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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.

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March 13, 2019

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 capacities as Trustee of Securitized Asset Backed Receivables LLC Trust 2007-BR1 and Trustee of 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.

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PRELIMINARY STATEMENT

A common error runs throughout Respondents' arguments—their failure to acknowledge the uniquely limited role of the Trustee, as established in the PSAs.[1] The Trustee's limited function highlights the fact that the economic injury resulting from Respondents' contract breach was not an injury to the Trustee, but to the Trusts it administers for the benefit of investors. For that reason, the claims asserted by the Trustee on behalf of the Trusts accrued in New York, where the breaches occurred and the Trusts suffered harm, not in California, where the Trustee happens to reside. The PSAs bear out, in numerous provisions, the Trustee's limited role. Those provisions also explain why, contrary to Respondents' contentions, California law would treat the claims as timely, even if California law applied (though it does not).

Respondents attempt to rewrite this Court's holding in *Global Financial Corp. v. Triarc Corp.*, 93 N.Y.2d 525 (1999). That decision embraced "the traditional definition of accrual—a cause of action accrues at the time and in the place of the injury." *Id.* at 529. *Global Financial* did not announce a rigid "plaintiff-residence rule," which would have been a stark departure from the "traditional definition." Rather, it merely acknowledged that "the place of injury *usually* is where the plaintiff resides and sustains the economic impact of the loss." *Id.* (emphasis added). "Usually" does not mean "always," and, as the Second Circuit and federal district

[1] Terms not defined have the same meaning as in DBNTC's opening brief.

courts in New York had recognized long before *Global Financial*, "[w]here the plaintiff is a trust, the use of the residency of the trustee . . . does not make sense as a practical matter;" the court must instead inquire "who became poorer, and where did they become poorer" as a result of the breach. *Maiden v. Biehl*, 582 F. Supp. 1209, 1217-18 (S.D.N.Y. 1984). On the facts alleged in the Actions, that is indisputably the Trusts and not the Trustee, and Respondents have not shown otherwise as they must. To the extent Respondents go beyond mere recitation of the Trustee's residence, they nonetheless place disproportionate weight on the Trustee's residence and indiscriminately point to every contact the Trusts have with California, no matter how far removed in time and place from the actual injury at issue. Their analysis emphasizes the irrelevant fact that the Trustee's main office is in California over the relevant fact that the economic injury to the Trusts occurred in New York.

Even if the claims accrued in California, the Actions are timely. Respondents double down on the First Department's mix-and-match approach, asking this Court to select the particular combination of California and New York law that is most favorable to them in order to find that the Actions are time-barred. Yet, if California's limitations period applies, this Court's precedent requires it to apply California law on tolling and extensions.

First, California expressly allows parties to extend its presumptive four-year statute of limitations for contract claims to eight years. That is what the parties to

the BR1 BRA did in the Accrual Provision when they agreed that the limitations period would not start to run until a later date.

Second, the Actions are also timely under the Repurchase Protocols. While such protocols do not delay the running of the statute of limitations under New York law, California law takes a different approach.

Third, the Actions are timely under California's discovery rule. At a minimum, given that the PSAs expressly limited the Trustee's obligation to make any investigation of the Mortgage Loans' quality, the timeliness of the complaints under California law involves questions of fact that cannot be determined on a motion to dismiss.

For these reasons, this Court should reverse the First Department's Decision.

ARGUMENT

I. THE TRUSTEE'S CLAIMS ACCRUED IN NEW YORK, BECAUSE THAT IS WHERE THE INJURY WAS SUFFERED

A. The IAS Court Correctly Held That Respondents Failed to Meet Their Burden to Show That the Claims Accrued Outside New York

As the IAS Court recognized, under CPLR 202, Respondents bear the burden of showing that the economic impact of the injury at issue in the Actions was suffered "without the state." CPLR 202; *see also Romano v. Romano*, 19 N.Y.2d 444, 447 (1967); *Brush v. Olivo*, 438 N.Y.S.2d 857, 859 (2d Dep't 1981); (Barclays-Br.22 (acknowledging Respondent's burden to show that claims accrued in California).) Even under Respondents' view of CPLR 202, therefore, they must show that it was the Trustee who "sustain[ed] the economic impact of the loss" before the Trustee's residence becomes the dispositive factor. *Glob. Fin.*, 93 N.Y.2d at 529. Respondents cannot do so, and consequently fail to meet their "initial burden of establishing, prima facie, that the time in which to sue has expired." (A22 (IAS Court Order quoting *Benn v. Benn*, 918 N.Y.S.2d 465 (1st Dep't 2011)).)

Respondents wrongly insinuate that it is the Trustee's burden to demonstrate "extraordinary circumstances" or "offer[] 'unusual circumstances'" to justify deviating from the purported "bright-line" plaintiff-residence rule. (HSBC-Br.15; Barclays-Br.28.) Nothing in *Global Financial* or in the trial court opinions cited by Respondents obviates their burden or says anything about "extraordinary circumstances." (*See* Barclays-Br.28; HSBC-Br.15, n.2.) Only after Respondents

have carried their initial burden to show that the cause of action accrued outside New York (*i.e.*, that the Trustee suffered the relevant injury) would the burden shift to the Trustee to raise a triable issue of fact on that issue. *See State of Narrow Fabric, Inc. v. Unifi, Inc.*, 5 N.Y.S.3d 512, 513-14 (2d Dep't 2015). As the IAS Court recognized, Respondents never did so. (A22.)

B. Global Financial Adopted the Traditional Place of Injury Rule and Recognized That the Plaintiff's Residence Would Not Control in All Cases

Global Financial did not mandate a "bright-line" plaintiff-residence rule that must be overcome by "extraordinary circumstances."[2] (*See* Section I.A., *supra.*) To the contrary, the Court explicitly adopted "the traditional definition of accrual—a cause of action accrues at the time and place of the injury." *Glob. Fin.*, 93 N.Y.2d at 529. The plaintiff in *Global Financial* argued that its contract claim accrued where the key events took place based on a "center of gravity" approach that New York courts typically apply to substantive choice of law questions. *Id.* at 528. The Court of Appeals rejected that argument, and adopted the place of injury rule for

[2] Contrary to Respondents' assertions, *Deutsche Bank Nat'l Tr. Co. v. Flagstar Capital Markets Corp.*, 32 N.Y.3d 139, 146 (2018) and *ACE Sec. Corp., Home Equity Loan Tr., Series 2006-SL2 v. DB Structured Prods., Inc.*, 25 N.Y.3d 581 (2015) ("*ACE III*") do not mandate a bright-line approach to claim accrual in all circumstances. (Barclays-Br.29-30; HSBC-Br.19-20.) Those cases relate to *when* a claim accrues and hold that New York's public policy prohibits extension of New York's statute of limitations by contract. *Flagstar*, 32 N.Y.3d.at 146; *ACE III*, 25 N.Y.3d at 593-98. *Flagstar* and *ACE III* are irrelevant to the inquiry here, which turns on *where* a claim accrued.

breach of contract claims. *Id.* at 529. Because the plaintiff in *Global Financial* had suffered the economic injury, the plaintiff's residence was held to be the place of injury. *See id.* at 527-28. If, on the facts of the case, the injury was suffered somewhere *other* than the plaintiff's place of residence, then *that* is where the claim arose under the traditional rule. This is not an exception, and there is no requirement to show "extraordinary circumstances" as Respondents claim. To the contrary, the Court's reference to the place of injury "usually" being the plaintiff's residence merely reflected the "usual" situation where, unlike here, the plaintiff (i) was injured and (ii) suffered that injury in its place of residence. *Id.* at 528-29.

Global Financial's favorable citation to *Lang v. Paine, Webber, Jackson & Curtis, Inc.*, 582 F. Supp. 1421 (S.D.N.Y. 1984), confirms that the plaintiff residence rule is not absolute. *See Glob. Fin.*, 93 N.Y.2d at 530. In *Lang*, the plaintiff was a resident of Ottawa who had established a separate "financial base" in Massachusetts. 582 F. Supp. at 1426. Acknowledging that the place of injury rule applied and that the place of injury is "normally the plaintiff's residence," the court in *Lang* nevertheless held that the cause of action accrued in Massachusetts because that was where the direct loss caused by the transactions at issue was felt. *Id.* at 1425 (citing *Sack v. Low*, 478 F.2d 360, 366 (2d Cir. 1973)). Far from holding that exceptions to the plaintiff-residence rule are "possible . . . only in rare situations" (Barclays-Br.28; *see also* HSBC-Br.15), the Court in *Global Financial* cited *Lang* for the simple

proposition that the place of injury controls, even when the place of injury is not the plaintiff's residence. 93 N.Y.2d at 530 (citing *Lang*, 582 F. Supp. at 1425-26).

Like *Lang*, the Actions simply do not represent the "usual" case in which the party suing is the party that suffered the injury giving rise to suit; therefore, the Court must "consider all *relevant* factors in determining where the loss is felt." *Lang*, 582 F. Supp. at 1425 (emphasis added); *see also Loreley Fin. (Jersey) No. 28, Ltd. v. Merrill Lynch*, 985 N.Y.S.2d 499, 501-02 (1st Dep't 2014). Where the economic impact of the injury in the Actions was sustained cannot be determined by reference to the Trustee's residence because the Trustee—a representative-plaintiff bringing suit on behalf of the Trusts for the benefit of the Certificateholders—did not sustain those injuries. (S*ee infra* Section I.G; *see also* Br.24-28.)[3]

C. Determining The Place of Injury Rule Requires Consideration of "All Relevant Factors"

Determining the place of injury when the plaintiff brings suit in a representative capacity requires "consider[ing] all *relevant* factors in determining the situs of the loss." *Loreley*, 985 N.Y.S.2d at 501-02 (emphasis added). That is

[3] Barclays notes that in certain other RMBS Repurchase Actions pending before the trial court in Part 60, DBNTC, in its capacity as trustee of other RMBS trusts, asserts that the injury in those actions originally accrued in favor of the depositor as assignor to the trustee. (Barclays-Br15, n.3.) DBNTC does not make that allegation or argument in either of the Actions, and all parties to these Actions have proceeded based on the allegations that the causes of action originally accrued in favor of the Trusts. Thus, while this Court may well have to confront the depositor assignment issue in some future case, no such issue is raised in this case.

the traditional rule applied in *Lang* (and cited favorably in *Global Financial*) and the rule more recently applied by the First Department in *Loreley Financial*. More specifically, it is the rule applied in *Maiden* (contemporaneous to *Lang*) in a case specifically concerning a suit brought by a trustee. The IAS Court therefore correctly adopted the *Maiden* court's reasoning and relied on a multi-factor test to assess where the economic impact of the loss to the Trusts was felt.

Maiden's approach is wholly consistent with *Global Financial*. (*Contra* HSBC-Br.32.) Although Respondents disparage *Maiden* as a pre-*Global Financial* decision, *Maiden* (like *Lang*) anticipated the *Global Financial* rule that accrual under CPLR 202 occurs "at the time and in the place of the injury," which "usually is where the plaintiff resides and sustains the economic impact of the loss." *See Glob. Fin.*, 93 N.Y.2d at 529; *Maiden*, 582 F. Supp. at 1217-18; *Lang*, 582 F. Supp. at 1425-26. *Global Financial* therefore could not have altered the analysis in *Maiden*, as both cases stand for the same "traditional" proposition—that accrual occurs in the place of injury.

Contrary to Respondents' argument, applying a *Maiden*-type test to determine the place of the injury does not "amount[] to [] a return to the amorphous 'Center of Gravity' analysis." (Barclays-Br.3-4; *see also* HSBC Br. 27-28.) Indeed, *Maiden* and *Lang* applied Second Circuit law that had already rejected the center of gravity approach and concluded that accrual under the borrowing statute is

governed by the place of injury. *See Indus. Consultants, Inc. v. H.S. Equities, Inc.*, 646 F.2d 746, 747 (2d Cir. 1981); *Sack*, 478 F.2d at 365-67. Applying *Sack*, the *Maiden* court expressly acknowledged that the "thrust of the inquiry" is "who became poorer, and where did they become poorer?"[4] *Maiden*, 582 F. Supp. at 1217-18. Here, the IAS Court appropriately employed reasoning similar to that used in *Maiden* to resolve this question, while the First Department failed to do so.

D. The IAS Court Properly Considered Factors Relevant to the Place of Injury in RMBS Repurchase Actions

The court in *Maiden* did not prescribe a rigid set of factors; rather, it looked at "all the facts presented on th[e] motion" to determine that the trust at issue was located and injured in New York.[5] 582 F. Supp. at 1218. Here, the relevant factors are (i) that the Trusts were established under New York law and the rights of the parties are governed by New York law (Br.11-13); (ii) that almost all of the Certificates representing "the entire ownership of the Trust Fund[s]" (A105, A572)

[4] Respondents acknowledge that looking to the location of the Certificateholders would be an "unworkable" test. (Barclays-Br.32; HSBC-Br.25-26.) That is exactly why the court in *Maiden*, the First Department, and the IAS Court all rejected a Certificateholder residence analysis, (A10, A22), and why the court in *Maiden* looked to the trust's location because "it [w]as the Trust itself that suffered the loss." *Maiden*, 582 F. Supp. at 1218.

[5] Contrary to Respondents' argument that the Trustee argued for "the *Maiden* test" and that the Court must apply each factor propounded in *Maiden* without regard to relevance (Barclays-Br.43; HSBC-Br.29), the Trustee has consistently advocated for the adoption of "the type of multi-factor analysis" employed by the *Maiden* court and asked that the "Court adopt the reasoning in *Maiden*." (Br.30-31); Br. for Pl.-Resp't at 19-21, *Deutsche Bank Nat'l Tr. Co. v. Barclays Bank PLC*, Index No. 651338/2013 (1st Dep't Nov. 2, 2016); Br. for Pl.-Resp't at 20-22, *Deutsche Bank Nat'l Tr. Co. v. HSBC Bank USA Nat'l Ass'n*, Index No. 652001/2013 (1st Dep't Aug. 10, 2016).

were held in New York on the Closing Date (Br.14); and (iii) that Respondents and their affiliates made the investment decisions in New York through, and at, the moment of closing. (Br.33.)

First, although the New York choice of law provisions in the PSAs are not *dispositive* of the question of which statute of limitations applies, they are *relevant* to the determination of where the Trusts are located and consequently where the injury at issue in the Actions occurred. (Br.34-35); *see Maiden*, 582 F. Supp. at 1217 (noting trust created in New York and governed by New York law). The IAS Court correctly concluded that it was relevant that the Trusts were New York common law trusts "established in the PSAs, pursuant to New York law" and that the rights of the parties are governed by New York law. (A20.) The law governing the creation of a business trust is similar to a corporation's state of legal organization; historically, "the trust was remarkably effective in offering the key features of the corporate form." John D. Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 Colum. L. Rev. 2145, 2146 (2017) ("Throughout modern history, the common law trust frequently allowed businesses to obtain many of the same doctrinal advantages as then-existing versions of the corporate form, including . . . legal personhood in litigation.")[6]

[6] In *Global Financial*, the Court found that because the plaintiff's cause of action was time-barred, both in its state of incorporation and where it maintained its principal place of business, "we need not determine whether it was in Delaware or Pennsylvania that plaintiff more acutely sustained the

A holding by this Court affirming that governing law is a relevant factor to determining where injury to a trust accrues for purposes of CPLR 202 would not conflict with *2138747 Ontario, Inc. v. Samsung C&T Corp.*, 31 N.Y.3d 372 (2018) or *Portfolio Recovery Associates, LLC v King*, 14 N.Y.3d 410 (2010). Those cases held that an express statement is needed in order for a choice of law provision to adopt a state's statute of limitations. *Ontario*, 31 N.Y.3d at 380-81; *Portfolio Recovery*, 14 N.Y.3d at 416. The Court did not suggest, and it does not logically follow, that the law chosen to govern the existence of a trust is irrelevant to where the trust exists and where an injury to that trust occurs. Here, the Trustee does not contend that the choice of law provisions encompass the statute of limitations, only that the provisions are a relevant factor in determining the location of the Trusts, which were expressly created as New York common law trusts. (A20 (citing Barclays PSA § 2.01(c); HSBC PSA § 2.01(c)).)

Second, almost all of the Certificates, which lost value due to Respondents' breaches, were held in New York at the time of securitization (A22, n.3); *see Maiden*, 582 F. Supp. at 1217 (noting New York is where the securities are kept).[7] Therefore, the economic impact of the reduction in value of the Trust Funds could

impact of its loss." 93 N.Y.2d at 530. Here, by contrast, the Trusts, which are organized under New York law, "more acutely" sustained the impact of its loss in New York.

[7] (*See* Br.32-33; A42, A1340.)

only have been felt in New York where the "entire ownership of the Trust Fund[s]" was located. (A105 (BR1 PSA §2.05 ("[T]he Certificates in authorized Denominations evidenc[e] directly or indirectly the entire ownership of the Trust Fund")), A572 (NC1 PSA §2.04 (same)).)[8]

Third, the Respondents selected the Mortgage Loans, structured the transactions, and made the Representations and Warranties, all at their offices in New York. (A38-A42, A287-A289, A814-A815, A1335-A1341.); *see Maiden*, 582 F. Supp. at 1217 (noting New York is where investment decisions were made). The final selection of the Mortgage Loans was not determined until they were conveyed to the Trusts on the Closing Dates. (A38-A42, A100, A102, A287-289, A567-A571, A814-A815, A1335-A1341.) Consequently, the final and most important investment decisions—which Mortgage Loans would be conveyed to the Trusts—were made in New York on the Closing Dates. Respondents' assertion that their investment decisions are irrelevant "pre-securitization factor[s]" (HSBC-Br.43-44; Barclays-Br.47), mischaracterizes their active role in the securitization process, which continued up until the moment the Representations and Warranties

[8] By contrast, courts in RMBS cases brought by individual certificateholders correctly look to the residence of the plaintiff. (*Contra* Barclays-Br.46-47.) Those suits fall squarely into the "usual situation" where the individual plaintiff (*i.e.* certificateholder) brings suit directly to remedy its own injury (*i.e.* reduction in value of its individual ownership). *See Commerzbank AG v. Deutsche Bank Nat'l Tr. Co.*, 234 F. Supp. 3d 462, 464-65, 469 (S.D.N.Y. 2017). Here, the Trustee sues as a representative to redress injury to the Trusts, which resulted in harm to the entire beneficial ownership of the Trust Funds.

were made and immediately breached upon closing in New York. *See Flagstar*, 32 N.Y.3d at 143.

E. The First Department Failed to Consider All Relevant Factors and Instead Improperly Employed a "Center of Gravity" Test

The factors considered by the First Department were not tailored towards identifying the location of the injury, but rather amount to a "center of gravity" test of the sort the Respondents purport to reject. The First Department relied on every possible contact the Trusts have with California, no matter how far removed in time and place from the actual injury at issue. None of the factors cited by the First Department—the location of the Mortgage Notes, the location of the Mortgage Loans' originators, the location of the properties securing the Mortgage Loans, the place of the Trusts' administration after the relevant injury occurred, or the hypothetical obligation to pay taxes—are relevant to the place where the injury accrued on the Closing Dates.

First, as discussed in the Opening Brief, the location where the Mortgage Notes *might* be maintained, *after* the transactions closed and *after* the injury occurred, has no bearing on the place of injury as of the Closing Date. (Br.36-37.) Second, the location of the mortgage originators—who sold mortgage loans to

Respondents that Respondents eventually securitized into numerous trusts—is also far attenuated from the place where the injury was felt.[9]

Third, the location of the properties securing the Mortgage Loans also has little bearing on the place of injury, as the underlying properties (as opposed to the Mortgage Loans themselves) do not belong to the Trusts, and it was Respondents' misrepresentations about the quality of the Mortgage Loans, not the properties, that gave rise to the Actions. The properties are not at issue—and, in any event, they are not "predominantly" located in California. (*See* Br.34, 36-37.)[10]

Fourth, while insisting that the place of the Trustee's "administration" of its duties should be afforded significant weight, Respondents can point only to passive post-closing duties ("holding title to the loans" and "receiving notices"), ministerial activities ("disbursements and transfers" from trust accounts), and the ability to "enforce the trust's contractual rights" or "conduct[] and defend[] litigation" on behalf of the Trusts as narrowly contemplated by the PSAs. (HSBC-Br.38; *see also*

[9] Perhaps recognizing that it would be "akin to looking to where a car was manufactured to determine where claims arising out of a car accident accrued" (Barclays-Br.47), neither Respondent suggests that this Court give weight to the location of the loan originators, though the Decision explicitly relied on it.

[10] While Respondents inflate their numbers by 10%, referring to the percentage of "loans by principal balance" that encumber California properties (as opposed to the number of loans), roughly 79% of BR1 Mortgage Loans and roughly 77% of NC1 Mortgage Loans encumber properties located in states other than California, including New York. (A283, A376, A815, A1008; *contra* HSBC-Br.37; Barclays Br.42.) HSBC creates a balancing test comparing California's and New York's "share" of the "loans by principal balance" to determine where the Trusts were injured. (HSBC-Br.37.) This serves only to demonstrate that Respondents are engaging in their own center of gravity analysis, cherry-picking any factor that points to California.

Barclays-Br.41.) All of these "activities" occurred after the Closing Dates, after the injury occurred. *ACE III*, 25 N.Y.3d at 589, 597-98. Thus, they shed no light on where the injury occurred.

Lastly, although it is undisputed that neither of the Trusts has ever been obligated to pay taxes in California (A10, A11 & n.3, A38, A1337), Respondents insist that the hypothetical possibility that they could pay taxes there should determine the Trusts' location. (HSBC-Br.38-39; Barclays-Br.41-42.) But the Trusts, recognized as REMICs which pass all income through to the Certificateholders, have no "taxable income" to report and are subject to a "tax regime" that contemplates that they will never pay state taxes. (Br.38-39.) Non-existent tax payments are irrelevant.

F. Respondents Propose An Arbitrary and Rigid Plaintiff-Residence Rule, But New York's Public Policy Requires a Common-Sense Focus on the Place of Injury

The rule Respondents advocate does not make sense. It would mean that for one type of representative plaintiff—a trustee of a trust—the place of injury will be the trustee's residence no matter how irrelevant to the injury sued on, while all other representative plaintiffs (such as shareholders bringing derivative suits and bankruptcy trustees) are subject to no such rule. (*See* Barclays-Br.36-37; HSBC-Br.22-23.) There is nothing consistent, fair, or predictable about such a rule—or about one that prioritizes the arbitrary location of a trustee's main office over the

relevant fact of where a trust suffers injury. (*Contra* Barclays-Br.37.) This cannot be consistent with CPLR 202's purpose of "add[ing] clarity to the law and to provid[ing] the certainty of uniform application to litigants." *Ins. Co. of N. Am. v. ABB Power Generation Inc.*, 91 N.Y.2d 180, 187 (1997). Indeed, the Decision's inherent unpredictability and "failure to protect the justified expectations of the parties to the contract" can only serve to damage "[New York's] pre-eminent financial position." *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 227 (1975).

Respondents argue that a "bright line" plaintiff-residence rule for trustees is necessary to provide "clear guidance" (Barclays-Br.26), and "permit[] . . . potential investors to know at the outset what limitations regime applies." (HSBC-Br.19.) But the Decision has generated confusion, not clarity. Until this case, it apparently occurred to no one that the location of a trustee's office would determine which statute of limitations would apply to an RMBS Repurchase Action. (*See* Br.42-44.) Respondents claim that the Decision does not upset settled expectations, but Barclays—which itself did not seek dismissal on statute of limitations grounds in two other cases brought by DBNTC before the Decision was issued (Br.43, n.17 (citing cases))—asserts that parties who failed to invoke the plaintiff-residence rule for purposes of CPLR 202 in numerous other RMBS cases "misapplied" or "misapprehended" what Barclays' says is the rule under *Global Financial*.

(Barclays-Br.39.)[11] Barclays does not confront the obvious fact that all of the parties it contends were "misapply[ying]" or "misapprehend[ing]" *Global Financial* had "expectations" that Respondents' rule will upset. HSBC says that "if no party made the argument" that the plaintiff-residence rule applies to trustees bringing suit on behalf of trusts, then "the courts would have no reason to address it." (HSBC-Br.47.) But the fact that "no party made the argument" is in itself a strong indication that all parties understood and expected (before, during, and after the PSAs were drafted) that New York's six-year statute of limitations applied.

Respondents suggest that New York courts are not equipped to analyze and weigh clearly relevant factors to adequately determine a trust's place of injury. (Barclays-Br.33-35; HSBC-Br.28-29.) But New York courts are already frequently asked to do just that. (*See* Br.31, n.9). Indeed, New York courts routinely require additional discovery to determine where or when a plaintiff is injured pursuant to CPLR 202. *See, e.g., Oxbow Calcining USA Inc. v. Am. Indus. Partners*, 948 N.Y.S.2d 24, 30-31 (dismissal under CPLR 202 reversed because a question of fact existed as to whether the plaintiff was injured in New York); *United Bhd. of Carpenters & Joiners of Am. v. Nyack Waterfront Assocs.*, 623 N.Y.S.2d 601, 601

[11] Barclays tells this Court that "the IAS Court has thus far granted stays [] in only two cases, both of which were brought by DBNT[C]" (Barclays-Br.6), but neglects to mention that the parties in multiple cases will argue a borrowing statute defense on a full factual record at summary judgment. *See In re Part 60 RMBS Put-Back Litig.*, Nos. 652614/2012, 650337/2013, 2018 WL 5099045 (N.Y. Sup. Ct., N.Y. Cty. Oct. 18, 2018).

(2d Dep't 1995) (affirming that statute of limitations defense required additional evidence). Barclays' self-serving suggestion that developing the factual record necessary to support a multi-factor analysis would "jettison the straightforward plaintiff-residence rule" and turn "every accrual analysis under CPLR 202 into a fact-intensive inquiry that must be individually adjudicated" is baseless and contradicted by its own admission that such an inquiry would only apply to a "narrow slice of cases." (*See* Barclays-Br.25-26, 32-33.)

G. The PSAs and Trust Jurisprudence Make Clear That the Trustee Acts as a Representative, On Behalf of the Trusts and for the Benefit of the Certificateholders

Respondents take the wholly unsupportable position that a trustee does not act in a representative capacity, and that, because the trustee "has the cause of action," it sues on its own behalf. (HSBC-Br.20-27; *see also* Barclays-Br.36-37.) Respondents turn the limited role of the Trustee under the PSAs on its head. Under this view, Respondents' dogmatic adherence to a plaintiff-residence rule would have this Court nullify not only the terms of the PSAs, but also two hundred years of trust jurisprudence.

The PSAs make the Trustee's representative status clear: the parties explicitly agreed that the Trustee acts "on behalf of the Trust" and that it received the rights transferred by the PSAs "for the benefit of the [c]ertificateholders." (*See* A102; A567.) Pursuant to the PSAs, the Trustee brought the Actions in a representative

capacity to redress economic injuries to the Trusts that can only have been felt in New York. (A33, A38, A1332, A1337.)

The United States Supreme Court, federal circuit and district courts, and New York State courts have all consistently recognized that trustees act in a representative capacity when bringing lawsuits on behalf of trusts and their beneficiaries, and that "courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit." *See Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 287 (2008) ("Trustees bring suits to benefit their trusts."); *see also Diana Allen Life Ins. Tr. v. BP P.L.C.*, 333 F. App'x 636, 638 (2d Cir. 2009) ("[A] trustee has the exclusive authority to sue third parties *who injure the beneficiaries' interest in the trust*.") (quoting *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 567 (1990)) (emphasis added); *Colorado & S. Ry. Co. v. Blair*, 214 N.Y. 497, 513 (1915) ("[G]enerally in defending or executing the trust, *the trustee represents the bondholders, who, though their rights are directly affected*, are individually not necessary parties.") (emphasis added).[12]

[12] Given this vast body of law, the dearth of authority supporting HSBC's position that a "suit to 'recover' trust assets or for 'damages thereto' is brought in the trustee's 'own right" is unsurprising. HSBC's sole authority for this proposition is *Toronto General Trust Co. v. Chicago, Burlington & Quincy Railroad*, 123 N.Y. 37 (1890)—a case involving a testamentary trust that was decided over 100 years ago, did not involve the borrowing statute, and was last cited by a New York state court in 1966. *See Farber v. Smolack*, 272 N.Y.S.2d 525, 530 (2d Dep't 1966) (briefly citing to *Toronto General* for unrelated proposition), *rev'd*, 20 N.Y.2d 198 (1967). The other cases cited by HSBC involve donative or testamentary trusts and stand only for the unremarkable proposition that a trustee may sue (or be sued) in its own name on *behalf* of the trust. *See Haag v. Turney*, 240 A.D. 149, 151 (1st Dep't 1934) (a trustee "may sue without joining with him the person for whose

Indeed, this Court has recently confirmed that RMBS trustees—including HSBC, acting in its capacity as trustee when the shoe is on its other foot—act in a representative capacity when suing to enforce breaches of representations and warranties. *See e.g.*, *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 578 (2017) ("HSBC, as trustee of the securitization trusts, commenced this litigation by bringing an action on behalf of each trust."); *ACE III*, 25 N.Y.3d at 590 ("HSBC acted as trustee . . . and was authorized to bring suit on the Trust's behalf."). In light of these cases, and numerous others it brought in its capacity as trustee before the lower courts of this state, HSBC's assertions that "it does not make sense" and is "completely artificial[] to talk about [the Trustee] suing on behalf of the Trust" are, quite frankly, astonishing. (HSBC-Br.25.)[13]

Respondents insist that the Trustee suffered injury because it holds legal title to the Trusts' assets. (*See* HSBC-Br.22-24; Barclays-Br.30-31.) But Respondents fail to mention that, despite its "ownership" of the Trust Funds, the Trustee cannot sell the Mortgage Notes, borrow against them, or even move them. (A41-A42,

benefit the action is prosecuted."); *Henning v. Rando Machine Corp.*, 207 A.D.2d 106, 109-10 (4th Dep't 1994) (finding trustees vested with legal title to property at issue were appropriately named defendants).

[13] Mem. of Law in Support of Mot. for Leave to Appeal, *Deutsche Bank Nat'l Tr. Co. v. Barclays Bank PLC, Deutsche Bank Nat'l Tr. Co. v. HSBC Bank USA, Nat'l Ass'n*, No. APL-2018-00169, Hennes Aff. Ex. 1 (N.Y. May 29, 2018) (listing cases in Part 60 including ten cases brought by HSBC as trustee on behalf of various trusts).

A100, A102, A104, A567-A571, A1339-A1340.)[14] "Legal title" is so called because it is distinct from beneficial ownership—and thus unconnected to the *economic* impact of any injury to the Trusts. Respondents fail to identify *any* economic injury alleged in the Actions that the Trustee itself suffered as a result of its nominal ownership of the trust assets.[15] Despite the Trustee's "bare legal title," any recovery in the Action would "initially go the [T]rusts, [but] would simply pass through the [T]rusts, and be distributed to the Noteholders and Certificateholders." *See Royal Park Inv. SA/NV v. HSBC Bank USA, Nat't Ass'n*, 109 F. Supp. 3d 587, 614 (S.D.N.Y. 2015). Accordingly, the Trustee brought the Actions to redress injury suffered by the Trusts which ultimately flowed to their Certificateholders. (A33, A38, A1332, A1337.)

Failing to identify any injury to the Trustee, Respondents point to the Trustee's purported status as the "real party in interest" under CPLR 1004. According to Respondents, because the Trustee "has the cause of action," it is

[14] Respondents also fail to appreciate the important distinction between traditional trustees, who have great discretionary control over the trust corpus and are subject to broad fiduciary duties, and RMBS trustees that have limited responsibility for, and power to exercise control over, the trust corpus. *See Phoenix Light SF Ltd. v. Bank of N. Y. Mellon*, No. 14-CV-10104 (VEC), 2015 WL 5710645, at *2 (S.D.N.Y. Sept. 29, 2015) ("The role of the Trustee in the context of the RMBS Trust is distinct from those of an 'ordinary trustee,' which might have duties extending well beyond the agreement.").

[15] Throughout its brief—once on the same page it asserts that the Trust is not a legal entity—Barclays describes actions *the Trust* may take, such as hypothetically paying taxes (Barclays-Br.10) and issuing participation certificates. (Barclays-Br.15.)

different from other representative plaintiffs—such as derivative shareholder plaintiffs or bankruptcy trustees—under the borrowing statute. (HSBC-Br.22-24; Barclays-Br.36-37.) But Respondents' artificial distinction among categories of trustees conflates actual injury (which is relevant under the borrowing statute) and legal capacity to sue (which is not). The "real party in interest" is not necessarily the party whose injury gives rise to the suit, but rather "the party who, by substantive law, possess[es] the right to be enforced." 82 N.Y. Jur. 2d Parties § 34. The purpose of CPLR 1004 is to "carve[] out exceptions for certain classes of persons"—like trustees—who have no economic interest in the subject matter at issue and therefore "might not otherwise fall within the traditional concept of a real party in interest," so that a party like a trustee can sue or be sued without joining the entity it represents. 82 N.Y. Jur. 2d Parties § 41. A plaintiff's technical status as a "real party in interest" is therefore irrelevant to the place of economic injury under CPLR 202.

This explains why, in the bankruptcy context, courts look to the residence of the injured entity (*i.e.* the bankrupt debtor) to determine the place of accrual under the borrowing statute, even though the bankruptcy trustee is the "real party in interest" for the purposes of any suit. *See Montoya v. Daniel O'Connell's Sons, Inc.*, 2017 WL 1167336, at *2 (S.D.N.Y. Mar. 28, 2017) ("[T]he bankruptcy trustee . . . has the 'capacity to sue and be sued' . . . [and] becomes the real party in interest[.]"). For the same reason courts look to where the cause of action accrued in favor of the

assignor (*i.e.* injured party) even though the assignee is the party that will benefit from recovery on the claim and brings suit as the "real party in interest." *See Portfolio Recovery*, 14 N.Y.3d at 416.

II. THE FIRST DEPARTMENT IMPROPERLY IMPOSED NEW YORK'S LAW ON THE CALIFORNIA LIMITATIONS PERIOD, FAILING TO RECOGNIZE THAT THE ACTIONS ARE TIMELY UNDER CALIFORNIA LAW

Even if the claims accrued in California, the Actions are still timely. Seeking to avoid this clear result, Respondents cobble together the aspects of New York and California law that suit them—suggesting that, while California's four-year limitations period applies, the timeliness of the Actions is otherwise governed by New York's law on accrual and tolling—and claim that this curious amalgam renders the Actions untimely. (Barclays-Br.49-50; HSBC-Br.54-55.) That approach defies the settled principle that "[a]ll the extensions and tolls applied in the foreign state . . . and *not merely its period*" must be borrowed. *In re Smith Barney, Harris Upham & Co., Inc.*, 85 N.Y.2d 193, 207 (1995) (emphasis added); *see also Norex Petroleum Ltd. v. Blavatnik*, 23 N.Y.3d 665, 676–77 (2014) (under CPLR 202 "[t]he New York tolls are not superimposed on the foreign period, or vice versa") (citation and quotation omitted).

Indeed, California may well have prescribed a shorter limitations period than New York precisely because it also has rules that afford parties greater flexibility. *See Hambrecht & Quist Venture Partners v. Am. Med. Int'l., Inc.*, 38 Cal. App. 4th

1532, 1548 (Ct. App. 1995) (California law "accord[s] contracting parties substantial freedom to modify the length of the statute of limitations"); *Zamora v. Lehman*, 214 Cal. App. 4th 193, 206 (2013) (California's public policy "seeks to preserve a reasonable opportunity to investigate and defend"). The First Department's interpretation of the borrowing statute, which incorporates only part of California's limitations regime, is not only inappropriate under CPLR 202 jurisprudence but also frustrates California's own policy choices, contrary to principles of comity.

A. The BR1 Accrual Clause Delayed the Accrual of the BR1 Action as Permitted By California Law

Section 360.5 of California's Civil Procedure Code allows contracting parties to extend California's four-year statute of limitations "in writing" for up to eight years. (Br.48-49.) That is precisely what the parties to the BR1 BRA did in the Accrual Provision when they agreed that the limitations period would not start to run until after specified events during the life of the BR1 Trust. (A192 (BRA § 3(a)).) New York public policy prohibits parties from extending *New York's* six-year limitations period. But it does not prohibit parties from extending *another state's* limitations period as permitted by that state's law. Because the BR1 Action was brought within California's eight-year period, it is timely under California law.

Barclays claims that the BRA's choice of law clause means that the Accrual Provision is governed by New York rather than California law. (Barclays-Br.49-50.) But, Barclays acknowledges that statutes of limitations are considered

procedural matters to which choice of law clauses ordinarily do not apply. (*Id.* at 23.) It tries to split hairs by arguing that, even if statutes of limitations are procedural, rules that determine *when a statute of limitations begins to run* are substantive. (Barclays-Br.49-50 n.14.) But this Court rejected that theory in *Flagstar*: The Court held that an accrual clause did not validly extend the limitations period under New York law precisely because it was *not* substantive. *See Flagstar*, 32 N.Y.3d at 148; *see also* Barclays-Br.50 (relying on same proposition).[16] Besides, labels aside, it defies common sense to say that the borrowing statute incorporates California's limitations period but not California's rules about how parties are permitted to adjust the date the period starts to run.

Far from extending the limitations period "indefinitely" (Barclays-Br.51), Section 360.5 permits extension only up to eight years. Cal. Code Civ. Proc. § 360.5. Thus, if an agreement appears to extend the statute of limitations "indefinitely," California courts allow a total limitations period of only eight years. *See*, *e.g.*, *Cal. First Bank v. Braden*, 264 Cal. Rptr. 820, 821-23 (Ct. App. 1989) (purported indefinite extension effective for eight years); *Builders Bank v. Oreland, LLC*, No. CV 14-06548, 2015 WL 1383308, at *3 & n.1 (C.D. Cal. Mar. 23, 2015) (explaining

[16] Nothing in *Tanges v. Heidelberg N. Am., Inc.*, 93 N.Y.2d 48 (1999), is to the contrary. That case's reference to "accrual" being a substantive concept had nothing to do with contractual *accrual clauses* that merely delay the commencement of the statute of limitations; rather, *Tanges* considered "whether a cause of action accrued in plaintiff's favor" under a foreign statute of repose. *Id.* at 53.

that § 360.5 states that "no waiver 'shall be effective for a period exceeding four years,' rather than saying that written waivers may not be general in scope").

Finally, Barclays claims that the Accrual Provision is not sufficiently "express[]" and "does not mention any statute of limitations." (Barclays-Br.52.) But Section 360.5 does not require magic words. *See, e.g.*, *Celador Int'l Ltd. v. Walt Disney Co.*, No. CV04-03541, 2010 WL 11505709, at *8-10 (C.D. Cal. Dec. 21, 2010) (applying Section 360.5 to provision that did not mention statute of limitations because "the effect of the . . . clause is the same as . . . a modification of an existing statute of limitations"), *aff'd*, 499 F. App'x 721 (9th Cir. 2012); *SMS Fin. IV, LLC v. Benigno*, No. B160387, 2003 WL 21500696, at *5 (Cal. Ct. App. July 1, 2003) (applying Section 360.5 where "[e]ven though none of the extensions specifically mentioned additional waivers of the statute of limitations, that was their effect"). To be effective, agreements extending the statute of limitations merely need to be "in writing and signed by the person obligated." Cal. Code Civ. Proc. § 360.5. The Accrual Provision states unambiguously that claims will accrue only upon the occurrence of specified events. This is all California law requires.

B. The Repurchase Protocols Delayed the Running of the Limitations Period Under California Law

Even apart from the Accrual Provision in the BR1 Trust, the Repurchase Protocols for both Trusts independently render the claims timely. Under California law, those protocols created conditions precedent to suit that delayed accrual of the

Trustee's claims. (Br.51.) HSBC's assertion that the repurchase demand required under the Repurchase Protocol is "nothing more than a procedural prerequisite to suit," (HSBC-Br.54 n.21), relies on a *New York* law distinction between procedural prerequisites and substantive conditions precedent seen only in New York, but not California, case law. California law does not recognize such a distinction. (Br.50-51.)

Respondents' argument that the Trustee was required to make demand pursuant to the Repurchase Protocols within the original four-year limitations period in order to toll the statute of limitations is without merit. (Barclays-Br.53-54; HSBC-Br.52-53.) California courts have held only that, where demand is required as a condition precedent to a lawsuit, such demand must be made within a "reasonable" period of time. *See Meherin v. S.F. Produce Exch.*, 117 Cal. 215, 217 (Cal. 1897).[17] Here, Certificateholders' investigations uncovered the Defective Loans at issue in the Actions for the first time in 2012 (BR1) and 2013 (NC1), and the Trustee demanded repurchase within months of each discovery. (A46-A51, A240-A245, A1343-A1346, A1354-A1363.) Accordingly, the Trustee made its

[17] For the reasons discussed in Section II.A. *supra*, there is no danger that the Repurchase Protocols could extend the statute of limitations indefinitely under Section 360.5, as pursuant to Section 360.5 California courts would only allow an eight-year timeframe to make a demand.

demand within a reasonable period, and therefore brought the Actions within California's statutory period. (*See* Br.52-53.)

At the very least, there is a factual issue regarding whether the Trustee made demand within a "reasonable" period of time, which was not properly determined on a motion to dismiss. (Br.52 n.21.) *Meherin* (cited by Respondents) holds that "no precise rule" governs what is considered a "reasonable time" for making demand, which "must depend on circumstances," including whether there was "cause for delay." 117 Cal. at 217-18; *see also Kaplan v. Reid Bros.*, 104 Cal. App. 268, 272 (Ct. App. 1930) ("[W]here delay in making the demand is expressly contemplated . . . there is no rule of law that requires that demand shall be made within the statutory period for bringing an action.").[18] Here, the "circumstances" and "cause for delay" include the extremely limited role of the Trustee, including express provisions of the PSAs stating that the Trustee shall have no duty to make any investigation of the underlying quality of the mortgage loans (A104, A144,

[18] Respondents also cite *Taketa v. State Bd. Of Equalization* for the proposition that, where a cause of action has fully accrued except for a plaintiff's demand, "the cause of action has accrued for the purpose of setting the statute of limitations running." 104 Cal. App. 2d 455, 460 (Cal. Ct. App. 1951) (quotation omitted). However, neither *Taketa* nor *Meherin* say anything about whether demand must be made within the original limitations period, as opposed to an extended period agreed upon by the parties in accordance with Section 360.5. Moreover, unlike the Trustee here—which was not aware of or informed of any breaches with respect to the BR1 and NC1 Trusts until 2012 and 2013 respectively (A46-A51, A240-A245, A1343-A1346, A1354-A1363.)—the plaintiffs in *Taketa* and *Meherin* had immediate knowledge of the injury, and thus had the ability to make demand immediately upon injury. *Taketa*, 104 Cal. App. At 459; *Meherin*, 117 Cal. at 216.

A570-A572, A607), and the affirmative duties of Respondents and their affiliates to notify the Trustee upon discovery of any breach of representations and warranties (A191-A192, A572), as discussed further below.

C. Even if the Claims Accrued in 2007, They Were Tolled By California's Discovery Rule

Respondents' assertion that the discovery rule is applicable only to warranty claims involving "fraudulent concealment" is an incorrect statement of the law. (HSBC-Br.55 (citing *Mary Pickford Co. v. Bayly Bros., Inc.*, 12 Cal. 2d 501, 526 (1939)); *accord* Barclays-Br.56.) It is well-settled that California courts apply the discovery rule in breach of contract actions, even in the absence of fraud. (*See* BR.54 (citing *Gryczman v. 4550 Pico Partners, Ltd.*, 107 Cal. App. 4th 1, 5-6 (2003)).) *Mary Pickford*, which pre-dates *Gryczman* by over 60 years, has nothing to do with the discovery rule. *Mary Pickford*, 12 Cal. 2d at 525-26.

Equally unpersuasive is Respondents' contention that the Trustee failed to "plea[d] any facts showing why it could [not] have discovered [the] injury . . . through the exercise of reasonable diligence." (Barclays-Br.57; *see also* HSBC-Br.55-57.)[19] The Trustee has adequately alleged such facts here.

[19] Respondents also argue that the Trustee did not show that the Certificateholders acted promptly. (Barclays-Br.59; HSBC-Br.57.) The question under California law is whether the plaintiff itself could have discovered the injury sooner. The Trustee was not required to plead facts about any other party's diligence.

First, the Trustee did not have pre-securitization access to the Mortgage Loan files,[20] which are "critical to assessing the full set of [the] R&Ws." *Home Equity Mortg. Tr. Series 2006-1 v DLJ Mortg. Capital, Inc.*, No. 156016/12, 2014 WL 136499, at *2 (N.Y. Sup. Ct., N.Y. Cty. Jan. 10, 2014). Nor did the Trustee's allegations suggest that it had access to the Respondents' due diligence results or to underwriting guidelines used by New Century. Indeed, the PSAs explicitly state that Trustee "may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein," upon opinions furnished to it under the PSAs. (A143; A606.) Such opinions include, of course, Respondents' Representations and Warranties.

Second, under the express terms of the PSA, the Trustee (i) is "not [] bound to make any investigation" into the quality of the Mortgage Loans; (ii) "shall not be responsible to verify the validity, sufficiency or genuineness of any document in any Custodial File"; and (iii) "shall undertake to perform such duties and only such duties as are specifically set forth in this Agreement." (A104, A143-A144, A571, A606-A607.)

Third, the Trustee justifiably relied on Respondents' extensive Representations and Warranties, including that: (i) Respondents (or their affiliates)

[20] (*See* A568-A570 (NC1 PSA § 2.01 (b) and 2.02 (loan files transferred to Custodian on Closing Date and retained by Custodian thereafter)), A85, A98 (*compare* PSA definitions of "Servicing File," *with* "Custodial File" (Servicer, not Trustee, received and retained loan origination files)).)

conducted thorough due diligence on the Mortgage Loans; (ii) the Mortgage Loans met certain quality standards and complied with originator guidelines; and (iii) all information in the mortgage schedules was accurate. (*See* A190-201, A738-A744, A749-A764.)

Finally, Respondents' breach of their contractual duty to notify the Trustee of Defective Loans (A107, A572)[21] "prevented plaintiff from discovering the breach." *See Gryczman*, 107 Cal. App. 4th at 6. To date, Respondents have still never notified the Trustee of a single Defective Loan. (A53-54, A1348-A1349.)

These provisions in the PSAs reflect the commercial reality of the complex securitizations at issue, and the limited role of the Trustee. *Flagstar* 32 N.Y.3d at 168 (Wilson, J., dissenting) ("Without immense cost, neither party can feasibly verify the characteristics set forth in the representations and warranties as to each of the thousands of loans in the pool[.]"); (*contra* HSBC-Br.56-57 (arguing obligations under PSA have no effect on application of discovery rule); Barclays-Br.8, 56 (same)). What constitutes notice and "reasonable diligence" for a plaintiff in these particular circumstances is a fact determination not appropriate for adjudication on the pleadings. *Alexander v. Exxon Mobil*, 219 Cal. App. 4th 1236, 1252 (2013).[22]

[21] HSBC had a duty to notify the other parties to the PSA of Defective Loans. (A572.) Although Barclays did not explicitly have such a duty, the BR1 Depositor—an affiliate and wholly owned subsidiary of Barclays that was managed by key Barclays personnel—did. (A39, A107.)

[22] If the Court determines, as Respondents argue, that Appellant failed to adequately plead "reasonable diligence," the Trustee should be permitted to re-plead because, with the benefit of

Further, California courts recognize that plaintiffs have a diminished responsibility to investigate breaches where defendants, like Respondents, have a contractual obligation to provide notice. *See Gryczman*, 107 Cal. App. 4th at 6; *Turner v. Scicon Techs. Corp.*, No. B260881, 2016 WL 7387173, at *11 (Cal. Ct. App. Dec. 21, 2016). "Reasonable diligence" is assessed in light of defendant's contractual assurances. *See E. L.A. Health Task Force, Inc. v. Santa Fe Emps. Hosp. Ass'n-Coast Lines*, No. B250881, 2015 WL 2384075, at *8 (Cal. Ct. App. May 19, 2015) (finding discovery rule not precluded by information "available in publicly filed documents" because defendant "expressly assured [plaintiff] that it was aware of no violations . . . and [plaintiff] had no reason to disbelieve that representation or probe its truthfulness.").[23]

Nonetheless, Respondents argue that the Trustee had notice of Defective Loans due to: (i) a 2008 New Century bankruptcy report; (ii) information in the Prospectus Supplement regarding New Century; and (iii) monthly distribution reports. (Barclays-Br.58; HSBC-Br.58-60.) But those documents could not have

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discovery, it is now aware of numerous actions taken by Respondents that prevented the discovery of breaches. *Curtis T. v. Cty. of L.A.*, 123 Cal. App. 4th 1405, 1422 (2004) (holding that trial court abused its discretion in sustaining demurrer without leave to amend "[g]iven there is a reasonable possibility the complaint can be amended to allege facts sufficient to invoke the delayed discovery rule of accrual.").

[23] *CAMSI IV v. Hunter Tech. Corp.*, a tort case involving a single plot of land, in which plaintiff received express notice of "serious contamination problems" (*i.e.* the same injury alleged) from a state regulator years before bringing suit, is inapposite. 230 Cal. App. 3d 1525, 1536-38 (Cal. Ct. App. 1991); (*contra* Barclays-Br.57-59; HSBC-Br. 56-57.)

provided notice of Respondents' breaches: The bankruptcy report did not even mention the Trusts at issue, and the Prospectus Supplements only discussed New Century's financial condition and "general market conditions." (A794-A795, A824-A828); *see also Eidson v. Medtronic, Inc.*, 40 F. Supp. 3d 1202, 1220 (N.D. Cal. May 13, 2014) ("[P]ublic awareness of a problem . . . alone cannot create constructive suspicion" because the statute of limitations starts to run "only once the plaintiff has a suspicion of *wrongdoing*.") (emphasis added) (citation and quotation omitted). In any event, this information did not provide notice as to *Respondents' breaches* of their Representations and Warranties, as Respondents vouched for the quality of the Mortgage Loans on the Closing Dates after and notwithstanding New Century's bankruptcy announcement. *See April Enters., Inc. v. KTTV*, 147 Cal. App. 3d 805 832 (Cal. Ct. App. 1983) (Plaintiff has no duty to "continually monitor whether the other party is performing some act inconsistent with one of many possible terms in a contract" under discovery rule.)

Respondents' reliance on the monthly distribution reports exemplifies why the First Department erred in concluding that the discovery rule did not apply on the current record. Respondents fail to establish, among other things (i) whether and to what extent the Trustee analyzed these monthly reports; and (ii) whether these reports would have revealed breaches of Representations and Warranties. *See In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, No. 2:11-CV-10414 MRP, 2012

WL 1322884, at *4 (C.D. Cal. Apr. 16, 2012) ("2007 was a turbulent time during which the causes, consequences, and interrelated natures of the housing downturn and subprime crisis were still being worked out. The Court cannot, based solely on the FAC and judicially noticeable documents, conclude that . . . a reasonably diligent investor should have linked increased defaults and delinquencies in the loan pools underlying the Certificates with [] a failure to follow the underwriting and appraisal guidelines[.]"). These are all questions of fact not susceptible to resolution on a motion to dismiss.

CONCLUSION

For the foregoing reasons, and those stated in its Opening Brief, 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
March 13, 2019

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CERTIFICATE OF COMPLIANCE

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

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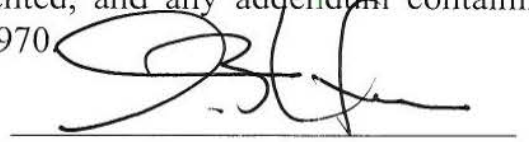
Dated: March 13, 2019



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