581

6/11

New York County Clerk's Index Nos. 651338/13 and 652001/13

Court of Appeals

STATE OF NEW YORK

Index No. 651338/13

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

Plaintiff-Respondent,

—against—

BARCLAYS BANK PLC,

Defendant-Appellant.

Index No. 652001/13

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

Plaintiff-Respondent,

—against—

HSBC BANK USA, NATIONAL ASSOCIATION,

Defendant-Appellant.

MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

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

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

Attorneys for Plaintiff-Respondent

May 29, 2018

CORPORATE DISCLOSURE STATEMENT

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

Dated: May 29, 2018
New York, New York

ROPES & GRAY LLP

By: _____

David B. Hennes
1211 Avenue of the Americas
New York, New York 10036
Telephone: (212) 596-9000
Fax: (212) 596-9090
David.Hennes@ropesgray.com

Attorney for plaintiff-respondent

STATE OF NEW YORK COURT OF APPEALS

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

Plaintiff-respondent,

–against–

BARCLAYS BANK PLC

Defendant-appellant.

NOTICE OF MOTION FOR LEAVE TO APPEAL

STATE OF NEW YORK COURT OF APPEALS

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

Plaintiff-respondent,

–against–

HSBC BANK USA, NATIONAL ASSOCIATION

Defendant-appellant.

PLEASE TAKE NOTICE that, upon the annexed affirmation of David B. Hennes, dated May 29, 2018; a Memorandum of Law, the Record on Appeal, and

upon all the papers and proceedings therein, plaintiff-respondent,[1] through its attorneys Ropes & Gray LLP and Friedman Kaplan Seiler & Adelman LLP, will move this Court at Court of Appeals Hall, 20 Eagle Street, Albany, New York on the 11th of June, 2018, or as soon thereafter as counsel can be heard, for an order, pursuant to CPLR 5602(a)(1)(i) and Section 500.22 of the Rules of this Court, granting leave to appeal the Decision and Order of the Supreme Court Appellate Division, First Department, dated December 5, 2017 (the "Decision"), which reversed the Decision and Order of the Supreme Court of the State of New York, New York County (Friedman, J.), dated November 25, 2015, which had denied, in pertinent part, the respective motions of defendants-appellants to dismiss Trustee's above-captioned actions.

PLEASE TAKE FURTHER NOTICE that, answering papers (if any) must be served and filed in the Clerk's Office of the Court of Appeals, with proof of service, on or before the return date of the motion pursuant to this Court's Rule of Practice 500.21.

---

[1] Plaintiff-respondent Deutsche Bank National Trust Company ("DBTC") is acting solely in its capacity as Trustee of Securitized Asset Backed Receivables LLC Trust 2007-BR1 and HSI Asset Securitization Corporation Trust 2007-NC1 (the "Trustee").

Dated: May 29, 2018
New York, New York

ROPES & GRAY LLP

By: _____

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

FRIEDMAN KAPLAN SEILER & ADELMAN LLP

By: _____

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

Attorneys for plaintiff-respondent

TO:

Jeffrey T. Scott
Sullivan & Cromwell LLP
125 Broad Street
New York, New York 10004
Attorney for defendant-appellant Barclays

Nicholas J. Boyle
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
Attorney for defendant-appellant HSBC

Michael O. Ware
Mayer Brown LLP
1221 Avenue of the Americas
New York, New York 10020
Attorney for defendant-appellant HSBC

John P. Asiello
Chief Clerk and Legal Counsel to the Court
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207

STATE OF NEW YORK COURT OF APPEALS

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

Plaintiff-respondent,

–against–

BARCLAYS BANK PLC

Defendant-appellant.

STATE OF NEW YORK COURT OF APPEALS

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

Plaintiff-respondent,

–against–

HSBC BANK USA, NATIONAL ASSOCIATION

Defendant-appellant.

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

David B. Hennes, hereby affirms the following to be true under penalty of perjury, pursuant to Rule 2106 of New York's Civil Practice Law and Rules:

1. I am an attorney admitted to practice in the courts of the State of New York, and a partner at the firm Ropes & Gray LLP, counsel for plaintiff-respondent in the above-captioned actions.

2. I make this affirmation in support of plaintiff-respondent's motion for leave to appeal to this Court from the Decision and Order of the Supreme Court Appellate Division, First Department (the "First Department"), dated December 5, 2017 (the "Decision") in the above-captioned actions (the "Actions"), which reversed the Decision and Order of the Supreme Court of the State of New York, New York County (Friedman, J.) (the "IAS Court Order"), dated November 25, 2015, which had denied in pertinent part the respective motions of defendants-appellants Barclays Bank PLC ("Barclays") and HSBC Bank USA, National Association ("HSBC") to dismiss the Actions.

3. Attached hereto as **Exhibit A** is a true and complete copy of the Notice of Entry and IAS Court Order, entered November 25, 2015, which denied, in pertinent part, Barclays' motion to dismiss (Index No. 651338/13).

4. Attached hereto as **Exhibit B** is a true and complete copy of the Notice of Entry and IAS Court Order, entered November 25, 2015, which denied, in pertinent part, HSBC's motion to dismiss (Index No. 652001/13).

5. Attached hereto as **Exhibit C** is a true and complete copy of Barclays' Notice of Appeal from the IAS Court Order (Index No. 651338/13).

6. Attached hereto as **Exhibit D** is a true and complete copy of HSBC's Notice of Appeal from the IAS Court Order (Index No. 652001/13).

7. Attached hereto as **Exhibit E** is a true and complete copy of the Notice of Entry and the Decision, entered on December 5, 2017, which reversed the IAS Court Order and granted Barclays' motion to dismiss (Index No. 651338/13).

8. Attached hereto as **Exhibit F** is a true and complete copy of the Notice of Entry and the Decision, entered on December 5, 2017, which reversed the IAS Court Order and granted HSBC's motion to dismiss (Index No. 652001/13).

9. Attached hereto as **Exhibit G** is a true and complete copy of plaintiff-respondent's Notice of Motion to the First Department for leave to appeal the Decision to this Court, served on Barclays and HSBC January 4, 2018 (Index Nos. 651338/13, 652001/13).

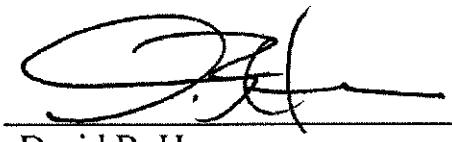
10. Attached hereto as **Exhibit H** is a true and complete copy of the First Department's Order and Decision, dated April 26, 2018, denying plaintiff-respondent's motion to seek leave to appeal to this Court, and the Notice of Entry served by Barclays on the same day (Index No. 651338/13).

11. Attached hereto as **Exhibit I** is a true and complete copy of the First Department's Order and Decision, dated April 26, 2018, denying plaintiff-

respondent's motion to seek leave to appeal to this Court, and the Notice of Entry served by HSBC on April 27, 2018 (Index No. 652001/13).

WHEREFORE, it is respectfully requested that plaintiff-respondent be granted leave to appeal to this Court.

Dated: May 29, 2018
New York, New York



David B. Hennes

EXHIBIT A

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

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

Plaintiff,

-against-

BARCLAYS BANK PLC,

Defendant.

Index No. 651338/2013

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within is a true copy of a Decision and Order of the Hon. Marcy S. Friedman of the Supreme Court of the State of New York, New York County ("Decision and Order"), dated November 25, 2015, and duly entered and filed by the New York County Clerk on November 27, 2015. Also attached is the New York County Supreme Court confirmation of electronic filing of the Decision and Order received from the NYSCEF system.

Pursuant to Rule 202.5-b of the N.Y.S. Uniform Civil Rules for the Supreme Court and the County Court, transmittal of this Notice of Entry via NYSCEF filing constitutes notice of entry of the Decision and Order.

Dated: New York, New York
December 1, 2015

ROPES & GRAY LLP

By s\ Brian F. Shaughnessy
Brian F. Shaughnessy
1211 Avenue of the Americas
New York, New York 10036-8704
Telephone: (212) 596-9000
Brian.Shaughnessy@ropesgray.com

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

PRESENT: MARCY S. FRIEDMAN **PART** 60
Justice

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

INDEX NO. 651338/2013

-against-

MOTION DATE _____

BARCLAYS BANK PLC

MOTION SEQ. NO. 002

The following papers, numbered 1 to _____ were read on this motion to dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	No (s). _____
Answering Affidavits — Exhibits _____	No (s). _____
Replying Affidavits _____	No (s). _____

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that

Upon the foregoing papers, it is ORDERED that the motion to dismiss of defendant Barclays Bank PLC is decided in accordance with the attached decision/order, dated November 25, 2015.

Dated: 11-25-15

_____, J.S.C.
MARCY S. FRIEDMAN, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. Check one: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check as appropriate:.....Motion is: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

DEUTSCHE BANK NATIONAL TRUST COMPANY, solely in its capacity as Trustee of the SECURITIZED ASSET BACKED RECEIVABLES LLC TRUST 2007-BR1 (SABR 2007-BR1), Plaintiff, - against - BARCLAYS BANK PLC, Defendant	DECISION/ORDER Index No. 651338/2013 Mot. Seq. 002
DEUTSCHE BANK NATIONAL TRUST COMPANY, solely as Trustee for HSI ASSET SECURITIZATION CORPORATION TRUST 2007-NC1, Plaintiff, - against - HSBC BANK USA, NATIONAL ASSOCIATION, Defendant	Index No. 652001/2013 Mot. Seq. 002

In these separate breach of contract actions, each brought by a plaintiff-trustee against the defendant-securitizer of residential mortgage-backed securities (RMBS), plaintiff alleges that defendant breached representations and warranties regarding the quality and characteristics of mortgage loans underlying the securities. In each case, defendant moves to dismiss the complaint, pursuant to CPLR 3211 (a) (1), (5), and (7), on the ground, among others, that the complaint is time-barred by the California statute of limitations. The actions are consolidated solely for purposes of this decision of the motions to dismiss, which raise substantially similar arguments on substantially similar pleadings and governing agreements.

California Statute of Limitations

Defendants argue that both plaintiff-trustees have their principal place of business in California, that their causes of action therefore accrued in California, and that, under New York's

borrowing statute, the actions are barred by the four-year California statute of limitations. Plaintiffs counter that the borrowing statute is inapplicable because the choice of law provisions in the governing Pooling and Servicing Agreements (PSAs) require application of the New York statute of limitations. In the alternative, plaintiffs dispute defendants' claim that their place of business dictates the place of accrual of the causes of action.

It is well settled that "[c]hoice of law provisions typically apply to only substantive issues, and statutes of limitations are considered 'procedural'. . . ." (Portfolio Recovery Assocs., LLC v King, 14 NY3d 410, 416 [2010], rearg denied 15 NY3d 833 [internal citation omitted].) A choice of law provision that does not evidence an "express intention" to apply a state's statute of limitations will not be "read to encompass that limitations period." (Id.) The choice of law provisions in the PSAs at issue by their terms make only the "substantive laws" of New York applicable. They state that the obligations, rights and remedies of the parties to the PSAs shall be determined in accordance with "such laws"; but the only laws to which the PSAs expressly refer are "substantive laws." (Barclays PSA § 10.03; HSBC PSA § 12.03.)[1] Plaintiffs cite no authority, and the court does not find, that such terms sufficiently evidence the "express intent" to make the New York statute of limitations applicable.

The court accordingly turns to the application of CPLR 202, the New York borrowing statute. Under the borrowing statute, where a non-resident sues on a cause of action accruing outside New York, "the cause of action [must] be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued." (Global Fin. Corp. v Triarc Corp., 93 NY2d 525, 528 [1999].) In cases involving purely economic loss, "the place of injury

[1] Barclays PSA § 10.03 provides in full: "Governing Law. This Agreement shall be construed in accordance with and governed by the substantive laws of the State of New York applicable to agreements made and to be performed in the State of New York and the obligations, rights and remedies of the parties hereto and the certificateholders shall be determined in accordance with such laws." (After the words Governing Law, all capital letters in the original.)

usually is where the plaintiff resides and sustains the economic impact of the loss," which would typically be a corporation's place of incorporation or principal place of business. (Id. at 529; Portfolio Recovery Assocs., LLC, 14 NY3d at 416.) As the Court of Appeals has emphasized, "CPLR 202 is designed to add clarity to the law and to provide the certainty of uniform application to litigants. This goal is better served by a rule requiring the single determination of a plaintiff's residence" than by a center of gravity approach. (Global Fin. Corp., 93 NY2d at 530 [internal quotation marks & citation omitted].) Thus, although there is authority that a court "can properly consider all relevant factors in determining where the loss is felt" (Lang v Paine, Webber, Jackson & Curtis, Inc., 582 F Supp 1421, 1424-1426 [SD NY 1984]), this exception has been applied only in extremely rare cases. (See Metropolitan Life Ins. Co. v Morgan Stanley, 2013 WL 3724938, at * 7 [Sup Ct, NY County June 8, 2013] [Bransten, J.] [and authorities cited therein]; Global Fin Corp., 93 NY2d at 530 [summarizing Lang as involving a "Canadian plaintiff [who] intentionally maintained separate financial base in Massachusetts; under the circumstances, injury of losing Massachusetts funds was felt in Massachusetts, not Canada"].)

The general rule is not, however, invariable. While the parties do not cite any authority that applies the New York borrowing statute to a case brought by an RMBS trustee, courts applying the borrowing statute to cases brought by non-RMBS trustees have repeatedly rejected the trustees' residence as determinative of the place of accrual of the causes of action. In a leading case, Maiden v Biehl (582 F Supp 1209 [SD NY 1984]), the Court held 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, and is not required legally." (Id. at 1217.) As the Court reasoned, it was "the Trust itself that suffered the loss . . . . The corpus of the Trust diminished as a result of the investment . . . ." (Id. at 1218.) The Court further held: "From all

the facts presented on this motion, it is clear that the Trust is located in New York. New York is where taxes are paid, where its investment decisions are made, and where the securities are physically kept. For the purposes of determining the applicability of the borrowing statute, New York is where the cause of action accrued." (Id.; see also The 2002 Lawrence R. Buchalter Alaska Trust v Philadelphia Fin. Life Assur. Co., 96 F Supp 3d 182, 201-02 & fn 7 [SD NY 2015] [following the Maiden holding that the trust itself suffered the loss, and determining that the injury occurred in Alaska for purposes of the borrowing statute, based on the following factors: the trust was located in Alaska and organized under Alaska law; the trustee at the time of the injuries was an Alaska party; and the trust beneficiaries were not entitled to guaranteed distributions and their location was unknown]; Appel v Kidder, Peabody & Co. Inc., 628 F Supp 153, 155-56 [SD NY 1986] [holding that for purposes of the borrowing statute, injury occurred not in New York where trust investments were made but in Connecticut where family members, who were trustees and beneficiaries of employee pension trust, resided, court applying a factors analysis as in Maiden, but reaching different result].)

Here, the California residence of the trustees is not a reliable indicator of the place where the injury occurred. The trusts were established in the PSAs, pursuant to New York law. (Barclays PSA § 2.01 [c]; HSBC PSA § 2.01 [c].) As discussed above, the rights of the parties to the PSAs are governed by New York law. (Barclays PSA § 10.03; HSBC PSA § 12.03.) The trustees hold the mortgage loans on behalf of the trusts, for the benefit of the certificateholders. (Barclays PSA, § 2.01 [a] ["The Depositor . . . hereby sells, transfers, . . . and otherwise conveys to the Trustee for the benefit of the Certificateholders, without recourse, all the right, title and interest of the Depositor in and to the Trust Fund, and the Trustee, on behalf of the Trust, hereby

accepts the Trust Fund"]; HSBC PSA § 2.01 [a], [d].) The trust corpus was therefore allegedly diminished as a result of the loss in value of the loans.

The other factors considered by the courts in determining the place of injury to non-RMBS trusts lack apparent relevance in the RMBS context. These factors do not, in any event, point to California.[2] Even assuming that the trusts are administered from the California offices of the trustees, RMBS trustees do not make major investment decisions, as the loans underlying the trusts are selected and pooled by the sponsors and/or depositors before the trusts are established. (See ACE Secs. Corp, Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc., 25 NY3d 581, 589-590 [2015] [ACE] [describing securitization process]; U.S. Bank Natl. Assn. v DLJ Mtge. Capital, 121 AD3d 535, 536 [1st Dept 2014] [noting that the RMBS trust "typically does not come into existence prior to the closing of the transaction"].)

As to the location of the trusts' assets, in the Barclays action, it appears to be undisputed that the mortgage notes are held in California. The PSA allows, however, for the possibility that the notes will be held in other states. (Barclays PSA § 2.02 [providing that the mortgage notes will be held in California "unless otherwise permitted by the Rating Agencies"].) In the HSBC action, PSA § 2.02 provides that the notes will be held not only in California but also in Minnesota and Utah, unless otherwise permitted by the Rating Agencies. The complaint alleges, and HSBC does not dispute, that the notes are actually held in Minnesota. (HSBC Second Am. Compl., ¶ 18.)

The PSAs contemplate payment of federal and local taxes. (Barclays PSA § 8.11 [a]; HSBC PSA § 8.11 [a].) In both actions, however, the complaints allege, and defendants do not

[2] Review of this court's RMBS docket shows that there are nearly 40 currently pending RMBS breach of contract actions (colloquially known as put-back actions). Although many involve out-of-state trustees, the two actions at issue are the only ones in which the court has to date heard motions to dismiss based on the out-of-state residence of the trustees.

dispute, that the trusts have not owed or in fact paid taxes in any state. (Barclays Am. Complaint, ¶ 19; HSBC Second Am. Compl., ¶ 18.)

Finally, the complaints allege, and defendants do not dispute, that the residence of the numerous certificateholders, who are the beneficiaries of the trusts, does not furnish a workable basis for determining where the injury occurred. (See Maiden, 582 F Supp at 1218 ["If the beneficiaries were scattered, it would be unworkable to fractionalize one claim because some parts were time-barred"].)[3]

The court accordingly concludes that defendants in both actions fail to make a prima facie showing that the cause of action accrued in California, and therefore that the four-year California statute of limitations bars maintenance of these actions. It is well settled that in moving to dismiss a cause of action based on the statute of limitations, "a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired." (Benn v Benn, 82 AD3d 548, 548 [1st Dept 2011] [internal quotation marks and citation omitted]; see 400 East 77th Owners, Inc. v New York Eng'g. Assn., P.C., 122 AD3d 474, 474-75 [1st Dept 2014].) The burden does not shift to the plaintiff to raise a triable issue of fact until the defendant has met its initial burden. (State of Narrow Fabric, Inc. v Unifi, Inc., 126 AD3d 881, 882 [2d Dept 2015].) As defendants fail to meet their burden, the branch of their motions for dismissal under the borrowing statute must be denied.

Barclays' Remaining Bases for Dismissal

Barclays also argues that all of plaintiff's claims, except as to the 74 loans that were the subject of a pre-suit notice to repurchase, are time-barred under New York law. The parties' memoranda of law, which were filed prior to the Appellate Division's recent decision in Nomura

[3] Defendants do not claim that the certificates are generally held in California. Rather, it is undisputed that many are held by a nominee (Cede & Co.) in New York. (Barclays Am. Compl., ¶ 35; HSBC Second Am. Compl., ¶ 30.)

Home Equity Loan, Inc. Series 2006-FM2 v Nomura Credit & Capital, Inc. (___AD3d ___, 2015 WL 5935177 [1st Dept Oct. 13, 2015] [Nomura]), did not address the impact of this decision on Barclays' claim, although the decision was briefly discussed at the oral argument. Barclays also appears to have conceded at the oral argument that the trustee is authorized to maintain claims, at least for "systematic" breaches of representations and warranties, based either on Barclays' own discovery of such breaches, or on notice to Barclays of the breaches. (See Nov. 10, 2015 Oral Argument at 29-30 [referring to Barclays Representation Agreement § 3 [a], second sentence].) This branch of the motion to dismiss will accordingly be denied.

Barclays also seeks dismissal of plaintiff's second cause of action for anticipatory repudiation, which is based on Barclays' alleged categorical rejection of breach notices and failure to repurchase any loans. (Barclays Am. Compl., ¶¶ 81-86.) This branch of the motion will be granted for the reasons previously stated, and on the authority previously cited, in this court's RMBS decisions involving similar arguments. (See e.g. Law Debenture Trust Co. of New York, Home Equity Loan Trust Series AMQ 2007-HE2 v DLJ Mtge. Capital, Inc., 2015 WL 1573381, * 9-10 [Sup Ct, NY County Apr. 8, 2015].)

Plaintiff's third cause of action for breach of the duty to cure or repurchase defective loans will also be dismissed. Although this cause of action was dismissed by this court's decision dated March 13, 2015, it was improperly restated in the amended complaint. (See generally Orient Overseas Assocs. v XL Ins. Am., Inc., 132 AD3d 574, 2015 WL 6456455, * 3 [App Div 1st Dept Oct. 27, 2015].) The claim is barred by ACE (25 NY3d at 599).

On the authority of the Appellate Division's recent decision in Nomura (2015 WL 5935177, at *7), the court holds that plaintiff's request for rescissory damages is not maintainable. Plaintiff's claim for unspecified consequential damages will also be dismissed.

(See Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC, 2015 WL 4038760, * 6 [Sup Ct, NY County July 1, 2015] [this court's prior decision dismissing claim for consequential damages inconsistent with the repurchase protocol].)[4]

Finally, Barclays seeks dismissal of plaintiff's claim for attorney's fees. This claim is based on the definition of Repurchase Price in the PSA, which includes "all expenses incurred by the Trustee arising out of the Trustee's enforcement of Barclays Bank PLC's purchase obligation under the Barclays Representation Agreement." (Barclays PSA, Art. I.) As this court has previously held in the RMBS litigation, this provision does not unmistakably evidence the parties' intent to authorize attorney's fees, as it does not expressly include such fees among the covered expenses. (See Nomura Home Equity Loan, Inc., Home Equity Loan Trust, Series 2007-2 v Nomura Credit & Capital, Inc., 2014 WL 5243512, * 2 [Sup Ct, NY County July 18, 2014], mod on other grounds 2015 WL 5935177 [1st Dept Oct. 13, 2015]; ACE Secs. Corp., Home Equity Loan Trust, Series 2007-WM1 v DB Structured Prods., Inc., 2014 WL 5243511, * 2 [Sup Ct, NY County Sept. 25, 2014] [citing authorities].)

HSBC's Remaining Bases for Dismissal

HSBC argues that plaintiff's breach of contract claims are time-barred under New York law because its representations and warranties were made on the "as of" date, as opposed to the closing date, of the governing agreements, and the action was commenced more than six years after the "as of" date. The governing agreements do not support these contentions. In so holding, the court rejects HSBC's contention that the trust was created prior to the closing date of the PSA. (See HSBC PSA §§ 2.01 [a], [d]; Mortgage Loan Purchase Agreement § 4; see generally ACE, 25 NY3d at 599; U.S. Bank Natl. Assn., 121 AD3d at 536.)

[4] It is noted that the amended complaint in the Barclays action does not plead the damages claims upheld in Nomura (2015 WL 5935177, at * 8) for breach of a No Untrue Statement provision or for the defendant's "failure to give prompt written notice after discovering material breaches of the representations and warranties."

HSBC also seeks dismissal of plaintiff's second cause of action for breach of contract based on HSBC's alleged failure to promptly notify plaintiff-trustee of HSBC's breaches of representations and warranties regarding the mortgage loans. The original complaint pleaded the same cause of action, as well as a cause of action for breach of contract based on failure to cure or repurchase defective loans. By decision and order dated October 17, 2014, this court dismissed the original complaint, and granted leave to plaintiff solely to replead a cause of action for breach of contract based on breaches of representations and warranties. Plaintiff subsequently served a first amended complaint which pleaded a first cause of action for breaches of representations and warranties, and restated the dismissed cause of action for failure to notify. By stipulation of the parties dated December 10, 2014, plaintiff served the second amended complaint, which repleads the causes of action from the first amended complaint and adds a third cause of action for anticipatory repudiation. This stipulation preserved HSBC's objections to the pleaded claims.

In its recent decision in Nomura, the Appellate Division held, without elaboration, that this court had "erred in not allowing plaintiffs to pursue damages for defendant's failure to give prompt written notice after it discovered material breaches of the representations and warranties" in the RMBS governing agreement. (2015 WL 5935177, at * 7.) As discussed above, the parties' briefs were filed prior to the Nomura decision and did not discuss its import. Given that the notice claim was repleaded without leave, the claim will be dismissed. In light of Nomura's potentially wide-ranging impact, however, the dismissal will be without prejudice (as further set forth in the ordering provision).

The branch of HSBC's motion to dismiss plaintiff's third cause of action for anticipatory repudiation will be granted for the reasons stated in connection with Barclays' motion to dismiss.

HSBC's claim that liquidated loans are not subject to repurchase will be denied on the authority of the Appellate Division's recent decision in Nomura (2015 WL 5935177, at * 5). In construing a substantially similar governing agreement, the Appellate Division also rejected the claim, which HSBC makes here, that the sole remedy provision (or repurchase protocol) is inconsistent with a claim for money damages where cure or repurchase is impossible. (Id. at * 7.)[5] Plaintiff's claim for attorney's fees is not, however, maintainable, for the reasons stated on Barclays' motion to dismiss.

It is accordingly hereby ORDERED that Barclays' motion to dismiss the amended complaint is granted to the extent of dismissing the following claims with prejudice: the second cause of action (anticipatory repudiation); the third cause of action (breaches of the duty to cure or repurchase defective loans); and the claims for rescissory damages, consequential damages, and attorney's fees incurred by the trustee and trust to enforce Barclays' obligations under the PSA; and it is further

ORDERED that HSBC's motion to dismiss the second amended complaint is granted to the extent of dismissing the following claims with prejudice: the third cause of action (anticipatory repudiation); and the claim for attorney's fees incurred by the trustee and trust to enforce HSBC's obligations under the PSA; and it is further

ORDERED that HSBC's motion to dismiss the second cause of action in the second amended complaint (breach of contractual duties to notify and repurchase defective loans) is granted to the following extent: The cause of action is dismissed with prejudice insofar as it pleads a claim for an independent breach of a duty to repurchase defective loans; and the cause of action is dismissed without prejudice insofar as it pleads a claim with respect to a breach of a

[5] The second amended complaint in the HSBC action does not by its terms seek rescissory or consequential damages.

duty to give prompt written notice of breaches of HSBC's representations and warranties. Provided that: plaintiff's right, if any, to seek leave to replead a claim with respect to the duty to notify shall be sought in conformity with procedures to be established in the coordinated RMBS put-back actions in Part 60. Nothing herein shall be construed as determining the scope or import of the Appellate Division Nomura decision (___AD3d ___, 2015 WL 5935177 [Oct. 13, 2015]) with respect to such claim.

This constitutes the decision and order of the court.

Dated: New York, New York
November 25, 2015

MARCY S. FRIEDMAN, J.S.C.

NYSCEF - New York County Supreme Court

Confirmation Notice

This is an automated response for Supreme Court / Court of Claims cases. The NYSCEF site has received your electronically filed document(s) for:

DEUTSCHE BANK NATIONAL TRUST COMPANY et al - v. - BARCLAYS BANK PLC

651338/2013

Documents Received on 11/27/2015 09:46 AM

Doc #	Document Type	Motion #
135	DECISION + ORDER ON MOTION	002

Court User

E-mail Notifications

An e-mail notification regarding this filing has been sent to the following address(es) on 11/27/2015 09:46 AM:

BARATT, CARLY BRONSON - Carly.Baratt@ropesgray.com

D'AMBRA JR., JAMES S. - james.dambra@alston.com

DOHERTY, JOHN P - john.doherty@alston.com

KOZAR, JENNIFER S - jennifer.kozar@alston.com

RUSSO, LOUIS A - louis.russo@alston.com

SHAUGHNESSY, BRIAN FREDERICK - Brian.Shaughnessy@ropesgray.com

WOHLSTADTER, DAVID CARL - david.wohlstadter@alston.com

WOLKOFF, HARVEY JOEL - harvey.wolkoff@ropesgray.com

NOTE: If submitting a working copy of this filing to the court, you must include as a notification page firmly affixed thereto a copy of this Confirmation Notice.

EXHIBIT B

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

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

Plaintiff,

-against-

HSBC BANK USA, NATIONAL ASSOCIATION,

Defendant.

Index No.: 652001/2013

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within is a true copy of a Decision and Order of the Hon. Marcy S. Friedman of the Supreme Court of the State of New York, New York County ("Decision and Order"), dated November 25, 2015, and duly entered and filed by the New York County Clerk on November 27, 2015. Also attached is the New York County Supreme Court confirmation of electronic filing of the Decision and Order received from the NYSCEF system.

Pursuant to Rule 202.5-b of the N.Y.S. Uniform Civil Rules for the Supreme Court and the County Court, transmittal of this Notice of Entry via NYSCEF filing constitutes notice of entry of the Decision and Order.

Dated: New York, New York
December 30, 2015

ROPES & GRAY LLP

By s\ Brian F. Shaughnessy
Brian F. Shaughnessy
1211 Avenue of the Americas
New York, New York 10036-8704
Telephone: (212) 596-9000
Brian.Shaughnessy@ropesgray.com

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

PRESENT: MARCY S. FRIEDMAN **PART** 60
Justice

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

INDEX NO. 652001/2013

-against-

MOTION DATE _____

HSBC BANK USA, NATIONAL ASSOCIATION

MOTION SEQ. NO. 002

The following papers, numbered 1 to _____ were read on this motion to dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	No (s). _____
Answering Affidavits — Exhibits _____	No (s). _____
Replying Affidavits _____	No (s). _____

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that

Upon the foregoing papers, it is ORDERED that the motion to dismiss of defendant HSBC Bank USA, National Association is decided in accordance with the attached decision/order, dated November 25, 2015.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11-25-15

Marcy S. Friedman, J.S.C.

MARCY S. FRIEDMAN, J.S.C.

1. Check one: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check as appropriate:.....Motion is: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

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

- against -

BARCLAYS BANK PLC,
Defendant

DECISION/ORDER
Index No. 651338/2013
Mot. Seq. 002

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

- against -

HSBC BANK USA, NATIONAL ASSOCIATION,
Defendant

Index No. 652001/2013
Mot. Seq. 002

In these separate breach of contract actions, each brought by a plaintiff-trustee against the defendant-securitizer of residential mortgage-backed securities (RMBS), plaintiff alleges that defendant breached representations and warranties regarding the quality and characteristics of mortgage loans underlying the securities. In each case, defendant moves to dismiss the complaint, pursuant to CPLR 3211 (a) (1), (5), and (7), on the ground, among others, that the complaint is time-barred by the California statute of limitations. The actions are consolidated solely for purposes of this decision of the motions to dismiss, which raise substantially similar arguments on substantially similar pleadings and governing agreements.

California Statute of Limitations

Defendants argue that both plaintiff-trustees have their principal place of business in California, that their causes of action therefore accrued in California, and that, under New York's

borrowing statute, the actions are barred by the four-year California statute of limitations. Plaintiffs counter that the borrowing statute is inapplicable because the choice of law provisions in the governing Pooling and Servicing Agreements (PSAs) require application of the New York statute of limitations. In the alternative, plaintiffs dispute defendants' claim that their place of business dictates the place of accrual of the causes of action.

It is well settled that "[c]hoice of law provisions typically apply to only substantive issues, and statutes of limitations are considered 'procedural'. . . ." (Portfolio Recovery Assocs., LLC v King, 14 NY3d 410, 416 [2010], rearg denied 15 NY3d 833 [internal citation omitted].) A choice of law provision that does not evidence an "express intention" to apply a state's statute of limitations will not be "read to encompass that limitations period." (Id.) The choice of law provisions in the PSAs at issue by their terms make only the "substantive laws" of New York applicable. They state that the obligations, rights and remedies of the parties to the PSAs shall be determined in accordance with "such laws"; but the only laws to which the PSAs expressly refer are "substantive laws." (Barclays PSA § 10.03; HSBC PSA § 12.03.)[1] Plaintiffs cite no authority, and the court does not find, that such terms sufficiently evidence the "express intent" to make the New York statute of limitations applicable.

The court accordingly turns to the application of CPLR 202, the New York borrowing statute. Under the borrowing statute, where a non-resident sues on a cause of action accruing outside New York, "the cause of action [must] be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued." (Global Fin. Corp. v Triarc Corp., 93 NY2d 525, 528 [1999].) In cases involving purely economic loss, "the place of injury

[1] Barclays PSA § 10.03 provides in full: "Governing Law. This Agreement shall be construed in accordance with and governed by the substantive laws of the State of New York applicable to agreements made and to be performed in the State of New York and the obligations, rights and remedies of the parties hereto and the certificateholders shall be determined in accordance with such laws." (After the words Governing Law, all capital letters in the original.)

usually is where the plaintiff resides and sustains the economic impact of the loss," which would typically be a corporation's place of incorporation or principal place of business. (Id. at 529; Portfolio Recovery Assocs., LLC, 14 NY3d at 416.) As the Court of Appeals has emphasized, "CPLR 202 is designed to add clarity to the law and to provide the certainty of uniform application to litigants. This goal is better served by a rule requiring the single determination of a plaintiff's residence" than by a center of gravity approach. (Global Fin. Corp., 93 NY2d at 530 [internal quotation marks & citation omitted].) Thus, although there is authority that a court "can properly consider all relevant factors in determining where the loss is felt" (Lang v Paine, Webber, Jackson & Curtis, Inc., 582 F Supp 1421, 1424-1426 [SD NY 1984]), this exception has been applied only in extremely rare cases. (See Metropolitan Life Ins. Co. v Morgan Stanley, 2013 WL 3724938, at * 7 [Sup Ct, NY County June 8, 2013] [Bransten, J.] [and authorities cited therein]; Global Fin Corp., 93 NY2d at 530 [summarizing Lang as involving a "Canadian plaintiff [who] intentionally maintained separate financial base in Massachusetts; under the circumstances, injury of losing Massachusetts funds was felt in Massachusetts, not Canada"].)

The general rule is not, however, invariable. While the parties do not cite any authority that applies the New York borrowing statute to a case brought by an RMBS trustee, courts applying the borrowing statute to cases brought by non-RMBS trustees have repeatedly rejected the trustees' residence as determinative of the place of accrual of the causes of action. In a leading case, Maiden v Biehl (582 F Supp 1209 [SD NY 1984]), the Court held 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, and is not required legally." (Id. at 1217.) As the Court reasoned, it was "the Trust itself that suffered the loss. . . . The corpus of the Trust diminished as a result of the investment . . . ." (Id. at 1218.) The Court further held: "From all

the facts presented on this motion, it is clear that the Trust is located in New York. New York is where taxes are paid, where its investment decisions are made, and where the securities are physically kept. For the purposes of determining the applicability of the borrowing statute, New York is where the cause of action accrued." (Id.; see also The 2002 Lawrence R. Buchalter Alaska Trust v Philadelphia Fin. Life Assur. Co., 96 F Supp 3d 182, 201-02 & fn 7 [SD NY 2015] [following the Maiden holding that the trust itself suffered the loss, and determining that the injury occurred in Alaska for purposes of the borrowing statute, based on the following factors: the trust was located in Alaska and organized under Alaska law; the trustee at the time of the injuries was an Alaska party; and the trust beneficiaries were not entitled to guaranteed distributions and their location was unknown]; Appel v Kidder, Peabody & Co. Inc., 628 F Supp 153, 155-56 [SD NY 1986] [holding that for purposes of the borrowing statute, injury occurred not in New York where trust investments were made but in Connecticut where family members, who were trustees and beneficiaries of employee pension trust, resided, court applying a factors analysis as in Maiden, but reaching different result].)

Here, the California residence of the trustees is not a reliable indicator of the place where the injury occurred. The trusts were established in the PSAs, pursuant to New York law. (Barclays PSA § 2.01 [c]; HSBC PSA § 2.01 [c].) As discussed above, the rights of the parties to the PSAs are governed by New York law. (Barclays PSA § 10.03; HSBC PSA § 12.03.) The trustees hold the mortgage loans on behalf of the trusts, for the benefit of the certificateholders. (Barclays PSA, § 2.01 [a] ["The Depositor . . . hereby sells, transfers, . . . and otherwise conveys to the Trustee for the benefit of the Certificateholders, without recourse, all the right, title and interest of the Depositor in and to the Trust Fund, and the Trustee, on behalf of the Trust, hereby

accepts the Trust Fund"]; HSBC PSA § 2.01 [a], [d].) The trust corpus was therefore allegedly diminished as a result of the loss in value of the loans.

The other factors considered by the courts in determining the place of injury to non-RMBS trusts lack apparent relevance in the RMBS context. These factors do not, in any event, point to California.[2] Even assuming that the trusts are administered from the California offices of the trustees, RMBS trustees do not make major investment decisions, as the loans underlying the trusts are selected and pooled by the sponsors and/or depositors before the trusts are established. (See ACE Secs. Corp. Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc., 25 NY3d 581, 589-590 [2015] [ACE] [describing securitization process]; U.S. Bank Natl. Assn. v DLJ Mtge. Capital, 121 AD3d 535, 536 [1st Dept 2014] [noting that the RMBS trust "typically does not come into existence prior to the closing of the transaction"].)

As to the location of the trusts' assets, in the Barclays action, it appears to be undisputed that the mortgage notes are held in California. The PSA allows, however, for the possibility that the notes will be held in other states. (Barclays PSA § 2.02 [providing that the mortgage notes will be held in California "unless otherwise permitted by the Rating Agencies"].) In the HSBC action, PSA § 2.02 provides that the notes will be held not only in California but also in Minnesota and Utah, unless otherwise permitted by the Rating Agencies. The complaint alleges, and HSBC does not dispute, that the notes are actually held in Minnesota. (HSBC Second Am. Compl., ¶ 18.)

The PSAs contemplate payment of federal and local taxes. (Barclays PSA § 8.11 [a]; HSBC PSA § 8.11 [a].) In both actions, however, the complaints allege, and defendants do not

[2] Review of this court's RMBS docket shows that there are nearly 40 currently pending RMBS breach of contract actions (colloquially known as put-back actions). Although many involve out-of-state trustees, the two actions at issue are the only ones in which the court has to date heard motions to dismiss based on the out-of-state residence of the trustees.

dispute, that the trusts have not owed or in fact paid taxes in any state. (Barclays Am. Complaint, ¶ 19; HSBC Second Am. Compl., ¶ 18.)

Finally, the complaints allege, and defendants do not dispute, that the residence of the numerous certificateholders, who are the beneficiaries of the trusts, does not furnish a workable basis for determining where the injury occurred. (See Maiden, 582 F Supp at 1218 ["If the beneficiaries were scattered, it would be unworkable to fractionalize one claim because some parts were time-barred"].)[3]

The court accordingly concludes that defendants in both actions fail to make a prima facie showing that the cause of action accrued in California, and therefore that the four-year California statute of limitations bars maintenance of these actions. It is well settled that in moving to dismiss a cause of action based on the statute of limitations, "a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired." (Benn v Benn, 82 AD3d 548, 548 [1st Dept 2011] [internal quotation marks and citation omitted]; see 400 East 77th Owners, Inc. v New York Eng'g. Assn., P.C., 122 AD3d 474, 474-75 [1st Dept 2014].) The burden does not shift to the plaintiff to raise a triable issue of fact until the defendant has met its initial burden. (State of Narrow Fabric, Inc. v Unifi, Inc., 126 AD3d 881, 882 [2d Dept 2015].) As defendants fail to meet their burden, the branch of their motions for dismissal under the borrowing statute must be denied.

Barclays' Remaining Bases for Dismissal

Barclays also argues that all of plaintiff's claims, except as to the 74 loans that were the subject of a pre-suit notice to repurchase, are time-barred under New York law. The parties' memoranda of law, which were filed prior to the Appellate Division's recent decision in Nomura

[3] Defendants do not claim that the certificates are generally held in California. Rather, it is undisputed that many are held by a nominee (Cede & Co.) in New York. (Barclays Am. Compl., ¶ 35; HSBC Second Am. Compl., ¶ 30.)

Home Equity Loan, Inc. Series 2006-FM2 v Nomura Credit & Capital, Inc. (___AD3d ___, 2015 WL 5935177 [1st Dept Oct. 13, 2015] [Nomura]), did not address the impact of this decision on Barclays' claim, although the decision was briefly discussed at the oral argument. Barclays also appears to have conceded at the oral argument that the trustee is authorized to maintain claims, at least for "systematic" breaches of representations and warranties, based either on Barclays' own discovery of such breaches, or on notice to Barclays of the breaches. (See Nov. 10, 2015 Oral Argument at 29-30 [referring to Barclays Representation Agreement § 3 [a], second sentence].) This branch of the motion to dismiss will accordingly be denied.

Barclays also seeks dismissal of plaintiff's second cause of action for anticipatory repudiation, which is based on Barclays' alleged categorical rejection of breach notices and failure to repurchase any loans. (Barclays Am. Compl., ¶¶ 81-86.) This branch of the motion will be granted for the reasons previously stated, and on the authority previously cited, in this court's RMBS decisions involving similar arguments. (See e.g. Law Debenture Trust Co. of New York, Home Equity Loan Trust Series AMQ 2007-HE2 v DLJ Mtge. Capital, Inc., 2015 WL 1573381, * 9-10 [Sup Ct, NY County Apr. 8, 2015].)

Plaintiff's third cause of action for breach of the duty to cure or repurchase defective loans will also be dismissed. Although this cause of action was dismissed by this court's decision dated March 13, 2015, it was improperly restated in the amended complaint. (See generally Orient Overseas Assocs. v XL Ins. Am., Inc., 132 AD3d 574, 2015 WL 6456455, * 3 [App Div 1st Dept Oct. 27, 2015].) The claim is barred by ACE (25 NY3d at 599).

On the authority of the Appellate Division's recent decision in Nomura (2015 WL 5935177, at *7), the court holds that plaintiff's request for rescissory damages is not maintainable. Plaintiff's claim for unspecified consequential damages will also be dismissed.

(See Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC, 2015 WL 4038760, * 6 [Sup Ct, NY County July 1, 2015] [this court's prior decision dismissing claim for consequential damages inconsistent with the repurchase protocol].)[4]

Finally, Barclays seeks dismissal of plaintiff's claim for attorney's fees. This claim is based on the definition of Repurchase Price in the PSA, which includes "all expenses incurred by the Trustee arising out of the Trustee's enforcement of Barclays Bank PLC's purchase obligation under the Barclays Representation Agreement." (Barclays PSA, Art. I.) As this court has previously held in the RMBS litigation, this provision does not unmistakably evidence the parties' intent to authorize attorney's fees, as it does not expressly include such fees among the covered expenses. (See Nomura Home Equity Loan, Inc., Home Equity Loan Trust, Series 2007-2 v Nomura Credit & Capital, Inc., 2014 WL 5243512, * 2 [Sup Ct, NY County July 18, 2014], mod on other grounds 2015 WL 5935177 [1st Dept Oct. 13, 2015]; ACE Secs. Corp., Home Equity Loan Trust, Series 2007-WM1 v DB Structured Prods., Inc., 2014 WL 5243511, * 2 [Sup Ct, NY County Sept. 25, 2014] [citing authorities].)

HSBC's Remaining Bases for Dismissal

HSBC argues that plaintiff's breach of contract claims are time-barred under New York law because its representations and warranties were made on the "as of" date, as opposed to the closing date, of the governing agreements, and the action was commenced more than six years after the "as of" date. The governing agreements do not support these contentions. In so holding, the court rejects HSBC's contention that the trust was created prior to the closing date of the PSA. (See HSBC PSA §§ 2.01 [a], [d]; Mortgage Loan Purchase Agreement § 4; see generally ACE, 25 NY3d at 599; U.S. Bank Natl. Assn., 121 AD3d at 536.)

[4] It is noted that the amended complaint in the Barclays action does not plead the damages claims upheld in Nomura (2015 WL 5935177, at * 8) for breach of a No Untrue Statement provision or for the defendant's "failure to give prompt written notice after discovering material breaches of the representations and warranties."

HSBC also seeks dismissal of plaintiff's second cause of action for breach of contract based on HSBC's alleged failure to promptly notify plaintiff-trustee of HSBC's breaches of representations and warranties regarding the mortgage loans. The original complaint pleaded the same cause of action, as well as a cause of action for breach of contract based on failure to cure or repurchase defective loans. By decision and order dated October 17, 2014, this court dismissed the original complaint, and granted leave to plaintiff solely to replead a cause of action for breach of contract based on breaches of representations and warranties. Plaintiff subsequently served a first amended complaint which pleaded a first cause of action for breaches of representations and warranties, and restated the dismissed cause of action for failure to notify. By stipulation of the parties dated December 10, 2014, plaintiff served the second amended complaint, which repleads the causes of action from the first amended complaint and adds a third cause of action for anticipatory repudiation. This stipulation preserved HSBC's objections to the pleaded claims.

In its recent decision in Nomura, the Appellate Division held, without elaboration, that this court had "erred in not allowing plaintiffs to pursue damages for defendant's failure to give prompt written notice after it discovered material breaches of the representations and warranties" in the RMBS governing agreement. (2015 WL 5935177, at * 7.) As discussed above, the parties' briefs were filed prior to the Nomura decision and did not discuss its import. Given that the notice claim was repleaded without leave, the claim will be dismissed. In light of Nomura's potentially wide-ranging impact, however, the dismissal will be without prejudice (as further set forth in the ordering provision).

The branch of HSBC's motion to dismiss plaintiff's third cause of action for anticipatory repudiation will be granted for the reasons stated in connection with Barclays' motion to dismiss.

HSBC's claim that liquidated loans are not subject to repurchase will be denied on the authority of the Appellate Division's recent decision in Nomura (2015 WL 5935177, at * 5). In construing a substantially similar governing agreement, the Appellate Division also rejected the claim, which HSBC makes here, that the sole remedy provision (or repurchase protocol) is inconsistent with a claim for money damages where cure or repurchase is impossible. (Id. at * 7.)[5] Plaintiff's claim for attorney's fees is not, however, maintainable, for the reasons stated on Barclays' motion to dismiss.

It is accordingly hereby ORDERED that Barclays' motion to dismiss the amended complaint is granted to the extent of dismissing the following claims with prejudice: the second cause of action (anticipatory repudiation); the third cause of action (breaches of the duty to cure or repurchase defective loans); and the claims for rescissory damages, consequential damages, and attorney's fees incurred by the trustee and trust to enforce Barclays' obligations under the PSA; and it is further

ORDERED that HSBC's motion to dismiss the second amended complaint is granted to the extent of dismissing the following claims with prejudice: the third cause of action (anticipatory repudiation); and the claim for attorney's fees incurred by the trustee and trust to enforce HSBC's obligations under the PSA; and it is further

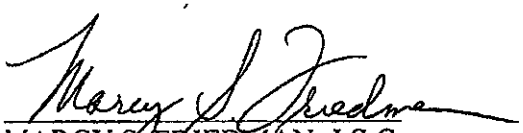
ORDERED that HSBC's motion to dismiss the second cause of action in the second amended complaint (breach of contractual duties to notify and repurchase defective loans) is granted to the following extent: The cause of action is dismissed with prejudice insofar as it pleads a claim for an independent breach of a duty to repurchase defective loans; and the cause of action is dismissed without prejudice insofar as it pleads a claim with respect to a breach of a

[5] The second amended complaint in the HSBC action does not by its terms seek rescissory or consequential damages.

duty to give prompt written notice of breaches of HSBC's representations and warranties. Provided that: plaintiff's right, if any, to seek leave to replead a claim with respect to the duty to notify shall be sought in conformity with procedures to be established in the coordinated RMBS put-back actions in Part 60. Nothing herein shall be construed as determining the scope or import of the Appellate Division Nomura decision (__AD3d ___, 2015 WL 5935177 [Oct. 13, 2015]) with respect to such claim.

This constitutes the decision and order of the court.

Dated: New York, New York
November 25, 2015



MARCY S. FRIEDMAN, J.S.C.

NYSCEF - New York County Supreme Court

Confirmation Notice

This is an automated response for Supreme Court / Court of Claims cases. The NYSCEF site has received your electronically filed document(s) for:

Deutsche Bank National Trust Company - v. - HSBC Bank USA, National Association

652001/2013

Documents Received on 11/27/2015 09:48 AM

Doc #	Document Type	Motion #
163	DECISION + ORDER ON MOTION	002

Court User

E-mail Notifications

An e-mail notification regarding this filing has been sent to the following address(es) on 11/27/2015 09:48 AM:

BARATT, CARLY BRONSON - Carly.Baratt@ropesgray.com

BOYLE, NICHOLAS JAMES - nboyle@wc.com

RISKIN, DAVID RANDALL J. - driskin@wc.com

SHAUGHNESSY, BRIAN FREDERICK - Brian.Shaughnessy@ropesgray.com

WARE, MICHAEL O - mware@mayerbrown.com

WOLKOFF, HARVEY JOEL - harvey.wolkoff@ropesgray.com

NOTE: If submitting a working copy of this filing to the court, you must include as a notification page firmly affixed thereto a copy of this Confirmation Notice.

EXHIBIT C

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

IN RE: PART 60 RMBS PUT-BACK LITIGATION	Index No. 777000/2015
DEUTSCHE BANK NATIONAL TRUST COMPANY, solely in its capacity as Trustee of the SECURITIZED ASSET BACKED RECEIVABLES LLC TRUST 2007-BR1 (SABR 2007-BR1),	Index No. 651338/2013
	Hon. Marcy Friedman
	IAS PART 60
Plaintiff-Respondent,	
- against -	Motion Sequence No. 2
BARCLAYS BANK PLC,	**NOTICE OF APPEAL**
Defendant-Appellant.	

PLEASE TAKE NOTICE that Defendant-Appellant Barclays Bank PLC ("Barclays"), by its undersigned counsel, hereby appeals to the Appellate Division of the New York Supreme Court in and for the First Department from a Decision and Order of the New York Supreme Court, New York County, IAS Part 60 (Marcy S. Friedman, J.S.C.) dated November 25, 2015, entered with the Clerk of the Court on November 27, 2015, and with Notice of Entry served upon Barclays on December 1, 2015, which granted in part and denied in part Barclays' Motion to Dismiss the Amended Complaint (Motion Sequence No. 2) (the "Decision and Order"). A copy of the Decision and Order is attached as Exhibit A.

PLEASE TAKE FURTHER NOTICE that this appeal is taken from the portions of the Decision and Order that denied Barclays' Motion to Dismiss the Amended Complaint.

[*signature pages follows*]

Dated: December 18, 2015
New York, New York

ALSTON & BIRD LLP

By: /s/ John P. Doherty
John P. Doherty
David C. Wohlstadter
90 Park Avenue
New York, New York 10016
Tel: (212) 210-9400

Attorneys for Defendant-Appellant Barclays Bank PLC

To:

Hon. Milton A. Tingling
County Clerk, New York County
60 Centre Street
New York, New York 10007

ROPES & GRAY LLP
Brian Shaughnessy
Carly B. Baratt
1211 Avenue of the Americas
New York, New York 10036
Tel: (212) 596-9190

Harvey J. Wolkoff
Daniel V. Ward
Prudential Tower, 800 Boylston Street
Boston, Massachusetts 02199
Tel: (617) 951-7000

Attorneys for Plaintiff-Respondent Deutsche Bank National Trust Company

EXHIBIT D

SUPREME COURT OF THE STATE OF NEW YORK

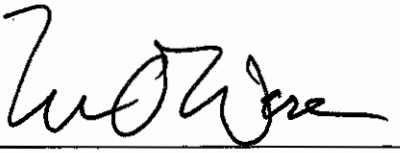
COUNTY OF NEW YORK

In re	:	Index No. 777000/2015 IAS Part 60
PART 60 PUT-BACK LITIGATION.	:	Justice Friedman
DEUTSCHE BANK NATIONAL TRUST COMPANY, solely as Trustee for HSI ASSET SECURITIZATION CORPORATION TRUST 2007-NC1,	:	Index No. 652001/2013
	:	**NOTICE OF APPEAL**
Plaintiff,	:	
– against –	:	
HSBC BANK USA, NATIONAL ASSOCIATION,	:	
Defendant.	:	

PLEASE TAKE NOTICE that defendant HSBC Bank USA, National Association ("HSBC") hereby appeals to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, from that part of the Decision/Order (one paper) of Supreme Court, New York County, dated November 25, 2015, and entered November 27, 2015, that denied HSBC's motion to dismiss the action as time-barred.

Dated: January 20, 2016

Nicholas J. Boyle
David Randall J. Riskin
WILLIAMS & CONNOLLY LLP
725 Twelfth St., N.W.
Washington, D.C. 20005
(202) 434-5000



Michael O. Ware
John M. Conlon
MAYER BROWN LLP
1221 Avenue of the Americas
New York, N.Y. 10020
(212) 506-2500

Attorneys for defendant HSBC Bank USA, National Association

TO: CLERK OF NEW YORK COUNTY
60 Centre St.
New York, N.Y. 10007

ROPES & GRAY LLP
1211 Avenue of the Americas
New York, N.Y. 10036
Attorney for plaintiff

EXHIBIT E

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

IN RE: PART 60 RMBS PUT-BACK LITIGATION	Index No. 777000/2015
DEUTSCHE BANK NATIONAL TRUST COMPANY, solely in its capacity as Trustee of the SECURITIES ASSET BACKED RECEIVABLES LLC TRUST 2007-BR1 (SABR 2007-BR1), Plaintiff, -against- BARCLAYS BANK PLC, Defendants.	Index No. 651338/2013 Hon. Marcy Friedman IAS PART 60 **NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the within is a true and correct copy of a Decision and Order entered today by the Clerk of the Supreme Court, Appellate Division First Department.

Dated: December 5, 2017
New York, New York

Jeffrey T. Scott
Jonathan M. Sedlak
Andrew H. Reynard
(scottj@sullcrom.com)
(sedlakj@sullcrom.com)
(reynarda@sullcrom.com)
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004-2498
Telephone: 212-558-4000
Facsimile: 212-558-3588

Counsel for Defendant
Barclays Bank PLC

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 5, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Richter, Moskowitz, Gische, Kapnick, JJ.

4033-
4034 Index 651338/13
652001/13

Deutsche Bank National Trust Company, etc.,
Plaintiff-Respondent,

-against-

Barclays Bank PLC,
Defendant-Appellant.

- - - - -

Deutsche Bank National Trust Company, etc.,
Plaintiff-Respondent,

-against-

HSBC Bank USA, National Association,
Defendant-Appellant.

Sullivan & Cromwell LLP, New York (Jeffrey T. Scott of counsel), for Barclays Bank PLC, appellant.

Mayer Brown LLP, New York (Michael O. Ware of counsel), for HSBC Bank USA National Association, appellant.

Ropes & Gray LLP, New York (Harvey J. Wolkoff of counsel), for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered November 27, 2015, which, in each of the above-

captioned actions, to the extent appealed from as limited by the briefs, denied each defendant's motion to dismiss the surviving cause of action for breach of contract on the ground of the statute of limitations, unanimously reversed, on the law, with costs, and the motion granted. In each action, the Clerk is directed to enter judgment for defendant dismissing the complaint.

In 2013, plaintiff commenced the two above-captioned actions, each solely in plaintiff's capacity as trustee of one of two trusts. In each action, plaintiff asserts, as relevant to this appeal, a cause of action for breach of contract based on each defendant's alleged breaches of the representations and warranties it had made in connection with the sale, in 2007, of the residential mortgage-backed securities that are pooled in the relevant trust. Each defendant moved to dismiss the action against it, arguing, in pertinent part, that, because plaintiff's principal place of business is in California, plaintiff's contractual claim is barred by California's four-year statute of limitations, pursuant to the borrowing statute (CPLR 202), although it is conceded that the claims would be timely under New York's six-year statute of limitations (CPLR 213[2]). Upon defendants' respective appeals from Supreme Court's denial of

this aspect of their motions, we reverse.[1]

CPLR 202 requires that an action brought by a nonresident plaintiff, "based upon a cause of action accruing without the state," be timely under the respective statutes of limitations of both New York and "the place without the state where the cause of action accrued." In *Global Fin. Corp. v Triarc Corp.* (93 NY2d 525, 529-530 [1999]), the Court of Appeals set forth the general rule that, in cases where (as here) the alleged injury is purely economic, a cause of action is deemed, for purposes of CPLR 202, to have accrued in the jurisdiction of the plaintiff's residence.

Plaintiff, a California domiciliary, argues that the plaintiff-residence rule of *Global Financial* – a case in which the plaintiff was a corporation suing to recover for an injury to itself – should not be applied here, where plaintiff is suing solely in its capacity as trustee of the subject trusts. Rather, plaintiff argues that we should apply the multi-factor test used in *Maiden v Biehl* (582 F Supp 1209 [SD NY 1984]), which also dealt with a trustee-plaintiff, to determine where the injury occurred. However, we need not decide whether the plaintiff-residence rule or the multi-factor test applies in this context

[1]Although Supreme Court dismissed certain of plaintiff's claims in each action, plaintiff has not taken an appeal.

because, even under the multi-factor test, we find that the injury/economic impact was felt in California and the claims are thus deemed to have accrued there.

Initially, it is undisputed that the domiciles of the trust beneficiaries, which are in various jurisdictions, do not provide a workable basis for determining the place of accrual. As to the New York choice-of-law clauses of the relevant agreements, because these provisions do not expressly incorporate the New York statute of limitations, they "cannot be read to encompass that limitation period" (*Portfolio Recovery Assoc., LLC v King*, 14 NY3d 410, 416 [2010]). By contrast, the subject trust in each action comprises a pool of mortgage loans, originated by California lenders and encumbering California properties, either exclusively (in the Barclays case) or predominantly (in the HSBC case), and, as previously discussed, administered in California by plaintiff, a California-based trustee.[2] Further, it is undisputed that the relevant pooling and servicing agreement (PSA) for each trust contemplates the payment of state taxes, if

[2]While plaintiff argues that each defendant selected the (exclusively or predominantly) California mortgages to be pooled in the trust at its New York office, such operations are irrelevant to determining where the injury to the trust corpus was sustained (*see Global Financial*, 93 NY2d at 528 ["plaintiff's cause of action accrued where it sustained its alleged injury"]).

any, in California.[3] To the extent the physical location of the notes memorializing the securitized mortgage loans has relevance to the analysis, each trust's PSA contemplates that the notes may be maintained in California, but neither contemplates maintaining the notes in New York.[4]

We agree with defendants that the claims are barred by the California's four-year statute of limitations for contract actions (Cal Code Civ Proc § 337). As previously noted, the alleged breaches of representations and warranties occurred in 2007, when allegedly nonconforming mortgage loans were deposited into the trust pools, and these actions were not commenced until 2013. Under California law, plaintiff's claims for the alleged

---

[3]Although it is undisputed that the trusts have not incurred any state tax liability, it may be inferred from plaintiff's contractual acknowledgment that each trust is subject to the tax regime of California that the situs of each trust corpus — and thus of any injury to that trust corpus — is California

[4]Specifically, the PSA in the HSBC case provides that the notes may be maintained in California, Minnesota or Utah, and the PSA in the Barclays case provides that the notes may be maintained only in California, unless the rating agencies permit them to be maintained in another state. It is undisputed that, in fact, the HSBC notes are maintained in Minnesota and the Barclays notes are maintained in California. We note that, contrary to plaintiff's argument, the 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.

breaches accrued "at the time of the sale" (*Mary Pickford Co. v Bayly Bros., Inc.*, 12 Cal 2d 501, 521, 86 P2d 102, 112 [1939]). Although plaintiff seeks to enforce the repurchase protocol under the relevant agreements, its failure to demand cure or repurchase until after the expiration of four years from the original breach did not serve to extend the statute of limitations (*Meherin v S.F. Produce Exch.*, 117 Cal 215, 217, 48 P 1074, 1075 [1897]; *Taketa v State Bd. of Equalization*, 104 Cal App 2d 455, 460, 231 P2d 873, 875 [Cal Ct App 1951]). Moreover, under New York law, which, pursuant to the choice-of-law clauses, governs substantive matters, the contractual provisions for demand under the repurchase protocol are not conditions precedent to suit for a preexisting breach (*see ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 25 NY3d 581, 597 [2015]). Nor do any of the relevant agreements expressly waive or extend the statute of limitations. Plaintiff's claims are not saved by California's discovery rule, inasmuch as 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 (*cf. April Enters., Inc. v KTTV*, 147 Cal App 3d 805, 832 [Cal Ct App 1983] [a

discovery rule may apply in contract cases where "breaches will not be *reasonably* discoverable by plaintiffs until a future time"] [emphasis added]). Finally, whether a California court would apply New York's statute of limitations is irrelevant to the analysis under CPLR 202, which demands application of the shorter of the two limitation periods at issue (*see Ledwith v Sears, Roebuck & Co.*, 231 AD2d 17, 24 [1st Dept 1997] ["CPLR 202 is to be applied as written, without recourse to a conflict of law analysis"]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 5, 2017

CLERK

EXHIBIT F

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

In re	:	Index No. 777000/2015 IAS Part 60
PART 60 PUT-BACK LITIGATION.	:	Justice Friedman
DEUTSCHE BANK NATIONAL TRUST COMPANY, solely as Trustee for HSI ASSET SECURITIZATION CORPORATION TRUST 2007-NC1,	:	Index No. 652001/2013
	:	**NOTICE OF ENTRY**
Plaintiff-Respondent,	:	
– against –	:	
HSBC BANK USA, NATIONAL ASSOCIATION,	:	
Defendant-Appellant.	:	

PLEASE TAKE NOTICE that the within is a true and correct copy of a Decision and Order entered today by the Clerk of the Supreme Court, Appellate Division, First Department.

Dated: December 5, 2017

Michael O. Ware
John M. Conlon
MAYER BROWN LLP
1221 Avenue of the Americas
New York, N.Y. 10020
(212) 506-2500

Nicholas J. Boyle
David Randall J. Riskin
WILLIAMS & CONNOLLY LLP
650 Fifth Avenue, Suite 1500
New York, N.Y. 10019

725 Twelfth St., N.W.
Washington, D.C. 20005
(202) 434-5000

Attorneys for defendant HSBC Bank USA, National Association

TO: ROPES & GRAY LLP
1211 Avenue of the Americas
New York, N.Y. 10036
Attorney for plaintiff

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 5, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Richter, Moskowitz, Gische, Kapnick, JJ.

4033-
4034 Index 651338/13
652001/13

Deutsche Bank National Trust Company, etc.,
Plaintiff-Respondent,

-against-

Barclays Bank PLC,
Defendant-Appellant.

- - - - -

Deutsche Bank National Trust Company, etc.,
Plaintiff-Respondent,

-against-

HSBC Bank USA, National Association,
Defendant-Appellant.

Sullivan & Cromwell LLP, New York (Jeffrey T. Scott of counsel), for Barclays Bank PLC, appellant.

Mayer Brown LLP, New York (Michael O. Ware of counsel), for HSBC Bank USA National Association, appellant.

Ropes & Gray LLP, New York (Harvey J. Wolkoff of counsel), for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered November 27, 2015, which, in each of the above-

captioned actions, to the extent appealed from as limited by the briefs, denied each defendant's motion to dismiss the surviving cause of action for breach of contract on the ground of the statute of limitations, unanimously reversed, on the law, with costs, and the motion granted. In each action, the Clerk is directed to enter judgment for defendant dismissing the complaint.

In 2013, plaintiff commenced the two above-captioned actions, each solely in plaintiff's capacity as trustee of one of two trusts. In each action, plaintiff asserts, as relevant to this appeal, a cause of action for breach of contract based on each defendant's alleged breaches of the representations and warranties it had made in connection with the sale, in 2007, of the residential mortgage-backed securities that are pooled in the relevant trust. Each defendant moved to dismiss the action against it, arguing, in pertinent part, that, because plaintiff's principal place of business is in California, plaintiff's contractual claim is barred by California's four-year statute of limitations, pursuant to the borrowing statute (CPLR 202), although it is conceded that the claims would be timely under New York's six-year statute of limitations (CPLR 213[2]). Upon defendants' respective appeals from Supreme Court's denial of

this aspect of their motions, we reverse.[1]

CPLR 202 requires that an action brought by a nonresident plaintiff, "based upon a cause of action accruing without the state," be timely under the respective statutes of limitations of both New York and "the place without the state where the cause of action accrued." In *Global Fin. Corp. v Triarc Corp.* (93 NY2d 525, 529-530 [1999]), the Court of Appeals set forth the general rule that, in cases where (as here) the alleged injury is purely economic, a cause of action is deemed, for purposes of CPLR 202, to have accrued in the jurisdiction of the plaintiff's residence.

Plaintiff, a California domiciliary, argues that the plaintiff-residence rule of *Global Financial* — a case in which the plaintiff was a corporation suing to recover for an injury to itself — should not be applied here, where plaintiff is suing solely in its capacity as trustee of the subject trusts. Rather, plaintiff argues that we should apply the multi-factor test used in *Maiden v Biehl* (582 F Supp 1209 [SD NY 1984]), which also dealt with a trustee-plaintiff, to determine where the injury occurred. However, we need not decide whether the plaintiff-residence rule or the multi-factor test applies in this context

[1]Although Supreme Court dismissed certain of plaintiff's claims in each action, plaintiff has not taken an appeal.

because, even under the multi-factor test, we find that the injury/economic impact was felt in California and the claims are thus deemed to have accrued there.

Initially, it is undisputed that the domiciles of the trust beneficiaries, which are in various jurisdictions, do not provide a workable basis for determining the place of accrual. As to the New York choice-of-law clauses of the relevant agreements, because these provisions do not expressly incorporate the New York statute of limitations, they "cannot be read to encompass that limitation period" (*Portfolio Recovery Assoc., LLC v King*, 14 NY3d 410, 416 [2010]). By contrast, the subject trust in each action comprises a pool of mortgage loans, originated by California lenders and encumbering California properties, either exclusively (in the Barclays case) or predominantly (in the HSBC case), and, as previously discussed, administered in California by plaintiff, a California-based trustee.[2] Further, it is undisputed that the relevant pooling and servicing agreement (PSA) for each trust contemplates the payment of state taxes, if

[2]While plaintiff argues that each defendant selected the (exclusively or predominantly) California mortgages to be pooled in the trust at its New York office, such operations are irrelevant to determining where the injury to the trust corpus was sustained (*see Global Financial*, 93 NY2d at 528 ["plaintiff's cause of action accrued where it sustained its alleged injury"]).

any, in California.[3] To the extent the physical location of the notes memorializing the securitized mortgage loans has relevance to the analysis, each trust's PSA contemplates that the notes may be maintained in California, but neither contemplates maintaining the notes in New York.[4]

We agree with defendants that the claims are barred by the California's four-year statute of limitations for contract actions (Cal Code Civ Proc § 337). As previously noted, the alleged breaches of representations and warranties occurred in 2007, when allegedly nonconforming mortgage loans were deposited into the trust pools, and these actions were not commenced until 2013. Under California law, plaintiff's claims for the alleged

---

[3]Although it is undisputed that the trusts have not incurred any state tax liability, it may be inferred from plaintiff's contractual acknowledgment that each trust is subject to the tax regime of California that the situs of each trust corpus — and thus of any injury to that trust corpus — is California

[4]Specifically, the PSA in the HSBC case provides that the notes may be maintained in California, Minnesota or Utah, and the PSA in the Barclays case provides that the notes may be maintained only in California, unless the rating agencies permit them to be maintained in another state. It is undisputed that, in fact, the HSBC notes are maintained in Minnesota and the Barclays notes are maintained in California. We note that, contrary to plaintiff's argument, the 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.

breaches accrued "at the time of the sale" (*Mary Pickford Co. v Bayly Bros., Inc.*, 12 Cal 2d 501, 521, 86 P2d 102, 112 [1939]). Although plaintiff seeks to enforce the repurchase protocol under the relevant agreements, its failure to demand cure or repurchase until after the expiration of four years from the original breach did not serve to extend the statute of limitations (*Meherin v S.F. Produce Exch.*, 117 Cal 215, 217, 48 P 1074, 1075 [1897]; *Taketa v State Bd. of Equalization*, 104 Cal App 2d 455, 460, 231 P2d 873, 875 [Cal Ct App 1951]). Moreover, under New York law, which, pursuant to the choice-of-law clauses, governs substantive matters, the contractual provisions for demand under the repurchase protocol are not conditions precedent to suit for a preexisting breach (*see ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 25 NY3d 581, 597 [2015]). Nor do any of the relevant agreements expressly waive or extend the statute of limitations. Plaintiff's claims are not saved by California's discovery rule, inasmuch as 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 (*cf. April Enters., Inc. v KTTV*, 147 Cal App 3d 805, 832 [Cal Ct App 1983] [a

discovery rule may apply in contract cases where "breaches will not be *reasonably* discoverable by plaintiffs until a future time"] [emphasis added]). Finally, whether a California court would apply New York's statute of limitations is irrelevant to the analysis under CPLR 202, which demands application of the shorter of the two limitation periods at issue (*see Ledwith v Sears, Roebuck & Co.*, 231 AD2d 17, 24 [1st Dept 1997] ["CPLR 202 is to be applied as written, without recourse to a conflict of law analysis"]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 5, 2017

CLERK

EXHIBIT G

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

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

Plaintiff-respondent-movant,

-against-

BARCLAYS BANK PLC,

Defendant-appellant.

Index No. 651338/13

NOTICE OF MOTION

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

Plaintiff-respondent-movant,

-against-

HSBC BANK USA, NATIONAL ASSOCIATION,

Defendant-appellant.

Index No. 652001/13

PLEASE TAKE NOTICE THAT, upon the accompanying affirmation of Brian F. Shaughnessy, dated January 4, 2018, the exhibits attached thereto, the supporting memorandum of law, and all prior pleadings and papers herein, plaintiff-respondent-movant,[1] by and through its undersigned counsel, will hereby move this Court at the Courthouse located at 27 Madison Avenue, New York, New York on January 12, 2018, or as soon thereafter as counsel can be heard, for an Order, pursuant to CPLR 5602(a)(1)(i) and NYCRR § 600.14(b), granting Trustee's motion for leave to appeal this Court's Decision and Order, dated December 5, 2017 (the "Decision") in the above-captioned actions (the "Actions"). The Decision reversed the Decision and Order of the Supreme Court of the State of New York, New York County (Friedman, J.) (the "IAS Court"), dated November 25, 2015, which had denied the respective motions of defendants Barclays Bank PLC ("Barclays") and HSBC Bank USA, National Association ("HSBC") to dismiss the Trustee's complaints in the Actions.

The Trustee's motion, which pertains to the Actions, seeks leave to appeal to the Court of Appeals the holding in the Decision that, for purposes of CPLR 202, and on a motion to dismiss without resolution of questions of fact: (1) the Trustee's

[1] Plaintiff-respondent-movant Deutsche Bank National Trust company is acting solely in its capacity as Trustee of Securitized Asset Back Receivables LLC Trust 2007-BR1 and HSI Asset Securitization Corporation Trust 2007-NC1 (the "Trustee").

claims accrued in California; and (2) the Trustee's claims were untimely under California law.

Dated: New York, New York
January 4, 2018

ROPES & GRAY LLP

By: _____

Harvey J. Wolkoff
Brian F. Shaughnessy
1211 Avenue of the Americas
New York, New York 10036
Telephone: (212) 596-9000
Fax: (212) 596-9090
Harvey.Wolkoff@ropesgray.com
Brian. Shaughnessy@ropesgray.com

FRIEDMAN KAPLAN SEILER & ADELMAN LLP

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

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

TO:

Ms. Susanna Molina Rojas
CLERK OF THE COURT
Appellate Division, First Department
27 Madison Avenue
New York, New York 10010

Jeffrey T. Scott
Sullivan & Cromwell LLP
125 Broad Street
New York, New York 10004
Attorney for defendant-appellant Barclays

Nicholas J. Boyle
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
Attorney for defendant-appellant HSBC

Michael O. Ware
Mayer Brown LLP
1221 Avenue of the Americas
New York, New York 10020
Attorney for defendant-appellant HSBC

EXHIBIT H

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

IN RE: PART 60 RMBS PUT-BACK LITIGATION	Index No. 777000/2015
DEUTSCHE BANK NATIONAL TRUST COMPANY, solely in its capacity as Trustee of the SECURITIES ASSET BACKED RECEIVABLES LLC TRUST 2007-BR1 (SABR 2007-BR1), Plaintiff, -against- BARCLAYS BANK PLC, Defendants.	Index No. 651338/2013 Hon. Marcy Friedman IAS PART 60 **NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the attached Decision and Order of the Supreme Court of the State of New York, Appellate Division, First Department, was duly entered in the Office of the Clerk of the Appellate Division, First Department on April 26, 2018.

Dated: April 26, 2018
New York, New York

Jeffrey T. Scott
Jonathan M. Sedlak
Andrew H. Reynard
(scottj@sullcrom.com)
(sedlakj@sullcrom.com)
(reynarda@sullcrom.com)
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004-2498
Telephone: 212-558-4000
Facsimile: 212-558-3588

Counsel for Defendant
Barclays Bank PLC

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on April 26, 2018.

PRESENT: Hon. David Friedman, Justice Presiding,
Rosalyn H. Richter
Richard T. Andrias
Barbara R. Kapnick, Justices.

----------X

Deutsche Bank National Trust Company, etc.,
Plaintiff-Respondent,

-against-

Barclays Bank PLC,
Defendant-Appellant.

- - - - -

Deutsche Bank National Trust Company, etc.,
Plaintiff-Respondent,

-against-

HSBC Bank USA, National Association,
Defendant-Appellant.

----------X

M-45
Index Nos. 651338/13
652001/13

Plaintiff-respondent having moved for leave to appeal to the Court of Appeals from the decision and order of this Court, entered on December 5, 2017 (Appeal Nos. 4033-34),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTERED:

CLERK

EXHIBIT I

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

In re	:	Index No. 777000/2015 IAS Part 60
PART 60 PUT-BACK LITIGATION.	:	Justice Friedman
DEUTSCHE BANK NATIONAL TRUST COMPANY, solely as Trustee for HSI ASSET SECURITIZATION CORPORATION TRUST 2007-NC1,	:	Index No. 652001/2013 **NOTICE OF ENTRY**
Plaintiff-Respondent,	:	
– against –	:	
HSBC BANK USA, NATIONAL ASSOCIATION,	:	
Defendant-Appellant.	:	

PLEASE TAKE NOTICE that the within is a true and correct copy of an order entered April 26, 2018. by the Clerk of the Supreme Court, Appellate Division, First Department.

Dated: April 27, 2018

Michael O. Ware
John M. Conlon
MAYER BROWN LLP
1221 Avenue of the Americas
New York, N.Y. 10020
(212) 506-2500

Nicholas J. Boyle
David Randall J. Riskin
WILLIAMS & CONNOLLY LLP
650 Fifth Avenue, Suite 1500
New York, N.Y. 10019

725 Twelfth St., N.W.
Washington, D.C. 20005
(202) 434-5000

Attorneys for defendant HSBC Bank USA, National Association

TO: ROPES & GRAY LLP
1211 Avenue of the Americas
New York, N.Y. 10036
Attorney for plaintiff

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on April 26, 2018.

PRESENT: Hon. David Friedman, Justice Presiding,
Rosalyn H. Richter
Richard T. Andrias
Barbara R. Kapnick, Justices.

----------X

Deutsche Bank National Trust Company, etc.,
Plaintiff-Respondent,

-against-

Barclays Bank PLC,
Defendant-Appellant.

M-45
Index Nos. 651338/13
652001/13

- - - - -

Deutsche Bank National Trust Company, etc.,
Plaintiff-Respondent,

-against-

HSBC Bank USA, National Association,
Defendant-Appellant.

----------X

Plaintiff-respondent having moved for leave to appeal to the Court of Appeals from the decision and order of this Court, entered on December 5, 2017 (Appeal Nos. 4033-34),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTERED:

CLERK

New York County Clerk's Index Nos. 651338/13 and 652001/13

Court of Appeals

STATE OF NEW YORK

Index No. 651338/13

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

Plaintiff-Respondent,

—against—

BARCLAYS BANK PLC,

Defendant-Appellant.

Index No. 652001/13

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

Plaintiff-Respondent,

—against—

HSBC BANK USA, NATIONAL ASSOCIATION,

Defendant-Appellant.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

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

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

Attorneys for Plaintiff-Respondent

May 29, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Plaintiff-Respondent Deutsche Bank National Trust Company ("DBNTC"), solely in its capacity as Trustee of Securitized Asset Back Receivables LLC Trust 2007-BR1 and HSI Asset Securitization Corporation Trust 2007-NC1 (the "Trustee"), submits this memorandum of law in support of its motion (the "Motion"), pursuant to C.P.L.R. Section 5602(a)(1) and Section 500.22 of the Rules of the Court (22 NYCRR Section 500.22), for leave to appeal to this Court from the Decision and Order of the Supreme Court Appellate Division, First Department (the "First Department"), dated December 5, 2017 (the "Decision") in the above-captioned actions (the "Actions").[1] The Decision reversed the Decision and Order of the Supreme Court of the State of New York, New York County (Friedman, J.) (the "IAS Court Order"), dated November 25, 2015, which had denied in pertinent part the respective motions of defendants-appellants Barclays Bank PLC ("Barclays") and HSBC Bank USA, National Association ("HSBC," and together with Barclays, the "Defendants") to dismiss the Trustee's claims in the Actions.

[1] Copies of the IAS Court Order and the Decision are attached as Exhibits A and B and Exhibits E and F respectively to the Affirmation of David B. Hennes dated May 29, 2018, which accompanies the Motion ("Hennes Mot. Aff."). Citations to the Decision are in the form of "Decision at _") and are applicable to both Actions. Copies of the records on appeal and a copy of each party's Appellate Division briefs have been filed with the Court concurrently with the Motion, pursuant to this Court's Rule 500.22(c). Citations to the record on appeal are in the form of "BR1 R._" for Index No. 651338/2013 and "NC1 R._" for Index No. 652001/2013. "BR1 Br.", "BR1 Answering", and "BR1 Reply" refer to the Appellate Division opening, answering, and reply briefs, respectively, in Barclays' appeal (No. 651338/2013) and "NC1 Br.", "NC1 Answering", and "NC1 Reply" refer to the Appellate Division opening, answering, and reply briefs, respectively, in HSBC's appeal (No. 652001/2013).

This Motion, which pertains to both of the Actions, seeks leave to appeal the Decision as it presents publicly important, novel questions of law and conflicts with this Court's prior decisions. *See* 22 NYCRR § 500.22(b)(4).

JURISDICTION AND TIMELINESS

This Court has jurisdiction to hear this Motion pursuant to C.P.L.R. 5602(a)(1)(i), which authorizes litigants to seek leave from this Court to appeal a final Appellate Division order when the action originates in the Supreme Court and is not appealable as of right. The Decision's dismissal of the Actions constitutes a final order.[2]

This Motion is also timely. The Defendants served the Trustee with Notices of Entry of the Decision on December 5, 2017.[3] The Trustee then served Defendants with notice of its motion to the First Department for leave to appeal to this Court on January 4, 2018, within 30 days of service of the Notices of Entry, as required by C.P.L.R. Section 5513(b).[4] The First Department denied the Trustee's motion on April 26, 2018, and Defendants served Notices of Entry on April 26 (Barclays) and

[2] In the Decision, the First Department directed the Clerk in the County of New York to enter judgment for defendant dismissing the complaint in each Action.

[3] Copies of the Notices of Entry of the substantive appellate order for Index No. 651338/2013 and Index No. 652001/2013 are attached as Exhibits E and F to the Hennes Mot. Aff., respectively.

[4] A copy of the Notice of Motion to the First Department for leave to appeal for Index No. 651338/13 and Index No. 652001/2013 is attached as Exhibit G to the Hennes Mot. Aff.

April 27 (HSBC), 2018. This Motion was served within 30 days of Barclays' service of Notice of Entry, and is therefore timely pursuant to C.P.L.R. Section 5513(b).[5]

PRELIMINARY STATEMENT

This case presents two questions about the interpretation of C.P.L.R. Section 202 ("CPLR 202"), New York's "borrowing" statute, that are having an immediate and major impact on pending litigation in which billions of dollars are at stake. The issues are: (1) how a court should determine where a cause of action accrues for purposes of CPLR 202, when the plaintiff is a trustee suing solely in its representative capacity on behalf of trust beneficiaries; and (2) whether in determining whether an action is brought "after the expiration of the time limited by the laws" of a foreign state under CPLR 202, a New York court should give effect to all the laws of a foreign state that determine the timeliness of an action.

These issues arise in litigation involving residential mortgage-backed securities ("RMBS"), and the Decision is already having a significant impact on more than three dozen other RMBS cases pending in Supreme Court, involving claims collectively worth billions of dollars. Before the Decision, parties to these lawsuits almost unanimously understood that warranties made in New York in agreements governed by New York law for the benefit of New York trusts and

[5] Copies of the Notice of Entry of the First Department's order denying the Trustee's motion for leave to appeal to this Court for Index No. 651338/2013 and Index No. 652001/2013 are attached as Exhibits H and I to the Hennes Mot. Aff., respectively.

breached in New York thereby causing injury to those trusts would give rise to repurchase claims subject to New York's six-year statute of limitations period. Since the Decision, the defendants in many RMBS cases have piled into the courthouse to inform the IAS Court of their intention to assert, for the first time, a defense based on the First Department's unique construction of CPLR 202. Several actions were stayed pending the outcome of the Trustee's motion to the First Department, and it is the defendants' position in those cases that the stay should remain in effect pending the outcome of this Motion and any subsequent appeal. Thus, the Decision has already created significant uncertainty in RMBS litigation and has wreaked havoc on coordinated pretrial schedules.

But the impact of the Decision will not be limited to RMBS litigation. Even in other cases involving New York trusts, the Decision's ruling on the first issue leaves confusion as to the appropriate standard for evaluating the "place of injury" under CPLR 202 where an out-of-state plaintiff sues to redress an injury to a trust estate. While the Decision acknowledged that the "place of injury" was the relevant inquiry, it did not adopt any test for resolving it.

In this state of the law, lower courts are unable to consistently evaluate where trust claims accrue under CPLR 202. As a result, every potential and current investor in a New York trust must evaluate whether an adverse party could argue that the trustee or other representative plaintiff resides out-of-state, and if so, to analyze —

without the benefit of established standards — whether CPLR 202 may be invoked to shorten the time in which remedies for potential damages to the trust's corpus may be sought. Uncertainty would cloud the rights of investors in existing New York trusts, which are otherwise unambiguously governed by New York law. Sophisticated investors may view New York trusts as carrying an additional level of risk, and may shy away from establishing and investing in New York trusts and/or from choosing New York law to govern the rights of trust beneficiaries.

In addition, the Decision is inconsistent with this Court's precedents. ***First***, the holding in *Global Financial Corp. v. Triarc Corp.*, that "a cause of action accrues at the time and in the place of the injury[,]" 93 N.Y.2d 525, 529 (1999), read in conjunction with the holding in *ACE Securities Corp., Home Equity Loan Trust, Series 2006-SL2 v. DB Structured Products, Inc.*, that for RMBS breach of warranty actions, the relevant "injury" occurs the moment the warranties are made and breached, 25 N.Y.3d 581, 597-98 (2015) ("*ACE III*"), dictates that the cause of action here accrued in New York — when and where the warranties were breached. ***Second***, the Decision runs afoul of the well-settled rule of New York law that courts must apply all the laws of a foreign state when construing that state's statute of limitations. *See Smith, Barney, Harris Upham & Co., Inc. v. Luckie*, 85 N.Y.2d 193, 207 (1995).

For these reasons and those set forth below, leave to appeal to the Court of Appeals should be granted.

QUESTIONS PRESENTED

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

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

BACKGROUND FACTS AND PROCEDURAL HISTORY

The Actions are breach of contract actions against Barclays and HSBC, respectively, arising from the falsity of representations and warranties they made in the course of bringing certain RMBS securitizations to market.

Barclays securitized certain mortgage loans (the "BR1 Mortgage Loans") into Securitized Asset Back Receivables LLC Trust 2007-BR1 ("BR1") and HSBC securitized certain mortgage loans (the "NC1 Mortgage Loans," and together with the BR1 Mortgage Loans, the "Mortgage Loans") into HSI Asset Securitization Corporation Trust 2007-NC1 ("NC1," together with BR1, the "Trusts"). The Trusts were created under New York law, and the relevant operating agreements are

expressly governed by New York law. BR1 R.121 (BR1 PSA § 2.01 (c)); BR1 R.174 (BR1 PSA § 10.03); BR1 R.210 (BRA § 7); NC1 R.96 (NC1 PSA § 2.01(c)); NC1 R.172 (PSA § 12.03); NC1 R.271 (NC1 MLPA § 8).

The BR1 claims are brought for breach of representations and warranties made in a Pooling and Servicing Agreement (the "BR1 PSA"), dated March 1, 2007, and a Barclays Representation Agreement (the "BR1 BRA"), dated April 12, 2007, in which Barclays made dozens of representations and warranties regarding the quality and characteristics of over 5,000 BR1 Mortgage Loans. BR1 R.78-268, 350. As indicated in the BR1 Prospectus Supplement, 3,985 of the 5,028 BR1 Mortgage Loans — roughly 79% — are secured by properties in states other than California, including in New York. BR1 R.350, 443.

The NC1 claims are brought for breach of representations and warranties made in a Mortgage Loan Purchase Agreement ("MLPA") and a Pooling and Servicing Agreement (the "NC1 PSA," and collectively with the BR1 PSA, the "PSAs"), both dated May 1, 2007. By way of those documents, HSBC made more than 100 representations and warranties (together with the BR1 representations and warranties, the "Representations and Warranties") regarding the quality and characteristics of over 4,600 mortgage loans, which were securitized into NC1. NC1 R.40-290. As indicated in the NC1 prospectus supplement, 3,567 of the 4,635 NC1

mortgage loans — roughly 77% — are secured by properties in states other than California, including in New York. NC1 R.341, 534.

As relevant, the steps leading to the BR1 Trust's creation were as follows. Through an MLPA dated December 28, 2006, Sutton Funding LLC, a Barclays affiliate with its principal office in New York, acting as the "Sponsor" of the BR1 securitization, agreed to sell and assign the BR1 Mortgage Loans to a depositor, Securitized Asset Backed Receivables LLC ("SABR"), also an affiliate of Barclays with its principal executive office in New York. BR1 R.55-56, 327, 355-56. In the BR1 BRA, which is governed by New York law, Barclays made the BR1 Representations and Warranties regarding the BR1 Mortgage Loans to SABR. BR1 R.257-68. Then, through the BR1 PSA, SABR assigned the BR1 Mortgage Loans and the BR1 Representations and Warranties to the BR1 Trust. BR1 R.78-256; BR1 R.207, 257, 350, 371. The BR1 Trust was created when this assignment occurred under the BR1 PSA, on the closing date of the BR1 Trust on April 12, 2007 (the "BR1 Closing Date"). BR1 R.100, 119-24.

The relevant steps leading to the NC1 Trust's creation were as follows. Pursuant to the NC1 MLPA, which is governed by New York law, HSBC sold the NC1 Mortgage Loans to a depositor, its affiliate HSI Asset Securitization Corporation ("HASC," and together with SABR, the "Depositors"), an entity with its principal office in New York. NC1 R.263-90, 271, 298. Also through the MLPA,

HSBC assigned the NC1 Representations and Warranties to HASC. NC1 R.263-90. Then, pursuant to the NC1 PSA, HASC assigned the NC1 Representations and Warranties and the NC1 Mortgage Loans to the Trust. NC1 R.40-262. The NC1 Trust was created when this assignment occurred under the NC1 PSA, on the closing date of the NC1 Trust on June 5, 2007 (the "NC1 Closing Date"). NC1 R.66, 77, 93-100.

Pursuant to the terms of the PSAs, each Trust acknowledged the Depositors' assignment of the Mortgage Loans and the Representations and Warranties, and each Trust issued pass-through certificates ("Certificates") to investors ("Certificateholders") on the applicable Closing Dates. BR1 R.55-56, 97, 121-22, 150-61, 323; NC1 R.77, 98, 100, 291, 865-66. These Certificates are securities which represent ownership interests in the Trusts entitling the Certificateholders to periodic payments of principal and interest from the Trusts based on remittances from the Trust's respective mortgage loans. BR1 R.323, 328-35; NC1 R.291, 307-11. The prices at which the Certificates trade tend to reflect the nature of the Representations and Warranties, specifically, the likelihood the Mortgage Loans will be repaid in full according to their terms. BR1 R.58; NC1 R.864. With the exception of two out of 15 classes, entities located in New York held the BR1 Certificates as

of the BR1 Closing Date.[6] BR1 R.59, 323. Entities located in New York held all of the NC1 Certificates as of the NC1 Closing Date.[7] NC1 R. 866. The Certificateholders' rights and remedies with respect to their investments are expressly governed by New York law as set forth in the PSAs, BR1 BRA, and NC1 MLPA.[8] In short, the Actions arise from: (i) investment decisions made by Defendants and their affiliates in New York; (ii) representations and warranties made in agreements governed by New York law and assigned by New York entities to the New York Trusts; and (iii) an injury that can only have been felt in New York—the falsity of the warranties.

By contrast, the Trustee had no role in organizing the Trusts pre-securitization, it did not select or purchase the Mortgage Loans that went into the

---

[6] Barclays and Cede & Co., entities located in New York, held the BR1 Certificates as of the BR1 Closing Date. R.59.

[7] Cede & Co. and HSBC Securities (USA) Inc., entities located in New York, held the NC1 Certificates as of the NC1 Closing Date. NC1 R.866.

[8] Section 7 of the BR1 BRA states: "This agreement shall be governed by, and construed in accordance with, the laws of the State of New York without regards to conflicts of laws principles." BR1 R.210 (BRA § 7) (original is in all caps). Section 10.03 of the BR1 PSA states: "This agreement shall be construed in accordance with and governed by the substantive laws of the State of New York applicable to agreements made and to be performed in the State of New York and the obligations, rights and remedies of the Parties hereto and the Certificateholders shall be determined in accordance with such laws." BR1 R.174 (BR1 PSA § 10.03) (original is in all caps). Section 8 of the NC1 MLPA states that the "[a]greement shall be governed by and construed in accordance with the laws of the State of New York." NC1 R.271 (NC1 MLPA § 8). Section 12.03 of the NC1 PSA states: "This agreement shall be construed in accordance with and governed by the substantive laws of the state of New York applicable to agreements made and to be performed in the state of New York and the obligations, rights and remedies of the parties hereto and the certificateholders shall be determined in accordance with such laws." NC1 R.172 (PSA § 12.03) (original is in all caps).

Trusts, it has only limited and ministerial post-securitization obligations under the governing documents,[9] and it suffered no direct injury from the falsity of the Defendants' warranties. BR1 R.55; BR1 R.119-21 (BR1 PSA § 2.01); NC1 R.93 (NC1 PSA § 2.01); NC1 R.863.

Pursuant to the Repurchase Protocols,[10] Barclays and HSBC agreed to repurchase any Mortgage Loan that materially breached their respective Representations and Warranties (each a "Defective Loan"). BR1 R.208-09 (BR1 BRA § 3(a), attached to the BR1 PSA as Exhibit O); NC1 R.98 (NC1 PSA § 2.03(d)). The BR1 BRA also contains an express accrual provision, which states that any "cause of action" against Barclays for breaches of the BR1 Representations and Warranties does not accrue until Barclays fails to comply with a repurchase demand by the Trustee (the "Accrual Provision"). BR1 R.209 (BR1 BRA § 3(a)).

After investigations conducted at the request of Certificateholders uncovered wide-scale breaches of Barclays' and HSBC's Representations and Warranties, the Trustee promptly sent notices to Defendants demanding cure or repurchase of the Defective Loans, in accordance with the Repurchase Protocols. BR1 R.63-68; NC1 R.859-60, 869-72. When Barclays and HSBC failed to cure or repurchase any of

---

[9] The Trustee had particularly limited obligations with respect to the NC1 Trust, for which the Trustee served as a mere nominal trustee. NC1 R.131-49 (NC1 PSA §§ 8.01-8.13).

[10] "Repurchase Protocols" refers to the provisions requiring the repurchase of defective loans on demand, contained in Section 3(a) of the BR1 BRA and Section 2.03(d) of the NC1 PSA.

the Defective Loans, the Trustee, solely on behalf of the Trusts, commenced the BR1 and NC1 Actions on April 12, 2013 and June 5, 2013, respectively. BR1 R.25-48; NC1 R.19-39. It is not in dispute that the Actions were timely under New York's six-year statute of limitations.

The Trustee subsequently filed amended complaints in both Actions (collectively, the "Amended Complaints"), which allege that Barclays and HSBC each breached their Representations and Warranties and injured "[t]he Trust[s]" as opposed to the Trustee, and that the Trustee is suing solely in a representative capacity. BR1 R.50, 72, 77; NC1 R.858, 876, 879.

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

Barclays and HSBC each moved to dismiss the relevant Amended Complaint, arguing that, pursuant to *Global Financial*, California's four-year statute of limitations should be applied to bar the Trustee's claims under CPLR 202 because the Trustee resides in California. BR1 R.9-10; NC1 R.8-9. On November 25, 2015, the IAS Court denied Defendants' motions to dismiss in relevant part. BR1 R.14; NC1 R.13.

Finding that the "California residence of the trustees is not a reliable indicator of the place where the injury occurred" because the Trusts, not the Trustees, were injured, the IAS Court assessed where the Trusts suffered the loss. BR1 R.11-14; NC1 R.10-13. Adopting the reasoning used by the United States District Court for

the Southern District of New York in *Maiden v. Biehl*, 582 F. Supp. 1209, 1217-18 (S.D.N.Y. 1984), and other relevant case law, the IAS Court ultimately focused on three factors: (1) each Trust was established by the relevant PSA pursuant to New York law, which is where the Trust is located; (2) the rights of the parties to the relevant agreements are governed by New York law; and (3) the Trustee holds the Mortgage Loans on behalf of the Trusts for the benefit of the Certificateholders, and it was the trust corpus that was diminished as a result of the loss in value of those loans. BR1 R.12-14; NC1 R.11-13. Because these factors point clearly to New York, and the other factors "lack apparent relevance in the RMBS context [and] do not, in any event, point to California," the IAS Court concluded that Barclays and HSBC failed to show that the Trustee's claims accrued in California. BR1 R.12-14; NC1 R.11-13. Consequently, the IAS Court did not reach the question of when the Trustee's claims accrued if they accrued in California.

Both Barclays and HSBC appealed the IAS Court's decision to the First Department.

II. THE FIRST DEPARTMENT'S DECISION

On December 5, 2017, the First Department issued the Decision, which reversed the IAS Court's denial of Barclays' and HSBC's motions to dismiss. Decision at 1-2. The First Department held that the Trustee's claims accrued in California under CPLR 202, and that the claims were untimely under California's

four-year statute of limitations. Decision at 2-6. However, the First Department declined to articulate a standard for evaluating claim accrual in such circumstances, finding that the Trustee's claims accrued in California under both *Global Financial* and *Maiden*, without resolving the inherent tension between those two approaches. Decision at 3-4. According to the First Department, the Trustee's claims accrued in California under *Global Financial* because the plaintiff, the Trustee, is a California resident, notwithstanding contrary authority that the place of injury to the trust – rather than the location of the trustee – is the dispositive issue. Decision at 3. The court held that the claims also accrued in California under *Maiden* because: (1) California lenders originated the Mortgage Loans; (2) the Mortgage Loans predominantly encumber California properties;[11] (3) the Trusts are administered in California; (4) the PSAs contemplate the payment of state taxes in California; and (5) the PSAs contemplate that the mortgage notes may be maintained in California. Decision at 3-5.

The First Department further held that the claims were untimely under California's statute of limitations because the Trustee failed to demand cure or repurchase within four years from the date of the securitizations. Decision at 5-6. The First Department relied on "New York law" (*ACE III*), rather than California

[11] Contrary to the First Department's finding, the Mortgage Loans in both Trusts in fact predominantly encumbered properties in states *other than* California. *See supra* at 7-8.

law, to determine when the California statutory period started to run, and on that basis rejected the Trustee's argument that the contractual provisions for demand in the Repurchase Protocols were conditions precedent to the running of the statute. Decision at 6. Misapplying its own decision in *Ledwith v. Sears, Roebuck & Co.*, 231 A.D.2d 17, 24 (1st Dep't 1997), the First Department said "whether a California court would apply New York's statute of limitations is irrelevant to the analysis under CPLR 202, which demands the application of the shorter of the two limitation periods at issue." Decision at 7. Only by picking those parts of California and New York law that were least favorable to the Trustee did the Court reach the anomalous result that the complaint was untimely, even though it would have been timely in a New York court applying New York law or in a California court applying California law.

ARGUMENT

The Decision's sharp departure from this Court's borrowing statute jurisprudence is evident from the reaction of Defendants (and their sophisticated counsel) in the multi-billion dollar RMBS actions pending in Supreme Court. Before the Decision, only Defendants in these specific Actions sought dismissal based on the borrowing statute; after the Decision, defendants in other RMBS actions have raced to assert the borrowing statute as grounds for dismissal (*infra* at Part I, below). The defendants' about-face is no surprise: the Decision obscures the issue of where a

representative capacity claim accrues under the borrowing statute (Part II, below), and does so in a way that defies this Court's precedents relating to the borrowing statute in general and RMBS warranty claims in particular (Parts III and IV, below). Specifically, this Court's past precedents holding that in cases of purely economic injury, the place of accrual is the place where the injury is felt, and that express warranties are breached when made to the injury of a New York trust, cannot be squared with the Decision. *Global Financial Corp.*, 93 N.Y.2d at 529; *ACE III*, 25 N.Y.3d at 598.

Review by this Court is warranted to restore the parties' unsettled expectations and provide stability in this area of law.

I. THE FIRST OF THE ISSUES PRESENTED HERE IS OF SUBSTANTIAL AND IMMEDIATE CONSEQUENCE FOR RMBS AND OTHER LITIGATION.

The First Department's ruling that CPLR 202 required a New York court to apply California's statute of limitations to the Actions even though the Trusts were organized under New York law upends settled expectations and creates significant uncertainty for parties to RMBS litigation, for trustees pursuing trust claims in a representative capacity, and for investors in New York trusts generally. This is precisely the sort of issue of significant "public importance" that merits review by the Court of Appeals. 22 NYCRR § 500.22(b)(4).

Until the First Department issued the Decision, parties to RMBS transactions widely understood that the New York statute of limitations applied to disputes arising from the underlying transactions, which had created New York trusts subject to New York choice-of-law provisions. The interplay between New York choice-of law provisions and CPLR 202 is a question currently before this Court, which recently heard oral argument in *2138747 Ontario Inc. v. Samsung C&T Corp.*, Index No. 653270/2014 (N.Y. Ct. App. argued Apr. 24, 2018) ("*Ontario*"). That case calls into question the applicability of CLPR 202 in cases where the choice-of-law provision(s) in the applicable agreement(s) evidence an intent by the parties to adopt the entirety of New York law to govern their rights and remedies. *See generally* Brief for Appellant, *2138747 Ontario*, No. 653270/2014.[12]

Based on the understanding that the New York statute of limitations applies, plaintiffs have typically filed RMBS repurchase actions on or shortly before the six-year anniversary of the applicable closing dates. The plaintiffs in the RMBS cases

[12] Because its decision in *Ontario* may be applicable to this case, the Court should consider holding its decision on this motion for leave to appeal in abeyance until it issues its decision in *Ontario*. Specifically, the choice of law clauses in the NC1 and BR1 PSAs both state that the "obligations, rights and *remedies* of the parties hereto and the certificateholders shall be determined in accordance with" the "substantive laws of the State of New York." BR1 R.174 (BR1 PSA § 10.03) (emphasis added); NC1 R.172 (PSA § 12.03). By stating that New York law governs all *remedies* under the PSA, the choice-of-law clause incorporates New York's limitations period. As the New York Court of Appeals has observed, statutes of limitations are "viewed as pertaining to the *remedy* rather than the right." *Tanges v. Heidelberg N. Am.*, 93 N.Y.2d 48, 54-55 (1999) (citation omitted) (emphasis added).

currently pending in New York state courts — each sophisticated parties bringing suit on behalf of New York trusts subject to New York choice of law provisions and each represented by experienced attorneys — filed lawsuits in 2012 or 2013 regarding securitizations that closed in 2006-2007, evidencing their belief that those suits were timely under New York's six-year statute of limitations.[13] Indeed, out of 42 RMBS actions, 29 were brought close to the six-year anniversary of the closing date, 12 were filed after the six-year anniversary, and only one was filed well before the anniversary. Hennes Memo. Aff. Ex. 1.

Likewise, numerous sophisticated defendants, each similarly represented by experienced attorneys, typically did not seek dismissal on statute of limitations grounds before the Decision was issued. The fact that defendants declined to seek dismissal on these grounds strongly suggests that they believed statute of limitations defenses to be without merit.[14] In several other cases, the defendants did not even plead a statute of limitations defense in their answers.[15] The IAS Court Order

---

[13] The chart attached as Exhibit 1 to the Affirmation of David B. Hennes dated May 25, 2018 which accompanies the Memorandum ("Hennes Memo. Aff.") provides columns with the "Closing Date" and "Summons with Notice Date" for repurchase actions brought by RMBS trustees.

[14] For example, Barclays decided not to move to dismiss on foreign statute of limitations grounds in two other cases brought by DBNTC in early 2014, months before the IAS Court's order denying the motions to dismiss in the instant cases, issued on November 25, 2015. *See* BR1 R.8; Defs.' Mot. Dismiss, *SABR 2007-BR2-5*, No. 651789/2013 (N.Y. Sup. Ct., N.Y. Cty. Feb. 7, 2014) [Dkt. 34]; Defs.' Mot. Dismiss, *EQLS 2007-1*, No. 651957/2013 (N.Y. Sup. Ct., N.Y. Cty. Jan.10, 2014) [Dkt. 22].

[15] *See e.g.*, Answer, *Deutsche Bank Nat'l Tr. Co., solely in its capacity as Trustee of the Morgan Stanley ABS Capital I Inc. Tr., Series 2007-NC4 v. Morgan Stanley Mortg. Capital Holdings LLC*,

rejecting the defense below confirmed that understanding for all such cases pending in the IAS Court, which oversees the vast majority of RMBS cases in New York state court. *See* BR1 R.13 n.2, 14. As the IAS Court noted, no other defendant in any of the "nearly 40 currently pending RMBS breach of contract actions" on the docket of the IAS Court had sought dismissal "based on the out-of-state residence of the trustees" despite the fact that "many involve out-of-state trustees." BR1 R.13 n.2.

The First Department's ruling has now upset the parties' settled expectations in a large number of cases, at odds with CPLR 202's purpose "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*, 91 N.Y.2d 180, 187 (1997). Every single one of those cases claimed damages of hundreds of millions of dollars; the cases collectively claim many *billions* of dollars in damages. Defendants in numerous other RMBS cases have sought a stay of proceedings in order to assert a defense based on the statute of limitations of a foreign state (where the trustees purportedly have connections), and have now informed the IAS Court that they intend to submit

---

No. 652877/2014 (Sup. Ct. N.Y. Cnty. Jan. 22, 2016) (Dkt. 81); Answer, *HSBC Bank USA, Nat'l Ass'n, in its capacity as Trustee of Nomura Home Equity Loan, Inc., Asset Backed Certificates, Series 2007-2 v. Nomura Credit & Capital, Inc.*, No. 650337/2013 (Sup. Ct. N.Y. Cnty. Aug. 27, 2014) (Dkt. 63); Answer, *Nomura Asset Acceptance Corp., Mortg. Pass-Through Certificates, Series 2006-AF2 Trust, by HSBC Bank USA, Nat'l Ass'n, as Trustee v. Nomura Credit & Capital, Inc.*, No. 652614/2012 (Sup. Ct. N.Y. Cnty. Aug. 27, 2014) (Dkt. 73).

dispositive motions on such grounds promptly upon resolution of this Motion or the subsequent appeal — even though none of those defendants had originally sought dismissal on that basis.[16] The IAS Court, faced with the ongoing issue of balancing coordinated discovery schedules with the multiple current and/or pending stays in light of the Decision, on May 24, 2018 (days before service of this Motion), held a conference with all of the parties to the RMBS cases before it, which was attended by at least 56 lawyers with an interest in the outcome of this case. Defendants in three of those cases sought leave to amend their answers to now assert a statute of limitations defense based on CPLR 202, and numerous other defendants sought a stay of all proceedings until these appellate proceedings have concluded (predicated on their intent to assert the defense should this Court decline to grant this Motion). Resolution of this uncertainty, in an area where dozens of pending cases allege billions of dollars of damages, is of utmost public importance.[17]

---

[16] To date, Defendants have sought indefinite stays of discovery in 12 cases. *See* Hennes Memo. Aff. Ex. 2 (Letter from Michael S. Schuster and Brian S. Weinstein to Justice Friedman regarding *In re: Part 60 RMBS Put-Back Litig.*, No. 777000/2015 (N.Y. Sup. Ct., N.Y. Cty. May 11, 2018) [Dkt. Nos. 513, 514, 515, 516]). Defendants in those cases assert that they are entitled to immediate dismissal of plaintiffs' representation and warranty claims unless this Court reverses the Decision. *Id.* at Dkt. No. 515, pp. 1-2.

[17] *See also* Michael Hanin & Uri Itkin, *Applying N.Y.'s Borrowing Statute to Asset-Backed Securities Claims After "Deutsche Bank"*, N.Y.L.J. (Mar. 9, 2018) (identifying several "substantial questions" that remain as a result of the Decision "regarding the application of the borrowing statute to asset-backed securities claims").

To be sure, there are factual distinctions among the trusts in those cases, including those for which DBNTC serves as trustee. But those distinctions do not undermine the widespread impact of the Decision, particularly since defendants seek to paint all cases with (purportedly) out of state trustees with the same brush, nor do they obviate the need for a clear, uniform standard for the IAS Court to apply to determine where a cause of action brought by an out-of-state trustee accrued in evaluating the forthcoming dispositive motions.[18] Guidance from this Court is particularly important in light of the First Department's failure to "decide whether the plaintiff-residence rule or the multi-factor test applies in this context." Decision at 3-4. Currently, under the Decision, it is not possible to conclude that *any* fact or set of facts is dispositive to that determination. Defendants are free to argue that factors like the locations of originators, mortgage notes, subject properties, and hypothetical tax payments weigh in an accrual analysis, wherever the representative-plaintiff may reside.[19] Guidance from this Court regarding how to determine where

[18] Defenses may also have been waived in some of the cases, an issue which is sure to generate voluminous briefing to the IAS Court. *See* Hennes Memo. Aff. Ex. 2 at Dkt. No. 514 p. 1.

[19] For example, defendants in the Part 60 RMBS cases argue that multiple cases brought by HSBC (as trustee) are time-barred under Delaware or California's statute of limitations, *see* Hennes Memo. Aff. Ex. 2 at Exhibit C, despite the fact HSBC is a resident of New York. *See* NC1 R.863-64; Br. 15..

Investments, S.A., 20 N.Y.3d 310, 314-16 (2012) (citing General Obligations Law § 5-1401(1), which "[t]he Legislature passed . . . in 1984 in order to allow parties without New York contacts to choose New York law to govern their contracts."). For this reason, contracting parties overwhelmingly select New York law to govern their agreements, more than any other jurisdiction in the United States. *See* Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 Cardozo L. Rev. 1475, 1490 (2009) (finding that 46% of commercial parties in the U.S. choose New York law to govern their contracts).

That choice is even more pronounced in the bond market, where New York law was selected for a total of 22,275 bonds issued globally from 2015 to 2017. Bloomberg L.P., Fixed Income search of Asset Classes: Corporates, Governments, Municipals, Certificates; All Securities, Bloomberg Terminal (accessed May 22, 2018). And the number of bond issuances choosing New York law increased each year during that period, with 6,123 bonds issued in 2015, 6,237 bonds issued in 2016, and 9,915 bonds issued in 2017. *Id.*

Virtually all such bond issuances have indenture trustees, who serve — largely ministerial — functions similar to those that DBNTC serves here. The idea that bondholders, who expect that New York law governs their rights, are left with an array of uncertain and diverse factors that govern when such a trustee can access

the New York courts to protect those rights, is anathema to New York's bedrock commercial principles.

As the sheer volume of bond issuances selecting New York law demonstrates, the public import of the Decision extends beyond the RMBS context, to representative claims generally. Prior to the Decision, multiple federal cases interpreting CPLR 202 held that when a plaintiff sued in a representative capacity on behalf of the entity that actually incurred the injury, the representative's location was irrelevant for purposes of CPLR 202 and the place of actual injury controlled. This reasoning was applied in the trust context, in the bankruptcy trustee context, and in the shareholder derivative suit context.[21] The First Department's conclusion that California was the place of injury despite the fact that the injuries at issue were sustained by New York trusts contradicts that well-settled case law, which representative plaintiffs have relied on in the past in asserting claims in New York.

---

[21] *See, e.g., 2002 Lawrence R. Buchalter Alaska Trust v. Phila. Fin. Life Assurance Co.*, 96 F. Supp. 3d 182, 201-02 (S.D.N.Y. 2015) (relying on *Maiden* to hold that place of injury was where Trust suffered the loss); *Appel v. Kidder, Peabody & Co. Inc.*, 628 F. Supp. 153, 156 (S.D.N.Y. 1986) (for purposes of CPLR 202, trustee's residence not dispositive in trust context; place of injury is where "financial harm [was] sustained by the trust"); *In re Adelphia Commc'ns Corp.*, 365 B.R. 24, 58 n.137 (Bankr. S.D.N.Y. 2007) (for purposes of CPLR 202, residence of the bankruptcy trustee is irrelevant when trustee sues as a representative of the estate of a bankrupt corporation; residence of injured corporation applies); *Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman*, 277 B.R. 20, 30 (S.D.N.Y. 2002) (same); *Brinckerhoff v. JAC Holding Corp.*, 692 N.Y.S.2d 381, 382 (1st Dep't 1999) (for purposes of CPLR 202, residence of shareholder suing derivatively irrelevant because the injuries are felt by the corporation, not the shareholder; residence of corporation applies); *Korn v. Merrill*, 403 F. Supp. 377, 383-86 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 310 (2d Cir. 1976) (same).

Further, investors in trusts organized under New York law, under agreements providing that the rights and remedies attached to the assets of the trust would be governed by New York law, have relied on this case law to assess the risk of their investments. The Decision can only increase uncertainty and risk, discouraging investors from establishing, or investing in, trusts in this State. This result frustrates the purpose of New York General Business Obligation Law Section 5-1401, which encourages sophisticated commercial parties to select New York law to govern their agreements. *See Ministers & Missionaries Ben. Bd. v. Snow*, 26 N.Y.3d 466, 468 (2015); *IRBBrasil Resseguros, S.A.*, 20 N.Y.3d at 314-15 (2012).

Given the Decision's lack of clarity on the application of CPLR 202 in the representative plaintiff-trustee context, as well as its contravention of well-settled New York law concerning representative plaintiffs and its frustration of New York General Business Obligation Law Section 5-1401, an authoritative ruling from the Court of Appeals would clarify New York law on this issue and enable representative plaintiffs, including out-of-state trustees of New York trusts to more accurately assess their ability to commence and maintain suit in New York.

II. THIS COURT HAS NOT DIRECTLY ADDRESSED THE NOVEL QUESTION OF HOW TO DETERMINE THE PLACE OF ACCRUAL UNDER CPLR 202 IN THE REPRESENTATIVE TRUSTEE CONTEXT

A. The Question Of How To Evaluate The "Place of Injury" In The Representative Plaintiff Context Is Unsettled Under New York Law

Remarkably, no New York appellate court prior to the Decision appears to have directly addressed where a cause of action accrues for purposes of CPLR 202 when the claim is brought by a nonresident representative plaintiff. CPLR 202 reads as follows:

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

CPLR 202.

In *Global Financial*, this Court held that "a cause of action accrues at the time and in the place of the injury," and where the "injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss." 93 N.Y.2d at 529. But unlike the Actions here, *Global Financial* involved a plaintiff that was the injured party, as opposed to a representative plaintiff like the Trustee. *Global Financial* therefore did not address how to apply the "place of the

injury" standard to the context of trustees suing in their representative capacity on behalf of trusts and/or beneficiaries, who suffer the actual "injury."

In contrast, the decision in *Maiden v. Biehl* — a trustee's suit for fraud related to ongoing investment decisions that occurred after the subject trust was established — recognized that the "residence" test does not make sense in a case brought by a representative plaintiff on behalf of beneficiaries, and instead employed a multi-factor test to determine the trust's place of injury. *See* 582 F. Supp. at 1218. But this Court has not had the opportunity to decide the question, which the First Department also sidestepped, of "whether the plaintiff-residence rule or the multi-factor test [in *Maiden*] applies" to the Trustee's claims here. Decision at 3-4. Given the absence of controlling authority on this question, this Court should resolve it.

Assuming that a *Maiden*-type analysis should apply in the representative trustee context, the question of *which Maiden*-type factors should be considered in determining the place of injury is also novel. The factors considered in the *Maiden* decision — (1) where the trust was created, (2) which state's law governs the trust, (3) where the trust's securities are physically kept, (4) where the trust's investment decisions are made, and (5) where the trust's taxes are paid — were specifically relevant to the small investment trust and the fraud claims at issue in that case. *See* 582 F. Supp. at 1217-18. Here, in contrast, the Trusts are large, pass-through RMBS trusts suing for breaches of representations and warranties. Thus, some of the factors

considered in *Maiden* are irrelevant in these Actions, as the IAS Court observed. BR1 R.13-14; *see also infra* Part III. The First Department also cited factors that were not considered in *Maiden*, such as the location of the originators and properties encumbered by the Mortgage Loans. Decision at 4.

Thus, while *Maiden* correctly holds that CPLR 202, as applied to representative claims that did not accrue in favor of a New York resident, requires a court to determine where the actual injury giving rise to the claims occurred, the lack of Court of Appeals precedent on this subject leaves open the question of how courts are to determine the place of injury with respect to different types of trusts with distinct characteristics, like an RMBS trust. This Court should therefore clarify which factors should apply in determining where an RMBS trust suffered its injury.

B. The Trustee Brought These Claims Not For Its Own Benefit, But In Its Representative Capacity On Behalf Of The Trusts

Defendants argued below that this case presents no occasion to address CPLR 202's application to plaintiffs suing in a "representative capacity" because the Trustee is not acting in such a capacity here. BR1 Reply 7-11; NC1 Reply 8-14. But the fact that the Trustee may be a "real party in interest" for purposes of establishing diversity jurisdiction in federal court has nothing to do with the issue of where a cause of action accrues within the meaning of CPLR 202, which depends upon who was harmed and where. *See Maiden*, 582 F. Supp. at 1217-18.

Under New York law, the real party in interest is not necessarily the party whose injury gives rise to the suit, but rather "the party who, by substantive law, possesses the right to be enforced." 82 N.Y. Jur. 2d Parties § 34. Here, the Trustee brings these lawsuits not on its own behalf, but in a representative capacity to redress economic injury sustained by investors in the Trusts – the Certificateholders.[22] BR1 R.72;77; NC1 R.876, 879.

III. THE DECISION CONFLICTS WITH GLOBAL FINANCIAL AND ACE III BECAUSE THE TESTS IT EMPLOYS ARE UNRELATED TO WHERE AND WHEN THE TRUSTS WERE INJURED

The Decision also merits review by this Court because it conflicts with *Global Financial* and *ACE III.*

First, the Decision's use of a plaintiff-residence rule to establish the place of injury in the representative plaintiff context misapprehends *Global Financial.* In *Global Financial*, the Court held that a claim accrues, without exception, at the place of injury. *See* 93 N.Y.2d at 529. As the First Department recently stated, it is appropriate under CPLR 202 to "consider all *relevant* factors in determining the situs

[22] Pursuant to the terms of the PSA, the Trustee is appointed only to act "on behalf of the Trust," but holds no economic interest in the Trust's assets. BR1 R.121 (PSA §2.01(d)); NC1 R.96 (NC1 PSA § 2.01(d); 92 (NC1 PSA Article I). Defendants' argument below that the Trustee brings suit "in [its] own right as the legal owner of the property," NC1 Reply 9, is therefore wrong. The Trustee holds nothing more than "bare legal title" to the Mortgage Loans without any economic interest or the benefits of actual ownership. *See* Restatement (Third) of Trusts § 42, cmt. a (Am. Law Inst. 2003) (noting that as the holder of a non-beneficial interest in the trust property, the trustee ordinarily "holds 'bare' legal title to the property"); *see also, e.g*, *Korn*, 403 F. Supp. at 383-86 ((shareholder's residence irrelevant to CPLR 202 analysis in derivative action on behalf of corporation); *In re Adelphia*, 365 B.R. at 58 n.137 (residency of corporation applies when bankruptcy trustee sues as representative of estate of bankrupt corporation).

of the loss." *Loreley Fin. (Jersey) No. 28, Ltd. v. Merrill Lynch*, 985 N.Y.S.2d 499, 501 (1st Dep't 2014) (emphasis added). But the First Department did not follow its own guidance here.

The decision in *Global Financial* held that "the place of injury *usually* is where the plaintiff resides and sustains the economic impact of the loss." 93 N.Y.2d at 529 (emphasis added); *compare* Decision at 3 (stating that the general rule that the Court of Appeals set forth in *Global Financial* is that "where (as here) the alleged injury is purely economic, a cause of action is deemed . . . to have accrued in the jurisdiction of the plaintiff's residence."). *Global Financial* did not state, as the Decision suggests, that the plaintiff's residence *always* controls. Indeed, the Court's direction in *Global Financial* is that claims accrue under the borrowing statute where the *injury* occurred such that the plaintiff's residence is relevant only when (as is typical in the non-representative context) it is the plaintiff that suffered the injury giving rise to suit. 93 N.Y.2d at 529.

The Decision's holding tying the place of accrual to the residence of a representative plaintiff conflicts with this instruction from *Global Financial*. In general, there is no reason to suspect a representative plaintiff's residence will be informative of where the injury in suit occurred. Here, the injury is that the Representations and Warranties were false, increasing the risk of loss on the Mortgage Loans and the Certificates. That injury did not fall to the Trustee – the

Trustee did not become richer or poorer on the Closing Dates. Instead, as the IAS Court observed, it fell to the Trusts, which received Mortgage Loans riskier than advertised and issued Certificates to the New York Depositors that were impaired in value as a result. *See NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 166 (2d Cir. 2012) ("[T]he revelation that borrowers on loans backing the Certificates were less creditworthy than the Offering Documents represented affected the Certificates' 'value' immediately, because it increased the Certificates' credit risk profile."). Thus, it is the Defendants' Representations and Warranties, and their impact on the value of Certificateholders' investments that matters for purposes of assessing the claimed injury here under *Global Financial's* guidance regarding the application of CPLR 202.

Second, the Decision's application of the *Maiden* test conflicts with this Court's guidance in *ACE III*, which held that RMBS warranty claims accrue the moment the warranties are made and breached. 25 N.Y.3d at 597-98. The purpose of applying the multi-factor *Maiden* analysis is to determine where the "injury is felt." As the decision in *Maiden* recognizes, the plaintiff "residence" test does not make sense in a case brought by a representative plaintiff on behalf of trust beneficiaries, as it sheds no light on the question of "who became poorer, and where did they become poorer, as a result" of the defendant's actions. *See* 582 F. Supp. at

1218. Rather, a multi-factor test, as articulated in *Maiden*, should be employed in that circumstance.

The First Department should have geared any *Maiden* analysis to determining the location of the injury giving rise to the claims here. Yet despite *ACE III*'s guidance, the First Department declined to weigh in its *Maiden* analysis undisputed facts relevant to determining the situs of the loss. As discussed above, the Trusts are both New York trusts governed by New York law. The Certificates were located in New York at the time of injury. *See supra* n.7. This relevant injury was felt in New York. The IAS Court properly held that, at a minimum, both HSBC and Barclays failed to meet their burden to establish that the Trustee's claims accrued in California. BR1 R.14. Under *Global Financial* – and other well-settled New York case law regarding representative plaintiffs – the First Department should have affirmed that holding. *See supra* n.7.

Without adopting any test and in purporting to apply *Maiden*, the First Department relied on the following factors: (i) California lenders originated the Mortgage Loans; (ii) the Mortgage Loans encumber California properties, "exclusively" in BR1 and "predominantly" in NC1 (a finding that is factually incorrect);[23] (iii) the Trusts are administered in California; (iv) the PSAs

[23] The First Department's statement that the Mortgage Loans were "exclusively (in the Barclays case) or predominantly (in the HSBC case)" California properties was indisputably incorrect. In

contemplate the payment of state taxes in California; and (v) the PSAs contemplate that the mortgage notes may be maintained in California after the Closing Dates. Decision at 4-5. But, as the IAS Court observed, and as a simple review of the factors makes clear, these factors "lack apparent relevance in the RMBS context [and] do not, in any event, point to California[.]" BR1 R.12-14.

Specifically, neither pre-securitization factors (such as the location of the loan originator) nor post-securitization factors (such as where the Trusts were to be administered, or the notes *might* be maintained) can be relevant to the place of injury, and are at odds with this Court's holding in *ACE III* that a claim for breach of representation and warranty accrues at the moment the governing documents are executed. *See* 25 N.Y.3d at 597-98; *see also Schultz v. Boy Scouts, Inc.*, 65 N.Y.2d 189, 195 (1985) ("[T]he place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred.").

Likewise, the location of the Mortgage Loan originators, the location of the Mortgage Notes, and the location of the properties encumbered by the Mortgage Loans have no bearing on the place of injury. Those factors are unmoored from the RMBS transaction at issue and the injuries suffered as a result of the breaches of Representations and Warranties at the moment of securitization. Similarly, the place

---

fact, the prospectus supplements reflect that approximately 79% of the Mortgage Loans in BR1, and approximately 77% in NC1, are secured by properties in states other than California. BR1 R. 350, 443; NC1 R.179, 534.

of trust administration was not the place of injury. The Trusts' composition was determined when Defendants and their affiliates created and funded the Trusts and selected the Mortgage Loans at the time of securitization. Accordingly, "[e]ven assuming that the trusts are administered from the California offices of the trustee[]," the IAS Court noted, "RMBS trustees do not make major investment decisions, as the loans underlying the trusts are selected and pooled by the sponsors and/or depositors before the trusts are established." BR1 R.13; NC1 R.12. The only relevant investment decisions were made before closing by Defendants and their affiliates in New York. BR1 R.55-56; 119-21 (BR1 PSA §2.01); NC1 R.93 (NC1 PSA §2.01), 863-64.

Finally, the fact that the PSAs contemplated a hypothetical possibility of state taxes being assessed in California is of no significance. The taxes (which by their nature are *de minimis*) would only arise if the "pass through" nature of the Trusts were not recognized for federal tax purposes, which was not the case. In fact, each Trustee, on behalf of its Trust, holds bare legal title, while beneficial ownership of each Trust's income producing assets is owned by the investors in the Trust. It is, accordingly, the investors who receive proceeds from the Trust's assets, as outlined in the PSAs. BR1 R.55, 164, 328-35; NC1 R.138, 291, 307-11, 863. The Trusts therefore have not owed or been obligated to pay any of the above mentioned taxes, at any time. Decision at 5 n.3; BR1 R.55; NC1 R.863. The provision cited by the

First Department exists only as a failsafe if the pass-through is not valid and, since it is valid, the provision demonstrates, if anything, California is ***not*** the place of injury.

Compounding this confusion, the First Department failed to consider certain factors that are particularly instructive in the RMBS context such as: (i) the fact that the Trusts were organized under, and the parties' rights governed by, New York law; (ii) the fact that the Trust Certificates were located in New York; (iii) the fact that Defendants made the investment in New York; and (iv) the sequence of events that led to the transfer of the Representations and Warranties to the Trusts, including the assignment of the Representations and Warranties from the New York Depositors to the Trusts, took place in New York. Decision 4 n.2, 5 n.4; BACKGROUND FACTS AND PROCEDURAL HISTORY, *supra*. Whether or not the New York choice-of-law clauses in the relevant agreements may be read to encompass the New York statute of limitations, the fact that the Trusts are New York entities and that PSAs mandate that New York law governs the Certificateholders' rights and remedies militates strongly in favor of a finding that all of the parties to the PSAs intended, and the investors in the Trusts understood, that the Trusts would be "located" in New York.[24]

[24] Moreover, there is a further open question, pending this Court's resolution of the *Ontario* case, of whether the PSAs' broad choice of law provisions include the selection of New York's limitations period. *See supra* at n. 11; *see also, generally* Brief for Appellant, *2138747 Ontario*, No. 653270/2014.

See Decision at 4; NC1 Answering at 37-38 (arguing that the IAS Court appropriately considered that the trusts were established under and governed by New York law); BR1 Answering 37-38 (same).

Further, it is not the location of the Mortgage Loans or the properties underlying the Mortgage Loans, but the location of the Certificates, that is relevant to the question of "who became poorer, and where did they become poorer" under CPLR 202. *See Maiden*, 582 F. Supp. at 1218. The Certificates — the instruments through which Certificateholders (the beneficial owners of the Trust) receive allocations of principal and interest[25] — lost value due to Defendants' breaches of Representations and Warranties, and that injury gave rise to these actions. *See Martin v. Julius Dierck Equip. Co.*, 43 N.Y.2d 583, 591 (1978) (accrual is determined by the place of injury). And, critically, the Certificates were held in New York at the time of securitization.[26]

Additionally, all major investment decisions — specifically, the selection of the Mortgage Loans and structuring of the transaction — were made by the Defendants, and their affiliated Sponsors and Depositors, in New York prior to

---

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

[26] Barclays and Cede & Co., entities located in New York, held the BR1 Certificates as of the BR1 closing date. BR1 R.59. Cede & Co. and HSBC Securities (USA) Inc., entities located in New York, held the NC1 certificates as of the NC1 closing date. NC1 R.866.

securitization. Under the Trusts' governing documents, these decisions could not be altered post-closing by the Trustee. BR1 R.55-57; 119-21 (BR1 PSA §2.01); NC1 R.93-96 (NC1 PSA §2.01), 863-64. That factor has far more relevance in deciding where the injury occurred than the subsequent place (or places) of trust administration. *See Maiden*, 582 F. Supp. at 1218 (looking to "where [the trust's] investment decisions [were] made"); *see also* BR1 R.13 (Friedman, J.) ("Even assuming that the trusts are administered from the California offices of the trustee[], RMBS trustees do not make major investment decisions, as the loans underlying the trusts are selected and pooled by the sponsors and/or depositors *before the trusts are established.*") (emphasis added); NC1 R.12.

Court of Appeals review of such matters is particularly important where the inclusion or exclusion of certain factors will have predictable and systematic effects on the outcome. The location of the trust's certificates and investment decisions will often be salient factors in determining the place of injury in RMBS repurchase actions. The Decision's ruling that courts must exclude those factors from consideration will thus have a systematic effect on the borrowing statute analysis in other RMBS repurchase actions. That reality underscores the broader importance of the question presented for other cases and the need for Court of Appeals review.

By relying on factors that are irrelevant to where the Trusts sustained their injuries, the Decision conflicts with both *Global Financial* and *ACE III*, warranting leave to appeal.

IV. THE FIRST DEPARTMENT'S SELECTIVE APPLICATION OF CALIFORNIA LAW IS CONTRARY TO THE LANGUAGE OF CPLR 202 AND TO THIS COURT'S PRECEDENT

The Appellate Division's CPLR 202 analysis with respect to the timeliness of the Trustee's claim under California's statute of limitations also conflicts with well-settled New York law. Under CPLR 202, quoted in full at page 26 above, a cause of action "accruing without the state" is time-barred if brought "after the expiration of the time limited by the laws of . . . the place without the state where the cause of action accrued." The "primary purpose" of CPLR 202 "is to prevent forum shopping by a nonresident seeking to take advantage of a more favorable Statute of Limitations in New York[.]" *Antone v. Gen. Motors Corp., Buick Motor Div.*, 64 N.Y.2d 20, 27-28 (1984).

To effect this purpose, CPLR 202 should be interpreted to mean that an action, if timely in New York, is barred if, but only if, it would have been barred in the foreign state. That interpretation eliminates any incentive to shop for a shorter statute of limitations. The words "the time limited by the laws of" a foreign state should therefore be read to mean "the time within which the laws of the foreign state

would permit the bringing of the action." This is a straightforward reading of CPLR 202, and one supported by this Court's precedent.

Once it determined that the Trustee's claims accrued in California, the First Department was required — by well-settled principles of New York law — to apply not only California's statute of limitations, but also California's related law with regard to the time the claims accrued and the applicability of any tolling provisions. Instead, the First Department applied the California statute of limitations to the Trustee's claims, but then improperly applied New York law in holding that the Repurchase Protocols and Accrual Provision "are not conditions precedent to suit for a preexisting breach." Decision at 6 (citing *ACE III*, 25 N.Y.3d at 597). Such mixing and matching of two states' laws is inconsistent with the text of CPLR 202. Nothing in CPLR 202 suggests that a complaint should be deemed time-barred by operation of that provision when it would have been timely if brought in New York courts under New York law or brought in a foreign jurisdiction's courts under the laws of that jurisdiction.

In *Smith Barney, Harris Upham & Co., Inc. v. Luckie* this Court held: "In borrowing the foreign statute, "[a]ll the extensions and tolls applied in the foreign state must be imported with the foreign statutory period, so that the *entire* foreign statute of limitations . . . applie[s], and not merely its period." 85 N.Y.2d at 207 (internal quotation marks and citation omitted) (emphasis in original); *see also*

Ledwith v. Sears Roebuck & Co., 660 N.Y.S.2d 402, 406 (1st Dep't 1997) (New York courts applying CPLR 202 must "embrace[] all the laws" of the state "that serve to limit the time within which an action may be brought."). Once a determination was made that the Trustee's claims accrued in California, the First Department was required to apply not only California's statute of limitations, but also California's attendant laws to the extent necessary to determine application of that State's limitations laws such as, among other things, the time the claims accrued, the applicability of any tolling provisions, and the applicability of any statutes of repose, despite the choice-of-law provision in the contract. *See Smith Barney*, 85 N.Y.2d at 207.

The First Department here, however, having decided (incorrectly) that the cause of action accrued in California, applied only parts of California law in deciding the timeliness of these Actions. This approach produced a bizarre result: the Actions, which would have been timely if filed on the same day in either California or New York (because, as discussed below, the California courts would have given effect to both Trusts' repurchase protocols and the BR1 Accrual clause) were held to be barred in New York by CPLR 202. This outcome is inconsistent with the statute's text and purpose and with this Court's rulings in *Antone* and *Smith Barney*. The error will cause similar indefensible results in many cases. This Court should grant leave to consider whether the First Department's "mix-and-match" approach,

combining California and New York law, is based on a mistaken interpretation of CPLR 202.

California courts routinely enforce accrual clauses under California law, deferring the running of the four-year statute of limitations for up to four years. "In general, California courts have permitted contracting parties to modify the length of the otherwise applicable California statute of limitations, whether the contract has extended or shortened the limitations period." *Hambrecht & Quist Venture Partners v. Am. Med. Int'l, Inc.*, 46 Cal. Rptr. 2d 33, 42 (Cal. Ct. App. 1995). Indeed, Section 360.5 of the California Code of Civil Procedure "specifically allows statutes of limitations [defenses] . . . to be waived by written agreement" before a claim accrues — just one example where "the California Legislature itself has expressly recognized that statutory limitations periods are not imbued with any element of nonwaivable 'public policy.'" *See Brisbane Lodging, L.P. v. Webcor Builders, Inc. et al.*, 157 Cal. Rptr. 3d 467, 475 (Cal. Ct. App. 2013); *see also Cal. First Bank v. Braden*, 264 Cal. Rptr. 820, 821, 823 (Cal. Ct. App. 1989) (enforcing provision extending four-year statute of limitations period for breach of contract claim). It is also well-settled under California law that the statute of limitations does not begin to run until any contractually required demand is made and refused. *See, e.g., Leonard v. Rose*, 65 Cal. 2d 589, 592-93 (Cal. 1967); *Mansouri v. Superior Court*,

104 Cal. Rptr. 3d 824, 831 (Cal. Ct. App. 2010); *Kaplan v. Reid Bros.*, 104 Cal. App. 268, 272 (Cal. Dist. Ct. App. 1930).

The First Department ignored those decisions. While it cited three other cases from California in its timeliness analysis, the First Department improperly did not address whether this case would be timely if filed in a California court. Decision at 5-6. Instead, the First Department applied New York law as part of its analysis in concluding that the demand requirement was not a condition precedent and that the Accrual Provision in the BR1 BRA did not govern the date on which the statute of limitations began to run. Decision 6-7. The result was a confusing hybrid of New York and California law. Applying purely California law, the Trustee's claims would have been timely had they been filed in California, and therefore the First Department should have found them timely under CPLR 202. Instead, the court paradoxically held that a case that was filed within the New York limitations period, and which would have been timely if originally filed in California, is untimely in both jurisdictions.[27]

---

[27] The First Department recently invalidated an accrual clause virtually identical to the Accrual Provision in BR1, finding that it would extend the statute of limitations in violation of New York public policy. *See Deutsche Bank Nat'l Tr. Co. v. Flagstar Capital Mkts. Corp.*, 36 N.Y.S.3d 135, 139-40 (1st Dep't 2016). This Court now has *Flagstar* before it, and if the Court reverses the First Department's decision in *Flagstar* that may well dictate reversal in this case as well. *See Deutsche Bank Nat'l Tr. Co. v. Flagstar Capital Mkts. Corp.*, 2016 N.Y. Slip Op 96056(U), 2016 WL 8139010 (1st Dep't 2016) (granting leave to appeal to the Court of Appeals), *appeal docketed*, APL-2016-00237. Indeed, this Court and the First Department have already granted leave to appeal RMBS accrual issues in at least four cases, recognizing the need for clear statements of law

In short, the First Department has misread the law and reached an unjust and illogical result, which conflicts with well-settled precedent establishing that California law must control the application of California's statute of limitations under CPLR 202, conflicts with other holdings by the First Department currently before this Court, and implicates the same questions of public policy raised by *Ontario*. If its error is not corrected, it will be replicated in many future cases at great economic consequence. CPLR 202 is an important statute that courts often confront: a Westlaw search for cases citing CPLR 202 yields thousands of results. This Court should grant the Trustee leave to appeal the Decision leave to ensure that the statute is not again misinterpreted.

---

in this area. *See U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 29 N.Y.3d 910, 2017 N.Y. Slip Op. 76048 (2017); *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 29 N.Y.3d 1027, 2017 N.Y. Slip Op. 76049 (2017); *U.S. Bank Nat'l Ass'n v. GreenPoint Mortgage Funding, Inc.*, 2017 N.Y. Slip Op 70556(U), 2017 WL 1360296 (1st Dep't 2017); *Deutsche Bank Nat'l Tr. Co. v. Flagstar Capital Mkts. Corp.*, 2016 N.Y. Slip Op 96056(U), 2016 WL 8139010 (1st Dep't 2016).

CONCLUSION

For the foregoing reasons, Deutsche Bank National Trust Company solely in its capacity as Trustee for the Trusts, requests that this Court grant the Motion and grant the Trustee leave to appeal the Decision.

Dated: New York, New York
May 29, 2018

ROPES & GRAY LLP

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

FRIEDMAN KAPLAN SEILER & ADELMAN LLP

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

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

STATE OF NEW YORK COURT OF APPEALS

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

Plaintiff-respondent,

–against–

BARCLAYS BANK PLC,

Defendant-appellant.

Index No. 651338/13

AFFIRMATION OF DAVID B. HENNES

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

Plaintiff-respondent,

–against–

HSBC BANK USA, NATIONAL ASSOCIATION,

Defendant-appellant.

Index No. 652001/13

Dated: May 29, 2018
New York, New York

David B. Hennes

EXHIBIT 1

Case Name	Case Number	Closing Date	Summons with Notice Date	Trustee/Rep. Plaintiff	Notes
Part 60 Cases					
Freedom Trust 2011-2, on behalf of ACE Securities Corp. Home Equity Loan Trust, Series 2006-FM1 v. DB Structured Products, Inc.	652985/2012	8/25/2006	8/24/2012	HSBC Bank USA, National Association	N/A
ACE Securities Corp. Home Equity Loan Trust, Series 2007-WM1, by HSBC Bank USA, National Association, as Trustee v. DB Structured Products, Inc.	650312/2013	1/29/2007	1/28/2013	HSBC Bank USA, National Association	N/A
LDIR, LLC on behalf of ACE Securities Corp. Home Equity Loan Trust, Series 2007-ASAP1 v. DB Structured Products, Inc.	650949/2013	3/15/2007	3/15/2013	HSBC Bank USA, National Association	N/A
U.S. Bank National Association, solely in its capacity as Trustee of the CSMC Asset-Backed Trust 2007-NC1 (CSMC 2007-NC1) v. DLJ Mortgage Capital, Inc.	652699/2013	8/31/2007	7/31/2013	U.S. Bank National Association	N/A
HSBC Bank USA, National Association, in its capacity as Trustee of Nomura Home Equity Loan, Inc., Asset Backed Certificates, Series 2007-2 v. Nomura Credit & Capital, Inc.	650337/2013	1/31/2007	1/30/2013	HSBC Bank USA, National Association	N/A
Nomura Asset Acceptance Corporation, Mortgage Pass-Through Certificates, Series 2006-AF2 Trust, by HSBC Bank USA, National Association, as Trustee v. Nomura Credit & Capital, Inc.	652614/2012	7/28/2006	7/27/2012	HSBC Bank USA, National Association	N/A
U.S. Bank National Association, solely in its capacity as Trustee of the J.P. Morgan Alternative Loan Trust 2007-A2 (JPALT 2007-A2) v. GreenPoint Mortgage Funding, Inc.	651954/2013	5/31/2007	5/31/2013	U.S. Bank National Association	N/A

Case Name	Case Number	Closing Date	Summons with Notice Date	Trustee/Rep. Plaintiff	Notes
Nomura Home Equity Loan, Inc., Series 2006-FM2, pursuant to a Pooling and Servicing Agreement, dated as of October 1, 2006, by HSBC Bank, USA, National Association, solely in its capacity as the Trustee v. Nomura Credit & Capital, Inc.	653783/2012	10/31/2006	10/29/2012	HSBC Bank USA, National Association	N/A
Nomura Home Equity Loan, Inc., Series 2007-3, pursuant to a Pooling and Servicing Agreement, dated as of April 1, 2007, by HSBC Bank USA, National Association, solely in its capacity as the Trustee v. Nomura Credit & Capital, Inc.	651124/2013	4/30/2007	3/28/2013	HSBC Bank USA, National Association	N/A
Nomura Asset Acceptance Corporation Alternative Loan Trust, Series 2006-S3, by HSBC Bank USA, National Association, in its capacity as Trustee pursuant to a Pooling and Servicing Agreement, dated as of July 1, 2006 v. Nomura Credit & Capital, Inc.	652619/2012	7/28/2006	7/27/2012	HSBC Bank USA, National Association	N/A
Nomura Asset Acceptance Corporation Alternative Loan Trust, Series 2006-S4, by HSBC Bank USA, National Association, in its capacity as Trustee v. Nomura Credit & Capital, Inc.	653390/2012	9/28/2006	9/27/2012	HSBC Bank USA, National Association	N/A
U.S. Bank National Association, solely in its capacity as Trustee of the Asset Backed Securities Corporation Home Equity Loan Trust, Series AMQ 2006-HE7 (ABSHE 2006-HE7) v. DLJ Mortgage Capital, Inc.	653140/2015	11/30/2006	09/17/2015	U.S. Bank National Association	N/A
U.S. Bank National Association, solely in its capacity as Trustee of the Home Equity Asset Trust 2006-8 (HEAT 2006-8) v. DLJ Mortgage Capital, Inc.	654157/2012	12/1/2006	11/30/2012	U.S. Bank National Association	N/A

Case Name	Case Number	Closing Date	Summons with Notice Date	Trustee/Rep. Plaintiff	Notes
Home Equity Asset Trust 2007-2 (HEAT 2007-2), by U.S. Bank National Association, solely in its capacity as Trustee v. DLJ Mortgage Capital, Inc.	651174/2013	4/2/2007	4/2/2013	U.S. Bank National Association	N/A
ACE Securities Corp., Home Equity Loan Trust, Series 2006-SL2, by HSBC Bank USA, National Association, solely in its capacity as Trustee pursuant to a Pooling and Servicing Agreement, dated as of March 1, 2006 v. DB Structured Products, Inc.	651854/2014	3/28/2006	6/18/2014	HSBC Bank USA, National Association	Case dismissed in August 2016, still on appeal
Federal Housing Finance Agency, as Conservator of the Federal Home Loan Mortgage Corporation, on behalf of the Trustee of the MASTR Adjustable Rate Mortgages Trust 2006-OA1 (MARM 2006-OA1) v. UBS Real Estate Securities Inc.	651282/2012	4/20/2006	4/19/2012	U.S. Bank National Association	Case dismissed in July 2016, still on appeal
Morgan Stanley Mortgage Trust 2007-2AX (MSM 2007-2AX), by U.S. Bank National Association, solely in its capacity as Trustee v. Morgan Stanley Mortgage Capital Holdings LLC	650339/2013	1/31/2007	1/30/2013	U.S. Bank National Association	N/A
Deutsche Bank National Trust Company, solely in its capacity as Trustee of the Equifirst Loan Securitization Trust 2007-1 v. Equifirst Corporation	651957/2013	6/27/2007	5/31/2013	Deutsche Bank National Trust Company	N/A
IXIS Real Estate Capital Trust 2007-HE1, by Computershare Trust Company, National Association, solely in its capacity as Separate Securities Administrator v. Natixis Real Estate Holdings, LLC	652087/2014	1/30/2007	7/8/2014	Computershare Trust Company, National Association (acting as securities administrator)	N/A

Case Name	Case Number	Closing Date	Summons with Notice Date	Trustee/Rep. Plaintiff	Notes
IXIS Real Estate Capital Trust 2006-HE3, by Computershare Trust Company, National Association, solely in its capacity as Separate Securities Administrator v. Natixis Real Estate Holdings, LLC	652088/2014	9/29/2006	7/8/2014	Computershare Trust Company, National Association (acting as securities administrator)	N/A
Federal Housing Finance Agency, as Conservator of the Federal Home Loan Mortgage Corporation, on behalf of the Trustee of the Novastar Mortgage Funding Trust Series 2007-1 (NHEL 2007-1) v. Novation Companies, Inc.	650693/2013	2/28/2007	2/28/2013	Deutsche Bank National Trust Company	N/A
Federal Housing Finance Agency, as Conservator for the Federal Home Loan Mortgage Corporation, on behalf of the Trustee of the HIS Asset Securitization Corporation Trust, Series 2007-HE2 (HASC 2007-HE2) v. HSBC Finance Corporation	651627/2013	5/4/2007	5/3/2013	Deutsche Bank National Trust Company	N/A
Wilmington Trust Company, not in its individual capacity but solely in its capacity as Trustee for Morgan Stanley Mortgage Loan Trust 2007-12 v. Morgan Stanley Mortgage Capital Holdings LLC	652686/2013	7/31/2007	7/31/2013	Wilmington Trust Company	N/A
Federal Housing Finance Agency, as Conservator for the Federal Home Loan Mortgage Corporation, on behalf of the Trustee of the Morgan Stanley ABS Capital I Inc. Trust, Series 2007-NC1 (MSAC 2007-NC1) v. Morgan Stanley ABS Capital I Inc.	650291/2013	1/26/2007	1/25/2013	Deutsche Bank National Trust Company	N/A
Federal Housing Finance Agency, as Conservator for the Federal Home Loan Mortgage Corporation, on behalf of the Trustee of the Morgan Stanley ABS Capital I Inc. Trust, Series 2007-NC3 (MSAC 2007-NC3) v. Morgan Stanley Mortgage Capital Holdings LLC	651959/2013	5/31/2007	5/31/2013	Deutsche Bank National Trust Company	N/A

Case Name	Case Number	Closing Date	Summons with Notice Date	Trustee/Rep. Plaintiff	Notes
Deutsche Bank National Trust Company, solely in its capacity as Trustee of the Morgan Stanley ABS Capital I Inc. Trust, Series 2007-NC4 v. Morgan Stanley Mortgage Capital Holdings LLC	652877/2014	6/20/2007	9/19/2014	Deutsche Bank National Trust Company	N/A
Morgan Stanley Mortgage Trust 2006-13ARX, by U.S. Bank National Association, solely in its capacity as Trustee on behalf of the Trust v. Morgan Stanley Mortgage Capital Holdings LLC	653429/2012	9/29/2006	9/28/2012	U.S. Bank National Association	N/A
Specialty Underwriting & Residential Finance Trust, Series 2006-AB3 (SURF 2006-AB3), by U.S. Bank National Association, solely in its capacity as Trustee v. Merrill Lynch Mortgage Lending, Inc.	651371/2014	9/1/2006	5/2/2014	U.S. Bank National Association	N/A
Specialty Underwriting & Residential Finance Trust, Series 2007-AB1 (SURF 2007-AB1), by U.S. Bank National Association, solely in its capacity as Trustee v. Merrill Lynch Mortgage Lending, Inc.	651388/2014	3/1/2007	5/5/2014	U.S. Bank National Association	N/A
Ownit Mortgage Loan Trust, Series 2006-5 (OWNIT 2006-5) by U.S. Bank National Association, solely in its capacity as Trustee v. Merrill Lynch Mortgage Lending, Inc.	651370/2014	7/27/2006	5/2/2014	U.S. Bank National Association	N/A
Ownit Mortgage Loan Trust, Series 2006-7 (OWNIT 2006-7) by U.S. Bank National Association, solely in its capacity as Trustee v. Merrill Lynch Mortgage Lending, Inc.	651373/2014	11/3/2006	5/2/2014	U.S. Bank National Association	N/A

Case Name	Case Number	Closing Date	Summons with Notice Date	Trustee/Rep. Plaintiff	Notes
Deutsche Bank National Trust Company, solely in its capacity as Trustee of the Securitized Asset Backed Receivables LLC Trust 2007-BR (SABR 2007-BR1) v. Barclays Bank PLC	651338/2013	4/12/2007	4/12/2013	Deutsche Bank National Trust Company	N/A
Deutsche Bank National Trust Company, solely in its capacity as Trustee of the Securitized Asset Backed Receivables LLC Trust 2007-BR2, Securities Asset Backed Receivables Trust 2007-BR3, Securitized Asset Backed Receivables LLC Trust 2007-BR4, Securitized Asset Backed Receivables LLC 2007-BR5 v. Barclays Bank PLC	651789/2013	5/17/2007 (BR2); 6/13/2007 (BR3); 6/17/2007 (BR4); 7/10/2007(BR5)	5/17/2013	Deutsche Bank National Trust Company	N/A
Deutsche Bank National Trust Company, solely as Trustee for HIS Asset Securitization Corporation Trust 2007-NC1 v. HSBC Bank USA, National Association	652001/2013	6/5/2007	6/5/2013	Deutsche Bank National Trust Company	N/A
Nomura Asset Acceptance Corporation Alternative Loan Trust, Series 2007-1, by HSBC Bank USA, National Association, in its capacity as Trustee v. Nomura Credit & Capital, Inc.	652842/2014	5/10/2007	9/17/2014	HSBC Bank USA, National Association	N/A
HSBC Bank USA, National Association, in its capacity as Trustee of Merrill Lynch Alternative Note Asset Trust, Series 2007-A3 v. Merrill Lynch Mortgage Lending, Inc.	652727/2014	4/30/2007	9/5/2014	HSBC Bank USA, National Association	N/A
U.S. Bank National Association, as Indenture Trustee for the Benefit of the Insurers and Noteholders of GreenPoint Mortgage Funding Trust 2006-HE1, Home Equity Loan Asset-Backed Notes, Series 2006-HE1 v. GreenPoint Mortgage Funding, Inc.	600352/2009	8/28/2006	4/22/2009	U.S. Bank National Association	N/A

Case Name	Case Number	Closing Date	Summons with Notice Date	Trustee/Rep. Plaintiff	Notes
Natixis Real Estate Capital Trust 2007-HE2, by Computershare Trust Company, National Association, solely in its capacity as Separate Securities Administrator v. Natixis Real Estate Capital Inc.	153945/2013	4/30/2007	4/30/2013	Computershare Trust Company, National Association (acting as securities administrator)	N/A
Other Cases					
Deutsche Bank National Trust Co., solely in its capacity as Trustee for the Morgan Stanley Structured Trust I 2007-1 v. Morgan Stanley Mortgage Capital Holdings LLC	1:14-cv-03020-KBF (S.D.N.Y.)	7/6/2007	4/28/2014	Deutsche Bank National Trust Company	N/A
U.S. Bank, National Association, solely in its capacity as Trustee of MASTR Adjustable Rate Mortgages Trust 2006-OA2, MASTR Adjustable Rate Mortgages Trust 2007-1, and MASTR Adjustable Rate Mortgages Trust 2007-3 v. UBS Real Estate Securities, Inc.	1:12-cv-07322-PKC (S.D.N.Y.)	11/15/2006 (2006- OA2); 1/16/2007 (2007-I); 5/15/2007 (2007-3)	9/28/2012	U.S. Bank National Association	N/A
Law Debenture Trust Company of New York, solely in its capacity as Separate Trustee of the Securitized Asset Backed Receivables LLC Trust 2006-WM2 (SABR 2006-WM2) v. WMC Mortgage, LLC	3:12-cv- 01538-CSH (D. Conn.)	10/26/2006	10/26/2012	Law Debenture Trust Company of New York (at filing; TMI Trust Company substituted after sale)	N/A
Lehman XS Trust, Series 2006-GP2 (LSX 2006-GP2), by U.S. Bank National Association, solely in its capacity as Trustee v. GreenPoint Mortgage Funding, Inc.	1:12-cv-07935-ALC-HBP (S.D.N.Y.)	5/31/2006	5/30/2012	U.S. Bank National Association	N/A

EXHIBIT 2

May 11, 2018

VIA NYSCEF

The Honorable Marcy S. Friedman
Supreme Court of the State of New York
County of New York, Commercial Division
60 Centre Street, Room 663
New York, New York 10007

Re: *In re: Part 60 RMBS Put-back Litigation (No. 777000/2015)*

Dear Justice Friedman:

As directed by the Court's order dated April 5, 2018, we write on behalf of Plaintiffs and Defendants in the Part 60 Putback Cases to provide the Court with additional information in advance of the conference scheduled for May 24, concerning all cases in which stays have been requested or will be requested (the "Affected Cases") in light of the First Department's borrowing statute decision in SABR 2007-BR1 (No. 651338/2013) and HASC 2007-NC1 (No. 652001/2013) ("SABR/HASC"). Plaintiffs' and Defendants' submissions are attached as Exhibits A and B, respectively. In addition, Plaintiffs and Defendants are jointly providing the table attached as Exhibit C, listing the Affected Cases and showing the status of discovery in each of them.

The First Department recently denied leave to appeal the SABR/HASC decision. The plaintiffs in those cases intend to file a motion shortly to seek leave to appeal from the Court of Appeals directly.

We are available at the Court's convenience should the Court have any questions before the May 24 conference.

Respectfully submitted,

/s/ Michael S. Shuster
Michael S. Shuster
HOLWELL SHUSTER & GOLDBERG LLP
750 Seventh Avenue, 26th Floor
New York, NY 10019
Tel: (646) 837-5151
Fax: (646) 837-5150

Liaison Counsel for the Part 60 Putback Plaintiffs

/s/ Brian S. Weinstein
Brian S. Weinstein
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, NY 10019
Tel: (212) 450-4972
Fax: (212) 701-5972

Counsel for the Morgan Stanley Defendants, and on behalf of all other Part 60 Putback Defendants in the Affected Cases

EXHIBIT A

Plaintiffs' Position

The Court should reject Defendants' invitation to indefinitely stay all discovery in 12 coordinated cases. As discussed in Plaintiffs' previous submissions,[1] many Defendants waived any borrowing statute defense, and in any event the defense lacks merit because CPLR 202 does not apply or does not impose a limitations period shorter than six years.

Even assuming Defendants' borrowing statute arguments had any merit, discovery must continue because Plaintiffs raised failure-to-notify claims that cannot be resolved until disclosure is complete. Staying the cases will only delay their ultimate resolution, without any benefit.

Plaintiffs also already served their expert reports (or will shortly) in 11 of the 12 cases, and a one-sided, indefinite extension for Defendants' reports would be prejudicial and unfair. Further, if the 12 cases are stayed for even a few months, putback cases without *any* borrowing statute issues will be prejudiced. Changes to expert report deadlines in the stayed cases threaten to disrupt work by the same experts in non-stayed cases. And staying some cases will complicate any effort to coordinate summary judgment briefing by spreading out case schedules.

Proceedings in the Court of Appeals also counsel against any further stays. The premise behind Defendants' stay requests—that purported statute-of-limitations defenses render further discovery unnecessary—is called into doubt by multiple appeals. The Court of Appeals will decide this Term whether a contractual choice-of-law provision incorporates New York's statute of limitations, and a favorable result could render SABR/HASC irrelevant (assuming it was relevant at all). In addition, the SABR/HASC plaintiffs themselves are seeking leave to appeal. Should plaintiffs win on appeal, discovery will need to continue. And even if they lose, discovery will need to continue on the failure-to-notify claims. Whatever the outcome of the appeals, Defendants' effort to delay a dozen cases in the interim makes no sense.

I. Failure-to-Notify Claims Require the Continuation of Discovery

The initial Case Management Order sets forth the criteria for a stay of discovery. 777000/2015, Dkt. 17 ("CMO #1"). The CMO first admonishes that "parties should exercise restraint in requesting stays". CMO #1 at I.D.3. It then incorporates the Court's instruction at a previous conference in which the Court disapproved of stays pending a motion to dismiss "unless a case would be subject to dismissal in its entirety". 650312/2013, Dkt. 128 at 14.

Defendants' borrowing statute arguments cannot resolve any of the 12 cases "in their entirety". Plaintiffs in each of these cases have either pleaded failure-to-notify claims or have served or will serve a proposed amended complaint containing such claims in accordance with the Court's previous rulings. As this Court recently held in its failure-to-notify bellwether decision, "the viability of [these] claims cannot ordinarily be resolved at the pleading stage," 650291/2013, Dkt. 176 at 24, thus the ongoing expert discovery in these cases will need to be completed. Expert testimony will inform the Court's analysis of whether, and when, Defendants had knowledge of breaching loans that triggered their notification obligations and accordingly

[1] Plaintiffs filed one-page statements in EQLS 2007-1 (651957/2013, Dkt. 158); MANA 2007-A3 (652727/2014, Dkt. 215); MANA 2007-OAR5 (652793/2016, Dkt. 86); MSAC 2007-NC4 (652877/2014, Dkt. 112); MSM 2007-12 (652686/2013, Dkt. 119); NAAC 2007-1 (652842/2014, Dkt. 189); NHELI 2007-2 (650337/2013, Dkt. 264); NAAC 2006-AF2 (652614/2012, Dkt. 258); NAAC 2007-S3 (652619/2012, Dkt. 305); NAAC 2007-S4 (653390/2012, Dkt. 290); NHELI 2006-FM2 (653783/2012, Dkt. 316); and NHELI 2007-3 (651124/2013, Dkt. 310). Briefs were filed in MSAC 2007-NC4 (652877/2014, Dkt. 124); NAAC 2006-AF2 and NHELI 2007-2 (650337/2013, Dkt. 299).

when the claims accrued. Defendants will likely argue that relief is available only if their experts agree that the loans are breaching. Discovery thus must proceed without further delay.

Aware that failure-to-notify claims render their stay arguments untenable, Defendants try to litigate the merits of those claims prematurely. The parties are still discussing how to implement the bellwether ruling, including via amended complaints *that have yet to be filed.* The Court should not stay cases based on speculation about hypothetical motions to dismiss.

In any event, Defendants' arguments on the merits of the failure-to-notify claims are unavailing. In many cases, the alleged "overlap" window is two years, or even more.[2] Further, overlap might be irrelevant. The bellwether opinion acknowledges (at page 25) that non-repurchase damages may be available even *after* the overlap period, warning that the record on that issue is undeveloped. For example, Defendants' gross negligence invalidates the sole remedy and frees Plaintiffs to seek damages beyond the repurchase remedy. Thus, on the present record, the Court cannot rule that the claims are untimely as a matter of law. But this letter is not the place for such arguments. The Court will be positioned to address failure-to-notify claims—including arguments regarding discovery, notice, causation, or gross negligence—only when the contours of the claims are clear and expert discovery is complete.

II. Stays Would Adversely Affect Coordination

Stays Have and Will Prejudice Plaintiffs Who Have Served Expert Reports. Defendants present their stay requests as costless, saying if they are wrong about SABR/HASC, the parties can simply resume discovery. In fact, stays would be unfairly prejudicial in nearly all the cases in which they are sought. In 11 of the 12 cases, Plaintiffs have already served their opening expert reports or will serve them this month. See Ex. C. Stays would thus operate as an unfair extension of time for work by Defendants' rebuttal experts.

Stays Will Cause a Renewed Expert Crunch. When negotiating last summer's Sixth CMO (777000/2015, Dkt. 316), Plaintiffs and Defendants agreed to a staggered expert report schedule because the qualified experts in this area are few in number, their work is labor intensive, and they have substantial overlapping commitments. Staggering report dates avoided a potential "crunch" where an expert might have numerous reports due at about the same time.

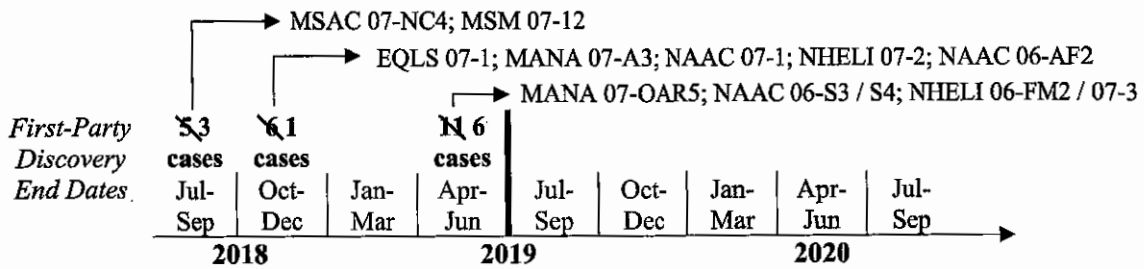
If a subset of the Part 60 cases is now stayed—even if only for a few months—the revised reply report deadlines for some experts will overlap with deadlines in cases where the borrowing statute is not at issue. For example, an 80-day shift in reply deadlines in NHELI 2007-2, NAAC 2006-AF2, and MANA 2007-A3, see Ex. C, would push them into the period when plaintiff's reunderwriting expert will be working on four other reports, see 651370/2014, Dkt. 261, raising the risk that the stays will cause a cascade of extensions in *non-stayed* cases.

Stays Will Disrupt Coordinated Summary Judgment Briefing. Open-ended stays will make coordinated summary judgment briefing between cases or groups of cases impractical.

---

[2] If the Nomura / Merrill defendants discovered breaches after HSBC moved its main office to Virginia, then even under their incorrect interpretation of CPLR 202, Virginia's five-year limitations period would apply, not three years. Defendants also are wrong that, if the borrowing statute applies, there is no "Relevant Period" for MANA 2007-OAR5. For example, as noted in the Trustee's March 20 submission, Del. Code § 8106(c) would apply a 20-year limitations period. See BSMF 2006-SL1 v. EMC Mortg. LLC, 2015 WL 139731, at *14-15 (Del. Ch. Jan. 12, 2015). Thus, *all* the MANA 2007-OAR5 claims would remain timely, and the same applies to MANA 2007-A3.

The Part 60 Putback Cases with the earliest discovery end dates are currently scheduled to finish discovery towards the end of this summer, while those with the latest end dates are scheduled to finish all discovery in the middle of next year. As shown below, the 12 requested stays would scatter discovery end dates over a broader and indeterminate window, reducing the number of cases expected to finish first-party discovery this year from 11 to only 4. Coordinated briefing of summary judgment motions already presents challenges to the timely adjudication of these cases; delaying a dozen cases indefinitely would make meaningful coordinated briefing unrealistic.[3]



III. The Court of Appeals Ruling in Samsung Could Render SABR/HASC Irrelevant

The grounds that Defendants asserted to support the initial stay may soon be undermined. Not only is the plaintiff in SABR/HASC seeking leave to appeal, the Court of Appeals has *already* granted leave to appeal and heard argument in a different case that raises a similar issue.

The SABR/HASC decision addressed the borrowing statute, but to reach its conclusion that the borrowing statute applied, the court also held that the choice-of-law provision in the governing agreements did not incorporate the New York statute of limitations. A similar issue is now before the Court of Appeals in 2138747 Ontario, Inc. v. Samsung C&T Corp., No. APL-2017-00129. The appeal was fully briefed in October 2017, and oral argument was held on April 24, 2018. Depending on the Court of Appeals' ruling, the choice-of-law provisions in these putback cases could be deemed to incorporate New York's six-year limitations period as a matter of law, foreclosing any argument under SABR/HASC that the cases are untimely.

Defendants are well-aware of Samsung's importance. In their January 24 stay application in EQLS 2007-1, the defendants' lead argument as to why SABR/HASC applied was that "the First Department ha[d] rejected" in Samsung the Trustee's contention that the choice-of-law clause incorporated New York's statute of limitations. 651957/2013, Dkt. 157 at 2 (citing 144 A.D.3d 122 (1st Dep't 2016)). But they failed to inform this Court that the decision was already on appeal, and they obtained a stay based on authority they knew was already being reviewed.

Under these circumstances, the cases should not be stayed. Two cases have already been stayed for months. Several more months will pass before the Court of Appeals provides clarity. But we know now that the Court of Appeals' ruling in Samsung might render SABR/HASC irrelevant. Samsung aside, SABR/HASC's CPLR 202 ruling might be reviewed, and the parties dispute whether it applies here at all. Because the implications of SABR/HASC are in doubt, it

[3] Stays could also adversely impact the orderly resolution of the Part 60 putback cases by reducing the parties' incentives to settle. Completing expert discovery encourages settlement by forcing both sides to focus on the merits in a way that often does not occur until experts synthesize what has been learned through fact discovery. Stays thus could delay the resolution of cases and needlessly complicate coordination of the remaining cases.

cannot be the basis for further stays; here, "preserving the status quo" means keeping the cases on track. It certainly does not warrant the extraordinary step of staying a dozen active litigations.

IV. Nomura's and Merrill Lynch's Renewed Request for a Stay Should Be Denied

Nomura is a defendant in seven cases and Merrill Lynch in two cases, all filed by HSBC as Trustee. As previously argued in several of those cases, the borrowing statute argument has been waived, and in all of them the borrowing statute argument lacks merit because the Trustee and its assignor are New York residents. The SABR/HASC appeal does not affect those arguments, and thus it cannot support a stay.[4] After preliminary briefing, the Court *denied* a stay of fact discovery. The Court should not change course and impose a stay of expert discovery.

These cases are moving briskly, and a stay of expert discovery now would be prejudicial and unfair. In six cases, the Trustees' expert reports have been served, and the reports in another two cases will be filed this month.[5] Defendants are not entitled to an indefinite, one-sided stay. Moreover, as described above, these cases include or will soon include failure-to-notify claims, so in no event are they at risk of being dismissed as untimely "in their entirety".[6]

V. The EQLS and MSM Stays Have Ended and Should Not Be Reinstated

Discovery in EQLS 2007-1 and MSM 2007-12 was stayed following requests to "stay the action[s] pending determination of a motion by plaintiff in [SABR/HASC] for leave to appeal the Appellate Division's decision (156 A.D.3d 401) to the Court of Appeals, and, if the motion is granted, to stay this action pending determination of that appeal." 651957/ 2013, Dkt. 161; 652686/2013, Dkt. 121. This Court granted those applications "to the following extent: Discovery in th[ese] action[s] is stayed *pending determination of the aforesaid motion for leave to appeal. . . .*" *Id.* (emphasis added). Thus, it is the position of the Trustee in these two cases that, per the Court's orders, the stays expired on April 26, when the First Department denied leave, and the clock began running again on the defendants' expert report deadlines.

The stay in MSM 2007-12 should not be reinstated for all the reasons in the plaintiff's previous submission, 651957/2013, Dkt. 158, and given the passage of time the situation is even more acute now. The context here is that the plaintiff is a successor trustee who was not the trustee when the claim accrued, thus the only limitations periods that could possibly apply are New York's (6 years) and Illinois's (10 years); the suit is timely under either. The defendants waited until almost five years into the litigation to raise this purported defense, when the plaintiff

---

[4] See Hope's Windows v. Albro Metal Prods. Corp., 93 A.D.2d 711 (1st Dep't 1983) (reversing trial court's grant of a stay pending an appeal in another case because the parties and the issues to be litigated were not "identical").

[5] Defendants incorrectly suggest that coordination between NAAC 2007-1 and Ambac extends only to certain fact depositions. As the NAAC 07-1 Trustee has noted repeatedly, Ambac and the Trustee are coordinating with respect to re-underwriting expert work. The coordination is particularly sensitive (and the case schedules set accordingly) because Ambac's action involves a second trust not at issue in NAAC 2007-1. Nomura would receive no benefit from a stay of NAAC 2007-1, since it will continue to litigate claims concerning NAAC 2007-1 in Ambac.

[6] Nomura has argued that some complaints do not plead post-closing discovery of breaches, but that is incorrect. For example, the complaints plead that "many" breaches were discovered prior to closing; drawing all reasonable inferences in Plaintiff's favor, many were discovered post-closing as well.

had already served opening expert reports and the defendants' rebuttal reports were due within a few weeks. As a result of the conditional stay order, the Defendants have already received an extra six weeks to draft rebuttal reports on top of the *six months* provided in the CMO, and they will obtain an even larger strategic advantage if the case is stayed again. In addition, any further shift in the deadline for reply reports necessitated by the defendants' stays could conflict with work that Plaintiff's reunderwriting expert is scheduled to perform in three other cases.

The situation in EQLS 2007-1 is similar. It is dispositive that the Trustee is the assignee of the depositor, a New York resident, an issue not addressed in SABR/HASC but raised in several other cases since the stay was imposed.[7] Also, the applicable choice-of-law provision incorporates all "remedies" available under New York law, including the six-year statute of limitations, as will be addressed in Samsung. In any event, SABR/HASC is inapplicable here because, for example, the mortgage note custodian is a New York resident, and less than 15% of the loans were secured by California properties. And even though Barclays is a defendant both here and in SABR/HASC, here it waited almost five years to raise the borrowing statute, and abandoned its appeal of this Court's statute-of-limitations ruling in this case. The plaintiff served opening expert reports last year, and the defendants have already received a two-and-a half-month extension. It is imperative that any applications to reinstate the stays be denied.

VI. The BR2-5 Stay Should Continue

As compared to the 12 other trusts in which stays have been requested, SABR 2007-BR2/3/4/5 (651789/2013, "BR2-5") is uniquely situated, and the BR2-5 Trustee does not currently seek to lift the stay. Among other reasons, SABR and BR2-5 involve rights outlined in virtually identical agreements; fact witnesses and most testimonial and documentary evidence in the cases are identical; all the experts are identical (so serving expert reports now in BR2-5 would prejudice the Trustee in SABR); and expert reports have not been served in either case, so the cases will remain on the same track if and when the stays are lifted. Accordingly, the BR2-5 Trustee's position should not be viewed as an indication that a stay is appropriate in other cases.

* * *

Although Defendants argue that *briefing* regarding SABR/HASC would be inefficient while the Court of Appeals considers CPLR 202, that does not mean *discovery* should be stayed.[8] Any further stays are unwarranted given (i) CPLR 202 does not apply, based on arguments not at issue in SABR/HASC; (ii) the failure-to-notify claims; (iii) the prejudice Plaintiffs would suffer; and (iv) the effect on coordination with cases unaffected by CPLR 202. Moreover, the rulings purportedly justifying the stay are already under review or might be soon. Thus, even if the Court were to consider a stay, it should not do so until after the Court decides Samsung *and* the SABR/HASC motion for leave to appeal. In the meantime, the cases should stay on track.

---

[7] Indeed, this argument applies equally in MSM 2007-12, where the depositor was a New York resident, and thus would preclude application of Delaware's statute of limitations even if Wilmington Trust Company had been the trustee when the cause of action for breach of representations and warranties accrued (which it was not).

[8] Defendants base their stay request in part on a bald assertion that plaintiffs have not "adduced evidence" of discovery during the relevant period. That assertion is inaccurate and also illogical: they cannot justify a stay of *discovery* by pointing to the absence of evidence to be gathered during discovery (and well before the time plaintiffs must demonstrate triable issues of fact).

EXHIBIT B

I. A Stay is Appropriate Because the Affected Cases Are Subject to Immediate Dismissal Unless *Deutsche Bank* Is Reversed

Defendants respectfully seek a stay, or continuation of an existing stay,[1] of the Affected Cases so that they are not required to spend millions of dollars on expert discovery in cases that are subject to immediate dismissal on grounds unrelated to such expert discovery.[2]

As explained in the prior case-specific submissions, plaintiffs' representation and warranty ("R&W") claims are time-barred as a matter of law under CPLR 202 and *Deutsche Bank National Trust Company v. Barclays Bank PLC*, 156 A.D.3d 401 (1st Dep't 2017) ("*Deutsche Bank*").[3] Expert discovery has no bearing on the CPLR 202 issues. Indeed, the First Department decided *Deutsche Bank* as a matter of law at the pleadings stage without requiring any discovery, let alone expert discovery. *Id.* at 401. Defendants are prepared to seek dismissal of the R&W claims now, but recognize that the Court will understandably want to wait to see whether the Court of Appeals takes the *Deutsche Bank* case before adjudicating such motions. In the meantime, defendants respectfully submit that it would be wasteful to spend millions of dollars on irrelevant expert discovery for claims that should be dismissed now.[4]

Plaintiffs' existing or putative failure to notify ("FTN") claims do not change this conclusion, because, as explained below, they are likewise subject to dismissal now through dispositive motions unrelated to expert discovery. And even if any FTN claims survive such motions, it would be wasteful to spend enormous sums on expert discovery that would only be relevant to plaintiffs' R&W claims, not their FTN claims.

Plaintiffs' argument concerning *2138747 Ontario, Inc. v. Samsung C&T Corp.*, No. APL-2017-00129 ("*Samsung*") is a red herring. The Court of Appeals will only decide whether a unique choice-of-law provision, which expressly provides that the contract will be "governed by, construed, *and enforced* in accordance with the laws of the State of New York," sufficiently

---

[1] In light of the Court's instructions at the April 2, 2018 telephone conference and in the April 6, 2018 Order that parties may defer service of expert reports until the hearing now scheduled for May 24, 2018, defendants do not believe the Court intended to lift the stays in *MSM 2007-12*, No. 652686/2013, and *EQLS 2007-1*, No. 651957/13, prior to that hearing, and plaintiffs' position to the contrary should be rejected. Indeed, contrary to plaintiffs' position regarding these cases, it would make no sense that the First Department's *denial* of leave to appeal, which only made it more likely that *Deutsche Bank* will govern these cases, would cause the stay to be lifted.

[2] This Court has previously indicated that a stay is appropriate when a case is "subject to dismissal in its entirety." *See In re Part 60 RMBS Put-back Litigation* CMO, ¶ I.D(3); *In re: Part 60 RMBS Put-back Litigation*, Index No. 777000/2015, Dkt. 2, Aug. 26, 2015, at 14:16-17; *In re: Part 60 RMBS Put-back Litigation*, Index No. 777000/2015, Dkt. 216, Dec. 6, 2016, at 54:24-55:6.

[3] Per the Court's instruction during the April 2 telephone conference, defendants do not repeat those arguments here. To the extent that plaintiffs have done so, contrary to the Court's instructions, defendants' failure to respond should in no way be construed as a waiver or agreement with plaintiffs' arguments. Defendants believe these issues are better left for full merits briefing and reserve all rights to respond at an appropriate time to any new arguments that are raised either in plaintiffs' case-specific submissions or in their portion of this letter.

[4] The Court already has dismissed the R&W claims in *HASC 2007-HE2*, No. 65127/2013, because those claims were untimely under any applicable limitations period, including New York's six-year period.

demonstrates an intent to apply New York's statute of limitations, and if so, whether such a choice violates New York public policy. *See* Weinstein Aff. Exs. A-C (*Samsung* briefs). None of the choice-of-law provisions in the Affected Cases contains the "enforced" language on which the *Samsung* appeal is based. In any event, even if the *Samsung* appeal was relevant to the CPLR 202 issues here, and it is not, that would only be further reason to defer adjudication of defendants' CPLR 202 motions until after the Court of Appeals resolves both *Samsung* and *Deutsche Bank*; it would not be a reason to require expert discovery on claims that would be dismissed under current law, without regard to such expert discovery.[5]

II. The FTN Claims Are Subject to Immediate Dismissal Without Regard to Expert Discovery and, In All Events, Cannot Justify Expensive Expert Discovery Related Solely to the R&W Claims

Plaintiffs' FTN claims do not justify a different outcome. As an initial matter, certain of the complaints in the Affected Cases do not include FTN claims, though plaintiffs may move for leave to add such claims.[6] As to those cases in which the complaint or the proposed amended complaint currently includes FTN allegations, those claims are subject to dismissal now—either based on the record adduced in fact discovery or because of pleading deficiencies in certain cases—for reasons having nothing to do with expert discovery.[7]

First, many of the FTN claims are untimely because plaintiffs have adduced no evidence in fact discovery that defendants discovered material breaches during the relevant time period. In other instances, plaintiffs' pleadings are fatally defective. This Court defined the relevant period during which plaintiffs must allege and prove discovery of material breaches in *Federal Housing Finance Agency v. Morgan Stanley ABS Capital I Inc.*, Nos. 650291/2013, 651959/2013, 2018 WL 1187676 (Sup. Ct. N.Y. Cty. Mar. 7, 2018) ("*NC1/NC3*")—namely, the period when the applicable statute of limitations for the R&W claims, measured forward from the time of closing, overlaps with the limitations period for the FTN claims, measured backward from the time the complaint was filed (the "Relevant Period"). *Id.* at *13. Under the foreign statutes of limitations applicable to the Affected Cases under *Deutsche Bank*, the Relevant Period is much shorter than the one under New York's six-year statute of limitations. In *MSM 2007-12*,

[5] Plaintiffs are also mistaken that the residence of the depositors—which are merely conduits that insulate the trusts from the sponsor's bankruptcy risk—has any relevance to which statute of limitations applies under *Deutsche Bank*. Moreover, plaintiffs are simply wrong that the depositors in several cases are New York residents notwithstanding incorporation in Delaware. But even assuming a New York principal office is sufficient for the depositor to be treated as a New York resident, those same facts were true of the depositors in *Deutsche Bank*. The First Department nonetheless concluded that the trusts felt the injury in California. *See Deutsche Bank*, 156 A.D.3d at 473 n.1 ("While plaintiff argues that each defendant selected the . . . mortgages to be pooled in the trust at its New York office, such operations are irrelevant to determining where the injury to the trust corpus was sustained.").

[6] The relevant Affected Cases are: *MANA 2007-A3*, No. 652727/2014; *NAAC 2006-S3*, No. 652619/2012; *NAAC 2006-S4*, No. 653390/2012; *NHELI 2006-FM2*, No. 653783/2012; *NHELI 2007-3*, No. 651124/2013; *SASC 2007-BC2*, No. 650692/2013; and *NAAC 2007-1*, No. 652842/2014.

[7] Given the different posture of each case, defendants may seek such relief by a motion for summary judgment, a motion to dismiss, a renewed motion to dismiss, supplemental briefing in *MANA 2007-OAR5*, No. 652793/2016 (where defendants' motion to dismiss is pending), or in any manner that the Court deems appropriate.

which is subject to Delaware's three-year statute of limitations, the Relevant Period is a *single day*—July 31, 2010 (three years after the closing date and three years prior to the filing of the complaint). At most, the Relevant Period in the Affected Cases is approximately two years in cases where a four-year statute of limitations applies: from either 2008 or 2009 (four years prior to the filing of the applicable complaint) to either 2010 or 2011 (four years after the applicable closing date).[8] In cases that have completed fact discovery, plaintiffs have not adduced evidence that defendants actually discovered any breaches during the Relevant Period; in other cases, they have not even alleged facts in their complaints giving rise to an inference of discovery during these narrow Relevant Periods.[9] The FTN claims are therefore subject to dismissal without regard to expert discovery. If plaintiffs have not alleged or adduced facts showing that defendants discovered breaches during the Relevant Periods, expert discovery could do nothing to revive plaintiffs' FTN claims, and would instead be a complete waste of time and money.[10]

Even if plaintiffs had alleged or adduced evidence of discovery of breaching loans during the Relevant Periods (and they have not), their FTN claims will nevertheless be subject to dismissal based on their inability to demonstrate that defendants' purported failure to provide notice was the proximate cause of plaintiffs' failure to file a timely suit seeking repurchase. For instance, in certain Affected Cases, fact discovery has shown that plaintiffs refused to file suit even after receiving notice of purported breaches from certificateholders, who specifically requested that the plaintiffs initiate litigation against the relevant defendants. Moreover, insofar as plaintiffs intend to argue that defendants were obligated to provide notice during the Relevant Periods based on alleged "inquiry notice" of breaches, plaintiffs cannot demonstrate any resulting harm because they also would have had the same "inquiry notice" during the same time. *See NC1/NC3*, 2018 WL 1187676, at *19 ("[T]his court has repeatedly held that as early

[8] In *MANA 2007-OAR5*, No. 652793/2016, there is no Relevant Period during which repurchase damages would be available for FTN claims against two defendants because plaintiff's action was commenced after the expiration of the limitations period under either Delaware's three-year or California's four-year statute of limitations, even considering the applicable tolling agreement.

[9] In *NC1/NC3*, this Court noted that a "critical issue" remains as to whether plaintiffs must show actual knowledge to prove "discovery" or whether inquiry notice would suffice. *See NC1/NC3*, 2018 WL 1187676 at *15 n.14. Either way, plaintiffs' claims will fail as a matter of law. If the standard is actual knowledge gained during the Relevant Period, plaintiffs have adduced no evidence to support such a claim during fact discovery and have not alleged such facts in the complaints. And if the standard is inquiry notice, plaintiffs' FTN claims will fail as untimely because plaintiffs' theory is that defendants were put on inquiry notice of all alleged breaches by virtue of pre-securitization conduct such as origination or due diligence. Even in *MANA 2007-OAR5*, where plaintiff has alleged post-securitization FTN claims against BANA as servicer, the alleged discovery occurred so early in time that they would be time-barred under any of the relevant foreign statutes of limitations.

[10] Defendants in some of the Affected Cases may move to dismiss the actions on other applicable grounds, including that the existing or any amended complaints fail to satisfy the criteria articulated in *NC1/NC3*. For example, plaintiffs contend that, despite including absolutely no allegations of post-closing discovery of breaches in their complaints and proposed amended complaints against Nomura, this Court should infer that "many [breaches] were discovered post-closing" because plaintiffs alleged that breaches were discovered prior to closing. But that is not a reasonable inference. It is also contradicted by the complaints. *See, e.g.*, Nomura Motion for Leave Brief, at 11-13, *NHELI 2007-2*, No. 650337/2013 (filed April 13, 2018), Dkt. 266. At the Court's instruction, this letter is limited to the defendants' requests to stay in light of *Deutsche Bank* and the arguments herein are made without prejudice to any other applicable arguments defendants may advance in seeking dismissal of the actions.

as 2009, four years before the limitations periods lapsed in these actions, certificateholders were put on inquiry notice as to alleged fraudulent misrepresentations regarding the quality and characteristics of the mortgage loans underlying their securitizations."). Whatever the Court's rulings on these issues may be, they will be unrelated to expert discovery, and defendants respectfully submit that the motions should be adjudicated now, rather than after millions of dollars have been spent on irrelevant expert discovery.

Indeed, even if some FTN claims survive such motions, because such claims would be limited to loans for which plaintiffs were able to adduce evidence of defendants' discovery of breaches during the Relevant Period, the proper scope of expert discovery for such claims would be much more limited. Much of the expensive expert discovery that occurs in R&W cases—*e.g.*, reunderwriting of thousands of loans, without regard to whether defendant allegedly discovered the breaches during the Relevant Period, and expert discovery relating to sampling—is not relevant to FTN claims. Accordingly, even if some FTN claims may survive after the R&W claims are dismissed under *Deutsche Bank*, a stay would still be necessary to avoid wasting enormous resources on expert discovery that is entirely irrelevant to those claims. Defendants respectfully submit that the more appropriate process would be for FTN motion practice to occur alongside the CPLR 202 motion practice, following which it will be clear whether any claims survive, and if so, the proper scope of the remaining expert discovery.

III. A Stay Will Not Disrupt the Efficient Disposition of All Putback Cases

Plaintiffs contend that staying the Affected Cases will cause prejudice and disrupt the Court's efforts to coordinate expert discovery and summary judgment briefing across all putback cases. These arguments are without merit.

First, plaintiffs contend that a stay will prejudice plaintiffs who have already served their expert reports. This is simply not a basis to require further expenditure of resources on expert discovery for claims that should be dismissed now. Nor could plaintiffs credibly claim that defendants are somehow inappropriately advantaged by having "more time" to work on their expert reports; both sides were appropriately given ample time, plaintiffs have never suggested that they lacked sufficient time, and the point of seeking a stay is to *avoid* having to spend time and money on expert reports that will likely be unnecessary. Moreover, certain plaintiffs have manufactured their own "prejudice." For instance, during the April 2 teleconference with the Court, the Court instructed that expert reports otherwise due prior to the hearing on the stay requests (then scheduled for May 10) need not be served in the interim. Counsel for HSBC (as plaintiff in the Nomura cases) nonetheless requested, and received, permission to serve expert reports in advance of the hearing. It then chose to serve those expert reports on May 4 in two actions (*NAAC 2006-S3*, No. 652619/2012 and *NAAC 2006-S4*, No. 653390/2012), even though it was not required to do so. Similarly, HSBC chose to serve its reports in three other cases (*NAAC 2007-1*, No. 652842/2014; *NHELI 2007-2*, No. 650337/2013; and *NAAC 2006-AF2*, No. 652614/2012) after Nomura informed HSBC that it was seeking a stay in light of *Deutsche Bank* and offered to defer service of HSBC's reports. Defendants also informed DBNTC in both *SABR 2007-BR2-5*, No. 651789/2013, and *EQLS 2007-1*, No. 651957/2013, that it need not serve expert reports in light of *Deutsche Bank*. DBNTC accepted that offer in *SABR 2007-BR2-5* but it chose to serve expert reports in *EQLS 2007-1*. Plaintiffs now claim prejudice over their own decisions in an attempt to force defendants to engage in costly and unnecessary expert discovery.

Second, with respect to cases where plaintiffs have not served expert reports, plaintiffs contend that a stay will overburden plaintiffs' experts by requiring them to prepare reports in the Affected Cases at the same time as non-Affected Cases. But plaintiffs have no basis for such speculation. So long as *Deutsche Bank* remains good law, it is possible that the experts will never need to prepare reports in the Affected Cases at all. And even if expert reports have to be prepared for FTN claims—which defendants do not believe to be the case—the proper scope of such reports would be different from, and much more limited than for, R&W claims. Moreover, plaintiffs have no basis to predict "overlap" in expert report deadlines based on a stay, since they have no basis to know how long any stay will last. Nor do plaintiffs offer any reason why any "burden" on experts from "overlapping" deadlines would be more of an issue for plaintiffs than for defendants. Of course, in the purely hypothetical scenario that a particular expert for a particular party claimed to be unable to meet multiple deadlines, a party always remains free to explain the unusual circumstances at hand and seek relief. None of this is a reason to spend millions of dollars now on unnecessary expert discovery.

Third, plaintiffs' contention that a stay will "disrupt coordination" of summary judgment briefing across all putback cases is unfounded.[11] Without any stay in the Affected Cases, some of the putback cases would still be scheduled to complete expert discovery this summer while others would not be scheduled to complete it until June 2019.[12] Even absent a stay, coordination could only occur through bellwether briefing, and this Court's decisions on such bellwether motions would provide guidance for the Affected Cases regardless of whether they are stayed.

Finally, certain plaintiffs have suggested that a stay of certain Affected Cases brought by trustees would disrupt "coordination" with related monoline cases, but these contentions are meritless.[13] Expert discovery in these cases has never been coordinated, and even have separate expert schedules that would have rendered any coordination of reports or depositions impossible. In addition, the trustee and monoline plaintiffs have different theories of liability and damages, necessitating different sets of rebuttal reports in each case even if both sets of plaintiffs relied on a common sample of loans in both sets of cases. Denying a stay of the trustee cases will not promote any greater efficiency but will only require defendants—entirely unnecessarily—to expend resources in the trustee cases that are subject to immediate dismissal.

For the foregoing reasons, defendants respectfully request that the Court stay the Affected Cases until after the Court has ruled on dispositive motions in those cases, so that the parties are not required to waste substantial resources on unnecessary discovery.

---

[11] Numerous open discovery issues in the *MANA 2007-OAR5* case may delay the case schedule, regardless of a stay.

[12] Plaintiffs' contention and references to deadlines also ignore the fact that six of the Nomura cases involve third-party expert deadlines, which substantially alter the expert discovery schedules in four of those cases.

[13] Plaintiff in *MSAC 2007-NC4*, No. 652877/2014, contends that its case is "coordinated" with *FGIC v. Morgan Stanley*, No. 652914/2014 ("*FGIC*"). In addition, although *NAAC 2007-1* and *Ambac v. Nomura, No. 651359/2013* ("*Ambac*"), were coordinated for the limited purpose of certain fact depositions, expert discovery has not been coordinated and indeed the expert discovery schedule in *Ambac* lags the schedule in *NAAC 2007-1* by six months.

EXHIBIT C

In Re: Part 60 RMBS Put-Back Litigation, 777000/2015

Trust(s)	Full Case Caption	Index No.	Discovery Deadlines	Status of Expert Reports
MSM 2007-12	*Wilmington Trust Co., not in its individual capacity but solely in its capacity as Trustee for Morgan Stanley Mortgage Loan Trust 2007-12 v. Morgan Stanley Mortgage Capital Holdings LLC*	652686/2013	Expert discovery was stayed pursuant to the terms of the Court's 3/13/18 Order. Previously, the deadlines were: • Defendant's expert reports due April 25, 2018 • Plaintiff's reply expert reports due June 25, 2018 • Close of Expert Discovery on August 27, 2018	Plaintiff's opening expert reports were served on October 25, 2017
MSAC 2007-NC4	*Deutsche Bank National Trust Company, solely in its capacity as Trustee of the Morgan Stanley ABS Capital I Inc. Trust 2007-NC4 v. Morgan Stanley Mortgage Capital Holdings LLC, as Successor-by-Merger to Morgan Stanley Mortgage Capital Inc.*	652877/2014	The deadlines in this case are: • Pursuant to the Court's April 6, 2018 order, service of Defendant's expert reports, previously due April 19, 2018, has been deferred pending oral argument on Defendant's motion for leave to amend • Plaintiff's reply expert reports were previously due June 19, 2018 • Close of Expert Discovery was previously on August 20, 2018	Plaintiff's opening expert reports were served on October 5, 2017

In Re: Part 60 RMBS Put-Back Litigation, 777000/2015

Trust(s)	Full Case Caption	Index No.	Discovery Deadlines	Status of Expert Reports
MANA 2007-OAR5	*HSBC Bank USA, National Association, in its capacity as Trustee of Merrill Lynch Alternative Note Asset Trust, Series 2007-OAR5 v. Merrill Lynch Mortgage Lending, Inc., Bank of America, N.A., and Countrywide Home Loans, Inc.*	652793/2016	The deadlines in this case are: • Close of Fact Discovery on July 12, 2018 • Plaintiff's expert reports due August 13, 2018 • Defendants' expert reports due February 13, 2019 • Plaintiff's reply expert reports due April 15, 2019 • Close of Expert Discovery on June 17, 2019	No expert reports have been served
SABR 2007-BR2 SABR 2007-BR3 SABR 2007-BR4 SABR 2007-BR5	*Deutsche Bank National Trust Company, solely in its capacity as Trustee of SABR 2007-BR2, SABR 2007-BR3, SABR 2007-BR4, and SABR 2007-BR5 v. Barclays Bank PLC and WMC Mortgage, LLC*	651789/2013	Case is stayed as against WMC Mortgage, LLC pending settlement Expert discovery is currently stayed as to Barclays pending the appellate process in *SABR/HASC*. The parties stipulated to a stay prior to the due date for Plaintiff's expert reports. Previously, the deadlines were: • Plaintiff's expert reports due December 21, 2017 • Defendant's expert reports due July 12, 2018 • Plaintiff's reply expert reports due September 12, 2018 • Close of Expert Discovery on November 12, 2018	Case is stayed as against WMC Mortgage, LLC pending settlement Plaintiff has not served expert reports

In Re: Part 60 RMBS Put-Back Litigation, 777000/2015

Trust(s)	Full Case Caption	Index No.	Discovery Deadlines	Status of Expert Reports
EQLS 2007-1	*Deutsche Bank National Trust Company, solely in its capacity as Trustee of the EquiFirst Loan Securitization Trust 2007-1 v. EquiFirst Corporation*	651957/2013	Expert discovery was stayed pursuant to the terms of the Court's 2/9/18 Order. Previously, the deadlines were: • Defendant's expert reports due July 12, 2018 • Plaintiff's reply expert reports due September 12, 2018 • Close of Expert Discovery on November 12, 2018	Plaintiff's opening expert reports were served on December 21, 2017

In Re: Part 60 RMBS Put-Back Litigation, 777000/2015

Trust(s)	Full Case Caption	Index No.	Discovery Deadlines	Status of Expert Reports
MANA 2007-A3	*Merrill Lynch Alternative Note Asset Trust, Series 2007-A3, by HSBC Bank USA, N.A., in its capacity as Trustee v. Merrill Lynch Mortgage Lending, Inc.*	652727/2014	Fact discovery closed on September 27, 2017, for all but limited purposes. The outstanding issues include: • Corporate representative depositions under Rule 11-f; • Depositions of rating agency representatives; • Supplemental document productions in response to recent orders of the Court and the Special Master; and • Resolution of certain privilege log motions currently pending before the Special Master. Expert discovery is ongoing. The current deadlines are: • Defendant's expert reports are due August 7, 2018 • Plaintiff's reply expert reports are due October 8, 2018 • Expert discovery closes on December 10, 2018	Plaintiff's opening expert reports were served on February 7, 2018

In Re: Part 60 RMBS Put-Back Litigation, 777000/2015

Trust(s)	Full Case Caption	Index No.	Discovery Deadlines	Status of Expert Reports
NAAC 2006-S3	*Nomura Asset Acceptance Corporation, Alternative Loan Trust, Series 2006-S3, by HSBC Bank USA, National Association, in its capacity as Trustee pursuant to a Pooling and Servicing Agreement, dated as of July 1, 2006 v. Nomura Credit & Capital, Inc.*	652619/2012	• Close of Fact Discovery on May 18, 2018 • Third-party Plaintiff's expert reports due June 25, 2018 • Defendant's expert reports due December 4, 2018 • Third-party Defendants' expert reports due December 26, 2018 • Plaintiff's reply expert reports due February 4, 2019 • Third-party Plaintiff's reply expert reports due February 26, 2019 • Close of Expert Discovery on April 26, 2019	Plaintiff's opening expert reports were served on May 4, 2018
NAAC 2006-S4	*Nomura Asset Acceptance Corporation Alternative Loan Trust, Series 2006-S4, by HSBC Bank USA, National Association, in its capacity as Trustee v. Nomura Credit & Capital, Inc.*	653390/2012	• Third-party Plaintiff's expert reports due June 25, 2018 • Defendant's expert reports due December 4, 2018 • Third-party Defendants' expert reports due December 26, 2018 • Plaintiff's reply expert reports due February 4, 2019 • Third-party Plaintiff's reply expert reports due February 26, 2019 • Close of Expert Discovery on April 26, 2019	Plaintiff's opening expert reports were served on May 4, 2018

In Re: Part 60 RMBS Put-Back Litigation, 777000/2015

Trust(s)	Full Case Caption	Index No.	Discovery Deadlines	Status of Expert Reports
NHELI 2006-FM2	*Nomura Home Equity Loan, Inc., Series 2006-FM2, pursuant to a Pooling and Servicing Agreement, dated as of October 1, 2006, by HSBC Bank USA, National Association, solely in its capacity as the Trustee v. Nomura Credit & Capital, Inc.*	653783/2012	• Close of Fact Discovery on May 18, 2018 • Plaintiff's expert reports due May 25, 2018 • Third-party Plaintiff's expert reports due June 25, 2018 • Third-party Defendants' expert reports due December 26, 2018 • Defendant's expert reports due January 11, 2019 • Third-party Plaintiff's reply expert reports due February 26, 2019 • Plaintiff's reply expert reports due March 11, 2019 • Close of Expert Discovery on May 13, 2019	No expert reports have been served

In Re: Part 60 RMBS Put-Back Litigation, 777000/2015

Trust(s)	Full Case Caption	Index No.	Discovery Deadlines	Status of Expert Reports
NHELI 2007-3	*Nomura Home Equity Loan, Inc., Series 2007-3, pursuant to a Pooling and Servicing Agreement, dated as of April 1, 2007, by HSBC Bank USA, National Association, solely in its capacity as the Trustee v. Nomura Credit & Capital, Inc.*	651124/2013	• Close of Fact Discovery on May 18, 2018 • Plaintiff's expert reports due May 25, 2018 • Third-party Plaintiff's expert reports due June 25, 2018 • Third-party Defendants' expert reports due December 26, 2018 • Defendant's expert reports due January 11, 2019 • Third-party Plaintiff's reply expert reports due February 26, 2019 • Plaintiff's reply expert reports due March 11, 2019 • Close of Expert Discovery on May 13, 2019	No expert reports have been served
NAAC 2007-1	*Nomura Asset Acceptance Corporation Alternative Loan Trust, Series 2007-1, by HSBC Bank USA, National Association, in its capacity as Trustee v. Nomura Credit & Capital, Inc.*	652842/2014	• Close of Fact Discovery on May 18, 2018 • Defendant's expert reports due July 11, 2018 • Plaintiff's reply expert reports due September 11, 2018 • Close of Expert Discovery on November 13, 2018	Plaintiff's opening expert reports were served on January 11, 2018, and an amended report was served on January 12, 2018

In Re: Part 60 RMBS Put-Back Litigation, 777000/2015

Trust(s)	Full Case Caption	Index No.	Discovery Deadlines	Status of Expert Reports
NHELI 2007-2	*Nomura Home Equity Loan, Inc., Home Equity Loan Trust, Series 2007-2, by HSBC Bank USA, National Association, as Trustee v. Nomura Credit & Capital, Inc.*	650337/2013	• Close of Fact Discovery on May 18, 2018 • Third-party Plaintiff's expert reports due June 25, 2018 • Defendant's expert reports due July 31, 2018 • Plaintiff's reply expert reports due October 1, 2018 • Deadline for first-party expert depositions is December 3, 2018 • Third-party Defendants' expert reports due December 26, 2018 • Third-party Plaintiff's reply expert reports due February 26, 2019 • Deadline for third-party expert depositions is April 26, 2019	Plaintiff's opening expert reports were served on January 31, 2018, and an amendment for one report was served on February 17, 2018

In Re: Part 60 RMBS Put-Back Litigation, 777000/2015

Trust(s)	Full Case Caption	Index No.	Discovery Deadlines	Status of Expert Reports
NAAC 2006-AF2	*Nomura Asset Acceptance Corporation, Mortgage Pass-Through Certificates, Series 2006-AF2, by HSBC Bank USA, National Association, as Trustee v. Nomura Credit & Capital, Inc.*	652614/2012	• Close of Fact Discovery on May 18, 2018 • Third-party Plaintiff's expert reports due June 25, 2018 • Defendant's expert reports due July 31, 2018 • Plaintiff's reply expert reports due October 1, 2018 • Deadline for first-party expert depositions is December 3, 2018 • Third-party Defendants' expert reports due December 26, 2018 • Third-party Plaintiff's reply expert reports due February 26, 2019 • Deadline for third-party expert depositions is April 26, 2019	Plaintiff's opening expert reports were served on January 31, 2018, and an amendment for one report was served on February 17, 2018