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

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, Plaintiff, -against- DB STRUCTURED PRODUCTS, INC., Defendant.	Index No. 651854/2014 IAS Part: 60 Justice Marcy S. Friedman Motion Seq. No. 1 **Oral Argument Requested**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT DB STRUCTURED PRODUCTS INC.'S MOTION TO DISMISS THE COMPLAINT

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July 30, 2015

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Defendant DB Structured Products, Inc. ("DBSP") respectfully submits this memorandum of law, together with the affirmation of David J. Woll dated July 30, 2015 (the "Woll Affirmation") and the exhibits annexed thereto, in support of its motion to dismiss the complaint under CPLR 3211(a)(5) and (a)(7).

PRELIMINARY STATEMENT

This case represents a fundamentally flawed attempt to revive, pursuant to CPLR 205(a), an action (the "Prior Action"[1]) that was unanimously dismissed as time-barred by the First Department and the Court of Appeals. In *ACE Securities Corp. v. DB Structured Products, Inc.*, 112 A.D.3d 522, 522 (1st Dep't 2013) ("*ACE I*"), the Appellate Division ruled that the Prior Action was "barred by the six-year statute of limitations on contract causes of action." In *ACE Securities Corp. v. DB Structured Products, Inc.*, -- N.Y.3d ---, 2015 N.Y. Slip Op. 04873, at *8 (June 11, 2015) ("*ACE II*"), the Court of Appeals affirmed the decision in *ACE I* and confirmed that the plaintiff "failed to pursue its contractual remedy within six years of the alleged breach." CPLR 205(a), by its plain terms, does not permit the revival of an action, such as the Prior Action, that was not "timely commenced." The holdings of *ACE I* and *ACE II* that the Prior Action was untimely are binding and have preclusive effect in this action, thus rendering the revival provisions of CPLR 205(a) unavailable to the plaintiff. In addition, the current action fails to satisfy the criteria of CPLR 205(a) because it was commenced by a different plaintiff than the plaintiffs that initiated the Prior Action. Pursuant to the Court of Appeals' binding precedent in *Reliance Insurance Co. v. PolyVision Corp.*, 9 N.Y.3d 52 (2007), CPLR 205(a) does not apply in these circumstances. Accordingly, this action, like the Prior Action, should be dismissed with prejudice.

[1] *ACE Sec. Corp. v. DB Structured Prods., Inc.*, No. 650980/2012 (Sup Ct. N.Y. Cnty.).

BACKGROUND

I. THE PRIOR ACTION

The Prior Action was initiated by RMBS Recovery Holdings 4, LLC and VP Structured Products, LLC (the "Funds"), two investment funds that held certificates in ACE Securities Corp., Home Equity Loan Trust, Series 2006-SL2 (the "Trust"), a RMBS trust sponsored by DBSP. *See ACE II*, 2015 N.Y. Slip Op. 04873, at *3. The plaintiff in the instant action, HSBC Bank USA, N.A. ("Plaintiff" or "Trustee"), acts as the trustee of the Trust. As in other repurchase actions, the governing March 28, 2006 Mortgage Loan Purchase Agreement ("MLPA") and March 1, 2006 Pooling and Servicing Agreement ("PSA") contained representations and warranties made by DBSP concerning the characteristics of the mortgage loans transferred to the Trust, as well as a specific protocol for addressing alleged breaches. *See* MLPA §§ 6, 7; PSA § 2.03(a).[2] As summarized by the Court of Appeals:

> The PSA authorized the trustee to enforce the repurchase obligation in the following way: if HSBC learned of a breach of a representation or warranty, it was required to "promptly notify DBSP and the Servicer" of the breach and request that DBSP cure the identified defect or breach within 60 days. If DBSP did not cure the defect or breach in all material respects, the trustee was empowered to "enforce the obligations of DBSP under the MLPA to repurchase such Mortgage Loan ... within ninety (90) days after the date on which DBSP was notified of the breach."

ACE II, 2015 N.Y. Slip Op. 04873, at *3 (brackets omitted). The PSA also contained a "no-action clause" which required certificateholders, *inter alia*, to "provide the trustee with 'a written notice of default and of the continuance thereof'" before commencing an action on behalf of the Trust. *ACE I*, 112 A.D.3d at 523 (quoting PSA § 12.03).

[2] The MLPA and PSA are attached as an exhibit to Plaintiff's complaint ("Compl."). *See* NYSCEF Dkt. No. 2.

On January 12, 2012, the Funds informed the Trustee that a review they had commissioned had purportedly uncovered numerous breaches and requested that the Trustee demand that DBSP repurchase the breaching loans; they also "alerted the trustee to 'the urgent need for a Tolling Agreement . . . in light of potential expiring statute of limitations deadlines,' and expressed their belief that 'it was imperative that the Trustee act expeditiously to request such an agreement.'" *ACE II*, 2015 N.Y. Slip Op. 04873, at *3-*4 (brackets omitted). The Trustee forwarded the Funds' breach claims to DBSP on February 8, 2012, *ACE I*, 112 A.D.3d at 523, but it "neither sought a tolling agreement nor brought suit against DBSP." *ACE II*, 2015 N.Y. Slip Op. 04873, at *4.[3] The Funds then attempted to commence the Prior Action by filing a summons with notice on March 28, 2012, at which point "the 60- and 90-day periods for cure and repurchase had not yet elapsed." *ACE I*, 112 A.D.3d at 523. The Trustee was named as a "nominal defendant" in the summons with notice. Almost six months later, on September 13, 2012, the Trustee filed a complaint in the Prior Action in which it purported to "substitute for the [Funds]" as plaintiff. *ACE II*, 2015 N.Y. Slip Op. 04873, at *4. The Trustee did not move for intervention or substitution before filing its complaint; it simply unilaterally inserted itself as plaintiff.

DBSP moved to dismiss the Prior Action with prejudice, arguing, *inter alia*, that (1) "the trustee's claims accrued as of March 28, 2006, more than six years before the Trust filed its complaint"; (2) "the [Funds'] summons and notice was a nullity because they did not give DBSP 60 days to cure and 90 days to repurchase before bringing suit"; (3) "the [Funds] lacked standing

[3] In the summons with notice filed by the Funds, the Funds asserted that "[o]n March 8, 2012, [the Funds] directed the Trustee, and offered the Trustee reasonable indemnity, to enforce DB[SP]'s repurchase obligations. The Trustee has not accepted [the Funds'] direction." *See* Woll Aff., Ex. A at 3 (Summons with Notice, *RMBS Recovery Holdings 4, LLC, et al. v. DB Structured Products, Inc., et al.*, No. 650980/2012 (Sup. Ct. N.Y. Cnty. March 28, 2012)).

because only the trustee was authorized to sue for breaches of representations and warranties"; and (4) "the trustee's substitution could not relate back to March 28, 2012 because there was no valid pre-existing action." *ACE II*, 2015 N.Y. Slip Op. 04873, at *4. Supreme Court concluded that the statute of limitations did not begin to run until DBSP refused to repurchase an allegedly breaching loan and therefore denied DBSP's motion, reasoning that while "[i]t is undisputed that [the Funds] lacked standing to maintain this action … the manner in which this action was originally commenced, in the end, is not at issue because the relevant statute of limitations did not expire before the substitution." *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 965 N.Y.S.2d 844, 846-847 (Sup. Ct. N.Y. Cnty. 2013).

DBSP appealed. The First Department reversed and ordered dismissal, ruling that the Prior Action was "barred by the six-year statute of limitations on contract causes of action." *ACE I*, 112 A.D.3d at 522. In *ACE I*, the First Department made four rulings that underpinned its conclusion that the Prior Action was time-barred:

1. The Accrual Holding: "[T]he claims accrued on the closing date of the MLPA, March 28, 2006, when any breach of the representations and warranties contained therein occurred," and therefore "[t]he motion court erred in finding that plaintiff's claims did not accrue until defendant either failed to timely cure or repurchase a defective mortgage loan." *Id.* at 522-23.

2. The Condition Precedent Holding: "[T]he 60– and 90–day periods for cure and repurchase had not yet elapsed" when the summons with notice was filed, and this "failure to comply with a condition precedent to commencing suit rendered [the Funds'] summons with notice a nullity." *Id.* at 523.

3. The Standing Holding: "[T]he [Funds] lacked standing to commence the action on behalf of the trust" under the PSA's no-action clause, which "does not authorize certificate holders to provide notices of 'default' in connection with the sponsor's breaches of the representations." *Id.*

4. The Substitution Holding: "[T]he substitution of the trustee as plaintiff [does not] permit us to deem timely filed the trustee's complaint, which was filed September 13, 2012." *Id.*

As this Court has recognized, the Condition Precedent Holding and the Standing and Substitution Holdings are "alternative holding[s]" that independently supported dismissal of the Prior Action. *Nomura Asset Acceptance Corp. v. Nomura Credit & Capital, Inc.*, 2014 WL 2890341, at *14 (Sup. Ct. N.Y. Cnty. June 26, 2014).

The Court of Appeals granted leave to appeal on June 26, 2014, *see* 23 N.Y.3d 906, and on June 11, 2015, unanimously affirmed the Appellate Division's ruling, *ACE II*, 2015 N.Y. Slip Op. 04873, at *5. The Court of Appeals held that "the Trust's cause of action against DBSP for breach of representations and warranties accrued at the point of contract execution on March 28, 2006," and that "even assuming standing, the two [Funds] did not validly commence this action because they failed to comply with the contractual condition precedent to suit; namely, affording DBSP 60 days to cure and 90 days to repurchase from the date of notice of the alleged non-conforming loans." *Id*. at *2. Thus, the Court of Appeals affirmed the First Department's Accrual and Condition Precedent Holdings, and, finding this a sufficient basis to affirm, declined to address the Standing and Substitution Holdings. *Id.* at *9 ("[B]ecause the Trust admittedly failed to fulfill the condition precedent, we need not and do not address the issues of standing and relation back disputed by the parties."). Since the Court of Appeals did not overturn (or in any way call into question) the First Department's Standing or Substitution Holdings, these holdings remain binding on this Court and are preclusive in this action. *See, e.g.*, *Miller v. Miller*, 441 N.Y.S.2d 339, 340 (Sup. Ct. Suffolk Cnty. 1981) ("It is axiomatic that this court is bound by a determination of its Appellate Division unless such Appellate Division determination has been overruled by the Court of Appeals.").

II. THE INSTANT ACTION

The Trustee filed the instant action on June 18, 2014, shortly before the Court of Appeals granted leave to appeal in the Prior Action. The complaint is identical to the belated complaint

filed by the Trustee in the Prior Action, except for the addition of paragraphs 1 through 5, which assert that this action "revive[s]" the Prior Action under CPLR 205(a) because "the Prior Action was timely commenced by the [Funds]" and was "terminated in a manner other than 'a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute, or a final judgment upon the merits." Compl. ¶ 1, Woll Aff., Ex. B. The Trustee erroneously contends that since the "cure and repurchase periods have now elapsed" and "the Trustee has standing to commence this action," the deficiencies that led to the dismissal of the Prior Action have been "cured." *Id.* ¶¶ 3-4.

The complaint is otherwise generally similar to complaints filed in other repurchase actions. It alleges "breaches of representations and warranties and DBSP's refusal to comply with its repurchase obligation." *ACE II*, 2015 N.Y. Slip Op. 04873, at *4.

After leave to appeal was granted in the Prior Action, this action was stayed pending the Court of Appeals' determination of the appeal. That stay was lifted last month after the Court of Appeals unanimously affirmed the Prior Action's dismissal.

ARGUMENT

A complaint that is barred by the statute of limitations or *res judicata* is subject to dismissal. *See* CPLR 3211(a)(5), (a)(7). *ACE I* and *ACE II* held that the statute of limitations on the claims asserted in the Prior Action—which are identical to the claims asserted in this action—expired on March 28, 2012. *See, e.g., ACE II*, 2015 N.Y. Slip Op. 04873, at *9 ("[T]he Trust's claim, subject to the six-year statute of limitations for breach-of-contract actions, accrued on March 28, 2006."). Since this action was commenced on June 18, 2014, it is time-barred. Plaintiff nonetheless argues that CPLR 205(a) renders this action timely by allowing Plaintiff to benefit from the March 28, 2012 filing date of the Funds' summons with notice in the Prior

Action. As demonstrated below, however, the present action fails to meet the requirements of CPLR 205(a).

CPLR 205(a) renders timely an action that would otherwise be barred by the statute of limitations if each of the following criteria are met:

1. A prior action was "timely commenced";
2. That prior action was terminated other than by "voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits";
3. "[T]he plaintiff" in the prior action—"or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator"—commences a new action after termination of the prior action;
4. The new action is filed and served within six months of dismissal of the prior action; and
5. The new action is based upon "the same transaction or occurrence or series of transactions or occurrences" as the prior action.

CPLR 205(a). This action fails to meet each of the first three criteria, and each such failure is independent grounds for dismissal with prejudice. First, the Appellate Division and the Court of Appeals expressly held that the Prior Action was *not* timely commenced. As such, the untimeliness of the Prior Action has been conclusively established and precludes application of CPLR 205(a). Second, the dismissal of the Prior Action as barred by the statute of limitations constitutes a final judgment on the merits, which also precludes application of CPLR 205(a).[4] Third, under established Court of Appeals precedent, "the benefit provided by [CPLR 205(a)] is explicitly, and exclusively, bestowed on 'the plaintiff' who prosecuted the initial action," and cannot be obtained by "an individual or entity other than the original plaintiff." *Reliance Ins.*, 9

[4] In the alternative, if this Court were to find that the Prior Action was somehow not dismissed as untimely, it should hold that the dismissal of the Prior Action, which arose from deficiencies in the Funds' Summons with Notice, was for lack of personal jurisdiction, which also precludes application of CPLR 205(a).

N.Y.3d at 57. Thus, even assuming the Funds' March 28, 2012 summons "commenced" an action (despite *ACE I*'s finding that it was a "nullity" and *ACE II*'s finding that it was not "validly commenced"), the "'plaintiff[s]' who prosecuted" that "action" were the Funds who filed the summons, not the Trustee. *Id.* CPLR 205(a) does not permit the Trustee—a distinct and separate corporate entity—to benefit from the Funds' filing date.

I. THE PRIOR ACTION WAS NOT TIMELY COMMENCED AND THEREFORE CANNOT BE REVIVED PURSUANT TO CPLR 205(a)

Plaintiff cannot invoke CPLR 205(a) because the Prior Action was untimely. *See, e.g.*, *Oriskany Cent. Sch. Dist. v. Edmund J. Booth Architects*, 85 N.Y.2d 995, 997 (1995) ("Since the original action was barred by the Statute of Limitations, CPLR 205(a) … is not applicable."). As noted, CPLR 205(a) only permits revival of actions that are "timely commenced." *ACE I*, however, dismissed the Prior Action as *untimely*, stating unambiguously and without qualification: "This action is barred by the six-year statute of limitations on contract causes of action." *ACE I*, 112 A.D.3d at 522. *ACE II* affirmed. 2015 N.Y. Slip Op. 04873, at *5 ("The Appellate Division reversed and granted DBSP's motion to dismiss the complaint as untimely. . . . We now affirm."). In so doing, the Court of Appeals reiterated that the dismissal was on timeliness grounds. *See, e.g., id.* at *8 ("The Trust simply failed to pursue its contractual remedy within six years of the alleged breach."). The *ACE I* and *ACE II* Courts' determinations that the Prior Action was untimely are *res judicata* and preclude the Trustee from relitigating that question here. *See Hae Sheng Wang v. Pao-Mei Wang*, 96 A.D.3d 1005, 1007 (2d Dep't 2012) ("The dismissal of a claim on the ground that the statute of limitations has run is a determination on the merits for res judicata purposes.").[5] Thus, CPLR 205(a) cannot apply.

[5] Section 205(a) does not apply for the independent reason that the Prior Action's dismissal on statute of limitations grounds was "a final judgment upon the merits," a category of dismissals that 205(a) expressly excludes from its ambit. *Yonkers Contracting Co. v. Port Auth. Trans-*

Nor can Plaintiff argue that the Prior Action was "timely commenced" by virtue of the Funds' summons with notice, which was filed on the last day of the limitations period. The First Department found in *ACE I* that the Funds' summons with notice did not actually "commence" an action at all, reasoning that the Funds' failure to comply with the pre-suit cure and repurchase protocol rendered their summons with notice a "nullity." *ACE I*, 112 A.D.3d at 523. The Court of Appeals similarly held that "the two [Funds] did not validly commence this action because they failed to comply with the contractual condition precedent to suit." *ACE II*, 2015 N.Y. Slip Op. 04873, at *2. Failing to "validly commence" an action is different than commencing a defective action; if an action is not "validly commenced," it is a nullity and cannot be revived pursuant to CPLR 205(a). *See, e.g., Goldenberg v. Westchester County Health Care Corp.*, 68 A.D.3d 1056, 1056 (2d Dep't 2009) (action "was never validly commenced" when summons and complaint were served "without ever filing them or obtaining an index number"); *Sciarabba v. State*, 152 A.D.2d 229, 231 (3d Dep't 1989) ("It logically follows that an action which was never validly commenced cannot be pending."). Thus, the Prior Action was "commenced" not by the Funds' summons with notice, but by the Trustee's untimely September 2012 complaint.[6]

Indeed, the Appellate Division's holding that the summons with notice was a nullity and the Court of Appeals' holding that the summons with notice did not validly commence the action mean that the summons with notice was fundamentally defective and, as such, did not confer jurisdiction over the defendant. *See Roth v. State Univ. of N.Y.*, 61 A.D.3d 476, 476 (1st Dep't

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Hudson Corp., 93 N.Y.2d 375, 379-80 (1999) ("CPLR 205(a) would not in any event serve to save plaintiff's action here because the statute expressly excludes the availability of the toll where the first action was dismissed by 'a final judgment upon the merits.'").

[6] Like *ACE I*'s and *ACE II*'s timeliness holdings, the determination that the Funds' summons did not validly commence an action has preclusive effect here. *See Buechel v. Bain*, 97 N.Y.2d 295, 303 (2001) ("Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party . . . .").

2009) ("In thus failing to comply with the notice requirements of CPLR 305(b), the summons was jurisdictionally defective . . . ."); *Bloomingdale Rd. Judgment Recovery v. Wise*, 912 N.Y.S.2d 388, 391 (Sup. Ct. Kings Cnty. 2010) (omission of plaintiff's address from summons with notice was defect in personal jurisdiction). A case that is dismissed for lack of personal jurisdiction cannot be revived under CPLR 205(a). *See, e.g.*, *Parker v. Mack*, 61 N.Y.2d 114, 117 (1984) ("The fatal consequence of a lack of jurisdiction over the person of the defendant as contrasted with a lack of subject matter jurisdiction for purposes of availability of a CPLR 205 (subd [a]) extension is well recognized."). Accordingly, this constitutes an additional reason why CPLR 205(a) is unavailable in this case.

II. EVEN ASSUMING THE FUNDS' SUMMONS VALIDLY COMMENCED AN ACTION, THE TRUSTEE CANNOT BENEFIT FROM ITS FILING DATE

Even assuming that the Prior Action was "timely commenced" for purposes of CPLR 205(a)—in spite of it having been dismissed as barred by the statute of limitations by the Appellate Division and the Court of Appeals—CPLR 205(a) still does not apply here. The Court of Appeals has squarely held that CPLR 205(a) "does not allow[] for commencement of the new action by an entity that is different from . . . the original corporate plaintiff." *Reliance Ins.*, 9 N.Y.3d at 56. Instead, "the benefit provided by [CPLR 205(a)] is explicitly, and exclusively, bestowed on 'the plaintiff' who prosecuted the initial action." *Id.* at 57. The "original corporate plaintiff[s]" in the Prior Action were the Funds, not the Trustee (whose September 13, 2012 complaint could not be "deem[ed] timely filed" by virtue of the Funds' summons' March 28, 2012 filing date, *ACE I*, 112 A.D.3d at 523). The Court of Appeals' ruling in *Reliance* is therefore dispositive here and requires dismissal of this action.

A. The Court Of Appeals' Ruling In *Reliance Insurance*

Reliance Insurance involved a suit filed pursuant to rights acquired under certain

performance bonds issued by Reliance Insurance Company ("RIC"). "[F]or unknown reasons," *Reliance Ins.*, 9 N.Y.3d at 55, Reliance Insurance Company of New York ("RNY"), a subsidiary of RIC, brought suit in New York state court, "identif[ying] itself"—rather than RIC—"as the issuer of [the] performance bonds." *Reliance Ins. Co. v. PolyVision Corp.*, 390 F. Supp. 2d 269, 271 (E.D.N.Y. 2005). The state court dismissed the case because RNY did not, in fact, "issue the bonds," and therefore had "no right to seek indemnification for claims paid out under such bonds." Order at 2, *Reliance Ins. Co. of N.Y. v. Info. Display Tech., Inc.*, No. 94-22608 (Sup. Ct. Suffolk Cnty. Jan. 4, 2005), Woll Aff., Ex. C.

RIC filed suit in federal court within six months of dismissal of the state court action, asserting that CPLR 205(a) rendered its claims timely. The defendant moved to dismiss, and the district court granted the motion, holding that "RIC may not take advantage of CPLR 205[(a)] because it was not 'the plaintiff' in the dismissed action." *Reliance Ins.*, 390 F. Supp. 2d at 274. On appeal, the Second Circuit certified to the New York Court of Appeals the question of whether corporate litigants other than "the plaintiff" in the original action can obtain the benefits of CPLR 205(a), finding "no dispositive New York decision on this issue." *See Reliance Ins. Co. v. PolyVision Corp.*, 474 F.3d 54, 58 (2d Cir. 2007). The Court of Appeals accepted certification, noting that "this is an open, important issue which will determine not only the pending case but also future cases." *Reliance Ins.*, 9 N.Y.3d at 56. The Court of Appeals unanimously answered the question in the negative.

The Court of Appeals' opinion first addressed the text of CPLR 205(a):

> Turning first, as we must, to the text of the statute, we note that the benefit provided by the section is explicitly, and exclusively, bestowed on "the plaintiff" who prosecuted the initial action. Only if "the plaintiff" dies, and his or her cause of action survives, may the executor or administrator of a deceased plaintiff's estate commence a new action based on the same occurrence. Outside of

> this representative context, we have not read "the plaintiff" to include an individual or entity other than the original plaintiff.

Reliance Ins., 9 N.Y.3d at 57.[7] Stressing that prior precedents allowing new or substituted plaintiffs to take advantage of CPLR 205(a) were limited to "this representative context"—*i.e.*, the executor/administrator context—the Court noted that its prior rulings had cast doubt on the broader reading urged by RIC. *Id.* In *George v. Mt. Sinai Hospital*, for instance, the Court had permitted an administratrix to recommence a suit improperly filed in the decedent's name, but had noted that "[u]sually, of course, the fact that one party commenced an action which is subsequently dismissed, will not serve to justify application of [CPLR 205 (a)] so as to support a later action by a different claimant." 47 N.Y.2d 170, 179 (1979). Similarly, in *Streeter v. Graham & Norton Co.*, the Court had refused to allow an administrator to obtain the benefits of CPLR 205(a)'s similarly-worded predecessor statute where the first suit had been commenced not by the decedent, but rather by an insurance company, which lacked standing to assert the claims at issue. 263 N.Y. 39, 41-42 (1933). In so ruling, the Court had explained that "[t]o grant the right conferred by [the statute] to a different party plaintiff, representing in part different interests, would require the placing of a construction upon the section plainly beyond its intent and purpose." *Id.* at 44.

Having concluded that the statutory text, as well as the Court's precedents, provided no

[7] The Second Circuit similarly explained in its certification opinion that "[i]n the most typical cases, § 205(a) is used to save a suit brought by an executor or administrator on behalf of the proper but deceased plaintiff." *Reliance Ins.*, 474 F.3d at 58 (citing *Carrick v. Cent. Gen. Hosp.*, 51 N.Y.2d 242 (1980); *George v. Mt. Sinai Hosp.*, 47 N.Y. 2d 170 (1979); *Krainski v. Sullivan*, 208 A.D.2d 904, (2d Dep't 1994); *Ballav v. Deepdale Gen. Hosp.*, 196 A.D.2d 520 (2d Dep't 1993)). The Second Circuit noted that despite "seemingly broad statement[s]" in at least one of those decisions regarding the availability of CPLR 205(a) to cure "error[s] relating to the identity of the named plaintiff in the original action," that case was itself in the executor/administrator context, and "all of the decisions on which it relies are of the same genre." *Reliance Ins.*, 474 F.3d at 58 (quotation marks omitted).

support for applying CPLR 205(a) to new or substituted plaintiffs, the Court considered and rejected RIC's argument that the remedial purposes of CPLR 205(a) would nonetheless be served by such a construction. *See Reliance Ins.*, 9 N.Y.3d at 57-58. First, the Court reasoned that different corporate entities, even parents and their wholly-owned subsidiaries, represent, in part, different interests (even as they necessarily seek to pursue the same claim, a precondition for the application of CPLR 205(a)). Unlike an administrator or executor—"the situation the Legislature addressed in CPLR 205(a)"—a new or substituted corporate plaintiff does not simply step into the shoes of the corporate plaintiff it replaces. *Id.* In other words, "RIC is not RNY in a different capacity." *Id* at 58. Second, the Court concluded that permitting RIC to avail itself of CPLR 205(a) would "open a new tributary in the law" that could "breathe life into otherwise stale claims" that were appropriately barred by the statute of limitations. *Id.* The Court stressed that it was "mindful of the potential ramifications of a rule allowing a 'different, related corporate entity' the benefit of the statutory grace period, not knowing precisely what that means or portends," and that it "prefer[red] to read CPLR 205(a) as it was written by the Legislature and has consistently been applied by this Court." *Id.*

B. Applying *Reliance Insurance*

1. *Reliance Insurance* Mandates Dismissal

Reliance Insurance establishes an explicit, bright-line rule: apart from the statutory exception for administrators or executors acting on behalf of deceased original plaintiffs, an individual or entity other than the original plaintiff cannot revive a dismissed action under CPLR 205(a). *Id.* at 57. Applying this rule to this case is simple. HSBC Bank USA, N.A., the plaintiff in this action, is a different plaintiff than the Funds, RMBS Recovery Holdings 4, LLC and VP Structured Products, LLC, the plaintiffs who commenced the Prior Action. *Compare* Compl. ¶ 2 ("[O]n March 28, 2012, the Certificateholders commenced the Prior Action by filing a summons

with notice . . . ."), *with id.* ¶ 1 ("[T]he Trustee brings this action . . . ."). Therefore, HSBC cannot obtain the benefit of CPLR 205(a) in this action, and this action must be dismissed as untimely.

2. Plaintiff's Arguments To The Contrary Are Unavailing

Plaintiff will contend in opposition, as it did before the First Department and the Court of Appeals in the Prior Action, that CPLR 205(a) should nonetheless apply because the Funds' summons purported to assert the rights of the Trust, and the Trustee is also asserting the rights of the Trust in this Action. This is wrong. First, as noted above, *Reliance Insurance* establishes a bright-line rule based on the text of CPLR 205(a): apart from the executor and administrator context, the plaintiff in the prior action must be the same as the plaintiff in the revival action.

Second, even if CPLR 205(a) could be read to generally permit, outside of the executor/administrator context, a new or substituted plaintiff to revive a prior action if the new plaintiff is a "representative" of the original plaintiff, such a rule would not apply in this case. As the *George* court explained, a prior action may be revived if the original plaintiff, while holding the underlying claim, is subject to a disability which prevents it from bringing suit, and the claim is reasserted in a subsequent action by a representative who is free from the original plaintiff's capacity defect. *George*, 47 N.Y.2d at 178 (applying CPLR 205(a) to the substitution of administratrix for decedent plaintiff because "the subsequent claimant is acting as the representative of the named plaintiff in the prior action").[8] Here, by contrast, the Funds lacked

[8] The district court opinion in *Reliance Insurance* offered two additional examples: a bankruptcy trustee being allowed to recommence an action improperly brought by the debtor (*Genova v. Madani*, 283 A.D.2d 860 (3d Dep't 2001)), and a corporation being able to recommence an action dismissed due to its lack of capacity resulting from nonpayment of taxes (*Lorisa Capital Corp. v. Gallo*, 119 A.D.2d 99 (2d Dep't 1986)). *See Reliance Ins.*, 390 F. Supp. 2d at 273. It is doubtful that cases such as *Madani* survive the Court of Appeals' ruling in *Reliance Insurance*. However, despite the lack of statutory textual support for the result in *Madani*, the situation there

standing (not capacity) to bring the claims asserted in the Prior Action, because those claims belonged to the Trustee on behalf of the Trust,[9] and this revival action is brought by the Trustee, the party who always held those claims but failed to timely assert them. In this regard, this case is analogous to *Reliance Insurance* and *Streeter*, both cases in which an original plaintiff attempted to assert claims which it lacked standing to pursue, and then the plaintiff who actually held the claims but failed to timely assert them was held to be outside the purview of CPLR 205(a). Just as "RIC [wa]s not RNY in a different capacity" in *Reliance Insurance*, 9 N.Y.3d at 58, the Trustee is not the Funds in a different capacity here.[10]

Finally, Plaintiff's invocation of CPLR 205(a) in this case is contrary to the statute's purpose. "The very function of [CPLR 205(a)] is to provide a second opportunity *to the claimant* who has failed the first time around because of some error pertaining neither to *the claimant's willingness to prosecute in a timely fashion* nor to the merits of the underlying claim." *George*, 47 N.Y.2d at 178-79 (emphases added). But instead of allowing an aggrieved plaintiff to re-file a suit diligently pursued but technically defective, the application of CPLR 205(a) here would inure to the benefit of a second, different plaintiff that *deliberately chose not to sue DBSP*

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at least involves a representative plaintiff in some ways analogous to an executor or administrator.

[9] *See ACE I*, 112 A.D.3d at 523 (The Funds "lacked standing to commence the action on behalf of the trust.").

[10] In fact, the First Department concluded that the relationship between the Funds and the Trustee was materially more remote than the relationship that existed between RNY and RIC (its parent company) in *Reliance Insurance*. In rejecting the argument that the Trustee's complaint in the Prior Action could be deemed timely filed by virtue of the Funds' summons' filing date, the First Department distinguished cases allowing such retroactively-effective substitutions on the basis that those cases involved substitution of closely-related corporate affiliates, implicitly concluding that no such close relationship existed. *See ACE I*, 112 A.D.3d at 523. It would be anomalous indeed if the Funds and the Trustee, parties who are *not* sufficiently closely related for substitution purposes, could revive each other's dismissed actions under CPLR 205(a), while close corporate affiliates, who are permitted to substitute, could not.

within the limitations period. *See ACE II*, 2015 N.Y. Slip Op. 04873, at *4 (noting that "the trustee neither sought a tolling agreement nor brought suit against DBSP" within the limitations period). This is exactly the sort of untoward result the Court of Appeals sought to avoid in *Reliance Insurance*. *See, e.g.*, 9 N.Y.3d at 58 ("We are, moreover, mindful of the potential ramifications of a rule allowing a 'different, related corporate entity' the benefit of the statutory grace period, not knowing precisely what that means or portends."). Certainly, there is no precedent for the proposition that a new plaintiff can benefit from CPLR 205(a) after expressly refusing to bring suit within the limitations period, and this Court should decline to open this new tributary in the law. This Court should instead apply CPLR 205(a) as it was written by the Legislature and consistently applied by New York courts, and dismiss this case with prejudice.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court grant its motion to dismiss the Complaint with prejudice pursuant to CPLR 3211(a)(5) and (a)(7).

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