To Be Argued By:
DOUGLAS H. HALLWARD-DRIEMEIER
(admitted *pro hac vice*)
Time Requested: 30 Minutes

APL-2018-00169
New York County Clerk's Index Nos. 651338/13 and 652001/13

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,

—against— *Plaintiff-Appellant,*

BARCLAYS BANK PLC,

Defendant-Respondent.

Index No. 652001/13

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

—against— *Plaintiff-Appellant,*

HSBC BANK USA, NATIONAL ASSOCIATION,

Defendant-Respondent.

BRIEF FOR PLAINTIFF-APPELLANT

ROBERT S. SMITH
FRIEDMAN KAPLAN SEILER
& ADELMAN LLP
7 Times Square
New York, New York 10036
Telephone: (212) 833-1125
Facsimile: (212) 373-7925

DAVID B. HENNES
DOUGLAS H. HALLWARD-DRIEMEIER
(admitted *pro hac vice*)
DANIEL V. WARD
(admitted *pro hac vice*)
HEATHER T. SPRAGUE
(admitted *pro hac vice*)
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, New York 10036
Telephone: (212) 596-9000
Facsimile: (212) 596-9090

Attorneys for Plaintiff-Appellant Deutsche Bank National Trust Company solely in its capacity as Trustee for Securitized Asset Backed Receivables LLC Trust 2007-BR1 and HSI Asset Securitization Corporation Trust 2007-NC1

November 28, 2018

CORPORATE DISCLOSURE STATEMENT

Pursuant to Section 500.1(f) of the Court of Appeals State of New York Rules of Practice, Deutsche Bank National Trust Company ("DBNTC"), solely in its capacity as Trustee of Securitized Asset Backed Receivables LLC Trust 2007-BR1 and HSI Asset Securitization Corporation Trust 2007-NC1 (the "Trusts"), certifies that DBNTC is a wholly-owned subsidiary of Deutsche Bank Holdings, Inc., which is a wholly-owned subsidiary of Deutsche Bank Trust Corporation, which is a wholly-owned subsidiary of DB USA Corporation, which is a wholly-owned subsidiary of Deutsche Bank AG, a publicly held banking corporation organized under the laws of the Federal Republic of Germany. No publicly held company owns 10% or more of Deutsche Bank AG's stock. The Trusts, which are formed under the laws of the State of New York, have issued mortgage-backed securities that are eligible for public trading. Certain holders of those securities are believed to be publicly traded corporations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Plaintiff-Respondent Deutsche Bank National Trust Company ("DBNTC"), solely in its capacity as Trustee of Securitized Asset Backed Receivables LLC Trust 2007-BR1 and HSI Asset Securitization Corporation Trust 2007-NC1 (the "Trustee" of the "Trusts"), respectfully submits this brief in support of its appeal from the Decision and Order of the Supreme Court Appellate Division, First Department (the "First Department"), dated December 5, 2017 (the "Decision") in the above-captioned actions (the "Actions").[1] The Decision reversed the Decision and Order of the Supreme Court of the State of New York, New York County (Friedman, J.) (the "IAS Court Order"), dated November 25, 2015, which had denied in pertinent part the respective motions of defendants-appellants Barclays Bank PLC ("Barclays") and HSBC Bank USA, National Association ("HSBC," and together with Barclays, the "Respondents") to dismiss the Trustee's claims in the Actions as time-barred.

PRELIMINARY STATEMENT

The financial crisis of 2008 led to an explosion of litigation involving claims seeking repurchase of mortgage loans securitized into residential mortgage-backed securities ("RMBS") in the New York County Supreme Court Commercial Division. There are now dozens of such cases (the "RMBS Repurchase Actions") assigned to

[1] Copies of the IAS Court Order and the Decision are located in the Appendix ("Appdx") at A14-A28 and A4-A13.

the Supreme Court pursuant to the Individual Assignment System (the "IAS Court"), in which billions of dollars are potentially at stake. All of these cases have been pending for several years, and five cases have previously reached this Court.[2] Two of those five cases, *ACE III* and *Flagstar*, required this Court to interpret New York's statute of limitations.

As *ACE III* and *Flagstar* illustrate, until the First Department's Decision in this case, none of the parties involved in any of the RMBS Repurchase Actions (with the exception of Respondents) ever questioned the applicability of New York's six-year statute of limitations for contract actions, CPLR § 213(2). That conclusion seemed self-evident: the purchase and sale of RMBS has been historically centered in New York City, the nation's financial capital. Mortgage loans were securitized into New York RMBS trusts — in which investors residing all over the world held interests — pursuant to investment decisions made in New York. The contracts governing these complex transactions routinely contained New York choice-of-law clauses. And the injuries that give rise to RMBS Repurchase Actions occurred in New York, because that is the location of almost all of the certificates beneficially owned by RMBS investors, which lost value due to the defendants' breaches of

[2] *Deutsche Bank Nat'l Tr. Co. v. Flagstar Capital Markets Corp.*, No. 96, 2018 WL 4976777 (N.Y. Oct. 16, 2018) ("*Flagstar*"); *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569 (2018); *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 57 N.Y.S.3d 111 (2017); *Nomura Home Equity Loan, Series 2006-FM2 v. Nomura Credit & Capital*, 30 N.Y. 3d 572 (2017); *ACE Sec. Corp., Home Equity Loan Tr., Series 2006-SL2 v. DB Structured Prods., Inc.*, 25 N.Y.3d 581 (2015) ("*ACE III*").

representations and warranties in New York. For these reasons, before the motions that give rise to the present appeal, RMBS Repurchase Actions had proceeded on the basis that the New York statute applied; the issue was never before litigated in the New York courts.

But here, Respondents hatched the unprecedented idea of asking the courts to invoke New York's borrowing statute, C.P.L.R. § 202 ("CPLR 202"), and to apply California's shorter limitations period, based on the happenstance that the Trustee bringing these Actions, DBNTC, has its main office in California (DBNTC was also the plaintiff in *Flagstar*, but no similar argument was made in that case). Upon hearing the motions to dismiss, the IAS Court Justice presiding over dozens of coordinated RMBS Repurchase Actions in Part 60 of the Commercial Division rejected the argument; however, the First Department accepted it. The First Department avoided the issue of whether the location of DBNTC's main office was alone determinative by also relying on other asserted California contacts of no relevance to the dispute. The result has been confusion, and a sort of modern-day California gold rush: the defendants in many RMBS Repurchase Actions have since piled into the courthouse to inform the IAS Court of their newfound intention to assert a defense based on the First Department's Decision.

The borrowing statute, CPLR 202, provides that when a nonresident plaintiff brings a "cause of action accruing without the state," the action must be timely both

under New York law and under the law of the state where the action accrued. Critical to the CPLR 202 inquiry, then, is determining the location of accrual, *i.e.*, the place of injury. This Court's precedent provides significant guidance, most significantly that "the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss[.]" *Global Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 529 (1999). That is, claims arising from economic injury generally accrue where the plaintiff lost money — "the question is always where the plaintiff felt the economic impact." *Maiden v. Biehl*, 582 F. Supp. 1209, 1212 (S.D.N.Y. 1984).

The First Department's Decision is wrong. It holds that a cause of action brought by a trustee on behalf of a New York trust with beneficial ownership certificates issued and held in New York, concerning a series of related securitization transactions occurring in New York, and asserting breaches of representations and warranties made by New York entities in a contract governed by New York law, "accrued without the state" for purposes of CPLR 202 and is time-barred under California's four-year statute of limitations. In so holding, the First Department misconstrued this Court's guidance in *Global Financial* that "a cause of action accrues at the time and in the place of the injury," and that a purely economic injury "usually" accrues at the plaintiff's residence. 93 N.Y.2d at 529.

The First Department's mechanical application of the "usual" guidance in *Global Financial* is inappropriate in cases like the Actions, where the Trusts — not

the Trustee, which serves only as a representative plaintiff — suffered the injuries. In that circumstance, the location of the injured entity, not that of its representative, controls. This Court in *Flagstar* and *ACE III* confirmed that "a cause of action for breach of representations and warranties contained within [an RMBS] contract accrued at the moment the contract was executed." *Flagstar*, 2018 WL 4976777, at *1 (*quoting ACE III*, 25 N.Y.3d at 589). *Global Financial*, *Flagstar*, and *ACE III* all dictate that the claims at issue here accrued under CPLR 202 in New York, where the Trusts were injured, not California, where the Trustee happens to have its main office and where the Trustee administered the Trusts only *after* the relevant contracts were executed and breached. The First Department's Decision relied on post-closing factors, at odds with the Court of Appeals' uniform holdings in *Flagstar* and *ACE III*. The IAS Court's determination of which factors were relevant to evaluating where the "injury is felt" in the context of RMBS Repurchase Actions was correct, and should be adopted by this Court. Indeed, the approach taken by the Decision, which gives significant weight to the residence of a representative trustee, will cause confusion that will not be limited to the context of RMBS Repurchase Actions; it will result in inconsistent treatment of virtually identical capital markets transactions based on a decision — the selection of a trustee — not made by the investors and irrelevant to where the investors' injuries are felt.

Further, the Decision is wrong even independent from its own mistaken premise that CPLR 202 applies here. CPLR 202 and this Court's precedent require that, where the statute applies, a New York court must enforce not only the California time period, but all relevant principles of California limitations law. If this were a California suit governed by California law and brought on a cause of action arising in California, a California court would have held that the Actions were timely filed, or at a minimum that an appropriate application of California's laws creates questions of fact that cannot be determined on a motion to dismiss. Only by applying a mix-and-match approach that picked those parts of California and New York law that were least favorable to the Trustee did the First Department reach the anomalous result that the complaint was untimely, even though it would have been timely in a New York court applying New York law or in a California court applying California law. CPLR 202 neither requires nor permits such an outcome.

This Court should reverse the First Department's Decision.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to C.P.L.R. 5602(a)(1)(i) and CPLR § 5611 because the underlying Actions originated in the Supreme Court, New York County (A33-A60, A1332-A1353); the Decision appealed from is an order of the First Department, entered on December 5, 2017, which finally determined the Actions and is not appealable as a matter of right (A4-A13); and this Court granted the Trustee's motion for leave to appeal on September 18, 2018. (A2-A3.)

QUESTIONS PRESENTED

1. How should New York courts determine where a cause of action accrues for purposes of CPLR 202 when the plaintiff is suing solely in its representative capacity as trustee of a New York trust?

Where a trustee is acting in a representative capacity solely on behalf of an injured trust, a multi-factor analysis designed to determine where the trust suffered injury should govern for purposes of CPLR 202, rather than a plaintiff-residence test.

2. Did the First Department here apply the multi-factor test correctly?

No. All relevant factors point to the conclusion that the causes of action sued on here accrued in New York.

3. In determining whether an action is brought "after the expiration of the time limited by the laws" of a foreign state under CPLR 202, should a New York court give effect to all the laws of a foreign state that determine the timeliness of an action?

Yes. "The time limited by the laws of" a foreign state must, under this Court's precedent, be read to mean the time within which the laws of the foreign state would permit the bringing of the action, so that an action, if timely in New York, is time-barred by CPLR 202 only if it would have been time-barred if filed in the foreign state.

4. Did the First Department give effect to all the laws of California that determine the timeliness of this action?

No. This action is timely even if California law applies.

STATEMENT OF THE CASE

I. THE SECURITIZATIONS UNDERLYING THE TRUSTS AND RESPONDENTS' REPRESENTATIONS AND WARRANTIES

A. Securitized Asset Backed Receivables LLC Trust 2007-BR1 ("BR1")

Pursuant to a Mortgage Loan Purchase Agreement ("MLPA") dated December 28, 2006, NC Capital Corporation and Ameriquest Mortgage Company sold several pools of mortgage loans to Sutton Funding LLC (the "Sponsor"), a Barclays' affiliate for which Barclays, at an office in New York, served as administrator and managed its mortgage loan acquisition business. (A38-A40, A91, A190.) NC Capital Corporation was the primary originator of the loans in both of the BR1 and NC1 Trusts and was a wholly owned subsidiary of New Century Financial Corporation ("New Century"), which on April 2, 2007 filed a voluntary petition for reorganization under Chapter 11 of the United States Bankruptcy Code. (A273, A289, A774, A794.) Pursuant to a Pooling and Servicing Agreement dated March 1, 2007 (the "BR1 PSA"), Securitized Asset Backed Receivables LLC (the "BR1 Depositor") — a wholly owned subsidiary and affiliate of Barclays with its principal executive office in New York (A39, A41, A289, A423) — agreed to convey 5,028 mortgage loans (the "BR1 Mortgage Loans") to be held in the Securitized Asset Backed Receivables LLC Trust 2007-BR1 (the "BR1 Trust"). (A41-A42, A283.) As indicated in the BR1 Prospectus Supplement, the BR1 Mortgage Loans are secured by properties all over the country, and the large majority

— roughly 79% — are in states other than California, including New York. (A283, A376.) The BR1 mortgage notes (the "BR1 Mortgage Notes") are held in California, but the BR1 PSA provides for the possibility that the notes will be held in other states. (A104 (providing that the BR1 Mortgage Notes will be held in California "unless otherwise permitted by the Rating Agencies").)

On April 12, 2007, Barclays — the sole administrator of the Sponsor and parent of the BR1 Depositor (A79, A287-A289) — entered into a representation and warranty agreement with the BR1 Depositor (the "Barclays Representation Agreement" or "BRA"), which was incorporated into the PSA. (A36, A79, A102, A190-A201.) Barclays itself is authorized to conduct business in New York, maintains a principal office in New York County, and regularly transacts business within the State of New York. (A38.) Pursuant to the BR1 PSA and BRA, Barclays made over 35 representations and warranties (the "BR1 Representations and Warranties") to the BR1 Depositor regarding the agreed upon characteristics and quality of each BR1 Mortgage Loan.[3]

The BR1 Trust was established pursuant to the laws of the State of New York as a New York common law trust. (A38, A104, A289.) In addition, the parties agreed that the BR1 PSA and BRA would be governed by New York law (as those

[3] Barclays' Representations and Warranties were made after New Century declared bankruptcy, meaning that it was warranting the quality of the loans notwithstanding that bankruptcy.

agreements were "made and [are] to be performed in the State of New York"). (A157, A193.) The securitization closed on April 12, 2007 (the "BR1 Closing Date"), at which time the BR1 Depositor conveyed the BR1 Mortgage Loans (as selected by Barclays and its affiliates), and assigned the BR1 Representations and Warranties, to the BR1 Trust. (A41-A42, A100, A102, A190-A201.)

B. HSI Asset Securitization Corporation Trust 2007-NC1 ("NC1")

Pursuant to an MLPA dated March 1, 2006, NC Capital Corporation sold a pool of mortgage loans to HSBC. Under a separate MLPA dated May 1, 2007, HSBC sold a pool of 4,635 mortgage loans (the "NC1 Mortgage Loans," and together with the BR1 Mortgage Loans, the "Mortgage Loans") to its affiliate, the HSI Asset Securitization Corporation (the "NC1 Depositor," and together with the BR1 Depositor, the "Depositors"), an entity with its principal office in New York. (A544, A737-A764, A892, A1335, A1337-A1338.) Under a Pooling and Servicing Agreement dated May 1, 2007 (the "NC1 PSA," and together with the BR1 PSA, the "PSAs"), the NC1 Depositor then agreed to convey the NC1 Mortgage Loans to be held in the HSI Asset Securitization Corporation Trust 2007-NC1 (the "NC1 Trust"). (A567-A570, A1339.) As with the BR1 Trust, the large majority of the NC1 Mortgage Loans — roughly 77% — are secured by properties in states other than California, including New York. (A815, A1008.) The NC1 mortgage notes (the "NC1 Mortgage Notes," and together with the BR1 Mortgage Notes, the

"Mortgage Notes") are held by Wells Fargo in Minnesota. (A570.) Pursuant to the MLPA and the NC1 PSA, HSBC made more than 100 representations and warranties to the NC1 Depositor (the "NC1 Representations and Warranties," and together with the BR1 Representations and Warranties, the "Representations and Warranties") regarding the characteristics and quality of each NC1 Mortgage Loan.[4] (A567-A572, A738-744, A749-764, A1340-A1341.)

The NC1 Trust was established pursuant to the laws of the State of New York as a New York common law trust. (A570, A772.) The NC1 PSA and MLPA are governed by New York law, and the rights and remedies of the parties to those agreements — including HSBC and the Trustee — are determined in accordance with New York law. (A646, A745.) The Securitization closed on June 5, 2007 (the "NC1 Closing Date"), at which time the NC1 Depositor conveyed the NC1 Mortgage Loans (as selected by HSBC and its affiliates), and assigned the NC1 Representations and Warranties, to the NC1 Trust. (A567-A571, A1339-A1340.)

II. THE CERTIFICATES

Pursuant to the terms of the PSAs, each Trustee acknowledged the Depositors' assignment of the Mortgage Loans and the Representations and Warranties, and each Trust issued pass-through certificates (the "Certificates") to investors (the

[4] As with Barclays, HSBC's Representations and Warranties were made after New Century declared bankruptcy, meaning that it too was warranting the quality of the loans notwithstanding that bankruptcy.

"Certificateholders") on the applicable Closing Dates. (A41-A42, A102-A105, A567-572, A1339-A1340.) These Certificates are securities that represent ownership interests in the Trusts entitling the Certificateholders to periodic payments of principal and interest from the Trusts based on remittances from each Trust's respective Mortgage Loans. (A42, A263, A304, A765, A853-A854.) As alleged in the amended complaints, the trading prices of the Certificates tend to reflect the nature of the Representations and Warranties and the likelihood the Mortgage Loans will be repaid in full according to their terms. (A40-A41, A1338.) Although the Certificateholders are the beneficial owners of the Certificates and have all economic interest therein, the physical Certificates themselves are held by other entities as designated by the trust documents. (A.86, A544). As of the BR1 Closing Date, 13 out of 15 classes of the BR1 Certificates were held by Barclays and Cede & Co.[5] — both located in New York. (A42.) As of the NC1 Closing Date, all of the NC1 Certificates were held by HSBC Securities (USA) Inc. and Cede & Co. in New York. (A1340.) The Certificateholders' rights and remedies with respect to their investments are expressly governed by New York law per agreement of the parties, as set forth in the PSAs, BR1 BRA, and NC1 MLPA.

[5] Cede & Co. is the nominee for the depository, The Depository Trust Company ("DTC"), which was the registered holder of the Book-Entry Certificates for the Trusts. (A86, A544.)

III. THE REPURCHASE PROTOCOLS

Under their respective agreements, Barclays and HSBC bear the risk associated with any Mortgage Loan that materially breached their Representations and Warranties (each a "Defective Loan"). In Section 3(a) of the BR1 BRA and Section 2.03(d) of the NC1 PSA (the "Repurchase Protocols"), Respondents agreed that within 30 days (HSBC) or 60 days (Barclays) of the earlier of either discovering or being given notice of a breach of the Representations and Warranties (the "Cure Period"), they must use their best efforts to cure the breach in all material respects. (A191-A192, A572.) If Respondents cannot cure the breach within the Cure Period, they are required to substitute or repurchase the Defective Loan(s) at issue. (*Id.*)

The BRA also contains an explicit accrual provision, which states that any "cause of action" against Barclays for breaches of the BR1 Representations and Warranties does not accrue until Barclays fails to comply with a repurchase demand by the Trustee (the "Accrual Provision"). (A192.) Specifically, a cause of action:

> shall accrue as to any Mortgage Loan upon (i) discovery of such breach by the [Trustee] or notice thereof by [Barclays] to the [Trustee], (ii) failure by [Barclays] to cure such breach, purchase such Mortgage Loan or substitute a Qualified Substitute Mortgage Loan [within the Cure Period] and (iii) demand upon [Barclays] by the [Trustee] for compliance with this Agreement.

(*Id*.)

IV. THE TRUSTEE'S ROLE IN THE SECURITIZATIONS

The Trustee is a national banking association organized under the laws of the United States of America, acting solely as a representative plaintiff on behalf of the Trusts. The Trustee did not select or purchase the Mortgage Loans conveyed to the Trusts, but merely acknowledged that the Depositors transferred and assigned the Mortgage Loans to the Trust Fund "for the exclusive use and benefit of all present and future Certificateholders." (A104-A105, A288-A289, A570-A572.)

In contrast to Respondents, the Trustee has limited obligations under the PSAs. Section 8.01 of both the BR1 and NC1 PSAs provide that "[t]he Trustee … shall undertake to perform such duties and only such duties as are specifically set forth in this Agreement." (A143, A605.) Each of the PSAs also expressly exempts the Trustee from the duty to investigate either the quality of the Mortgage Loans or their compliance with the Representations and Warranties without being directed to do so by the Certificateholders. (A104, A144, A570-A572, A607.) It is undisputed that the Trustee in these Actions brings these claims solely on behalf of investors in the Trusts, and not for any injury to the Trustee.

V. THE CERTIFICATEHOLDERS' INVESTIGATIONS

A. BR1 Investigations

In 2011, a BR1 Certificateholder launched an investigation into the quality of the BR1 Mortgage Loans (the "First BR1 Investigation"). (A46-A49.) More than 64% of the BR1 Mortgage Loans analyzed during the First BR1 Investigation were

determined to materially breach one or more of Barclays' Representations and Warranties. (*Id*.) After the BR1 Certificateholder notified the Trustee of these breaches and directed that the Trustee enforce Barclays' obligations under the Repurchase Protocols, the Trustee promptly sent a notice to Barclays on December 26, 2012, identifying the breaches and demanding repurchase of the Defective Loans (the "First BR1 Breach Notice"). (A240-A245.) On February 18, 2013, Barclays rejected the Trustee's demands and refused to cure or repurchase any of the Defective Loans in response to the First BR1 Breach Notice. (A246-A255.)

Later in 2013, the same BR1 Certificateholder launched a second investigation into the quality of the BR1 Mortgage Loans (the "Second BR1 Investigation"). (A49.) This investigation uncovered hundreds of Defective Loans. On August 27, 2013, shortly after the BR1 Certificateholder notified the Trustee of these breaches and directed that the Trustee enforce Barclays' obligations under the Repurchase Protocols, the Trustee made a second repurchase demand on Barclays, specifying the breaches identified in the Second BR1 Investigation and demanding cure or repurchase of the Defective Loans (the "Second BR1 Breach Notice," and together with the First BR1 Breach Notice, the "BR1 Breach Notices"). (A51.)

To date, Barclays has failed to cure or repurchase any of the Defective Loans identified in the BR1 Breach Notices. (A52-A53.)

B. NC1 Investigations

In 2013, a NC1 Certificateholder launched an investigation into the quality of the NC1 Mortgage Loans (the "First NC1 Investigation"). (A1343-A1345.) More than 45% of the NC1 Mortgage Loans analyzed during the First NC1 Investigation were determined to materially breach one or more of HSBC's Representations and Warranties. (A1333.) After the NC1 Certificateholder notified the Trustee of these breaches and Certificateholders directed that the Trustee enforce HSBC's obligations under the Repurchase Protocols, the Trustee promptly sent a notice to HSBC on April 29, 2013, identifying the breaches and demanding repurchase of the Defective Loans (the "First NC1 Breach Notice"). (A1354-A1363.) HSBC failed to cure or repurchase any of the Defective Loans in response to the First NC1 Breach Notice. (A1345.)

Later in 2013, the same NC1 Certificateholder launched a second investigation into the quality of the NC1 Mortgage Loans (the "Second NC1 Investigation"). (A1345-A1346.) This investigation uncovered hundreds of Defective Loans. On September 12, 2013, after the NC1 Certificateholder notified the Trustee of these breaches and Certificateholders directed that the Trustee enforce HSBC's obligations under the Repurchase Protocols, the Trustee made a second repurchase demand on HSBC, specifying the breaches identified in the Second NC1 Investigation and demanding cure or repurchase of the Defective Loans (the "Second

BR1 Breach Notice," together with the First NC1 Breach Notice, the "NC1 Breach Notices" and collectively with the BR1 Breach Notices the "Breach Notices"). (A1346.)

To date, HSBC has failed to cure or repurchase any of the Defective Loans identified in the NC1 Breach Notices. (A1345-A1347.)

VI. THE TRUSTEE'S CLAIMS AND UNDERLYING ACTIONS

When Barclays and HSBC failed to cure or repurchase any of the Defective Loans, the Trustee, acting solely on behalf of the Trusts and in compliance with the Certificateholders' direction that it enforce the Repurchase Protocols, commenced the BR1 and NC1 Actions on April 12, 2013 and June 5, 2013, respectively. (A35, A1334, A1340.) The Trustee subsequently filed amended complaints in both Actions (collectively, the "Amended Complaints"), which were the subject of the motions to dismiss giving rise to this appeal. It is not disputed that the Actions were timely under New York's six-year statute of limitations.

The Amended Complaints allege that Barclays' and HSBC's breaches of Representations and Warranties caused injury to "[t]he Trust[s]," and that the Trustee is suing solely in a representative capacity. (A33, A55, A60, A1332, A1350, A1353.) In short, the Actions arise from: (i) investment decisions made by Respondents and their affiliates in New York, (ii) Respondents' breaches of Representations and Warranties that were made in agreements governed by New

York law and assigned by New York entities to the New York Trusts, and (iii) an injury to the Trusts that can only have been felt in New York — diminished value of the Certificates caused by the falsity of the Representations and Warranties.

VII. THE IAS COURT'S DENIAL OF THE MOTIONS TO DISMISS

Barclays and HSBC each moved to dismiss the relevant Amended Complaint, arguing that California's four-year statute of limitations should be applied to bar the Trustee's claims under CPLR 202 because the Trustee resides in California. (A17.) On November 25, 2015, the IAS Court denied Respondents' motions to dismiss in relevant part. (A22.)

Finding that the "California residence of the trustees is not a reliable indicator of the place where the injury occurred" because the Trusts, not the Trustee, suffered the injury at issue in the Actions, the IAS Court assessed where the Trusts suffered the loss. (A20-A22.) Adopting the reasoning used in *Maiden*, 582 F. Supp. at 1217-18, and other relevant case law, the IAS Court focused on three factors: (1) each Trust was established pursuant to New York law, where each Trust is located; (2) the parties agreed that their rights would be governed by New York law; and (3) the Trustee holds the Mortgage Loans on behalf of the Trusts, and it was the Trusts that were injured as a result of the loss in value of those loans. (A19-22.) Because these factors point clearly to New York, and other factors "lack apparent relevance in the RMBS context . . . [and] do not, in any event, point to California," the IAS Court

concluded that Barclays and HSBC failed to meet their burden of showing that the Trustee's claims accrued in California. (A21-A22.) Consequently, the IAS Court did not reach the question of whether the Actions were timely under California law.

Both Barclays and HSBC appealed the IAS Court Order to the First Department.

VIII. THE FIRST DEPARTMENT'S DECISION

On December 5, 2017, the First Department reversed the IAS Court's denial of Barclays' and HSBC's motions to dismiss. (A7-13.) The First Department held that the Trustee's claims accrued in California within the meaning of CPLR 202, and that the claims were untimely under California's four-year statute of limitations. (A9-A13.) However, the First Department declined to articulate a standard for evaluating claim accrual in such circumstances, finding that the Trustee's claims accrued in California under either a residence-based test or a *Maiden* multi-factor analysis. (A9-A10.)

The First Department did not decide whether, as Respondents argued, the Trustee's claims accrued in California under *Global Financial* solely because the plaintiff, the Trustee, is a California resident. (*Id*.) The court held that the claims accrued in California even under *Maiden*. The court said, incorrectly, that each trust "comprises a pool of mortgage loans, originated by California lenders and encumbering California properties, either exclusively (in the Barclays case) or

predominantly (in the HSBC case)." (A10.)[6] The court also said that (1) the Trusts are administered in California by . . . a California-based trustee" (apparently relying on the location of DBNTC's main office); (2) the PSAs contemplate the payment of state taxes in California; and (3) the PSAs contemplate that the mortgage notes may be maintained in California. (A10-11.)

The First Department further held that the claims were untimely under California's statute of limitations because the Trustee failed to demand cure or repurchase within four years from the date of the securitizations. (A11-A13.) The First Department cited "New York law" (*ACE III*) in determining when the California statutory period started to run, and on that basis rejected the Trustee's argument that the contractual provisions for demand in the Repurchase Protocols were conditions precedent to the running of the statute. (A12.) Although the First Department did not directly address the BR1 Accrual Clause, it opined that under *ACE III* the repurchase protocol did not serve to extend the statute of limitations. (*Id*.) Finally, pointing to "information in the prospectuses, [and] the underwriting and default information [the Trustee] received after closing," the First Department held that the record established that the Trustee "reasonably could have discovered alleged breaches within the limitation period." (*Id*.)

[6] In fact, large majority of the Mortgage Loans in both Trusts indisputably encumber properties in states other than California. *See supra* pp. 10-12.

ARGUMENT

The First Department's Decision cannot be correct. With respect to the place of accrual under CPLR 202, this Court should hold that the rule it articulated in *Global Financial* — that "a cause of action accrues at the time and in the place of the injury" — as applied in the context of an out-of-state representative plaintiff, requires an analysis of factors relevant to where the injury was felt, rather than a mechanical application of the plaintiff-residence rule. In these Actions, such an analysis clearly points to New York. If the Court finds that the Actions accrued in California, however, the Court should hold that the application of a foreign state's statute of limitations requires consideration of all of the foreign state's attendant laws, including any applicable tolling provisions, to determine the time the claims accrued.

I. NEW YORK'S SIX-YEAR STATUTE OF LIMITATIONS APPLIES BECAUSE THE TRUSTEE'S CLAIMS ACCRUED IN NEW YORK FOR PURPOSES OF CPLR 202

A. Under New York Law the Causes of Action Accrued on the Closing Date in New York, Which Is When and Where the Trusts Were Injured

New York's borrowing statute, CPLR 202, reads as follows:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

CPLR 202. The threshold question is whether the Actions accrued in New York or "without the state." *Id.* Because Respondents' breaches of Representations and Warranties occurred in New York, and injured New York trusts by diminishing the value of the Certificates held in New York, the cause of action — a breach of contract claim seeking specific performance of the Repurchase Protocols in the form of cure or repurchase by the New York-based Respondents — accrued in New York. When the cause of action accrues in New York, the plaintiff's residence is irrelevant. CPLR 202 simply does not apply to the Actions.

In *Global Financial*, this Court held that for purposes of CPLR 202, "a cause of action accrues at the time and in the place of the injury." 93 N.Y.2d at 529. Where the "injury is purely economic," the place of injury is where the plaintiff "sustains the economic impact of the loss," which is "usually" where the plaintiff resides. *Id.* But unlike these Actions, *Global Financial* involved a plaintiff who was also the injured party. Here, the Trust, not the Trustee, suffered the injury at issue in the Actions, and thus the injury at issue cannot have accrued in California simply by virtue of the Trustee's residence there.

Indeed, it was the Trusts and their Certificateholders that suffered the injury in New York on the Closing Dates, due to Respondents' breaches of Representations and Warranties — which increased the risk of loss on the Mortgage Loans and diminished the value of the Certificates (the vast majority of which were held in New

York). *See supra* pp. 13-14; *ACE III*, 25 N.Y.3d at 589 ("Where, as in this case, representations and warranties concern the characteristics of their subject as of the date they are made, they are breached, if at all, on that date."). These Actions, brought to remedy injury to the Trusts due to Respondents' breaches of the Representations and Warranties, do not allege any kind of financial impact on the Trustee.

Global Financial did not address how to apply the "place of the injury" standard in the context of trustees suing in their representative capacity on behalf of the trusts and/or the beneficiaries who suffered the actual "injury," nor did it hold, as the First Department's Decision suggests, that the plaintiff's residence *always* controls. (A9 (stating that the general rule that the Court of Appeals set forth in *Global Financial* is that "where (as here) the alleged injury is purely economic, a cause of action is deemed . . . to have accrued in the jurisdiction of the plaintiff's residence").) Instead, the Court in *Global Financial* acknowledged that the plaintiff-residence rule is not absolute but rather is subject to exceptions — even where the plaintiff, unlike here, is the injured party. *See* 93 N.Y.2d at 530 (citing *Lang v. Paine, Webber, Jackson & Curtis, Inc.*, 582 F. Supp. 1421, 1426 (S.D.N.Y. 1984) ("Canadian plaintiff maintained separate financial base in Massachusetts[;]" injury therefore was felt in Massachusetts, not Canada)). Additionally, the court in *Global*

Financial stated that the plaintiff-residence rule, even when applicable, is not a universal litmus test.

For example, where the out-of-state plaintiff is a corporation with residences in two separate states, the Court of Appeals acknowledged that to decide the place of injury, a court might have to determine the residence in which the plaintiff "more acutely sustained the impact of its loss" in undertaking a CPLR 202 analysis. *Global Fin.*, 93 N.Y.2d at 530.[7] Such a scenario would preclude mechanical application of the plaintiff-residence rule and require a factual inquiry to determine the place of injury. *See Oxbow Calcining USA Inc. v. Am. Indus. Partners*, 948 N.Y.S.2d 24, 30-31 (1st Dep't 2012) (dismissal under CPLR 202 was reversed because a question of fact existed as to whether the plaintiff was injured in New York).

As the First Department previously stated, it is appropriate under CPLR 202 to "consider all *relevant* factors in determining the situs of the loss." *Loreley Fin. (Jersey) No. 28, Ltd. v. Merrill Lynch*, 985 N.Y.S.2d 499, 501 (1st Dep't 2014) (emphasis added). Under *Global Financial*, the relevant factors relate to the question of where the injury is felt. 93 N.Y.2d at 528. By focusing on the location of the Trustee's residence instead of the place of injury, the First Department failed

[7] In *Global Financial*, the Court of Appeals did not need to resolve the factual question concerning the plaintiff's possible dual residency, because the Court found that the claims would have been untimely in either of the two out-of-state jurisdictions in which the plaintiff suffered its injury. 93 N.Y.2d at 530.

to appropriately consider the limited role of a trustee suing in a representative capacity, as well as the commercial reality of RMBS transactions.

Pursuant to the terms of the PSA, the Trustee is appointed only to act "on behalf of the Trust" and holds no economic interest in the Trust's assets. Accordingly, the Trustee was not, and cannot be, injured by the diminution of value in the Trust Fund caused by Respondents' breaches of the Representations and Warranties, and therefore does not seek any remedy on its own behalf. The Trustee holds nothing more than "bare legal title" to the Mortgage Loans without any economic interest or the benefits of actual ownership. *See* Restatement (Third) of Trusts § 42, cmt. a (Am. Law Inst. 2003) (noting that as the holder of a non-beneficial interest in the trust property, the trustee ordinarily "holds 'bare' legal title to the property"); *see also*, *e.g.*, *Korn v. Merrill*, 403 F. Supp. 377, 383-86 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 310 (2d Cir. 1976) (shareholder's residence irrelevant to CPLR 202 analysis in derivative action on behalf of corporation); *In re Adelphia Commc'ns Corp.*, 365 B.R. 24, 58 n.137 (Bankr. S.D.N.Y. 2007) (residency of corporation applies when bankruptcy trustee sues as representative of estate of bankrupt corporation). Indeed, the Trustee brought these Actions on behalf of the Trusts only after the Certificateholders gave the Trustee written notice of the Defective Loans and directed that the Trustee enforce the Repurchase Protocols. *See supra* pp. 16-20.

As the IAS Court correctly observed, the Actions were brought to remedy the impact of the Respondents' breaches of Representations and Warranties on the Trusts — which received Mortgage Loans riskier than promised and issued Certificates that were impaired in value as a result — not the Trustee. *See NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 166 (2d Cir. 2012) ("[T]he revelation that borrowers on loans backing the Certificates were less creditworthy than the Offering Documents represented affected the Certificates' 'value' immediately, because it increased the Certificates' credit risk profile."). Thus, it is where the impact of those breaches of Representations and Warranties on the value of the Certificates is felt that matters for purposes of assessing the claimed injury here under the logic of *Global Financial*.

The First Department should have affirmed the IAS Court's conclusion that the plaintiff-residence principle set out in *Global Financial* "is not … invariable." (A18-19.) It should also have considered other factors necessary to evaluate where the injuries at issue were felt. Because the place where the Trusts were injured controls under CPLR 202, the Trustee's residence is irrelevant. Further, as *Global Financial* instructs, the First Department should not have adjudicated the Trusts' places of injury — which is a fact intensive analysis — on a pleadings motion with an entirely undeveloped factual record. In doing so, the First Department not only

erred in its recitation of certain facts, but it also ascribed weight to factors that are wholly irrelevant.

B. In the Representative Plaintiff Context, A Multi-Factor Test is Most Appropriate to Determine the Location of the Injury

The Southern District of New York in *Maiden v. Biehl* — a New Jersey based trustee's suit for fraud related to investment decisions that occurred after the subject New York trust was established — recognized that when the plaintiff is the injured party, the place of injury is *usually* the plaintiff's residence, but that, consistent with *Global Financial*, the fundamental inquiry is *always* the place of injury. 582 F. Supp. at 1217. The court in *Maiden* held that "the New Jersey residency of the Trustee . . . is . . . not dispositive" because the trustee in *Maiden*, like the Trustee here, did not suffer the injuries at issue; therefore, "New Jersey is not where the economic impact of the fraud was felt." *Id.* The court in *Maiden* reasoned:

> [U]sually the place where the economic loss . . . would be felt is the plaintiff's residence: no cases hold that the residency of the plaintiff always determines where a cause of action accrued. Where the plaintiff is a trust, the use of the residency of the trustee as the sole factor to determine the place of accrual does not make sense as a practical matter, and is not required legally. . . . [I]n the context of the borrowing statute, *residency is merely a shorthand method to decide where economic impact is felt.*

Id. (emphasis added). Because it was not the trustee, but "the Trust itself that suffered the loss," the court in *Maiden* looked to the trust's location, noting that the

"thrust of the inquiry" is "who became poorer, and where did they become poorer?"[8] *Id.* at 1218. Considering several factors, including (i) where the trust was created, (ii) which state's law governed the trust, (iii) where the securities were physically kept, (iv) where the trust's investment decisions were made, and (v) where the trust's taxes were paid, the court concluded that the trust was injured in New York. Therefore, the New York limitations period applied. *Id.* at 1217-18.

This Court should take the same approach in answering the question the First Department declined to answer: "whether the plaintiff-residence rule or the multi-factor test [in *Maiden*] applies." (A9-A10.) The Court should hold that where a trustee is acting in a representative capacity solely on behalf of an injured trust, the type of multi-factor analysis employed by the *Maiden* court should govern. Otherwise, if the Trustee's residence were dispositive despite the fact that it does not bring these Actions for any injury to itself, the fundamental principle that "a cause of action accrues at the time and in the place of the injury" would be violated. *Global Fin.*, 93 N.Y.2d at 529. As the court in *Maiden* observed, that result "does not make sense." 582 F. Supp. at 1217.

[8] The court in *Maiden* also considered using the residence of the trust beneficiaries to determine the place of injury, noting that this method "has appeal because these are the individuals who lost money." 582 F. Supp. at 1218. But the court ultimately rejected this type of analysis, reasoning that "[i]f the beneficiaries were scattered, it would be unworkable to fractionalize one claim because some parts were time-barred." *Id.*

C. The IAS Court Identified the Factors That Should Be Given the Most Weight in Determining the Place of Injury In RMBS Repurchase Actions

Assuming that this Court holds that a *Maiden*-type analysis applies in the representative trustee context, the question of *which* factors should be given the most weight in determining the place of injury in the context of RMBS Repurchase Actions must also be addressed. As is typical with multi-factor tests, factors should be given different weight in different circumstances.[9] The factors considered in the *Maiden* decision, listed above, were specifically relevant to the small investment trust and the fraud claims at issue in that case. *See* 582 F. Supp. at 1217-18. Here, in contrast, the Trusts are large, pass-through RMBS trusts suing for breaches of representations and warranties. Thus, some of the factors considered in *Maiden* are less relevant to these Actions, as the IAS Court correctly observed. (A19-A22.) The First Department also cited factors not considered in *Maiden* that are not relevant in this context, such as the location of the originators and properties encumbered by the Mortgage Loans. (A10-A11.) This Court should hold that the factors that should be accorded the most weight in this context are those that relate to when and where the

[9] New York courts dealing with complex commercial disputes are frequently asked to apply and weigh competing facts and factors relevant to the elements of claims, issues of contract interpretation, issues of statutory construction, expert issues, and jurisdictional issues, to name just a few. For example, the doctrine of *forum non conveniens*, as codified in the CPLR, requires New York courts to "consider[] and balance[e] various competing factors" where "[n]o one factor is controlling." *Islamic Republic of Iran v. Pahlavi,* 62 N.Y.2d 474, 479 (1984).

injuries, based on Respondents' breaches of Representations and Warranties, were felt.

(1) The IAS Court Considered Facts Relevant to RMBS

In finding that Respondents had not met their burden to show that the Actions were untimely,[10] the IAS Court correctly considered facts that are particularly instructive in the context of RMBS Repurchase Actions, and relevant to where the Trusts were injured at the time the governing agreements were executed and breached, per the Court's guidance in *ACE III* and *Flagstar*. First, the parties' selection of New York law to govern their rights under the applicable agreements, coupled with the fact that the Trusts are New York common law trusts, underscores the nexus between the Trusts and New York. (A20.)

Second, almost all of the Certificates were held in New York at the time of securitization.[11] It was the Certificates — the instruments through which Certificateholders (the beneficial owners of the Trust) receive allocations of principal and interest[12] — that lost value due to Respondents' breaches of

[10] The IAS Court correctly noted that a party moving to dismiss an action as time-barred bears the "initial burden of establishing, prima facie, that the time in which to sue has expired." (A22 (quoting *Benn v. Benn*, 82 A.D.3d 548 (1st Dep't 2011).)

[11] Barclays and Cede & Co., entities located in New York, held 13 of the 15 classes of the BR1 Certificates as of the BR1 closing date. (A4259.) Cede & Co. and HSBC Securities (USA) Inc., entities located in New York, held all of the NC1 certificates as of the NC1 closing date. (A1340.)

[12] *See, e.g.*, *Dexia SA/NV, Dexia Holdings, Inc. v. Morgan Stanley*, No. 650231/2012, 2013 WL 5663259, at *1 (N.Y. Sup. Ct., N.Y. Cty. Oct. 16, 2013) ("The actual securities held by the [RMBS] investor are pass-through participation certificates, which are an ownership interest in the issuing trust, the entity that holds the pools.").

Representations and Warranties. *See NECA-IBEW Health & Welfare Fund,* 693 F.3d at 166.

Third, all major decisions relating to the Mortgage Loans securitized into the Trusts — specifically, the selection of the Mortgage Loans, the structuring of the transactions, and the exact nature of the Representations and Warranties that Barclays and HSBC made to the Depositors in the BRA and the NC1 MLPA respectively — occurred in New York. (A38-39, A287-289, A1337.) Under the Trusts' governing documents, these decisions could not be altered post-closing by the Trustee, who merely received "the Trust Fund[s]" (including Respondents' Representations and Warranties) on behalf of the Trusts "for the exclusive use and benefit of all present and future Certificateholders." (A38-A39, A102-A105, A567-572, A1337.) Therefore, the location of the Respondents and their affiliates (including the Depositors and Sponsors) — who were responsible for making the investment decisions which resulted in the selection of the Mortgage Loans and the accompanying Representations and Warranties that form the substance of the Actions — is far more relevant to where the injury occurred than the subsequent place (or places) of trust administration. *See Maiden*, 582 F. Supp. at 1218 (looking to "where [the trust's] investment decisions [were] made").[13]

[13] When faced with the identical question of where a cause of action accrued for a New York RMBS trust, the Delaware Court of Chancery also relied on these same factors. *Bear Stearns Mortg. Funding Tr. 2006–SL1 v. EMC Mortg. LLC*, No. CV 7701-VCL, 2015 WL 139731, at *10

(2) The First Department Failed to Give Appropriate Weight to Relevant Factors and Instead Relied on Factors Unrelated to the Place of Injury

The First Department's misapplication of *Maiden* to determine the place of injury conflicted with its own decision in *Flagstar*, recently affirmed by this Court, and with this Court's decision in *ACE III*, both of which held that claims in RMBS Repurchase Actions accrue the moment the warranties are made and breached. *Flagstar*, 2018 WL 4976777, at *1 (*citing ACE III*, 25 N.Y.3d at 597-98). That is the injury sued on, and the First Department should have geared its *Maiden* analysis to determining the location of that injury. Yet despite *ACE III*'s and *Flagstar*'s guidance, the First Department did not do so. Instead, the First Department relied on post-closing factors — like the location from which the Trustee administered the Trusts, the location where the Mortgage Notes would be "maintained," and the (unrealized) possibility of the Trustee paying state taxes — none of which could happen until *after* the relevant contracts were executed and breached. (A10-A11.)

As a threshold matter, the First Department rejected the IAS Court's conclusion that the Trusts' New York choice of law provisions were among the factors demonstrating that the injury to the Trusts occurred in New York. Citing this Court's decision in *Portfolio Recovery Assoc., LLC v King*, 14 N.Y.3d 410, 416

(Del. Ch. Jan. 12, 2015) (holding that an RMBS trustee's claims accrued in New York after considering the PSA's choice of law provision, the "Trust's status as a New York common law trust, the creation of the Trust in New York by [defendant and its] affiliates . . . the underwriting of the Certificates in New York, and the physical location of the Certificates . . . in New York.").

(2010), the First Department held that because the choice of law provisions "do not expressly incorporate the New York statute of limitations, they 'cannot be read to encompass that limitation period.'" (A10 (quoting *Portfolio Recovery*).) This reasoning misses the point. The IAS Court acknowledged that, under *Portfolio Recovery*, New York choice-of-law provisions that do not expressly incorporate the New York limitations period are not by themselves dispositive on the issue of which law applies. (A18.) But, pursuant to *Maiden*, the IAS Court properly considered the New York choice of law provision as one factor among others in determining that Respondents had failed to meet their burden to demonstrate that California was the place of injury. (A19-A22.)

In *Portfolio Recovery*, this Court held that a choice of law provision must expressly incorporate the applicable state's statute of limitations for the choice of law clause to *mandate* that limitations period. *See* 14 N.Y.3d at 416. Nowhere in *Portfolio Recovery*, however, did this Court state that a choice of law provision could not be considered as a *factor* in a *Maiden*-type CPLR 202 analysis. Similarly, this Court's recent decision in *2138747 Ontario, Inc. v. Samsung C&T Corp.*, 31 N.Y.3d 372 (2018), held that a New York choice of law clause does not of itself make CPLR 202 inapplicable. Nothing in *Ontario* precludes a finding that the parties' voluntary selection of New York law to govern contractual disputes should be considered as a relevant factor in determining where a cause of action accrues.

The First Department also mistakenly found — in contravention of undisputed facts in the record — that the Mortgage Loans were "exclusively" or "predominantly" originated in California, and encumber California properties. *See supra* pp. 10-12 (citing NC1 and BR1 Prospectus Supplements that were attached to the Complaints). In fact, only a minority of the loans encumbered California properties, and the large majority of the loans relate to properties in other states, including New York. (A283, A376 (roughly 79% of BR1 Mortgage Loans are secured by properties in states other than California, including New York), A815, A1008 (roughly 77% of NC1 Mortgage Loans are secured by properties in states other than California, including New York).) In reality, nearly 80% of the Mortgage Loans encumber properties located in states other than California. (*See id.*)

Further, with respect to the location of the Mortgage Notes, the First Department itself questioned the "extent [to which] the physical location of the [Mortgage Notes] has relevance," and noted that "the HSBC notes are maintained in Minnesota and the Barclays notes are maintained in California" but that the "ratings agencies [may] permit them to be in another state." (A11.) The location where the Mortgage Notes *might* be maintained, after the transactions closed and the injury occurred, has no bearing on the place of injury, which was determined as of the execution date of the operative contracts. *Flagstar*, 2018 WL 4976777, at *1; *ACE III*, 25 N.Y.3d at 597-98.

Even if the First Department's factual premises were correct, its conclusion would still be wrong: the location of the Mortgage Loans' originators, the location of the properties securing the Mortgage Loans, and the location of the Mortgage Notes are all irrelevant to the question of "who became poorer, and where did they become poorer" under CPLR 202. *See Maiden*, 582 F. Supp. at 1218. Rather, it is the breach of those Representations and Warranties that diminished the value of Certificates held in New York that gave rise to these Actions. *See Martin v. Julius Dierck Equip. Co.*, 43 N.Y.2d 583, 591 (1978) (accrual is determined by the place of injury).

Apart from its mistaken view about the location of the Mortgage Notes and the underlying properties, the First Department relied on three other irrelevant factors: (i) the Trusts are administered in California, (ii) the PSAs contemplate the payment of state taxes in California, and (iii) the PSAs contemplate that the Mortgage Notes may be maintained in California after the Closing Dates. (A10-11.) But, as the IAS Court put it, these factors "lack apparent relevance in the RMBS context." (A21-A22.) This is because none of these factors bear on the critical question — the place of injury.

Like the location of the Mortgage Loan originators and properties, the place of the administration of the Trusts has no bearing on the place of injury. Any "administration" of the Trusts occurred after the Closing Dates, and after the

Representations and Warranties were made and breached. (A143-A144 (BR1 PSA § 8.01, outlining duties of Trustee), A605-A606 (NC1 PSA § 8.01 (same).) The Trusts' composition was determined when Respondents and their affiliates created and funded the Trusts and selected the Mortgage Loans at the time of securitization. Accordingly, "[e]ven assuming that the trusts are administered from the California offices of the trustee[]," the IAS Court noted, "RMBS trustees do not make major investment decisions, as the loans underlying the trusts are selected and pooled by the sponsors and/or depositors before the trusts are established." (A21.) The place of administration is unconnected to injuries suffered by the Certificateholders as a result of the diminution in value of the Trusts' Certificates caused by Respondents' breaches of Representations and Warranties at the moment of securitization. *See Flagstar*, 2018 WL 4976777, at *1; *ACE III*, 25 N.Y.3d at 597-98.

It is likewise of no significance that the PSAs contemplated a hypothetical possibility of state taxes being assessed in California, but *only* in the event that the "pass through" status of the Trusts as residential mortgage investment conduits ("REMICs") was not recognized for federal tax purposes, in which case state income tax liability may have arisen. (A147, A612-A616.) A REMIC, as defined by federal tax law is an "entity that holds a fixed pool of mortgages and issues multiple classes of interests in itself to investors." 26 U.S.C. § 860D (2012). REMICs are "generally treated as [] partnership[s]" for Federal income "tax purposes" with their income

passed through to their interest holders. *See* I.R.S. Pub. No. 550, Cat. No. 15093R, 24-25 (Apr. 9, 2018). Indeed, the Trusts have been recognized as REMICs (A38, A40-A42, A147, A263, A612-A616, A765, A853-A854, A1338), and, as the First Department acknowledged, it is "undisputed" that neither of the Trusts have ever paid, owed or been obligated to pay any taxes in California at any time. (A10-A11, A38, A1337.) Thus, the hypothetical question of where the Trusts *might* be obligated to pay taxes at some future date — if and only if, they were not recognized as REMICs — cannot be relevant to evaluating where the injury occurred here. Moreover, both the *ACE III* and *Flagstar* decisions make clear that injury related to breach of Representations and Warranties must be determined as of the execution date of the operative contracts, which further undermines the relevance of the state in which future hypothetical taxes may in theory become due. *Flagstar*, 2018 WL 4976777, at *1; *ACE III*, 25 N.Y.3d at 597-98.

D. CPLR 202's Purpose and New York's Public Policy Favor a Multi-Factor Test that Focuses on the Place of Injury to the Trust

CPLR 202's purpose — "to add clarity to the law and to provide the certainty of uniform application to litigants" — is entirely frustrated by the Decision. *Ins. Co. of N. Am. v. ABB Power Generation*, 91 N.Y.2d 180, 187 (1997). Prior to the Decision, multiple federal cases interpreting CPLR 202 had held that when a plaintiff sued in a representative capacity on behalf of the entity that actually incurred the injury at issue, the representative's location was irrelevant for purposes

of CPLR 202 and the place of actual injury controlled. This reasoning has also been applied in the trust context, in the bankruptcy trustee context, and in the shareholder derivative suit context.[14] The federal courts' reasoning advances CPLR 202's stated purpose and should be adopted here. In contrast, there is nothing uniform about an application of the law which would allow the beneficiaries of a New York common law trust a six-year time period to direct the trustee to bring suit if the trustee resided in a state with the same six-year statute of limitations, but would require the same beneficiaries of the same trust seeking redress for the same wrong to direct the trustee to bring suit years sooner if the trustee resided in a state with a shorter limitations period.[15]

The Decision's holding tying the place of accrual to the residence of a trustee has the potential to produce inconsistent and confusing results in numerous other factual circumstances. Using the PSAs relevant to these Actions as an example, the Trustee might be replaced by a successor trustee (A146 (BR1 PSA §§ 8.08, 8.09),

---

[14] *See, e.g.*, *2002 Lawrence R. Buchalter Alaska Tr. v. Phila. Fin. Life Assurance Co.*, 96 F. Supp. 3d 182, 201-02 (S.D.N.Y. 2015) (relying on *Maiden* to hold that place of injury was where Trust suffered the loss); *Appel v. Kidder, Peabody & Co.*, 628 F. Supp. 153, 156 (S.D.N.Y. 1986) (for purposes of CPLR 202, trustee's residence not dispositive in trust context; place of injury is where "financial harm [was] sustained by the trust"); *In re Adelphia Commc'ns Corp.*, 365 B.R. at 58 n.137 (for purposes of CPLR 202, residence of the bankruptcy trustee is irrelevant when trustee sues as a representative of the estate of a bankrupt corporation; residence of injured corporation applies); *Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman*, 277 B.R. 20, 30 (S.D.N.Y. 2002) (same); *Brinckerhoff v. JAC Holding Corp.*, 692 N.Y.S.2d 381, 382 (1st Dep't 1999) (for purposes of CPLR 202, residence of shareholder suing derivatively irrelevant because the injuries are felt by the corporation, not the shareholder; residence of corporation applies); *Korn*, 403 F. Supp. at 383-86 (same).

[15] N.Y. C.P.L.R. § 213(2); Conn. Gen. Stat. § 52-576; Mass. Gen. Laws ch. 260, § 2.

A611 (NC1 PSA §§ 8.08, 8.09)) who could reside in a state with a shorter or longer statute of limitations, or the Trusts might be administered by co-trustees or separate trustees (A146-A147 (BR1 PSA § 8.10), A611 (NC1 PSA § 8.10)), who might reside in a different states. Applying the Decision's plaintiff-residence test to suits brought in either circumstance begs the question of which trustee's residence would control the analysis, resulting in precisely the sort of inconsistency that CPLR 202 was designed to prevent.

Representative plaintiffs seeking to commence suit on behalf of the aggrieved parties they represent look to the courts of this State to interpret and apply CPLR 202 in a consistent, fair, and predictable manner. New York "is a financial capital of the world," *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 227 (1975), and it protects that status through its commitment to predictable commercial laws. This Court has long recognized that "in order to maintain [New York's] pre-eminent financial position, it is important that the justified expectations of the parties to the contract be protected." *Id.* And the New York Legislature has expressed its desire "to promote and preserve New York's status as a commercial center and to maintain predictability for [contracting] parties." *IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A.*, 20 N.Y.3d 310, 314-16 (2012) (citing General Obligations Law § 5-1401(1), which "[t]he Legislature passed . . . in 1984 in order to allow parties without New York contacts to choose New York law to govern their

contracts"). For this reason, contracting parties overwhelmingly select New York law to govern their agreements, more than any other jurisdiction in the United States. *See* Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 Cardozo L. Rev. 1475, 1490 (2009) (finding that 46% of commercial parties in the U.S. choose New York law to govern their contracts).

As applied to the instant Actions specifically, and more generally in the context of RMBS Repurchase Actions, until the First Department issued the Decision, parties to RMBS transactions (with the exception of Respondents) never questioned that the New York statute of limitations applied to RMBS Repurchase Actions arising from the underlying transactions, which had created New York trusts in which the beneficiaries' rights and remedies were subject to New York law. The IAS Court Order confirmed that understanding for all such cases pending before the IAS Court in Part 60, which oversees the vast majority of RMBS Repurchase Actions in New York state court. (*See* A21 n.2.) As the IAS Court noted, no other defendant in any of the "nearly 40 currently pending RMBS breach of contract actions" on the Part 60 docket had sought dismissal "based on the out-of-state residence of the trustees" despite the fact that "many involve out-of-state trustees." (*Id*.)

Even in *Flagstar* — where DBNTC was also the representative plaintiff, and which also concerned the statute of limitations — no defense was asserted under CPLR 202, and the parties, the lower courts and this Court all assumed that New York's six-year statute of limitations applied. Indeed, based on the understanding that the New York statute of limitations applies, plaintiffs have typically filed RMBS repurchase actions on or shortly before the six-year anniversary of the applicable closing dates,[16] and numerous sophisticated defendants represented by experienced attorneys — including Barclays — did not seek dismissal on statute of limitations grounds before the Decision was issued.[17] The fact that these defendants declined to seek dismissal on these grounds strongly suggests that they believed statute of limitations defenses to be without merit.

The First Department's ruling has now upset the parties' settled expectations in a large number of RMBS Repurchase Actions, each of which involves claimed damages of hundreds of millions of dollars; the cases collectively claim many

[16] *See, e.g., Flagstar*, 2018 WL 4976777, at *3 (deciding that "six-year statutory limitations period [] would begin to run, at the latest, on [] the closing date for the last group of loans" securitized in the trust); *ACE III*, 25 N.Y.3d at 591 (noting that certificateholders brought suit "six years to the day from the date of contract execution").

[17] For example, Barclays did not to move to dismiss on foreign statute of limitations grounds in two other cases brought by DBNTC in early 2014, months before the IAS Court Order denying the motions to dismiss in the instant cases, issued on November 25, 2015. *See* Defs.' Mot. Dismiss, *Deutsche Bank Nat'l Tr. Co. v. Barclays Bank PLC*, No. 651789/2013 (N.Y. Sup. Ct., N.Y. Cty. Feb. 7, 2014) ("*SABR 2007-BR2-5*") [Dkt. 34]; Defs.' Mot. Dismiss, *Deutsche Bank Nat'l Tr. Co. v. EquiFirst Corp.*, No. 651957/2013 (N.Y. Sup. Ct., N.Y. Cty. Jan. 10, 2014) ("*EQLS 2007-1*") [Dkt. 22].

billions of dollars in damages. After the First Department ruled, defendants in numerous other RMBS Repurchase Actions pending before the IAS Court sought a stay of proceedings in order to assert a defense based on the statute of limitations of a foreign state (where the trustees purportedly have connections), and informed the IAS Court that they intend to submit dispositive motions on such grounds promptly upon resolution of this appeal — even though none of those defendants had originally sought dismissal on that basis.[18]

Applied more broadly, the Decision will cause confusion and harm to investors in trusts organized under New York law, under agreements providing that the rights and remedies attached to the assets of the trust would be governed by New York law. These investors have relied on the extensive body of federal case law addressing CPLR 202 in other representative contexts to assess the risk of their investments.[19] This result frustrates the purpose of New York General Business Obligation Law Section 5-1401, which encourages sophisticated commercial parties to select New York law to govern their agreements. *See Ministers & Missionaries Ben. Bd. v. Snow*, 26 N.Y.3d 466, 468 (2015); *IRB-Brasil Resseguros, S.A.*, 20

[18] To date, defendants in RMBS Repurchase Actions have sought indefinite stays of discovery in 11 cases (not including *SABR 2007-BR2-5* in which DBNTC and Barclays stipulated to a stay pending resolution of this appeal). *See* Decision and Order, *In re: Part 60 RMBS Put-Back Litig.*, No. 777000/2015, at *29-31 (N.Y. Sup. Ct., N.Y. Cty. Oct. 19, 2018) [Dkt. No. 609] (granting motions to amend answers in three cases and motions to maintain stays in two actions; denying motions to stay in nine actions but noting defendants' contention that the Decision is dispositive in those cases).

[19] *See supra* note 14 (citing cases).

N.Y.3d at 314-15 (2012). In furtherance of this public policy, this Court should announce a rule that determining the place of injury for purposes of CPLR 202 in the context of an out-of-state representative plaintiff requires an analysis of factors actually relevant to when and where the injury was felt, and therefore in line with the expectations of investors, rather than a mechanical application of the plaintiff-residence rule.

II. EVEN IF CALIFORNIA LAW GOVERNS THE TIMELINESS OF THE ACTIONS, THE ACTIONS WERE BROUGHT BEFORE "THE EXPIRATION OF THE TIME LIMITED BY THE LAWS" OF CALIFORNIA

A. CPLR 202 Requires the Application of All Relevant California Law

Under CPLR 202 a cause of action "accruing without the state" is time-barred if brought "after the expiration of the time limited by the laws of . . . the place without the state where the cause of action accrued." The "primary purpose" of the statute "is to prevent forum shopping by a nonresident seeking to take advantage of a more favorable Statute of Limitations in New York." *Antone v. Gen. Motors Corp.*, 64 N.Y.2d 20, 27-28 (1984).

To effect this purpose, this Court has interpreted the borrowing statute to incorporate not just the time period chosen by the foreign state, but all that state's rules determining the timeliness of an action — so that an action, if timely in New York, is barred if, but only if, it would have been barred in the foreign state. That interpretation eliminates any incentive for a plaintiff to "shop" for a longer statute

of limitations. Under this Court's precedent, the words "the time limited by the laws of" a foreign state should be read to mean "the time within which the laws of the foreign state would permit the bringing of the action."

Thus, in *In re Smith Barney, Harris Upham & Co., Inc.*, this Court held: "In borrowing the foreign statute, [a]ll the extensions and tolls applied in the foreign state must be imported with the foreign statutory period, so that the *entire* foreign statute of limitations . . . applie[s], and not merely its period." 85 N.Y.2d 193, 207 (1995) (internal quotation marks and citation omitted) (emphasis in original); *see also Ledwith v. Sears Roebuck & Co.*, 660 N.Y.S.2d 402 (1st Dep't 1997) (New York courts applying CPLR 202 must "embrace[] all the laws" of the state "that serve to limit the time within which an action may be brought."). Once it determined that the Trustee's claims accrued in California, the First Department was required by the principles stated in *Antone*, *Smith Barney* and *Ledwith* to apply not just California's statute of limitations, but all of California's related law, including those governing the time the claims accrued and the applicability of any tolling provisions. But the First Department did not do so.

Instead, the First Department applied the California statute of limitations to the Trustee's claims, but then improperly applied New York law in holding that the Repurchase Protocols and Accrual Provision "are not conditions precedent to suit for a preexisting breach." (A12 (citing *ACE III*, 25 N.Y.3d at 597).) Such mixing

and matching of two states' laws is inconsistent with the text of CPLR 202. Nothing in CPLR 202 suggests that a complaint should be deemed time-barred by operation of that provision when it would have been timely if brought *either* by a resident plaintiff in New York or in the relevant foreign jurisdiction. That is a bizarre result the New York Legislature could not have intended.

If the First Department had properly applied *all* of California's laws governing when the statute of limitations accrued to Petitioner's causes of action, as is required by CPLR 202, it would have determined that the Trustee's claims are timely under California law. *See infra* at pp. 45-57. At a minimum, the First Department should have found that the record necessary for analyzing these questions of California law needed to be developed in order to properly decide when the claims accrued, and could thus not properly be decided on a motion to dismiss.

B. The Actions Would Have Been Timely if Brought in California

These Actions, if filed in California on the day they were filed in New York, would not have been time-barred. This is so for two reasons. First, pursuant to the Accrual Provision for the BR1 Trust and the Repurchase Protocols for both Trusts, the Trustee's claims did not accrue under California law until February 2013 for the BR1 action (when Barclays rejected the Trustee's First Breach Notice) and May 2013 for the NC1 action (when HSBC rejected the Trustee's first repurchase demand). (A49, A246-A255, A1344-A1345.) Second, under California law, the

limitations period was tolled until the Trustee discovered the Defective Loans at issue for the first time in 2012 (BR1) and 2013 (NC1).

(1) The Claims Are Timely Under California Laws Governing Accrual Because California Law Permits Contracting Parties to Delay the Accrual of a Cause of Action

Under New York law, pre-accrual agreements to extend a statute of limitations are not allowed. General Obligations Law § 17-103; *John J. Kassner & Co. v. City of New York*, 46 N.Y.2d 544, 551 (1979). Accordingly, this Court has held in RMBS cases that contractual provisions that purport to delay the accrual of a cause of action cannot be enforced under New York law, because they amount to impermissible attempts to extend the statute of limitations. *ACE III*, 25 N.Y.3d at 597-99; *Flagstar*, 2018 WL 4976777 at *3.

But California law is different. Section 360.5 of the California Code of Civil Procedure says:

> No waiver shall bar a defense to any action that the action was not commenced within the time limited by this title *unless the waiver is in writing and signed by the person obligated.* No waiver executed prior to the expiration of the time limited for the commencement of the action by this title shall be effective *for a period exceeding four years* from the date of expiration of the time limited for commencement of the action . . . .

Cal. Civ. Proc. Code § 360.5 (Emphasis added). Thus, unlike New York law, California law *does* permit contracting parties to extend the statute of limitations ahead of time — provided only that the extension is signed and in writing, and that

the total period as extended does not exceed eight years (*i.e.*, four years for the default period plus a four-year extension). *See, e.g., Builders Bank v. Oreland, LLC*, No. 14-06548, 2015 WL 1383308, at *3 & n.1 (C.D. Cal. Mar. 23, 2015).

As California case law explains, this statute "specifically allows statutes of limitations [defenses] … to be waived by written agreement" *before* a claim accrues; "the California Legislature itself has expressly recognized that statutory limitations periods are not imbued with any element of nonwaivable 'public policy.'" *Brisbane Lodging, L.P. v. Webcor Builders, Inc.*, 157 Cal. Rptr. 3d 467, 475 (2013); *Cal. First Bank v. Braden*, 264 Cal. Rptr. 820, 822 (1989). Accordingly, "[i]n general, California courts have permitted contracting parties to modify the length of the otherwise applicable California statute of limitations, whether the contract has extended or shortened the limitations period." *Hambrecht & Quist Venture Partners v. Am. Med. Int'l, Inc.*, 46 Cal. Rptr. 2d 33, 42 (1995).

The Accrual Provision in the BRA expressly conditions accrual upon Barclays' failure to cure or repurchase a Defective Loan *after* receiving a demand by the Trustee for repurchase of that loan. While, under *Flagstar*, New York courts would not honor such a clause because it would amount to an impermissible extension of the statute of limitations, California courts will honor it, as the authorities cited above show. A California court would treat the Accrual Provision as valid. Under that clause, the BR1 Trust's claims accrued no sooner than February

18, 2013, when Barclays rejected the First Breach Notice. (A49, A246-A255.) Once the First Department (incorrectly) determined that California law applied, it should also have enforced the Accrual Provision and held that Trust's Action to be timely, consistent with California's "well established principle that the parties to a contract may agree to shorten or extend the statute of limitations." *Blue Shield of Cal. Life & Health Ins. Co. v. Superior Court*, 120 Cal. Rptr. 3d 713, 720 n.11 (2011).

Even apart from the BR1 Accrual Provision, under California law the Trustee's claims did not accrue in either of the Actions until satisfaction of the applicable conditions precedent. California law recognizes that "[i]n cases where a demand is necessary before a cause of action arises, the statute of limitations does not begin to run until the demand is made." *Kaplan v. Reid Bros.*, 104 Cal. App. 268, 272 (1930); *see also Leonard v. Rose*, 65 Cal. 2d 589, 592 (1967) (where "no time is specified for performance" under a contract, "a [party] who has promised to do an act in the future . . . does not violate his agreement unless and until a demand for performance is made and performance is refused"); *accord Mansouri v. Superior Court*, 104 Cal. Rptr. 3d 824, 831 (2010). As long as the demand is made within a reasonable time, California courts will find that the statute of limitations does not begin to run until the requisite demand is made and performance is refused. *Kaplan*, 104 Cal. App. at 272. The distinction between merely "procedural" prerequisites to suit and "substantive" conditions precedent, which was applied in *ACE III* to hold

that conditions such as these do not delay the running of the statutory time period in RMBS Repurchase Actions, is not found in California law.

Here, the BR1 and NC1 Repurchase Protocols both contain three conditions precedent to the accrual of Petitioner's claims. First, Respondents must either independently discover or be notified of defective mortgage loans in the securitizations. (A191-A192 (BR1 BRA §3(a)), A572 (NC1 PSA § 2.03(d)).) Second, after Respondents learn of the Defective Loans, they have a Cure Period to assess the breaches of Representations and Warranties and to attempt to cure them. (*Id.*) Third, if the breaches cannot be cured, Respondents must either replace the Defective Loans with non-breaching loans or repurchase the Defective Loans. (*Id.*)

Under California law, pursuant to the Repurchase Protocols, a cause of action does not accrue unless and until the Respondent fails to cure, substitute, or repurchase Defective Loans upon the demand of the Trustee within the Cure Period. The requirements of the Repurchase Protocol thus would be construed by a California court as conditions precedent to accrual. *See Kaplan*, 104 Cal. App. at 272; *Leonard*, 65 Cal. 2d at 592; *see also Bjorklund v. N. Am. Cos. for Life & Health Ins.*, 72 F. App'x 550, 551 (9th Cir. 2003) (alleged breach was insurer's refusal to

pay upon insured's surrender of policy; thus claim did not accrue until the policy was surrendered).[20]

Accordingly, under California law, the statute of limitations did not begin to run until the conditions precedent in the Repurchase Protocols were satisfied. That occurred in the BR1 Action for the first time in February 2013 and in the NC1 Action for the first time in May 2013. (A49, A246-A255, A1344-A1345.) At the very least, there is a factual issue regarding when the statute of limitations began to run that was not properly determined on a motion to dismiss. *Meherin v. San Francisco Produce Exch.*, 117 Cal. 215, 217 (1897) ("[w]hat is to be considered a reasonable time" for making demand is "not … settled by a precise rule," but "must depend on circumstances"); *Miles v. Bank of Am. Nat. Tr. & Sav. Ass'n*, 17 Cal. App. 2d 389, 397 (1936) (noting that whether repurchase demand was made within a reasonable time "depend[s] upon the facts of each case and is primarily a question to be decided by the trial court").[21]

---

[20] The cases cited by the First Department in the Decision do not support its conclusion. (*See* A11-12.) *Mary Pickford Co. v. Bayly Bros.* has nothing to do with conditions precedent and says nothing about the contractual language required to establish them. 12 Cal.2d 501 (1939). Further, *Meherin v. San Francisco Produce Exch.*, 117 Cal. 215 (1897) and *Taketa v. State Bd. of Equalization*, 104 Cal. App.2d 455 (1951) each involved a plaintiff who, unlike the Trustee here: (i) was the injured party; (ii) had immediate knowledge of the injury; and (iii) thus had the ability to make the demand immediately upon injury. *See Meherin*, 117 Cal. at 216 (demand for reinstatement after suspension from produce exchange membership privileges); *Taketa,* 104 Cal. App. at 459 (demand for restoration of liquor license).

[21] The California cases cited by the First Department illustrate that this issue depends on a factual inquiry and is not typically decided on a motion to dismiss. *See, e.g.*, *Meherin,* 117 Cal. at 216-17 (decision regarding whether the demand had been made within a reasonable time was determined after a bench trial); *Taketa*, 104 Cal. App. at 456, 460 (affirming trial court decision

The effect of the BR1 Accrual Clause and the Repurchase Protocols under California law is clear. They would render the Actions timely. The Decision simply failed to apply the bedrock legal principle that a court cannot solely apply the time period of a foreign state's statute of limitations without fully considering all the laws of the foreign state that govern the application of the limitations period. *Ledwith*, 231 A.D.2d at 24.

(2) Even if Petitioner's Claims Accrued in 2007, They Were Tolled By California's Discovery Rule

Even if Petitioner's claims accrued in 2007, rather than after the repurchase demands in each Action, the claims would still be timely under California's discovery rule. Under this rule, the statute of limitations is tolled until discovery of the breaches in cases where "the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time." *April Enters., Inc. v. KTTV*, 195 Cal. Rptr. 421, 437 (1983). Whether the discovery rule applies is a "question for the trier of fact" that was not properly decided on a motion to dismiss in the Actions. *See E-Fab Inc. v. Accountants Inc. Servs.*, 153 Cal. App. 4th 1308, 1326 (2007); *Cleveland v. Internet Specialties W., Inc.*, 171 Cal. App. 4th 24, 30-31 (2009) (trial court improperly granted motion for summary judgment when it

on stipulated facts that petition for writ of mandate to restore a liquor license was untimely); *Mary Pickford*, 12 Cal.2d at 509 (noting that defendants were appealing the trial court's judgment that they were liable for certain payments to plaintiffs).

"intruded on the province of the trier of fact" by determining when plaintiff had sufficient knowledge for limitations period to begin to run).

Unlike New York, which does not apply the discovery rule to statutes of limitations in contract actions, California courts have explicitly found that California's discovery rule applies to breach of contract cases, such as these Actions. *Compare ACE III,* 25 N.Y.3d at 584 (noting that New York has rejected the discovery rule in contract actions), *with Gryczman v. 4550 Pico Partners, Ltd.*, 131 Cal. Rptr. 2d, 680, 682 (2003) (finding that California law "specifically extend[s] the discovery rule" to breach of contract action), *and April Enters., Inc.*, 195 Cal. Rptr. at 433-37 (same). As the First Department correctly noted, parties asserting application of California's discovery rule must show an inability to have made an earlier discovery of the contractual breach despite reasonable diligence. *See April Enters., Inc.*, 195 Cal. Rptr. at 421. Petitioner is a Trustee with limited access to information about the Mortgage Loans who acts on demands made by Certificateholders, and receives only nominal fees for performing ministerial functions relating to the Trusts, and expressly has no duty to investigate absent a direction that complies with the requirements of the PSAs. (A104, A144, A570-A572, A607.) What constitutes "reasonable diligence" for a party in those circumstances is not an issue that can or should have been resolved against the Trustee on the pleadings.

On this point, the First Department held that "the record establishes that [the Trustee] 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." (A12.) Setting aside the Trustee's limited role in the securitizations, the First Department's conclusion applies California law on the discovery rule incorrectly and assumes facts that are not part of the appellate record. For example, with respect to the prospectuses, the First Department erred by finding at the pleading stage based on the current record, that the information in the prospectuses for the Actions was accurate. This assumption is in conflict with the allegations in the amended complaint (which the court was required to take as true) that information regarding the characteristics of the Mortgage Loans provided in the Mortgage Loan Schedules was inaccurate. *See Alexander v. Exxon Mobil*, 219 Cal. App. 4th 1236, 1250 (2013); (A.46-A51, A1333, A1343-1346).[22]

At most, the prospectuses reflected that New Century, the corporate parent of the primary loan originator for both Trusts, had declared bankruptcy prior to the

[22] The First Department's conclusion is also in tension with decisions from federal and state courts in New York that recognize the limited role of trustees in RMBS securitizations and consistently determine that trustees must have more than inquiry notice of breaches. *See Royal Park Invs. SA/NV v. HSBC Bank USA Nat'l Ass'n*, No. 14-CV-08175 (LGS) (SN), 2017 WL 945099, at *6 (S.D.N.Y. Mar. 10, 2017) ("Equating 'discovery' with constructive knowledge is [] inconsistent with the bargained-for-terms of the PSAs, which limit HSBC's pre-EOD duties as trustee to the four corners of the governing agreements."), *objections overruled sub nom.*, 2018 U.S. Dist. LEXIS 31157, at *1, 38-39 (S.D.N.Y. Feb. 23, 2018) ("[T]rustees . . . neither underwrite loans nor . . . have any duty to examine them absent receipt of some form of loan-specific information of a breach.").

closing date of the Trusts. (A273, A289, A774, A794.) But Respondents' Representations and Warranties, which were made as of the Closing Dates (after New Century declared bankruptcy), concerned the quality of the Mortgage Loans notwithstanding New Century's bankruptcy. Thus, the fact that the prospectuses reported New Century's bankruptcy could not have put the Trustee on notice of Respondents' breaches of their Representations and Warranties. Any further discussion of "underwriting and default information" purportedly received by the Trustee (according to the First Department) is inappropriate in deciding a motion to dismiss.[23]

The First Department erred in its conclusory finding that "plaintiff reasonably could have discovered the alleged breaches within the limitation period," which should not have been established at the pleading stage without a factual record. (A12.)

[23] Contrary to the First Department's findings, the operative complaints and the record do not contain any "underwriting" information. And, to the extent the First Department relied on "default information" the Trustee received after the closing, that reliance was inappropriate, as that "default information" was not attached to the complaints. California courts applying the discovery rule at the motion to dismiss phase must only consider the allegations in the complaint or facts subject to judicial notice. *See Alexander*, 219 Cal. App. 4th at 1252 ("When a plaintiff reasonably should have discovered facts for . . . [the] application of the delayed discovery rule is generally a question of fact, properly decided as a matter of law only if the . . . the allegations in the complaint and facts properly subject to judicial notice[] can support only one reasonable conclusion"). Neither underwriting nor default information are documents that are subject to judicial notice, and even if they were, it would be inappropriate for a California court to assume the veracity of that information or its impact on the parties. *See Joslin v. H.A.S. Ins. Brokerage*, 228 Cal. Rptr. 878, 881 (Ct. App. 1986) ("Taking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning.").

CONCLUSION

For the foregoing reasons, Deutsche Bank National Trust Company, solely in its capacity as Trustee for the Trusts, requests that this Court reverse the judgment of the First Department.

Dated: New York, New York
November 28, 2018

ROPES & GRAY LLP

By: _____

David B. Hennes
Douglas H. Hallward-Driemeier
(*pro hac vice*)
Daniel V. Ward
(*pro hac vice*)
Heather T. Sprague
(*pro hac vice*)
1211 Avenue of the Americas
New York, New York 10036
Telephone: (212) 596-9000
Fax: (212) 596-9090
David.Hennes@ropesgray.com
Douglas.Hallward-Driemeier@ropesgray.com
Daniel.Ward@ropesgray.com
Heather.Sprague@ropesgray.com

FRIEDMAN KAPLAN SEILER & ADELMAN LLP

By: _____

Robert S. Smith
7 Times Square
New York, New York 10036
Telephone: (212) 833-1125
Fax: (212) 373-7925
rsmith@fklaw.com

Attorneys for Plaintiff-Appellant Deutsche Bank National Trust Company, solely in its capacity as Trustee of Securitized Asset Backed Receivables LLC Trust 2007-BR1 and HSI Asset Securitization Corporation Trust 2007-NC1

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that this brief was prepared on a computer.

A proportionally spaced typeface was used as follows:

Name of typeface: Times New Roman
Pointsize: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the status of related litigation, the corporate disclosure statement, the table of contents, the table of cases and authorities, the statement of questions presented, and any addendum containing material required by subsection 500.1 (h) is 13,896.

Dated: November 28, 2018

David B. Hennes

ADDENDUM A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DEUTSCHE BANK NATIONAL TRUST COMPANY, solely in its capacity as Trustee of the SECURITIZED ASSET BACKED RECEIVABLES LLC TRUST 2007-BR2, SECURITIZED ASSET BACKED RECEIVABLES LLC TRUST 2007-BR3, SECURITIZED ASSET BACKED RECEIVABLES LLC TRUST 2007-BR4, SECURITIZED ASSET BACKED RECEIVABLES LLC TRUST 2007-BR5 Plaintiff, v. BARCLAYS BANK PLC and WMC MORTGAGE, LLC, as successor to WMC MORTGAGE CORP., Defendants.	Index No. 651789/2013 ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT BARCLAYS BANK PLC'S MOTION TO DISMISS

ALSTON & BIRD LLP
90 Park Avenue
New York, New York 10016
Telephone: (212) 210-9400

Attorneys for Barclays Bank PLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Statutes and Rules

SUMMARY OF TERMS

Barclays:	Defendant Barclays Bank PLC
BCAP:	BCAP LLC
Barclays Representation Agreements:	Collectively, BRA BR2, BRA BR3, BRA BR4 and BRA BR5
BR2:	Securitized Asset Backed Receivables LCC Trust 2007-BR2
BR3:	Securitized Asset Backed Receivables LCC Trust 2007-BR3
BR4:	Securitized Asset Backed Receivables LCC Trust 2007-BR4
BR5:	Securitized Asset Backed Receivables LCC Trust 2007-BR5
BRA BR2:	BR2 Barclays Representation Agreement between Barclays and SABR, dated as of May 17, 2007, attached to the Doherty Aff. as Exhibit 5
BRA BR3:	BR3 Barclays Representation Agreement between Barclays and SABR, dated as of June 13, 2007, attached to the Doherty Aff. as Exhibit 7
BRA BR4:	BR4 Barclays Representation Agreement between Barclays and SABR, dated as of June 14, 2007, attached to the Doherty Aff. as Exhibit 9
BRA BR5:	BR5 Barclays Representation Agreement between Barclays and BCAP LLC, dated as of July 10, 2007, attached to the Doherty Aff. as Exhibit 11
Closing Date:	The closing date of the respective Securitization, as defined in the Barclays Representation Agreements: with respect to BR2, May 17, 2007; with respect to BR3, June 13, 2007; with respect to BR4, June 14, 2007; and with respect to BR5 July 10, 2007

Complaint:	The Complaint filed by DBNTC on December 11, 2013, attached to the Doherty Aff. as Exhibit 1
DBNTC:[1]	Plaintiff Deutsche Bank National Trust Company
Defendants:	Defendants WMC and Barclays
Depositor:	For BR2, BR3, and BR4, SABR; for BR5, BCAP
Doherty Aff.:	Affirmation of John P. Doherty, Esq. in Support of Defendant Barclays' Motion to Dismiss, dated February 7, 2014
Freddie Mac:	Federal Home Loan Mortgage Corporation
Loans:	The mortgage loans deposited into the Trusts
New Century:	NC Capital Corporation and its affiliates
New Century Loans:	Loans with New Century as an originator and/or Original Loan Seller
Original Loan Seller:	"Original Loan Seller" as the term is defined in PSA BR2 and PSA BR3
PSAs:	Collectively, PSA BR2, PSA BR3, PSA BR4, and PSA BR5
PSA BR2:	BR2 Pooling and Servicing Agreement between SABR, as depositor, Barclays Capital Real Estate Inc. d/b/a HomEq Servicing, as servicer, WMC, as responsible party, DBNTC, as trustee and Wells Fargo Bank, N.A., as custodian, dated as of April 1, 2007, attached to the Doherty Aff. as Exhibit 4
PSA BR3:	BR3 Pooling and Servicing Agreement between SABR, as depositor, Barclays Capital Real Estate Inc. d/b/a HomEq Servicing, as servicer, WMC, as responsible party, DBNTC, as trustee and Wells Fargo Bank, N.A., as custodian, dated as of May 1, 2007, attached to the Doherty Aff. as Exhibit 6
PSA BR4:	BR4 Pooling and Servicing Agreement between SABR, as depositor, Barclays Capital Real Estate Inc. d/b/a HomEq Servicing, as servicer and DBNTC, as trustee, dated as of May 1, 2007, attached to the Doherty Aff. as Exhibit 8

[1] As used herein, "DBNTC" shall refer to DBNTC and the certificateholders in the Trust.

PSA BR5:	BR5 Pooling and Servicing Agreement between BCAP LLC, as depositor, Barclays Capital Real Estate Inc. d/b/a HomEq Servicing, as servicer and DBNTC, as trustee, dated as of June 1, 2007, attached to the Doherty Aff. as Exhibit 10
R&Ws:	Representations and warranties
Repurchase Protocol:	The parties' obligations to each other in connection with alleged Loan R&W breaches under Section 3 of the Barclays Representation Agreements
Securitizations:	The securitizations known as BR2, BR3, BR4 and BR5
Summons:	The Summons with Notice filed by DBNTC on May 17, 2013, attached to the Doherty Aff. as Exhibit 2
Supplemental Summons:	The Supplemental Summons with Notice filed by DBNTC on June 14, 2013, attached to the Doherty Aff. as Exhibit 3
Sponsor:	Sutton Funding LLC
SABR:	Securitized Asset Backed Receivables LLC
Trusts:	The trusts created for the Securitizations
Trustee:	Plaintiff DBNTC, in its capacity as trustee of the Trusts
WMC:	Defendant WMC Mortgage, LLC, as successor to WMC Mortgage Corp.
WMC Loans:	Loans with WMC as an originator and/or Original Loan Seller

Defendant Barclays respectfully submits this memorandum of law in support of its motion, pursuant to CPLR 305, 3013 and 3211(a)(1), (2), (5), (7) and (8) to dismiss the Complaint with respect to Barclays with prejudice.

PRELIMINARY STATEMENT

The Complaint is barred in its entirety by the First Department's recent decision in *ACE Securities Corp. v. DB Structured Products, Inc*., 112 A.D.3d 522, 977 N.Y.S.2d 229 (1st Dep't 2013) ("*ACE II*"). DBNTC failed to satisfy a condition precedent by failing to provide the 60-day notice and opportunity to cure period ***for any Loan*** prior to filing suit. The *ACE II* decision held that a summons is a "***nullity***" with respect to any Loan unless the defendant has received ***pre-suit*** notice and the contractually-specified time period to cure the alleged R&W defect for that Loan prior to the initiation of the suit. In *ACE II*, plaintiff's failure to provide notice and the full cure period before filing suit was a "***failure to comply with a condition precedent***" that "***rendered their summons with notice a nullity***." *Id*. (emphasis added).

Here, Barclays was entitled to notice and a 60-day cure period before suit could be filed against it. By DBNTC's ***own admission*** in the Complaint -

- ***DBNTC never sent a single repurchase demand prior to filing suit in BR2, BR3 or BR4***.
- ***DBNTC filed suit before the expiration of the 60-day cure period in connection with the sole pre-suit repurchase demand issued in BR5***.

Thus, DBNTC sent only a single pre-suit repurchase demand in connection with one of the four Securitizations in this litigation (in BR5), but even there, DBNTC failed to provide the contractually-specified cure period before filing suit (the ***exact scenario*** that warranted dismissal in *ACE II*). Under *ACE II*, the statute of limitations expired on the sixth anniversary of the closing of the Securitizations. Therefore, under *ACE II*, the Summons is a "nullity" and claims

regarding ***every Loan*** in the Complaint – and any additional claims for alleged breaches of R&Ws – are barred by the statute of limitations. The Complaint should therefore be dismissed with prejudice in its entirety.

BACKGROUND

I. The Securitizations

This litigation relates to four separate Securitizations known as BR2, BR3, BR4 and BR5, for which DBNTC acts as Trustee.[2] Prior to the Securitizations' respective Closing Dates, which occurred between May and July 2007, the Sponsor purchased the individual Loans and then transferred the Loans to the respective Depositor for the respective Securitization. *See* Compl. ¶ 34. Pursuant to the PSAs, the Loans were pooled in the Trusts, which issued certificates that were sold to investors. *See* Compl. ¶ 36. Barclays was not a party to the PSAs, but separately entered into a Barclays Representation Agreement with the respective Depositor for the purpose of making enumerated R&Ws regarding the Loans. *See* PSAs at p. 1; Barclays Representation Agreements BR2, BR3 and BR5 at p. 2, BR4 at p. 1. The PSAs and the Barclays Representation Agreements, which contain substantially similar provisions across the four Securitizations, govern the parties' rights and obligations in this action. *See* Compl. ¶ 11.

Barclays' R&Ws with respect to Loans for which New Century is the Original Loan Seller are contained in Section 2 and Exhibit I of the Barclays Representation Agreements. *See* Compl. ¶ 41. Section 6 of the Barclays Representation Agreement for BR2 and BR3 contain additional R&Ws with respect to Loans for which WMC is the Original Loan Seller, but the Complaint does not allege claims against Barclays for R&W breaches for WMC Loans. *See id.*

[2] Facts that are derived from the Complaint, which is annexed to the Doherty Aff. as Exhibit 1, are assumed to be true for purposes of this Motion only. Barclays disputes the Complaint's allegations and denies any liability to DBNTC.

The effective date of all of Barclays' R&Ws was on or before the "Closing Date" of the applicable Securitization, which is May 17, 2007 for BR2, June 13, 2007 for BR3, June 14, 2007 for BR4 and July 10, 2007 for BR5, respectively. *See* Barclays Representation Agreements, Section 2. Therefore, ***the date on which the statute of limitations began to run on all claims relating to Barclays' R&Ws contained in Section 2 and Exhibit I of the Barclays Representation Agreements was no later than May 17, 2007 (BR2), June 13, 2007 (BR3), June 14, 2007 (BR4) and July 10, 2007 (BR5), respectively.***

II. The Repurchase Protocol

Section 3(a) of the Barclays Representation Agreements prescribes the parties' obligations to each other in connection with Barclays' R&Ws (the "Repurchase Protocol"). *See* Compl. ¶ 66. If there is a breach of a Barclays' R&W that "materially and adversely affects the value of the [New Century] Mortgage Loans or the interest of the Depositor therein … [Barclays] shall cure such breach in all material respects and, if such breach cannot be cured, [Barclays] shall, within sixty (60) calendar days of [Barclays'] receipt of request … purchase such [New Century] Mortgage Loan at the Repurchase Price."[3] Barclays Representation Agreements, Section 3(a); Compl. ¶ 66.

[3] In addition to R&Ws made with respect to Loans originated by New Century, Barclays made a limited set of R&Ws with respect to WMC Loans included in BR2 and BR3. *See* Compl. ¶ 41. Specifically, pursuant to Section 6 of BRA BR2 and BRA BR3, Barclays provided R&Ws that nothing had occurred "since the Servicing Transfer Date" of March 1, 2007 or "as of January 30, 2007 (the 'Original Sale Date')" to render certain R&Ws made by WMC in Schedule III of PSA BR2 and PSA BR3 "untrue in any material respect as of the Closing Date" of May 17, 2007 (BR2) and June 13, 2007 (BR3), respectively. BRA BR2 and BRA BR3, Section 6; Compl. ¶ 54. Barclays' remaining R&Ws with respect to WMC Loans relate to compliance with federal, state and local law. BRA BR2 and BRA BR3, Section 6(a) and (b). As such, Barclays' R&Ws with respect to WMC Loans cover only a narrow, post-transfer and pre-closing time frame and a small subset of the characteristics of Loans. More importantly, there is no allegation in the Complaint that Barclays breached any of the R&Ws with respect to WMC Loans. In fact, the only R&W breaches that are alleged in the Complaint with respect to WMC Loans do not concern violations of law, and they relate to circumstances that already existed either at the time of Loan origination, or as of the Servicing Transfer Date or the Original Sale Date. Compl. ¶¶ 75, 83, 88, 93, 96, 98, 106-7, 113-16. Furthermore, because DBNTC (1) sent breach notices in connection with the first three BR2 investigations – presumably concerning only

Under the clear and unambiguous terms of the Repurchase Protocol set forth in Section 3(a) of the Barclays Representation Agreements, no claim for breach of R&Ws can be brought unless and until DBNTC provides Barclays notice of the alleged R&W breaches and the 60-day cure or repurchase period has expired.

The Barclays Representation Agreements further provide that the Repurchase Protocol is the ***sole remedy*** available to DBNTC for any R&W breach by Barclays alleged in the Complaint:

> It is understood and agreed that the obligation of [Barclays] set forth in Section 3(a) to purchase or substitute for a [New Century] Mortgage Loan in breach of a representation or warranty contained in Section 2 constitutes the ***sole remedy*** of the Depositor or any other person or entity with respect to such breach.

Barclays Representation Agreements, Section 3(b) (emphasis added).

Each Loan is to be repurchased at the "Repurchase Price" as defined in the applicable PSAs. Compl. ¶ 71; PSAs, Article I. Upon payment of the Repurchase Price, and in order to complete the repurchase, DBNTC must arrange for the reassignment of the Loan to Barclays and the delivery of the Loan documents held by DBNTC relating to the Loan to Barclays. Barclays Representation Agreements, Section 3(a).

III. Procedural History and the Filing of the Complaint

Prior to filing the threadbare Summons and Supplemental Summons, DBNTC did not send any demand notices in connection with BR2, BR3 and BR4. The sole pre-suit demand concerning any of the four Securitizations involved only BR5, and that demand notice was sent on April 1, 2013 – 47 days before the Summons was filed on May 17, 2013. Therefore, DBNTC

WMC Loans – exclusively to WMC and not to Barclays; and (2) followed up its first R&W breach notice to Barclays in connection with BR3 with a letter to counsel for Barclays specifically identifying the New Century Loans identified through its investigation, DBNTC has effectively recognized that it does not have any viable claims against Barclays for Loans originated by WMC. *See* Compl. ¶¶ 78, 85, 89.

failed to comply with the 60-day notice and cure period set forth in the Repurchase Protocol for any Loan in this lawsuit.[4]

The Complaint was filed on December 11, 2013, months after the expiration of the statute of limitations for the breach of R&W claims asserted in this action.

1. BR2

DBNTC did not send a demand notice relating to the Loans in BR2 until almost five months after the Summons was filed and the statute of limitations had expired. A timeline of the procedural history of DBNTC's BR2 claims is detailed below:

DBNTC filed the Summons on May 17, 2013 – six years to the day of the Closing Date of the BR2 Securitization – which asserted that WMC and/or Barclays had breached unidentified R&Ws with respect to an unidentified number of unidentified BR2 Loans.

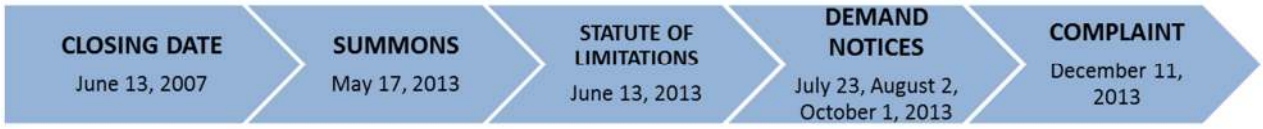
Almost five months after the Summons was filed, on or about October 8, 2013, DBNTC sent Barclays and WMC a demand notice alleging R&W breaches and demanding that Barclays or WMC cure or repurchase 2,050 BR2 Loans, without specifying which of the identified Loans were purportedly covered by Barclays' R&Ws. *See* Compl. ¶ 99. To date, Barclays has not received any other notice or demand letter concerning BR2 Loans.

[4] Barclays did not respond to DBNTC's demand notices for several reasons, including: DBNTC sent almost all the breach notices after the statute of limitations ran as to R&W claims; DBNTC failed to provide "prompt written notice" under Section 2.08 of the PSA; and, DBNTC had already commenced this lawsuit two weeks before the 60-day notice period expired on R&W claims as to BR5.

In the Complaint, DBNTC asserted causes of action against Barclays and WMC for breach of contract, alleging breaches of R&Ws by Barclays and WMC with respect to 2,873 BR2 Loans. Compl. ¶¶ 74, 82, 88, 92.

2. BR3

DBNTC did not send a demand notice relating to the Loans in BR3 until more than one month after the Summons was filed and the statute of limitations had expired. A timeline of the procedural history of DBNTC's BR3 claims is detailed below:



DBNTC filed the Summons on May 17, 2013. The Summons fails to identify which, if any, Barclays' R&Ws were breached, or which or how many Loans, if any, are allegedly defective.

On or about July 23, 2013, DBNTC sent Barclays and WMC a demand notice alleging R&W breaches and demanding that Barclays or WMC cure or repurchase certain BR3 Loans, without specifying which of the identified Loans were purportedly covered by Barclays' R&Ws. *See* Compl. ¶ 108. Only later, by letter to Barclays dated August 2, 2013, did DBNTC specify which of the Loans identified in the July 18, 2013 correspondence were originated by New Century, and not WMC. *See* Compl. ¶ 108.

On or about October 1, 2013, DBNTC sent Barclays and WMC a second demand notice as to 2,597 BR3 Loans. *See* Compl. ¶ 117. To date, Barclays has not received any other notice or demand letter concerning BR3 Loans.

In the Complaint, DBNTC asserted causes of action against Barclays for breach of contract, alleging breaches of R&Ws with respect to 3,184 BR3 Loans. Compl. ¶¶ 105 and 112.

3. BR4

DBNTC did not send a demand notice relating to the Loans in BR4 until more than two months after the Supplemental Summons was filed and the statute of limitations had expired. A timeline of the procedural history of DBNTC's BR4 claims is detailed below:

Notably, the initial Summons filed in this action did not contain any allegations regarding BR4. DBNTC filed the Supplemental Summons on June 14, 2013 – six years to the day of the Closing Date of the BR4 Securitization – for the specific purpose of including BR4 in this action. The Supplemental Summons contains only the following conclusory allegation with respect to alleged R&W breaches: "Barclays also breached its representations and warranties with respect to loans in the SABR 2007-BR4 Trust." *Id.* The Supplemental Summons has no other allegations specifically addressed to BR4 Loans. *Id.*

On or about August 27, 2013, DBNTC sent Barclays a demand notice alleging R&W breaches and demanding that Barclays cure or repurchase 132 BR4 Loans. *See* Compl. ¶ 125.

On or about October 1, 2013, DBNTC sent Barclays a second demand notice requesting that Barclays cure or repurchase 98 BR4 Loans. *See* Compl. ¶ 137.

On December 2, 2013, DBNTC sent Barclays a third demand notice as to an additional 190 BR4 Loans. *See* Compl. ¶ 149. To date, Barclays has not received any other notice or demand letter concerning BR4 Loans.

In the Complaint, DBNTC asserts a cause of action against Barclays for breach of contract in connection with alleged breaches of R&Ws with respect to 420 BR4 Loans. Compl. ¶¶ 124, 128 and 140.

4. BR5

DBNTC sent two demand notices relating to the Loans in BR5, one less than 60 days before, and the other almost four months after, the Summons was filed. A timeline of the procedural history of DBNTC's BR5 claims is detailed below:

On or about April 1, 2013, DBNTC sent a demand notice to Barclays alleging breaches of R&Ws and demanding that Barclays cure or repurchase 326 BR5 Loans. Compl. ¶ 157.

Two weeks before the expiration of the 60-day notice and cure period under the Barclays Representation Agreement, DBNTC filed the Summons.

On September 12, 2013, almost four months after filing the Summons and three months after the statute of limitations expired, DBNTC sent a second demand notice as to 1,917 BR5 Loans. Compl. ¶ 165. To date, Barclays has not received any other notice or demand concerning BR5 Loans.

In the Complaint, DBNTC asserts a cause of action against Barclays for breach of contract in connection with alleged breaches of R&Ws with respect to 2,156 BR5 Loans. Compl. ¶¶ 154 and 160.

5. Summary

The procedural history of the four Securitizations is detailed below:

	BR2	**BR3**	**BR4**	**BR5**
Closing	5/17/2007	6/13/2007	6/14/2007	7/10/2007
Pre-Summons Notice	None	None	None	4/1/2013
Summons/ Supplemental Summons	5/17/2013	5/17/2013	6/14/2013	5/17/2013
Expiration of Statute of Limitations	5/17/2013	6/13/2013	6/14/2013	7/10/2013
Post-Summons Notice(s)	10/8/2013	7/23/2013 (amended 8/2/2013) 10/1/2013	8/27/2013 10/1/2013 12/2/2013	12/2/2013
Complaint	12/11/2013			

ARGUMENT

I. DBNTC's Claims against Barclays Are Time-Barred in their Entirety

The First Department's recent *ACE II* decision confirms that DBNTC's claims "***accrued on the closing date … when any breach of the representations and warranties contained therein occurred***." 112 A.D.3d 522, 977 N.Y.S.2d 229, 231 (1st Dep't 2013) (holding that "[t]he motion court erred in finding that plaintiff's claims did not accrue until defendant either failed to timely cure or repurchase a defective mortgage loan") (emphasis added). This decision rests on the basic proposition that, because a repurchase obligation is only a remedy, the refusal to repurchase is irrelevant to the running of the statute of limitations that began to accrue when the relevant R&Ws were made. *See id.*; *see also U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, Index No. 650369/13, 2014 WL 176813, at *4 (Sup. Ct. N.Y. County Jan. 15, 2014) (Bransten, J.) ("*DLJ Mortg.*") (adopting *ACE II*'s holding that statute of limitations for breach of contract runs from the date the representations and warranties were made); *Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2005-S4 ex rel. HSBC Bank USA, Nat'l Ass'n v. Nomura*

Credit & Capital, Inc., Index No. 653541/11, 39 Misc. 3d 1226(A), 2013 WL 2072817, at *8 (Sup. Ct. N.Y. County May 10, 2013) ("*Nomura*") (same).

Here, as in *ACE II*, *DLJ Mortg.* and *Nomura*, the R&Ws were either true or false when made by Barclays in 2007. (Consistent with this, DBNTC alleges in the Complaint that the Loans were in breach of R&Ws at the time they were sold to each Trust. *See* Compl. ¶ 4.) As such, the statute of limitations on DBNTC's claims began to run no later than the respective Closing Dates for the Securitizations – May 17, 2007 (BR2), June 13, 2007 (BR3), June 14, 2007 (BR4) and July 10, 2007 (BR5) – and expired six years later.[5]

As discussed below, the Summons and Supplemental Summons failed to toll the applicable statute of limitations for each Securitization because: (1) DBNTC failed to provide the 60-day notice and opportunity to cure or repurchase period for any Loan in advance of commencing this action, thus rendering the Summons and Supplemental Summons nullities under *ACE II* for failure to satisfy a condition precedent; and (2) the Summons and Supplemental Summons do not comply with the minimum pleading requirements of CPLR 305(b) and are therefore jurisdictionally defective.

[5] In the alternative, Barclays' R&Ws were made on the "as of" dates the PSAs were signed (April 1, 2007 (BR2), May 1, 2007 (BR3), May 1, 2007 (BR4) and June 1, 2007 (BR5)), which were earlier than the respective Closing Dates. The "as of" dates are when "the alleged misrepresentations were made" and therefore DBNTC's claims are time barred in their entirety as to BR2, BR3 and BR4 because the respective Summons were filed after the "as of" dates of the PSAs. *See Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2006-S2, by HSBC Bank USA, Nat'l Ass'n v. Nomura Credit & Capital, Inc.*, Index No. 651827/12, 2013 WL 6840128, at *1 (Sup. Ct. N.Y. County Dec. 23, 2013) (Sherwood, J.) (holding that the statute of limitations ran from the "as of" date of the relevant agreement when the R&Ws were made, and not from the Closing Date). In the further alternative, to the extent the Court determines a shorter statute of limitations applies pursuant to CPLR 202, DBNTC's claims are likewise barred in their entirety.

A. DBNTC Failed to Comply With the 60-Day Notice Period As a Condition Precedent to Commencing the Action, Rendering the Summons and Supplemental Summons a Nullity

Under *ACE II,* the Summons and Supplemental Summons are null and void because DBNTC failed to satisfy a condition precedent to filing this action. The Barclays Representation Agreements, like the applicable agreements in *ACE II,* expressly provide Barclays with the right to a 60-day notice and cure period to permit it to assess and act upon any Loan-specific R&W demand. *See* Section 3(a) of the Barclays Representation Agreements. *ACE II* establishes that, under these provisions, DBNTC's failure to provide Barclays with ***notice and the requisite time*** to cure R&W breaches or repurchase Loans in advance of filing suit is a "failure to comply with a condition precedent" that "rendered [the] summons with notice a nullity." By its own admissions, DBNTC did not send Barclays any demand notices for BR2, BR3 or BR4 and did not provide Barclays with the 60-day notice and cure period for BR5 prior to filing the Summons. Accordingly, as in *ACE II,* the Summons and Supplemental Summons are null and void and are ineffective due to DBNTC's failure to satisfy a condition precedent to the initiation of this action. *Id.* ("The MLPA and PSA provided that the trustee was not entitled to sue or to demand that defendant repurchase defective mortgage loans until it discovered or received notice of a breach *and* the cure period lapsed") (emphasis in original).

While DBNTC may argue that the "Accrual Provision" in Section 3(a) of the Barclays Representation Agreements – which provides that a cause of action "shall accrue" following (i) discovery of a breach; (ii) failure to cure or repurchase; and (iii) demand for compliance with the Agreement – serves to extend the statute of limitations under New York law, this argument was soundly rejected in a recent decision (following *ACE II*) by the U.S. District Court for the Southern District of New York in *Lehman XS Trust, Series 2006-4N ex rel. U.S. Bank Nat. Ass'n*

v. GreenPoint Mortgage Funding, Inc., 1:13-cv-04707-SAS, 2014 WL 108523, at *4 (S.D.N.Y. Jan. 10, 2014) ("*GreenPoint*").[6] The *GreenPoint* court considered an "Accrual Provision" virtually identical to that in Section 3(a) of the Barclays Representation Agreements[7] and held that – consistent with *ACE II* – this language did not "define a new breach which triggers the running of a new limitation period." *Id*. In so holding, *GreenPoint* noted that "parties may not contractually adopt an accrual provision that effectively extends the statute of limitations before any claims have accrued." *Id*. (citing *John J. Kassner & Co. v. City of New York*, 46 N.Y.2d 544, 551, 415 N.Y.S.2d 785, 789-90 (1979) ("If the agreement to waive or extend the Statute of Limitations is made at the inception of liability it is unenforceable because a party cannot in advance, make a valid promise that a statute founded in public policy shall be inoperative." (quotation marks and citations omitted)); *Caronia v. Philip Morris USA, Inc.*, 715 F.3d 417, 431 (2d Cir. 2013) (holding that a plaintiff does not have the "'power to put off the running of the Statute of Limitations indefinitely.'") (quotations omitted); *Lehman Bros. Holdings, Inc. v. Evergreen Moneysource Mortg. Co*., 793 F. Supp. 2d 1189, 1194 (W.D. Wash. 2011) (applying New York law in holding that parties "may not extend the accrual date of the statute of limitations simply by delaying its demand for payment [because a] cause of action for breach of contract accrues when the party making the claim possesses a legal right to demand payment.").

[6] A copy of the *GreenPoint* decision is annexed to the accompanying Affidavit of John P. Doherty as Exhibit 12.

[7] "Any cause of action against the Seller relating to or arising out of the Breach of any representations and warranties made in Sections 6 and 7 shall accrue as to any Mortgage Loan upon (i) discovery of such Breach by the Purchaser or notice thereof by the Seller to the Purchaser, (ii) failures by the Seller to cure such Breach or repurchase such Mortgage Loan as specified above, and (iii) demand upon the Seller by the Purchase[r] for compliance with this Agreement." *GreenPoint*, 2014 WL 108523, at *2.

GreenPoint further noted that courts applying CPLR 206(a)[8] distinguish between a substantive demand (*i.e.*, an "essential [legal] element of the plaintiff's cause of action" that must be made before the statute of limitations can begin to run) and a procedural demand (*i.e.*, a "mere procedural trigger to commence proceedings" that is not a requisite element of a cause of action). 2014 WL 108523, at *3. The *GreenPoint* court found that because the alleged underlying breach occurred at the time the R&Ws were made – and not at the time the defendant allegedly failed to cure or comply with any repurchase obligations – the Accrual Provision was a "pre-suit remedial provision that is neither an element of the breach of contract claim, nor grounds for a separate breach of contract action," and the plaintiff's claims began to run at the time that the Purchase Agreement was entered into and the R&Ws were made. *Id*. at *4.

Nor can DBNTC circumvent its obligation to satisfy the Repurchase Protocol by arguing that Barclays repudiated the relevant agreements by not repurchasing the allegedly breaching Loans. *See* Compl. ¶ 7. Such reasoning was effectively rejected by the First Department in *ACE II*. Furthermore, repudiation of an agreement must be "definite and final" or "unequivocal" and DBNTC fails to allege any such conduct by Barclays. *See Jacobs Private Equity, LLC v. 450 Park LLC*, 22 A.D.3d 347, 347, 803 N.Y.S.2d 14, 15 (1st Dep't 2005) (dismissing claim for anticipatory breach where there was no "definite and final communication" that defendant refused "*all* future performance of its obligations under the [agreement]") (emphasis added); s*ee also Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 463, 682 N.Y.S.2d 664, 667 (1998) ("*Norcon*") (quoting commentary noting that repudiation must be "unequivocal").

[8] CPLR 206(a) provides that "where a demand is necessary to entitle a person to commence an action, the time within which the action must be commenced shall be computed from the time when the right to make the demand is complete."

Accordingly, the Summons and Supplemental Summons are nullities under *ACE II* and this action is time-barred in its entirety.

B. The Summons and Supplemental Summons Are Jurisdictionally Defective Because They Fail to Satisfy the Minimum Pleading Requirements of CPLR 305(b)

Additionally, this case should be dismissed because the Summons and Supplemental Summons are jurisdictionally defective under CPLR 305(b) and failed to toll the applicable statute of limitations. CPLR 305(b) mandates that, if a complaint is not served with the summons, "the summons shall contain or have attached thereto a notice stating the nature of the action and the relief sought." "Outside the context of *simple … cases*, the danger of dismissal due to a conclusory notice looms large." CPLR 305(b), Practice Commentary (emphases added).

A summons with notice that does little more than refer the defendant generally to possible theories of recovery and leaves the defendant "to guess the precise claim against [it]" must be dismissed as jurisdictionally defective. *See Roth v. State Univ. of New York*, 61 A.D.3d 476, 476, 876 N.Y.S.2d 403, 404 (1st Dep't 2009).

The deficiency of DBNTC's allegations is most glaring with respect to BR4. Almost one month after filing the Summons, DBNTC filed the Supplemental Summons for the sole purpose of including BR4 in this litigation. The totality of allegations concerning BR4 Loans is contained in the following conclusory assertion: "Barclays also breached its representations and warranties with respect to loans in the [BR4] Trust." Supplemental Summons at p. 5.

The Summons is equally deficient with respect to BR2, BR3 and BR5. For BR2, BR3 and BR5, DBNTC never identifies a single Loan that allegedly breached an identified R&W (among the approximately 15,000 Loans contained in these Securitizations). Barclays did not even have the benefit of pre-suit repurchase demands for BR2, BR3 or BR4 to assist in

identifying the Loans and R&Ws that would be at issue in this action (and still lacks that information today). Just as in *Roth*, merely citing generally to the source of legal obligations fails to provide the sort of notice that CPLR 305(b) demands.

This is not a simple breach of contract case for which a truncated summons with notice could provide adequate notice to Barclays. Here, the Loan pools across the four distinct Securitizations consisted of 21,236 unique Loans (each with, among many other things, a note, mortgage, loan application, and supporting documentation particular to each individual borrower), having a combined original principal balance of approximately $4.2 billion. Barclays' numerous R&Ws contain multiple subparts and, conservatively speaking, the R&Ws cover more than 100 specific characteristics of the Loans (and related documentation). Given the nature of the alleged R&W breaches – relating to specific characteristics of individual Loans – DBNTC was, at a minimum, required to identify the allegedly defective Loans and the applicable R&Ws. Without that information, Barclays, like the defendant in *Roth*, would be left – in the words of the First Department – "to guess the precise claim against [it]," which is insufficient under CPLR 305(b). *See Roth*, 61 A.D.3d at 476, 876 N.Y.S.2d at 404.

The law is clear that where, as here, only a defective summons with notice is served prior to the expiration of the statute of limitations, the plaintiff's claim is time barred. *See Wells v. Mount Sinai Hosp. & Med. Ctr.*, 196 A.D.2d 749, 602 N.Y.S.2d 45 (1st Dep't 1993) (dismissing action where summons did not comply with CPLR 305(b) and consequently failed to toll the statute of limitations, and further noting that the plaintiff could not amend the jurisdictionally void summons to "breathe life into a dead claim"); *see also Kaplan v. Manoli*, 100 A.D.2d 928, 928, 474 N.Y.S.2d 815, 816 (2d Dep't 1984), *aff'd*, 64 N.Y.2d 849, 487 N.Y.S.2d 323 (1985) ("the complete absence of the notice requirements contained in CPLR 305(b) is a jurisdictional

defect"); *Frerk v. Mercy Hosp.*, 99 A.D.2d 504, 504, 470 N.Y.S.2d 673, 674 (2d Dep't), *aff'd*, 63 N.Y.2d 635, 479 N.Y.S.2d 519 (1984) (noting same). As the Court of Appeals observed in *Parker v. Mack*, 61 N.Y.2d 114, 117-18, 472 N.Y.S.2d 882, 883 (1984), "the Legislature … has determined and fixed a defendant's entitlement, at the time and as part of service of process, to knowledge concerning the claim being asserted against him – an entitlement which imposes no conceivable burden or hardship on the plaintiff."

II. The Complaint Must be Dismissed in Its Entirety Because DBNTC Failed to Provide Prompt Notice of Alleged R&W Breaches

The Complaint should be dismissed in its entirety because "prompt written notice" of any breach of the R&Ws was not provided in accordance with Section 2.08 of the PSAs. Under New York law, the obligation to provide "prompt written notice" of a breaching loan within a reasonable time is not satisfied where, as here, such notice is not provided for years after the breach was or should have been discovered. *See, e.g., Morgan Guar. Trust Co. of New York v. Bay View Franchise Mortg. Acceptance Co.*, No. 00 Civ. 8613, 2002 WL 818082, at *10 (S.D.N.Y. Apr. 30, 2002) (notice of breach eight months after discovery was not prompt); *LaSalle Bank Nat'l Assoc. v. Citicorp Real Estate Inc.*, No. 02-cv-7868, 2003 WL 1461483, at *7 (S.D.N.Y. Mar. 21, 2003) (notice of breach within two years of discovery was not prompt). "A party 'discovers' a breach when it knows or should know that the breach has occurred." *Morgan Guar.*, 2002 WL 818082, at *5. And, where a party has received notice of facts suggesting that a breach may have occurred, it becomes incumbent upon that party "to pick up the scent and nose to the source, and if the quest confirms this suspicion, then he must make the decision to raise the claim with reasonable dispatch." *Id*.

The Trust and its certificateholders clearly were, or should have been, on notice of any purported breaches long before the first notice was sent in April 2013. Freddie Mac – the

directing certificateholder that conducted the investigation of the BR4 Loans – was one of the two prime movers in the United States mortgage market and, thus, was uniquely situated to understand and identify the likelihood and magnitude of any breaches with respect to the Loans. In addition, the Trust and its certificateholders were in possession of the Loan files for years before any notice or repurchase demand was sent to Barclays. *See* PSAs, Section 2.02. Certificateholders also received monthly statements providing information and statistics regarding the performance of the Loans. *See* PSAs, Section 4.03. If – as DBNTC alleges – Loan breaches exist throughout the Loan pool, the foregoing information should have put the Trust and the certificateholders on notice of facts "suggestive of a breach" requiring further investigation years ago. *See Policemen's Annuity and Benefit Fund of the City of Chicago v. Bank of America, N.A.*, 907 F. Supp. 2d 536, 553-54 (S.D.N.Y. 2012) (noting that public reporting of general loan deficiencies coupled with access to loan files put trustee on notice of potential breaches and obligated it to investigate any suspicions of the loans in the trusts). As such, waiting six or more years to send demand notices for any of the Securitizations is untimely.

III. Barclays Has No Obligation to Repurchase Non-Existent Loans That Were Previously Liquidated

A. Barclays Has No Obligation to Repurchase Liquidated Loans Due to DBNTC's Failure to Provide Prompt Notice

If a Loan defaults, and is headed to foreclosure or liquidation, DBNTC is required to give notice ***at that time*** to Barclays of any R&W breach claim. A loan default constitutes a "red flag" suggesting that a breach may have occurred – thereby requiring the aggrieved party to promptly investigate. *See Morgan Guar.*, 2002 WL 818082; *see also MASTR Asset Backed Securities Trust 2006-HE3, by U.S. Bank Nat'l Assoc. v. WMC Mortg. Corp.*, No. Civ. 11-2542, 2012 WL 4511065, at *7 n.11 (D. Minn. Oct. 1, 2012) (applying New York law) ("[n]otice of default may

be enough to put a party on notice that such a breach may have occurred so as to trigger a duty to investigate").

If DBNTC does not provide Barclays with timely notice, and instead chooses to liquidate a defaulting Loan, DBNTC denies Barclays its bargained-for right to be involved with the disposition of the allegedly defective Loan from the moment a potential R&W claim could be identified. Under the Barclays Representation Agreements, Barclays has the right to investigate and cure an R&W breach (for instance, by obtaining a missing document from the borrower). And, if there is an R&W breach, Barclays has the right to substitute in a new loan (within a certain time period) or repurchase the defective Loan. DBNTC's failure to provide timely notice to Barclays denied Barclays its contractual right to maximize value and mitigate losses. *See MASTR Asset Backed Securities Trust 2006-HE3*, 2012 WL 4511065, at *7 ("[p]roviding [R&W maker] notice of the R&W breach only after the Trust elected to foreclose eviscerates [R&W maker's] mitigation opportunities"). In such an instance, DBNTC has elected unilaterally to pursue a remedy, to the exclusion of Barclays, and as such it cannot now demand that the Loans also be repurchased by Barclays.

B. Barclays Is Not Contractually Obligated to Repurchase Liquidated Loans

The language of the Barclays Representation Agreements and the PSAs reflects that Barclays is not obligated to repurchase non-existent Loans. A liquidated Loan has a Repurchase Price of $0, confirming that repurchase was not intended by the parties.[9] *See MASTR Asset Backed Securities Trust 2006-HE3*, 2012 WL 4511065, at *6 n.9 (stating that the fact that the

[9] A Loan must be repurchased at the "Repurchase Price," which is defined as "an amount equal to the sum of … the unpaid principal balance of such Mortgage Loan as of the date of purchase …." Barclays Representation Agreements, Section 3(a); PSAs, Art. 1, Definitions, "Repurchase Price." There is no "unpaid principal balance" for a liquidated Loan. The "Stated Principal Balance" of any Loan that is a "Liquidated Mortgage Loan" "shall be ***zero***." PSAs, Article 1, Definitions, "Stated Principal Balance" (emphasis added).

repurchase price would be $0 "further shows that the parties did not contemplate the repurchase remedy as being applicable in the present circumstance."). Moreover, the documents held by DBNTC relating to a Deleted Mortgage Loan must be reassigned to Barclays, but a non-existent Loan cannot be "reassign[ed]" because it no longer exists. [10]

As such, Barclays has no obligation to repurchase liquidated Loans.

IV. DBNTC Is Limited to the Contractual Sole Remedy for Alleged Breaches of the Barclays Representation Agreements

If the Court does not dismiss the Complaint in its entirety, DBNTC is limited to the agreed-upon "sole remedy" for R&W breaches – the Repurchase Protocol – and is not entitled to relief outside the scope of this provision, including rescission or other monetary damages.

A. The "Sole Remedy" Provision Limits DBNTC's Damages

DBNTC expressly bargained for the Repurchase Protocol as the "sole remedy" in the event of any R&W breaches. Specifically, the Barclays Representation Agreements state that "[i]t is understood and agreed that the obligation of [Barclays] … to purchase or substitute [] a Mortgage Loan in breach of a representation or warranty contained in Section 2 constitutes the ***sole remedy*** … with respect to such breach." Barclays Representation Agreements, Section 3(b) (emphasis added). Noticeably absent from this "sole remedy" language is any mention of – let alone express right to – rescission or rescissory, compensatory or consequential damages. Accordingly, these remedies are not available to DBNTC.

[10] Under the laws of many states, "including New York, a foreclosure decree operates to merge the interests of mortgagor and mortgagee, and vest in the purchaser the entire interest and estate as it existed at the date of the mortgage." *See, e.g., MASTR Asset Backed Securities Trust 2006-HE3*, 2012 WL 4511065, at *4. ("[i]t would be a tortured reading … to equate [a] loan's constituent parts with the loan itself, and hold that merely because the trustee can produce certain parts of the 'Mortgage Loan'—the Mortgage File, foreclosure proceeds, etc.—the Mortgage Loan as a whole remains to be repurchased.").

Numerous courts construing similar contracts have upheld parties' intent to limit themselves to the contractually specified remedies. *See, e.g., U.S. Bank Nat. Ass'n v. DLJ Mortg. Capital, Inc.*, Index No. 650369/13, 2014 WL 176813, at *4 (Sup. Ct. N.Y. County Jan. 15, 2014) (dismissing claims for compensatory, consequential, rescissory and equitable damages based on the "sole remedy" provision); *Assured Guar. Corp. v. EMC Mortgage, LLC*, Index No. 650805/12, 39 Misc. 3d 1207(A), 2013 WL 1442177, at *5 (Sup. Ct. N.Y. County Apr. 4, 2013) ("This court cannot ignore the language of the parties' agreement [] that plainly restricts [plaintiff] to the remedy of the Repurchase Protocol to enforce [defendant's] obligations under the Operative Documents."); *Ambac Assur. Corp. v. EMC Mortg. Corp.*, Index No. 651013/12, 2013 WL 2919062, at *5 (Sup. Ct. N.Y. County June 13, 2013) (holding that "damages for breaches of representations and warranties pertaining to the mortgage loans are limited to the Repurchase Protocol").

Nor can DBNTC claim that Barclays' alleged failure to comply with the Repurchase Protocol permits it to circumvent the sole remedy clause in favor of other damages. Under New York law, the failure to provide a contractually specified remedy does not subject a party to liability beyond that remedy. *See Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2005-S4 ex rel. HSBC Bank USA, Nat'l Ass'n v. Nomura Credit & Capital, Inc.*, Index No. 653541/11, 39 Misc. 3d 1226(A), 2013 WL 2072817, at *8 (Sup. Ct. N.Y. County May 10, 2013) ("[t]he repurchase obligation in this case is merely a remedy. It is not a duty independent of the Mortgage Representation breach of contract claims."); s*ee also ACE II*, 112 A.D.3d 522, 977 N.Y.S.2d 229, 231 (1st Dep't 2013) ("The motion court erred in finding that plaintiff's claims did not accrue until defendant either failed to timely cure or repurchase a defective mortgage loan").

B. The "Sole Remedy" Provision Bars DBNTC's Claims for Rescission or Any Other Damages

Notwithstanding DBNTC's unsubstantiated allegation that "Barclays' failure and/or refusal to comply with [its] obligations to cure or repurchase the Defective Loans for which [it is] responsible defeats the fundamental purpose of the relevant agreements for each Trust," DBNTC is not permitted to set aside the sole remedy agreed to by the parties and pursue rescission, rescissory or other damages. *See* Complaint ¶ 9 & Prayer for Relief (b). Rescission is available "only where there is lacking a complete and adequate remedy at law." *Rudman v. Cowles Commc'ns, Inc.*, 30 N.Y.2d 1, 13, 330 N.Y.S.2d 33 (1972); *New Shows, S.A. de C.V. v. Don King Prods., Inc.*, Nos. 99-9019, 99-9069, 2000 WL 354214, at *2 (2d Cir. Apr. 6, 2000) ("Indeed, what [plaintiff] seeks through rescission is ... payment for the net losses it suffered ... But since the legal remedy in this case is adequate, the equitable remedy of rescission is simply inappropriate."); *New Paradigm Software Corp. v. New Era of Networks, Inc.*, 107 F. Supp. 2d 325, 330 (S.D.N.Y.2000) (claim for rescission dismissed because "Plaintiff has asserted no reason why damages would not be an adequate remedy"). Here, DBNTC had agreed to and pled the "adequate remedy at law": *i.e.*, the Repurchase Protocol.

Because the remedy provided by the Repurchase Protocol is complete and adequate, rescission, rescissory damages and other monetary damages are legally unavailable to DBNTC. *See MBIA Ins. Co. v. Countrywide Home Loans, Inc.*, 105 A.D.3d 412, 413, 963 N.Y.S.2d 21, 22 (1st Dep't 2013) (holding that plaintiff was not entitled to the "very rarely used equitable tool" of rescissory damages where it was legally unavailable); *see also DLJ Mortg. Capital, Inc.*, 2014 WL 176813, at *5 (dismissing claims for rescissory damages because "Plaintiff has an alternative remedy – repurchase"); *MBIA Ins. Co. v. Residential Funding Co.*, Index No. 603552/08, 26 Misc. 3d 1204(A), 2009 WL 5178337, at *8 (Sup. Ct. N.Y. County Dec. 22,

2009) (plaintiff "cannot be permitted to circumvent the express provisions of the [contracts] through the assertion of quasi-contractual and equitable remedies that go beyond the negotiated terms of those agreements").

C. DBNTC's Claims of Repudiation Fail

While a party may repudiate an agreement by words or conduct, either must be "definite and final" or "unequivocal." *See Jacobs Private Equity, LLC v. 450 Park LLC*, 22 A.D.3d 347, 347, 803 N.Y.S.2d 14, 15 (1st Dep't 2005); *see also Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 463, 682 N.Y.S.2d 664, 667 (1998). DBNTC fails to allege any statements or conduct by Barclays repudiating the agreements that were "definite and final" or "unequivocal." Further, it is impossible for DBNTC to allege Barclays repudiated the agreements by failing to follow the Repurchase Protocol, as it is a remedy and not an independent contractual duty. *See Walnut Place LLC v. Countrywide Home Loans, Inc.*, 96 A.D.3d 684, 684-85, 948 N.Y.S.2d 580, 581 (1st Dep't 2012); *ACE II*, 112 A.D.3d 522, 977 N.Y.S.2d at 231.

Allowing DBNTC to seek any remedy other than specific performance of the Repurchase Protocol – including compensatory, consequential, equitable, or rescissory damages, or rescission itself – is impermissible because it would render the sole remedy provision meaningless. *See Ronnen v. Ajax Elec. Motor Corp.*, 88 N.Y.2d 582, 589, 648 N.Y.S.2d 422, 425 (1996) ("We have long and consistently ruled against any construction that would render a contractual provision meaningless or without force or effect."). The sophisticated parties bargained for the Loan-by-Loan repurchase remedy as the sole remedy with respect to claims asserted here. The parties must follow this protocol: DBNTC cannot seek to re-write the parties' agreements. *See Blonder & Co., Inc. v. Citibank, N.A.*, 28 A.D.3d 180, 182, 808

N.Y.S.2d 214, 217 (1st Dep't 2006) ("it is fundamental that courts enforce contracts, not rewrite them."). Accordingly, DBNTC's sole remedy is the repurchase of defective Loans under the Repurchase Protocol, and its claims for damages must be dismissed.

V. DBNTC's Claims for Attorneys' Fees and Costs Must Be Dismissed

DBNTC improperly seeks reimbursement for its attorneys' fees and costs from Barclays.[11] Under New York law, fees, costs and expenses will not be awarded under an indemnity provision unless the intention to do so is "unmistakably clear" from the language of the contract. *See Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491-93, 549 N.Y.S.2d 365, 366-68 (1989) (strictly construing indemnification clause in refusing to award reimbursement of plaintiff's attorneys' fees); *see also Gotham Partners, L.P. v. High River Ltd. P'ship*, 76 A.D.3d 203, 209, 906 N.Y.S.2d 205, 209 (1st Dep't 2010) (holding that based on a strict construction, a third-party indemnification clause does not encompass reimbursement of attorneys' fees to parties of the contract).

Here, because neither the Barclays Representation Agreements nor the PSAs explicitly provide for the recovery of attorneys' fees in litigation between the parties,[12] DBNTC cannot recover its attorneys' fees and costs. *See DLJ Mortg. Capital, Inc.*, 2014 WL 176813, at **5-6 (dismissing claims for indemnification in the RMBS context based on a similar provision which "[fell] short of satisfying [*Hooper's*] exacting standard"); *MASTR Asset Backed Securities Trust*

[11] While not explaining specifically how DBNTC is entitled to attorneys' fees and costs from Barclays (*see* Complaint ¶¶ 191, 213, 228, 235 & Prayer for Relief (d)), DBNTC attempts to impermissibly expand the definition of the Repurchase Price as defined in the PSAs to include such fees and costs. *See* Compl. ¶ 72.

[12] To the extent DBNTC is arguing that it is entitled to its attorneys' fees and expenses under the indemnification provisions of the PSAs, its argument must fail because the PSAs only contemplate indemnification with respect to third party claims, and not claims between the parties. PSAs, Section 6.05(a). This provision also does not identify any obligation by Barclays to indemnify DBNTC. *See id.* Similarly, should DBNTC look to Section 2.08 of the PSAs to support its claim, that provision explicitly affords the Trustee compensation from the "Collection Account" for the "legal expenses and costs of such [an] action [for a breach of representations and warranties made by Barclays]," and not from Barclays itself.

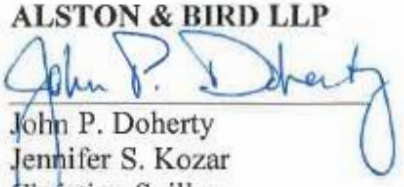
2006-HE3, ex rel. U.S. Bank Nat'l Assn v. WMC Mortg. Corp., Nos. Civ. 11-2542, 12-1372, 12-1831, 12-2149, 2013 WL 5596419, at *8 (D. Minn. Oct. 11, 2013) (same). Therefore, DBNTC's claim for attorneys' fees and costs against Barclays must fail.

CONCLUSION

For the reasons stated above, Barclays requests that this Court dismiss all claims of the Complaint asserted against Barclays with prejudice, and grant such other and further relief as it deems necessary and proper.

Dated: New York, New York
February 7, 2014

ALSTON & BIRD LLP

By: 

John P. Doherty
Jennifer S. Kozar
Christina Spiller
90 Park Avenue
New York, New York 10016
(212) 210-9400
Attorneys for Defendants

ADDENDUM B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DEUTSCHE BANK NATIONAL TRUST COMPANY, solely in its capacity as Trustee of the EQUIFIRST LOAN SECURITIZATION TRUST 2007-1, Plaintiff, v. EQUIFIRST CORPORATION, EQUIFIRST MORTGAGE CORPORATION OF MINNESOTA and BARCLAYS BANK PLC, Defendants.	Index No. 651957/2013 ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

ALSTON & BIRD LLP
90 Park Avenue
New York, New York 10016
Telephone: (212) 210-9400

Attorneys for Defendants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Statutes and Rules **Page(s)**

SUMMARY OF TERMS

Assignment Agreement:	Assignment, Assumption and Recognition Agreement between Sutton and EquiFirst Defendants, dated June 27, 2007, attached to the Doherty Aff. as Exhibit 4
Barclays:	Defendant Barclays Bank PLC
Barclays Legal Compliance R&Ws:	Representations and warranties made by Barclays in Section 2(c) of the Barclays Representations Agreement that the Loans complied with certain federal and state laws
Barclays Representation Agreement:	Barclays Representation Agreement between Barclays and Depositor, dated as of June 27, 2007, attached to the Doherty Aff. as Exhibit 5
Barclays Servicing Post-Origination R&Ws:	Representations and warranties made by Barclays in Sections 2(a) & (b) of the Barclays Representation Agreement that nothing occurred from the Servicing Transfer Date to the Closing Date (PSA) that would render untrue limited Loan-level R&Ws listed in Exhibit I to the Barclays Representation Agreement
Closing Date (MLPA):	The March 27, 2007 date on which Sutton purchased from EquiFirst Defendants, as sellers, the Loans
Closing Date (PSA):	The June 27, 2007 date of the securitization
Complaint:	The Complaint filed by DBNTC on November 18, 2013, attached to the Doherty Aff. as Exhibit 1
DBNTC:[1]	Plaintiff Deutsche Bank National Trust Company
Defendants:	Defendants EquiFirst Corporation, EquiFirst Mortgage Corporation of Minnesota, and Barclays Bank PLC
Depositor:	BCAP LLC
Doherty Aff.:	Affirmation of John P. Doherty in Support of Defendants' Motion to Dismiss, dated January 9, 2014
EquiFirst Corporation:	Defendant EquiFirst Corporation
EquiFirst Defendants:	Defendants EquiFirst Corporation and EquiFirst Mortgage

[1] As used herein, "DBNTC" shall refer to DBNTC and the certificateholders in the Trust.

	Corporation of Minnesota
EquiFirst Mortgage:	Defendant EquiFirst Mortgage Corporation of Minnesota
Freddie Mac:	Federal Home Loan Mortgage Corporation
Loans:	The mortgage loans deposited into the Trust
LTV:	Loan-to-value ratio
MLPA:	Mortgage Loan Purchase Agreement between Sutton and EquiFirst Defendants, dated as of March 1, 2007, attached to the Doherty Aff. as Exhibit 3
November 2013 Notice:	The notice dated November 1, 2013 sent by DBNTC to Barclays and EquiFirst Defendants
PSA:	Pooling and Servicing Agreement between Depositor, Barclays Capital Real Estate Inc. d/b/a HomEq Servicing, DBNTC, and The Bank of New York Trust Company, N.A., dated as of June 1, 2007, attached to the Doherty Aff. as Exhibit 6
R&Ws:	Representations and warranties
Repurchase Protocol:	The parties' obligations to each other in connection with alleged Loan R&W breaches under Section 2.03 of the PSA, Section 9.03 of the MLPA and Section 3 of the Barclays Representation Agreement
Securitization:	The securitization known as EquiFirst Loan Securitization Trust 2007-1
September 2012 Notice:	The notice dated September 13, 2012 sent by DBNTC to Barclays and EquiFirst Defendants
Servicing Transfer Date:	The April 23, 2007 date when EquiFirst Corporation, the Interim Servicer, transferred servicing of the Loans
Summons:	The Summons with Notice filed by DBNTC on May 31, 2013, attached to the Doherty Aff. as Exhibit 2
Sutton or Sponsor:	Sutton Funding LLC
Trust:	The trust created for the Securitization
Trustee:	Plaintiff DBNTC, in its capacity as trustee of the Trust

Defendants respectfully submit this memorandum of law in support of their motion, pursuant to CPLR 305, 3013 and 3211(a)(1), (2), (5), (7) and (8) to dismiss the Complaint.

PRELIMINARY STATEMENT

DBNTC alleges that certain Loans originated by the EquiFirst Defendants breached Defendants' R&Ws made to the RMBS securitization Trust concerning those Loans. The Complaint should be dismissed in its entirety with prejudice because – assuming, without conceding, the allegations in the Complaint are true – the responsible parties would be the EquiFirst Defendants, not Barclays – and the Complaint was filed after the statute of limitations expired against the EquiFirst Defendants.

The Complaint is time-barred against the EquiFirst Defendants. Because the EquiFirst Defendants' R&Ws were made effective as of April 23, 2007, under the First Department's recent decision in *ACE Securities Corp. v. DB Structured Products, Inc.*, Nos. 11384, M-5893, M-6111, 2013 WL 6670379 (1st Dep't Dec. 19, 2013)[2], the statute of limitations on these R&Ws began to run in April 2007 and expired six years later, on ***April 23, 2013.*** DBNTC did not file the (defective) Summons until ***May 31, 2013***, and accordingly, all claims against the EquiFirst Defendants must be dismissed.

The Complaint fares no better when it comes to Barclays.

First, the Summons is jurisdictionally defective under CPLR 305(b) and, thus, failed to toll the statute of limitations before it expired as to Barclays on June 27, 2013. Specifically, the Summons is entirely devoid of detail and, for instance, does not specifically identify the Barclays Representation Agreement or the MLPA, does not identify any specific Loans, does not identify any specific R&W breaches, and does not even disclose the number of Loans at issue. Thus, the

[2] A true and correct copy of the decision is annexed to the Doherty Aff. as Ex. 9.

Summons failed to provide Defendants with reasonable notice of DBNTC's claims and, therefore, failed to toll the statute of limitations, which expired against Barclays on June 27, 2013.

Second, in contrast to the EquiFirst Defendants' broad R&Ws, Barclays made only select R&Ws that are limited in scope and duration. The Complaint alleges that only 54 Loans – of the 1,748 Loans discussed therein – breach Barclays' R&Ws. Specifically, Barclays represented and warranted that nothing occurred from April 23, 2007 (when the EquiFirst Defendants transferred servicing of the Loans) through the Closing Date (PSA) of the Securitization on June 27, 2007 that would render certain Loan-level R&Ws untrue. Barclays further represented and warranted that the Loans complied with certain federal, state and local laws as of the June 27, 2007 Closing Date (PSA). Even if the Complaint is not dismissed against Barclays on statute of limitations grounds, DBNTC has stated a claim against Barclays, at most, with respect to 54 Loans that are allegedly in breach of Barclays' R&Ws.

Finally, DBNTC's claims are improper because it has failed to comply with the terms of the Repurchase Protocol before initiating this action, and because it seeks relief – including rescission, monetary damages, and attorneys' fees – that is precluded and not contemplated by the parties' agreements and is prohibited under New York law. Similarly, because DBNTC's claim for breach of the implied covenant of good faith and fair dealing is based on the same agreements and conduct as its claim for breach of contract, it must be dismissed as duplicative.

Therefore, the Complaint should be dismissed with prejudice.

BACKGROUND

I. The Securitization

This litigation relates to a securitization known as EquiFirst Loan Securitization Trust 2007-1, for which DBNTC is the Trustee.[3] The Trust contains loans originated by the EquiFirst Defendants that were sold to the Sponsor pursuant to the MLPA, which is dated as of March 1, 2007. *See* Compl. ¶ 21. The Sponsor, in turn, transferred its interest in the Loans to the Depositor pursuant to the Assignment Agreement dated as of June 27, 2007. Under the Assignment Agreement, the EquiFirst Defendants restated their R&Ws made in the March 1, 2007 MLPA as of the ***April 23, 2007 Servicing Transfer Date***. Compl. ¶ 33.

The Depositor assigned its interest in the Loans to the Trust on June 27, 2007 (the "Closing Date" for the Securitization). Compl. ¶ 22.

II. EquiFirst Defendants' R&Ws

The EquiFirst Defendants' R&Ws, which are set forth in Sections 9.01 and 9.02 of the MLPA with the Sponsor, relate to the characteristics of the Loans at origination. *See* MLPA §§ 9.01, 9.02. These R&Ws were first made as of the March 1, 2007 date of the MLPA and thereafter on the sale date of each Loan (the "Closing Date" for purposes of the MLPA), which occurred on or prior to March 27, 2007.[4] (*Id.* at § 1.01.)

The Assignment Agreement between the Sponsor and Depositor, in turn, reaffirmed that the R&Ws were effective as of April 23, 2007. Assignment Agreement at § 4 (stating that "[p]ursuant to Section 13 of the [MLPA]," the EquiFirst Defendants represented and warranted

---

[3] Facts that are derived from the Complaint, which is annexed to the Doherty Aff. as Exhibit 1, are assumed to be true for purposes of this motion only. Barclays disputes the Complaint's allegations and denies any liability to DBNTC.

[4] The MLPA defines the Closing Date as "[t]he date or dates on which the Purchaser [*i.e.*, Sutton] from time to time shall purchase, and the Sellers [*i.e.*, the EquiFirst Defendants] from time to time shall sell, the Mortgage Loans listed on the related Mortgage Loan Schedule with respect to the related Mortgage Loan Package." *Id.* at § 1.01.

that the R&Ws set forth in Section 9.01 and 9.02 of the MLPA "are true and correct as of April 23, 2007 (the servicing transfer date)." [5] Therefore, ***the date on which the statute of limitations began to run on claims relating to the EquiFirst Defendants' R&Ws is April 23, 2007.***

III. Barclays' R&Ws

Barclays' R&Ws are contained in Section 2 of the Barclays Representation Agreement, dated as of June 27, 2007. *See* Compl. ¶¶ 34-36. Pursuant to Sections 2(a) and 2(b), Barclays provided R&Ws that nothing had occurred "since the Servicing Transfer Date" of April 23, 2007 to render the R&Ws made in Exhibit I to the Barclays Representation Agreement "untrue in any material respect as of the Closing Date" of June 27, 2007.

The remaining R&Ws in Section 2(c) relate to compliance with federal, state and local law:

> (i) No Mortgage Loan is a High Cost Loan or Covered Loan, as applicable, and no Mortgage Loan originated on or after October 1, 2002 through March 6, 2003 is governed by the Georgia Fair Lending Act. No Mortgage Loan is covered by the Home Ownership and Equity Protection Act of 1994 and no Mortgage Loan is in violation of any comparable state or local law; and
>
> (ii) Any and all requirements of any federal, state or local law including, without limitation, usury, truth-in-lending, real estate settlement procedures, consumer credit protection, equal credit opportunity, disclosure and all predatory, abusive and fair lending laws applicable to the Mortgage Loan, including, without limitation, any provisions relating to Prepayment Charges, have been complied with, and the consummation of the transactions contemplated hereby will not involve the violation of any such laws or regulations.

As such, Barclays' R&Ws cover only a narrow, post-origination time frame and a small subset of the characteristics of Loans. These R&Ws have nothing to do with most of the Complaint, except for 54 Loans discussed in Paragraphs 82 and 83. Thus, DBNTC has sufficiently pled a claim against Barclays with respect to, at most, these 54 Loans.

[5] The servicing obligations of the Interim Servicer, EquiFirst Corporation, were relinquished and ceased as of the Servicing Transfer Date. *See* Compl. ¶ 24.

IV. The Repurchase Protocol

The Repurchase Protocol set forth in the MLPA and the Barclays Representation Agreement is DBNTC's "sole remedy" and provides a formal, detailed mechanism to address alleged R&W breaches. In the event of a R&W breach that "materially and adversely affects the value of the Loans or the interest of" DBNTC (as successor), the party discovering such breach shall "give ***prompt written notice*** to the others." PSA § 2.03(b); MLPA § 9.03 (emphasis added). Following receipt of such prompt notice, the party or parties receiving such notice "shall cure such breach in all material respects and, if such breach cannot be cured ... shall, within sixty (60) days ... purchase such Mortgage Loan at the Repurchase Price." *Id.* DBNTC cannot commence legal action until actual notice of the breach is provided and a demand for compliance is made. MLPA § 9.03; Barclays Representation Agreement § 3.

The Repurchase Protocol is the ***sole remedy*** available to DBNTC for a R&W breach. By illustration, the Barclays Representation Agreement provides: "It is understood and agreed that the obligation of [Barclays] set forth in Section 3(a) to purchase or substitute for a Mortgage Loan in breach of a representation or warranty contained in Section 2 constitutes the ***sole remedy*** of the [Trustee] or any other person or entity with respect to such breach." Barclays Representation Agreement § 3(b) (emphasis added); *see also* MLPA § 9.03.

V. The Dissolution of the EquiFirst Defendants

Neither of the EquiFirst Defendants is currently an existing legal entity. EquiFirst Corporation was dissolved in June 2010. Compl. ¶ 11. EquiFirst Mortgage was dissolved in May 2009. Compl. ¶ 12.

VI. Procedural History and the Filing of the Complaint

In connection with this matter, DBNTC sent Defendants two repurchase demand notices, one prior to filing the Summons and one after filing the Summons.

In September 2012, DBNTC forwarded Defendants a letter from Freddie Mac dated September 13, 2012, which alleged that a group of Loans were allegedly in breach of R&Ws and requested the cure or repurchase of those Loans. *See* Compl. ¶ 90. Defendants denied the request for several reasons, including that DBNTC failed to provide "prompt written notice" pursuant to Section 2.08 of the PSA. DBNTC never demanded compliance thereafter.

In initiating this action on May 31, 2013 by filing the Summons, DBNTC ostensibly sought to initiate this action one day prior to the six-year anniversary of the June 1, 2007 date of the PSA – assumedly for statute of limitations purposes – by filing a threadbare Summons. As discussed below, by the time the Summons was filed on May 31, 2013, the statute of limitations as against the EquiFirst Defendants had already expired.

Five months after the Summons was filed, DBNTC sent a letter dated November 1, 2013 to Defendants alleging R&W breaches for an additional 63 Loans and requesting the cure or repurchase of those 63 Loans. *See* Compl. ¶ 91. To date, Defendants have not received any other demand letter.

On November 18, 2013, DBNTC filed its Complaint asserting causes of action against all Defendants for breach of contract and breach of the implied covenant of good faith and fair dealing.

ARGUMENT

I. DBNTC's Claims Against the EquiFirst Defendants Are Time-Barred in Their Entirety

A. The Statute of Limitations Expired on April 23, 2013

The statute of limitations commenced as to the EquiFirst Defendants on April 23, 2007. Assignment Agreement ¶ 4. Accordingly, because the Summons was filed on May 31, 2013, any claims against the EquiFirst Defendants for breaches of the R&Ws made in the MLPA and Assignment Agreement are time-barred. *See, e.g., ACE Sec. Corp. v. DB Structured Products,*

Inc., Nos. 11384, M-5893, M-6111, 2013 WL 6670379, at *1 (1st Dep't Dec. 19, 2013); *Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2006-S2, by HSBC Bank USA, National Ass'n v. Nomura Credit & Capital, Inc.*, Index No. 651827/2012 (Sup. Ct. N.Y. County December 23, 2013) (Sherwood, J.)[6]; *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 402, 599 N.Y.S.2d 501, 502-03 (1993); *Structured Mortg. Trust 1997-2 v. Daiwa Fin. Corp.*, No. 02-cv-3232, 2003 WL 548868, at *2 (S.D.N.Y. Feb. 25, 2003).

ACE Securities confirms that claims against the EquiFirst Defendants are untimely. In *ACE Securities*, the First Department held that claims for alleged R&W breaches "***accrued on the closing date of the MLPA ... when any breach of the representations and warranties contained therein occurred.***" 2013 WL 6670379, at *1 (holding that "[t]he motion court erred in finding that plaintiff's claims did not accrue until defendant either failed to timely cure or repurchase a defective mortgage loan") (emphasis added). This decision rests on the basic proposition that, because a repurchase obligation is only a remedy, the refusal to repurchase is irrelevant to the running of the statute of limitations that began to accrue when the relevant R&Ws were made. *See id.*; *see also Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2005-S4 ex rel. HSBC Bank USA, Nat'l Ass'n v. Nomura Credit & Capital, Inc.*, Index No. 653541/11, 39 Misc. 3d 1226(A), 2013 WL 2072817, at *8 (Sup. Ct. N.Y. County May 10, 2013) (cause of action for breach of contract occurs when the party making the claim possesses the legal right to make a demand).

Here, as in *ACE Securities* and *Nomura*, the EquiFirst Defendants' R&Ws were either true or false when made by the EquiFirst Defendants. Accordingly, any claims against the

[6] A true and correct copy of the Decision and Order is annexed to the Doherty Aff. as Ex. 10.

EquiFirst Defendants for alleged breaches of R&Ws expired on April 23, 2013.[7] Because this action was commenced after the expiration of the statute of limitations, all claims against the EquiFirst Defendants must be dismissed.

B. Claims against EquiFirst Mortgage Corporation of Minnesota Are Untimely and Were Barred as of May 14, 2012

In addition to being barred by the statute of limitations, claims against EquiFirst Mortgage are also barred because that entity was dissolved in accordance with Minnesota law in May 2009.

It is well established under New York law that "the issue of whether a dissolved corporation may be subject to suit is governed by the laws of its state of incorporation." *See Herlihy v. Supply Corp*, Index No. 190149/2011, 2012 WL 171028, at *1 (Sup. Ct. N.Y. County Jan. 10, 2012) (citing *Republique Francaise v. Cellosilk Mfg. Co.*, 309 N.Y. 269, 278, 128 N.E.2d 750 (1955) (holding that Illinois law applied to dissolved Illinois corporation); *Mock v. Spivey Co.*, 167 A.D.2d 230, 230-31, 561 N.Y.S.2d 729, 729 (1st Dep't 1990) (upholding dismissal of action against dissolved entity pursuant to Pennsylvania law, which permits suit against a dissolved corporation only within two years of dissolution); *Bayer v. Sarot*, 51 A.D.2d 366, 381 N.Y.S.2d 489 (1st Dep't 1976).

Because EquiFirst Mortgage was incorporated under Minnesota law in December 1998, Minnesota law applies for purposes of determining the viability of any claims against that now-

[7] Because the R&Ws by the EquiFirst Defendants were originally made as of the March 1, 2007 date of the MLPA and as of the "Closing Date" of the MLPA, which was on or before March 27, 2007, April 23, 2007 – the date as of which the EquiFirst Defendants' R&Ws were confirmed to be "true and correct" pursuant to the Assignment Agreement – is the latest possible date on which the statute of limitations commenced to run. Regardless of whether DBNTC's claims began to run in March 2007 or April 2007, they were clearly time-barred when the Summons was filed on May 31, 2013. *Cf. Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2006-S2,* Index No. 651827/2012 (Sup. Ct. N.Y. County December 23, 2013) (Sherwood, J.) (holding that statute of limitations ran from the May 1, 2006 date of the MLPA, and not from the May 25, 2006 date of the PSA in which the representations in the MLPA were stated to be "true and correct").

dissolved entity. *See* Compl. ¶ 12. Under Minnesota law, a claimant has, at most, three years following notice of intent to dissolve to bring suit. *See* Minn. Stat. 302A.7291; Minn. Stat. 302A.781; *Abad v. ISCO, Inc.*, 534 N.W.2d 728, 730 (Minn. Ct. App.) (citing Minn. Stat. 302A.7291), *rev'd on other grounds*, 537 N.W.2d 620 (Minn. 1995). EquiFirst Mortgage filed its Intent to Dissolve, as well as its Articles of Dissolution, on May 14, 2009. *See* Intent to Dissolve, annexed to the Doherty Aff. as Ex. 7; Articles of Dissolution, annexed to Doherty Aff. as Ex. 8. Claims against EquiFirst Mortgage were thus barred three years later, on May 14, 2012. Because DBNTC's action was not initiated until May 31, 2013, claims against EquiFirst Mortgage must be dismissed.

II. Claims Against All Defendants Are Further Time-Barred Because the Summons Is Jurisdictionally Defective

A. The Summons is Defective for All Loans

Additionally, this case should be dismissed because the Summons is jurisdictionally defective and failed to toll the statute of limitations. CPLR 305(b) mandates that, if a complaint is not served with the summons, "the summons shall contain or have attached thereto a notice stating the nature of the action and the relief sought." "Outside the context of *simple* ... cases, the danger of dismissal due to a conclusory notice looms large." CPLR 305(b), Practice Commentary (emphases added).

A summons with notice that does little more than refer the defendant generally to possible theories of recovery must be dismissed as jurisdictionally defective. This is illustrated by *Roth v. State Univ. of New York*, 61 A.D.3d 476, 476, 876 N.Y.S.2d 403, 404 (1st Dep't 2009), in which the First Department granted dismissal where the summons with notice stated that "'[t]he nature of this action sounds in violations of federal, New York State, and New York City human rights laws, including but not limited to' various named statutes." 61 A.D.3d at 476, 876 N.Y.S.2d at 404. The Court held that a summons with notice so lacking in detail leaves the

defendant "to guess the precise claim against [it]." *Id.* This is little different from the bare statement in the Summons concerning "Defendants' breaches of various representations and warranties regarding certain mortgage loans." Summons at p. 2. *See Maldonado v. Olympia Mech. Piping & Heating Corp.*, 8 A.D.3d 348, 350, 777 N.Y.S.2d 730, 731 (2d Dep't 2004).

Here, the Summons did not identify the operative agreements – *i.e.*, the MLPA and the Barclays Representation Agreement. It did not identify even a single Loan, or a single factual basis for a R&W breach. It also did not attach any repurchase demand notice(s) including this information. DBNTC should not receive any credit – as it will undoubtedly seek – for listing several representative R&Ws and referencing an unidentified "notice" to Defendants in the Summons. The Summons is no more illuminating than was the *Roth* plaintiff's citation to several statutes. Just as in *Roth*, merely citing generally to the source of legal obligations fails to provide the sort of notice that CPLR 305(b) demands. In the face of a R&W agreement concerning more than 5,600 Loans, DBNTC has done nothing more than say "bad." Such lack of notice fails under New York law.

This is not a simple breach of contract case for which a truncated summons with notice could provide adequate notice to Defendants. Here, the Loan pool consisted of 5,683 unique Loans made to individual borrowers with an original principal balance of approximately $1 billion. Defendants' R&Ws – approximately 70 in number – contain multiple subparts and, conservatively speaking, the R&Ws cover more than 100 specific characteristics of Loans (and related documentation). ***Simple mathematics tells a compelling story – there are at least 550,000 distinct, theoretical R&W breaches across the Loan pool.*** Against a backdrop of more than 5,600 Loans, 70 R&Ws, and more than a half-million possible issues, the Summons spoke only in vague generalities and did not identify even one specific R&W breach for one Loan.

Like the defendant in *Roth*, Barclays was left – in the words of the First Department – "to guess the precise claim against [it]." 61 A.D.3d at 476, 876 N.Y.S.2d at 404.

As the Court of Appeals observed in *Parker v. Mack*, 61 N.Y.2d 114, 117-18, 472 N.Y.S.2d 882, 883 (1984), "the Legislature ... has determined and fixed a defendant's entitlement, at the time and as part of service of process, to knowledge concerning the claim being asserted against him – an entitlement which imposes no conceivable burden or hardship on the plaintiff." The law is clear that where only a defective summons with notice is served prior to the expiration of the statute of limitations, the plaintiff's claim is time barred. *Wells v. Mount Sinai Hosp. & Med. Ctr.*, 196 A.D.2d 749, 602 N.Y.S.2d 45 (1st Dep't 1993) (dismissing action where summons did not comply with CPLR 305(b) and consequently failed to toll the statute of limitations, and further noting that the plaintiff could not amend the jurisdictionally void summons to "breathe life into a dead claim"); *see also Kaplan v. Manoli*, 100 A.D.2d 928, 928, 474 N.Y.S.2d 815, 816, (2d Dep't 1984), *aff'd*, 64 N.Y.2d 849, 487 N.Y.S.2d 323 (1985) ("the complete absence of the notice requirements contained in CPLR 305(b) is a jurisdictional defect"); *Frerk v. Mercy Hosp.*, 99 A.D.2d 504, 504, 470 N.Y.S.2d 673, 674 (2d Dep't), *aff'd*, 63 N.Y.2d 635, 479 N.Y.S.2d 519 (1984) (noting same). Therefore, the Summons is a nullity which failed to toll the statute of limitations as against any Defendant.

B. DBNTC Failed to Comply with the 60-Day Notice Period as a Condition Precedent Prior to Commencing the Action With Respect to 63 Loans Referenced in the November 2013 Notice

At a minimum, the Complaint must be dismissed with respect to the 63 Loans for which DBNTC provided notice in November 2013 – and any other Loans identified after the Summons was filed – because DBNTC concededly failed to provide Defendants with a 60-day notice and cure period with respect to alleged R&W breaches for such Loans. The Barclays Representation Agreement and MLPA expressly give Defendants the right to a 60-day period to review a R&W

repurchase claim. Barclays Representation Agreement § 3(a); MLPA § 9.03. In light of the Defendants' contractual right to review repurchase demands, DBNTC was not allowed to pursue legal action until it satisfied conditions precedent. "Any cause of action against [Defendant(s)] relating to or arising out of the breach of any representations and warranties...shall accrue as to any mortgage Loan upon (i) discovery of such breach...(ii) failure by [Defendant(s)] to cure...(iii) demand upon [Defendant(s)]." *Id.*

As *ACE Securities* recently established, "failure to comply with a condition precedent to commencing suit render[s] [a] summons with notice a nullity." *ACE Sec. Corp.*, 2013 WL 6670379, at *1. DBNTC filed the Summons on May 31, 2013. On November 1, 2013 – after the statute of limitations had run on all claims against the Defendants – DBNTC for the first time sent the November 2013 Notice regarding the 63 Loans. Accordingly, because Defendants were not provided with notice, an opportunity to cure or repurchase, or a demand for compliance in accordance with the Repurchase Protocol for those 63 Loans, any claims relating to these 63 Loans are barred under New York law.[8]

III. The Complaint Must Be Dismissed in Its Entirety Because DBNTC Failed to Provide Prompt Notice of Alleged R&W Breaches

The Complaint must also be dismissed because "prompt written notice" of any breach of the R&Ws was not provided in accordance with Section 2.08 of the PSA and Section 9.03 of the

[8] Any attempt by DBNTC to argue that claims regarding these 63 Loans (or any other loans identified or included in repurchase demands made after the statute of limitations ran) "relate back" to the Summons must fail because, under New York law, claims do not relate back "where 'the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved....'" *August Bohl Contracting Co., Inc. v. L.A. Swyer Co., Inc.*, 74 A.D.3d 1649, 1650, 903 N.Y.S.2d 793, 794 (3d Dep't 2010) (quoting CPLR 203(f)). DBNTC's attempt to sweep new Loans into this lawsuit fails this test. In RMBS R&W litigation, notice of an alleged breach concerning one Loan does not give notice of breaches concerning any other Loans, because "***each alleged breach of contract due to a breach of representation made...as to each individual loan constitutes a separate transaction or occurrence, regardless of the fact that the loans might have been part of the same loan pool.***" *Central Mortgage Co. v. Morgan Stanley Mortg. Cap. Holding LLC*, No. Civ. A. 5140-CS, 2012 WL 3201139, at *18 (Del. Ch. Aug. 7, 2012) (emphasis added).

MLPA. Under New York law, the obligation to provide "prompt written notice" of a breaching loan within a reasonable time is not satisfied where, as here, such notice is not provided for eight or more months after the breach was or should have been discovered. *See, e.g., Morgan Guar. Trust Co. of New York v. Bay View Franchise Mortg. Acceptance Co.*, No. 00 Civ. 8613, 2002 WL 818082, at *10 (S.D.N.Y. Apr. 30, 2002) (notice of breach eight months after discovery was not prompt); *LaSalle Bank Nat'l Assoc. v. Citicorp Real Estate Inc.*, No. 02-cv-7868, 2003 WL 1461483, at *7 (S.D.N.Y. Mar. 21, 2003) (notice of breach within two years of discovery was not prompt). "A party 'discovers' a breach when it knows or should know that the breach has occurred." *Morgan Guar.*, 2002 WL 818082, at *5. And, where a party has received notice of facts suggesting that a breach may have occurred, it becomes incumbent upon that party "to pick up the scent and nose to the source, and if the quest confirms this suspicion, then he must make the decision to raise the claim with reasonable dispatch." *Id.*

The Trust and its certificateholders clearly were or should have been on notice of any purported breaches long before the first notice was sent in September 2012. Freddie Mac – the directing certificateholder that conducted the investigation of the Loans – was one of the two prime movers in the United States mortgage market and, thus, was uniquely situated to understand and identify the likelihood and magnitude of any breaches with respect to the Loans. In addition, DBNTC was in possession of the Loan files for years before any notice or repurchase demand was sent to Defendants. *See* PSA § 2.02. Certificateholders also received monthly statements providing information and statistics regarding the performance of the Loans. PSA § 4.03. And, the EquiFirst Defendants' dissolution in 2009 and 2010 was well-publicized. If – as DBNTC alleges – Loan breaches exist throughout the Loan pool, the foregoing information should have put the Trust and the certificateholders on notice of facts "suggestive of a breach" requiring further investigation years ago. *See Policemen's Annuity and Benefit Fund*

of the City of Chicago v. Bank of America, N.A., 907 F. Supp. 2d 536, 553-54 (S.D.N.Y. 2012) (noting that public reporting of general loan deficiencies coupled with access to loan files put trustee on notice of potential breaches and obligated it to investigate any suspicions of the loans in the trusts). As such, waiting until September 2012 to first send a demand notice was untimely.

IV. The Complaint Fails to State a Claim against Barclays for R&W Breaches

In the event the Complaint is not dismissed against Barclays due to the grossly deficient Summons or failure to provide prompt notice, the Complaint is arguably sufficient, at most, with respect to only 54 of the 1,748 Loans discussed therein. As discussed, Barclays' R&Ws cover only: (1) events occurring in the "gap" period from April 23, 2007, to June 27, 2007; and (2) the Loans' compliance with law. Barclays' R&Ws (other than legal compliance) do not cover any aspect of the origination of the Loans (which were covered by the EquiFirst Defendants' R&Ws).

The only allegations in the Complaint addressed to Barclays' R&Ws are set forth in Paragraphs 80-84 and concern, in total, 54 Loans. More specifically, in Paragraph 82, the Complaint alleges that two Loans violate the Truth in Lending Act (Barclays Legal Compliance R&Ws) and in Paragraph 83, alleges that 52 unidentified Loans became delinquent during the "gap" period from April 23, 2007 to June 27, 2007 (Barclays Servicing Post-Origination R&Ws). While the Complaint does not state a claim with respect to a breach of Barclays Servicing Post-Origination R&Ws because it fails to identify even a single specific Loan, to the extent any claim is allowed to proceed, the Complaint should be limited to – at most – the 54 Loans referred to in the Complaint that purportedly breach Barclays' R&Ws.

V. Defendants Have No Obligation to Repurchase Non-Existent Loans That Were Previously Liquidated

A. Defendants Have No Obligation to Repurchase Liquidated Loans Due to DBNTC's Failure to Provide Prompt Notice

If a Loan defaults, and is headed to foreclosure or liquidation, DBNTC is required to give notice ***at that time*** to Defendants of any R&W breach claim. A loan default constitutes a "red flag" suggesting that a breach may have occurred – thereby requiring the aggrieved party to promptly investigate. *See Morgan Guar.*, 2002 WL 818082; *see also MASTR Asset Backed Securities Trust 2006-HE3, by U.S. Bank Nat'l Assoc. v. WMC Mortg. Corp.*, No. Civ. 11-2542, 2012 WL 4511065, at *7 n.11 (D. Minn. Oct. 1, 2012) (applying New York law) ("[n]otice of default may be enough to put a party on notice that such a breach may have occurred so as to trigger a duty to investigate").

If DBNTC does not provide Defendants with timely notice, and instead chooses to liquidate a defaulting Loan, DBNTC denies Defendants their bargained-for right to be involved with the disposition of the allegedly defective Loan from the moment a potential R&W claim could be identified. Under the Barclays Representation Agreement and MLPA, Defendants have the right to investigate and cure a R&W breach (for instance, by obtaining a missing document from the borrower). And, if there is a R&W breach, Defendants have the right to substitute in a new loan (within a certain time period) or repurchase the defective Loan. DBNTC's failure to provide timely notice to Defendants denied them their contractual right to maximize value and mitigate losses. *See MASTR Asset Backed Securities Trust 2006-HE3,* 2012 WL 4511065, at *7 ("[p]roviding [R&W maker] notice of the R&W breach only after the Trust elected to foreclose eviscerates [R&W maker's] mitigation opportunities"). In contrast, if Defendants do not receive timely notice, and the Loan is liquidated, Defendants have lost these critical, bargained-for rights: they cannot cure the breach or repurchase the Loan, and are stuck with the alleged value

lost due to the foreclosure and/or other disposition dictated by a third party. In such an instance, DBNTC has elected unilaterally to pursue a remedy, to the exclusion of Defendants, and as such it cannot now demand that the Loans also be repurchased by Defendants.

B. Defendants Are Not Contractually Obligated to Repurchase Liquidated Loans

The language of the PSA and the MLPA reflects that Defendants are not obligated to repurchase non-existent Loans.

First, a Loan must be repurchased at the "Repurchase Price," which is defined as "an amount equal to the sum of ... the unpaid principal balance of such Mortgage Loan as of the date of purchase ...." PSA Art. 1, Definitions, "Repurchase Price." There is no "unpaid principal balance" for a liquidated Loan. The "Stated Principal Balance" of any Loan that is a "Liquidated Mortgage Loan" "shall be ***zero***" (PSA Article 1, Definitions, "Stated Principal Balance") (emphasis added). Thus, a Loan that has been liquidated has a Repurchase Price of $0, confirming that repurchase was not intended by the parties. *See MASTR Asset Backed Securities Trust 2006-HE3*, 2012 WL 4511065, at *6 n.9 (stating that the fact that the repurchase price would be $0 "further shows that the parties did not contemplate the repurchase remedy as being applicable in the present circumstance.").

Second, when a Loan is repurchased, the Depositor is required to "arrange for the reassignment of the Deleted Mortgage Loan to [the repurchasing Defendant] and the delivery of any documents held by DBNTC relating to the Deleted Mortgage Loan." Barclays Representation Agreement § 3(a); MLPA § 9.03. A non-existent Loan cannot be "reassign[ed]" to Defendants. *See also MASTR Asset Backed Securities Trust 2006-HE3,* 2012 WL 4511065, at *4 ("[i]t would be a tortured reading ... to equate [a] loan's constituent parts with the loan itself, and hold that merely because the trustee can produce certain parts of the 'Mortgage Loan'—the

Mortgage File, foreclosure proceeds, etc.—the Mortgage Loan as a whole remains to be repurchased.") Indeed, a liquidated Loan no longer exists.[9]

As such, the Defendants have no obligation to repurchase liquidated Loans.

VI. DBNTC Is Limited to the Contractual Sole Remedy for Alleged Breaches of the Barclays Representation Agreement and MLPA

If the Court does not dismiss the Complaint in its entirety, DBNTC is limited to the agreed-upon "sole remedy" for R&W breaches – the Repurchase Protocol – and is not entitled to relief outside the scope of this provision, including rescission or other monetary damages.

A. The "Sole Remedy" Provision Limits DBNTC's Damages

DBNTC expressly bargained for the Repurchase Protocol as the "sole remedy" in the event of any R&W breaches. Specifically, the Barclays Representation Agreement states that "[i]t is understood and agreed that the obligation of [Barclays] ... to purchase or substitute for a Mortgage Loan in breach of a representation or warranty contained in Section 2 constitutes the ***sole remedy*** ... with respect to such breach." Barclays Representation Agreement § 3(b) (emphasis added). Similarly, the MLPA states that "[i]t is understood and agreed that the obligations of [the EquiFirst Defendants] set forth in this Section 9.03 to cure, substitute for or repurchase a defective Mortgage Loan and to indemnify the Purchaser [for third party claims] ... constitute the ***sole remedies*** ... respecting a breach of the foregoing representations and warranties." Noticeably absent from this "sole remedy" language is any mention of – let alone express right to – rescission or rescissory, compensatory or consequential damages. Accordingly, these remedies are not available to DBNTC for Loan-level breaches of R&Ws.

[9] Under the laws of many states, "including New York, a foreclosure decree operates to merge the interests of mortgagor and mortgagee, and vest in the purchaser the entire interest and estate as it existed at the date of the mortgage." *See, e.g., MASTR Asset Backed Securities Trust 2006-HE3*, 2012 WL 4511065, at *4.

Numerous courts construing similar contracts have upheld the parties' intent to limit themselves to the contractually specified remedies. *See, e.g., Assured Guar. Corp. v. EMC Mortgage, LLC*, Index No. 650805/12, 39 Misc. 3d 1207(A), 2013 WL 1442177, at *5 (Sup. Ct. N.Y. County Apr. 4, 2013) ("This court cannot ignore the language of the parties' agreement [] that plainly restricts [plaintiff] to the remedy of the Repurchase Protocol to enforce [defendant's] obligations under the Operative Documents."); *Ambac Assur. Corp. v. EMC Mortg. Corp.*, Index No. 651013/12, 2013 WL 2919062, at *5 (Sup. Ct. N.Y. County June 13, 2013) (holding that "damages for breaches of representations and warranties pertaining to the mortgage loans are limited to the Repurchase Protocol"); *MASTR Asset Backed Sec. Trust v. WMC Mortgage Corp.*, 843 F. Supp. 2d 996, 1001 (D. Minn. 2012) ("[U]nder the clear terms of the parties' agreement, the sole remedy available to [certificateholders] is to seek cure, repurchase or substitution of the allegedly defective WMC mortgages. [Plaintiff] may not recover additional remedies, including monetary damages, from [defendant]...").

Nor can DBNTC claim that Defendants' alleged failure to comply with the Repurchase Protocol permits it to circumvent the sole remedy clause in favor of other damages. Under New York law, the failure to provide a contractually specified remedy does not subject a party to liability beyond that remedy. *See Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2005-S4 ex rel. HSBC Bank USA, Nat'l Ass'n v. Nomura Credit & Capital, Inc.*, Index No. 653541/11, 39 Misc. 3d 1226(A), 2013 WL 2072817, at *8 (Sup. Ct. N.Y. County May 10, 2013) ("[t]he repurchase obligation in this case is merely a remedy. It is not a duty independent of the Mortgage Representation breach of contract claims."); s*ee also Bear Stearns Mortg. Funding Trust 2007-AR2 v. EMC Mortg. LLC*, No. 6861-CS, 2013 WL 164098, at *3 (Del. Ch. Jan. 15, 2013) (applying New York law and finding that a similar repurchase provision "specif[ied] the extent of the trustee's remedies").

B. The "Sole Remedy" Provision Bars DBNTC's Claims for Rescission or Any Other Damages

Notwithstanding DBNTC's allegations that "widespread" breaches are purportedly "so substantial" that they "defeat the central purpose of the agreements," DBNTC is not permitted to set aside the sole remedy agreed to by the parties and pursue rescission, rescissory or other damages. Rescission is available "only where there is lacking a complete and adequate remedy at law." *Rudman v. Cowles Commc'ns, Inc.*, 30 N.Y.2d 1, 13, 330 N.Y.S.2d 33 (1972); *New Shows, S.A. de C.V. v. Don King Prods., Inc.*, Nos. 99-9019, 99-9069, 2000 WL 354214, at *2 (2d Cir. Apr. 6, 2000) ("The harm plaintiff claims to have suffered is the financial loss it incurred ... Indeed, what [plaintiff] seeks through rescission is ... payment for the net losses it suffered ... But since the legal remedy in this case is adequate, the equitable remedy of rescission is simply inappropriate."); *New Paradigm Software Corp. v. New Era of Networks, Inc.*, 107 F. Supp. 2d 325, 330 (S.D.N.Y.2000) (claim for rescission dismissed because "Plaintiff has asserted no reason why damages would not be an adequate remedy"). Here, DBNTC had agreed to and pled the "adequate remedy at law": *i.e.*, the Repurchase Protocol.

Because the remedy provided by the Repurchase Protocol is complete and adequate, rescission, rescissory damages and other monetary damages are legally unavailable to DBNTC. *See MBIA Ins. Co. v. Countrywide Home Loans, Inc.*, 105 A.D.3d 412, 413, 963 N.Y.S.2d 21, 22 (1st Dep't 2013) (holding that plaintiff was not entitled to the "very rarely used equitable tool" of rescissory damages where it was legally unavailable); *see also MBIA Ins. Co. v. Residential Funding Co.*, Index No. 603552/08, 26 Misc. 3d 1204(A), 2009 WL 5178337, at *8 (Sup. Ct. N.Y. County Dec. 22, 2009) (plaintiff "cannot be permitted to circumvent the express provisions of the [contracts] through the assertion of quasi-contractual and equitable remedies that go beyond the negotiated terms of those agreements").

C. DBNTC's Claims of Repudiation Fail

DBNTC's allegations that Defendants have "repudiated the parties' agreements" and "repudiated [their] obligations to cure breaches or repurchase breaching Mortgage Loans" are without merit. *See* Compl. ¶¶ 6, 100-101, 106, 116-117. While a party may repudiate an agreement by words or conduct, either must be "unequivocal." *See Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 463, 682 N.Y.S.2d 664, 667 (1998). DBNTC fails to allege any statements or conduct whereby Defendants "unequivocally" repudiated the agreements. Moreover, it is impossible for DBNTC to allege Defendants repudiated the agreements by failing to follow the Repurchase Protocol, as it is a remedy and not an independent contractual duty. *See Walnut Place LLC v. Countrywide Home Loans, Inc.*, 96 A.D.3d at 684, 684-85, 948 N.Y.S.2d 580, 581 (1st Dep't 2012); *ACE Sec. Corp.*, Nos. 11384, M-5893, M-6111, 2013 WL 6670379, at *2 (1st Dep't Dec. 19, 2013).

Allowing DBNTC to seek any remedy other than specific performance of the Repurchase Protocol – including compensatory, consequential, equitable, or rescissory damages, or rescission itself – is impermissible because it would render the sole remedy provision meaningless. *See Ronnen v. Ajax Elec. Motor Corp.*, 88 N.Y.2d 582, 589, 648 N.Y.S.2d 422, 425 (1996) ("We have long and consistently ruled against any construction that would render a contractual provision meaningless or without force or effect."). The sophisticated parties in this transaction bargained for the Loan-by-Loan repurchase remedy as the sole remedy with respect to claims like those asserted here. The parties must follow this protocol: DBNTC cannot seek to re-write the parties' agreements. *See Blonder & Co., Inc. v. Citibank, N.A.*, 28 A.D.3d 180, 182, 808 N.Y.S.2d 214, 217 (1st Dep't 2006) ("it is fundamental that courts enforce contracts, not rewrite them."). Accordingly, DBNTC's sole remedy would be to seek the repurchase of the Loans under the Repurchase Protocol, and its claims for damages must be dismissed.

VII. DBNTC's Claim For Breach of the Implied Covenant of Good Faith and Fair Dealing is Duplicative of Its Claim for Breach of Contract

In an impermissible attempt to seek remedies barred by the clear language of the relevant agreements, DBNTC repurposes its breach of contract claim as an additional claim for a breach of the implied covenant of good faith and fair dealing. This claim must be dismissed as duplicative of the breach of contract claim. Under New York law, it is well established that a cause of action for a breach of the implied covenant will be dismissed where, as here, "it is premised on the same conduct that underlies the breach of contract cause of action and is 'intrinsically tied to the damages allegedly resulting from a breach of the contract.'" *See MBIA Ins. Corp. v. Merrill Lynch*, 81 A.D.3d 419, 419-420, 916 N.Y.S.2d 54, 55 (1st Dep't 2011) (citing *The Hawthorne Grp., LLC v. RRE Ventures*, 7 A.D.3d 320, 323, 776 N.Y.S.2d 273 (1st Dep't 2004)).

DBNTC's allegations regarding the breach of the implied covenant concern Defendants' alleged sale of breaching Loans into the Securitization, and its alleged failure to follow the Repurchase Protocol by "keeping silent" about the breaches. Complaint at ¶¶ 126-128. These allegations are patently the same as those for breach of contract. Complaint at ¶¶ 116-122. The damages alleged for the breach of the implied covenant are also identical, and copied verbatim, to the allegations regarding the breach of contract. *Compare* Complaint at ¶ 122 *with* ¶ 130. DBNTC tries to distinguish the two claims "by reiterating its breach of contract claims while adding bad faith to its allegations," but this effort fails. *See MBIA Ins. Co. v. GMAC Mortgage LLC*, 30 Misc. 3d 856, 865-66, 914 N.Y.S.2d 604, 612 (Sup. Ct. N.Y. County 2010) (finding claims duplicative where plaintiff "pick[ed] out clauses of the parties' written agreements that it felt [defendant] did not comply with and added 'that [defendant's] non-performance was in bad faith'").

An identical claim was dismissed by the First Department in *MBIA Ins. Corp. v. Merrill Lynch* where, as here, the plaintiffs essentially copied their breach of contract claims and attempted to repurpose them as claims for breach of the implied covenant. *See MBIA Ins. Corp. v. Merrill Lynch*, 81 A.D.3d at 419-420, 916 N.Y.S.2d at 55. Other attempts by plaintiffs in the RMBS context have similarly been dismissed. *See GMAC Mortgage LLC*, 30 Misc. 3d at 865-66, 914 N.Y.S.2d at 612 (dismissing claims for breach of the implied covenant as duplicative); *Residential Funding Co.*, 2009 WL 5178337 (same).

Moreover, a breach of the implied covenant occurs when "a party to a contract acts in a manner ... *not expressly forbidden by any contractual provision* ... [that] deprive[s] the other party of the right to receive the benefits under their agreement." *Jaffe v. Paramount Commc'ns Inc.*, 222 A.D.2d 17, 22-23, 644 N.Y.S.2d 43 (1st Dep't 1996) (emphasis added). Per DBNTC's own allegations, Defendants' alleged sale of breaching Loans, and their alleged failure to follow the Repurchase Protocol with respect to those Loans, expressly breaches the relevant agreements, and thus cannot also constitute a separate breach of the implied covenant. Complaint at ¶¶ 126-128. Accordingly, DBNTC's claim for breach of the implied covenant should be dismissed as duplicative of its breach of contract claim.

VIII. DBNTC's Claims for Attorneys' Fees and Costs Must Be Dismissed

DBNTC improperly seeks reimbursement for its attorneys' fees and costs from Defendants.[10] Under New York law, fees, costs and expenses will not be awarded under an indemnity provision unless the intention to do so is unmistakably clear from the language of the contract. *See Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491-93, 549 N.Y.S.2d 365, 366-68 (1989) (strictly construing indemnification clause in refusing to award

[10] While not explaining specifically how DBNTC is entitled to attorneys' fees and costs from Barclays (*see* Complaint ¶¶ 120, 123), presumably DBNTC attempts to impermissibly expand the definition of the Repurchase Price as defined in the PSA to include such fees and costs.

reimbursement of plaintiff's attorneys' fees); *see also Gotham Partners, L.P. v. High River Ltd. P'ship*, 76 A.D.3d 203, 209, 906 N.Y.S.2d 205, 209 (1st Dep't 2010) (holding that based on a strict construction, a third-party indemnification clause does not encompass reimbursement of attorneys' fees to parties of the contract); *Campbell v. Citibank, N.A.*, 302 A.D.2d 150, 154, 755 N.Y.S.2d 367, 371 (1st Dep't 2003).

Here, because neither the PSA nor the Barclays Representation Agreement explicitly provides for the recovery of attorneys' fees in litigation between the parties,[11] DBNTC cannot recover its attorneys' fees and costs. *See Hooper Assocs.*, 74 N.Y.2d at 491-93, 549 N.Y.S.2d at 366-68.

As against the EquiFirst Defendants, while Section 9.03 of the MLPA provides for the reimbursement of attorneys' fees and costs resulting from breach of R&W claims, any right to such fees and costs expired when the statute of limitations on any claims ran on April 23, 2013.[12] *See, e.g., ACE Sec. Corp.*, 2013 WL 6670379; *Nomura Asset Acceptance Corp.*, 2013 WL 2072817, at *8. Therefore, DBNTC cannot recover attorneys' fees from Defendants.

[11] To the extent DBNTC is arguing that it is entitled to its attorneys' fees and expenses under the indemnification provisions of the PSA, its argument must fail because the PSA only contemplates indemnification with respect to third party claims, and not claims between the parties. PSA § 6.05(a). This provision also does not identify any obligation by Barclays to indemnify DBNTC. *See id.* Similarly, should DBNTC look to Section 2.08 of the PSA to support its claim, that provision explicitly affords the Trustee compensation from the "Collection Account" for the "legal expenses and costs of such [an] action [for a breach of representations and warranties made by Barclays or EquiFirst]," and not from Barclays or the EquiFirst Defendants.

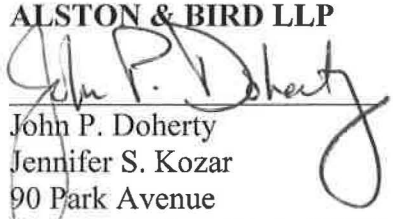
[12] Additionally, claims against EquiFirst Mortgage as a dissolved Minnesota corporation cannot be brought after May 14, 2012. *See Abad v. ISCO, Inc.*, 537 N.W.2d, 728, 730 (Minn. Ct. App.), *rev'd on other grounds*, 537 N.W.2d 620 (Minn. 1995).

CONCLUSION

For the reasons stated above, Defendants request that this Court dismiss the Complaint in its entirety, and grant such other and further relief as it deems necessary and proper.

Dated: New York, New York
January 9, 2014

ALSTON & BIRD LLP

By: 

John P. Doherty
Jennifer S. Kozar
90 Park Avenue
New York, New York 10016
(212) 210-9400

Attorneys for Defendants

ADDENDUM C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

----------X

IN RE PART 60 RMBS PUT-BACK LITIGATION

----------X

NOMURA ASSET ACCEPTANCE CORPORATION, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AF2 TRUST, by HSBC Bank USA, National Association, as Trustee,

Plaintiff,

- v -

NOMURA CREDIT & CAPITAL, INC.,

Defendant.

INDEX NO. 777000/2015
652614/2012

MOTION DATE

MOTION SEQ. NO. 009

DECISION AND ORDER

----------X

HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document number (Motion Seq No 009) 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 311, 312, 313, 314, 315, 316, 317

were read on this motion to/for AMEND PLEADINGS.

Upon the foregoing papers, it is hereby ORDERED that the motion of defendant Nomura Credit & Capital, Inc. for leave to amend the answer is decided in accordance with the accompanying decision and order of today's date; and it is further

ORDERED that the letter application of defendant, dated March 20, 2018, for a stay of expert discovery pending hearing and determination by the Court of Appeals of Deutsche Bank National Trust Co. v Barclays Bank PLC and Deutsche Bank National Trust Co. v HSBC Bank USA, National Association (156 AD3d 401 [1st Dept 2017], lv granted ___NY3d___, 2018 WL 4440302 [Sept 18, 2018]) is denied in accordance with the aforesaid decision and order; and it is further

ORDERED that the parties in this and the six other Nomura Actions[1] shall meet and confer in an effort to reach an agreement as to a schedule for completing expert discovery; and it is further

ORDERED that, by November 2, 2018, the parties in the Nomura Actions shall submit a proposed schedule or, if they are unable to reach an agreement, a 3-page joint letter setting forth their positions.

10/18/2018
DATE

MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

[1] The Nomura Actions are: Nomura Asset Acceptance Corporation, 2006-AF2 v Nomura Credit & Capital, Inc. (652614/2012); Nomura Asset Acceptance Corp., 2006-S4 v Nomura Credit & Capital, Inc. (Index No 653390/2012); Nomura Asset Acceptance Corp., 2006-S3 v Nomura Credit & Capital, Inc. (Index No 652619/2012); Nomura Asset Acceptance Corp., 2007-1 v Nomura Credit & Capital, Inc. (Index No 652842/2014); Nomura Home Equity Loan, Inc., 2006-FM2 v Nomura Credit & Capital, Inc. (Index No 653783/2012); Nomura Home Equity Loan, Inc., 2007-3 v Nomura Credit & Capital, Inc. (Index No 651124/2013); HSBC Bank USA, National Association, in its capacity as Trustee of Nomura Home Equity Loan, Inc., Asset Backed Certificates, Series 2007-2 v Nomura Credit & Capital, Inc. (Index No 650337/2013).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

----------X

IN RE PART 60 RMBS PUT-BACK LITIGATION — Index No. 777000/2015

----------X

NOMURA ASSET ACCEPTANCE CORPORATION, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AF2 TRUST, by HSBC Bank USA, National Association, as Trustee, — Index No. 652614/2012

Plaintiff,

-against-

NOMURA CREDIT & CAPITAL, INC.,

Defendant.

----------X

HSBC BANK USA, NATIONAL ASSOCIATION, in its capacity as Trustee of Nomura Home Equity Loan, Inc., Asset Backed Certificates, Series 2007-2, — Index No. 650337/2013

Plaintiff,

-against-

NOMURA CREDIT & CAPITAL, INC.,

Defendant.

----------X

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR THE MORGAN STANLEY ABS CAPITAL I INC. TRUST 2007-NC4, — Index No. 652877/2014

Plaintiff,

-against- — DECISION/ORDER

MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS LLC, as Successor-by-Merger to MORGAN STANLEY CAPITAL INC., and MORGAN STANLEY ABS CAPITAL I INC.,

Defendants.

----------X

HON. MARCY S. FRIEDMAN, J.S.C.

In two residential mortgage-backed securities (RMBS) actions brought by plaintiff-trustee, HSBC Bank USA, National Association (HSBC), against defendant-securitizer, Nomura Credit & Capital, Inc. (Nomura) (the HSBC Actions), HSBC asserts causes of action for breach of contract based on Nomura's alleged breaches of representations and warranties regarding the mortgage loans and on Nomura's alleged failure to notify HSBC of its discovery of such breaches. Nomura moves for leave to amend its answers in the two actions to assert a statute of limitations defense based on CPLR 202, the borrowing statute. Nomura contends that because HSBC is a national banking association, its residence for purposes of the borrowing statute is Delaware, the state in which it had its main office at the time of closing, and that HSBC's claims are therefore time-barred under Delaware's four year statute of limitations.[1] HSBC counters that it is a resident of the State of New York for purposes of the borrowing statute, because New York is its principal place of business, and that its claims are timely under New York's six year statute of limitations. HSBC also contends that the standards for leave to amend have not been satisfied and that it would be prejudiced by the amendment.

In a separate breach of contract action brought by plaintiff-trustee, Deutsche Bank National Trust Company (DBNT), against defendant-securitizer, Morgan Stanley Mortgage Capital Holdings LLC (Morgan Stanley) (the DBNT Action), DBNT alleges causes of action based on Morgan Stanley's alleged breaches of representations and warranties and on its alleged failure to notify DBNT of its discovery of such breaches. Morgan Stanley moves for leave to amend its answer to assert a statute of limitations defense to these causes of action based on

[1] In this decision, the terms "national banking association" and "national bank" will be used interchangeably.

CPLR 202. According to Morgan Stanley, the causes of action are time-barred under the Appellate Division decision in Deutsche Bank National Trust Co. v Barclays Bank PLC and Deutsche Bank National Trust Co. v HSBC Bank USA, National Association (156 AD3d 401 [1st Dept 2017] [DBNT/Barclays], lv granted ___NY3d___, 2018 WL 4440302 [Sept 18, 2018]). There, the Court applied the borrowing statute to DBNT, a conceded resident of California where it has its principal place of business. The Court held that the causes of action for breaches of representations and warranties brought by DBNT as trustee against defendant-securitizers were time-barred under the California statute of limitations. Morgan Stanley argues that the analysis of the Appellate Division is equally applicable to bar DBNT's assertion of such claims here. DBNT seeks to distinguish the trust at issue in this action from the trusts considered in DBNT/Barclays. Like HSBC, it argues that the standards for leave to amend have not been satisfied and that it would sustain prejudice if leave to amend were granted.

The defendants in the HSBC and DBNT Actions seek stays of expert discovery pending final resolution of the appeal of DBNT/Barclays by the Court of Appeals. Defendants in other RMBS breach of contract actions brought by HSBC and DBNT, respectively, also seek stays of such discovery in those actions.[2]

DISCUSSION

CPLR 3211 (e) provides that a "defense based upon a ground set forth in paragraphs one, three, four, five [which includes the statute of limitations] and six of subdivision (a) is waived unless raised either by such motion [i.e., a motion to dismiss] or in the responsive pleading." It

[2] These actions are consolidated solely for purposes of decision of these motions and of the applications for stays.

is well settled, however, that the decision whether to permit amendment of pleadings is committed to the discretion of the court. (Edenwald Contr. Co., Inc. v City of New York, 60 NY2d 957, 959 [1983].) A court retains discretion to grant leave to amend as to defenses waived under CPLR 3211 (e). (A.J. Pegno Constr. Corp. v City of New York, 95 AD2d 655, 656 [1st Dept 1983]; Onewest, F.S.B. v Goddard, 131 AD3d 1028, 1029 [2d Dept 2015].)

In general, leave to amend a pleading should be freely granted absent prejudice or surprise resulting from the delay. (CPLR 3025 [b]; Thomas Crimmins Contr. Co., Inc. v City of New York, 74 NY2d 166, 170 [1989].) "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side." (Edenwald Contr. Co. Inc., 60 NY2d at 959 [internal quotation marks and citation omitted].)

The party opposing the amendment has the burden of demonstrating prejudice. (Gonzalez v New York City Hous. Auth., 107 AD3d 471, 471 [1st Dept 2013]; Leslie v Hymes, 60 AD2d 564, 564 [1st Dept 1977].) "A proper showing of prejudice must be 'traceable not simply to the new matter sought to be added, but also to the fact that it is only now being added. There must be some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add.'" (Williams v Tompkins, 132 AD3d 532, 533 [1st Dept 2015], quoting A.J. Pegno Constr. Corp., 95 AD2d at 656.) Prejudice also occurs when a party "is hindered in the preparation of its case or has been prevented from taking some measure in support of its position." (Anoun v City of New York, 85 AD3d 694, 694 [1st Dept 2011] [granting leave to amend answer]; Norwood v City of New York, 203 AD2d 147, 149 [1st Dept 1994] [same], lv dismissed 84 NY2d 849; Kocourek v Booz Allen Hamilton Inc., 85 AD3d 502,

504 [1st Dept 2011] [granting leave to amend complaint], quoting Loomis v Civetta Corino Constr. Corp., 54 NY2d 18, 23 [1981]; Spitzer v Schussel, 48 AD3d 233, 233 [1st Dept 2008] [same].)

It is further settled that the amendment should be denied if the amendment "plainly lacks merit." (Thomas Crimmins Contr. Co. Inc., 74 NY2d at 170; Herrick v Second Cuthouse, Ltd., 64 NY2d 692, 693 [1984].) As the Appellate Division of this Department has repeatedly held, on a motion for leave to amend a pleading, the movant "need not establish the merit of its proposed new allegations, but [must] simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." (MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499, 500 [1st Dept 2010] [internal citation omitted]; accord e.g. Miller v Cohen, 93 AD3d 424, 425 [1st Dept 2012]; Kocourek, 85 AD3d at 505.)

Applying these standards, the court holds, for the reasons discussed further below, that leave to amend should be granted in both the HSBC and the DBNT Actions.

HSBC Actions

As a threshold matter, the court rejects HSBC's contentions that Nomura intentionally waived the statute of limitations defense and that leave to amend must be denied because Nomura lacks a sufficient excuse for failure to assert the defense in its answer. (HSBC Memo. In Opp., at 8, 10.) By way of explanation for its delay in asserting the defense, Nomura claims that the First Department's recent decision in DBNT/Barclays effected a change in, or constituted a development of, the law as to the standards for application of the borrowing statute to an RMBS trustee. (Nomura Memo. In Supp., at 15-16.)

Under the borrowing statute, CPLR 202, where a nonresident brings "[a]n action based

upon a cause of action accruing without the state," the action "cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued. . . ." In DBNT/Barclays it was undisputed that DBNT was not a resident of New York. In determining where DBNT's breach of contract cause of action accrued, the Court applied the test set forth by the Court of Appeals in Global Financial Corp. v Triarc Corp. (93 NY2d 525 [1999]). Under this test, a nonresident's cause of action accrues at the time and place of the injury, and "[w]hen an alleged injury is purely economic, the place of injury usually is where the [nonresident] plaintiff resides and sustains the economic impact of the loss." (Id., at 529.) The Appellate Division accepted California, DBNT's undisputed principal place of business, as DBNT's residence and the place where the injury was felt. (DBNT/Barclays, 156 AD3d at 401-402.) In the alternative, the Appellate Division determined the place where the injury was felt, and the cause of action therefore accrued, under a "multi-factor test" articulated in Maiden v Biehl (582 F Supp 1209 [SD NY 1984]), a federal case that applied CPLR 202 to a non-RMBS trustee-plaintiff. (DBNT/Barclays, 156 AD3d at 402.) The Appellate Division concluded that "we need not decide whether the plaintiff-residence rule or the multi-factor test applies in this context because, even 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." (Id.)

DBNT/Barclays applied existing tests in determining where a nonresident RMBS trustee's cause of action accrues. Although it did not articulate a new test, or create a new statute of limitations defense for RMBS trustees, it was the first New York appellate decision to apply the borrowing statute to an RMBS trustee. DBNT/Barclays raises issues of importance to the

RMBS litigation which will now be the subject of consideration by the Court of Appeals.

As HSBC correctly points out, however, prior to the Appellate Division decision, Nomura filed answers asserting a statute of limitations defense in five other RMBS breach of contract cases brought by HSBC as trustee. (HSBC Memo. In Opp., at 1.) The timeliness of trustees' claims under the borrowing statute was challenged in the coordinated Part 60 RMBS litigation several years prior to the Appellate Division decision in DBNT/Barclays. The borrowing statute was in fact raised in a motion to dismiss, initially brought in January 2014 and then re-filed in January 2015 (Index No 652001/2013, NYSCEF Doc Nos 9, 73), in one of the cases that was ultimately determined by DBNT/Barclays. The answers in the five HSBC cases asserted a defense under "the applicable statute of limitations" and were all served after the filing of the 2014 motion to dismiss which raised the borrowing statute.[3] The potential availability of a statute of limitations defense under the borrowing statute was thus known to the parties, although the application of the borrowing statute to RMBS trustees was not the subject of appellate

[3] The answers asserting the statute of limitations in the actions brought by HSBC were filed as of the following dates: Nomura Asset Acceptance Corp., 2006-S4 v Nomura Credit & Capital, Inc. (Index No 653390/2012) – August 11, 2014; Nomura Asset Acceptance Corp., 2006-S3 v Nomura Credit & Capital, Inc. (Index No 652619/2012) – August 26, 2014; Nomura Asset Acceptance Corp., 2007-1 v Nomura Credit & Capital, Inc. (Index No 652842/2014) – May 5, 2015; Nomura Home Equity Loan, Inc., 2006-FM2 v Nomura Credit & Capital, Inc. (Index No 653783/2012) – Amended Answer, October 26, 2015; Nomura Home Equity Loan, Inc., 2007-3 v Nomura Credit & Capital, Inc. (Index No 651124/2013) – Amended Answer, October 26, 2015.

In three of the five above actions, Nomura asserted the defense in the answers notwithstanding the fact that motions to dismiss based on the New York statute of limitations had been denied, raising the inference that another state's statute of limitations was at issue. (See Nomura Asset Acceptance Corp., 2006-S4 v Nomura Credit & Capital, Inc., 2014 NY Slip Op 31671 [U], 2014 WL 2890341, * 5-6 [Sup Ct, NY County 2014]; Nomura Asset Acceptance Corp., 2006-S3 v Nomura Credit & Capital, Inc., Index No 652619/2012, NYSCEF Doc No 103 [Sup Ct, NY County July 17, 2014]; Nomura Asset Acceptance Corp., 2007-1 v Nomura Credit & Capital, Inc., Tr. of Decision on the Record on Feb. 24, 2015, so-ordered on Mar. 23, 2015, Index No 652842/2014, NYSCEF Doc No 70 [Sup Ct, NY County].)

authority prior to DBNT/Barclays.[4] Under these circumstances, the court holds that Nomura's excuse for its failure to assert the defense prior to this motion is less than compelling.

The court further holds, however, that the absence of a compelling excuse for the delay here is not determinative of whether leave to amend should be granted. As discussed above, under long-standing authority, the general rule is that there "must be lateness coupled with significant prejudice to the other side" in order for an amendment to be barred. (Edenwald Contr. Co., Inc., 60 NY2d at 959 [internal quotation marks and citation omitted] [reversing the denial of leave to amend to assert a waiver defense post-note of issue, without discussion of the excuse for the delay, the Court reasoning that the party opposing the amendment did not show significant prejudice]; see also Cherebin v Express Ambulance Serv., Inc., 43 AD3d 364, 365 [1st Dept 2007] [reversing the denial of leave to the plaintiff to amend the complaint, notwithstanding that the "plaintiff's excuse for the delay could have been more compelling," where the trial court failed to address "the critical issue of defendant's failure to demonstrate meaningful prejudice by the delay"].)

With respect to the statute of limitations, in particular, in Fahey v County of Ontario (44 NY2d 934 [1978], revg 55 AD2d 1034 [4th Dept 1977]), the Court of Appeals reversed the Appellate Division's affirmance of the denial of a motion for leave to amend an answer to assert a statute of limitations defense, where the Appellate Division had relied on the defendant's

[4] By Order of the Administrative Judge, dated May 23, 2013, this court was designated to hear "all actions hereafter brought in this [C]ourt alleging misrepresentation or other wrong in connection with or arising out of the creation or sale of residential mortgage-backed securities." The RMBS breach of contract actions in this Part (colloquially known as put-back actions) have been coordinated under a common master index number, pursuant to a Case Management Order (CMO). (Index No 777000/2015, NYCEF Doc Nos 1 [Master Filing Order, Aug. 28, 2015], 17 [CMO #1, Dec. 7, 2015].) Coordination has involved the appointment of liaison counsel to facilitate communication between the court and the parties, with the goal, among others, of avoiding duplication of motion practice involving issues common to multiple actions. (See CMO #1, ¶¶ II, IV.)

failure to offer any explanation for its delay. Without discussion of excuse, the Court of Appeals reasoned that, under CPLR 3025 (b), "[l]eave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay. Since the respondents cannot claim here such prejudice or surprise, the court below abused its discretion as a matter of law in denying appellant's motion to amend the answer to plead the Statute of Limitations." (Id. at 935 [internal quotation marks and citations omitted].)

Substantial authority in this Department has held that leave to amend to assert a statute of limitations defense is not proper where the defendant lacks a reasonable excuse for the delay, particularly where the delay is lengthy and the case has been certified as trial ready. As the Appellate Division has explained, "where the amendment is sought after a long delay, and a statement of readiness has been filed, judicial discretion in allowing the amendment should be discreet, circumspect, prudent and cautious." (Cseh v New York City Tr. Auth., 240 AD2d 270, 272 [1st Dept 1997] [internal quotation marks and citation omitted] [reversing the grant of leave to amend to add a statute of limitations defense after a 10-year delay, the Court finding "significant prejudice" to the plaintiff, but also stating that, in permitting the defendant to amend the answer after this time "without offering any excuse for the delay, we believe the court improvidently exercise[d] its discretion"]; Borges v Placeres, 123 AD3d 611, 611 [1st Dept 2014] [affirming the denial of a motion for leave to amend to add a statute of limitations defense, made on the eve of trial 8 years after the answer was served, "for lack of any excuse for the delay"]; Cameron v 1199 Hous. Corp., 208 AD2d 454, 454-455 [1st Dept 1994] [affirming the denial of the defendant's motion for leave to amend to assert the statute of limitations where the motion was made 6 years after the defendants served their answer and after the case was placed

on the calendar, the Court finding that prejudice to the plaintiff, "coupled with [defendants'] failure to offer any excuse for the delay in asserting the defense, provided ample reason for denying the motion"].)

Substantial other authority in this Department has, however, held, without consideration of whether the defendant had a valid excuse for a lengthy delay in seeking leave to assert a statute of limitations defense, that leave was proper where the plaintiff did not show prejudice or surprise resulting from the delay. (See Arellano v HSBC Bank USA, 67 AD3d 554, 554 [1st Dept 2009] [3-year delay]; Lettieri v Allen, 59 AD3d 202, 202 [1st Dept 2009] [motion made on the eve of trial after 2-year delay]; Solomon Holding Corp. v Golia, 55 AD3d 507, 507 [1st Dept 2008] [19-month delay]; Seda v New York City Hous. Auth., 181 AD2d 469, 470 [1st Dept 1992], lv denied 80 NY2d 759 [1992] [3-year delay]; Barbour v Hospital for Special Surgery, 169 AD2d 385, 386 [1st Dept 1991] [7-year delay].)[5]

Here, Nomura's answers in the two cases were filed on August 27, 2014. Neither answer pleaded a statute of limitations defense. The motion for leave to amend was filed nearly four years later on April 13, 2018. Expert discovery is, however, ongoing, and the note of issue has not been filed. Nomura's delay in moving for leave to amend, although unquestionably lengthy,

[5] At least in the context of motions for leave to amend complaints, there is also authority that a reasonable excuse must be offered for lengthy delay in moving for leave to amend. (Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assocs., LLC, 4 AD3d 290, 293 [1st Dept 2004] ["where there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay" [internal quotation marks, citation, and brackets omitted]; see also Hickey v Steven E. Kaufman, P.C., 156 AD3d 436, 436 [1st Dept 2017], lv denied ___ NY3d ___, 2018 WL 4440619 [Sept. 18, 2018] [same] [holding that the plaintiff was not required to explain a 6-month delay in moving to amend the complaint, and comparing cases involving 2 1/2 and 6-year delays in which the lack of an excuse was cited as a basis for denial of the motion]; Van Damme v Gelber, 111 AD3d 408, 409-410 [1st Dept 2013], lv denied 23 NY3d 904 [2014].)

is not comparable to the delays in the cases, discussed above, in which the defendants sought leave post-note of issue, and in which the Courts cited the lack of a reasonable excuse for the delay as a basis for, or at least as a factor supporting, denial of leave. Based on the particular circumstances of Nomura's motion and the numerous cases in which leave to amend has been granted without consideration of the sufficiency of the defendant's excuse for the delay in seeking leave, this court is not persuaded that Nomura's motion should be denied based on the lack or weakness of its excuse for its delay in asserting the statute of limitations defense. The court accordingly turns to the critical issue of whether HSBC has shown prejudice or surprise as a result of Nomura's delayed assertion of the defense.

In opposing Nomura's motion for leave to amend, HSBC asserts that "[i]n reliance on Nomura's decision not to raise a statute of limitations defense," it has engaged in extensive pre-trial motion practice and extensive fact discovery, filed six expert reports, and incurred millions of dollars in attorney's fees and other expenses. (HSBC Memo. In Opp., at 13.)

In a number of cases, Courts have found that plaintiffs have sustained prejudice as a result of the delayed assertion of a statute of limitations (or other dispositive) defense where, prior to the assertion of the defense, the parties have conducted significant discovery or other pre-trial proceedings addressed to the merits. (See e.g. Cseh, 240 AD2d at 271-272 [finding that the defendant hospital's 10-year delay in asserting the statute of limitations defense caused prejudice because the scope of discovery to establish the hospital's liability had been "significantly broadened" beyond the discovery needed to establish the liability of the co-defendant doctors who had asserted the defense]; Cameron, 208 AD2d at 454-455 [holding that the plaintiff was prejudiced by a post-note of issue motion to assert a statute of limitations

defense, as the plaintiff "had engaged in motion practice and disclosure . . . , and otherwise spent considerable time and expense preparing for trial"]; see also Arias-Paulino v Academy Bus Tours, Inc., 48 AD3d 350, 350 [1st Dept 2008] [reversing the grant of leave to the defendant to assert the defense of release, where the plaintiff had litigated the matter extensively and participated in a mediation over the 2 1/2 year delay]; compare Seda, 181 AD2d at 470 [holding that the plaintiff was not prejudiced by the delay where there had been "a dearth of discovery" in the 3 years preceding the motion for leave to amend]; Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3025:7.)[6]

The mere conduct of discovery or other pre-trial proceedings is not, however, dispositive. In numerous other cases, even after a lengthy delay during which the cases have been prepared for trial on the merits, Courts have granted leave to assert statute of limitations (or other dispositive) defenses, where the plaintiffs have not shown that they have been prejudiced or surprised as a result of the defendants' delay. (See e.g. Barbour, 169 AD2d at 386 [holding that the plaintiffs could "hardly claim" that they were surprised by the defendant doctor's assertion of a statute of limitations defense 7 years after the commencement of the action, where the co-defendant hospital had asserted the defense from the outset]; Lettieri, 59 AD3d at 202 [granting leave to assert a statute of limitations defense on the eve of trial, where the plaintiff could not

[6] In the context of motions for leave to amend complaints, however, there are authorities holding that the expense of litigating the claims that were asserted prior to the amendment does not constitute prejudice that would bar the amendment. (See e.g. Hickey, 156 AD3d at 436 [holding that time and expense in briefing and preparing to argue a motion to dismiss the original complaint was "not the kind of prejudice required to defeat an amendment"]; Pomerance v McGrath, 124 AD3d 481, 482 [1st Dept 2015], lv dismissed 25 NY3d 1038 [holding that the defendants' expenditure of $200,000 in legal fees prior to the amendment did not constitute prejudice]; Jacobson v Croman, 107 AD3d 644, 645 [1st Dept 2013] [rejecting the argument of the opponents of the amendment that they were prejudiced because they had tailored their extensive preparations to the claims that had originally been asserted].)

"reasonably claim" that he was prejudiced or surprised by the request for leave to amend]; Arellano, 67 AD3d at 554 [granting leave to assert a statute of limitations defense 3 years after the defendants answered]; see generally Norwood, 203 AD2d at 149 [reversing the denial of a motion for leave to amend at trial to assert a defense of qualified privilege, the Court reasoning that the plaintiff "cannot claim surprise since the facts and circumstances with respect to the qualified privilege were fully explored during discovery"].)

Here, similarly, HSBC cannot persuasively claim that it conducted discovery in reliance on Nomura's waiver of the statute of limitations defense or that it was unaware of the possible assertion of the defense. As noted above, the statute of limitations was pleaded by Nomura in five other cases brought against it by HSBC as trustee, in answers filed in 2014 and 2015. (See supra, n 2.) In none of these cases has the viability of the defense been the subject of motion practice.[7] Yet, by the time the motion in the instant actions was brought, HSBC had proceeded to conduct extensive fact discovery in each of the five actions and had served, or was about to serve, expert reunderwriting reports. (See Exhibit C to Put-back Liaison Counsels' Joint Letter, dated May 11, 2018, Index No 777000/2015, NYSCEF Doc No 516.) Here, HSBC has also expended substantial time and money on discovery in order to prepare the two cases for hearing on the merits. HSBC's claim that it performed this discovery in reliance on Nomura's failure to assert the statute of limitations lacks plausibility under these circumstances in which it performed

[7] HSBC asserts that if the statute of limitations defense based on the borrowing statute had been raised in the cases at issue in the initial motion to dismiss, the viability of the defense could have been determined in October 2015, when the Appellate Division issued a decision on the appeal from the decision on that motion, and "before the parties spent any meaningful time in discovery." (HSBC Memo. In Opp., at 12.) This assertion is not only highly speculative, but also ignores the terms of CPLR 3211 (e), under which a defendant may timely raise a statute of limitations defense in either a motion to dismiss or in the answer. It also ignores the conduct of the parties, discussed above, in five other cases brought by HSBC.

substantially similar discovery in the other five cases notwithstanding the assertion of the statute of limitations defenses there. Put another way, HSBC does not argue that, after these defenses were asserted in the other five cases, it curtailed preparation of the cases for trial on the merits or conducted discovery that was any narrower than that conducted here. Nor does HSBC point to any discovery that it requires as a result of the delayed assertion of the statute of limitations defense.

The court turns to the merits of the proposed amendment. As a federally-chartered national banking association, HSBC is required to designate in its articles of association the location of its main office. (Wachovia Bank v Schmidt, 546 US 303, 307 n 1 [2006] [citing 12 USC § 22 and other federal banking laws and regulations].) The main office of a national bank is "the place where its operations of discount and deposit are to be carried on." (Id. [internal quotation marks omitted].) "The State in which the main office is located qualifies as the bank's 'home State' under the banking laws." (Id.) HSBC's designated main office as of the closing of the securitization was located in Delaware, and the main office was subsequently relocated to Virginia. (See Articles of Association, Kahn Aff., Exs. E, F.)

The parties do not dispute that CPLR 202, the borrowing statute, does not apply to New York residents. Rather, they dispute whether HSBC is a New York resident. Nomura contends that a national bank's sole state of residence for purposes of the borrowing statute is the state of its designated main office. (See Nomura Memo. In Supp., at 9.) HSBC contends that a national bank, like other business entities, is a New York resident if its principal place of business is in New York, and that it qualifies as a New York resident under this standard. (See HSBC Memo. In Opp., at 2.)

In support of its contention that HSBC's designation of its main office is conclusive of its residence for purposes of the borrowing statute, Nomura relies on federal authority determining the location of national banks for purposes of diversity jurisdiction. In Wachovia Bank v Schmidt (546 US 303, supra), the Supreme Court construed 28 USC § 1348, the federal diversity jurisdiction statute applicable to national banks, which provides that national banks "shall . . . be deemed citizens of the States in which they are respectively located." Rejecting the Circuit Court's holding that, for diversity purposes, "located" could refer to any state in which a national bank had a branch, the Supreme Court reasoned that the meaning of the word "located" "depends on the context in and purpose for which it is used." (546 US at 318.) The Court noted that under various provisions of the National Bank Act, a national bank may be considered to be "located" either at its main office or at its branch offices, depending upon the purpose of the provision. (Id., at 313.) In the context of venue, the Court reasoned that the word "located" "may refer to multiple places," because venue "is primarily a matter of choosing a convenient forum." (Id., at 316, 318.) In the differing context of diversity jurisdiction, the Court reasoned that locating the place of citizenship of a national bank in any state in which it had a branch, rather than in the state of its main office, would impermissibly curtail the access of national banks to the federal forum, compared to the access afforded state banks and other state incorporated entities. (Id., at 307.)

In OneWest Bank, N.A. v Melina (827 F3d 214 [2d Cir 2016]), the Second Circuit joined other Circuit Courts in holding, for purposes of federal diversity jurisdiction, that a national bank is a citizen only of the state in which its main office is located, and not also of the state of its principal place of business. (Id. at 216, 217.) The Court's holding was based on a comparison of

the differing terms of the federal diversity jurisdiction statutes applicable to national banks and corporations, respectively, and the fact that only the latter, 28 USC § 1332, provides that a corporation shall be deemed a citizen of its state of incorporation and of the state where it has its principal place of business. (Id. at 218.) This case thus recognized that a national bank may have a principal place of business different from its main office. Wachovia also recognized this distinction. (See 546 US at 317, n 9.) According to OneWest, however, Wachovia "left open the question of whether a national bank is also a citizen of the state of its principal place of business" for purposes of diversity jurisdiction. (827 F3d at 218.)

Contrary to Nomura's contention, Wachovia and OneWest do not support its claim that because a national bank is a "creature[] of federal statutory law," and a citizen only of the state of its designated main office, it is also a resident only of the state of its main office for purposes of the borrowing statute. (See Nomura Reply, at 11-12.) As the above review of these authorities shows, the determination of citizenship involved policy concerns and interpretation of statutory terms specific to diversity jurisdiction. On this motion, Nomura fails to claim—let alone, show—that the different policy considerations underlying the borrowing statute would be served by equating the residence of a national bank only with the location of its main office and, more particularly, by treating a national bank with a principal place of business in New York as a nonresident of New York.[8]

As explained by the Court of Appeals, "[t]he primary purpose of CPLR 202 and its

[8] Nomura also contends that because the state in which HSBC's main office is located is also its "home State," this state must be its residence under the borrowing statute. (See Nomura Reply, at 11-12.) Nomura undertakes no analysis of the purposes for which a national bank's home State is relevant under the banking laws. It accordingly also does not make any showing that such purposes are relevant to the purpose underlying the borrowing statute.

predecessors is to prevent forum shopping by a nonresident seeking to take advantage of a more favorable Statute of Limitations in New York or, as the Court also stated, to "discourag[e] forum shopping by plaintiffs who have no significant contacts with New York. . . ." (Antone v General Motors Corp., Buick Motor Div., 64 NY2d 20, 29, 27-28 [1984]; accord Global Fin. Corp., 93 NY2d at 528; Norex Petroleum Ltd. v Blavatnik, 23 NY3d 665, 676 [2014] [also explaining that "the legislature enacted section 202 primarily to prevent forum shopping; i.e., to make sure that nonresidents do not select a New York forum and burden New York's state and federal courts when, and perhaps precisely because, their lawsuits are time-barred by the applicable laws of the foreign states where the causes of action accrued"].)

Nomura does not argue, and this court does not find, that this prohibition against forum shopping by a nonresident is furthered by precluding a business entity with a principal place of business in New York from initiating suit in New York. As held with respect to other business entities, a plaintiff with a "significant connection with the state does not 'come into' New York to take advantage of its laws, the person is already there. . . . Establishment of a principal place of business in New York is a sufficiently 'significant connection' to New York to qualify as a resident for purposes of C.P.L.R. § 202." (Matter of Countrywide Fin. Corp. Mortgage-Backed Secs. Litigation, 834 F Supp 2d 949, 968 [CD Cal 2012] [Pfaelzer, J.] [Countrywide] [holding CPLR 202 inapplicable to AIG and related corporate entities, which had their principal place of business in New York but were incorporated outside the state].)

Nomura does not cite, and this court has not located, any authority which analyzes whether a national bank's residence for purposes of the borrowing statute is its main office or

principal place of business.[9] Courts which have considered the residence of corporations under the borrowing statute have, however, repeatedly held that the residence may be the state of incorporation or the principal place of business, or only the principal place of business.

In determining the residence of a corporation for purposes of the borrowing statute, the Court of Appeals has looked to both the place of incorporation and the principal place of business. (E.g. Global Fin. Corp., 93 NY2d at 530 [holding that the plaintiff corporation's "causes of action are time-barred whether one looks to its State of incorporation or its principal place of business"].) Although the Court of Appeals has not expressly held that the corporation's residence may be in both places, there is intermediate appellate authority that the residence of a corporate plaintiff under CPLR 202 "may be the state of incorporation or its principal place of business." (Oxbow Calcining USA Inc. v American Indus. Partners, 96 AD3d 646, 651 [1st Dept 2012].)[10]

As noted above, a federal court applying CPLR 202 in an RMBS action held that corporate insurers with a principal place of business in New York were New York residents, although they were incorporated outside this state. (Countrywide, 834 F Supp 2d 949, supra [extensively surveying New York authorities on residence under the borrowing statute].) The

[9] As discussed below, this issue was not addressed in DBNT/Barclays.

[10] Prior to Global Finance, the Court of Appeals had held that an entity incorporated in New York, with a principal place of business in Massachusetts, was a New York resident for purposes of the borrowing statute. (Wydallis v United States Fidelity & Guar. Co., 63 NY2d 872 [1984].) Outside the context of the borrowing statute, the Court of Appeals has observed that "[i]t is generally recognized that a corporation, like an individual, may have a place of residence other than its domicile. Corporations often have their principal places of business outside of the State of incorporation. The domicile of a corporation is the State in which it is incorporated." (Sease v Central Greyhound Lines, Inc., of New York, 306 NY 284, 286 [1954].) It is also noted that in Antone (64 NY2d at 28-30), the Court held that an individual may have more than one residence for purposes of the borrowing statute, and that residence is not equivalent to domicile.

United States Court of Appeals, in applying CPLR 202, has recently observed that "Courts within the Second Circuit have consistently held that a business entity's residence is determined by its principal place of business." (Luv N' Care, Ltd. v Goldberg Cohen, LLP, 703 Fed Appx 26, 28 [2d Cir 2017]; see e.g. Robb Evans & Assocs. LLC v Sun Am. Life Ins., 2012 WL 488257, * 3 [SD NY, No 10 Civ 5999, Feb. 14, 2012] [Daniels, J.]; National Union Fire Ins. Co. of Pittsburgh, Pa. v Forman 635 Joint Venture, 1996 WL 507317, * 3-4 [SD NY, No 94 Civ 1312, Sept. 6, 1996] [Stanton, J.].)[11]

As HSBC correctly points out (HSBC Memo. In Opp., at 20-21), Nomura cites no authority that the residence of a national bank should be treated differently than that of other business entities by a court in applying the borrowing statute. To the extent that Nomura argues that Courts have rejected the principal place of business as the place of other business entities' residence for purposes of the borrowing statute, the authority on which Nomura relies does not support this contention. (See Nomura Memo. In Supp., at 11-12, citing Verizon Directories Corp. v Continuum Health Partners, Inc., 74 AD3d 416, 417 [1st Dept 2010], lv denied 15 NY3d 716, affg 2009 WL 1116113 [Sup Ct, NY County 2009] [rejecting the plaintiff corporation's claim that it was a resident of New York "by virtue of its authorization to do business and asserted extensive presence here" where, as indicated in the trial court decision, the plaintiff was

[11] In Countrywide, the Court held that a corporation is a New York resident under CPLR 202 if the corporation "is either incorporated in New York or maintains its principal place of business there." (834 F Supp 2d at 958.)

In contrast, the federal courts in the Second Circuit appear to hold that only the principal place of business is relevant to the determination of where the business entity resides. (Luv N' Care, Ltd., 703 Fed Appx at 28 n 1 [stating, in the case of a nonresident plaintiff, that "[i]t would seem that an economic harm has greater effect on a for-profit enterprise's activities at its principal place of business rather than at its place of incorporation"]; Robb Evans & Assocs. LLC, 2012 WL 488257, * 3 [in a case involving a partnership, holding that "the sole residency of a business entity for the purpose of the New York borrowing statute is its principal place of business"].)

incorporated in and had its principal place of business in other states][12]; Gordon v Credno, 102 AD3d 584, 585 [1st Dept 2013] [holding, without discussing where the plaintiff had its principal place of business, that "given the minimal business activities of the [plaintiff] corporation," its cause of action accrued for purposes of the borrowing statute in its out-of-state place of incorporation].)

In holding that a national bank is a New York resident if its principal place of business is here, this court rejects Nomura's contention that the Appellate Division decision in DBNT/Barclays is dispositive of whether HSBC's claims are time-barred. (See Nomura's Memo. In Supp., at 3.) There, the parties did not dispute that the plaintiff-trustee, DBNT, a national bank, was a California resident, with its principal place of business and main office in California. As stated by the Appellate Division, each of the defendant-securitizers (Barclays and HSBC) "moved to dismiss the action against it, arguing, in pertinent part, that, because plaintiff's principal place of business is in California, plaintiff's contractual claim is barred by California's four-year statute of limitations. . . ." (156 AD3d at 401-402.) The Court was not presented with the issue of whether a national bank's residence for purposes of the borrowing statute should be considered its main office as opposed to its principal place of business. Rather, the issue before the Court was whether "the plaintiff-residence rule or the multi-factor test" should be applied in determining the place of accrual of a nonresident RMBS trustee's cause of action under the borrowing statute. (Id. at 402.) In determining this issue, the court accepted the principal place of business as the place of the trustee's residence. Here, in contrast, there is no agreement as to

[12] This reading of Verizon was endorsed by the Appellate Division in a subsequent decision. (Oxbow Calcining USA Inc., 96 AD3d at 651.)

the place of HSBC's residence.

On this record, however, HSBC fails to demonstrate that its principal place of business is in fact New York. In support of its claim that New York is its principal place of business, HSBC relies on the following pleadings and evidence: The complaints in both actions allege that HSBC is a national banking association with its registered main office in Virginia and its "principal executive office" in New York, New York. (Nomura Asset Acceptance Corp. [NAAC], Series 2006-AF2 Am. Compl., ¶ 22; Nomura Home Equity Loan, Inc. [NHELI], Series 2007-2 Compl., ¶ 22.) The Annual Reports for 2006 and 2007 filed with the Securities and Exchange Commission by HSBC USA Inc., HSBC's parent, state that HSBC's "main office is in Delaware and its domestic operations are primarily located in New York State." These Reports also state that HSBC's "principal executive offices" are located in Buffalo, New York. (Annual Reports, Aff. of Brendan DeMay [HSBC's counsel], Exs. A at 5, 17; B at 5, 18.) The Pooling and Servicing Agreements for the securitizations at issue state that the "principal corporate trust office" of the trustee is located at 452 Fifth Avenue, New York, New York. (NAAC 2006-AF2 and NHELI 2007-2 PSAs, Definition of "Corporate Trust Office," DeMay Aff., Exs. C, D.)[13]

[13] HSBC also argues that the depositor for each securitization was a New York resident, that the trustee is the assignee of the depositor, and that courts look to the residence of the assignor in applying CPLR 202. (See Nomura Memo. In Opp., at 23.) As set forth in the Prospectus Supplements for the securitizations, each depositor is an affiliate of defendant Nomura, the sponsor of the securitization, and each depositor is a special purpose corporation incorporated in Delaware, with a "principal executive office" in New York, New York. The "limited purposes" of the depositor include the acquisition of mortgage loans and other assets, and the issuance of securities and notes secured by or representing ownership interests in mortgage loans. "[T]he depositor does not have, nor is it expected in the future to have, any significant assets." (Prospectus Supplements, DeMay Aff., Exs. G at 158-159, H at 144-145.)

On this motion, the parties do not discuss whether the status of the depositors, as special purpose vehicles (or mere conduits), affects the determination of the place where the injury is felt and the cause of action accrues for purposes of the borrowing statute. Nor do they discuss, except in the most cursory fashion, the terms of the Pooling and Servicing agreements by which the depositors' rights to the trust corpus were transferred to the trustee, and the extent to which HSBC seeks in these actions to enforce breaches of representations and warranties that were made to

In opposition, Nomura points to numerous complaints, answers, and notices of removal filed by HSBC in other actions, in which HSBC states that its principal place of business is either in Delaware or, after HSBC relocated its main office, in Virginia. (See Nomura Memo. In Supp., at 7, Aff. of Daniel Kahn [Nomura's counsel], Exs. J-M, O-S.) Nomura also cites a page from HSBC's website, stating that its principal place of business is in Virginia. ("HSBC Cross-Border Disclosure," Kahn Aff., Ex. N at 5.)

A dispute of fact thus exists as to whether, or to what extent, a national bank's principal executive office is equivalent to its principal place of business and as to where HSBC's principal place of business is located. This dispute is not appropriately resolved on a motion to amend. If the court does not ultimately find that HSBC has its principal place of business in New York and thus finds that HSBC is not a New York resident, the court will be required by CPLR 202 to determine where HSBC's cause of action accrued. This determination will be made under the plaintiff-residence rule, the multi-factor test, or some other standard tailored to the unique characteristics of RMBS trusts. It is expected that the Court of Appeals' determination of DBNT/Barclays will provide much needed guidance on these issues. At this juncture, with HSBC's residence in dispute, the court cannot find that Nomura's requested amendment is patently without merit.

The court accordingly concludes that Nomura has met the standards for leave to amend its answers to add a statute of limitations defense.

DBNT Action

---

the depositors. On this motion, the court accordingly declines to reach the issue of whether the residence of the depositors governs for purposes of CPLR 202.

Morgan Stanley's answer, which did not contain a statute of limitations defense, was filed on January 22, 2016. (NYSCEF Doc No 81.) By letter dated January 24, 2018, filed shortly after the DBNT/Barclays decision, Morgan Stanley first sought leave to amend to add a statute of limitations defense under the borrowing statute. (Joint Letter, Index No 777000/2015, NYSCEF Doc No 403.)

This action is brought by the same California trustee that brought the actions at issue in DBNT/Barclays. Here, as in those actions, DBNT does not dispute that it is a national bank with its principal place of business in California, and does not claim that it is a resident of any other state. (DBNT Memo. In Opp., at 12.) Rather, DBNT claims that its residence is not "dispositive" under the borrowing statute for purposes of determining the place where its cause of action accrued, and that the trust at issue here is "far less connected to California than the trusts considered in [DBNT/Barclays]." (Id. at 12.) DBNT thus in effect argues that, under the multi-factor test that was also considered in DBNT/Barclays, its cause of action would not accrue in California.

The sole difference in the factors that DBNT points to, in briefing this motion, is the percentage of loans that encumber California properties. (Id.) The court notes that this percentage does not appear to differ significantly from that in DBNT/Barclays. Moreover, as Morgan Stanley argues, and DBNT does not dispute, the other factors considered by the Court in DBNT/Barclays—e.g., the principal administration of the trust in California; the obligation of the trust to pay taxes, if any, in California; the origination of all of the mortgages by a California-based lender; and maintenance of the notes in California—apply equally to DBNT here. (See Morgan Stanley Memo. In Supp., at 4-5; DBNT Memo. In Opp., at 12-13; Oral Argument

Transcript at 25-26.) On the reasoning of DBNT/Barclays, these factors point to California as the place of accrual of its causes of action. Morgan Stanley thus makes a strong showing, under DBNT/Barclays, of the merit of the proposed amendment to assert a statute of limitations defense under the borrowing statute.[14] The critical issue, to which the court turns, is accordingly whether the standards for leave to amend are otherwise satisfied.

DBNT argues that Morgan Stanley waived the statute of limitations defense by virtue of its failure to assert the defense in its original answer, and that "[w]aiver is waiver, and leave to amend cannot cure it." (DBNT Memo. In Opp., at 8.) For the reasons stated, and on the authority cited, in the above determination of the HSBC Actions, this contention is without merit.

DBNT also argues that leave to amend should be denied because Morgan Stanley lacks an excuse for its delay in asserting the defense. (DBNT Memo. In Opp., at 9.) Morgan Stanley argues in its briefing of the motion that, under governing law, an excuse need not be shown in the absence of prejudice. (Morgan Stanley Reply, at 7.) At oral argument it also argued that it sought leave promptly after the Appellate Division decided DBNT/Barclays which, it asserts, represented a "development in the case law." (Tr. at 14.) Here, as in the HSBC Actions, the parties were aware of a potential defense under the borrowing statute and Morgan Stanley could

---

[14] In so holding, the court rejects DBNT's claim that the amendment lacks merit because this action, unlike the actions decided by DBNT/Barclays, pleads a failure to notify claim that is timely in whole or in part. (See DBNT Memo. In Opp., at 13-14.) The fact that the action may not be subject to dismissal in its entirety based on the statute of limitations defense does not render the amendment plainly lacking in merit or, as argued by DBNT, "futile."

The court also declines on this motion to consider DBNT's argument that the depositor for the securitization has its principal place of business in New York, and that the residence of the depositor, as DBNT's assignor, controls for purposes of the borrowing statute. By letter dated May 16, 2018, DBNT purported to join in the argument of HSBC to this effect, although DBNT did not assert this argument in its brief. In any event, for the reasons stated above with respect to the HSBC Actions (see n 11, supra), the record is not sufficiently developed to permit determination of this argument.

have asserted the defense prior to the decision in DBNT/Barclays. As in the HSBC Actions, however, the absence of a compelling excuse is not determinative as to whether leave to amend should be granted, given DBNT's failure to show that it is prejudiced or surprised by the amendment.

In support of its claim of prejudice, DBNT argues that "in reliance on" Morgan Stanley's failure to assert the statute of limitations defense, it conducted expensive and burdensome discovery and, in particular, reviewed hundreds of thousands of documents, reunderwrote over 400 loans, and served expert reports. (DBNT Memo. In Opp., at 1, 11.) Morgan Stanley argues, and DBNT does not dispute, that DBNT continued to conduct complex, expensive discovery in another RMBS case brought by DBNT in which the defendant asserted the statute of limitations.[15] (Morgan Stanley Reply, at 5, citing Joint Letter, Ex. C [Index No 777000/2015, NYSCEF Doc No 405].) Under these circumstances, the court finds unpersuasive DBNT's assertion that the extensive discovery here would have been avoided had Morgan Stanley asserted the statute of limitations defense.

The court is also unpersuaded by DBNT's contention that it is prejudiced because it has "lost the opportunity" to conduct discovery relevant to the statute of limitations defense. (See

[15] In this case, Deutsche Bank National Trust Co. (EQLS 2007-1) v EquiFirst Corp. (Index No 651957/2013 [EQLS Action]), a dissolved defendant-originator moved to dismiss under the Minnesota statute of limitations, and the dissolved defendant and a second defendant-originator moved to dismiss under the New York statute of limitations. The borrowing statute was not at issue on the motion. By decision dated May 25, 2016, this court granted the motion only to the extent that it was based on the Minnesota statute of limitations. (2016 WL 3017760, mod on other grounds 154 AD3d 605 [1st Dept 2017].) The remaining defendants, a second originator and the securitizer–defendant, then filed an answer, dated August 3, 2016, which asserted the statute of limitations. As DBNT acknowledges in a letter to this court regarding defendants' request for a stay in the instant action and the EQLS Action, DBNT completed fact discovery and served its initial expert reports, notwithstanding the assertion of the statute of limitations defense in the answer in the EQLS Action. (Joint Letter, Ex. C [Index No 777000/2015, NYSCEF Doc No 405].)

DBNT Memo. In Opp., at 10.) To the extent that DBNT claims that it requires discovery on the administration of the trust and its assets (see id.), this information is largely within its own possession. To the extent that DBNT also claims that it requires information regarding the California discovery rule (see id.), this discovery can still be obtained if it is not barred by DBNT/Barclays.

As the Appellate Division explained in DBNT/Barclays, under California law, "a discovery rule may apply in contract cases where breaches will not be reasonably discoverable by plaintiffs until a future time." (156 AD3d at 404 [internal quotation marks and citation omitted].) The Court held, on the record of the motion to dismiss, that DBNT's breach of contract claims were "not saved by California's discovery rule, inasmuch as the record establishe[d] 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." (Id.)

DBNT asserts that discovery would enable it to "develop[] evidence concerning what information was available concerning Morgan Stanley's breaches; what was done, not done, and why; and the ordinary practice for trustees of securitization trusts. More importantly, the Trustee could have an engaged an expert to opine on whether it acted with reasonable diligence here." (DBNT Memo. In Opp., at 10-11.) DBNT does not undertake any analysis of the record that the DBNT/Barclays Court had before it when it determined that the California discovery rule did not save DBNT's complaint. In particular, DBNT does not address whether there is any relevant difference between the pleadings in the cases before the DBNT/Barclays Court and the complaint here, or whether the DBNT/Barclays Court had any evidence before it. On this

record, this court cannot determine whether the DBNT/Barclays reasoning on the California discovery rule will effectively bar the discovery that DBNT seeks here.

Even assuming that DBNT can ultimately show that it is entitled to, and needs, discovery regarding the California discovery rule, DBNT will not sustain prejudice because the discovery can still be ordered. (See e.g. Williams, 132 AD3d at 533; Tri-Tec Design, Inc. v Zatek Corp., 123 AD3d 420, 420 [1st Dept 2014]; see also Jacobson v McNeil Consumer & Specialty Pharms., 68 AD3d 652, 654 [1st Dept 2009].) Cost shifting, if appropriate, can also be considered. (See CPLR 3025.)

The court accordingly concludes that Morgan Stanley has met the standards for leave to amend its answer to add a statute of limitations defense.

Stays

In the HSBC Actions, Nomura seeks a stay of expert discovery pending the Court of Appeals' decision of the DBNT/Barclays appeal. As authorized by this court, the request for a stay in these actions is made not in the motion for leave to amend the answer, but by separate letter applications, dated March 20, 2018. The defendants in seven other breach of contract actions brought by HSBC—five against Nomura and two against Merrill Lynch Mortgage Lending, Inc. and other entities (Merrill Lynch)—also seek such stays by letter applications, dated March 20, 2018.[16]

[16] The other actions brought by HSBC in which defendants seek stays of expert discovery are as follows: Nomura Asset Acceptance Corp., 2006-S4 v Nomura Credit & Capital, Inc. (Index No 653390/2012); Nomura Asset Acceptance Corp., 2006-S3 v Nomura Credit & Capital, Inc. (Index No 652619/2012); Nomura Asset Acceptance Corp., 2007-1 v Nomura Credit & Capital, Inc. (Index No 652842/2014); Nomura Home Equity Loan, Inc., 2006-FM2 v Nomura Credit & Capital, Inc. (Index No 653783/2012); Nomura Home Equity Loan, Inc., 2007-3 v Nomura Credit & Capital, Inc. (Index No 651124/2013); Merrill Lynch Alternative Note Asset Trust, 2007-OAR5 v Merrill Lynch Mortgage Lending, Inc. (Index No 652793/2016); Merrill Lynch Alternative Note Asset Trust, 2007-A3 v Merrill Lynch Mortgage Lending, Inc. (Index No 652727/2014).

As held above, although Nomura's motion is not patently without merit and should be granted, HSBC raises a bona fide issue of fact as to whether its principal place of business is in New York and it is therefore a New York resident, rendering the borrowing statute inapplicable. As also explained above, the issue in DBNT/Barclays is where the cause of action accrues under the borrowing statute in an action brought by a nonresident RMBS trustee.

Although there are some factual differences between the HSBC Actions and the seven other actions brought by HSBC, in all of the actions HSBC's claims as to its residence are the same. HSBC acknowledges that its main office was in Delaware at the time of accrual of its breach of representations and warranties cause of action, but maintains that its principal place of business is, and was, in New York. In none of the actions does Nomura or Merrill Lynch make any showing of a likelihood that HSBC will be unable to establish its residence in New York, and that HSBC's claims will thus be subject to, and time-barred under, the borrowing statute. Put another way, they make no showing of a likelihood that the DBNT/Barclays decision will be dispositive of the timeliness of the actions brought by HSBC as trustee. Under these circumstances, the court declines to exercise its discretion to stay discovery in these actions pending the appeal. (See Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2201:11.)

The court reaches a contrary result in the DBNT Action and in the EQLS Action (EquiFirst Loan Securitization Trust 2007-1 v EquiFirst Corp., Index No 651957/2013), also brought by DBNT, in which stays of expert discovery are sought pending the DBNT/Barclays appeal to the Court of Appeals. The request for the stay is made in the motion for leave to amend in the DBNT Action and in a separate authorized letter application in the EQLS Action.

(DBNT Memo. In Supp., at 4-7; Joint Letter, Exs. B, C [Index No 777000/2015, NYSCEF Doc Nos. 404, 405].)

In these Actions, it is undisputed that DBNT is a California, not a New York, resident. As the borrowing statute is therefore applicable, the place where DBNT's cause of action accrued must be determined. DBNT attempts to distinguish the factors in the DBNT and EQLS Actions from the factors cited by the DBNT/Barclays Court in finding that California would be the place of injury if a multi-factor test, rather than a residence-rule, were applied. On the reasoning of DBNT/Barclays, however, significant factors in the DBNT and EQLS Actions, regarding the administration of the trusts and their assets, also point to California.

As held above, Morgan Stanley makes a strong showing, under existing law as articulated in DBNT/Barclays, of the merit of the proposed amendment. On the appeal of DBNT/Barclays, the Court of Appeals will decide the standards for application of the borrowing statute to DBNT as trustee. It is therefore also highly likely that the Court of Appeals' decision will be dispositive of the timeliness of DBNT's claims for breaches of representations and warranties in the DBNT and EQLS Actions. Contrary to DBNT's contention, the pleading in the DBNT and EQLS Actions of a failure to notify cause of action, which was not at issue before the DBNT/Barclays Court, does not militate against the requested stay. The timeliness of the failure to notify cause of action is also subject to determination under the borrowing statute, and the scope of expert discovery will be affected by the extent to which there are timely claims for alleged breaches of the duty to notify. (See generally Federal Hous. Fin. Agency v Morgan Stanley ABS Capital I Inc., 59 Misc 3d 754 [Sup Ct, NY County 2018] [this court's decision discussing the accrual dates for failure to notify claims].) Under these circumstances, the court will exercise its

discretion to stay all expert discovery in the DBNT and EQLS Actions pending determination of the DBNT/Barclays appeal.

ORDER

It is hereby ORDERED that the motion of defendant Nomura Credit & Capital, Inc., in Nomura Asset Acceptance Corp., Mortgage Pass-through Certificates, Series 2006-AF2, by HSBC Bank USA, National Association, as Trustee v Nomura Credit & Capital, Inc. (Index No 652614/2012, Motion Seq No 009), for leave to amend its answer is granted to the extent of granting leave to said defendant to serve and file the amended answer annexed as Exhibit A to the Affirmation of Daniel Kahn In Support of Defendant's Motion; and it is further

ORDERED that the amended answer shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that the motion of defendant Nomura Credit & Capital, Inc., in HSBC Bank USA, National Association, in its capacity as Trustee of Nomura Home Equity Loan, Inc., Asset Backed Certificates, Series 2007-2 v Nomura Credit & Capital, Inc. (Index No 650337/2013, Motion Seq No 009), for leave to amend its answer is granted to the extent of granting leave to said defendant to serve and file the amended answer annexed as Exhibit B to the Affirmation of Daniel Kahn In Support of Defendant's Motion; and it is further

ORDERED that the amended answer shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that the letter applications, dated March 20, 2018, by Nomura Credit & Capital, Inc. in the two-above captioned actions which are the subject of this decision and order,

for a stay of expert discovery pending hearing and determination by the Court of Appeals of Deutsche Bank National Trust Co. v Barclays Bank PLC and Deutsche Bank National Trust Co. v HSBC Bank USA, National Association (156 AD3d 401 [1st Dept 2017] [DBNT/Barclays], lv granted ___NY3d___, 2018 WL 4440302 [Sept 18, 2018]), are denied, pursuant to separate orders to be filed in said actions; and it is further

ORDERED that the motion of defendants Morgan Stanley Mortgage Capital Holdings LLC and Morgan Stanley ABS Capital I Inc., in Deutsche Bank National Trust Company, as Trustee for the Morgan Stanley ABS Capital I Inc. Trust 2007-NC4 v Morgan Stanley Mortgage Capital Holdings LLC (652877/2014, Motion Seq No 006), is granted to the following extent:

1. Leave is granted to defendants to serve and file the amended answer annexed as Exhibit A to the Affirmation of Brian S. Weinstein In Support of Defendants' Motion; and the amended answer shall be deemed served upon service of a copy of this order with notice of entry; and

2. All expert discovery in this action is stayed pending hearing and determination by the Court of Appeals of DBNT/Barclays; and it is further

ORDERED that the letter application, dated January 24, 2018, of defendants in EquiFirst Loan Securitization Trust 2007-1 v EquiFirst Corp. (Index No 651957/2013 [the EQLS Action]), for a stay of discovery is granted, pursuant to a separate order to be filed in said action, to the extent of staying all expert discovery in the action pending hearing and determination by the Court of Appeals of DBNT/Barclays; and it is further

ORDERED that the letter applications, dated March 20, 2018, by defendants for a stay of expert discovery pending hearing and determination by the Court of Appeals of DBNT/Barclays,

are denied, pursuant to separate orders to be filed in the following actions: Nomura Asset Acceptance Corp., 2006-S4 v Nomura Credit & Capital, Inc. (Index No 653390/2012); Nomura Asset Acceptance Corp., 2006-S3 v Nomura Credit & Capital, Inc. (Index No 652619/2012); Nomura Asset Acceptance Corp., 2007-1 v Nomura Credit & Capital, Inc. (Index No 652842/2014); Nomura Home Equity Loan, Inc., 2006-FM2 v Nomura Credit & Capital, Inc. (Index No 653783/2012); Nomura Home Equity Loan, Inc., 2007-3 v Nomura Credit & Capital, Inc. (Index No 651124/2013); Merrill Lynch Alternative Note Asset Trust, 2007-OAR5 v Merrill Lynch Mortgage Lending, Inc. (Index No 652793/2016); Merrill Lynch Alternative Note Asset Trust, 2007-A3 v Merrill Lynch Mortgage Lending, Inc. (Index No 652727/2014).

Dated: New York, New York
October 18, 2018

MARCY FRIEDMAN, J.S.C.