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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,

Plaintiff-Appellant,

—against—

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,

Plaintiff-Appellant,

—against—

HSBC BANK USA, NATIONAL ASSOCIATION,

Defendant-Respondent.

BRIEF FOR DEFENDANT-RESPONDENT BARCLAYS BANK PLC

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DISCLOSURE STATEMENT

Pursuant to Rule of Practice 500.1(f), Barclays Bank PLC states that it is a wholly owned subsidiary of Barclays PLC, a company whose shares are publicly held. Barclays Bank PLC's subsidiaries and affiliates are too numerous to list, but its principal subsidiaries and affiliates are:

Barclays Bank Delaware

Barclays Bank Trust Company Limited

Barclays Capital Inc.

Barclays Capital Securities Limited

Barclays Intermediate Holding Company

Barclays Private Clients International Limited

Barclays Securities Japan Limited

Barclays US LLC

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Defendant-Respondent Barclays Bank PLC ("Barclays") respectfully submits this brief in opposition to the appeal by Plaintiff-Appellant Deutsche Bank National Trust Company ("DBNT") of the Decision and Order of the Supreme Court Appellate Division, First Department ("First Department"), dated December 5, 2017, holding that DBNT's claims are time-barred and ordering the dismissal of those claims ("Decision").

PRELIMINARY STATEMENT

The First Department's Decision is correct under the Court's controlling "plaintiff-residence" rule adopted 20 years ago in *Global Financial Corp.* v. *Triarc Corp.*, 93 N.Y.2d 525 (1999). To prevent forum shopping, New York's borrowing statute, N.Y. CPLR § 202 ("CPLR 202"), requires that claims brought by nonresident plaintiffs be timely under the limitations period of both New York and the foreign jurisdiction where the claims accrued. In *Global Financial*, this Court adopted the straightforward plaintiff-residence rule for determining where contract claims that allege "purely economic" injury accrue. The plaintiff-residence rule replaced an older "rule dependent on a litany of events relevant to the 'center of gravity' of a contract dispute" with a modern "rule requiring the *single determination* of a plaintiff's residence." 93 N.Y.2d 525 at 530 (emphasis added). This Court mandated this bright-line rule because "the place of injury usually is where the plaintiff resides and sustains the economic

impact of the loss," and an easily applied rule would further CPLR 202's goals of uniformity, clarity, and certainty. *Id.* at 529-30.

In this action, California resident DBNT—a sophisticated corporate trustee—alleges that Barclays breached representations and warranties concerning mortgage loans that were deposited into the residential mortgage-backed securities ("RMBS") trust known as Securitized Asset Backed Receivables LLC Trust 2007-BR-1 (the "Trust"). Under *Global Financial*, DBNT's claims accrued in California because DBNT resided in California when the BR-1 securitization closed on April 12, 2007. Under California's applicable four-year limitations period, DBNT's breach of contract claims are therefore untimely because this action was commenced on April 12, 2013, six years after the alleged breach of contract.

The result of *Global Financial* has been clarity and predictability—not only for defendants, but perhaps, more importantly, for plaintiffs, who currently have straightforward guidance as to when a lawsuit must be commenced. Courts have interpreted the Court of Appeals' plaintiff-residence rule to apply in all situations except the "extremely rare" case where the party has offered "unusual circumstances." After *Global Financial*, courts no longer have to engage in subjective fact-intensive inquiries related to the so-called "center of gravity" of a dispute, and litigants no longer have to attempt to self-servingly resolve any

ambiguity as to where a claim may accrue. In the 20 years since *Global Financial*, no court has found "unusual circumstances" justifying a departure from the Court's plaintiff-residence rule in a breach of contract action. And, here, there are no "unusual circumstances" that warrant a departure from the plaintiff-residence rule.

This case underscores this Court's wisdom in adopting the plaintiff-residence rule. The outcome that the easily-applied plaintiff-residence rule requires here—finding that DBNT's contract claims accrued in California—is obvious upon examination of DBNT's allegations. DBNT is the California-based Trustee for a Trust that is administered in California and involves a trust corpus comprised of mortgage loans that were originated by California mortgage lenders, are currently held in California, and were serviced by a California-based servicing company at the time DBNT's claims accrued. Based on these facts, DBNT has not pleaded any "unusual circumstances" to justify a departure from *Global Financial*'s clear rule.

DBNT asks this Court to now abandon the plaintiff-residence rule in certain cases brought by trustees. DBNT describes the approach it advocates as a "multi-factor test," but upon even cursory examination it amounts to nothing more than a return to the amorphous "Center of Gravity" analysis that this Court

expressly rejected in *Global Financial*. (Br. at 29.)[1] DBNT identifies no specific equities or policy goals served by its proposed abandonment of the plaintiff-residence rule in cases commenced by trustees. On the contrary, DBNT's proposed approach would have the perverse effect of aiding forum shopping by reviving claims that would otherwise be time-barred by the limitations periods of the foreign jurisdiction where the trustee resides.

Moreover, DBNT's amorphous multi-factor test would invariably lead to inconsistent results by lower courts because it neither offers a defined set of factors that each court would be required to apply to a trustee's claims, nor suggests how each factor ought to be weighed. If adopted by this Court, DBNT's proposed approach will inevitably result in different outcomes—with some actions being time-barred and others not—based on the same set of facts. Indeed, that is precisely what happened in this case, with the IAS Court finding certain factors relevant in order to determine that New York's statute of limitations applied, and the First Department finding other factors relevant in order to determine that California's statute of limitations applied. Such a rule would be particularly unsettling for plaintiffs, who would bear the risk that their seemingly timely claims would be deemed time-barred as a result of a court's balance of ill-defined factors that would be entirely unforeseeable.

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[1] "Br." refers to the Brief for Plaintiff-Appellant DBNT.

DBNT's approach is therefore directly at odds with CPLR 202's dual purposes of preventing forum shopping and providing certainty of uniform application to litigants. Further, each of DBNT's criticisms of *Global Financial*'s plaintiff-residence rule (*see* Br. at 39-45) lacks merit: (i) none of the federal cases DBNT cites support its *ipse dixit* that the Decision conflicts with settled expectations of litigants in RMBS repurchase actions; (ii) there is nothing inconsistent about a rule that would result in the application of a different statute of limitations depending on the state in which a plaintiff resides—indeed, that is how CPLR 202 is designed; and (iii) if a trustee was replaced by a successor trustee after closing, a court would still look to the residence of the original trustee because the claim would have accrued to that trustee.

Furthermore, DBNT mischaracterizes the impact of the Decision, which unanimously held that DBNT's claims accrued in California under *either* the plaintiff-residence rule or DBNT's multi-factor test. Contrary to DBNT's assertion (Br. at 3, 43), the Decision has not caused confusion or disrupted settled expectations among litigants to RMBS repurchase actions. As the IAS Court Justice presiding over coordinated RMBS cases recently stated, the Decision "did not articulate a new test, or create a new statute of limitations defense for RMBS trustees," and "[t]he potential availability of a statute of limitations defense under the borrowing statute was thus known to [RMBS] parties." *In re Part 60 RMBS*

Put-Back Litig., 2018 WL 5099045, at *6-7 (N.Y. Sup. Ct., N.Y. Cty. Oct. 18, 2018). After considering applications to stay discovery in over a dozen actions following the Decision, the IAS Court has thus far granted stays pending this Court's decision in this case in only two cases, both of which were brought by DBNT. *Id*. at *14.

Even if DBNT is correct that the outdated multi-factor test articulated by a federal district court in *Maiden* v. *Biehl*, 582 F. Supp. 1209, 1212 (S.D.N.Y. 1984) should be applied to claims brought by trustees (it is not), the First Department correctly applied that test here, and concluded that all relevant factors point to California as the place of accrual. Applying *Maiden*, the First Department concluded that five factors pointed to California: (i) the Trust comprises mortgage loans originated by California lenders; (ii) the mortgage loans predominantly encumber California properties; (iii) the Trust is administered in California; (iv) the Trust's PSA contemplates the payment of taxes in California; and (v) the Trust's PSA contemplates that the mortgage notes may be maintained in California (and not in New York). (A.11-12.)

DBNT does not meaningfully dispute that these five factors point to California as the place of accrual. Rather, DBNT criticizes the First Department for not applying three other factors it has cherry-picked to argue that its claims accrued in New York: (i) the relevant contract's choice-of-law clause; (ii) the

location of Cede & Co., which holds the certificates as nominee; and (iii) where decisions relating to the selection of the mortgage loans were made. (Br. at 32-33.) But these factors are irrelevant because, among other reasons, they say nothing about where the alleged injury occurred and DBNT's claims accrued. Because the Trustee, which is the legal owner of the Trust assets (to say nothing of the allegedly impaired mortgage loans owned by the Trust (*i.e.*, the Trust corpus)), is located in California, DBNT's claim accrued "without the state" under CPLR 202.

DBNT attempts to muddy the injury analysis by alleging multiple (and contradictory) theories of injury. (Br. at 2-5, 24-25.) For example, DBNT now claims that the alleged breaches of representations and warranties "injured New York trusts by diminishing the value of the Certificates held in New York" by Cede & Co., a nominee of The Depository Trust Company. (Br. at 24.) But the location of Cede & Co. is unconnected to the injury analysis because the certificates held by Cede & Co. are beneficially owned by the certificateholders, not the Trust. Furthermore, in arguing that it was the certificateholders that were injured by the alleged breaches of representations and warranties, DBNT is conceding that the injury occurred outside New York. (Br. at 24.)[2] DBNT's multi-factor test therefore provides no basis for this Court to conclude that

[2] As the First Department correctly recognized and DBNT does not dispute, "it is undisputed that the domiciles of the [Certificateholders], which are in various jurisdictions, do not provide a workable basis for determining the place of accrual." (A.10.)

DBNT's claims accrued in New York. Under *Maiden*'s multi-factor test, the only logical place of accrual of DBNT's claims is California. Therefore, as the First Department correctly held, DBNT's claims accrued in California under either the plaintiff-residence rule or *Maiden*'s multi-factor test.

Finally, DBNT attempts to salvage its time-barred claims by asking this Court to ignore the parties' express agreement that the contracts shall be governed by and construed according to New York law, and to instead apply California law to interpret the parties' contractual accrual provision and repurchase protocol. But as the First Department correctly held, DBNT's claims would be untimely regardless of whether New York or California law applies. If New York law applies, the accrual provision and repurchase protocol do not toll the statute of limitations under this Court's decisions in *ACE Sec. Corp.* v. *DB Structured Prods., Inc.*, 25 N.Y.3d 581 (2015) ("*ACE III*") and *Deutsche Bank Nat'l Tr. Co.* v. *Flagstar Capital Mkts. Corp.*, 32 N.Y.3d 139 (2018). If California law applies, the accrual provision and repurchase protocol do not toll the statute of limitations because DBNT failed to make a demand during the limitations period and, in any event, any such tolling would be indefinite and thus contrary to California law. Furthermore, California's discovery rule does not apply here because (i) DBNT has not alleged that the misrepresentations made by Barclays were affected by fraud, let alone that they were concealed by Barclays, and (ii) as the First

Department correctly held (A.12-13), DBNT has not pleaded any facts demonstrating that it could not have discovered, with the exercise of reasonable diligence, the existence of its claims at an earlier date. Accordingly, DBNT's claims are time-barred under any applicable law.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should New York courts set aside the straightforward plaintiff-residence rule adopted in *Global Financial* and instead apply an amorphous "multi-factor" analysis to determine where a claim accrues for purposes of CPLR 202, New York's borrowing statute, solely because the claim is brought by a trustee, which is the trust's assets legal owner and the only entity legally permitted to enforce the trust's rights?

The First Department did not find it necessary to address this question, because it found that either under the Court's plaintiff-residence rule or a "multi-factor" analysis DBNT's claims accrued in California.

Answer: No. The plaintiff-residence rule adopted in *Global Financial* provides certainty of uniform application of CLPR 202 to litigants by precluding lower courts from engaging in the type of subjective guesswork inherent in a "multi-factor" or "center of gravity" analysis, and carving out an exception for claims brought by trustees would needlessly disrupt the bright-line approach to claim accrual adopted by this Court.

2. Does California's four-year limitations period govern even under a "multi-factor" test where a trust is administered in California by a California-based trustee; the mortgage loans constituting the trust corpus are held in California; the mortgage loans were originated by California lenders and predominantly encumber California properties; and the governing contracts subject the trust to California's tax regime?

The First Department answered this question in the affirmative.

Answer: Yes. Even under an outdated "multi-factor" test, DBNT's claims accrued in California under New York's borrowing statute because relevant factors overwhelmingly point to California as the location where DBNT's claims accrued: (i) the Trust is administered by a California trustee; (ii) the Trust's corpus consists of mortgage loans held in California; (iii) the mortgage loans were originated by California lenders and predominantly encumber California properties; and (iv) to the extent the Trust owes taxes, it owes them to the State of California.

3. Does a contractual accrual provision toll California's statute of limitations where a New York choice-of-law provision governs interpretation of the contract, and where the party fails to make a demand within the four-year limitations period?

The First Department answered this question in the negative.

Answer: No. New York law governs the contractual accrual provision because the parties selected a New York choice-of-law provision, and contractual accrual provisions do not toll the statute of limitations under New York law. Furthermore, even if California law applied, DBNT's claims are still untimely because it failed to make a demand within the limitations period.

4. Is a party entitled to toll California's statute of limitations under California's discovery rule where: (i) fraud did not affect the representations in the governing contract; (ii) the party failed to plead facts showing that it could not have ascertained through the exercise of reasonable diligence that the alleged wrongdoing injured it, nor did it plead concealment of any wrongdoing by the defendant; and (iii) publicly available information establishes that the party was on constructive notice of the existence of its injury?

The First Department answered this question in the negative.

Answer: No. California's discovery rule does not render DBNT's claims timely because: (i) fraud did not affect the representations in the governing contract; (ii) DBNT failed to plead facts showing that it could not have ascertained the basis of its claim through the exercise of reasonable diligence, nor did it plead any concealment of wrongdoing by Barclays; and (iii) publicly available information—among other things, the securitization's prospectus supplement and DBNT's own reports to certificateholders—establish that DBNT was on actual or

constructive notice of the injury caused by the alleged breaches of representations and warranties.

NATURE OF THE CASE

DBNT is the California-based trustee of a RMBS trust known as Securitized Asset Backed Receivables LLC Trust 2007-BR1. The corpus of this Trust comprises mortgages that were originated by two California mortgage lenders and serviced by a California-based servicing company at the time DBNT's claims accrued, and are currently held in California, where they are administered in California by DBNT. (A.38, 83, 104, 158, 261-62.)

A. The Applicable Contracts

There are two contracts that are relevant for purposes of DBNT's breach of contract claim. The first contract is a Pooling and Servicing Agreement ("PSA") dated March 1, 2007, which established the Trust. (A.57, 61, 104.) DBNT is a party to the PSA along with two other entities: HomEq Servicing ("HomEq"), which was the servicer of the securitized mortgage loans, and Securitized Asset Backed Receivables LLC ("SABR"), which was the "Depositor" entity that transferred the securitized mortgage loans to the Trust as a part of the RMBS securitization at issue (the "Securitization"). (A.86, 97, 102.)

The PSA outlines the relationship between the Trust and the Trustee, notably providing that the Trustee has "all the right, title, and interest" to the

mortgage notes. (A.102.) The mortgage notes are the sole relevant asset of the Trust and provide income that the PSA requires the Trustee to distribute to sophisticated institutional investors in the Securitization, who are otherwise referred to herein as "Certificateholders." (A.105.) The PSA provides that the "Trustee shall maintain possession of the Related Mortgage Notes in the State of California, unless otherwise permitted by the Rating Agencies." (A.104.) The PSA contains a choice-of-law provision that states that the agreement is "governed by the substantive laws of the state of New York." (A.157 (capitalization omitted).)

The second contract is the Barclays Representation Agreement (the "Barclays Agreement"), dated April 12, 2007. (A.190.) The Barclays Agreement includes certain representations and warranties regarding the mortgage loans' characteristics, including, for example, that "all payments required to be made" on the mortgage files associated with the mortgage loans were conducted by a "qualified appraiser" and satisfy the requirements of Fannie Mae or Freddie Mac. (A.193, 196.) The Barclays Agreement contains a choice-of-law provision that states that the agreement is "governed by, and construed in accordance with, the laws of the State of New York." (A.193 (capitalization omitted).)

The Barclays Agreement contains a repurchase protocol (the "Repurchase Protocol"), stating that, if DBNT discovers a loan that breaches the

representations and warranties in the PSA, it must provide Barclays with notice of such defect or breach which "materially and adversely affects the value of the Mortgage Loan[] or the interest of the Depositor therein." (A.191.) After receiving notice, "[Barclays] shall cure such breach in all material respects and, if such breach cannot be cured, [Barclays] shall, within sixty (60) calendar days of [its] receipt of request from [DBNT], purchase such Mortgage Loan at the Repurchase Price." (A.191.) The Barclays Agreement also contains an accrual provision (the "Accrual Provision") providing that 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.

(A.192.)

B. The Creation and Administration of the Trust

Prior to formation of the Trust, Barclays' affiliate, Sutton Funding LLC ("Sutton"), acquired 5,028 mortgage loans from California loan originators NC Capital Corporation and Ameriquest Mortgage Company. (A.190.) These mortgage loans were secured predominantly by mortgaged properties located in California. (A.273.) Over 32% of the mortgaged properties were located in California—over three times the percentage of mortgage loans secured by

mortgage properties located in any other state—and just 5.59% were located in New York. (*Id.*) The mortgage loans were transferred to the Depositor, SABR, which then deposited the mortgage loans into the Trust. (A.102, 190.)[3] The Trust issued participation certificates (the "Certificates"), which were sold by the Securitization's underwriter, Barclays Capital Inc., to sophisticated institutional investors. (A.40, 42.) Each Certificateholder is entitled to a specified share of the principal and interest payments made on the mortgage loans held by the Trust. (A.124-38.) The Securitization closed on April 12, 2007—the date on which DBNT acknowledges its claims accrued.

The Trust is a not a legal entity, and has "no officers or directors and no continuing duties other than to hold and service the mortgage loans and related assets and issue the certificates." (A.289.) It is the Trustee that is contractually responsible for "perform[ing] administrative functions on behalf of the [Trust] and for the benefit of the certificateholders pursuant to the terms of the pooling and servicing agreement." (A.303.) As described in the PSA, those functions include, among other things, to: (1) "retain possession and custody of each [mortgage

[3] Notably, in a separate action brought by DBNT against Barclays, DBNT has taken a position contrary to its position here, arguing that it was the depositor, not the trust, that suffered an injury as a result of alleged breaches of representations and warranties. *See* Pl.'s Memo. of Law in Support of Mot. for Leave to Reargue, *Deutsche Bank Nat'l Trust Co., solely in its capacity as Trustee of the EquiFirst Loan Securitization Trust 2007-1* v. *EquiFirst Corp. & Barclays Bank PLC*, No. 651957/2013 (Nov. 19, 2018) (Dkt. No. 166), at 4-5, 7.

file];" (2) "establish and maintain the Distribution Account;"[4] (3) "make the disbursements and transfers from amounts then on deposit in the Distribution Account;" (4) "prepare and file on behalf of the Trust a Form 10-K [and 10-D];" (5) issue monthly reports regarding the mortgage loans to all Certificateholders "based in part on information provided by the Servicer;" and (6) "[pay] the amount of any federal or state tax . . . imposed on each Trust[.]" (A.104, 111, 124 128, 150.)

The Securitization's prospectus supplement (the "Prospectus Supplement") explicitly disclosed to potential investors that 94% of the loans in the Securitization would be subprime loans purchased from NC Capital Corporation ("New Century"), a California originator. (A.261-62.) The Prospectus Supplement also explained that New Century loans bore particular risks because New Century: (1) had filed for Chapter 11 bankruptcy in April 2007, before the PSA was executed; (2) had ceased selling mortgage loans to Federal Home Loan Mortgage Corp. and Federal National Mortgage Association; and (3) was under investigation by the Securities and Exchange Commission and U.S. Attorney's office. (A.273.)

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[4] The Distribution Account is an account created and maintained by the Trustee for the benefit of the Certificateholders. (A.86.) Payments collected by the Servicer on the mortgage loans are deposited in the Distribution Account and distributed to Certificateholders pursuant to the PSA. (A.124-38.)

The monthly reports issued by the Trustee also contain information regarding, among other things: (1) "the number and aggregate outstanding principal balances of Mortgage Loans ([i]) as to which the Scheduled Payment is delinquent 31 to 60 days, 61 to 90 days, 91 or more days, and in such other periods and for such times as required by Regulation AB, ([ii]) that have become REO Property, ([iii]) that are in foreclosure and ([iv]) that are in bankruptcy, in each case as of the close of business on the last Business Day of the immediately preceding month;" (2) "the aggregate amount of Applied Realized Loss Amounts incurred during the preceding calendar month;" and (3) "the Cumulative Loss Percentage." (A.128-29.)

DBNT is solely and exclusively responsible for pursuing remedies for a breach of a representation or warranty. (A.107.) DBNT pleads that its principal place of business is in California, and that it discharges all of its contractually required administrative duties from its offices there. (A.38.)

HomEq was "obligated to service and administer the mortgage loans on behalf of the trust." (A.269.) The PSA describes these responsibilities as including "collect[ing] all payments" made by borrowers that are "called for under the terms and provisions of the Mortgage Loans" and providing payment information to the Trustee for purposes of the monthly reports described above that the Trustee provides to Certificateholders. (A.110.) HomEq has its principal place

of business in California, where it performed all servicing functions relating to the Trust. (A.260.)

C. DBNT's Breach of Contract Allegations

DBNT alleges that it first demanded that Barclays repurchase loans from the Trust on December 26, 2012, when it forwarded to Barclays a December 20, 2012 letter (the "December 2012 Letter") authored by the Federal Home Loan Mortgage Corporation ("Freddie Mac") claiming that Barclays breached certain representations and warranties with respect to 74 loans. (A.52, 243-45.) DBNT "request[ed] Barclays . . . cure any material breaches . . . or repurchase such Mortgage Loans" identified by Freddie Mac. (A.240.)

Barclays responded to DBNT by letter on February 18, 2013, denying an "obligation to repurchase or take any other action with respect to" the 74 loans under the PSA and the Barclays Agreement because of the Trustee's failure to provide timely notice to Barclays, among other reasons. (A.246.) Specifically, Barclays informed DBNT that the "Trustee's multi-year delay in providing notice to Barclays breache[d] Section 2.08 of the PSA, which bars any recovery by the Trustee." (A.247.) Barclays explicitly invited DBNT to discuss the matter further. (*Id.*)

On April 12, 2013, six years after the closing date of the PSA and the entering of the Barclays Agreement, DBNT filed a summons alleging breaches of

unidentified representations and warranties with respect to an unidentified number of loans. (A.35.) On August 27, 2013, DBNT demanded by letter that Barclays cure or repurchase 796 loans backing the Securitization that allegedly breached unidentified representations and warranties. (A.51.)

On September 17, 2013, DBNT filed its Complaint alleging a single cause of action against Barclays for "Breach of Contract/Breaches of the Duty to Cure or Repurchase Defective Loans." (A.1.) The IAS Court dismissed the Complaint on the ground that First Department precedent barred DBNT's duty to cure or repurchase claims, but it granted DBNT leave "to replead a breach of contract cause of action based on alleged breaches of representations and warranties." *Deutsche Bank Nat'l Tr. Co.* v. *Barclays Bank PLC*, 2015 WL 1206519, at * 1 (N.Y. Sup. Ct., N.Y. Cty. Mar. 13, 2015).

On April 6, 2015, DBNT filed the Amended Complaint relevant to this appeal, pleading three causes of action: (i) Breach of Contract/Breach of Representations and Warranties; (ii) Anticipatory Repudiation of Contract; and (iii) Breach of Contract/Duty to Cure or Repurchase Defective Loans. (A.33, 54-59.)

D. Barclays' Motion to Dismiss and the IAS Court's Order

On May 21, 2015, Barclays moved to dismiss the Amended Complaint, arguing, *inter alia*, that DBNT's April 2013 breach of contract claims were time-barred because they arose from representations and warranties that had

allegedly been breached in 2007. (A.17.) Specifically, Barclays argued that, under this Court's controlling decision in *Global Financial*, DBNT's breach of contract claim accrued in California and was therefore time-barred under California's four-year statute of limitations. (A.17-19.)

On November 25, 2015, the IAS Court denied Barclays' motion to dismiss in relevant part. The IAS Court correctly observed that, under *Global Financial*, in cases involving purely economic loss, a cause of action typically accrues "where the plaintiff resides and sustains the economic impact of the loss." (A.19-20 (quoting *Global Fin.*, 93 N.Y.2d at 529).) The IAS Court also acknowledged that, in *Global Financial*, this Court "emphasized [that] 'CPLR 202 is designed to add clarity to the law and to provide certainty of uniform application to litigants [and] [t]his goal is better served by a rule requiring the single determination of a plaintiff's residence' . . . ." (A.19.)

Despite acknowledging that this Court adopted a rule of "single determination" in *Global Financial*, the IAS Court declined to follow that controlling precedent, and instead relied on federal district court decisions that purportedly established that "cases brought by non-RMBS trustees have repeatedly rejected the trustees' residence as determinative of the place of accrual . . . ." (A.19.)

Based in particular on the federal district court decision in *Maiden*, which predated *Global Financial* by over 15 years, the IAS Court determined that "the California residence of [DBNT] is not a reliable indicator of the place where the injury occurred" and instead considered a number of factors to determine where DBNT's claims accrued. (A.19-21.) The IAS Court offered no policy rationale for why New York courts should apply an "all relevant factors" test solely because an action is brought by a trustee, and no explanation of how this test would better serve CPLR 202's goal of providing uniform application to litigants. (A.19.) Instead, the IAS Court simply adopted the reasoning of the federal district court in *Maiden*—that, "[w]here 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." (A.19 (alteration in original).)

Although the IAS Court adopted the reasoning used by the federal district court in *Maiden*, it declined to adopt all of the factors examined in *Maiden*. Instead, the IAS Court created its own test. First, the IAS Court looked to the law designated by the transaction contracts' choice-of-law clauses and the law pursuant to which the Trust was established. (A.18-19.) The IAS Court then weighed certain of the factors considered by the *Maiden* court, the notable exception being DBNT's California residence. (A.19-20.) The IAS Court held that three factors—where the Trust is administered (California), the location of the Trust's assets

(California), and the state where the Trust is subject to taxation (California)—did not "point to California" as the place of accrual and "lack apparent relevance in the RMBS context." (A.21.)

The IAS Court ultimately held that Barclays had failed to meet its burden of showing that the Trustee's claims accrued in California, and declined to dismiss the claims pursuant to California's four-year statute of limitations. (A.22.) On December 30, 2015, Barclays appealed the IAS Court's Order to the First Department.

E. The First Department's Decision

On December 5, 2017, the First Department unanimously reversed the IAS Court's denial of Barclays' motion to dismiss on statute of limitations grounds, holding that DBNT's claims accrued in California under CPLR 202 and were untimely under California's four-year statute of limitations. (A.10-12.)

The First Department determined that it "need not decide" whether *Global Financial*'s plaintiff-residence rule or *Maiden*'s multi-factor test applied because, under either test, "the injury/economic impact was felt in California and the claims are thus deemed to have accrued there." (A.9-10.) First, the First Department noted correctly that DBNT is a "California domiciliary"—thus ending its analysis of where DBNT's claims accrued under the plaintiff-residence rule this

Court announced in *Global Financial*. (A.9.) The Court then analyzed where DBNT's claims accrued under the multi-factor test DBNT advocated. (A.10.)

Turning first to the factors that DBNT claimed pointed to New York as the place of accrual, the First Department found none of those factors was relevant to accrual. First, the First Department rejected DBNT's reliance on the New York choice-of-law clauses in the relevant agreements, concluding that, "because these provisions do not expressly incorporate the New York statute of limitations, they 'cannot be read to encompass that limitation period.'" (A.10 (quoting *Portfolio Recovery Assocs., LLC* v. *King*, 14 N.Y.3d 410, 416 (2010)).) Second, the First Department dismissed as irrelevant the fact that Barclays selected the mortgages to be pooled in the trust at its New York office. (A.10.) Finally, the First Department held that the location of the Trust Certificates held by the Trust's beneficiaries was also irrelevant, "because such certificates are not part of the trust corpus." (A.11.)

By contrast, the First Department found that at least five factors pointed to California as the place of accrual: (i) the Trust is comprised of mortgage loans originated by California lenders; (ii) the mortgage loans predominantly encumber California properties;[5] (iii) the Trust is administered in

[5] The First Department mistakenly stated that the mortgage loans in the BR1 securitization "exclusively" encumbered California properties (A.10), but they only "predominantly" encumber (*footnote continued…*)

California by DBNT, a California trustee; (iv) the Trust's PSA contemplates the payment of taxes in California; and (v) the Trust's PSA contemplates that the mortgage notes may be maintained in California (but not in New York). (A.11-12.)

Having concluded that DBNT's claims accrued in California under both the plaintiff-resident rule and DBNT's proposed multi-factor test, the First Department held that California's four-year statute of limitations for breach of contract barred DBNT's claims. The First Department reasoned that, under California law, DBNT's claims for breach of representations and warranties accrued "at the time of the sale" of the mortgages—April 12, 2007 in the case of the BR1 securitization—but DBNT failed to bring suit until six years later. (A.11-12 (quoting *Mary Pickford Co.* v. *Bayly Bros., Inc.*, 12 Cal. 2d 501, 521 (1939)).)

The First Department also rejected DBNT's arguments that the statute of limitations was tolled under California law. First, the First Department held that DBNT's "failure to demand cure or repurchase" did not "serve to extend the statute of limitations." (A.12.) The First Department reached the same conclusion whether California law applied, or whether New York law applied pursuant to the

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(…*footnote continued*)
California properties (like those in the HSBC securitization the First Department also ruled was time-barred) (A.273.) Approximately 32.19% of the mortgage loans were secured by mortgaged properties located in California, over three times the percentage of mortgage loans secured by mortgage properties located in any other state. (A.273.)

choice-of-law clauses. (A.12.) Second, the First Department held that DBNT's claims were not "saved by California's discovery rule," because "the record establishes that plaintiff reasonably could have discovered the alleged breaches within the limitation period, based on information in the prospectuses, the underwriting and default information it received after the closing." (A.12.) The First Department thus directed the Clerk "to enter judgment for defendant dismissing the complaint." (A.8.)

ARGUMENT

I. THE FIRST DEPARTMENT CORRECTLY HELD THAT UNDER *GLOBAL FINANCIAL*, DBNT'S CLAIMS ACCRUED AT ITS RESIDENCE IN CALIFORNIA.

A. The Plaintiff-Residence Rule Dictates That DBNT's Claims Accrued in California, Where DBNT Resides.

This case underscores this Court's wisdom in adopting the straightforward plaintiff-residence rule: rather than weigh ill-defined factors and parse through voluminous governing agreements, the Court can look to a plaintiff's residence to determine where its claims accrued in cases where plaintiff alleges an economic injury. (A.38.) DBNT asks this Court to abandon the easily-applied plaintiff-residence rule for certain claims brought by trustees of trusts that would complicate New York's accrual law and contravene CPLR 202's goals of uniformity, clarity, and certainty. *Global Fin.*, 93 N.Y.2d at 530. DBNT's proposed multi-factor test would resurrect the outdated "center of gravity" test in a

narrow slice of cases involving claims brought by trustees that satisfy a series of indeterminate factors. DBNT's approach also would (i) burden New York's lower courts by requiring them to weigh an indeterminate number of factors to decide the timeliness of cases commenced by trustees, and (ii) fail to provide trustee plaintiffs with clear guidance concerning when they must commence their lawsuits. Instead, the only apparent purpose served by DBNT's proposed approach would be to render its *own* claims timely.

A straightforward rule—adhering to the 20-year old precedent set forth by this Court's *Global Financial* plaintiff-residence rule—will aid trustee plaintiffs and their counsel by providing a definitive and clear deadline by which they must commence their suits (as it has since *Global Financial* was decided). Trustees and their counsel will know exactly when to bring suit if *Global Financial* applies, whereas, if DBNT's proposed multi-factor approach is adopted as the new law in New York, trustees would be unable to determine with any degree of certainty when to bring suit. Trustees and their counsel would be left wondering: which factor(s) will courts determine are the most important here, and which statute of limitations will apply and thus, when shall I bring suit? The Court should reject that inevitable outcome, and thus reject DBNT's effort to upend settled law—the Court should affirm that *Global Financial* applies to trustee plaintiffs, just as it does to other plaintiffs.

Moreover, a straightforward rule serves more than one purpose: New York's borrowing statute was "enacted . . . primarily to prevent forum shopping." *Norex Petroleum Ltd.* v. *Blavatnik*, 23 N.Y.3d 665, 676 (2014). It requires that claims brought by nonresident plaintiffs, such as DBNT's claims here, be timely under the limitations periods of both New York and the foreign jurisdiction where the claims accrued. *See* CPLR 202. "[A]lthough deterrence of forum shopping may be a primary purpose of CPLR 202, it is not the only purpose. . . . CPLR 202 is designed to add clarity to the law and to provide the certainty of uniform application to litigants." *Ins. Co. of N. Am.* v. *ABB Power Generation, Inc.*, 91 N.Y.2d 180, 187 (1997).

In *Global Financial*, this Court was presented with two methods for determining where a claim accrues for purposes of New York's borrowing statute. 93 N.Y.2d at 527-28. Plaintiff Global Financial, a consulting services firm that was incorporated in Delaware and had its principal place of business in Pennsylvania, argued that this Court should "apply a 'grouping of contacts' or 'center of gravity'" analysis to determine where an "action accrue[s] for purposes of CPLR 202" and conclude that New York's statute of limitations applied "because most of the events relating to the contract took place in New York." *Id*. Defendant Triarc argued that this Court should instead look to the plaintiff's residence, and apply the statute of limitations of either the state where "plaintiff

[was] incorporated" or the state where "plaintiff had its principal place of business." *Id*. at 527.

This Court unanimously adopted the latter approach, concluding that the CPLR's goals of consistency and predictability are better served by a bright-line rule that requires a simple "single determination" of where a plaintiff resides—which is where purely economic injuries usually are felt—rather than "a rule dependent on a litany of events relevant to the 'center of gravity' of a contract dispute." *Id.* at 530. This Court indicated that exceptions to the plaintiff-residence rule are possible, but only in rare situations where looking to the plaintiff's residence might not serve the goal of preventing forum shopping—namely, where a "plaintiff intentionally maintain[s] [a] separate financial base" in a state other than where it resides. *See Global Fin.*, 93 N.Y.2d at 529-30 (citing *Lang* v. *Paine, Webber, Jackson & Curtis, Inc.*, 582 F. Supp. 1421 (S.D.N.Y. 1984)).[6] In the 20 years since *Global Financial*, courts have interpreted the plaintiff-residence rule to apply in all situations except the "extremely rare" case where the party has offered "unusual circumstances," *Stichting Pensioenfonds ABP*, 2012 WL 6929336, at *2-

[6] Courts have been reluctant to extend *Lang* to different fact patterns because creating exceptions to the plaintiff-residence rule—as DBNT asks this Court to do here—"would allow the exception to swallow the rule and render New York's borrowing statute toothless." *See, e.g.*, *Stichting Pensioenfonds ABP* v. *Credit Suisse Group AG*, 966 N.Y.S.2d 349 (Table), 2012 WL 6929336, at *2-3 (N.Y. Sup. Ct., N.Y. Cty. Nov. 30, 2012); *Deutsche Zentral-Genossenschaftsbank AG* v. *HSBC N. Am. Holdings, Inc.*, 2013 WL 6667601, at *6 (S.D.N.Y. Dec. 17, 2013) (same).

3, and no court—not one—has found "unusual circumstances" justifying a departure from the plaintiff-residence rule in a breach of contract action.

DBNT misreads *Global Financial* as holding that, in determining where an injury occurs and a claim accrues for purposes of New York's borrowing statute, a court must analyze various factors rather than simply determine where the plaintiff resides. (Br. at 3, 24-26.)[7] That interpretation, and the "multi-factor" test DBNT advocates, would lead to guesswork and inconsistent outcomes that would impede, rather than further, CPLR 202's goals of "add[ing] clarity to the law" and "provid[ing] the certainty of uniform application to litigants." *See Global Fin.*, 93 N.Y.2d at 530. It also would contradict the bright-line approach to claim accrual that this Court has repeatedly emphasized. *See Deutsche Bank Nat'l Trust Co.* v. *Flagstar Capital Mkts.*, 32 N.Y.3d. 139, 146 (2018) (recognizing that this Court has "repeatedly rejected accrual dates which cannot be ascertained with any degree of certainty, in favor of a bright line approach") (internal quotations omitted); *ACE III*, 25 N.Y.3d at 593-94 (same). New York courts take a bright-line approach to statutes of limitations because they "not only save litigants from

[7] Although DBNT argues that the plaintiff-residence rule "is not a universal litmus test," the case on which it relies for this proposition merely observes that, in certain situations (as in *Global Financial*), a question may exist as to where the plaintiff actually resides. *See Oxbow Calcining USA Inc.* v. *Am. Indus. Partners*, 948 N.Y.S.2d 24, 30-31 (1st Dep't 2012) (applying the plaintiff-residence rule, but concluding that the plaintiff's residence may "be the state of incorporation or its principal place of business"). This is an unremarkable observation, at best. Determining where a plaintiff resides is a simpler, more predictable inquiry than determining where a "center of gravity" of events occurred. (A.38.)

defending stale claims, but also 'express[] a societal interest or public policy of giving repose to human affairs.'" *ACE III*, 25 N.Y.3d at 593 (quoting *John J. Kassner & Co.* v. *City of N.Y.*, 46 N.Y.2d 544, 550 (1979) (alteration in original)).

DBNT's misguided interpretation is rooted in the faulty supposition that, in actions brought by trustee plaintiffs, the trustee's residence is not correlative with where the injury occurs. (Br. at 3.) That is not so. Here, California is the location where the Trustee resides and thus where the injury was felt. DBNT alleges an injury due to the "diminution of value in the Trust Fund caused by [Barclays'] breaches of the Representations and Warranties." (Br. at 27.) The "Trust Fund" is owned by DBNT. And the "Trust Fund"—the corpus of the trust—consists of mortgage loans (A.100), as well as the mortgage notes pertaining to those loans, which entitle the noteholder (here, DBNT) to payments of principal and interest from borrowers and which are also held in California (A.104). Indeed, the PSA *requires* the notes to be held in California. (A.104 ("The Trustee shall maintain possession of the related Mortgage Notes in the State of California, unless otherwise permitted by the Rating Agencies.").) Therefore, any "diminution of value" of the Trust Fund was felt in California, where DBNT resides.

DBNT fixates on the (incorrect) notion that "the Trustee was not, and cannot be, injured by the diminution of the value in the Trust Fund caused by

Respondent's breaches of the Representations and Warranties" (Br. at 27), but it fails entirely to identify any injury felt in New York. In searching for an injury that could hypothetically have occurred in New York, DBNT argues that Barclays "injured [a] New York trust[] by diminishing the value of the Certificates held in New York." (Br. at 24.) But there is no such thing as a "New York trust," and a trust cannot suffer an injury—a trust is nothing more than a "fiduciary relationship with respect to property." Restatement (Third) of Trusts § 2 (Am. Law Inst. 2003).[8] And the Certificates are not held by the Trust; thus an injury to the Certificates could not have harmed the Trust. The alleged injury to the Trust Fund must have occurred "without the state" under CPLR 202, because the injury could only have been felt by the Trustee that held "all right, title, and interest" in the Trust's property (A.102). *See Henning* v. *Rando Mach. Corp.*, 207 A.D.2d 106, 110 (4th Dep't 1994) ("[L]egal title is vested entirely in the trustees.") (citing 106 N.Y. Jur. 2d *Trusts* §§ 7, 16).

Furthermore, if DBNT actually believed that some "fundamental principle . . . would be violated" if this Court applied the plaintiff-residence rule,

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[8] Indeed, it is well-established that a trust is "not an entity separate from its trustees" with a tangible location that can sue or be sued. 90 C.J.S. Trusts § 6; *see also Orentreich* v. *Prudential Ins. Co. of Am.*, 713 N.Y.S.2d 330, 331 (1st Dep't 2000) (affirming dismissal of action brought over policies "owned by a trust" because "only the trustee, who was not named as a plaintiff in that capacity" could bring a claim regarding the trust's assets); 76 Am. Jur. 2d Trusts § 2 (2013) ("A trust is not a legal entity . . . distinct from its trustees and capable of legal action on its own behalf . . . .").

rather than engage in a fact-intensive search for an alternative situs of the loss, it would advocate that the Court look to the residence of the Certificateholders. (*See* Br. at 30.) It does not, for obvious reasons.[9] First, as the First Department recognized, "it is undisputed that the domiciles of the [Certificateholders], which are in various jurisdictions, do not provide a workable basis for determining the place of accrual." (A.10.) Second, if this Court were to look to the residence of the Certificateholders, it would still have to apply CPLR 202 to out-of-state Certificateholders, which would render DBNT's claim untimely. *See* CPLR 202; *Maiden*, 582 F. Supp. at 1218 (observing that, if the beneficiaries of a trust were scattered among multiple states, it would be "unworkable to fractionalize [their] claim because some parts [would be] time-barred").

Moreover, DBNT apparently—and wrongly—does not even believe this Court has sufficient information to determine where the Trust was purportedly injured. Rather, it argues that this case should be remanded so that a factual record can be developed regarding the Trust's place of injury. (Br. at 28-29.) But there is no outcome that would provide *less* certainty to litigants—turning every accrual analysis under CPLR 202 into a fact-intensive inquiry that must be individually adjudicated based on extensive factual records would directly contradict the

[9] Although DBNT alleges that "the Trusts and their Certificateholders . . . suffered the injury," it never asks this Court to look to the residence of the Certificateholders to determine where the alleged injury occurred. (Br. at 24.)

certainty that CPLR 202 is intended to provide. *See Ins. Co. of North Am.*, 91 N.Y.2d at 187 (describing the two "equally important" purposes of CPLR 202 as to prevent "forum shopping" and to provide "clarity to the law and to provide the certainty of uniform application to litigants"). This Court should reject DBNT's invitation to jettison the straightforward plaintiff-residence rule in exchange for an amorphous, fact-intensive multi-factor test, which would inevitably lead to inconsistent results in the lower courts.

B. Application of a Multi-Factor Test Would Lead to Guesswork and Inconsistent Outcomes in Contravention of CPLR's Goals.

DBNT's contention that its proposed multi-factor test would lead to greater certainty than a single determination test defies logic. (Br. at 39-45.) A multi-factor test inherently requires courts to weigh different factors, causing courts to reach different outcomes, whether the circumstances in each individual case are the same or different.[10] By contrast, a single-determination plaintiff-residence test can lead to only one outcome: a claim accrues where the plaintiff resides.

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[10] DBNT argues that New York courts are frequently asked to "weigh competing facts and factors," citing the doctrine of *forum non conveniens*. (Br. at 31 n.9.) But in *forum non conveniens* cases, courts weigh, among other things, where the contracts were "negotiated and signed." *Wilson* v. *Dantas*, 9 N.Y.S.3d 187, 197 (1st Dep't 2015). These are the exact type of considerations that this Court rejected in *Global Financial*, holding that a "'grouping of contracts' or 'center of gravity' approach" should not be used for purposes of determining where a cause of action accrues under CPLR 202. 93 N.Y.2d at 527-28.

The failure of DBNT's position is underscored by its characterization of the Trustee's California location as mere "happenstance." (Br. at 3.) Far from happenstance, the residence of the Trustee—which typically is set out for investors in the offering materials—is a key fact that informs investors where claims brought by the Trustee under New York law to enforce the Trust's rights will accrue. The plaintiff-residence rule provides predictability to investors by allowing them to determine, based on the offering materials, where claims relating to a given securitization will accrue and to make their investment decisions accordingly. In doing so, the plaintiff-residence rule fully achieves the New York Legislature's goal "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).

By contrast, DBNT's proposed multi-factor test provides no such predictability. Investors cannot determine based on offering materials where their claims will accrue, because under DBNT's multi-factor test courts must give different factors "different weight in different circumstances." (Br. at 31.) Investors will thus be left to wonder whether, for example, the location of a trust's assets, the jurisdiction of the relevant choice-of-law provision, the location of securities issued by the trust, or where a trust pays taxes will be considered more or less important by any given court. Investors also will be left to guess which state's

law might govern the timeliness of their claims where the relevant factors each point to different jurisdictions. This Court has specifically rejected such a subjective and indefinite statute of limitations regime for breach of contract actions. *See Ely-Cruikshank Co.* v. *Bank of Montreal*, 81 N.Y.2d 399, 403 (1993) (rejecting approach to determining the "running of Statute of Limitations affecting contract causes of action" because it "would be entirely dependent on the subjective equitable variations of different Judges and courts instead of the objective, reliable, predictable and relatively definitive rules that have long governed this aspect of commercial repose").

Indeed, each of the arguments DBNT asserts in support of its claim that application of the plaintiff-residence rule here would "upset the parties' settled expectations in a large number of RMBS Repurchase Actions" (Br. at 43) fails upon examination. *First*, neither of the federal cases DBNT cites involving trustees supports its argument that the Decision conflicts with settled expectations based on "multiple [prior] federal cases interpreting CPLR 202." (Br. at 39-40.) *2002 Lawrence R. Buchalter Alaska Trust* v. *Philadelphia Financial Life Assurance Company* is entirely consistent with the plaintiff-resident rule: an *Alaska trustee* of an *Alaska trust* brought suit, and the court held that the claims accrued *in Alaska*. 96 F. Supp. 3d 182, 201-02 (S.D.N.Y. 2015). In any event, both parties agreed that Alaska's statute of limitations applied, rendering any

accrual analysis unnecessary and therefore *dicta*. *Id*. The decision in *Appel* v. *Kidder, Peabody & Co*. predates *Global Financial* by over a decade, and the court did not adopt a multi-factor test, holding instead that the cause of action accrued where the trust beneficiaries were located. 628 F. Supp. 153, 156 (S.D.N.Y. 1986). No party could possibly have assumed based on these non-binding cases that a multi-factor test applied to claims brought by trustees rather than *Global Financial*'s controlling plaintiff-residence rule.

Second, DBNT's argument that the First Department's decision is inconsistent with how courts have applied New York's borrowing statute in shareholder derivative suits and bankruptcy trustee actions (Br. at 40) is meritless. In contrast to a trustee of a trust, shareholder derivative plaintiffs and bankruptcy trustees derive their right to bring suit from the corporation or bankrupt entity itself. In a shareholder derivative action, the shareholder "'has no claim of his own,'" and instead "enforce[s] a right of a corporation." *Korn* v. *Merrill*, 403 F. Supp. 377, 383-84 (S.D.N.Y. 1975), *aff'd* 538 F.2d 310 (2d Cir. 1976). Bankruptcy trustees also do not prosecute claims that accrue in their favor, but only those accruing in favor of a bankrupt entity. *See, e.g.*, *In re Adelphia Commc'ns Corp.*, 385 B.R. 204, 58 n.137 (Bankr. S.D.N.Y. 2007) ("When a bankruptcy trustee sues as a representative of the estate of a bankrupt corporation,

it is the residency of the corporation which is applicable.") (internal quotation marks omitted).

Here, by contrast, the Trustee, rather than the Trust, is the real party in interest that "has the cause of action." N.Y. CPLR § 1004, Practice Commentaries; *see also Orentreich*, 713 N.Y.S.2d at 331 (affirming dismissal of action brought over policies "owned by a trust" because "only the trustee, who was not named as a plaintiff in that capacity," could bring a claim regarding the trust's assets). Furthermore, in shareholder derivative and bankruptcy actions, courts do not apply multi-factor tests to determine where a claim accrues; they look to the residence of the entity that has the cause of action. *See, e.g.*, *Official Comm. of Asbestos Claimants of G-1 Holdings, Inc.* v. *Heyman*, 277 B.R. 20, 30 (S.D.N.Y. 2002) (looking to the residence of the bankrupt corporation); *Brinckerhoff* v. *JAC Holdings Corp*., 692 N.Y.S.2d 381, 382 (1st Dep't 1999) (looking to the residence of the corporation that held the cause of action).

Third, there is nothing inconsistent about a rule that would result in the application of a different statute of limitations depending on the state in which a trustee plaintiff resides. (*See* Br. at 40.) Indeed, that is how the legislature designed CPLR 202. If the legislature intended for all claims brought in New York courts to be subject to the same statute of limitations, there would be no borrowing statute. Instead, the legislature adopted CPLR 202 to "protect New York resident-

defendants from suits in New York that would be barred by shorter statutes of limitations in other states where non-resident-plaintiffs could have brought suit." *Ins. Co. of N. Am.*, 91 N.Y.2d at 184-85. (*See also supra* p. 29 n.7.)

Fourth, DBNT's argument that applying the plaintiff-residence rule in these circumstances would lead to "inconsistent and confusing results" because "the Trustee might be replaced by a successor trustee" (Br. at 40) is a red herring. Under New York law, a cause of action for breach of representations and warranties accrues at closing. *See ACE III*, 25 N.Y.3d at 589. If a trustee was replaced by a successor trustee *after* closing (*i.e.*, after the cause of action had already accrued), the court would still look to the residence of the original trustee because the cause of action would have accrued *to that trustee* and then later been assigned to the successor trustee. *See IKB Int'l S.A.* v. *Bank of Am.*, 2014 WL 1377801, at *6 (S.D.N.Y. Mar. 31, 2014) ("[W]hen a claim has been assigned, the Section 202 analysis focuses on the statute of limitations of the jurisdiction in which the claim accrued to the assignor, not the law of the assignee's residence."); (*see also* A.146 ("[T]he predecessor trustee shall execute and deliver such instruments . . . confirming in the successor trustee all such rights, powers, duties, and obligations.")).

Fifth, DBNT's contention that the fact that certain other RMBS defendants did not assert a statute of limitations defense under CPLR 202 "strongly

suggests that they believed statute of limitations defenses to be without merit" (Br. at 43) is baseless speculation. It also mischaracterizes the significance of the Decision. (*Id.*) As the IAS Court recently explained, the Decision "did not articulate a new test, or create a new statute of limitations defense for RMBS trustees," and "[t]he potential availability of a statute of limitations defense under the borrowing statute was thus known to [RMBS] parties." *In re Part 60 RMBS Put-Back Litig.*, 2018 WL 5099045, at *6-7 (holding defendant had no compelling "excuse for its failure to assert [CPLR 202] defense" before the Decision). Before the Decision, RMBS plaintiffs were always on notice that, when a nonresident brings suit in New York, "CPLR 202 requires . . . courts to 'borrow' the Statute of Limitations of a foreign jurisdiction where a nonresident's cause of action accrued, if that limitations period is shorter than New York's." *Global Fin.*, 93 N.Y.2d at 526. The Decision does not alter this long-standing rule. Whether RMBS parties misapplied (or misapprehended) this rule says absolutely nothing about the correctness of the Decision.

II. THE FIRST DEPARTMENT CORRECTLY CONCLUDED THAT DBNT'S CLAIMS ACCRUED IN CALIFORNIA EVEN UNDER *MAIDEN*'S MULTI-FACTOR TEST.

The multi-factor test advocated by DBNT would frustrate CPLR's purpose—"to add clarity to the law and to provide the certainty of uniform application to litigants"—by leading to guesswork and inconsistent outcomes. *Ins.*

Co. of North Am., 91 N.Y.2d at 187. But even if DBNT's claims are subject to its multi-factor test, the First Department's Decision should be affirmed because it correctly held that, under *Maiden*, all relevant factors compel the conclusion that DBNT's breach of contract claims accrued in California.

A. The First Department Correctly Applied the *Maiden* Factors.

The First Department correctly found that the factors considered in *Maiden* compel the conclusion that California was the location of the alleged injury. In *Maiden*, which predated *Global Financial* by 15 years, a federal district court held that four factors were relevant to determining where the trust was located (*id.* at 1218), each of which the First Department found points to California as the place of accrual here (A.9-11).

First, *Maiden* looked to the trustee's residence to determine where a cause of action accrued. 582 F. Supp. at 1217. Here, it is undisputed that DBNT resides in California and administers the Trust from its offices there. (*See supra* p. 12.)

Second, *Maiden* looked to the location of the "corpus of the Trust[,] [which] diminished as a result of" the alleged breach of contract. 582 F. Supp. at 1218. The *Maiden* court found that the fact that the "securities are physically kept" in New York indicated that plaintiff's alleged loss was felt in New York. *Id.* Here,

the Trust's corpus consists of mortgage loans, and the PSA requires the notes pertaining to those loans to be held in California. (A.104.)

Third, *Maiden* considered "where [the trust's] investment decisions are made." 582 F. Supp. at 1218. The "investment decisions" discussed in *Maiden* were the primary activity of the trust's trustee, and those decisions affected the composition of the corpus of the trust. *Id*. at 1217-18. This inquiry therefore concerns the trust's activities, including those that generally affect trust assets. Here, DBNT, like all RMBS trustees, was responsible for many different decisions and actions that affected the trust. For instance, RMBS trustees "make disbursements and transfers" from the trust's accounts to certificateholders and enforce the trust's contractual rights, including the right to have breaching loans repurchased. (A.124.) These and other activities relating to the trust corpus all took place in California, where the alleged injury accrued, which demonstrates that the alleged injury was felt there.

Fourth, the final factor *Maiden* considered was "where taxes are paid." 582 F. Supp. at 1218. This factor looks to where a trust must report taxable income because it indicates the location of the income-producing assets that may suffer a purely economic injury. In *Maiden*, New York State and City tax returns were filed that related to the trust at issue, which indicated the income-producing assets were held in New York where they could suffer injury. *Id.* at 1217-18.

Here, the PSA identifies California as the state in which taxes, if any, must be paid, which demonstrates that California is the location where the trust assets may earn taxable income.[11]

Taken together, these four factors point to one irrefutable conclusion: the trust was located, and the alleged injury was felt, in California. The First Department agreed, holding that each of these factors, plus the fact that the Trusts comprise mortgage loans originated by California lenders and encumbering predominantly California properties, indicate that the Trustee's cause of action accrued in California. (A.273.)[12] That holding should be affirmed.

B. The Factors DBNT Asks This Court to Apply Are Irrelevant to Determining the Place of Injury.

DBNT does not meaningfully dispute that the *Maiden* factors point to California as the place of accrual. Rather, despite advocating for the use of the

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[11] DBNT claims that the fact that the PSA contemplates the payment of taxes in California is irrelevant because the Trust has been recognized as a "residential mortgage investment conduit ('REMIC') for federal tax purposes," and "income [is] passed through to the[Certificateholders]." (Br. at 38-39.) But DBNT does not dispute that the PSA contemplates the payment of taxes in California, and does not explain why this Court should distinguish between the contractual obligation to pay taxes in a specific state and the actual payment of taxes. Contrary to DBNT's assertions, the obligation to pay taxes in California is a relevant factor under *Maiden* because it indicates the location in which the trust assets may earn taxable income.

[12] DBNT argues that the First Department "mistakenly found" that the Mortgage Loans in the BR1 securitization were "exclusively" originated in California. (Br. at 36.) This oversight would not have changed the First Department's holding that this factor points to California as the place of injury, and thus is harmless error. Indeed, the First Department reached the same conclusion—that this factor weighs in favor of California—with respect to the HSBC securitization: it observed that the mortgage loans in that securitization (like those in the BR1 securitization) only "predominantly" encumbered California properties. (A.10; *see also supra* p. 23 n.5.))

Maiden test throughout this litigation, it now argues that the First Department should never have applied the *Maiden* factors, and instead should have applied a test of DBNT's own invention. (Br. at 31-33.) DBNT's criticisms of the First Department's application of *Maiden* are meritless, and the factors for which it self-servingly advocates say nothing about injury and should be rejected.

i. DBNT's Criticism of the First Department's Application of *Maiden* Are Without Merit.

Each of DBNT's criticisms of the First Department's application of *Maiden* lacks merit.

First, DBNT argues that the First Department misapplied *Maiden* by relying on "post-closing factors" in contravention of *ACE III* and its own decision in *Flagstar* holding that a breach of representation and warranty claim accrues at closing. (Br. at 34.) But the factors DBNT characterizes as "post-closing factors"—where the Trust is administered; where the mortgage notes are held; and where the Trust may pay taxes—all existed *at closing*. (A.10-11.)

Second, DBNT contends that the First Department improperly rejected the IAS Court's conclusion that the New York choice-of-law provision in the governing agreements demonstrated that the injury to the Trust occurred in New York. (Br. at 34-35.) But the First Department was correct to reject as irrelevant to the CPLR 202 analysis the fact that New York law applied to the governing agreements. Looking to choice-of-law provision to determine where an

injury took place would contradict this Court's holding that "[a] choice of law provision" that does not evidence an "express intention" to apply a state's statute of limitations "cannot be read to encompass that limitations period." *Portfolio Recovery Assocs., LLC* v. *King*, 14 N.Y.3d 410, 416 (2010). Where a choice-of-law provision lacks such an "express intention," as here, it is irrelevant for determining which statute of limitations applies. *Id.*; *see also 2002 Lawrence R. Buchalter Alaska Trust*, 96 F. Supp. 3d at 202 n.8 (observing that a "choice-of-law provision contained in [a contract] does not impact the Court's analysis as to which state's statute of limitations applies").

Third, DBNT characterizes the "injury" here as "the breach of those Representations and Warranties that diminished the value of [the] Certificates," and argues that the factors considered by the First Department are irrelevant to where this alleged injury occurred. (Br. at 37.) But the alleged breach of representations and warranties is not an injury; it is the alleged *cause* of injury. The injury is the diminution in the value of the assets held by the Trust as a *result* of the alleged breaches of the representations and warranties regarding the quality of the loans. The Certificates are not held by the Trust, and are therefore irrelevant to where an injury to the Trust occurred. (Br. at 24 (alleging that "the Trust, not the Trustee, suffered the injury at issue").) If the Trust suffered the injury, the

injury has to be to the Trust's *assets*, and the mortgage notes held in California are the Trust's sole assets at issue here. (A.104.)

ii. The Factors DBNT Asks This Court to Apply Are Irrelevant to Determining the Place of Injury.

DBNT argues that there are three factors relevant to determining where the alleged injury was suffered: (i) the relevant contract's choice-of-law clause; (ii) the fact that the Certificates (like substantially all trust certificates) are held by a New York depository company; and (iii) decisions relating to the selection of the mortgages *before* they were deposited in the Trust were made in New York. (Br. 31-33.) Not one of these factors has any bearing on the place of injury.

First, the parties' selection of New York law to govern the applicable contracts is in no way indicative of where an injury to mortgage loans held by a trust accrues. All it says is that the parties wanted to avail themselves of New York's commercial jurisprudence. For this reason, courts regularly apply a foreign state's statute of limitations pursuant to CPLR 202 in breach of contract actions despite the presence of a New York choice-of-law clause. *See, e.g.*, *Voiceone Commc'ns, LLC* v. *Google Inc.*, 2014 WL 10936546, at *8-9 & n.6 (S.D.N.Y. Mar. 31, 2014) (applying California's four-year statute of limitations pursuant to CPLR 202 to claims brought by California resident even though "the [contract] contains a choice-of-law provision providing that New York law governs");

Román y Gordillo, S.C. v. *Bank of N.Y. Mellon Corp.*, 2014 WL 1224361, at *12-13 & n.6 (S.D.N.Y. Mar. 20, 2014) (applying Mexico's two-year statute of limitations pursuant to CPLR 202 to claims brought by Mexico resident despite "presence in the [contract] of a [New York] choice-of-law clause").

Second, the physical location of the Certificates owned by Certificateholders is entirely irrelevant to an injury to the Trust. The Trust does not hold the Certificates or have any rights with respect to the Certificates. If the physical location of the Certificates was relevant to claim accrual, substantially all injuries involving financial instruments would accrue in New York. The primary holder of the Certificates—Cede & Co., a nominee of The Depository Trust Company—holds the certificates for nearly all equities and bonds traded in the U.S.[13] But as RMBS cases brought by actual certificateholders make clear, this is not the law. In each such case the court looked to the residence of the plaintiff, and not to New York where the certificates were held by Cede & Co. *See, e.g.*, *HSH Nordbank AG* v. *Barclays Bank PLC*, 2014 WL 841289, at *4 (N.Y. Sup. Ct. Mar. 3, 2014) ("[T]he cause of action accrued in Germany where the economic injury

[13] *See* Brian Patrick Eha, *You Don't Really Own Your Securities; Can Blockchains Fix That*, AMERICAN BANKER (July 27, 2016), https://www.americanbanker.com/news/you-dont-really-own-your-securities-can-blockchains-fix-that; *cf. Bader & Bader* v. *Ford*, 414 N.Y.S.2d 132, 135 (1st Dep't 1979) ("The fact that banks, insurance companies and other institutions in the State hold shares of stock in the company is without significance. If that were a relevant consideration, . . . the courts of this State would unnecessarily become a haven for most derivative suits brought against major United States corporations, merely as a result of the presence here of substantial Wall Street portfolios.").

occurred."); *Commerzbank AG* v. *Deutsche Bank Nat'l Tr. Co.*, 234 F. Supp. 3d 462, 469 (S.D.N.Y. 2017) ("challenged claims plainly accrued in Germany" where certificateholder "was incorporated in Germany with its principal place of business in Germany at the time its claims accrued").

Third, although DBNT contends that all major decisions relating to the mortgage loans that were deposited in the Trust were made in New York (Br. at 33), the location of investment decisions made *before* the allegedly defective loans were deposited into the Trust cannot possibly indicate where an injury for breach of representations and warranties occurred *after* the loans were deposited in the Trust. To find otherwise would be akin to looking to where a car was manufactured to determine where claims arising out of a car accident accrued. Moreover, DBNT is wrong that *Maiden* supports consideration of this factor. (*See* Br. at 33 (*citing Maiden*).) The *Maiden* court looked to where the at-issue *investment* trust carried out its activities—the trustee's "investment decisions"—as a proxy for determining the location of the trust. 582 F. Supp. at 1217-18. As an RMBS trustee overseeing an RMBS Trust, DBNT's activities involved "mak[ing] disbursements and transfers" from the Trust's accounts to certificateholders and enforcing the Trust's contractual rights, including the right to demand that breaching loans be repurchased. (A.124.) DBNT carried out these and other

activities relating to the trust corpus under the PSA where it resides—in California. (A.34, 104.)

III. DBNT'S CLAIMS ARE TIME-BARRED UNDER CALIFORNIA'S APPLICABLE FOUR-YEAR LIMITATIONS PERIOD.

There is no dispute that California's statute of limitations for breach of contract claims is four years, Cal. Civ. Proc. Code § 337, and that the statute of limitations begins to run at the time of breach. *See Mary Pickford*, 12 Cal. 2d at 521 (false representation in an offering document deemed "broken at the time of the sale . . . and the statute of limitations, therefore, begins to run immediately") (internal quotation marks omitted). *Menefee* v. *Ostawari*, 278 Cal. Rptr. 805, 809 (Cal Ct. App. 1991) (California statute of limitations begins to run "at the time of breach"). There is also no dispute that DBNT's claims are untimely under that four-year statute of limitations unless they were somehow tolled. (A.8.)

In arguing that its claims are timely, DBNT raises three arguments. First, in an attempt to avoid this Court's rulings in *ACE III* and *Flagstar*, DBNT argues the Court should ignore the parties' express New York choice-of-law provision and instead apply California law to interpret the Accrual Provision and Repurchase Protocol. (Br. at 45-53; *see also supra* pp. 7-8.) Second, DBNT argues that the Accrual Provision and Repurchase Protocol renders its claims timely under California law despite the fact that it failed to make demand within the four-year limitations period. Third, DBNT argues that its claims are saved

under California's narrow discovery rule. (Br. at 53-55.) As demonstrated below, each of these arguments is without merit.

A. The Accrual Provision and Repurchase Protocol Do Not Toll DBNT's Claims Because They Are Governed by New York Law.

In asserting that its claims are still timely under California law, DBNT argues that, "[o]nce it determined that the Trustee's claims accrued in California, the First Department was required . . . 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." (Br. at 46.) DBNT is wrong: it ignores that the parties expressly agreed that the contract—including the Accrual Provision—would be "governed by, and construed in accordance with, the laws of the State of New York." (A.183 (capitalization omitted).) *See also Welsbach Elec. Corp*. v. *MasTec N. Am., Inc.*, 7 N.Y.3d 624, 629 (2006) ("[C]ourts will enforce a choice-of-law clause so long as the chosen law bears a reasonable relationship to the parties or the transaction."). Thus, "[i]f this were a California suit" that was "brought on a cause of action arising in California" (Br. at 6), New York law—not California law—would still govern the interpretation of the Accrual Provision and Repurchase Protocol.[14]

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[14] In contrast to statutes of limitations, which "are considered 'procedural' because they are deemed 'as pertaining to the remedy rather than the right,'" *2138747 Ontario, Inc.* v. *Samsung C & T Corp.*, 31 N.Y.3d 372, 377 (2018), this Court has recognized that "[a]ccrual is a substantive concept," *Tanges* v. *Heidelberg N. Am., Inc.*, 93 N.Y.2d 48, 53 (1999). *See also* (*footnote continued…*)

It cannot be disputed that, under New York law, "nothing in the [A]ccrual [Provision] created a substantive condition precedent to the relevant performance that plaintiff alleges was breached," and that, "[i]f 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." *Flagstar*, 32 N.Y.3d at 149, 151.[15] Because neither the Accrual Provision nor the Repurchase Protocol creates a substantive condition precedent that extends the statute of limitations, DBNT's claims are untimely under California's four-year statute of limitations.

DBNT's arguments to the contrary are baseless. First, DBNT points to the "general rule" in New York that, "[i]n borrowing the foreign statute, [a]ll the extensions and tolls applied in the foreign state must be imported with the foreign statutory period." (Br. at 46 (quoting *In re Smith Barney, Harris Upham & Co., Inc.*, 85 N.Y.2d 193, 207 (1995).) But this general rule is inapplicable where, as here, the parties include a choice-of-law provision to govern interpretation of a contract's *substantive* provisions. It is also inapplicable where, as here, importing

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(…*footnote continued*)
Ministers & Missionaries Ben. Bd. v. *Snow*, 26 N.Y.3d 466, 476 (2015) ("[W]hen parties include a choice-of-law provision in a contract . . . the chosen state's substantive law—but not its common-law conflict-of-laws principles or statutory choice-of-law directives—is to be applied, unless the parties expressly indicate otherwise.").

[15] Notably, the Accrual Provisions here and in *Flagstar* are nearly identical. *Compare Flagstar*, 32 N.Y.3d at 144-45 at *2 *with* (A.192.).

a foreign tolling rule would have the effect of indefinitely extending the statute of limitations. In *GML, Inc.* v. *Cinque & Cinque, PC*, for example, this Court addressed whether, in borrowing Tennessee's one-year statute of limitations under CPLR 202, it was also required to import Tennessee's tolling statute. 9 N.Y.3d 949, 951 (2007). The Court held that it was not, finding that "[a] conclusion to the contrary would cause the statute of limitations to be tolled indefinitely against these defendants," and that the Legislature did not "intend[] this result in enacting CPLR 202."[16]

DBNT also argues that the New York legislature could not have intended the "bizarre result" that under CPLR 202 "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." (Br. at 47.) But it is hardly "bizarre" that CPLR 202 operates to the advantage of New York residents, given that the "primary purpose" of CPLR 202 is to protect New York residents from "forum shopping by a non-resident seeking to take advantage of a more favorable Statute of Limitations in New York." (Br. at 45 (citing *Antone* v. *Gen. Motors Corp.*, 64 N.Y.2d 20, 27-28 (1984));) *see also*

[16] California courts, too, recognize that, where a "tolling provision is not inherent in, or inseparable from, its statute of limitations," the statute of limitations can be applied without also applying the tolling rule. *Prof'l Collection Consultants* v. *Lujan*, 23 Cal. App. 5th 685, 693 (Cal. Ct. App. 2018).

Hughes Elecs Corp. v. *Citibank Del.*, 15 Cal Rptr. 3d 244, 250 (Cal. Ct. App. 2004) ("California law . . . supports enforcement of CPLR 202."). Furthermore, as demonstrated above (*see supra* pp. 48-49), this action *would not* be timely if brought in California given that the parties expressly agreed that New York law should govern the contract—including the Accrual Provision and Repurchase Protocol.

B. DBNT's Claims Are Untimely Even if California Law Applies to the Accrual Provision and Repurchase Protocol.

Even if California law governs interpretation of the Accrual Provision and Repurchase Protocol (it does not), DBNT's claims would still be untimely. In arguing that its claims would be timely under California law, DBNT points to Section 360.5 of the California Code of Civil Procedure, which allows parties to *expressly* waive statutes of limitations "in writing," provided the limitations period is not extended for more than four years. Cal. Civ. Proc. Code § 360.5. But, as the First Department correctly held, the Accrual Provision here does no such thing: it does not "expressly waive or extend the statute of limitations." (A.12.) Indeed, it does not mention any statute of limitations, let alone California's.[17]

[17] By contrast, each of the cases cited by DBNT (Br. at 49) involved express waivers of the statute of limitations. *See Brisbane Lodging, L.P.* v. *Webcor Builders, Inc*., 157 Cal. Rptr. 3d 467, 474-75 (Cal. Ct. App. 2013); *Cal. First Bank* v. *Braden*, 264 Cal. Rptr. 820, 821-22 (Cal. Ct. App. 1989); *Builders Bank* v. *Oreland, LLC*, 2015 WL 1383308, at *3 (C.D. Cal. Mar. 23, 2015).

DBNT also argues that, under California law, the Trustee's claims did not accrue until satisfaction of the "conditions precedent" set forth in the Repurchase Protocol. (Br. at 50.) But the cases on which DBNT relies do not establish that the Repurchase Protocol tolled the statute of limitations under California law because they all involve claims where, unlike the claims here, demand was a condition precedent to suit. *See Kaplan* v. *Reid Bros., Inc.*, 104 Cal. App. 268, 271-72 (Cal. Ct. App. 1930) (statute of limitations did not begin to run until the demand was made because demand was "necessary before a cause of action arises"); *Leonard* v. *Rose*, 65 Cal. 2d 589, 592 (1967) (defendant was not in breach of contract "until a demand for performance [was] made and performance [was] refused"); *Bjorklund* v. *N.A. Cos. for Life & Health Ins.*, 71 Fed. App'x 550, 551 (9th Cir. 2003) (finding that defendants' refusal of plaintiff's demand for payment constituted alleged breach). Here, nothing in the Repurchase Protocol prevented DBNT from bringing suit when the alleged breaches of representations and warranties accrued at closing. (A.191-92.)

Moreover, DBNT itself recognizes that, where demand qualifies as a condition precedent, it must be made within a reasonable time to toll the statute of limitations. (Br. at 52.) DBNT does not come close to satisfying this requirement, because DBNT did not make its demand until *after* the limitations period had

already lapsed.[18] The California Supreme Court has held that, where a contract delegates the right to make a demand to the plaintiff, the demand must "be made within the period of limitations . . . [or] suit cannot be maintained thereon." *Harrington* v. *Home Life Ins. Co.*, 58 P. 180, 183 (Cal. 1899); *accord Meherin* v. *S.F. Produce Exch.*, 48 P. 1074, 1075 (Cal. 1897) ("[I]f . . . demand was necessary, it should have been made within a reasonable time, which would have been at least within the statutory period of limitations . . . ."). For this reason, it is well established under California law 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." *Taketa* v. *State Bd. of Equalization*, 104 Cal. App. 2d 455, 460 (Cal. Ct. App. 1951) (internal quotation marks omitted).

Moreover, if DBNT's interpretation were correct, the Accrual Provision and Repurchase Protocol would serve to extend the statute of limitations indefinitely, which is prohibited under California law. *Meherin*, 48 P. at 1075 (rejecting proposition that a plaintiff can "extend the statute of limitations indefinitely by failing to make a demand"); *see also Prof'l Collection Consultants* v. *Lujan*, 23 Cal. App. 5th 685, 693 (Cal. Ct. App. 2018) (declining to apply nonresident tolling provision that "would produce the absurd result of abolishing

[18] The Securitization closed on April 12, 2007, and DBNT did not make its first repurchase demand until December 26, 2012, more than four years after its claims accrued at closing. (*See supra* pp. 15-18.)

the statute of limitations defense entirely, which is surely inconsistent with a fundamental policy of California law"). Here, DBNT failed to demand cure or repurchase during the four-year limitations period, but its claims otherwise had fully accrued. Its failure to make a demand during the limitations period renders its claim undisputedly time-barred under California law. *Accord Ginther* v. *Tilton*, 206 Cal. App. 2d 284, 286 (Cal. Dist. Ct. App. 1962) ("[I]n the absence of peculiar circumstances, a time coincident with the running of the statute will be deemed reasonable, and if a demand is not made within that period, the action will be barred." (internal quotation marks omitted)); *Caner* v. *Owners' Realty Co.*, 33 Cal. App. 479, 481 (Cal. Ct. App. 1917) ("[A]s no demand was made within four years after the contracts in suit were executed, all of the causes of action arising therefrom and pleaded in the plaintiff's complaint were . . . barred by the statute of limitations.").

C. The California Discovery Rule Does Not Save DBNT's Claims.

DBNT also argues that California's discovery rule resuscitates its time-barred claims, and that the limitations period was tolled until it purportedly actually became aware of the alleged defects in 2012. (Br. at 48, 53.) DBNT is flat wrong. Indeed, under California's "general rule" for contract claims, the statute of limitations begins to run even if the allegedly injured party is not yet "aware of his or her right to sue." 3 B.E. Witkin et al., Cal. Proc. 5th Actions

§ 520 (5th ed. 2008); *see also Menefee*, 278 Cal. Rptr. at 809 ("[A] cause of action for breach of contract ordinarily accrues at the time of breach regardless of whether any substantial damage is apparent or ascertainable."). DBNT's argument also fails for at least three additional reasons.

First, the discovery rule only serves to toll limitations periods applicable to breach-of-representation claims where those claims involve *fraudulent* concealment. *Mary Pickford*, 12 Cal. 2d at 526 (a cause of action for breached representations accrues "at the date of the sale" unless the plaintiff alleges that fraud infected the representations). Here, DBNT does not allege in its Amended Complaint that Barclays committed fraud.

Second, California's discovery rule only applies in "unusual" circumstances where alleged breaches "can be, and are, committed in secret and . . . 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 (Cal. Ct. App. 1983). Here, the alleged breaches were not committed in secret—DBNT nowhere alleges concealment by Barclays—nor was DBNT incapable of discovering the purported breaches. According to the Amended Complaint, any party could have conducted an investigation of the loans at any time. (*See* A.34.)

Third, the discovery rule is inapplicable because, as the First Department correctly held (A.12), DBNT has not pleaded any facts showing why it "could have discovered injury and cause through the exercise of reasonable diligence." *CAMSI IV* v. *Hunter Tech. Corp*., 230 Cal. App. 3d 1525, 1536-37 (Cal. Ct. App. 1991); *see also NBCUniversal Media, LLC* v. *Superior Court*, 171 Cal. Rptr. 3d 1, 10 (Cal. Ct. App. 2014) (discovery rule inapplicable as a matter of law where plaintiffs "have not pled facts showing an inability to have discovered their claims earlier despite reasonable diligence"); *Grisham* v. *Philip Morris U.S.A., Inc.*, 151 P.3d 1151, 1159 (2007) (discovery rule inapplicable in case alleging economic injuries where plaintiff failed to "*plead facts* showing an inability to have discovered [those injuries], such as reasonable reliance on . . . company misrepresentations"). "A plaintiff whose complaint shows on its face that his or her claim would be barred by the applicable orthodox statute of limitations, and who intends to rely on the discovery rule to toll the orthodox limitation period, must specifically plead facts which show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." *CAMSI IV*, 230 Cal. App. 3d at 1536-37 (internal quotations and citation omitted). DBNT does not do so here.

DBNT acknowledges that "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" (Br. at 54), yet DBNT's Amended Complaint pleads no facts showing such an inability. DBNT argues that whether it exercised "reasonable diligence" should have been a question of fact resolved at a later stage of the proceedings, and claims that it is "a Trustee with limited access to information about the Mortgage Loans who acts on demands made by Certificateholders." (Br. at 54.) But, as the First Department correctly recognized, DBNT's own pleadings reveal that it "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." (A.12.) Although DBNT disputes the basis for this finding, it does not dispute that the information giving rise to its breach of contract claim was in its possession—through, among other things, information in the Prospectus Supplement and the monthly reports issued to Certificateholders by DBNT itself (A.128-130; *supra* pp. 16-17)—from the date the representations and warranties were made at closing.[19]

[19] Indeed, the Trustee's own Distribution Reports for the Trust provided information about foreclosure, delinquency, and loss rates. *See* Distribution Reports for SABR 2007-BR1 available at the website of DBNT, https://tss.sfs.db.com/investpublic/ (last visited Feb. 1, 2019). The Court may properly consider these reports, because "no significant dispute exists regarding [them]." *People* v. *Credit Suisse Secs. (USA) LLC*, 31 N.Y.3d 622, 644 (2018) *(*quotation omitted). *Guggenheimer* v. *Ginzburg*, 43 N.Y.2d 268, 275 (1977) (same); *see also Gomez-Jimenez* v. *N.Y. Law Sch.*, 36 Misc. 3d 230, 242 (N.Y. Sup. Ct., N.Y. Cty. 2012).

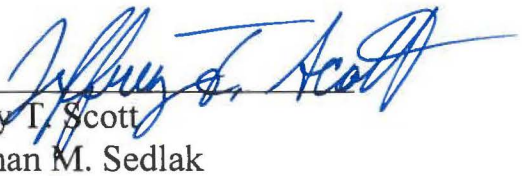
The Amended Complaint also fails to allege any efforts that it or its Certificateholders took to uncover the causes of actions within four years of the alleged breach, as it was required to do. (*See supra* pp. 51-55.) DBNT does not plead any facts regarding what prompted the reunderwriting analysis that formed the basis for its initial demand (*see supra* pp. 18-19), or any facts suggesting the examination could not have been commenced at an earlier date. Indeed, DBNT does not even provide the actual date that the examination began, other than generally stating that it took place at some point in 2011. Nor does DBNT explain how the Trustee acted "promptly" (Br. at 17) by sending Barclays a demand over a year later, on December 26, 2012, well after the four-year statute of limitations had run. Faced with similarly sparse pleadings, California courts have found the discovery rule inapplicable as a matter of law. *See, e.g.*, *CAMSI IV*, 230 Cal. App. 3d at 1536-38 (concluding "as a matter of law" the plaintiff could have learned of its claims earlier through the exercise of reasonable diligence, and noting that "[t]he burden was on [plaintiff] to plead *facts* to show *inability* to have made earlier discovery" (emphasis in original)).

CONCLUSION

For the foregoing reasons, this Court should affirm the Decision of the First Department.

Dated: February 6, 2019
New York, New York

SULLIVAN & CROMWELL LLP

By: 
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Dated: February 6, 2019

Jeffrey T. Scott