parties creating a trust with financial instruments as assets have good reason to establish the trust under New York law, without a nexus to New York. *See IRB-Brasil Resseguros*, 20 N.Y.3d at 314 (internal quotation marks omitted) (General Obligations Law § 5-1401 allows "parties without New York contacts to choose New York law to govern their contracts"). Most fundamentally, the trustee owns the allegedly impaired assets, and claims based on harm to those assets accrue to the trustee.

The First Department also correctly rejected as irrelevant the fact that the Trusts' certificates were located in New York. As the First Department explained (Decision 5 n.4), and DBNT's own authority establishes, *Dexia SA/NV* v. *Morgan Stanley*, No. 650231/2012, 2013 WL 5663259, at *1 (N.Y. Sup. Ct., N.Y. Cty. Oct. 16, 2013) (Br.36 n.25), the certificates are investor assets, not the Trusts' assets. Thus, certificate location does not answer the question DBNT poses under the accrual approach it advocated—where were the Trusts injured?

Finally, the First Department correctly rejected as irrelevant the fact that Defendants allegedly chose what loans to securitize in New York. (Decision 4 n.2.) DBNT argues that those "investment decisions," which it says occurred "prior to securitization," have "far more relevance" than other factors. (Br.36-37.) It apparently forgot its position, four pages earlier, that "pre-securitization factors . . . can[not] be relevant to the place of injury." (Br.33.) That inconsistency aside, De-

fendants' decisionmaking does not bear on DBNT's inquiry of where the Trusts were injured. Although investment decisions may relate to the alleged *cause* of injury (falsity of representations), they do not speak to the location of its *effect* (economic impairment of trust assets).

* * * * *

DBNT contends that the Court must consider "all relevant factors" to determine where its claims accrued. (Br.29 (internal quotation marks omitted).) That is precisely what the First Department did when it applied the *Maiden* analysis DBNT advocated. DBNT may not like the factors the court deemed relevant (over DBNT's arguments to the contrary (NC1 Answering.35-42)), the factors the court deemed irrelevant (over DBNT's arguments to the contrary (NC1 Answering.35-42)), or the court's conclusion. But a disagreement with the First Department's application of facts to DBNT's own proposed test is no basis for review.

B. The First Department's Holding that DBNT's Claims Are Untimely Under California Law Does Not Merit Review.

DBNT also objects to the First Department's conclusion that California's four-year limitations period bars DBNT's claims. Although DBNT contends that the court "misinterpreted" CPLR 202 (Br.43), its challenge is much narrower: it merely criticizes the court's analysis of California law. DBNT contends that, even if its claims accrued in California, the First Department erred by not finding that the repurchase protocols, as well as the accrual clause for the BR1 Trust, tolled the

statute of limitations under California law. (Br.38-43.) That argument is not a basis for Court of Appeals review, is wrong, and does not change the outcome here.

1. The First Department expressly held that the repurchase protocols do not extend the statute of limitations under California law, and thus this case would not be timely even if it had been filed in a California court. It explained that, as a matter of California law, DBNT's "failure to demand cure or repurchase"—to follow the repurchase protocols—"until after expiration of the four years from the original breach did not serve to extend the statute of limitations." (Decision 6 (citing *Meherin* v. *S.F. Produce Exch.*, 48 P. 1074, 1075 (Cal. 1897); *Taketa* v. *State Bd. of Equalization*, 231 P.2d 873, 875 (Cal. Ct. App. 1951)).) For good reason: "[M]any cases" in California hold that, where a right has fully accrued except for a plaintiff's demand, "the cause of action has accrued for the purpose of setting the statute of limitations running." *Taketa*, 231 P.2d at 875.

Simply put, the First Department found that the protocols did not have the effect under California law that DBNT ascribes to them. And it did so after considering the parties' competing arguments and cases, including the arguments and cases DBNT now repeats in its motion for leave to appeal.[19] In any event, the in-

[19] *Compare* NC1 Answering.44-47; BR1 Answering.45-48, *with* NC1 Reply.22-27; BR1 Reply.20-23. The California cases on which DBNT relies (Br.41-42) are inapposite because they all involve, unlike here, a demand that was a substantive condition precedent to suit. *See Leonard* v. *Rose*, 65 P.2d 604, 607 (Cal. 1967); *Mansouri* v. *Superior Court*, 104 Cal. Rptr. 3d 824, 831 (Cal. Ct. App. 2010); *Kaplan* v. *Reid Bros.*, 285 P. 868, 869 (Cal. Dist. Ct. App. 1930).

terpretation of California law is not a matter for the Court of Appeals. Indeed, DBNT does not identify a single case in which this Court took an appeal to consider the application of a foreign jurisdiction's law.

The First Department separately explained that the repurchase protocols could not toll the statute of limitations under New York law. (Decision 6); *see ACE III*, 25 N.Y.3d at 597-98 (finding indistinguishable repurchase protocol not a "condition precedent to suit that delayed accrual"). Thus, whether California law or New York law (because the Trust contracts have substantive New York choice-of-law clauses that would govern whether the contracts include a condition precedent) supplies the framework for interpreting the protocols' effect is a distinction without difference. Under both states' laws, the repurchase protocols do not toll the applicable statute of limitations or render DBNT's untimely claims timely.

2. DBNT's arguments regarding the accrual clause—which affects only Barclays and the BR1 Trust—rest on a difference between New York and California law that is entirely irrelevant to this case. DBNT argues that California courts "'have permitted contracting parties to modify the length of the otherwise applicable California statutes of limitations, whether the contract has extended or shortened the limitations period.'" (Br.41 (quoting *Hambrecht & Quist Venture Partners* v. *Am. Med. Int'l, Inc.*, 46 Cal. Rptr. 2d 33, 42 (Cal. Ct. App. 1995).) But the BR1 Trust accrual clause does no such thing: the First Department correctly held

that it does not "expressly waive or extend the statute of limitations." (Decision 6.)[20] Thus, whether an express waiver or extension would be permissible under California law (as opposed to New York law) is irrelevant, because the accrual clause here does not expressly waive or extend the applicable limitations period.[21]

* * * * *

Only by ignoring the Decision's plain language can DBNT contend that the First Department contravened CPLR 202 by "mixing-and-matching" the parts of New York and California law "that were least favorable to" DBNT. (Br.15, 39.) As shown above (pp.33-35, *supra*), the First Department did no such thing. After concluding that DBNT's claims accrued in California, the court considered whether California law held that the repurchase protocols or BR1 Trust accrual clause extended the statute of limitations. Finding that they did not under long-standing

---

[20] Although DBNT suggests that California courts enforce accrual clauses (Br.41-42), the cases it cites merely observe that California law permits parties to expressly modify the breach-of-contract limitations period, *see Hambrecht*, 46 Cal. Rptr. 2d at 42, or involve express waivers of the statute of limitations that are not present here, *see Brisbane Lodging, L.P.* v. *Webcor Builders, Inc.*, 157 Cal. Rptr. 3d 467, 475 (Cal. Ct. App. 2013); *Cal. First Bank* v. *Braden*, 264 Cal. Rptr. 820, 821-22 (Cal. Ct. App. 1989); *Builders Bank* v. *Oreland, LLC*, No. CV 14-06548, 2015 WL 1383308, at *3 (C.D. Cal. Mar. 23, 2015).

[21] This Court's review of *Deutsche Bank National Trust Co.* v. *Flagstar Capital Markets Corp.*, 143 A.D.3d 15 (1st Dep't 2016) has no bearing on DBNT's accrual-clause argument, or its motion (Br.42 n.27). *Flagstar* found that the accrual clause there was "tantamount to extending the statute of limitations based on an imprecise 'discovery' rule," 143 A.D.3d at 16, not that it was an express extension or waiver of the statute of limitations. Indeed, in its *Flagstar* brief before the First Department, DBNT argued that an accrual clause nearly identical to the BR1 Trust accrual clause here "does not extend the statute of limitations" (Br. for Pl.-App., *Deutsche Bank Nat'l Trust Co.* v. *Flagstar Capital Mkts. Corp.*, No. 653048/13 (N.Y. Feb. 1, 2016), at 2)—exactly what the First Department held here (Decision 6).

California authority (as well as under New York law), the court then asked whether the discovery rule (a feature anathema to New York contract law, *ACE III*, 25 N.Y.3d at 594), saved DBNT's claims. It did not. Far from introducing the horribles DBNT envisions (Br.43), the First Department followed CPLR 202's dictates in concluding that DBNT's claims were untimely under California law.

Undergirding DBNT's challenge to the First Department's California-law analysis is a sound bite: "the Trustee's claims would have been timely had they been filed in California, and therefore the First Department should have found them timely under CPLR 202." (Br.42; *see also* Br.38.) DBNT is wrong. Had DBNT filed either of the actions in California, a California court would have applied CPLR 202, undertaken the same analysis the First Department did, and concluded that DBNT's claims were untimely. California courts interpret choice-of-law clauses to incorporate statutes of limitations, and thus to incorporate CPLR 202. *See, e.g.*, *Hughes Elecs. Corp. v. Citibank Del.*, 15 Cal. Rptr. 3d 244, 250 (Cal. Ct. App. 2004) ("California law . . . supports enforcement of CPLR 202.").

CONCLUSION

For the foregoing reasons, the Court should deny DBNT's motion for leave to appeal the Decision to the Court of Appeals.

Dated: June 11, 2018

WILLIAMS & CONNOLLY LLP

By: _____

Nicholas J. Boyle
David Randall J. Riskin
650 Fifth Avenue
Suite 1500
New York, NY 10019
(202) 434-5000

725 12th Street, N.W.
Washington, DC 20005
nboyle@wc.com
driskin@wc.com

MAYER BROWN LLP

By: _____ /ORR

Michael O. Ware
1221 Avenue of the
Americas
New York, NY 10020
(212) 506-2500
mware@mayerbrown.com

Counsel for HSBC Bank USA, National Association

SULLIVAN & CROMWELL LLP

By: _____ /ORR

Jeffrey T. Scott
Jonathan M. Sedlak
Andrew H. Reynard
Colin A. Chazen
125 Broad Street
New York, New York 10004
(212) 558-4000
scottj@sullcrom.com
sedlakj@sullcrom.com
reynarda@sullcrom.com
chazenc@sullcrom.com

Counsel for Barclays Bank PLC

STATE OF NEW YORK COURT OF APPEALS

DEUTSCHE BANK NATIONAL TRUST COMPANY, solely as Trustee of HSI ASSET SECURITIZATION CORPORATION TRUST 2007-NC1,

Petitioner-Respondent,

-against-

HSBC BANK USA, NATIONAL ASSOCIATION,

Respondent-Appellant.

Index No. 652001/2013

AFFIRMATION OF DAVID RANDALL J. RISKIN

DEUTSCHE BANK NATIONAL TRUST COMPANY, solely as Trustee of SECURITIZED ASSET BACKED RECEIVABLES LLC TRUST 2007-BR1,

Petitioner-Respondent,

-against-

BARCLAYS BANK PLC,

Respondent-Appellant.

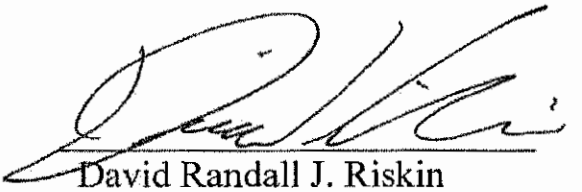
Index No. 651338/2013

DAVID RANDALL J. RISKIN, an attorney admitted to practice before the courts of the State of New York, hereby affirms that the following is true under the penalties of perjury, pursuant to Rule 2106 of New York's Civil Practice Law and Rules:

1. I am an attorney at the law firm Williams & Connolly LLP and counsel for HSBC Bank USA, National Association in Index No. 652001/2013. I submit this affirmation in support of the Memorandum of Law in Opposition to Deutsche Bank National Trust Company's Motion for Leave to Appeal to this Court from the Decision and Order of the New York Supreme Court Appellate Division, First Department, dated December 5, 2017.

2. Attached hereto as Exhibit 1 is a true and correct copy of the transcript of a hearing held before the Honorable Marcy S. Friedman on May 24, 2018 in *In re: Part 60 RMBS Put-Back Litigation*, Index No. 777000/2015 (N.Y. Sup. Ct., N.Y. Cty.) [Doc. 518].

Dated: June 11, 2018
Washington, DC



David Randall J. Riskin

EXHIBIT 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART 60

- X

IN RE: PART 60 RMBS PUT-BACK LITIGATION (777000/2015)

- X

WILMINGTON TRUST CO., not in its individual capacity but solely in its capacity as Trustee for Morgan Stanley Mortgage Loan Trust 2007-12,

Plaintiff,

- against -

INDEX NUMBER: 652686/2013

MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS LLC,

Defendant.

- X

DEUTSCHE BANK NATIONAL TRUST COMPANY, solely in its capacity as Trustee of the Morgan Stanley ABS Capital I Inc. Trust 2007-NC4

Plaintiff,

- against -

INDEX NUMBER: 652877/2014

MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS LLC, as Successor-by-Merger to Morgan Stanley Mortgage Capital Inc.,

Defendant.

- X

HSBC BANK USA, NATIONAL ASSOCIATION, in its capacity as Trustee of Merrill Lynch Alternative Note Asset Trust, Series 2007-OAR5,

Plaintiff,

- against -

INDEX NUMBER: 652793/2016

MERRILL LYNCH MORTGAGE LENDING, INC., BANK OF AMERICA N.A. and COUNTRYWIDE HOME LOANS, INC.,

Defendants.

- X

(Continued on following page)

- X
DEUTSCHE BANK NATIONAL TRUST COMPANY,
solely in its capacity as Trustee of
SABR 2007-BR2, SABR 2007-BR3,
SABR 2007-BR4 and SABR 2007-BR5,
Plaintiffs,
INDEX NUMBER:
- against - 651789/2013
BARCLAYS BANK PLC and
WMC MORTGAGE, LLC,
Defendants.
- X
DEUTSCHE BANK NATIONAL TRUST COMPANY,
solely in its capacity as Trustee of the
EquiFirst Loan Securitization Trust 2007-I,
Plaintiffs,
INDEX NUMBER:
- against - 651957/2013
EQUIFIRST CORPORATION,
Defendant.
- X
MERRILL LYNCH ALTERNATIVE NOTE ASSET TRUST,
SERIES 2007-A3, by HSBC Bank USA, N.A.,
in its capacity as Trustee,
Plaintiff,
INDEX NUMBER:
- against - 652727/2014
MERRILL LYNCH MORTGAGE LENDING, INC.,
Defendant.
- X
NOMURA ASSET ACCEPTANCE CORPORATION,
ALTERNATIVE LOAN TRUST, SERIES 2006-S3,
by HSBSC Bank USA, National Association
in its capacity as Trustee pursuant to a
Pooling and Servicing Agreement, dated
as of July 1, 2006,
Plaintiff,
INDEX NUMBER
- against - 652619/2012
NORMURA CREDIT & CAPITAL, INC.
Defendant.
- X

(Continued on following page.)

- X
NOMURA ASSET ACCEPTANCE CORPORATION ALTERNATIVE LOAN TRUST SERIES 2006-S4, by HSBC Bank USA, National Association, in its Capacity as Trustee,
Plaintiff,

- against -

INDEX NUMBER: 653390/2012

NOMURA CREDIT & CAPITAL, INC.,
Defendant.
- X
NOMURA HOME EQUITY LOAN, INC., SERIES 2006-FM2, pursuant to a Pooling and Servicing Agreement, dated as of October 1, 2006, by HSBC Bank USA, National Association, solely in its capacity as the Trustee,
Plaintiff,

- against -

INDEX NUMBER: 653783/2012

NOMURA CREDIT & CAPITAL, INC.
Defendant.
- X
NOMURA HOME EQUITY LOAN, INC., SERIES 2007-3, pursuant to a Pooling and Servicing Agreement, dated as of April 1, 2007, by HSBC Bank USA, National Association, solely in its capacity as the Trustee,
Plaintiff,

- against -

INDEX NUMBER: 651124/2013

NOMURA CREDIT & CAPITAL, INC.,
Defendant.
- X
NOMURA ASSET ACCEPTANCE CORPORATION ALTERNATIVE LOAN TRUST SERIES 2007-I by HSBC Bank USA, National Association, in its Capacity as Trustee,
Plaintiff,

- against -

INDEX NUMBER: 652842/2014

NOMURA CREDIT & CAPITAL, INC.,
Defendant.
- X

(Continued on following page)

- X
NOMURA HOME EQUITY LOAN, INC.,
HOME EQUITY LOAN TRUST, SERIES 2007-2,
by HSBC Bank USA, National Association,
as Trustee,
Plaintiff,
INDEX NUMBER:
- against - 650337/2013
NOMURA CREDIT & CAPITAL, INC.,
Defendant.
- X
NOMURA ASSET ACCEPTANCE CORPORATION,
MORTGAGE PASS THROUGH CERTIFICATES,
SERIES 2006-AF2, by HSBC Bank USA,
National Association, as Trustee,
Plaintiff,
INDEX NUMBER:
- against - 652614/2012
NOMURA CREDIT & CAPITAL, INC.,
Defendant.
- X
60 Centre Street
New York, New York
May 24, 2018

BEFORE:
HONORABLE MARCY S. FRIEDMAN, Justice.

APPEARANCES:

MOLO LAMKEN,LLP
Attorney for Plaintiff
Deutsche Bank as Trustee of the MSAC 2007-NC4 Trust
600 New Hampshire Avenue, N.W., Suite 660
Washington, D.C. 20037
BY: ROBERT KRY, ESQ.
LAUREN M. WEINSTEIN, ESQ.
MICHELLE PARTHUM, ESQ.

DAVIS POLK & WARDWELL LLP
Attorney for Defendants Morgan Stanley
Mortgage Capital Holdings, LLC
as Successor-by Merger to Morgan Stanley
Mortgage Capital Inc. And Morgan Stanley ABS Capital
450 Lexington Avenue
New York, New York 10017
BY: BRIAN S. WEINSTEIN, ESQ.
CRAIG CAGNEY, ESQ.

(Continued on next page.)

APPEARANCES: (Continued)

HOLWELL SHUSTER & GOLDBERG, LLP
Attorney for the Plaintiff
HSBC Bank USA, National Association, as Trustee
750 Seventh Avenue, 26th Floor
New York, New York 10019
BY: BRENDON DeMAY, ESQ.
MATTHEW V. H. NOLLER, ESQ.
MATTHEW GURGEL, ESQ.

SHEARMAN & STERLING LLP
Attorney for the Defendant Nomura Credit & Capital, Inc.
599 Lexington Avenue
New York, New York 10022-6069
BY: JEFFREY D. HOSCHANDER, ESQ.
DANIEL KAHN, ESQ.

CHELNEY LAW GROUP PLLC
Attorney for the Third-Party Defendant
Ocwen Loan Servicing, LLC
535 Fifth Avenue, 4th Floor
New York, New York 10017
BY: STAN CHELNEY, ESQ.

LOWENSTEIN SANDLER LLP
Attorney for the Plaintiff Deutsche Bank National Trust Company, solely in its capacity as Trustee of the EquiFirst Loan Securitization Trust 2007-I
1251 Avenue of the Americas
New York, New York 10020
BY: JENNIFER F. DELGADO, ESQ.
ALEXANDRA S. DROZ, ESQ.

SULLIVAN & CROMWELL LLP
Attorney for Defendant EquiFirst Corp./Barclays Bank
125 Broad Street
New York, New York 10004-2498
BY: JEFFREY T. SCOTT, ESQ.

(Continued on next page.)

APPEARANCES: (Continued)

MAYER BROWN LLP
Attorney for the Defendants HASCO 2007-HE2
1221 Avenue of the Americas
New York, New York 10020-1001
BY: MICHAEL O. WARE, ESQ.

McKOOL SMITH, P.C.
Attorney for the Defendant HSBC Bank USA, N.A. as Trustee
One Bryant Park, 47th Floor
New York, New York 10036
BY: ROBERT W. SCHEEF, ESQ.
ZACHARY MAZIN, ESQ.

O'MELVENY & MYERS LLP
Attorney for the Defendants Merrill Lynch
Mortgage Lending Inc. and Bank of America, N.A.
Times Square Tower, 7 Times
New York, New York 10036-6537
BY: PAMELA A. MILLER, ESQ.
MONIQUE GAYLOR, ESQ.

SIDLEY AUSTIN, LLP
Attorney for the Defendant Countrywide Home Loans, Inc.
787 Seventh Avenue
New York, New York 10019
BY: DANIEL GIMMEL, ESQ.

QUINN EMANUEL URQUHART & SULLIVAN, LLP
Attorney for Computershare
51 Madison Avenue
New York, New York 10001
BY: STEPHEN SCHWEITZER, ESQ.

SKADDEN, ARPS, SLATE MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
BY: CHRISTOPHER P. MALLOY, ESQ.

MARGARET BAUMANN
OFFICIAL COURT REPORTER

PROCEEDINGS

COURT OFFICER: Counsel, come to order.

Be seated.

THE COURT: On the record.

Good morning.

I would like to have the appearances of counsel who are seated at the table and anyone else who is going to speak today. And then, as I indicated when you arrived, we have a sign-in sheet.

This is really a full house today, much fuller than even in the past. So we will see what kind of fireworks we are going to be having.

Let's start with counsel for the plaintiffs.

MR. KRY: Your Honor, Robert Kry and Lauren Weinstein from Molo Lamken, for the trustee in the MSAC 2007 NC4 case.

THE COURT: I have a little trouble with the way you refer to your cases, both sides. I don't refer to them in the same way, so can you give me, as well as the trust numbers, the names of the trustee and the defendants, please.

MR. KRY: Certainly.

The caption in our case is Deutsche Bank National Trust Company, as Trustee of the MSAC 2007-NC4 Trust, versus Morgan Stanley.

THE COURT: Thank you.

PROCEEDINGS

MR. DeMAY: Your Honor, Brendon DeMay of Holwell Shuster & Goldberg, for the plaintiff, Trustee HSBC, against Nomura, in the two cases against Nomura.

MR. WEINSTEIN: Good morning, Your Honor.

Brian Weinstein from Davis Polk, for Morgan Stanley defendants in the Deutsche Bank versus Morgan Stanley NC4 case.

MR. HOSCHANDER: Good morning, Your Honor.

Jeffrey Hoschander from Shearman & Sterling, on behalf of defendant, Nomura Credit & Capital in all the cases with Nomura, and with me is my colleague, Daniel Kahn.

THE COURT: Anyone else?

I understand that we are going to hear first the -- I don't have that set of papers -- Deutsche Bank against Morgan Stanley motion and then on the Nomura motion. And counsel would like to have 10 to 15 minutes on each motion. That's fine.

MR. WEINSTEIN: Thank you, Your Honor.

Your Honor, on behalf of Morgan Stanley, we respectfully request leave to amend our answer to assert the statute of limitations defense in light of the First Department's recent decision in the Deutsche Bank case.

As Your Honor is obviously aware, the standard under New York law is that amendment of pleadings is liberally granted unless the party opposing amendment can

show meaningful prejudice.

And the First Department has made clear that there is a heavy presumption in favor of granting leave. That policy has been frequently applied to allow amend of the answers to assert statute of limitations defenses, and that includes cases where the defense was added as late as summary judgment or even the eve of trial.

Again, the touchstone is whether there is significant prejudice to the party opposing leave, and we respectfully submit that Deutsche Bank cannot demonstrate meaningful prejudice or really any prejudice at all.

They argue first they were prejudiced by having to incur the expenses of litigating this case, Your Honor, but that cost would have been incurred regardless of whether or not this defense was asserted. They have not and couldn't suggest that they would have abandoned their case if the defense had been asserted.

And, in fact, we know that that is not the case because they are still arguing that their complaint is timely. They're still pursuing this issue in the Court of Appeals. And, even after the First Department ruled in Deutsche Bank, they are arguing here still an amendment would be futile.

And, in fact, Your Honor, in another Part 60 case, the EQLS case, the defense was asserted and Deutsche Bank

has not pointed to anything in their briefs suggesting that they litigated the case any differently or any less aggressively there.

Their second argument, Your Honor, really contradicts their first.

THE COURT: Excuse me. Which one is the EQLS?

MR. WEINSTEIN: That is 651957-2013.

THE COURT: And the trustee is?

MR. WEINSTEIN: The trustee is Deutsche Bank, same trustee here.

THE COURT: And the defendant?

MR. WEINSTEIN: The defendant is EquiFirst Corporation and Barclays Bank.

THE COURT: So the defense of the foreign statute of limitations was asserted in that case?

MR. WEINSTEIN: The statute of limitations was asserted as an affirmative defense in that case, Your Honor.

THE COURT: And was there a motion?

MR. WEINSTEIN: Do not believe there was a motion made in that case, Your Honor, no.

MR. SCOTT: Your Honor, Jeffrey Scott from Sullivan & Cromwell. I represent EquiFirst and Barclays in that case. I did not represent them at the time.

My understanding, the motion to dismiss was filed, a statute of limitations argument was made. I think the

court rejected that argument.

We are now, obviously, here later to argue on the stay issues because of the BR1 case that is on appeal.

THE COURT: Excuse me. Was that a statute of limitations argument under New York law or under both?

MR. SCOTT: I believe it was under New York law, Your Honor, yes.

MR. WEINSTEIN: Your Honor, their second argument of prejudice, which in a sense is the opposite of their first, is not they were prejudiced by having to litigate the case at all, but, rather, they would have conducted more discovery if the statute of limitations defense had been asserted.

And, preliminarily, Your Honor, it is noteworthy that in the initial letter briefs that were submitted by the parties on this issue, plaintiffs didn't even make this argument, which, we submit, shows how much of an afterthought it really is.

But, in any event, the discovery that they claim they would have liked to get is discovery about their own actions and their own operations, and they obviously don't need discovery for that.

So, they claim they need discovery on the location of the mortgage notes, Your Honor, but they know where the mortgage notes are. The PSA requires the trustee to

maintain the mortgage notes in California.

And they have actually admitted in writing in this case, we submitted this as Exhibit C to my supplemental affidavit, they admitted that the notes are in a locked room in Santa Ana, California.

They can't claim they were prejudiced by not having discovery about the location of the notes when they have already admitted that they know.

Likewise, they claim that they would have wanted discovery on where Deutsche Bank administered the trust, but they, obviously, know where they administered the trust. And, in fact, their complaint alleges in paragraph seven that the principal place of trust administration is in Santa Ana, California.

And so, to say that they were somehow prejudiced by not getting discovery about themselves, we would submit, is a stretch, to say the least, Your Honor.

And, the same is true of the final thing that they say they would have liked to get here; namely, an expert report stating that they acted reasonably under California's discovery rule for accrual. Again, Your Honor, in the EQLS case, they never submitted such an expert report.

And, stepping back, Your Honor, the First Department's decision in the Deutsche Bank case was on a motion to dismiss, so it was prior to any discovery, much

less, expert discovery. And, the court there held that California law applied and rendered the case untimely on the pleadings.

Deutsche Bank argued in that case that it needed discovery in order for this motion to be properly assessed. That it wasn't proper to rule on this, on a motion to dismiss, and the First Department rejected that.

So we would submit that they can't claim prejudice based on an alleged missed opportunity to take more discovery of any kind because under the Deutsche Bank case, discovery would not even be permitted.

But the fact that the discovery that they are seeking is discovery about their own actions and their own operations and discovery they never tried to obtain in another case where a statute of limitations was pled, simply confirms that their argument is meritless.

Your Honor, an additional reason for supporting leave to amend on top of the absence of prejudice is the fact of the intervening decision from the First Department in Deutsche Bank.

At the time that Morgan Stanley answered the complaint in January 2016, this Court had already held in an indistinguishable case that the six-year New York statute of limitations applied. And when this Court's decision was overturned in the Deutsche Bank case and the First

Department held that the California's four-year statute applied, Morgan Stanley immediately sought leave to amend in order to account for this development in the case law.

So, contrary to Deutsche Bank's suggestion, Your Honor, there has been no gamesmanship of any kind here. And we respectfully submit that leave should be granted both because they can't show prejudice and because the intervening First Department decision provides a legitimate reason for seeking leave.

The final issue, Your Honor, on the motion to amend is plaintiff's argument that amendment would be futile because they claim that the First Department's decision in Deutsche Bank doesn't lead to the same result here.

But, Your Honor, there is no merit to that argument. Far from being futile, the factors that the First Department applied in Deutsche Bank apply precisely the same here. Each one of them.

Deutsche Bank is the same California resident in both cases. All of the loans were originated by a California lender. More loans encumber California properties than any other state. The trust was administered in California, as Deutsche Bank has admitted. State taxes, if any, were to be paid in California, and the notes were maintained in California.

So each of the factors the First Department applied

apply squarely here, and there can't be any suggestion.

THE COURT: Excuse me. I think if we are going to have to look at this issue again, we are going to have to have a lot more information about the significance of those factors.

The record on the motion that I decided was really lacking in any indepth discussion of the significance of those factors. And, if I am going to consider these issues in the future, I am going to want detailed factual briefing.

This is the same complaint I often make about being asked to decide things in a vacuum.

MR. WEINSTEIN: And, certainly --

THE COURT: This one ought to be fairly easy to address on a detailed factual basis. I am not intending to suggest that I am going to grant leave to amend. I am just saying if we look at this again, this is something I am going to want.

I would like you to address, though, what you expect is going to happen if leave to amend is granted with respect to motion practice addressing both the statute of limitations claims and the failure to notify claims.

MR. WEINSTEIN: Absolutely, Your Honor. And that is, I think, the issue that we will be addressing in connection with the arguments concerning the stay.

THE COURT: Okay.

PROCEEDINGS

MR. WEINSTEIN: And, we'd certainly be happy to provide more detail about the different factors in Deutsche Bank at the appropriate time, but there really isn't any factual dispute as to those factors.

But, in any event, we'll be guided by the Court in terms of what else the Court may require. And then --

THE COURT: I guess the issue, though, is why they matter in determining where the injury occurred or was felt.

MR. WEINSTEIN: Right. And that was the First Department's conclusion that those were the relevant factors. But we would certainly be happy to provide more information if it would be helpful to the Court.

Then the last thing, just quickly, Your Honor, on this futility point, Deutsche Bank submitted a letter recently after briefing was complete purporting to incorporate by reference an argument made by the trustee in the Nomura case, that it is the residence of the depositor rather than the residence of the trustee that controls.

Deutsche Bank never made that argument in the briefs here. We submit they can't claim futility based on an argument they never even made. We think the argument would be completely meritless for a host of reasons, and certainly can't support the conclusion that amendment is futile.

But, in the event that the Court does decide to

entertain that issue or is at all moved by that issue, we would certainly request the opportunity to submit a supplemental brief on that, Your Honor.

Thank you.

THE COURT: Thank you.

MR. KRY: Good morning, Your Honor. Robert Kry for the trustee.

Morgan's motion to amend should be denied for two reasons:

Both because there was a lengthy delay in raising this defense for which no adequate excuse has been shown, and because amendment would cause significant prejudices to the trustee.

Morgan Stanley has no justification for failing to raise the statute of limitations defense sooner in this case. The existence of New York borrowing statute was not a mystery, at least two RMBS defendants raised the defense already in proceedings before this Court.

And, although this Court had rejected the arguments, both those defendants had filed notices of a appeal to the First Department before Morgan Stanley filed its answer in this case. So Morgan Stanley was well aware that this was a live issue.

Other defendants in RMBS case had raised statute of limitations defenses. They did so before this Court's

ruling and they did so after this Court's ruling.

And, while the First Department's ruling in Barclays may have made the borrowing statute stronger on these facts, the decision did not create a new defense that did not previously exist. There was no prior decision from the First Department foreclosing the defense. And, in fact, that this Court rejected it did not mean that it was no longer a live issue.

The law clearly required Morgan Stanley to plead that defense in its answer whether to pursue it in this Court or even just to plan to pursue it on appeal. Defendants are expected to plead all defenses they plan to raise in a case. They are not entitled to wait until an Appellate Court spoon-feeds them a decision applying a law to a particular set of facts.

Morgan Stanley waited three years into the litigation to raise this defense with no justification whatsoever. And that alone is grounds for denying the motion to amend.

In a number of cases, the First Department has affirmed denials of leave to amend solely on the basis of a lengthy and inexcusable delay in raising the defense, without even inquiring into prejudice to the other party. And so, that means that the Court need not even reach the question of prejudice in this case. But, in fact, the

trustee has suffered significant prejudice.

THE COURT: Which cases are you referring to for that proposition?

MR. KRY: Sure. I would cite, for example, the Borges versus Placeres case, 123 A.D. 3d 611, from the First Department. And that case, in fact, cites some prior First Department precedent. And that is a series of cases, each of which affirms or says that motion for leave should be denied based on inexcusable delay in raising the motion without any inquiry into prejudice.

THE COURT: Was that a post note of issue case?

MR. KRY: Post note of issue.

So, the case has various facts. The Borges case itself, I think, was decided very close to trial. The case it cites -- that was a post note of issue case.

The case it cites is another one, Van Damme from the First Department at 11 A.D. 3d 408.

That was a case where there was a three-year delay in raising the defense, and no inquiry into prejudice to the other side. And that case, in turn, cites the First Department case Oil Heat Institute versus RMTS Associates at 4 A.D. 3d 290, and I think that is a 2004 case.

And the language there is particularly telling. The First Department says:

Generally, leave to amend the pleading is in the

absence of prejudice surprise the opposing party freely granted.

But then, in the very next sentence it says:

"However, where there has been an extended delay in moving to amend, the parties seeking leave to amend must establish a reasonable excuse for the delay."

So we think it is clear under First Department law that whether or not there is prejudice, a lengthy delay for which there is no justification is a sufficient basis for denying the motion.

The Court doesn't need to reach that, though, because there is prejudice here, and, regardless of what the Court thinks of the lack of justification, at a minimum it is certainly a factor to weigh when comparing it to the amount of prejudice the trustee needs to show.

And here, the principal form of prejudice on which we are relying is that the trustee would have litigated this case differently had these issues been injected into the case sooner.

Morgan Stanley litigated the case for three years without raising the statute of limitations. In fact, discovery closed almost nine months ago, in September 2017. The trustee served its expert reports in October 2017.

Inserting a statute of limitations defense now would be prejudicial because there are several areas where

the trustee would have explored, both through fact and expert evidence, had it known this California statute of limitations was in the case.

And I want to touch preliminary on this EQLS case. I don't think that is a fair comparison. The statute of limitations argument that was made on a motion to dismiss in that case was completely different. The argument there was that the Minnesota statute of limitations should apply because EquiFirst was a dissolved entity.

So there was an argument made that that factor meant that a different statute would apply. It was not a borrowing statute's argument in favor of the residence of the trustee, the same way it is here.

So whatever arguments the trustee made in the EQLS case, the case where they're represented by separate counsel, I can't speak to that, it was a different statute of limitations issue implicating completely different issues. So the fact things were done or not done in that case are completely irrelevant here.

In terms of what could have been done in this case, there are three things I want to point to. First is the discovery rule.

As Mr. Weinstein acknowledges, unlike New York, California applies its discovery rule to breach of contract claims. And the test is not whether the plaintiff

theoretically could have discovered the basis for its action, it is whether the plaintiff reasonably could have done so.

And here, had this California statute been in the case while fact discovery was still ongoing, while expert discovery had not yet begun, we could have pursued evidence of both types to establish our record that whether or not the trustee theoretically could have discovered breaches, it wasn't reasonable for it to have done so on the facts of this case.

Morgan Stanley claims the First Department rejected that argument in Barclays. But the court there said the discovery rule failed on, quote, the record in that case. The court did not hold that the discovery rule can never apply in any RMBS case. Morgan Stanley points out that Barclays was on a motion to dismiss. But that just means --

THE COURT: Which case are you referring to?

MR. WEINSTEIN: Barclays -- I mean the First Department decision that is the subject of this hearing, which the court held that the borrowing statute of the foreign state applied.

THE COURT: Okay.

MR. KRY: Barclays was decided on --

THE COURT: So you are saying that you would have had discovery on whether it would have been reasonable for

the trustee to discover breaches?

MR. KRY: Sure, Your Honor, there is a number of ways we could have.

THE COURT: What discovery would that have been that you didn't have?

MR. KRY: So, for example, discovery into industry standards for trustees. We think it is important in a case like this, unlike the depositors and the sponsors that have significant financial stakes in these deals, trustees earn maybe a few thousand dollars a year performing very limited contractual functions.

So what could reasonably be expected of a trustee exercising reasonable diligence under the circumstances may well be very different when they spontaneously undertake millions of dollars of loan underwriting, may well not be something that a reasonably diligent trustee should be expected to do.

And that is the kind of inquiry we would want to explore, maybe through discovery from Morgan Stanley, maybe from third-party discovery, and certainly, in terms of expert discovery. Why would we not want to engage an expert to opine the reasonableness of what the trustee did or did not do? Those are all issues we could have been pursuing from the outset of fact discovery through expert discovery.

But now, we are in a situation where not only is

fact discovery closed almost nine months ago, expert reports have been filed almost eight months ago, and this is very late in the case. And to inject new issues would just cause massive delays. That there is no reason we should be saddled with as a result of Morgan Stanley's failure to raise this argument in their defense.

And, even you need just to turn again to the Barclays' point, the claim is that was a motion to dismiss, so there is nothing we could have done in discovery to avoid it. But that is just a non sequitur. Because Barclays was considering the pleadings in a specific case. If they had moved for judgment on the pleadings on this basis, we could have amplified our pleadings with whatever factual record or expert record we established through discovery.

So, the fact is, if it is a motion to dismiss or motion for summary judgment really doesn't matter. What does matter is Barclays, by its terms, said on this record the discovery rule doesn't apply. Barclays did not say that you can never make a discovery rule argument in any case.

The second point I want to make is about the Barclays factor. And I think what Your Honor said earlier is telling. You said that a five-factor test is something you would like to see a detailed factual opinion on, and, quite so, because that is a fact-intensive issue.

But the problem is, that is a record that we would

want to have built during the fact discovery period, not a year after fact discovery is closed, and after opening expert reports have been long ago served.

And, Mr. Weinstein makes the point that some of this information might be in the trustee's own possession. But even so, that is still time-consuming to investigate. To pull the trustee's own documentary evidence records and go through them and investigate what particular trustee's current or former employee might have known.

Whether or not that is factual development from the trustee's own records as opposed to another party, it is still burdensome and can cause delay. And it shouldn't be something we should have to do at the stage of this case for the failure to plead a defense that Morgan Stanley should have included.

This case on the record before the Court is very different from Barclays. And the fully detailed factual record that this Court requested may well show that it is even more unlike Barclays.

For example, even though we have only preliminarily investigated the issues, it is our understanding that Deutsche Bank, while it performed some trust administration functions in California, also performed some functions in New York. So that is a distinction.

It is also our understanding that even though the

majority of the notes were located in California at the time of the closing, some of them may well have been located elsewhere. That is another distinction.

And then, just on the face of the case, we know that Barclays involved a situation where, at least based on the First Department's understanding of the fact, the mortgaged properties were located exclusively or predominantly in California, and that is just not the case here. Only 20 percent of the properties were located in California. And so, that factor simply does not carry anywhere close to the same weight it carried in Barclays, based on the First Department's understanding of the record in that case.

And, Mr. Weinstein will tell you that the First Department just made a mistake, or it said something different from what it intended to say.

But, at the end of the day, the precedential value of the Barclays decision comes from what the court thought the facts were and what it said in its opinion what it understood what the facts were. So Barclays stands as precedent only for cases where properties are exclusively or predominantly located in a particular foreign state, and that is just not the facts here.

Finally is this point about the depositor assignment. The trustee in this case is suing as an

assignee of rights that it obtained from the depositor in the securitization. New York law is clear that when a party assigns a claim that is already accrued the residence and the location you look to for the borrowing statute is that of the depositor, not that -- or rather -- sorry, that of the assignor, not that of the assignee.

In this case, under the deal documents, the sponsor conveyed loans to the depositor pursuant to a representations and warranties agreement that did not even come into existence until the closing date.

On that closing date, those representations and warranties were already in breach. So the depositor on that date received breaching loans had an accrued cause of action against a sponsor.

Under Section 2.01 of the PSA, the depositor then conveyed those rights, assigned those rights to the trustee pursuant to the PSA. And so, the trustee is not suing to enforce a right that accrued for the first time in its own hands. It is ensuing to enforce a right that accrued in favor of the depositor.

And the reason this matters, this is yet another area where there may well be a factual record that needs to be built. It shifts the focus to the depositor, but it doesn't change the fact that determining how the borrowing statute applies to the depositor is going to be a factual

inquiry.

In the Nomura case and other cases, the defendants have disputed where the depositors actually reside for purposes of the borrowing statute. In this case, Morgan Stanley admits that the principal place of business is New York. But defendants have sometimes tried to point to other facts, like the state of incorporation.

This is yet another vast field of inquiry that we would have wanted to be able to explore through discovery for which we have now been denied that opportunity because Morgan Stanley raised these defenses so belatedly.

At the end of the day, we have also raised the futility arguments. And that, as Mr. Weinstein notes, we have claimed that the assignment issue is one that is just so clear, once you dig into the facts, that that is the basis for denying the motion solely on the basis of futility, and so, we maintain that argument.

But even if the Court is not prepared to go that far at this juncture, at a minimum, it is yet another source of prejudice because there are factual issues we did not have a fair opportunity to explore because of the timing of the answer.

Finally, Your Honor, this is the question about the stay. And, I know that that is a topic that will be addressed more broadly.

PROCEEDINGS

THE COURT: So let's hold off on it. We have a great deal to do here this morning. Let's hear it all at the same time.

MR. KRY: Sure, your Honor.

Thank you very much.

THE COURT: Thank you.

MR. WEINSTEIN: Your Honor, briefly, plaintiff has suggested that prejudice is not necessarily a requirement in considering motions for leave to amend, as there has been a delay that that is sufficient.

That is simply not the law in New York. The First Department in Court of Appeals has been clear about that repeatedly.

The case that they cited, Borges case, Your Honor, asked if that was a post note of issue case. In fact, it was it was on the eve of trial. But, even more importantly, the Appellate Term had found prejudice when the First Department affirmed it is clear that that was part of what they were considering.

Sometimes, as Your Honor is familiar with, First Department decisions are short. They might not describe every basis for the decision, but when the issue has been presented, it has been very clear time and time again, you have to show prejudice. Delay is not enough.

Just to give you an example, Your Honor, of the

PROCEEDINGS

many, the Barbour case from the First Department. They said, for example, that the Court of Appeals has held that permission to amend pleadings should be granted even in mid-trial in the absence of operative prejudice.

And they cited at the Edenwald case from the Court of Appeals rejected a six-and-a-half-year delay from the commencement of the action as being justification to denying leave. "Said lateness alone is not a barrier to the amendment of pleadings since there must be significant prejudices, as well." That is a quote from the case.

So the law on that is clear, Your Honor. We don't believe they have been able to show meaningful prejudice. They talk about the fact it would be time-consuming for them to go through their own records to find out the facts relating to their own actions.

They have already admitted they know where the notes are maintained. They were required to maintain them themselves. They already admitted that the principal place of trust administration was in California. So, they really have not been able to show any demonstrable prejudice.

If they had been able to show some kind of discovery that they thought they were denied the opportunity to obtain, which we don't think they have done, we would submit that the proper remedy would be to allow them to obtain that additional discovery, not to deny amendment.

PROCEEDINGS

But, again, we don't think they have shown anything that they were truly deprived of the opportunity to obtain.

The last point, your Honor, this depositor argument.

THE COURT: Before you address that. Can you address the trustees' point that there has not been any explanation for this delay in moving for leave to assert the foreign statute of limitations.

MR. WEINSTEIN: Absolutely, your Honor.

As soon as the law was clear from the First Department reversing this Court's decision that actually New York law would apply, as soon as that happened, we immediately amended.

At the time we filed our answer, the state of the law in this court was that the New York statute of limitations applied.

And so, while it was true that in hindsight, it certainly would have been better if we had asserted the defense of statute of limitations at that time, and, in fact, all we would have had to have done is say "statute of limitations." The Court of Appeals has been clear in the Immediate versus St. John's case, you don't have to actually specify which state's statute of limitations applies.

But as soon as the First Department --

THE COURT: I'm sorry.

PROCEEDINGS

Did you get that.

MR. WEINSTEIN: As soon as the First Department made clear that it would be the four-year statute and now provided a new defense to Morgan Stanley in this case, we immediately amended. So there was no delay. There is no gamesmanship. There was no advantage to us in not asserting the defense.

But, again, at the time the answer was filed, the state of the law in this court was that New York law applied rather than California law.

THE COURT: Well, there were, I believe, two cases in which the California statute of limitations was raised at the motion to dismiss stage.

MR. WEINSTEIN: That's correct. At that point, this Court had already denied that motion and held that the New York statute of limitations applied.

Again, in hindsight, Your Honor, certainly we could have avoided having to argue this motion if we had pled the New York statute of limitations. But there has been no prejudice. There is no gamesmanship. There would have been no reason for us to delay.

And, as soon as the law changed, such that the California law applied, we immediately sought leave to amend.

On a depositor argument, Your Honor, they have not

argued that in their brief. Again, we don't think there is any merit to that argument. It certainly cannot render amendment futile.

But, again, if the Court is at all moved by that argument, we would request an opportunity to address it.

THE COURT: Thank you.

MR. WEINSTEIN: Thank you, your Honor.

THE COURT: We are going to have the Nomura motion now.

MR. HOSCHANDER: Good morning again.

Jeff Hoschander from Shearman & Sterling on behalf of defendant Nomura Credit & Capital, Inc.

If I may, Your Honor, I would like to please reserve a few minutes for rebuttal.

Thank you, your Honor.

We join in the arguments made by counsel for Morgan Stanley in favor of leave to amend. And, I will try not to be duplicative in that regard.

Respectfully, Your Honor, the Court should grant Nomura leave to amend its answers to add a statute of limitations defense. Fundamentally, leave to amend is freely granted by New York Courts. This is particularly true where there is no prejudice, and there clearly is no prejudice here.

Even if there were prejudice, though, which there

isn't, amendment is appropriate at this time due to the First Department's decision in the Deutsche Bank case, which has been alternatively referred to as the Barclays case. We refer to it, DBMT, HSBC. If Your Honor is okay, we will refer to it as Deutsche Bank.

A case -- and we would note, that is a case that HSBC itself was a defendant. As highlighted in our briefing, amendment is also appropriate now in these cases as of right because of the recent resolution of Nomrua's motions to dismiss in the Court of Appeals. And, also, in response to HSBC changes and proposed changes to its own pleadings in its cases.

Nomura's statute of limitations defense plainly has merit under the First Department decision in Deutsche Bank. Under that decision, the borrowing statute CPLR 202 applies to HSBC claims in these two cases. As HSBC was a Delaware resident at the time its purported breach claims accrued, its claims are time barred under Delaware three-year statute of limitations.

As evident from the briefing, the parties actually agree that HSBC residence is dispositive. At the time HSBC claims purportedly accrued in 2006 and 2007, it had designated its main office in its home state as Delaware. In its opposition, HSBC does not even deny that it was a Delaware resident at the time. Instead, HSBC argues that it

has a principal place of business in New York and, therefore, should also be considered a New York resident.

But HSBC offers no authority for the proposition that a national bank with a home state other than New York should additionally be considered a New York resident, which is a proposition that would be inconsistent with both treatment of national banks under Federal law, which recognizes the significance of the designated home state and not branch offices in other states.

THE COURT: Can you slow down a little bit, please. Thank you.

MR. HOSCHANDER: Apologies, your Honor.

And the Court of Appeals' preference, as expressed in the Global Financial Corp. case, as we cited in our briefs, for clarity and a single determination of plaintiff's residence.

For a national bank like HSBC, residence is simply and plainly the state designated in its articles of association.

As noted, this Court has the discretion to grant leave to amend. And the CPLR clearly provides that leave shall be freely granted at any time. Regardless of the impetus for amendment at any particular time, New York Courts grant leave to amend in the absence of prejudice. And there is none here.

PROCEEDINGS

As counsel for Morgan Stanley noted, courts even grant leave to amend concurrently with summary judgment motions, and even on the eve of trial. And they cited the Solomon and Barbour cases, I believe, and we did the same in our briefing. Nor does a lengthy delay preclude the freely given leave to amend.

HSBC ignores this precedent, and, instead, argues that leave to amend should be denied, notwithstanding the absence of prejudice here. But HSBC cites no First Department case that reasonably stands for the proposition that leave to amend should be denied in the absence of prejudice.

In any event, there is plainly no prejudice here. Nomura made it clear that it would be asserting a statute of limitations defense mere weeks after the Deutsche Bank decision from the First Department, which was also months before the end of fact discovery in these cases, before even a single expert report was served, well in advance of summary judgment motions, which are not yet scheduled, and even longer before trial.

And there is no need to speculate about what HSBC might have done differently if Nomura had sought to amend sooner. HSBC acknowledges that it knew the borrowing statute was at issue in the five other cases coordinated with these two that is litigating against Nomura.

PROCEEDINGS

Yet, HSBC has vigorously pursued those cases and engaged in the same discovery, notwithstanding Nomura has asserted statute of limitations defense, and HSBC does not even contend that it was denied the opportunity to seek any discovery, nor could it since it claims to have understanding the borrowing statute to be included in the five other cases all along and would have, therefore, sought whatever related discovery needed in those actions.

Moreover, HSBC has had nearly six months since Nomura indicated in early January that it intended to seek a stay and dismissal on borrowing statutes grounds in these cases and could have sought additional discovery if it thought it needed it.

As discovery was and is still ongoing, indeed, discovery is continuing even now on a limited basis, as the parties have stipulated to a new deadline of June 29th, approved yesterday by Judge Katz.

Even now --

THE COURT: A deadline for?

MR. HOSCHANDER: Fact discovery.

Even now, though, HSBC is claiming that Nomura's borrowing statute defense is, I quote, futile and clearly without merit, as it charges ahead in all seven cases.

Amendment here at this time is also justified by the development in the case law reflected in the Deutsche

Bank decision.

The decision in Deutsche Bank clarified that residents of the RMBS trustee is the touchstone for borrowing statute purposes in re-purchase cases. As this court recognized in its decision in the Deutsche Bank case. New York Courts had not previously applied the borrowing statute in RMBS trustee cases, and cases involving non-RMBS trustee had rejected the trustees' residence as determinative.

Moreover, as this Court has also recognized, including in the recent decision in the failure to notify bellwether cases, a change in the law is justification for amendment. That is also consistent with the Appellate precedent that we cited in our briefs.

HSBC itself is seeking to use this justification in these two cases to reinstate attorneys' fees' claims at this time that had been dismissed and not appealed by HSBC, and in its other cases against Nomura to add failure to notify claims all after Appellate decisions in other cases.

Leave to amend at this time is, therefore, clearly appropriate for several reasons, and Nomura does not need to establish the merit of its statute of limitations defense on this motion for leave to amend. It need only show that the defense is not palpably insufficient or clearly devoid of merit.

PROCEEDINGS

And the statute of limitations defense, in light of the Deutsche Bank decision, is not clearly devoid of merit. The essence of the decision is that CPLR 202 applies in a put-back case brought by an RMBS trustee, such that the cause of action generally accrues in the plaintiff's state of residence.

And, as is evident from the briefing, the parties agree that HSBC residence in HSBC's words is dispositive. And HSBC was a Delaware resident at the time of accrual in 2006 and 2007.

Consistent with Federal law, a national bank must be considered a resident of the state that it designates for its main office in its articles of association. The Supreme Court held that a national bank is a citizen of that state for diversity jurisdiction purposes.

The Second Circuit recently clarified that a national bank is a citizen only of the state listed in its articles of association as its main office, and not in any other state, including where it may purport to have a principal place of business.

And by Federal statute, that designated state is the national bank's, and I quote, home state. HSBC's decision to locate its main office in Delaware meant that under the Federal statutory framework for national banks, HSBC was representing that its operation of discount and

deposit were to be carried on in Delaware.

Indeed, HSBC does not apparently deny that it was a Delaware resident in 2006 and 2007. Instead, HSBC seems to suggest it was also a New York resident because that was where it supposedly maintains its principal place of business. But that does not make it a resident of New York.

By contrast, a conclusion that a national bank, like HSBC, is a resident only of its designated home state accords with the Court of Appeals' preference of clarity and new form application of CPLR 202 and Federal treatment of national banks.

Although the Global Financial decision from the Court of Appeals did not decide between the state of incorporation and principal place of business for resident purposes, the First Department has moved towards its determination of corporate residence based on the state of incorporation.

For example, in the Verizon case that we cite, affirmed by the First Department, Justice Kapnick held that a corporation's state of incorporation, rather than its business activities in New York dictated its residence for borrowing statute purposes.

Likewise, in Gordon v. Credno, the First Department found that state of incorporation was dispositive.

In any event, when addressing a national bank where

PROCEEDINGS

Federal law defines its home state by its designation, that determination should govern. HSBC's assertions in other cases, as we discussed in our briefing, that its principal place of business was Delaware also undermine HSBC's contention in these cases, that its residence should be considered to be in New York.

And as to its role as trustee, discovery has shown that HSBC did very little in its New York office, or it appears anywhere else. Regardless, even if New York were HSBC's principal place of business, which we dispute, the Second Circuit has clearly rejected the proposition that the principal place of business has significance for purposes of the citizen of a national bank.

The conclusion should be the same here, given that national banks are a creature of Federal law. Because HSBC was a Delaware resident at the time of accrual, Delaware's three-year statute of limitations applies. And, these cases were filed nearly three years too late under the Deutsche Bank decision.

Moreover HSBC's reference to purportedly assigned claims does not help it escape the application of the borrowing statute under Deutsch Bank. HSBC does not assert in its complaints that the claims it is pursuing against Nomura are claims that had been first assigned to it by the depositors. In any event, the depositors here are also

Delaware residents. The borrowing stature in Delaware's three-year statute of limitations, therefore, applies regardless.

Notably, if HSBC were now to assert claims purportedly assigned by the depositors, which it didn't do in its complaints, at least some of those claims would be barred even under New York's six-year statute of limitations. Because the notice provision for claims belonging to the depositor under the contracts at issue, the MLPAs in these two cases is longer with respect to the depositor than it is in the PSA to which the trustee is a party, it is 120 days, not 90 days. So that would reinsert even the six-year statute of limitations into these cases.

Most fundamentally, the crux of the CPLR 202 analysis is injury. The depositors are not the plaintiffs here. And HSBC cannot credibly argue, and certainly offers no support for any contention that any injury of which it complains was sustained during the interim stage of the securitization for the reasons discussed today, as well as those in Nomura's briefing.

This Court plainly has discretion to grant Nomura's motion for leave to amend. And we respectfully ask the Court to do so.

With that, unless the Court has any questions, we will rest, reserving our rebuttal time.

PROCEEDINGS

THE COURT: Thank you.

MR. DeMAY: Good morning, your Honor.

Brendon DeMay of Holwell Shuster & Goldberg, for the plaintiff trustee.

The circumstances here are highly unusual. Nomura chose not to raise the borrowing statute earlier in the case. Other than the Deutsche Bank case that the Court just heard, we couldn't find another situation like this. And a decision here is unlikely to have ramifications in the First Department.

Nomura is a sophisticated Wall Street bank represented by sophisticated counsel. It is a defendant in seven put-back cases in this part and other put-back cases in other parts. In every single other case, it has pled the statute of limitations. We put the full timeline in our brief.

But the key fact I want to focus on is there are four cases in this part covered by the First Department's decision in October of 2015. After that decision, Nomura added the statute of limitations to its answer in those other two cases, but not in these two cases. That was at the same time. By then, the borrowing statute had been raised by other Part 60 defendants under these unusual circumstances.

We have asserted twice in our pre-motion letter and

in our brief that they intentionally chose not to raise it in their answer. They have never disagreed with that. They have given no explanation, including just now. These are highly unusual circumstances, and they have given no excuse.

All the information they needed to raise this defense about the main office was available to them when the case was originally filed.

THE COURT: One moment, please.

(Pause.)

THE COURT: Thank you.

MR. DeMAY: Thank you.

Nomura cannot and has not explained why it pled the statute of limitations in every other case in 2014, and in 2015, but did not explain it here. They don't deny that they were aware of the borrowing statute and pled it in other cases. And they have given no explanation.

The idea that a change in the law is responsible for the defense coming up now does not add up. They pled the statute of limitations in 2014 and 2015 before this court ever said anything about the borrowing statute.

If the state of the law was good enough in 2014 and 2015, to allow them to plead the statute of limitations in every single other case in 2015, it was good enough to allow them to do it in these two cases.

And, in any event, the Deutsche Bank decision did

not change the law. First of all, it applies to nonresident trustee, has nothing to do with the resident trustee, and doesn't say anything about how to determine whether a trustee is a resident of New York or not. In that case, the parties agreed that the trustee was in a different state.

But, moreover, the First Department did not announce any new test. All it did was apply the Maiden Lane factors. The court specifically said, We decline to decide which test applies. All they did was apply Maiden Lane to the specific factors at issue in that case. It did not change the law at all.

The pointing to the Deutsche Bank decision as an excuse for why they didn't raise the defense earlier is a contrivance, and it doesn't explain their decision. They have offered no credible excuse. And that is another highly unusual circumstances here that warrants denying leave to amend.

And we don't dispute that in some cases courts consider whether there is prejudice. But that is often after there has been an credible explanation for the delay.

And the Court discussed with the parties in the previous argument. We have also cited additional cases where the First Department denied leave to amend long before the note of issue. And Nomura has not denied that those cases did, in fact, deny leave to amend without any finding

of prejudice.

But, again, we have shown serious prejudice. The First Department has been clear that litigating a case extensively is sufficient to show prejudice. That being, for example, the Arias-Paulino case. That is in our brief.

And we have had motions to dismiss. Discovery disputes. We've been keeping Judge Katz very busy. We have reviewed hundreds of thousands of documents. There have been thirty depositions, six expert reports, including a damages model, reviewing fifteen hundred loans, we incurred millions of dollars in cost as a result of litigating these cases.

The cases would not have proceeded the same way if Nomura had raised this defense earlier. This is a pure issue of law they are raising; that the main office trumps the principal place of business. It is a pure question of law.

If they had raised that in the motion to dismiss, which was in 2013, it would have been decided by Your Honor in July of 2014, and we would have had a decision from the First Department in 2015, which was before the CMO was entered, before there was any meaningful discovery in the case.

So under that theory, if this pure question of law were to be resolved in their favor, all of the discovery in

this case would have been avoided.

Again, these are highly unusual circumstances that warrant denying leave to amend. And, there is a serious judicial economy point to consider here in considering whether it is fair to grant leave to amend, which the Court has expressed constantly, that it prefers common issues across cases to be addressed at the same time.

And other defendants raised the borrowing statute in 2014, and Nomura chose not to. And, as a result, there are now a flood of new arguments that the Court is considering years later for the first time about resident trustee, nonresident trustee, main office, successor trustee, the depositor.

The Court should have had an opportunity to consider the borrowing statute from all angles the first time around, rather than piecemeal. And it is as though Nomura is saying the orderly procedure doesn't matter in a situation like this, where we have a large number of highly coordinated cases. This is another unusual circumstances that warrants denying leave to amend.

And Nomura argues that discovery would have been the same in these cases even if they had raised the statute of limitations earlier. And, that is not the test in the First Department. Other defendants have tried that argument in the First Department and failed.

PROCEEDINGS

And the case I want to urge the Court to consider is the Arias-Paulino case, which is cited at pages 11 to 13 of our brief. It is 48 A.D. 3d 350, from the First Department in 2008.

In that case, the defendant sought leave to add a defense that the plaintiffs claim up to a million dollars were barred by the terms of a release. And the trial court said, I agree, those cases are gone, but I will allow the claims that exceed a million dollars to proceed.

The plaintiffs appealed and said, That was wrong because we have litigated the matter extensively and now there is a late defense and we have been prejudiced.

The defendant on appeal said, That is absurd. You would have done the exact same discovery for your claims above a million dollars as for your claims up to a million dollars.

They make the same argument that Nomura makes here, that discovery would have proceeded the exact same way even if they had raised the defense earlier. And the First Department disagreed, and it reversed the trial court's grant of leave to amend.

And the court said, We find that there is prejudice because the parties have litigated the matter extensively, and they rejected, the same argument Nomura makes here.

And we mention this case in our brief. Nomura does

not address it in its reply. And we think that is the case the Court should consider in assessing prejudice.

And, moreover, the Court has discretion to assess the prejudice. And when you have a pure question of law, and they completely waived their defense and they are asking the Court to do equity, to do what is fair.

What is fair is that if you have a pure question of law, you should have raised it in your motion to dismiss. And, their theory is that if they had done that. They would have won and all of the thoughts of discovery would have been avoided.

On the argument that they are allowed to amend as of right because of the notice of entry, we think that is inconsistent with the letter and spirit of the rules, and so we will rest on our briefs on that.

And the attorney fee claims, we will generally rest on our brief there.

It is clear that the complaint is not being changed at all. The claims are already in the complaint. We are not filing an amended or supplemental pleading under 3025.

And Nomura is not going to change its answer. They already denied the allegations concerning the attorney fee claims.

And now there is a normal reason why parties delay for years in raising a defense they knew about earlier and

PROCEEDINGS

our brief shows that it applies to business entities.

Weinstein, Korn, and Miller says at, Section 202.03, quote:

"After Antone, the existence of a principal office in New York should result in a finding of residence under CPLR 202."

That is all we are asking for, Your Honor. That is all we are asking for.

Nomura cites no cases holding that if an entity has a principal place of business in New York, you should ignore that and look to an office elsewhere. There are a great many businesses that have a principal place of business in New York that are incorporated in Delaware. And one would think that if Nomura's argument were correct, it would cite one case saying that, but it doesn't.

The only case Nomura cites --

THE COURT: I'm sorry Mr. DeMay, I hate to stop you, because I realize how much is at stake here, but we have a great deal to do this morning. So, if you need another couple of minutes, please take them, but I must ask you to bring the argument to a close.

MR. DeMAY: Yes, Your Honor.

(Pause.)

MR. DeMAY: I'll address briefly the pleadings Nomura cites -- I'm sorry.

PROCEEDINGS

THE COURT: Hold on.

(Pause.)

THE COURT: Go ahead, please.

MR. DeMAY: Thank you, Your Honor.

Very quickly, the cases they cite can be taken out of context. The Verizon case has nothing to do with principal place of business. The plaintiff did not point to the principal place of business, and it wasn't decided.

The other cases Nomura cites are about businesses that are just holding companies and don't have a principal place of business. They don't apply here. There is no forum shopping.

And what I want to -- I want to address the pleadings that Nomura mentioned. There is no genuine fact dispute here. There is no credible suggestion that SEC filings are wrong when they say HSBC's principal place of business in New York. The pleadings they cite are insufficient. They are jut pleadings in other cases. They are not evidence. Principal place of business was not at issue in those cases. And they are inconclusive because there are plenty of pleadings that get that right.

And we know those pleadings are insufficient because in the proposed answer that Nomura wants to file if it wins this motion, it does not deny that HSBC's principal place of business in New York. We pled that in the

complaint and even now, they don't deny it.

They say they lack information sufficient to form a brief. If these pleadings they're talking about do not -- if they are not enough to give Nomura enough to deny that HSBC's principal place of business is in New York, then they don't give this Court enough to conclude that their argument on this point has any merit and is going to succeed.

And, quickly, on the main office point, we said it very clearly in our brief. And they haven't said anything new. Nomura cites nothing, nothing to support the idea that a New York Court will look to Federal law on citizenship for purpose of deciding residence under CPLR 202.

Their theory seems to be that main office or home state are magic phrases that mean that a bank is located there for every and all purpose and exclusively at that location. And that is simply not true as the cases we cited point out.

Federal law is clear that a bank is not located at its main office for venue purposes, for example. And so, that undercuts the notion that the main office is conclusive for all purposes.

And, again, the borrowing statute is about forum shopping. There is no support for the proposition that if an entity has its principal place of business in New York, but has a nominal office elsewhere, that that entity is

forum shopping.

The venue cases that were discussed in the briefs actually help the trustee. They say that if you specify your principal place of business as being in one location, then we are going to hold you to that.

And HSBC has specified in its SEC filings and elsewhere and the Pro Supp that Nomura drafted, that its office is in New York. So, there is no -- there is no credible argument that its principal place of business is anywhere else, or that any office other than the main office is relevant to CPLR 202.

And unless the Court has any questions, we will rest on our brief.

Thank you.

THE COURT: Thank you.

MR. HOSCHANDER: Thank you, Your Honor.

I think our briefing addressed the points that counsel for HSBC has raised. But I'll touch on a few of the items very briefly.

First, HSBC still offers no explanation of any prejudice on the basis of the absence of the assertion of a statute of limitations defense in these two cases. Nomura did assert a statute of limitations defense in five other cases for which discovery was coordinated with these two cases, and discovery proceeded in all seven cases along the

same lines.

HSBC's theory of prejudice is that Nomura did not move to dismiss on borrowing statute grounds, but that is not -- certainly not the standard here. Nothing required Nomura to move to dismiss to then have taken an appeal to the First Department, and to then have taken an appeal to the Court of Appeals before HSBC would have done something different in discovery.

We have also explained clearly why Nomura is amending it or requesting leave, with respect, Your Honor, to amend its answer to add a statute of limitations defense in these two cases.

The Deutsche Bank decision, which, as we have explained, focused on the residence of the RMBS trustee, which we view as a development in the law, within weeks of the Deutsche Bank decision, we notified HSBC that we would be asserting a statute of limitations defense based on the borrowing statute in light of Deutsche Bank. And that we'd also be moving to a stay in all seven of the Nomura cases.

HSBC's chronology of Nomura's answers in the seven cases HSBC is litigating against Nomura, which resulted in the assertion of statute of limitations defenses in five cases, but not these two, is both wrong and irrelevant.

In each of the other five cases, in addition to the borrowing statute defense, HSBC's claims are also barred, at

least in part, by New York City's six-year statute of limitations, in addition to the three-year Delaware statute of limitations under the borrowing statute in light of the Deutsche Bank decision.

Nomura clearly had a statute of limitations defense in those cases and asserted it. And Nomura clearly has a statute of limitations defense now against HSBC in these cases and is requesting leave to assert it in Nomura also.

THE COURT: Excuse me. There a factual dispute as to HSBC's principal place of business?

MR. HOSCHANDER: Yes, Your Honor. As we have highlighted in our briefing, HSBC itself asserts that its -- in other pleadings, in other cases, that its principal place of business was Delaware.

Indeed, HSBC uses its Delaware home state, or used, rather, during the time that it was in Delaware, it is now in Virginia, to keep itself out of New York. For example, HSBC has opposed motions to remand to Federal Court to New York State Court in cases against New York plaintiffs.

HSBC argues that its pleadings regarding its principal place of business in other cases were inartful and should be disregarded, but that only underscores why the charter designated home office provides the clarity of application called for by the Court of Appeals with respect to the borrowing statute.

PROCEEDINGS

And I would note that HSBC did not actually plead the principal place of business in its complaints. What it pleaded was its principal executive office, although HSBC is now arguing that it is associating the principal executive office with the principal place of business. That is not in their pleading.

I would also add that HSBC's characterization of the First Department decision as merely applying the Maiden Lane factors is wrong. The First Department's decision clearly focused in large part on the residence of the plaintiff RMBS trustee.

In sum, Your Honor, they, HSBC, does not deny that they would not have done anything differently in these cases in the absence of a motion to dismiss on borrowing statute grounds, appealed to the First Department, appealed to the Court of Appeals, if Nomura had asserted the statute of limitations defense sooner.

There is no prejudice here. New York State Courts routinely grant leave to amend, even to add a statute of limitations defense in the absence of prejudice.

And here there is also a development in the law that Nomura has identified in the form of the Deutsche Bank decision, after which Nomura expeditiously notified HSBC that it would be asserting a borrowing statute defense.

Thank you.

PROCEEDINGS

THE COURT: Thank you.

We will take a ten-minute recess by the courtroom clock.

And during that time, if counsel will speak to the stay issue, would get set up, that would be helpful.

Thank you.

(Brief recess.)

THE COURT: Back on the record. Let's turn to the stay.

I understand Mr. Weinstein and Mr. DeMay will speak first to general issues, and then if anyone wants to be heard they will let us know.

MR. WEINSTEIN: Thank you, Your Honor.

So speaking for the group of defendants in cases that are affected by the First Department's Deutsche Bank decision, we respectfully seek a stay, Your Honor, to try to avoid having to spend many millions of dollars on expert discovery in cases that we believe, unless Deutsche Bank is overturned, should be dismissed now and should be dismissed for reasons that couldn't be affected by the expert discovery.

Again, Deutsche Bank decision was on a motion to dismiss to the extent that decision is not overturned by the Court of Appeals, we would submit that it applies directly in these cases, and that nothing about expert discovery

re-underwriting thousands of loans, for example, could effect the CPLR 202 questions that are dispositive.

THE COURT: Has motion for leave to appeal to the Court of Appeals been filed?

MR. WEINSTEIN: You'd have to ask Deutsche Bank. I know it is about to be.

MR. WARE: It is due in a couple of days.

MR. WEINSTEIN: What the plaintiffs have argued, Your Honor, is that that these cases are not going to get dismissed in their entirety anyway because of the existence of a failure to notify claimants.

And we have two responses to that, Your Honor. The first is that while this Court did uphold the failure to notify claims at the pleading stage in the bellwether case, now the fact discovery has been completed in virtually all these cases, we believe we have good motions for summary judgment to make that they haven't adduced any evidence that during the relevant period of time, which is the period that was laid out in Your Honor's decision, that they have any evidence that defendants actually discovered breaches during that period.

We think we have other dispositive arguments too on the causation issue, and we don't think that the re-underwriting would have anything to do with it.

In other words, if they don't have any evidence

that defendants discovered any breaches during the relevant periods, why are we spending millions of dollars re-underwriting thousands of loans which there is no evidence that the defendants actually discovered a breach. That is really what this application is about.

Even if we are wrong, Your Honor, even if it turns out that some of the failure to notify claims do survive, we submit that the expert discovery for those claims should be much narrower and much less expensive than for the rep and warranty claims.

THE COURT: Are you suggesting that you would bring summary judgment motions on the failure to notify claims before all of the discovery was completed, and before all of the issues that were going to be the subject of summary judgment motions were briefed? Is that what I'm hearing?

MR. WEINSTEIN: Just to make sure I'm clear, Your Honor, fact discovery has already been completed, certainly in our case, and almost all of the cases. So we are not suggesting anything otherwise. At least, Morgan Stanley is certainly not, and I believe most defendants are in the same situation.

What we are suggesting, what we are suggesting is we think they have a dispositive legal argument that they just don't have any evidence that the defendants discovered the breaches. If you didn't discover the breach by a

PROCEEDINGS

relevant period --

THE COURT: I don't know what you mean by the relevant period either, because in the failure to notify decision, I indicated there would be a limitation on the time period during which there would be repurchase damages, but I did not indicate that there was a limitation on the the lifetime of the failure to notify obligation, and, therefore, on the timely claims that could be brought.

MR. WEINSTEIN: Right.

Well, the only type of damages that they have been able to assert so far is the loss of the ability to get repurchase, and the actual window during which that claim could exist is often very narrow.

But, in any event, Your Honor, the key point is, even if certain failure to notify claims did survive summary judgment, the expert discovery on those claims would be much, much less burdensome and less expensive than on the full rep and warranty claims because you would only be doing expert discovery on loans for which they have evidence of some discovery.

And so what we are really saying here, Your Honor, it doesn't make sense to have experts re-underwriting tens of thousands of loans of which there is no evidence of failure to notify because there is no evidence of discovery of a breach, and that is really the position we are

asserting here, Your Honor.

What they have said in response is that they really say there are three problems with that, and we don't think any of these points have merit.

They claim that this would be prejudicial if there were a stay of this expert discovery, that it would prejudice the plaintiffs who have already submitted their expert reports, and I think the idea is that the defendants' experts would have more time to work on these reports.

But the whole point of our application, Your Honor, is precisely not to have our experts spending all this money doing that until we get a ruling on the dispositive motions. So there is no real prejudice there.

And the plaintiffs, you know, we both were given ample time to do the extra or reports. They haven't suggested they didn't have enough time themselves, but the main point is we are not going to have to be having our experts do that because that is precisely what we're trying to avoid.

THE COURT: Weren't the expert reports done though on the representation and warranty claims?

MR. WEINSTEIN: Well, Your Honor, the point is many of the defendants reports, in fact, most of them, haven't been submitted yet.

THE COURT: No. But the plaintiffs' reports, they

PROCEEDINGS

were on the representation.

MR. WEINSTEIN: The plaintiffs, that's correct, Your Honor.

And what we are saying, we don't want to have spend millions of dollars re-underwriting the balance of loans if the case is going to get dismissed as untimely under Deutsche Bank, and there is no evidence that the defendants discovered any of these breaches during the relevant period.

There are two other arguments they raise, Your Honor. They say, Well, if there is a stay then plaintiffs' experts are going to have to be working on reports and multiple cases at the same time. But first of all, there is no reason to think it would prejudice plaintiffs more than the defendants because there is really no reason to speculate about that at this point, Your Honor. We don't know when the expert reports would come due.

But, obviously, if there is ever a situation in a particular case where a party claims that its experts are overburdened and it needs more time, the party is always free to explain the circumstances and try to seek relief. We view that at this point as purely speculative and not something that should drive the decision on this.

And that is also true, Your Honor, the last point they raised, which they say that if there were a stay, it would disrupt the coordination of summary judgment briefing.

PROCEEDINGS

But that is really a red herring, Your Honor, because even as things stand today, irrespective of the stay, there are some cases that are due to complete expert discovery this summer, and others are not due to complete expert discovery until a year from now. And so, the only way there could be any kind of cooperation for summary judgment purposes would be through bellwether briefing in a particular case, and a stay of expert discovery here would have no bearing on that.

In fact, with respect to these cases, the coordination that actually would be important is on the CPLR 202 issues and these failure to notify issues, and that is precisely what we are proposing, which is that we brief the 202 issues presumably after the Court of Appeals weighs in and at the same time those defendants who believe they have dispositive failure to notify motions brief those as well.

If all the cases are dismissed, we avoided all of this wasteful expert discovery. Even if some failure to notify claims survive, we have avoided all this wasteful discovery for expert reports and analyses that only relate to the rep and warranty claims.

THE COURT: Do you have any experience or does anyone in the room have experience as to how long it might be before we might have a decision from the Court of Appeals on whether leave will be granted?

MR. WEINSTEIN: I can't speak definitively on that,

PROCEEDINGS

Your Honor. My impression and experience, it could be a few months. It could be longer than that. But I wouldn't want to mislead the Court. I can't say precisely. I know, again my understanding is the application is about to be submitted, it would be a normal briefing period, and then it depends on how long it takes the Court of Appeals to rule, but I believe a few months wouldn't be out of the norm.

Thank you, Your Honor.

THE COURT: Thank you.

MR. DeMAY: Your Honor, Brendon DeMay again as the liaison counsel for the put-back plaintiffs.

There are a few things that I think the Court should consider. First, in order to get a stay in the middle of expert discovery, the defendants need to make a strong showing on the merits. That the merits of the defense are strong, and I think without getting into the merits in great detail, I just want to remind the Court that that is an important factor.

And, for one, nine out of the twelve cases that are being discussed do not have a California trustee and are distinguishable from the Deutsche Bank case on that ground, and that is one reason why that case can't be the basis for a stay. And, there are other arguments even in the other cases about why the location of the trustee does not matter because of the depositor or the successor trustee or for

other reasons.

So, I just want to iterate that to get a stay in the middle of expert discovery requires a strong showing on the merits that the defendants have not made.

Secondly, the stay they are asking for is not just a few months. They want a stay of a year or two years in the event that the Court grants leave, and the Court decide the case, and whether the stay is a couple of months or one to two years, here in this situation, a stay does not preserve the status quo for many reasons.

The status quo is that anyone who thinks they have a dispositive issue waits until summary judgment, when discovery is concluded, and that is when they make their motion. That is what the status quo is, and a stay here would not preserve the status quo.

First, the stay cuts off the failure to notify claims that are unaffected by the Deutsche Bank decision and should continue. It grants the defendants an extension of their expert reports. It prejudices plaintiffs in non-stay cases, which should be the touchstone for the Court. It creates the expert crunch that we have all tried to avoid in preparing summary judgment coordination, and I will explain those in more detail.

But another point I want to focus on early is I think the defendants' claims that millions of dollars in

expert costs will be saved are a little exaggerated. For example, most of the defendants have their expert reports nearly done. For example, in the NC4 case that the Court heard argument on this morning, the defendants' experts' reports were due a couple of days or a couple of weeks from when the Court ordered the stay. So all of their costs on their re-underwriting reports were already incurred.

And there is a similar fact pattern for other defendants. Most of the defendants are more than halfway through their expert report period. So the idea that the Court will be saving millions of dollars in expert re-underwriting costs is exaggerated.

On the failure to notify claims, all twelve cases that are at issue have failure to notify claims or soon will partly. Liaison counsel have been conferring on the best way to do that. The Court has said discovery on those cases is similar to discovery on rep and warranty claims. We believe, expert discovery will assist the Court in addressing the merits of the failure to notify claims.

In every RMBS case against sponsor or originators that has gone to trial, the reports of the re-underwriters are very important to speak to issues besides just whether a loan is breaching.

And defendants go into a lot of arguments on the merits. We think those arguments are very wrong, but

they're also very premature. If defendants have arguments that failure to notify claims are subject to dismissal as a matter of law, they will get their chance to raise that, and they can do it in the motion to dismiss if the claims have not been pled. Otherwise, that is a summary judgment issue.

And I think the Court had it exactly right we should be waiting until discovery is concluded before we start having dispositive motions on any of these claims.

They have raised arguments about causation. Those sound like classic fact-based arguments to me, and I think the experts will have something to say about those.

The Court is also correct, and I don't think the defendants offered a compelling argument to the contrary, that there is no limited time window for the failure to notify claims to accrue.

The Court's statement about the damages that are available is correct. We, the plaintiffs, will be pursuing gross negligent allegations, and in that instance they would not be limited to re-purchase damages.

And, it is not correct, as the defendants asserted, that expert discovery will be narrower if the failure to notify claims are addressed first. That gets it backwards. That gets it backwards.

The experts will be discussing factors that will be relevant to determining whether and how a breach is

discovered. So it is not true that expert discovery will be narrower. It is the other way around. We need to hear what the experts say so the Court can adjudicate the merits of the failure to notify claims.

We talked about a lot in previous sessions and today about choreographing the expert schedule. This was very choreographed last summer. Both sides agreed this was an important issue that needed to be avoided, and if an indefinite stay across twelve cases really throws off what the parties have done. It is another reason why a stay does not preserve the status quo.

Like I mentioned, they want a stay of one to two years. That is significant prejudice. First, because these are cases that were filed five or six years ago.

THE COURT: Where is that one to the two-year number coming from?

MR. DeMAY: It is an estimate of if the Court grants leave to appeal, the time it would take to brief it fully and issue a decision. That's where it is coming from.

These cases were filed five and six years ago. They are already halfway through experts' discovery, and they should be moving forward and not stopping it.

THE COURT: Just as an aside, is the gross negligence holding on appeal to the Court of Appeals?

MR. DeMAY: I don't believe so, although, perhaps,

other counsel can say more definitively, but I think there are two RMBS cases in the Court of Appeals currently and the Monoline case, and I don't believe either of those discuss its gross negligence claims.

THE COURT: I won't take it out of your time, could you tell me what they are?

MR. DeMAY: One case involves the Saving Statute CPLR 205(a).

THE COURT: Was that argued recently?

MR. DeMAY: It is not yet argued in the Court of Appeals; fully brief, but not argued.

Another case, fully briefed, not argued regarding the accrual clause, statute of limitations question.

There is a Monoline case which is not directly related to the types of put-back issues that we have been discussing, those are the three I'm aware of.

THE COURT: The Monoline case was argued?

MR. DeMAY: I don't believe so.

Again, when we are talking about a lengthy stay like what the defendants are asking for, I want to note that there is a very real effect on people's employment.

For example, the expert work requires grinding through thousands of loan files, and the experts hire staff to help them do that work, and they hire other firms, which have their own staff to help them do that work. And when we

are talking about an indefinite stay lasting a year to two years, experts might not be able to give those folks work for such a long time, like when the cases might then come back, and there could be real consequences for people's employment. This is what the experts have told us, and this is about people's lives. It is not about lawyer convenience.

And when you start talking about a stay of that length on work, expert work like this, this is why a stay does not preserve the status quo, and that is for a very long stay. Even for a short stay there is, there is prejudice against non-stayed cases if you start moving the expert reports a couple of months.

We laid it out in our letter. For example, the expert that has the most cases, there are very few experts in this area, it the requires a lot of coordination, which we tried to do last year, a stay of just a couple of months to see what the Court of Appeals will do pushes a number of his reports into a period where he has expert reports in non-stayed cases and where he has a trial in a case that is not in Part 60. And if the case -- if a stay were to be even a few months longer, a few more than two or three months, then it pushes him again into another Part 60 case, which is a very large number of loans, and that is a non-stayed case.

PROCEEDINGS

We submit that the outcome to avoid is for a stay in these cases to start having prejudicial effects in non-stayed cases. And, like I said, we are talking about an indefinite stay. And, I'm sure that there will be some targeted extensions in some individual cases that the parties work out among themselves after conferring with the experts, but an indefinite stay across twelve cases is not something that we should be looking for.

And on summary judgment, what the extent to which summary judgment will be coordinated is a big issue. I don't think this is the place to resolve that definitively. But, regardless how the Court wants to handle summary judgment, scattering the cases does not make it better for anybody.

What you want is as many cases as possible to be as far along as possible. So if there is any sort of early summary judgment, then you have as many people participating as possible. I think that would be the best outcome. But the stay that the defendants are asking for takes twelve cases and sends them towards the back of the line, and that is not going to help anybody.

And, even now, the cases that are furthest along are waiting for -- eager to move forward with summary judgment, and the non-stayed cases are going to be prejudiced, if these other twelve cases are going to be

saved. It is another reason why a stay here would not preserve the status quo.

And, I want to mention one point about the Court of Appeals' upcoming ruling in the Samsung case. In the defendants letter, they say this case is totally irrelevant. It has nothing to do with the borrowing statute or any of the issues here, and I want to say that maybe it was a different defendant, but that is not what the defendant said in January.

In January, they sought and obtained a stay from this Court based on the Samsung decision. They said it foreclosed the choice of law issue regarding the borrowing statute, and the Court will illuminate that in just a little bit. So that is another reason why the Deutsche Bank decision that is the basis for the stay is not going to be the last word, and a stay here would not preserve the status quo.

The overall -- I want to emphasize that we should be keeping the cases moving forward towards summary judgment when anyone who has a dispositive issue can raise it. And, otherwise the plaintiffs in the stayed cases would be prejudiced and the parties in even the non-stayed cases would be prejudiced, and that is really something we should be avoiding.

Thank you.

PROCEEDINGS

MR. WEINSTEIN: So, Your Honor, I'd like to just briefly address a handful of points.

They say that there would be a stay of a year or two if the Court of Appeals grants leave, but the point, Your Honor, is that if the Court of Appeals -- if the Court of Appeals grants leave, then we have to wait for that decision regardless before these cases can be resolved because it will be deciding the dispositive issue of whether or not these cases are time barred. So, it is not as if it sets the cases back for a year or two that otherwise wouldn't happen. We have to be waiting for that decision regardless.

The only question here is whether when the current state of the law is that these claims are time barred, we should be having experts spending millions of dollars grinding through all of these loan files that the plaintiffs describe, and we submit that is really a wasteful exercise if these cases will get dismissed under Deutsche Bank.

And, respectfully, Your Honor, they talked about the teams working under these experts and how it may affect their employment situations and the like if they don't have all this work to be done.

Respectfully, Your Honor, there is no record of the employment situations of the support staff for the experts. They are, obviously, not before the Court. Who is before

the Court are the litigants who are at this point under a situation where they are going to have to be basically throwing money out the windows to do expert reports under the current state of the law would be irrelevant. So, that is really what the basis of our application is.

And you know they say that the expert reports will be helpful on the failure to notify claims in order to assist the Court in determining whether or not those claims have merit, but I would respectfully suggest, Your Honor, that actually has it backwards because our point is if there is just no evidence of any kind that the defendants discovered breaches during the relevant period, why are we re-underwriting all of these thousands of loans. There is nothing that the expert can do to create factual evidence about discovery of breaches.

With respect to the idea that this is going to prejudice non-cases outside of this group of affected cases because there is going to this expert crunch and their experts are going to be busy working on other reports, again, Your Honor, there is just no basis to speculate as to that at this point. There is no basis to expect that that is going to prejudice plaintiffs more than defendants. We don't know if there is a stay precisely when an expert report will be due in different cases. But, again, if there is some problem, or where there is some crunch, a particular

litigant can always raise that. But I don't think that is a basis for the Court's ruling at this point.

And, finally, with respect to the Samsung case as they mentioned, as we indicated in our joint submission that really raises a distinct issue from the Deutsche Bank case. The plaintiff's suggestion seems to be that that decision could effectively undo the impact of Deutsche Bank.

We don't think that is accurate at all, Your Honor, in terms of issue that is before the Court. Even if there could be some impact on Deutsche Bank, we have no basis at this point to know what the Court of Appeals is actually going to rule.

The current governing law in this courtroom on the 202 issue with Deutsche Bank and speculation about what the Court of Appeals might or might not do on a different issue, we would submit is not a basis one way or another for making any decisions relating to the stay.

Thank you, Your Honor.

THE COURT: Would anyone like to to be heard?

MR. KRY: Should I come over here?

Your Honor, if I could address the stay issue just briefly.

THE COURT: Just say your name again for the record.

MR. KRY: Robert Kry for Deutsche Bank in the MSAC

2007-NC4 Trust.

In our case, of course, the Court does not reach the stay issue if it rules in our favor on the motion to amend.

If it does reach the stay issue, there is some additional reasons it should be denied in our case. One is that our case is at a very advanced stage compared to the the general body of cases pending before the Court. We filed our opening expert reports some eight months ago, in October 2017, and the case has already been at a standstill as far as expert discovery is concerned as a result of these things going on for eight months already.

As Mr. DeMay alluded to, Morgan Stanley obtained a stay of expert discovery in our case three days before the responsive expert reports were due, so there is every reason to believe they have already substantially completed whatever they were going to do in terms of responding to our expert reports.

And then the last point I wanted to make is that Mr. Weinstein's big point about expense ultimately came down primarily to the re-underwriting loans. But, in our case that is simply not an issue because there is a parallel case involving the same trust brought by the FGIC. And so, that case involves the same trust, it involves the same experts, and it involves largely the same loans. So Morgan Stanley

is going to need to re-underwrite those same loans in connection with that case regardless of what happens for our case.

Morgan Stanley claims there is some slight differences in the loan sense, but the key point is that the differences are that there are some additional loans in the FGIC case that are not in our case. Every loan that is in the sample in our case is also in that case. So every loan they are going to have to re-underwrite for our case they would also have to re-underwrite for that case. There is simply no reason at all in terms of the loan underwriting expense that would justify a further stay of discovery in our case that has already basically been on hold for eight months.

Thank you, Your Honor.

THE COURT: You want to respond?

MR. WEINSTEIN: Just briefly, Your Honor. I know there are a lot of people in the courtroom and others may want to be heard.

But, on this issue about the FGIC case, again, as we stated in our papers, there is not a complete overlap in the loans. There are ninety loans that are different between the two sets. That is a substantial number. That is a lot of work. It also throws off the sampling analysis. You have to have different sampling analyses because you

have two different sets of loans. The two cases have different damages' theory so there is different work to be done there. Again, we are still talking about a lot of extra work for claims that we submit are time barred under the current state of the law.

Thank you, Your Honor.

THE COURT: May I see how many more counsel will want to be heard?

Two. All right. We have time before the morning session ends.

MR. SCOTT: I'll be very quick, Your Honor. Jeff Scott from Sullivan & Cromwell. I actually represented Barclays Bank in the First Department decision that is the subject of and the basis for the request for the stay along with Williams & Connolly and Mayer Brown who represent HSBC in the companion case, which is also subject to that decision.

We know that the Appellate Division has already denied the request for permission to appeal. The typical practice it is very unlikely when that happens that the Court of Appeals then subsequently grants. So I think the chances of them obtaining a grant here is very, very low.

We know that this motion will be briefed very soon, right. I think their date to file is next Tuesday. They have to file by next Tuesday. We then have ten days to

oppose. I think the Court of Appeals will rule on this quickly. At that point we will know whether the Court of Appeals is going to take the case or not.

So, perhaps, a middle ground is to have a stay in place during the interim period, until, at least, we know what the Court of Appeals is going to do in the Deutsche Bank case, and this way nobody wastes any time or money or resources litigating these very expensive cases, and it is only a short time. It is only a short term stay.

And then when the Court of Appeals rules, if they deny it, we could come back here and have a case management conference and decide what to do.

And if they grant it, we could have the same case management conference and decide what to do going forward. That might be a sensible middle road here.

Thank you, Your Honor.

THE COURT: Mr. Scott, which case are you here on today?

MR. SCOTT: I'm here today on one case -- I represent Barclays in three different cases -- but I'm here on the EQS case, which is Index Number 651957/2013.

THE COURT: Thank you.

MR. SCOTT: Thank you.

MR. DeMAY: May I respond, Your Honor?

THE COURT: Yes.

PROCEEDINGS

MR. DeMAY: Brendon DeMay, liaison counsel for the put-back plaintiffs.

I would disagree the denial of leave to amend by the First Department is predictive. As we all remember in the ACE case several years ago, the First Department denied leave to appeal, and the Court of Appeals granted it. So I don't think there is any predictive value there one way or the other.

And then counsel suggested that staying discovery in the interim is a middle ground, and I think it is the opposite. It is one thing to say we are going to wait to brief these issues until the Court of Appeals speaks. That is very different from saying that we are going to stay discovery pending a decision on an appeal in another case.

So, I think the better middle ground is to let discovery proceed in all of these cases, including those that have a different trustee than the case that is on appeal, and we will let discovery proceed. We could pause briefing, but let discovery proceed, avoid all the negative consequences that I mentioned earlier. Then if the Court of Appeals acts, then we could come back and discuss what sort of briefing we would want to have. But, in the interim cases should keep moving.

MR. SCOTT: Your Honor, just briefly.

Counsel suggests that in these multiple cases, the

parties should spend tens of millions of dollars on expert discovery even if their claim is time barred, and they have no claim. That is just patently absurd on its face. That would be inefficient and would fly in the face of judicial economy and preserving the resources of the party.

These cases have been pending for a long time. We have a very important decision that came out of the First Department, the Deutsche Bank decision. If that is undisturbed by the Court of Appeals, which I believe it will be, my two other cases will be dismissed because they cannot distinguish that case.

My client, Barclays and EquiFirst should not be required to spend millions of dollars just because the plaintiffs believe they are going to win their motion. We should address that motion first before the parties continue to spend tens of millions of dollars.

I'll just note one other thing. In my case, in the EQS case, I approached Deutsche Bank, and I said to Deutsche Bank, Why don't we just agree to stay it because you are going to appeal the Deutsche Bank decision to the Court of Appeals, and you don't have to put your expert report in.

They put their expert report in. And the reason I think they put their expert report in is because it was a litigation of gamesmanship. They wanted to put the report in to provide them the basis to argue that they have already

PROCEEDINGS

put their reports in, so we should respond.

Now, ironically, in the other Deutsche Bank case that I have that is still alive, Deutsche Bank actually agreed with me and deferred the filing of the reports. So I think what we are involved in here is a little bit of gamesmanship on their side. They want to make the defendants incur millions of dollars of cost, even though their claims are time barred, and it is just not an efficient way to proceed.

Thank you, Your Honor.

MS. DELGADO: Your Honor, my name is Jennifer -- may I approach?

THE COURT: What would a day be without a little bit of ad hominem attack.

MS. DELGADO: I wasn't going to say anything, then I felt like I had to.

My name is Jennifer Delgado of Lowenstein Sandler. We represent Deutsche Bank National Trust Company in EQLS case that was just mentioned. I'm going to call it "Equals" because that's how our team refers to it.

I think the issue here is not gamesmanship on the part of the trustees. It is that there is a disagreement as to whether the Deutsche Bank case applies. That is why Deutsche Bank National Trust Company may have agreed to a stay in one case. I'm not representing Deutsche Bank

National Trust Company in that case, but I believe that the EQLS case presents far different facts and will show that even if the the First Department case decision is left undisturbed will not apply to hold that our claims are time barred in the EQLS case.

We mentioned a lot of these arguments in the joint letter that was submitted on January 24th, and I don't want to reiterate everything that was mentioned. But, I will mention that unlike in the SABR, cases which were the subject of the First Department decision, the DBNTC in the EQLS case is suing directly under the operative agreement. DBNTC as the trustee of the EQLS Trust is suing solely as the assignee of the claim, which is an argument that has been referenced during the proceedings today.

There are other distinguishing factors, and that is why we did not agree to stay the proceedings, and we did submit our expert report. We just don't think that the First Department decision applies here, and there is absolutely no gamesmanship.

If Your Honor has any questions, I'm happy to respond.

THE COURT: Thank you.

And we had another counsel who I'm afraid we're coming to the end of our court session, so I must give the other counsel who is stood an opportunity to speak.

PROCEEDINGS

MR. SCOTT: Thank you, Your Honor.

THE COURT: And rest assured, before I rule, I will look carefully again at the prior submissions in which the parties have been making factual distinctions or referring to them.

MR. SCHEEF: Thank you, Your Honor.

Robert Scheef, McKool Smith on behalf of HSBC.

I represent HSBC in the five cases filed against Nomura, where Nomura did assert a statute of limitations defense, and also the two cases HSBC filed against Merrill Lynch. I want to make a handful of points. They're going to be disjointed. I don't want to duplicate what Mr. DeMay has already said.

So first, I think Morgan Stanley's counsel this morning had said fact discovery is finished in most cases. It is not finished in any of my cases. I have seven of the twelve cases where stays have been requested. We are certainly near complete with fact discovery in many cases. But, as you heard this morning, in the Nomura cases, there has been a stipulation to extend fact discovery to the end of June. And, in one of my Merrill Lynch cases we have just been told that the defendants will be producing basically doubling their document production. So there is lots of fact discovery left to be done.

I also heard this morning from Morgan Stanley

counsel that the underwriting is not relevant to discovery of breaches. But, certainly to establish that they discovered a breach we need to establish the breach itself, and re-underwriting is how we do that.

You also heard this morning Nomura is apparently disputing where HSBC's principal place of business is. It is a fact dispute. I don't know how you can request a stay of discovery and yet say that there is a fact dispute that is relevant to your basis for dismissing the claim.

I did also want to respond to Morgan Stanley's counsel's point regarding the impact on expert work if these cases were stayed until the Court of Appeals decides the Deutsche Bank case.

Incidentally, Your Honor, the Court of Appeals has said that the average time from an order granting leave to appeal the decision is eighteen months based on last year's annual report. So, we are talking about, since we don't have an order granting leave to appeal, we're talking about a stay of one and a half to two years.

And, having spoken to the vendors, my experts and the vendors that support my experts, they have said they cannot support, they cannot sustain the staff needed for these cases if these cases are stayed for that long. And, that is not simply -- while that is a serious prejudice to the people who would be terminated, that is really prejudice

to HSBC as well. It is losing experienced, capable people who are familiar with these claims, with these facts, and our experts' methodologies, and a year and a half from now they will have gotten another job, and the proposition we could actually get those people back I think is slim to none.

The same holds true I think for the law firms which, at least, mine, we use a lot of contract attorneys on these cases. Some of them have been with me since these cases were filed six years ago. They have second-chaired depositions. They know the facts of these cases. I wouldn't be able to keep all twenty-eight of them on my payroll if these cases are stayed that long, and that is going to seriously disadvantage HSBC's ability to litigate these cases once they come back again.

Finally, Your Honor, I just make the point that in the cases where Nomura had already asserted the statute of limitations defense, I'm not exactly sure what their theory was when they asserted that answer, but whatever it was, it was always going to be addressed at summary judgment. That is when the borrowing statute argument they want to make now should be addressed.

Thank you.

THE COURT: All right. The trustees can have the last word since this is their application, but please be

brief.

MR. HOSCHANDER: Okay, then, thank you, Your Honor.

THE COURT: I'm sorry, I reversed that.

The defendants.

MR. HOSCHANDER: Thank you, Your Honor.

So, Jeff Hoschander for Shearman & Sterling for Nomura and in all of the cases that counsel for the trustee mentioned.

Just want to clarify a couple of points. Not a single expert report had been served when Nomura informed HSBC, including Mr. Scheef's firm that it would be requesting a stay and dismissal on the basis of the Deutsche Bank decision in early January. HSBC, nevertheless, continued to serve expert reports even though we had agreed that they would not have to, and even though Your Honor at the time of the teleconference in April had indicated to HSBC that it also would not have to serve expert reports in the then remaining cases until Your Honor had an opportunity to rule on the stay requests.

Instead, HSBC requested permission to serve those reports earlier than this hearing, which at that point had been scheduled for May 10th, and is now today, and actually did serve those reports in a couple of cases, and actually in a couple of additional cases HSBC has yet to serve their expert reports. So, that is just sort of a factual

clarification to bring up.

On broader level, I think most of the points that counsel for HSBC addressed have to do with fact discovery, and as I noted this morning it is true that fact discovery is continuing, and we address that in our argument on the merits of our motion for leave to amend. I won't repeat that.

This request is about expert discovery. It is not about fact discovery.

Thank you, Your Honor.

THE COURT: I am not seeing that anyone else is asking to be heard.

I am going to request that that liaison counsel arrange for the transcript on an expedited basis, and that it be E-Filed with two hard copies to the Clerk of Part 60.

As always, thank you for a very instructive argument.

The record is closed.

(A discussion was then held off the record.)

THE COURT: Back on the record.

We are going to have a standstill with respect to any service or requirement that the defendants serve expert reports pending the decision of these motions and the application for a stay.

If there is not a decision within two weeks from

PROCEEDINGS

today, I will look at this standstill issue again.

And now I have a question.

MR. MAZIN: Your Honor, Zach Mazin on behalf of HSBC in the Nomura cases. Can we just clarify if plaintiffs choose to serve their reports, that we may?

THE COURT: Does anyone want to be heard on that?

(Pause.)

THE COURT: All right. I don't see a problem with that.

MR. MAZIN: Thank you, Your Honor.

THE COURT: The record is again closed.

Thank you.

MR. WEINSTEIN: Thank you, Your Honor.

(Proceedings recessed.)

CERTIFIED TO BE A TRUE
AND CORRECT TRANSCRIPT

_____

MARGARET BAUMANN
OFFICIAL COURT REPORTER