To be Argued by:
NICHOLAS J. BOYLE
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Court of Appeals

of the

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 HSBC BANK USA, NATIONAL ASSOCIATION

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CORPORATE DISCLOSURE STATEMENT

HSBC Bank USA, National Association is a wholly owned subsidiary of HSBC USA Inc., which is an indirect, wholly owned subsidiary of HSBC Holdings plc, a United Kingdom corporation. The shares of HSBC Holdings plc are publicly traded on certain foreign stock exchanges and are traded in the United States as American Depository Shares on the New York Stock Exchange. No publicly held corporation owns ten percent or more of the stock of HSBC Holdings plc.

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INTRODUCTION

The First Department unanimously, and correctly, found Deutsche Bank National Trust Company's claim for alleged representation breaches untimely under California's applicable four-year statute of limitations. (A.7-13.)[1] The Court should affirm that ruling, and confirm that under CPLR 202, a suit by a trustee of a trust accrues where the trustee resides.

* * * * *

DBNT is a national banking association with its principal place of business and trust-administration office in California. It alleges that, in connection with a residential mortgage-backed securities transaction, HSBC breached representations and warranties made to DBNT about mortgage loans that DBNT owns, which increased the loans' risk of loss. DBNT's breached-representation claim accrued in California and is untimely under California law.

Global Financial Corp. v. Triarc Corp., 93 N.Y.2d 525 (1999) and its progeny hold that a contract claim accrues at the plaintiff's place of injury,

[1] The IAS Court had denied both HSBC Bank USA, National Association's motion to dismiss the representation-breach claim and a similar motion by Barclays Bank PLC. The First Department's ruling reversed both denials. Barclays is a party to this appeal as well. "A.__" indicates citations to the appendix Deutsche Bank ("DBNT") submitted; "Br.__" indicates citations to DBNT's opening brief; "R.A.__" indicates citations to HSBC's Respondent's Appendix.

which is at the plaintiff's residence absent extraordinary circumstances. Plaintiff DBNT is a California resident; applying the *Global Financial* rule, DBNT's claim accrued in California. This straightforward analysis heeds the Court's call for a "single determination" of where a cause of action accrued, and achieves CPLR 202's goals of uniformity and certainty. *Id.* at 530.

Because DBNT's claim accrued in California to California-resident DBNT, CPLR 202 requires that the claim be timely under both California's and New York's statutes of limitations. The applicable California limitations period is four years. DBNT's claim, filed in June 2013, is based on representations allegedly breached in 2007—six years earlier. The claim is untimely.

DBNT wanders far from the Court's authority, and New York jurisprudence generally, in an effort to manufacture a different outcome:

To forestall the plaintiff-residence rule, DBNT asserts that it is suing in a representative capacity, and thus that the Court should look to the residence of the represented party to determine the place of accrual. But the "who" or the "what" DBNT is representing shifts throughout its brief—from the trust, to the trust and its beneficiaries, to, perhaps, only the beneficiaries—in service of rendering an untimely claim timely. Uniformity and certainty this is not.

In any event, DBNT's representative-capacity theory is contrary to law

and fact. The governing contract and DBNT's own admissions establish that DBNT itself holds any cause of action for allegedly breached representations and was injured by the purported representation breaches. And DBNT's own representative-capacity cases, as well as authority detailing a trustee's role in trust litigation, foreclose its argument as a matter of law.

Having staked out a contrary-to-law-and-fact theory, DBNT then compounds its error by arguing that the Court should use the multi-factor test from *Maiden v. Biehl*, 582 F. Supp. 1209 (S.D.N.Y. 1984) to determine the place of accrual. Nowhere does DBNT explain how a multi-factor test is consistent with *Global Financial*'s required single determination. And nowhere does DBNT square *Maiden* with *Global Financial*'s rejection of an accrual rule "dependent on a litany of events." 93 N.Y.2d at 530. Because it cannot.

Even on its own terms, DBNT's *Maiden* argument misses the mark. *Maiden* deployed a multi-factor test to determine where a trust was "located"—the bottom-line inquiry DBNT asks the Court to undertake. (Br.8.) But just as quickly as DBNT tells the Court that *Maiden* controls, DBNT tosses aside the factors *Maiden* employed to determine a trust's location. With good reason: *Maiden*, too, points to a California accrual here.

Rather than faithfully apply *Maiden*, DBNT instead summons each and

every New York-related fact from the record, no matter how divorced from the trust or *Maiden*'s factors. This outcome-determinative approach contravenes *Global Financial* and belies DBNT's professed concern with a party's "expectations." Under DBNT's pick-and-choose analysis, no plaintiff (or party generally) would know at the outset what statute-of-limitations regime controlled. Plaintiffs who believed their claims to be timely, or defendants who believed claims against them to be untimely, may find the opposite after a court applied DBNT's multi-factor approach.

Following the plaintiff-residence rule here accurately reflects a trustee's role in trust litigation, accords with the Court's precedents, and respects modern CPLR 202 jurisprudence's command for certainty and uniformity.

QUESTIONS PRESENTED

1. Whether a claim brought by a California-based trustee of a trust—here for alleged diminution in value of trust assets, which the trustee owns—accrues in California under CPLR 202.

Yes, as the First Department correctly held.

2. Whether under CPLR 202, in a case brought by a trustee of a trust, a court may depart from the Court's straightforward, default plaintiff-residence rule and instead assess multiple factors to determine where a claim

accrued.

No, the plaintiff-residence rule applies in a suit brought by a plaintiff trustee. The First Department did not rule on this question.

3. Assuming a multi-factor test applies, whether a plaintiff trustee's claim accrued in California where the trustee has its principal place of business and administers the trust in California; the trust's assets, mortgage loans, may be held in California, encumber predominantly California properties, and were originated by a California mortgage originator; and the trust's governing contracts mention only one state's tax regime, California's.

Yes, as the First Department correctly held.

4. Whether a plaintiff's claim is untimely under California's four-year statute of limitations for breach-of-contract action where the claim accrued on June 5, 2007, but was not brought until six years later.

Yes, as the First Department correctly held.

STATEMENT OF FACTS AND THE CASE

This action arises from a residential mortgage-backed securities ("RMBS") transaction securitizing predominately California mortgages offered by a California mortgage originator and administered by a California trustee from an office in California. (A.540, 824, 1008.)

A. Creating the Trust.

In 2007, HSBC sold mortgage loans originated by New Century Mortgage Corporation to HSI Asset Securitization Corporation under a Mortgage Loan Purchase Agreement. (A.737-64.) HSI and several other parties, including DBNT as trustee, created the HSI Asset Securitization Corporation Trust 2007-NC1 (the "Trust") to securitize the loans under a Pooling and Servicing Agreement. (A.514-736.) The transaction closed on June 5, 2007. (A.540.)

All parties to the transaction, including potential investors, knew that New Century primarily originated "subprime" mortgages. (A.824.) The Prospectus Supplement, an offering document accompanying the transaction, detailed that New Century loans bore particular risk: in April 2007, before the PSA was executed, New Century filed for bankruptcy as a result of (i) losses suffered from litigation over allegedly breached loan representations, (ii) high loan default rates, and (iii) multiple investigations into its lending practices and finances. (A.794-95, 824-35.)

Notwithstanding those fully disclosed risks, investors—presumably motivated by the high returns associated with subprime loans—purchased the Trust's certificates. Although HSBC made certain representations and warranties about the loans as of the closing date or earlier, *e.g.*, A.737, HSBC did

not guarantee *future* loan performance. Rather, a host of parties, including DBNT and the investors, were able to monitor the loans' performance through detailed reports distributed monthly that included information about loan defaults and delinquencies. (A.586-88; R.A.4-141.)

B. DBNT Administers the Trust and Owns the Trust's Assets.

The Pooling and Servicing Agreement ("PSA") obligates DBNT to administer the Trust. DBNT's main office and principal place of business is in Los Angeles, California (A.1337, 1375); its trust-administration office is in Santa Ana, California (A.540). To the extent DBNT decided to move its trust-administration office, the PSA contemplates that the office would remain in California. (A.540.) From its California office, DBNT performs its duties under the PSA, including, by way of example, preparing, sending, and receiving required notices and reports; interacting with investors and other Trust parties; and conducting and defending litigation. *E.g.*, A.571-72, 605-07, 624-30.

By the PSA, the assets held in trust were "assign[ed] to" DBNT. (A.568.) And the PSA provides that DBNT is the legal owner of those assets and thus has "all the right, title and interest" to them. (A.567-68.)

The assets DBNT owns are mortgage loans. (A.566.) Those loans predominately secure properties in California, as compared to properties in any

other state: 32.1% of the mortgage loans by principal balance are secured by California properties; only 7% are secured by New York properties, and properties in only two other states secure more than 5% of the loans (Florida, 8.9%; Texas, 5.1%). (A.778, 1008.) The PSA permits the mortgage notes reflecting the loans to be held in California, Minnesota, or Utah (but not in New York). (A.570.) It also contemplates state tax payments only in one state: California. (A.616.) Income generated by payments from the mortgage loans is distributed monthly to the Trust's beneficiaries, each of whom holds certificates reflecting investment in the Trust. (A.581-86.) The certificates are not the Trust's assets (A.566 (defining "Trust Fund")), but rather they are owned by the beneficiaries, who are known as "Certificateholders."

C. DBNT's Claims Against HSBC.

Under the PSA, DBNT, as trustee, has the right to bring an action related to the assets that it holds in trust. (A.568, 572.) DBNT "accept[ed] such assignment" when it agreed to serve as trustee. (A.568.) The PSA makes explicit that HSBC's representations about the mortgage loans "inure to the benefit of the Trustee," as well as the Certificateholders. (A.572.)

For nearly six years after the transaction closed on June 5, 2007, no one

notified HSBC that any of the loans were flawed, or that any of HSBC's representations were defective—despite the fact that DBNT and the Certificateholders had been receiving monthly reports detailing the performance of the mortgage loans starting immediately after the 2007 closing. (A.586-88.)

Then, in April 2013, DBNT forwarded a letter from a newly created Certificateholder, QWWIP, LLC, alleging that the mortgage loans held in trust breached HSBC's representations. QWWIP had been formed two months earlier. (R.A.3.) QWWIP alleged that it had been put on notice of breaches of representations made about the Trust loans by New Century's "bankruptcy examination" (disclosed in the 2007 Prospectus Supplement, concluded in 2008) and investigations into, and legal proceedings against, New Century (also disclosed in the 2007 Prospectus Supplement). (A.824-42, 1364-65.)

DBNT demanded that HSBC cure any material breaches or repurchase the allegedly defective loans. (A.1354-55.) That demand arose from a "repurchase protocol" in the Trust's PSA. The protocol obligates DBNT to give HSBC notice of any loans that allegedly breach representations or warranties and provides HSBC an opportunity to cure or repurchase those loans. (A.572.)

Although the repurchase protocol was available to DBNT and Certificateholders since the transaction's June 2007 closing, DBNT waited until the

closing's six-year anniversary to file suit, by summons and notice, against HSBC. DBNT later filed a complaint in November 2013. The IAS Court dismissed that complaint, finding DBNT's claims barred by First Department authority. *See Deutsche Bank Nat'l Tr. Co. v. HSBC Bank USA, Nat'l Ass'n*, No. 652001/2013, 2014 WL 5419939, at *1 (N.Y. Sup. Ct., N.Y. Cty. Oct. 22, 2014). The court permitted DBNT to replead its claims. *See id.* at *2.

DBNT filed two additional complaints, the operative one of which asserted three claims: (i) breach of representations, (ii) breach of the duty to notify, and (iii) anticipatory repudiation. (A.1332-53.)

D. The IAS Court Denies in Part HSBC's Motion To Dismiss.

HSBC moved to dismiss DBNT's three claims arguing, among other things, that they were untimely under California's applicable four-year limitations period. HSBC explained that because DBNT is a California resident, its claims accrued in California under CPLR 202. And under California's four-year limitations period for breach-of-contract actions, those claims were untimely because DBNT did not file suit until six years after they arose.

Although the IAS Court correctly observed that in cases involving alleged economic loss, as here, *Global Financial* dictates that a claim typically

accrues where the plaintiff resides, it nevertheless found the plaintiff-residence rule inapplicable. (A.18-20.) Citing exclusively federal cases, and applying law formulated before *Global Financial*, the IAS Court stated that DBNT's California residence was "not a reliable indicator of the place where the injury occurred." (A.20.) Instead, it applied a multi-factor test purportedly derived from *Maiden*, a 1984 federal case, to determine where DBNT's claims accrued. (A.19-22.) HSBC explained that even under *Maiden* the claims accrued in California. The IAS Court disagreed and found them timely under New York law. (A.22.)

HSBC appealed the IAS Court's statute-of-limitations decision. So too did Barclays, as the IAS Court's ruling applied to its action as well.

The IAS Court dismissed DBNT's claims for breach of the duty to notify and anticipatory repudiation on other grounds (A.22-27), rulings DBNT did not appeal. The only claim on appeal is for alleged representation breaches.

E. The First Department Unanimously Holds that DBNT's Claim Is Untimely.

The First Department unanimously reversed the IAS Court's partial denial of HSBC's and Barclays' motions to dismiss, holding that DBNT's representation-breach claim accrued in California under CPLR 202 and was untimely under California's applicable four-year statute of limitations. (A.9-11.)

The First Department held that it "need not decide" whether *Global Financial*'s plaintiff-residence rule or *Maiden*'s multi-factor test controlled this action because both yielded the same outcome: "the injury/economic impact was felt in California and the claims are thus deemed to have accrued there." (A.9-10.) There was no dispute that DBNT, the plaintiff, was a California resident. The court addressed substantively only DBNT's multi-factor test, explaining that *Maiden*'s factors pointed to a California accrual: (i) DBNT, a California-based trustee, administers the Trust from California; (ii) the PSA contemplates that the allegedly impaired assets held in trust—mortgage loans originated by California lenders and predominately encumbering California properties—may be maintained in California (but not in New York); and (iii) the Trust is subject to California's tax regime. (A.10-11.)

The First Department rejected as irrelevant other factors DBNT offered that purportedly pointed to a New York accrual: (i) the Certificateholders' Certificates were located in New York; (ii) the PSA had a New York choice-of-law clause; and (iii) HSBC allegedly decided what loans to include in the Trust in New York. (A.10-11.)

Having concluded that DBNT's claim accrued in California, the First Department then held that California's four-year breach-of-contract statute of

limitations barred the claim. The court explained that under California law, DBNT's representation-breach claim accrued when the transaction closed but that DBNT did not bring suit within the limitations period. (A.11-12.)

The First Department rejected DBNT's arguments that California's statute of limitations was tolled. (A.12-13.) Citing California law, the court reasoned that because DBNT "fail[ed] to demand cure or repurchase until after the expiration of four years from the original breach," the limitations period could not be "extend[ed]." (A.12.) New York law yielded the same result: "the contractual provisions for demand under the repurchase protocol are not conditions precedent to suit" and thus did not toll the limitations period. (A.12.) Finally, the First Department held that California's discovery rule did not "save[]" DBNT's claim. (A.12.) "[T]he record establishes that plaintiff reasonably could have discovered the alleged breaches within the limitation period, based on information in the prospectus[], [and] the underwriting and default information it received after the closing." (A.12.)

ARGUMENT

I. THE FIRST DEPARTMENT CORRECTLY FOUND THAT DBNT'S CLAIM ACCRUED IN CALIFORNIA

The First Department held that under *Global Financial*'s plaintiff-residence rule and a multi-factor test, DBNT's breach-of-representation claim accrued in California. That conclusion was correct, and the Court should affirm.

The Court, however, should use this appeal to confirm what *Global Financial* and its progeny make plain: the plaintiff-residence rule determines the place of accrual under CPLR 202 in suits brought by trustees of a trust. That holding would serve CPLR 202's goals of "add[ing] clarity to the law and ... provid[ing] the certainty of uniform application to litigants." *Glob. Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 530 (1999) (internal quotation marks omitted). By contrast, DBNT's multi-factor test (which the IAS Court wrongly adopted) would produce the very accrual "guesswork" that *Global Financial* sought to eliminate. *Id.* at 528 (internal quotation marks omitted).

If the Court follows DBNT down the multi-factor-test rabbit hole, the result nevertheless is the same. DBNT asks the Court to determine "where the trust suffered injury" (Br.8) by following *Maiden v. Biehl*, 582 F. Supp. 1209 (S.D.N.Y. 1984). DBNT's claim accrued in California under *Maiden*.

A. DBNT's Breach-of-Contract Claim Accrued in California, Where DBNT Resides.

An action brought by a non-New York resident that accrues outside of New York must be timely under the relevant limitations periods of both New York and the state in which the cause of action accrued. *See* CPLR 202.

"[A] cause of action accrues at the time and in the place of the injury." *Glob. Fin.*, 93 N.Y.2d at 529. The Court has created a rule to answer the "where": "When an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss." *Id.*; *see Portfolio Recovery Assocs., LLC v. King*, 14 N.Y.3d 410, 416 (2010); *Ins. Co. of N. Am. v. ABB Power Generation, Inc.*, 91 N.Y.2d 180, 187 (1997).

The Court mandates this straightforward plaintiff-residence approach, and courts do not deviate from it absent extraordinary circumstances, which DBNT has not demonstrated, and cannot demonstrate, here.[2] CPLR 202 is "'designed to add clarity to the law and to provide the certainty of uniform application to litigants.'" *Glob. Fin.*, 93 N.Y.2d at 530 (quoting *Ins. Co. of N. Am.*, 91 N.Y.2d at 187); *cf. Ling Ling Yung v. County of Nassau*, 77 N.Y.2d

[2] Courts in New York have recognized that it is a plaintiff's obligation to establish those "extraordinary circumstances." *See, e.g.*, *Stichting Pensioenfonds ABP v. Credit Suisse Grp. AG*, 38 Misc. 3d 1214(A), 2012 WL 6929336, at *2-3 (N.Y. Sup. Ct., N.Y. Cty. Nov. 30, 2012); *see also Robb Evans & Assocs. LLC v. Sun Am. Life Ins.*, No. 10 Civ. 5999, 2013 WL 123727, at *1 (S.D.N.Y. Jan. 8, 2013).

568, 571 (1991) (CPLR is designed to "standardize the State's civil practice"). Those goals are "better served by a rule requiring the single determination of a plaintiff's residence"—the plaintiff-residence rule—"than by a rule dependent on a litany of events." *Glob. Fin.*, 93 N.Y.2d at 530.

1. Applying *Global Financial*'s Plaintiff-Residence Rule, DBNT's Claim Accrued in California.

DBNT concedes that any injury occurred at closing in 2007. (Br.24.) At that time (as now), DBNT, the plaintiff, was a California resident: DBNT pleads a California principal place of business (A.1337), and the PSA states that DBNT's trust-administration office is in California (A.540). *See generally Glob. Fin.*, 93 N.Y.2d at 529-30. That should be the end of the matter.

DBNT, as trustee, was injured. It alleges that breached representations "materially and adversely affect[ed] the value of" mortgage loans (A.1350) by "increas[ing] the[ir] risk of loss" (Br.24). DBNT is the legal owner of those loans. That is true as a matter of New York trust law. *See Henning v. Rando Mach. Corp.*, 207 A.D.2d 106, 110 (4th Dep't 1994)). As a matter of the PSA. (A.567 (recognizing that "all the right, title and interest" in and to Trust assets conveyed to DBNT), 568 (assigning all of the original purchaser's (the Depositor's) "rights and interest" in the Trust assets to DBNT).) And as a matter of DBNT's admissions, both in this action (Br.27 (DBNT has "bare legal title to

the Mortgage Loans" (internal quotation marks omitted)), and before a federal court in another RMBS contract action (A.1376 (relying on similar PSA to argue that DBNT "has legal title to the Trust's assets")).[3] By contrast, neither the Certificateholders nor the Trust legally owns the loans. *See Henning*, 207 A.D.2d at 110 ("[L]egal title is vested entirely in the trustees."); *see also Berardino v. Ochlan*, 2 A.D.3d 556, 557 (2d Dep't 2003).

Moreover, by the PSA, the representations regarding the loans "inure to the benefit *of the Trustee* and the Certificateholders," not the Trust. (A.572 (emphasis added).) And by DBNT's own allegations, the purported representation breaches "adversely affect[ed] the value of … [the] Loans or the *interest of the Trustee* or the Certificateholders therein," not of the Trust. (A.1349 (emphasis added).) Putting the indisputable facts together, DBNT alleges that assets it legally owns were impaired by breaches of representations made for its benefit, which breaches adversely affected its interest. That purported injury animates this action and renders DBNT's residence controlling under CPLR 202's default plaintiff-residence rule.

Separately, DBNT holds the right to bring a repurchase action. Under

[3] "[B]are legal title" presumably was pejorative, but it is an admission of legal ownership. Moreover, in its federal RMBS contract case, DBNT stated that it was "the holder and owner of the [trust assets], as well as of all of the rights relating to [them]." (A.1377.)

the PSA, DBNT was assigned "the right to enforce the Sponsor's obligation to repurchase or substitute defective Mortgage Loans." (A.568.) DBNT "accept[ed]" that assignment. (A.568.) Put simply, the cause of action for breached representations accrues to DBNT.

That DBNT suggests the breaching mortgage loans may have an effect on the value of the Certificateholders' Certificates (Br.24) is a red herring. A corporation's breach-of-contract claim may affect the value of investors' shares, but the claim still accrues to the corporation and, under CPLR 202, in the corporation's state of residence. DBNT's suggestion also ignores the operative complaint, which details that DBNT's claim is about purported "Mortgage Loans [owned by DBNT] that breach the Representations and Warranties [that inure to DBNT's benefit] in a manner that materially and adversely affects the value of such Mortgage Loans." (A.1350.) And DBNT's requested relief is "*specific performance* of HSBC's obligation to repurchase the Defective [Mortgage] Loans" (A.1350 (emphasis added)), not damages related to any diminished value of Certificates.

As a California resident holding title to the allegedly impaired assets and holding the claim for their alleged impairment, DBNT suffered an alleged injury in California, and its claim against HSBC accrued there. Because the

claim of California-resident DBNT accrued in California, California's limitations regime applies, and thus CPLR 202 requires that DBNT's claim be timely under California law. No fact issue exists because DBNT *pleaded* its undisputed California residence at the time its claim accrued. *Contra* Br.26.

2. A California Accrual Achieves CPLR 202's Goals.

This straightforward analysis serves CPLR 202's goals of "certainty" and "uniform[ity]," *Glob. Fin.*, 93 N.Y.2d at 530 (internal quotation marks omitted)—principles DBNT does not contest. It permits trust parties, including potential investors, to know at the outset what limitations regime will govern claims brought by a trustee about trust assets. Indeed, the trustee's identity generally is obvious at a trust's creation; a trust's documents may even detail the trustee's residence, as here. (A.540; A.83 (Barclays' agreement).) That a trust's investors may not "select[]" the trustee (Br.5) is beside the point; they will *know* the trustee's identity when investing and can decide whether the applicable limitations regime gives them sufficient protection.

The plaintiff-residence rule's "clarity," *Glob. Fin.*, 93 N.Y.2d at 530 (internal quotation marks omitted), accords with the Court's general statute-of-limitations jurisprudence. The Court has "repeatedly 'rejected accrual dates which cannot be ascertained with any degree of certainty, in favor of a bright

line approach.'" *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 25 N.Y.3d 581, 593-94 (2015) (quoting *MRI Broadway Rental v. U.S. Mineral Prods. Co.*, 92 N.Y.2d 421, 428 (1998)). That is why, for example, New York does not permit a "discovery rule" when assessing timeliness of a contract action. *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 403 (1993). The Court mandates its bright-line statute-of-limitations rules even where they produce "'harsh and manifestly unfair'" outcomes that work "'obvious injustice.'" *ACE*, 25 N.Y.3d at 594 (quoting *Ely-Cruikshank*, 81 N.Y.2d at 403). It is thus no surprise that in the nearly twenty years since *Global Financial*, courts have consistently followed the plaintiff-residence rule.[4]

3. DBNT's "Representative-Capacity" Theory Is Erroneous.

To circumvent the plaintiff-residence rule, DBNT asserts that it sues as a "representative." (Br.24-29.) DBNT thus would have the Court ignore its residence in favor of the location where the "represented party" purportedly was injured. (Br.24-29.) This theory ignores that DBNT was allegedly injured

[4] *See, e.g.*, *In re Libor-Based Fin. Instruments Antirust Litig.*, No. 11 MDL 2262, 2015 WL 6243526 (S.D.N.Y. Oct. 20, 2015); *Metro. Life Ins. v. Morgan Stanley*, No. 651360/2012, 2013 WL 3724938 (N.Y. Sup. Ct., N.Y. Cty. June 8, 2013); *Robb Evans*, 2013 WL 123727; *Vincent v. Money Store*, 915 F. Supp. 2d 553 (S.D.N.Y. 2013); *Stichting*, 2012 WL 6929336; *Kat House Prods., LLC v. Paul, Hastings, Janofsky & Walker, LLP*, No. 106781/2008, 2009 WL 1032719 (N.Y. Sup. Ct., N.Y. Cty. Apr. 6, 2009), *aff'd*, 71 A.D.3d 580 (1st Dep't 2010); *Seghers v. Morgan Stanley DW, Inc.*, No. 06 Civ. 4639, 2007 WL 1404434 (S.D.N.Y. May 10, 2007).

(detailed above), is internally inconsistent, and finds no support in DBNT's own representative-capacity case law.[5]

a. Who or what DBNT "represents" mutates throughout its brief. DBNT initially states that it is "acting in a representative capacity solely on behalf of an injured trust." (Br.8.) After detouring eight pages later to represent "solely" the "investors in the Trust[]" (Br.16), DBNT returns to its initial, Trust-representative position eight pages after that (Br.24). One sentence later, however, both the "Trust and the Certificateholders" allegedly suffered injury, suggesting that DBNT is suing on both their behalves. (Br.24.) And half a page after that, it is "the trust[] *and/or* the beneficiaries who suffered the actual 'injury'" (Br.25 (emphasis added))—leaving open the possibility the Trust did not suffer injury at all, and that DBNT is suing only for the Certificateholders. Identity matters, because in DBNT's telling the location of the "who" or the "what" DBNT represents is the place of accrual. That it cannot keep straight its position on this foundational element underscores how much it deviates from *Global Financial*'s command for certainty and uniformity.

b. DBNT's representative-capacity theory ignores governing law.

[5] That a corporate plaintiff may have two residences (place of incorporation and principal place of business) is not an "exception[]" to the plaintiff-residence rule. (Br.25-26.) A court faced with that fact pattern would be choosing *which* residence controls—a scenario *Global Financial* recognized and built into its straightforward approach. 93 N.Y.2d at 530.

Over 100 years ago, the Court held that a suit to "recover" trust property or for "damages thereto ... would not have been in a representative capacity." *Toronto Gen. Tr. Co. v. Chi., Burlington & Quincy R.R.*, 123 N.Y. 37, 44-45 (1890). And the true representative-capacity cases DBNT cites—shareholder-derivative and bankruptcy-trustee actions—confirm its theory is unavailing.

Under CPLR 202, "[t]he critical factor is ... the residency of the person in whose favor the cause of action accrued." *U.S. Fid. & Guar. Co. v. E.W. Smith Co.*, 46 N.Y.2d 498, 504 (1979); *see also* CPLR 202 (borrowing statute does not apply "where the cause of action accrued in favor of a resident of" New York). In true representative-capacity suits, the cause of action does not accrue in favor of the party bringing suit. For example, in shareholder-derivative cases the shareholder plaintiff "has no claim of his own" and instead "enforce[s] a right of a corporation." *Korn v. Merrill*, 403 F. Supp. 377, 383 (S.D.N.Y. 1975) (internal quotation marks omitted) (Br.27, 40 n.14), *aff'd*, 538 F.2d 310 (2d Cir. 1976). Similarly, a bankruptcy trustee prosecutes claims that accrue to the bankrupt entity. *See, e.g.*, *Adelphia Commc'ns Corp. v. Bank of Am., N.A.* (*In re Adelphia Commc'ns Corp.*), 365 B.R. 24, 51 (Bankr. S.D.N.Y. 2007) (Br.27, 40 n.14), *aff'd in part sub nom. Adelphia Recovery Tr. v. Bank of Am., Nat'l Ass'n*, 390 B.R. 64 (S.D.N.Y. 2008).

Because, in each instance, the cause of action does not accrue to the plaintiff bringing suit, courts ignore the plaintiff's residence for purposes of CPLR 202. Instead, they look to the residence of the party holding the claim—the bankrupt entity for claims brought by a bankruptcy trustee and the corporation in a shareholder-derivative suit—when determining the place of accrual. *See In re Adelphia*, 365 B.R. at 58 n.137; *Korn*, 403 F. Supp. at 384-85. Thus, while plaintiff-residence rule is the typical shorthand, the rule is perhaps more appropriately described as a claimant-residence rule.

In the trust context, the plaintiff and claimant is the trustee. A suit to "recover" trust assets or for "damages thereto" is brought in the trustee's "own right." *Toronto Gen.*, 123 N.Y. at 44-45. And under the CPLR, a trustee "has the cause of action" in a suit regarding trust assets, CPLR 1004 & Practice Commentaries, because it is the property's "legal owner," *Toronto Gen.*, 123 N.Y. at 45; *accord Henning*, 207 A.D.2d at 110 ("[L]egal title is vested entirely in the trustees."); *Haag v. Turney*, 240 A.D. 149, 151 (1st Dep't 1934); *cf. ACE Sec. Corp. v. DB Structured Prods., Inc.*, 52 Misc. 3d 343, 350 (N.Y. Sup. Ct., N.Y. Cty. 2016) (RMBS trustee not "akin to a bankruptcy trustee").

Here, both the PSA (A.567-68) and DBNT's own admissions (Br.27; A.1376-77) confirm its status as the claimant. Indeed, the PSA specifically

"assign[s]" DBNT the right to bring an action to "repurchase or substitute defective Mortgage Loans." (A.568.) This is consistent with New York law, under which a trustee "alone ha[s] power to maintain an action to protect and defend" the trust's assets in the first instance. *Robinson v. Adams*, 81 A.D. 20, 25 (1st Dep't 1903), *aff'd*, 179 N.Y. 558 (1904).

New York hornbook law further underscores that DBNT holds any cause of action regarding the Trust's assets. Under CPLR 1004, the trustee is a "real party in interest" in suits relating to trust assets. CPLR 1004, Practice Commentaries; *see also* A.1377 (DBNT admitting that "because [it] is the holder and owner of the Mortgage Loans, as well as of all of the rights relating to the Mortgage Loans on behalf of and for the benefit of the Certificateholders, [it] is a 'real party in interest'"). "[T]he real party in interest is the party who, by substantive law, possesses the right to be enforced." 82 N.Y. Jur. 2d *Parties* § 34 (West 2018).

DBNT is unlike the plaintiff in its representative-capacity cases, further demonstrating why DBNT's residence matters under CPLR 202.

c. Even were DBNT correct that it is suing in a representative capacity, DBNT erroneously applies the theory. Notwithstanding the shifting sands of its brief, DBNT's bottom-line position seems to be that it is suing "on

behalf of an injured trust." (Br.8 ("Questions Presented").) But a trust is "not a legal entity" and has "no being at all" that is "separate from its trustee." 90 C.J.S. *Trusts* § 6 (West 2019); *see also* Restatement (Third) of Trusts § 2 (Am. Law Inst. 2003) (explaining that a trust is a set of legal relationships with respect to property).[6] Indeed, even when the PSA notes that the Trust "shall have the capacity, power and authority ... to accept the sale, transfer, assignment, set over and conveyance by the Depositor ... to the Trust Fund," the PSA makes clear that that assignment is through the Trustee. (A.570 (trustee "authorized[] to accept the sale, transfer, assignment, set over and conveyance").) It thus does not make sense, and is completely artificial, to talk about DBNT suing on behalf of the Trust.[7]

The only party DBNT can be said to be representing is the Certificateholders, who maintain an equitable interest in the Trust's property. That was DBNT's initial position in this case:

> *Where, as here, a trustee asserts a claim on behalf of trust beneficiaries*, the ultimate impact of the injury at issue is not felt by the

[6] This results in a dispositive syllogism: If DBNT is suing on behalf of the Trust, but a trust is not separate from its trustee, then the trustee's (DBNT's) residence must control.

[7] Although pre-*Global Financial Maiden v. Biehl* observed that the trust there "suffered the loss," 582 F. Supp. at 1218, it failed to address, among other things, a trustee's legal ownership of the trust's assets, that a trustee is the real party in interest in trust litigation, and that a trustee holds the cause of action in a suit about trust assets—and thus failed to come to terms with trust law.

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

If that were true, then it is the Certificateholders' residences that would matter in determining accrual under CPLR 202 (not the Trust's location as DBNT now presses). But the First Department correctly found a Certificateholder-residence rule unworkable (A.10), and DBNT abandoned that approach after its initial motion to dismiss.[9]

Accordingly, even under DBNT's representative-capacity theory, the only practical, predictable approach to accrual is looking to the residence of the legal owner of the assets held in trust, the plaintiff here—an approach that

[8] That DBNT has changed its mind during the case about which accrual test applies undermines its suggestion (Br.39-45) that investors always have assumed that the accrual test it is now advocating always applied.

[9] If a Certificateholder-residence test applied, it would be appropriate under CPLR 202 to use the *shortest* limitations regime from the jurisdictions in which the beneficiaries resided at the time of accrual. A primary purpose of CPLR 202 is to prevent a nonresident from "tak[ing] advantage of a more favorable Statute of Limitations in New York," *Antone v. Gen. Motors Corp.*, 64 N.Y.2d 20, 27-28 (1984), a goal undermined if non-resident Certificateholders could avoid a limitations bar by virtue of being one of many trust beneficiaries.

achieves *Global Financial*'s required certainty and uniformity. DBNT's alternative—looking to the Trust's location—makes no legal or practical sense. DBNT ridicules the position that its residence matters because it purportedly holds only "bare legal title" to the Trust's assets. (Br.27 (internal quotation marks omitted).) Yet it then tells the Court to look to the Trust, which holds *no title* (neither legal nor equitable) to those assets, and which is not a legal entity. The artificial approach of assessing the location of a mere relationship is particularly untenable because DBNT proposes a multi-factor inquiry to determine that location.

B. Modern CPLR 202 Jurisprudence Precludes DBNT's Multi-Factor Test.

DBNT tells the Court to adopt a multi-factor test to determine where the Trust was located when it was allegedly injured. (Br.29-30.) That approach would revive an analysis *Global Financial* and its progeny discarded.

1. *Global Financial* Forecloses a Multi-Factor Test.

a. *Global Financial* rejected an accrual "rule dependent on a litany of events," and instead adopted "*a rule requiring the single determination of a plaintiff's residence*." 93 N.Y.2d at 530 (emphasis added). The "rule dependent on a litany of events" *Global Financial* tossed was a "center of gravity" test that relied on assessing various contacts, including a contract's connection

to a jurisdiction, to determine where a claim accrued. *Id.* at 529-30. A "'center of gravity' approach … [is] inapplicable to the question of statutory construction presented by CPLR 202." *Id.* at 529 (internal citation omitted). And not only could that approach require discovery, but it necessarily would result in "guesswork when determining the place of accrual." *Id.* at 528 (internal quotation marks omitted).

Of course. "[O]pen-ended balancing tests[] can yield unpredictable and at times arbitrary results." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 136 (2014). They permit a court to slice and dice facts as it sees fit, yielding different outcomes from the same set of facts. A multi-factor accrual rule would thus "lead to results that are anything but uniform or certain," *Ins. Co. of N. Am.*, 91 N.Y.2d at 187—contravening modern CPLR 202 jurisprudence.

Different courts could identify different relevant factors, producing a patchwork of jurisdictions in which a plaintiff's cause of action accrues. That is precisely what happened here: DBNT argued the same factors to the IAS Court and the First Department under the same multi-factor accrual test, yet each court found a different subset of the factors relevant and concluded that DBNT's claim accrued in a different jurisdiction.

Even if the jurisprudence agreed on a single set of relevant factors, two courts could weigh those factors differently, meaning the identical claim of two identically situated plaintiffs could accrue in different jurisdictions with different limitations periods—the antithesis of CPLR 202's required "certainty." *Glob. Fin.*, 93 N.Y.2d at 530 (internal quotation marks omitted). And a detriment to all parties—including plaintiffs and their counsel—who could never predict with certainty when a cause of action accrued, when the statute of limitations expired, and thus the time by which a claim had to be filed.

On these points, DBNT gives up its game. It asks the Court to follow *Maiden*'s multi-factor test for determining where a trust was located, but then immediately discards the factors *Maiden* considered relevant, on the theory that the "small" trust in *Maiden* is different than the "large" trust here. (Br.31.) Where does DBNT draw the line for this new distinction that it has created? And how would a litigant know on which side of the line its trust fell?

More problematic is DBNT's concession that "[a]s is typical with multi-factor tests, factors should be given different weight in different circumstances." (Br.31.) What is "typical with multi-factor tests" is "inapplicable" to CPLR 202, *Glob. Fin.*, 93 N.Y.2d at 529, and verboten under New York limitations jurisprudence for contracts generally, *see ACE*, 25 N.Y.3d at 593-94;

Ely-Cruikshank, 81 N.Y.2d at 403 (rejecting discovery rule 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"). Nothing about "CPLR 202's purpose and New York's public policy favor a multi-factor test" for statute-of-limitations purposes. (Br.39 (heading).)

DBNT professes concern that any accrual rule allow investors "to assess the risk of their investments." (Br.44.) But with DBNT's multi-factor approach, investors could never know with certainty *ex ante* where claims would accrue. Or else the "equitable variations of different Judges and courts," *Ely-Cruikshank*, 81 N.Y.2d at 403, would roil their expectations. A multi-factor test, unlike the plaintiff-residence rule, injects unpredictability into an investor's analysis. So too with parties generally.

b. It is entirely unsurprising that DBNT fails to explain how its multi-factor test accords with *Global Financial*—because the truth is quite the opposite. And it is puzzling for DBNT to contend that following the plaintiff-residence rule would "produce inconsistent and confusing results," "frustrat[ing]" CPLR 202's purpose. (Br.39, 40.) DBNT may not like the result of

the rule as applied here, but it will yield predictable, regular outcomes dependent on a single, knowable factor: the trustee's residence. DBNT cannot say that about a multi-factor test—as the parties' experience in this case attests.

In any event, DBNT manufactures the purported "inconsistent ... results." *First*, DBNT says that in the case of a "successor trustee," the plaintiff-residence rule "begs the question of which trustee's residence would control." (Br.40-41.) Not so. As DBNT's own case observes, the claim would accrue when the alleged harm occurred, where the then-in-place trustee resided. *Maiden*, 582 F. Supp. at 1217; *cf. Portfolio Recovery*, 14 N.Y.3d at 416 (in suit by assignee of claim, assignor's residence controls under CPLR 202 if claim accrued to assignor).[10] *Second*, DBNT suggests that applying the plaintiff-residence rule would confuse representative plaintiffs. (Br.41.) But as explained above, a trustee of a trust is not akin to the plaintiffs in representative-capacity cases. This action simply does not speak to those plaintiffs.

Third, DBNT laments that "there is nothing uniform" about a plaintiff-residence rule that grants trust beneficiaries six years to direct a trustee to act if the trustee resides in New York, but less time if the trustee of the same

[10] DBNT also suggests that a trust might be administered by "co-trustees." (Br.41.) That is not the case here. In any event, co-trustees would be akin to a corporation's two residences that *Global Financial* built into its bright-line rule—if the trust's governing documents did not answer which trustee mattered.

trust resides in a jurisdiction with a shorter limitations period. (Br.40.) Why? Two different corporations with the same set of shareholders asserting the same claim could be subject to two different limitations regimes if the corporations resided in different jurisdictions. That is how CPLR 202 works.

More generally, even if DBNT could manufacture complicating hypotheticals in applying the plaintiff-residence rule, it would not undermine the essential point that the rule yields predictable, certain outcomes in virtually all cases. That simply is not the case with a multi-factor test. A multi-factor test of the kind DBNT proposes would smuggle into CPLR 202 the same detailed inquiry "dependent on a litany of events" the plaintiff in *Global Financial* advocated and the Court rejected. 93 N.Y.2d at 530.

2. DBNT's Authority Provides Scant Support for a Multi-Factor Accrual Test.

DBNT's primary authority is *Maiden v. Biehl*, which applied a multi-factor test to determine a trust's location for purposes of CPLR 202 accrual. 582 F. Supp. at 1218. But *Maiden* pre-dates *Global Financial*, and *Global Financial* forecloses *Maiden*'s multi-factor approach for the reasons detailed above. Tellingly, not one post-*Global Financial* case, at least until the IAS Court's decision, adopted *Maiden*'s analysis as dispositive for determining the place of accrual.

And, before the IAS Court's decision, the only post-*Global Financial* authority that approvingly discussed *Maiden*'s multi-factor test is another of DBNT's federal cases: *2002 Lawrence R. Buchalter Alaska Trust v. Philadelphia Financial Life Assurance Co.*, 96 F. Supp. 3d 182 (S.D.N.Y. 2015) (Br.40 n.14). But there, not only did the plaintiff trustee's residence match the jurisdiction whose statute of limitations the court applied, but also both parties *agreed* on the governing limitations regime, 96 F. Supp. 3d at 201, rendering any accrual analysis unnecessary and therefore *dicta*.

Separately, although *Loreley Financing (Jersey) No. 28, Ltd. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, a fraud case, observed that "a court can consider all relevant factors in determining the situs of the loss," 117 A.D.3d 463, 465 (1st Dep't 2014) (Br.26), it did not even cite *Global Financial*, let alone square its reasoning with *Global Financial*'s commands. Instead, *Loreley* relied on a pre-*Global Financial*, federal-district-court case as authority for its conclusion. 117 A.D.3d at 465 (citing *Grosser v. Commodity Exch., Inc.*, 639 F. Supp. 1293, 1300 (S.D.N.Y. 1986), *aff'd*, 859 F.2d 148 (2d Cir. 1988)).[11]

[11] *Appel v. Kidder, Peabody & Co.*, another pre-*Global Financial* case, does not aid DBNT given that it used a beneficiary-residence analysis (of the type DBNT initially proposed, then abandoned) to determine accrual under CPLR 202 in a trust-related action. 628 F. Supp. 153, 155 (S.D.N.Y. 1986) (Br.40 n.14). And there, the plaintiff trustee's residence also matched the jurisdiction whose limitations regime the court applied. *Id.* at 155-56.

DBNT also purports to draw support from its representative-capacity cases, offering that "in the representative plaintiff context, a multi-factor test is most appropriate." (Br.29 (heading).) But *not one* of DBNT's true representative-capacity cases adopts a multi-factor accrual test. In each, the court determined accrual by the residence of the party holding the cause of action:

- *In re Adelphia*, 365 B.R. at 58 n.138 (bankruptcy-trustee suit): applying Pennsylvania law because the bankrupt entity's "principal place of business" was in Pennsylvania.

- *Official Comm. of Asbestos Claimants of G-1 Holding, Inc. v. Heyman*, 277 B.R. 20, 30 (S.D.N.Y. 2002) (bankruptcy-trustee suit) (Br.40 n.14): applying New Jersey law because the bankrupt entity "maintains its principal place of business in New Jersey."

- *Brinckerhoff v. JAC Holding Corp.*, 263 A.D.2d 352, 353 (1st Dep't 1999) (shareholder-derivative action) (Br.40 n.14): applying Georgia law because the corporation holding the cause of action "had its principal office" in Georgia.

- *Korn*, 403 F. Supp. at 385-86 (shareholder-derivative action): applying California law because the fund holding the cause of action "ha[d] its principal place of business in California."

DBNT's representative-capacity theory is thus doubly flawed. Not only is DBNT not suing in a representative capacity (as explained above), but the true representative-capacity cases adopt the same single-factor, residence-based accrual rule against which DBNT argues in this appeal.

As an afterthought, DBNT states that New York courts "are frequently

asked to apply and weigh competing facts and factors." (Br.31 n.9.) That may be true, but it is irrelevant. The Court has specifically rejected that approach under CPLR 202, as in statute-of-limitations analyses generally. *See, e.g.*, *ACE*, 25 N.Y.3d at 594; *Glob Fin.*, 93 N.Y.2d at 530.

C. Even if the Court Were To Adopt DBNT's Multi-Factor Trust-Location Inquiry, DBNT's Claim Accrued in California.

DBNT tells the Court that it should apply *Maiden*'s "multi-factor analysis ... to determine where the trust suffered injury," and find that that location was New York. (Br.8; Br.29-30.) If the Court were to depart from modern CPLR 202 jurisprudence and accept DBNT's invitation, the factors *Maiden* considered (and which addressed where a trust was located) establish that DBNT's claim accrued in California, as the First Department held.

DBNT gets to New York only by ignoring the factors *Maiden* considered relevant and cherry-picking any Empire-State-centric facts, no matter how divorced from assessing where the trust was located when it suffered alleged injury. That DBNT fabricates a "*Maiden-type* analysis" (Br.31 (emphasis added)) to reach its desired outcome shows just how far it wanders from certainty and uniformity.

1. DBNT's Claim Accrued in California Under *Maiden*.

a. *Maiden* analyzed the issue DBNT tells the Court to address: determining where a trust suffered injury based on its "location," assessed using a multi-factor test. (Br.8); *see Maiden*, 582 F. Supp. at 1218. The factors *Maiden* considered relevant to that inquiry point here to a California accrual.

First, under *Maiden*, DBNT's California residence remains highly relevant to the trust-location inquiry. 582 F. Supp. at 1217 (holding only that the trustee's residence is not the "*sole* factor to determine the place of accrual" (emphasis added)).

Second, the additional three factors *Maiden* analyzed—"[i] where taxes are paid, [ii] where its investment decisions are made, and [iii] where the securities are physically kept," *id.* at 1218—either point to California or, at most, do not point away from California[12]:

"[W]here the securities are physically kept." *Maiden* involved an investment trust, the assets of which were corporate securities. *Id.* at 1217. Here, the Trust's assets are the mortgage loans. (A.566.) California is one of

[12] *Maiden*'s reasoning confirms that these are the factors that mattered to the court. Immediately after stating that "[f]rom all the facts presented on this motion, it is clear that the Trust is located in New York," the court identified these three factors and concluded that "New York is where the cause of action accrued." 582 F. Supp. at 1218.

three states where the mortgage notes, reflecting the loans, are to be "maintain[ed]." (A.570.) And although DBNT pleads that the notes are held in Minnesota (A.1337), one Minnesota contact does not suggest that *New York* is the Trust's location.

The First Department identified additional, California-pointing facts about the assets held in trust (the mortgage loans) that were true at the time of the alleged breach and not subject to change: they were originated by a California originator and predominantly secured California properties. (A.824, 1008.) Indeed, 32% of the loans by principal balance encumber California properties. That predominates over any other state, *contra* Br.36, and is more than *350% greater* than New York's share (A.1008).

DBNT contends that the mortgage notes' location is irrelevant. (Br.36-37.) But under *Maiden*, the location of trust assets matters in determining where a trust is located. And DBNT's alternative—looking to the Certificates' location (Br.32-33)—has nothing to do with where the Trust is located. As DBNT's own authority observes, the Certificates are the investors' assets, not the Trust's. *See Dexia SA/NV v. Morgan Stanley*, 4 Misc.3d 1214(A), 2013 WL 5663259, at *1 (N.Y. Sup. Ct., N.Y. Cty. Oct. 16, 2013) (Br.32 n.12), *aff'd*, 135 A.D.3d 497 (1st Dep't 2016); *accord* A.11 ("[T]he certificates of interest in

the trust held by its beneficiaries are irrelevant to the analysis because such certificates are not part of the trust corpus."), 566 (definition of "Trust Fund" does not include the Certificates).

"[W]here investment decisions are made." DBNT administers the Trust from an office in California, and has done so since the Trust was formed. (A.540.) Although DBNT attempts to negate this factor by arguing that "RMBS trustees do not make major investment decisions" (Br.38 (internal quotation marks omitted)), this misses the point. The crux of this *Maiden* factor was identifying the location of the trustee's activities for the trust. In *Maiden*, that was investment because the trust was an investment trust. 582 F. Supp. at 1217. Here, it is the duties detailed in the PSA—among other things, holding title to the loans; conducting and defending litigation; preparing, sending, and receiving required notices, certifications, and reports; and interacting with investors and other Trust parties. *E.g.*, A.567-72, 605-07, 624-30. That activity occurs in California because that is where DBNT resides.

"[W]here taxes are paid." The PSA mentions only one state's tax regime: California's. (A.616.) DBNT does not dispute this fact, but instead argues that it is "of no significance" because the Trust has not "paid, owed or been obligated to pay any taxes in California." (Br.38-39.) That the Trust may

not have paid California taxes does not alter the fact that to the extent the Trust must pay state taxes, the PSA contemplates California taxes; none other. The tax regime to which the trust is subject, whether or not taxes are paid, points to a trust's location, both as a matter of logic and under *Maiden*.

Given that DBNT's residence continues to be relevant under *Maiden*, and that *Maiden*'s other factors point to a California trust location,[13] following *Maiden*'s analysis would confirm that DBNT's claim accrued in California.

b. DBNT makes no argument that *Maiden*'s factors point to a New York accrual. Instead, having told the Court to follow *Maiden*, DBNT then attacks the factors *Maiden* deemed relevant, contending that they are "post-closing" and thus conflict with the Court's jurisprudence holding that claims for breached representations accrue at closing. (Br.34, 39.) But each of *Maiden*'s factors—the location from which the trust would be run (California); the (potential) location of the notes (including California); and the state tax regime (California)—were detailed in the Trust's governing document (the PSA) and in the offering document for the transaction (the Prospectus Supplement), both of which accompanied closing.[14] And they were characteristics

[13] This, of course, wrongly assumes a trust—which is not an entity—can have a "location."

[14] *See* A.540 (DBNT's California trust-administration office (PSA)), 570 (mortgage notes may be maintained in California (PSA)), 616 (Trust's California tax regime (PSA)), 824

of DBNT, the trust assets, and the Trust itself at closing—when any breach-of-representation claim arose. The facts are "post-closing" only in the sense that they remained true after closing.

2. The Additional Factors DBNT Cites Are Irrelevant.

That DBNT discards *Maiden*'s factors immediately after telling the Court to follow *Maiden* lays bare its selective and outcome-determinative approach to accrual. DBNT summons any and all references to New York from the record, however irrelevant, declaring that those are the contacts that matter for accrual. This approach offers the opposite of certainty, licensing opportunistic outcomes instead of the required single determination.

Even on their own terms, the non-*Maiden* factors DBNT embraces—(i) the Certificates owned by investors are held in New York, (ii) the Trust was formed under, and governed by, New York law, and (iii) HSBC securitized the mortgage loans and made the representations about them in New York (Br.32-33)—are irrelevant to determining where the Trust was located. That much is clear from *Maiden*, which did not consider any of them. In fact, although *Maiden* noted that the trust there was a New York trust with a New York choice-of-law clause, it did not rely on those facts when determining the trust's

(loans originated by California-resident New Century (Prospectus Supplement)), 1008 (mortgage loans secure predominantly California properties (Prospectus Supplement)).

location. *Compare* 582 F. Supp. at 1217 (noting those facts), *with id.* at 1218 (identifying three relevant factors).

Certificate Location. As detailed above, the Certificates are the investor's assets, not the Trust's, and thus have no bearing on the Trust's location.[15]

The Trust's Relationship to New York Law. DBNT asserts that the PSA's New York choice-of-law clause "underscores the nexus between the Trust[] and New York." (Br.32.) Putting aside that a "nexus" test is *Global Financial*'s rejected "center-of-gravity" test by another name, absent an express statement that a choice-of-law clause encompasses a limitations regime, the clause is irrelevant to a statute-of-limitations analysis. *Portfolio Recovery*, 14 N.Y.3d at 416 (stating that there is a "'difference between a choice-of-law question ... and a Statute of Limitations issue'" (quoting *Glob. Fin.*, 93 N.Y.2d at 528) (alteration omitted)). There is no express statement about limitations in the PSA here. If the Trust's choice-of-law clause says anything, then, it says that the parties did *not* intend to adopt New York's limitations regime.[16]

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[15] Nor would they point to the investors' location, if that were the relevant inquiry. *See Oddo Asset Mgmt. v. Barclays Bank PLC*, 36 Misc. 3d 1205(A), 2010 WL 8748135, at *4 (N.Y. Sup. Ct., N.Y. Cty. Apr. 21, 2010) (when property diminishes in value, the place of injury is where the owner resides), *aff'd*, 84 A.D.3d 692 (1st Dep't 2011).

[16] *2138747 Ontario, Inc. v. Samsung C&T Corp.*, which DBNT cites, merely held that a choice-of-law clause selecting New York procedural law also selected CPLR 202. 31 N.Y.3d 372, 378 (2018) (Br.35). *Ontario* is irrelevant to the issues on appeal, although it confirms

DBNT notes that *Portfolio Recovery* did not explicitly reject including a choice-of-law clause in a "*Maiden*-type ... analysis." (Br.35.) It did not have to. *Portfolio Recovery* held that absent an "express" statement, a choice-of-law clause did not encompass a limitations regime. 14 N.Y.3d at 416. And *Global Financial* already had rejected an accrual analysis based on a contract's contacts with a jurisdiction. 93 N.Y.2d at 528, 530. That is why DBNT's own authority recognizes that choice-of-law clauses are irrelevant to determining trust location. *Buchalter*, 96 F. Supp. 3d at 202 n.8 (*Portfolio Recovery* means the "choice-of-law provision contained in the [contract] does not impact the Court's analysis as to ... statute of limitations.").

Moreover, there is nothing about the choice of New York as governing law that necessarily assists in locating the Trust geographically. Given New York's "well-developed system of commercial jurisprudence," parties without any connection to New York commonly choose New York law to govern their relationship. *See IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A.*, 20 N.Y.3d 310, 314-15 (2012) (internal quotation marks omitted). Indeed, the New York Legislature encourages parties to select New York law "whether or not [their]

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that CPLR 202 applies to this action. *See id.* at 378 (explaining that where choice-of-law clause selects "substantive" law, as here, CPLR 202 applies in case brought in New York).

contract, agreement or undertaking bears a reasonable relation to th[e] state." N.Y. Gen. Oblig. Law § 5-1401(1). Similarly, given that "well-developed system" of jurisprudence, it makes sense that parties creating a finance-related trust would establish the trust under New York law, even while planning to administer the trust from California. *Cf. Stichting*, 2012 WL 6929336, at *2 (New York nexus "hardly unusual for a major institution conducting financial business"; applying Dutch limitations regime).

These principles dispose of DBNT's position that following something other than New York's limitations' regime would frustrate § 5-1401. (Br.44.) After this case, parties including New York choice-of-law clauses in their contracts will still find that New York law applies to claims arising from those agreements. And *Portfolio Recovery* and *2138747 Ontario* will tell them whether those clauses encompass statutes of limitations and CPLR 202. *See 2138747 Ontario*, 31 N.Y.3d at 378 (CPLR 202); *Portfolio Recovery*, 14 N.Y.3d at 416 (limitations regime). This case says nothing unique about the effect of New York choice-of-law clauses.

HSBC's Location. DBNT offers that HSBC's location "is far more relevant ... than the subsequent place (or places) of trust administration" because HSBC selected which loans to include in the Trust and which representations

to make. (Br.33.) Curious. DBNT told the Court when seeking leave to appeal that "pre-securitization factors," which would include those purported HSBC decisions, "can[not] be relevant to the place of injury." DBNT Mem. in Supp. of Mot. for Leave to Appeal, *Deutsche Bank Nat'l Tr. Co. v. Barclays Bank PLC, Deutsche Bank Nat'l Tr. Co. v. HSBC Bank USA, Nat'l Ass'n*, No. APL-2018-00169 (N.Y. May 29, 2018), at 33. That inconsistency aside, HSBC's location does not bear on where the Trust was located when it purportedly was injured. Although loan selection may relate to the alleged *cause* of the injury (falsity of representations), if it relates to anything at all, it does not speak to the location of its *effect* (economic impairment of trust assets). (A.1350.)

The weakness of DBNT's non-*Maiden* factors is plain from DBNT's supporting authority. DBNT offers a Delaware Court of Chancery case that it says "relied on the[] same factors" it deploys to decide where a New York RMBS trust's claim accrued. (Br.33 n.13 (citing *Bear Stearns Mortg. Funding Tr. 2006-SL1 v. EMC Mortg. LLC*, No. 7701, 2015 WL 139731, at *10 (Del. Ch. Jan. 12, 2015)).) *Bear Stearns* was not decided under CPLR 202, and instead assessed accrual under a "most significant relationship" choice-of-law test. 2015 WL 139731, at *9 (internal quotation marks omitted). This is the same test that *Global Financial* rejected. 93 N.Y.2d at 529 (explaining that "choice-

of-law analyses are inapplicable" to CPLR 202).

D. A Ruling that DBNT's Claim Accrued Outside of New York Does Not Violate Settled Expectations.

For DBNT, "New York" is the only possible answer to where its claim could have accrued. (Br.42-45.) And other RMBS plaintiffs purportedly "never questioned" that New York's limitations regime applied in their cases. (Br.42.) But if a multi-factor accrual analysis controls, as DBNT says, those plaintiffs could not have known the governing limitations regime until the courts actually assessed the facts in front of them. There was no *ex ante* certainty because the analysis depended on the "subjective equitable variations of different Judges and courts." *Ely-Cruikshank*, 81 N.Y.2d at 403. That the First Department's ruling purportedly "upset ... settled expectations" of RMBS plaintiffs (Br.43) is thus nothing but DBNT's *ipse dixit*.

DBNT's protest about "expectations" rings particularly hollow given DBNT's positions in this case. DBNT initially argued that if the PSA's choice-of-law clause did not incorporate New York's limitations regime (incorrect under *Portfolio Recovery* and a theory DBNT rightly dropped), then "a question of fact exist[ed] as to where the Trustee's claims accrued." DBNT Opp'n to Mot. to Dismiss, *Deutsche Bank Nat'l Tr. Co.*, No. 652001/2013, at 7. The reason: according to DBNT, the Certificateholders' residences controlled, and

where they resided was not in the record. *See id.* at 8-9. DBNT at the outset of this case had no expectations as to where its claim accrued, assuming its choice-of-law theory was wrong. It then dropped both its choice-of-law and Certificateholder-residence theories for the multi-factor approach it now embraces. To cry "expectations dashed" is revisionist history.

DBNT's speculation as to what other RMBS plaintiff trustees believed is similarly unpersuasive. DBNT asserts that they largely waited until the six-year anniversary of a transaction's closing date before bringing suit because they "assumed" New York's limitations regime applied. (Br.43.) But DBNT told the Court that 29% of trustees (12 out of 42) filed RMBS breach-of-contract suits *after* the expiration of the New York limitations period DBNT asserts those trustees assumed applied. *See* DBNT Mem. in Supp. of Mot. for Leave to Appeal, *Deutsche Bank Nat'l Tr. Co.*, No. APL-2018-00169, at 18.

Moreover, in many cases, the plaintiff trustee resides in a jurisdiction with a limitations period at least as long as New York's. For example, U.S. Bank is the plaintiff in numerous RMBS contract actions pending before the IAS Court. *E.g.*, Nos. 650692/2013, 651954/2013, 651174/2013, 650339/2013 (N.Y. Sup. Ct., N.Y. Cty.). U.S. Bank's headquarters is in Minnesota, *see*

Compl., *Ownit Mortg. Loan Tr., Series 2006-5 v. Merrill Lynch Mortg. Lending, Inc.*, No. 651370/2014 (N.Y. Sup. Ct., N.Y. Cty. Mar. 11, 2015) [Doc. 4], ¶ 8, which has a six-year statute of limitations for contract like New York, *see* Minn. Stat. Ann. § 541.05, subd. 1(1).[17] Defendants in those cases had no reason to argue about CPLR 202 because it would not be outcome determinative. And that neither the "lower courts" nor "this Court" (Br.43) assessed whether something other than New York's limitations regime governed in other RMBS actions is not evidence of anything. If no party made the argument, the courts would have no reason to address it.

More generally, all plaintiffs, including RMBS trustees, knew that when a non-resident brings suit in New York, "CPLR 202 requires ... courts to 'borrow' the Statute of Limitations of a foreign jurisdiction where a nonresident's cause of action accrued, if that limitations period is shorter than New York's." *Glob. Fin.*, 93 N.Y.2d at 526. The First Department did not alter this long-standing rule. *See Nomura Asset Acceptance Corp. v. Nomura Credit & Capital, Inc.* (*In re Part 60 RMBS Put-Back Litig.*), Nos. 652614/2012,

[17] DBNT has said that U.S. Bank also has a connection with Ohio. *See* DBNT Mem. in Supp. of Mot. for Leave to Appeal, *Deutsche Bank Nat'l Tr. Co. v. Barclays Bank PLC*, *Deutsche Bank Nat'l Tr. Co. v. HSBC Bank USA, Nat'l Ass'n*, Nos. 651338/2013 & 652001/2013 (1st Dep't Jan. 4, 2018), at 16. Even if that connection were relevant to accrual, Ohio's breach-of-contract statute of limitations was fifteen years for claims arising before 2012, *see* Ohio Rev. Code Ann. § 2305.06—and thus not controlling under CPLR 202.

777000/2015, 650337/2013, 652877/2014, 2018 WL 5099045, at *3 (N.Y. Sup. Ct., N.Y. Cty. Oct. 18, 2018) ("*DBNT/Barclays* applied existing tests in determining where a nonresident RMBS trustee's cause of action accrues.").

Plaintiff trustees could have sought to circumvent CPLR 202 by suing outside of New York—which they were free to do if their transaction documents do not contain forum-selection clauses. But having chosen to litigate in New York, those plaintiffs were on notice that if they resided outside of New York, CPLR 202 controlled.

Even if DBNT were correct that plaintiff trustees expected New York's limitations regime to control, that is of no moment. Expectations yield to "objective, reliable, predictable and relatively definitive rules." *Ely-Cruikshank*, 81 N.Y.2d at 403. And the certainty and uniformity the plaintiff-residence rule supplies would trump any unfairness arising from its application. But any supposed unfairness is illusory, as the plaintiff-residence rule ensures plaintiffs, defendants, and their counsel can organize their affairs and make accurate predictions of when a claim will accrue and a statute of limitations will expire.

II. THE FIRST DEPARTMENT CORRECTLY HELD THAT CALIFORNIA'S STATUTE OF LIMITATIONS BARS DBNT'S CLAIM

Applying California's statute-of-limitations regime, DBNT's cause of action is untimely. Although DBNT's claim for alleged representation breaches

accrued in 2007, DBNT did not bring suit until 2013—two years after California's limitations period for contract claims expired. Nothing in California (or New York) law saves DBNT from this straightforward outcome.

A. DBNT Sued More than Four Years After Its Claim Accrued.

California's four-year limitations period for contract actions governs DBNT's claim. (A.1332 ("This is an action under the terms of a contract ....").)

1. In California, "[a]n action upon any contract, obligation or liability founded upon an instrument in writing" must be brought "[w]ithin four years." Cal. Civ. Proc. Code § 337. DBNT concedes that if California's statute of limitations applies, California law controls when the limitations period begins to run. (Br.46.) Where, as here, a party allegedly made false representations as part of a sale contract, any breach of representation or warranty occurs "at the time of the sale ... the statute of limitations[] therefore begins to run *immediately*." *Mary Pickford Co. v. Bayly Bros.*, 86 P.2d 102, 112 (Cal. 1939) (in bank) (per curiam) (emphasis added) (internal quotation marks omitted); *accord ACE*, 25 N.Y.3d at 596-97 (New York law).

DBNT's claim accrued, and the limitations period began to run, in 2007. DBNT asserts that HSBC made false representations as of no later than the June 5, 2007 closing. (Br.12-13.) California's four-year limitations period thus

expired long ago—in 2011. DBNT did not file a summons until June 5, 2013. Its claim is years too late, as the First Department rightly concluded. (A.11.)

The Court should not hear DBNT to dispute this. DBNT states that any alleged injury occurred "on the Closing Date[]." (Br.24.) And under California's "General Rule" for contract claims, the limitations period began to run on that date, notwithstanding that the allegedly injured party may not have been "aware of his or her right to sue." 3 B.E. Witkin, *California Procedure* § 520 (West 5th ed. 2008).

2. To circumvent the First Department's holding (and its own theory of when injury occurred), DBNT argues that the repurchase protocol's demand obligation delayed accrual until DBNT demanded repurchase in 2013. (Br.47, 51-53.) That is neither California law nor New York law (which governs the interpretation of the repurchase protocol).[18]

a. Where a plaintiff controls the right to make demand, as here, demand must "be made within the period of limitations ... [or] suit cannot be maintained thereon." *Harrington v. Home Life Ins.*, 58 P. 180, 183 (Cal. 1899); *accord Meherin v. S.F. Produce Exch.*, 48 P. 1074, 1075 (Cal. 1897). "[M]any

[18] The PSA does not contain an accrual clause, rendering irrelevant here DBNT's arguments about that clause in the Barclays action. (Br.48-50.)

cases" in California recognize this rule, holding that where a right has fully accrued except for demand, "the cause of action has accrued for the purpose[s] of setting the statute of limitations running." *Taketa v. State Bd. of Equalization*, 231 P.2d 873, 875 (Cal. Ct. App. 1951) (internal quotation marks omitted).

DBNT's right to sue accrued when the representations were made—at closing in 2007. That is what the California Supreme Court held in *Mary Pickford*. 86 P.2d at 112; *accord ACE*, 25 N.Y.3d at 596-97. And that is what DBNT says: the alleged injury occurred "on the Closing Date[]." (Br.24.) Because a contract claim accrues "at the time of injury," *Matsumoto v. Republic Ins.*, 792 F.2d 869, 871 (9th Cir. 1986) (per curiam) (California law),[19] DBNT's obligation to make demand before filing suit was irrelevant "for the purpose[s] of setting the statute of limitations running," *Taketa*, 231 P.2d at 875 (internal quotation marks omitted).

DBNT tosses aside in a footnote the "many" California cases foreclosing its delayed-accrual theory. It argues that they are irrelevant because they involve plaintiffs who "(i) [were] the injured party; (ii) had immediate

[19] The discovery rule, discussed below, is an exception that does not apply here. *Matsumoto*, 792 F.2d at 872.

knowledge of the injury; and (iii) thus had the ability to make the demand immediately upon injury." (Br.52 n.20.) But point (i) describes DBNT, *see* Part I.A, *supra*, and is irrelevant by DBNT's own position (because DBNT is purportedly suing on behalf of the injured party). Point (ii) is an argument about the discovery rule, a separate issue. And point (iii) describes DBNT (because DBNT and the Certificateholders could have demanded repurchase immediately upon closing) and also is about the discovery rule.

Kaplan v. Reid Brothers, 285 P. 868 (Cal. Ct. App. 1930) (Br.50, 51), DBNT's primary contrary authority, only underscores why DBNT's delayed-accrual theory is mistaken. *Kaplan* involved a contract permitting an investor to sell stock back to a company "at any time." *Id.* at 869. Seven years after signing the contract, the investor tried to exercise that right and the company refused. *Id.* The court rejected the company's limitations defense, holding that the period did "not begin to run until the demand [was] made." *Id.* Of course: Demand was an element of the breach of contract; prior to the refusal of demand, there was no injury. Here, by contrast, and as DBNT states, any injury occurred when HSBC made the representations, in 2007.[20]

[20] DBNT's remaining cases provide no greater help. *Bjorklund v. North American Cos. for Life & Health Insurance*, is akin to *Kaplan*, as the claim there did not arise until the insurer refused to pay on a policy. 72 F. App'x 550, 551 (9th Cir. 2003) (Br.51). Prior to the insurer's refusal, there was no breach of contract, and thus no basis for the limitations period to run.

DBNT also attempts to hide from binding California law by arguing that a demand's timeliness depends on "'the facts of each case.'" (Br.52 (quoting *Miles v. Bank of Am. Nat'l Tr. & Sav. Ass'n*, 62 P.2d 177, 182 (Cal. Ct. App. 1936)).) No fact issue exists here. Where a plaintiff controls the right to make demand (and DBNT and the Certificateholders controlled that right), demand must "be made within the period of limitations ... [or] suit cannot be maintained thereon." *Harrington*, 58 P. at 183; *accord Meherin*, 48 P. at 1075. Dispositively, DBNT made demand two years *after* the limitations period expired.

b. Labeling the repurchase protocol a "condition precedent" does not save DBNT. (Br.50-51.) For one thing, a condition precedent must be satisfied *before* the wrong occurs and the injury arises. *See ACE*, 25 N.Y.3d at 597. But New York law, California law, and DBNT's own brief demonstrate that any alleged injury stemming from representation breaches occurred when the representations were made, at closing.

For another, *ACE* found an indistinguishable protocol did not contain a condition precedent. *Id.* And whether the PSA has conditions precedent is an issue of contract interpretation, *see, e.g.*, *CIH Int'l Holdings, LLC v. BT U.S.*,

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Leonard v. Rose, 422 P.2d 604 (Cal. 1967) (in bank) (Br.50, 51) and *Mansouri v. Superior Court*, 104 Cal. Rptr. 3d 824 (Cal. Ct. App. 2010) (Br.50) had nothing to do with either accrual of claims or statutes of limitations.

LLC, 821 F. Supp. 2d 604, 610 (S.D.N.Y. 2011) (following New York choice-of-law clause); *Warth v. Greif*, 121 A.D. 434, 436-37 (2d Dep't 1907), *aff'd*, 193 N.Y. 661 (1908), which New York law governs here (A.646). *ACE* is thus dispositive. The result would be no different in a California court, which would enforce the PSA's choice-of-law clause and apply *ACE*. *See Colaco v. Cavotec SA*, 236 Cal. Rptr. 3d 542, 553 (Cal. Ct. App. 2018).[21]

* * * * *

DBNT criticizes the First Department for "mixing and matching ... two states' laws," and offers a sound bite: "These Actions, if filed in California on the day they were filed in New York, would not have been time-barred." (Br.47.) But even if that were the correct way of thinking about CPLR 202, DBNT is wrong. The First Department correctly concluded that the repurchase protocol did not delay accrual under long-settled California *and* New York law. (A.11-13.) A California court too would have applied CPLR 202, undertaken the same analysis the First Department did, and concluded that DBNT's claim was untimely. California courts interpret choice-of-law clauses

[21] California law does not "favor[]" conditions precedent and courts will not find them "absent plain and unambiguous contract language." *Colaco*, 236 Cal. Rptr. 3d at 553 (internal quotation marks omitted). Here, the PSA imposes obligations on HSBC only for a "Mortgage Loan as to which a breach ... *has* occurred" (A.572 (emphasis added))—confirming that demand is nothing more than a procedural prerequisite to suit.

to incorporate statutes of limitations, and thus to incorporate CPLR 202. *See Hughes Elecs. Corp. v. Citibank Del.*, 15 Cal Rptr. 3d 244, 250 (Cal. Ct. App. 2004) ("California law ... supports enforcement of CPLR 202." (heading)).

B. California's Discovery Rule Does Not Toll Accrual of DBNT's Claim.

1. The discovery rule does not apply to claims predicated on mere breaches of representations, as here. A cause of action for breached representations accrues "at the date of the sale" *unless* the plaintiff alleges that fraud infected the representations. *Mary Pickford*, 86 P.2d at 114. Without fraud, the discovery rule has no purchase on that claim—otherwise, *Mary Pickford*'s distinction between types of breach-of-representation claims would be meaningless. DBNT has not alleged that HSBC acted fraudulently, supplying an independent basis for rejecting DBNT's discovery-rule argument.

2. Even if the discovery rule were available, it would not rescue DBNT's untimely claim. As DBNT's own authority holds, California courts entertain the discovery rule in contract actions only in the "unusual" instance where the 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." *Apr. Enters., Inc. v. KTTV*, 195 Cal. Rptr. 421, 437 (Cal. Ct. App. 1983) (Br.53, 54). And to rely on the rule (again, as DBNT's

own cases detail), a plaintiff "must specifically plead" facts showing why, despite "reasonable diligence," it was unable to ascertain the basis for its claim. *Alexander v. Exxon Mobil*, 162 Cal. Rptr. 3d 617, 630 (Cal. Ct. App. 2013) (internal quotation marks omitted) (Br.55); *accord E-Fab, Inc. v. Accountants, Inc. Servs.*, 64 Cal. Rptr. 3d 9, 17 (Cal. Ct. App. 2007) (no "conclusory allegations" (internal quotation marks omitted)) (Br.53); *see also CAMSI IV v. Hunter Tech. Corp.*, 282 Cal. Rptr. 80, 86 (Cal. Ct. App. 1991).

Although DBNT asserts that the purported breaches were discovered in 2013, it fails to plead any facts in the complaint (or even make an argument in its brief) showing that the breaches could not have been discovered earlier. In fact, it does not describe at all its efforts to uncover the breaches within the limitations period. That alone precludes the discovery rule. *CAMSI IV*, 282 Cal. Rptr. at 86.

It is no answer for DBNT to say that under the PSA it "has no duty to investigate absent ... [Certificateholder] direction." (Br.54.) The PSA contemplates that DBNT may "discover[]" alleged representation breaches (A.572), belying DBNT's passivity theory. And that the PSA may outline DBNT's duties *vis-à-vis* Certificateholders says nothing about, and has no effect on, DBNT's obligations under California law. If DBNT wants to take advantage

of the discovery rule, it must satisfy its requirements—no matter the PSA.

In any event, *someone* had to exercise diligence. And if it was not DBNT, then it only could have been the Certificateholders. But, again, nothing in the complaint (or even DBNT's brief) describes the Certificateholders' thwarted efforts to identify purported representation breaches during the limitations period. Accordingly, even if "[w]hat constitutes 'reasonable diligence'" is a fact question (Br.54), DBNT's failure to plead or describe *any* facts about *any* diligence by *any* actor during the limitations period is dispositive—a second independent basis to reject DBNT's discovery-rule argument.

3. Although the Court need not reach the issue, the facts included with DBNT's complaint confirm that any breaches could have been discovered before the applicable limitations period expired. California courts have "rejected" the position that "discovery-rule issues are necessarily factual and cannot be resolved on" motions to dismiss. *CAMSI IV*, 282 Cal. Rptr. at 86 (citing cases); *contra* Br.53.

Under California law, a plaintiff need only "suspect[] a factual basis" for the elements of its claim to start the limitations period; it need not have

"knowledge thereof." *Norgart v. Upjohn Co.*, 981 P.2d 79, 88 (Cal. 1999).[22] DBNT's and QWWIP's allegations conclusively establish that DBNT and the Certificateholders were on notice with respect to the alleged breached representations beginning in 2007.

For example, QWWIP's 2013 notice letter alleging representation breaches stated that New Century's "bankruptcy examination" (disclosed in 2007, concluded in 2008) and the investigations into, and legal proceedings against, New Century (disclosed in 2007) "evidenced New Century's wholesale abandonment of underwriting standards." (A.1364-65.) According to DBNT, that the Trust's loans purportedly "violated the applicable underwriting guidelines" demonstrated the representations were breached. (A.1345.)

The facts about New Century were public in 2007; moreover, the Prospectus Supplement specifically detailed them, and warned potential Certificateholders that New Century's financial difficulties stemmed, in part, from litigation about "material breaches of representations and warranties made on the mortgage loans." (A.794-95, 824-42.) Simply put, DBNT's and QWWIP's own words establish that they had reason to "suspect[] a factual basis" in 2007

[22] That the Southern District of New York found the term "discovery" as used in a repurchase protocol means "more than inquiry notice" (Br.55 n.22) is makeweight. The court was neither addressing California's discovery rule nor interpreting the rule's requirements.

for the claim DBNT now asserts. *Norgart*, 981 P.2d at 88.

DBNT's suggestion that New Century's bankruptcy "could not have put the Trustee on notice of Respondent['s] breaches of [its] Representations and Warranties" (Br.56) is thus folderol. To the contrary, QWWIP offered up the "bankruptcy examination" as support for the theory that the representations made about the mortgage loans in *this Trust* had been breached. (A.1364.) Also misplaced is the position that the Court cannot assume "the information in the prospectus[] ... was accurate." (Br.55.) DBNT ignores that the facts about New Century were public, independent of the Prospectus Supplement. And although DBNT may allege the "Mortgage Loan Schedule[]" was inaccurate (Br.55), the transitive property does not render the facts about New Century from the Prospectus Supplement inaccurate. Even now, DBNT does not assert that the Supplement, or its New Century facts, were inaccurate.

Additionally, both QWWIP's 2013 letter (A.1364) cited in the operative complaint, and DBNT in that pleading (A.1344-46), asserted that the existence of delinquent and liquidated loans dating from 2007 and 2008 indicated breaches of the representations at issue. As the PSA details, DBNT and the Certificateholders received monthly reports beginning in 2007 outlining the

performance of the Trust's loans, including the number of delinquent and defaulted loans. (A.586-88.) Those reports showed DBNT and the Certificateholders the very delinquent, defaulted, and liquidated loans that they said put them on notice of the breached-representation claim. (R.A.4-49 (July 2008 loan report), 50-141 (April 2009 loan report).) Although DBNT suggests the Court cannot take judicial notice of the reports (Br.56 n.23), the PSA (a document attached to the complaint) specifically details their content and availability (A.586-88). Perhaps that is why DBNT never made its judicial-notice argument before the IAS Court or the First Department.

The facts on which DBNT and the Certificateholders allege they relied in identifying purported breaches were before them in 2007, 2008, and 2009. DBNT pleaded the very facts precluding the discovery rule.

CONCLUSION

For the foregoing reasons, the Court should affirm the First Department's decision.

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CERTIFICATE OF COMPLIANCE

I hereby certify under 22 NYCRR § 500.13(c) that this brief was prepared on a computer by a word-processing system (Microsoft Word) using a proportionally spaced typeface as follows:

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Dated: February 6, 2019

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