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. 001

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

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Plaintiff ACE Securities Corp., Home Equity Loan Trust, Series 2006-SL2 (the "Trust"), by HSBC Bank USA, National Association (the "Trustee"), in its capacity as the Trustee for the holders of Asset Backed Pass-Through Certificates, Series 2006-SL2 (the "Certificates"), issued by the Trust pursuant to a Pooling and Servicing Agreement ("PSA") and a Mortgage Loan Purchase Agreement ("MLPA"), both of which closed on March 28, 2006, respectfully submits this memorandum of law in opposition to the motion of defendant DB Structured Products, Inc. ("DBSP") to dismiss the complaint (the "Complaint")[1] pursuant to CPLR 3211(a)(5) and (a)(7).[2]

PRELIMINARY STATEMENT

The sole issue for the Court to determine on this motion is whether the instant action was properly filed pursuant to CPLR 205(a). CPLR 205(a), entitled "New action by plaintiff," provides, in pertinent part, as follows:

> If an action is timely commenced and is terminated in any other manner than by a 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, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

CPLR 205(a) serves a broad, remedial purpose: "to ameliorate the potentially harsh effect of the Statute of Limitations in certain cases in which at least one of the fundamental purposes of the Statute of Limitations has in fact been served, and the defendant has been given timely notice of the claim being asserted by or on behalf of the injured party." *George v. Mt. Sinai Hosp.*,

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[1] The Memorandum of Law In Support of DBSP's Motion to Dismiss the Complaint, dated July 30, 2015, is referred to herein as the "DBSP Br."

[2] Submitted herewith in opposition to DBSP's motion is the Affirmation of Zachary W. Mazin, sworn to on September 4, 2015 (the "Mazin Aff."). The Affirmation of David J. Woll (Doc. No. 55), sworn to on July 30, 2015 and submitted in support of DBSP's motion, is referred to herein as the "Woll Aff."

47 N.Y.2d 170, 177-78 (1979). This action presents precisely the questions of fundamental fairness that CPLR 205(a) was designed to address:

- Where certain certificateholders of the Trust (the "Certificateholders") timely filed and served a summons with notice not on their own behalf, but derivatively on behalf of the entire Trust and all its certificateholders, and the action was then dismissed for its failure to have complied with a condition precedent, may the Trustee file a new action on behalf of the same Trust and certificateholders after that procedural defect has been cured? CPLR 205(a) explicitly provides that it may.
- Viewed from another perspective, where DBSP was provided with timely notice of the Trust's claims against it, but the action was dismissed for its failure to comply with a condition precedent, can DBSP claim prejudice from the Trustee's subsequent CPLR 205(a) revival action on behalf of the same Trust, simply because the summons in the original action was filed by the Trust's Certificateholders? CPLR 205(a) answers that question with a resounding "no."

Because the Trustee's instant action falls squarely within the parameters of CPLR 205(a), DBSP's motion to dismiss should be denied.

The claims here – seeking the same relief for the same breaches on behalf of the same stakeholders – were first asserted in a summons with notice the Certificateholders filed on March 28, 2012 under Index No. 650980/2012 (the "Original Action"). Because the Certificateholders filed the Original Action within six years of the Trust's closing, it was a timely-commenced action, which the Trustee thereafter ratified by filing a complaint on September 13, 2012.

DBSP moved to dismiss the Original Action, leading to proceedings that escalated to the New York Court of Appeals. On June 11, 2015, the Court of Appeals dismissed the Original Action, holding that: (i) the Trust's claim for breach of contract accrued on the Trust's March 28, 2006 closing date; and (ii) a condition precedent to suit – the expiration of 60-day cure and 90-day repurchase periods – had not been satisfied by the date the Certificateholders

commenced the Original Action. *ACE Sec. Corp. Home Equity Loan Trust, Series 2006-SL2 v. DB Structured Prods., Inc.*, 25 N.Y.3d 581, 593-97, 597-98 (2015) ("*ACE 2006-SL2 – COA*").[3]

Because the relevant cure and repurchase periods have now expired (*i.e.*, the condition precedent found lacking in the Trust's Original Action has now been satisfied), the Trustee commenced this "revival" action pursuant to CPLR 205(a). Under the controlling standards the First Department announced in *Carmenate v. City of New York*, this new action, filed "upon the same transaction or occurrence … within six months after the termination" of the Original Action, comports with CPLR 205(a) because the following three elements are satisfied:

- the instant revival action would have been timely commenced at the time of commencement of the Original Action;
- the Original Action was terminated as defective, not on the merits; and
- the Original Action provided DBSP with notice of all of the Trust's claims against it.

59 A.D.3d 162, 163 (1st Dep't 2009). In the words of the *Carmenate* court, "No additional factors are mandated ...." *Id.*

DBSP now seeks dismissal of this revival action by proffering arguments that are utterly at odds with the text of CPLR 205(a), the holding in the Original Action, and controlling precedent issued by the Court of Appeals, the First Department, and even this Court. DBSP primarily argues that "the Appellate Division and the Court of Appeals expressly held that the [Original Action] was <u>not</u> timely commenced." (DBSP Br. at 7 (emphasis in original)) This is false. This Court has already found "unpersuasive[]" another RMBS defendant's assertion that the First Department "dismissed the [Original Action] as time barred." *U.S. Bank N.A. v. DLJ Mortg. Capital, Inc.*, Index No. 654147/2012, 2015 N.Y. Misc. LEXIS 872, at *17-18 (Sup. Ct. N.Y. Cnty. March 24, 2015) ("*ABSHE 2006-HE7*"). There, this Court held that:

[3] The Court of Appeals assumed *arguendo* the Certificateholders' standing in commencing the Original Action and, ultimately, declined to address the issue. *Id.* at 589, 599.

> The [First Department's] ACE decision [] did not state, or hold, that the failure to comply with the condition precedent of service of a repurchase demand rendered the action "untimely." Nor, in this court's opinion, would such a holding be consistent with the authority under CPLR 205(a) cited [herein].

Id., at *18. The Court of Appeals, meanwhile, made clear that it dismissed solely because the Trust "fail[ed] 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." *ACE 2006-SL2 – COA*, 25 N.Y.3d at 589. Because the Original Action was dismissed not on timeliness grounds, but solely on the basis of a curable defect that has now been cured, the Trustee's instant action is properly brought under CPLR 205(a).

DBSP also argues that the Trustee's "current action … was commenced by a different plaintiff than the plaintiffs that initiated the [Original Action]." (DBSP Br. at 1) DBSP is simply wrong on the law. Indeed, in the very case upon which DBSP relies, the Court of Appeals made clear that, in a CPLR 205(a) revival action, "the plaintiff in the new lawsuit may appear in a different capacity, such as a duly appointed administrator, but the identity of the individual on whose behalf redress is sought must remain the same." *Reliance Ins. Co. v. PolyVision Corp.*, 9 N.Y.3d 52, 57 (2007) (emphasis added). Here, the Certificateholders' summons sought relief not on behalf of themselves, but derivatively on behalf of the Trust and all its certificateholders – the same entities on whose behalf the Trustee's revival complaint seeks redress. The distinction DBSP tries to draw between the two proceedings does not exist.

In short, this action properly revives the claims asserted on behalf of the same entities on whose behalf the Certificateholders' timely summons asserted claims. Because the Original Action was dismissed solely for failure to satisfy a condition precedent that has now been satisfied, this action satisfies CPLR 205(a) and DBSP's motion to dismiss should be denied.

STATEMENT OF FACTS

This action seeks to enforce DBSP's obligation to repurchase, or make the Trust whole with respect to, the thousands of defective residential mortgage loans (the "Defective Loans") DBSP sold to a residential mortgage-backed securities ("RMBS") trust in exchange for over $537 million raised from pension funds, insurance companies and other institutional investors that purchased Certificates in the Trust. These securities were pitched on the premise that the certificateholders, who had no ability to conduct diligence on the Trust's collateral, could invest safely because of two fundamental promises:

- DBSP promised, via express representations and warranties (the "Mortgage Representations"), that the nearly 9,000 mortgage loans (the "Mortgage Loans" or "Loans") it sold to the Trust would have certain characteristics and be of a certain quality; and
- DBSP promised that, upon its own discovery or its receipt of notice of a material breach of a Mortgage Representation, DBSP would either cure the breach or repurchase the Defective Loans (the "Cure or Repurchase Obligation") within a specified period (the "Cure or Repurchase Period").

DBSP here breached its Mortgage Representations in pervasive fashion, but has refused to repurchase even a single Defective Loan. By the instant motion, DBSP seeks once again to avoid having to answer for its breach of that basic bargain.

On March 28, 2012, two Certificateholders in the Trust commenced the Original Action by filing a summons with notice seeking specific performance of the Cure or Repurchase Obligation, damages and other relief "*on behalf of the Trust and all of the Certificateholders*." (Woll Aff. Ex. A at 3 (emphasis added)) Service was thereafter effected consistent with CPLR 306-b. (Mazin Aff. Ex. A) On August 24, 2012, DBSP appeared and demanded a complaint and, on September 13, 2012, the Trustee, acting on behalf of the Trust, filed the complaint. (Mazin Aff. Ex. B) The IAS Court denied DBSP's subsequent motion to dismiss the Trustee's complaint, but, on December 19, 2013, the First Department reversed and dismissed

the Original Action. *ACE Sec. Corp. Home Equity Loan Trust, Series 2006-SL2 v. DB Structured Prods., Inc.*, 112 A.D.3d 522 (1st Dep't 2013) ("*ACE 2006-SL2 – 1AD*").

In a brief opinion, the First Department first held that the Trustee "was not entitled to sue or to demand that defendant repurchase defective mortgage loans until it discovered or received notice of a breach *and* the cure period lapsed." *ACE 2006-SL2 – 1AD*, 112 A.D.3d at 522 (emphasis in original). The First Department also held that the Trust's claims accrued on the March 28, 2006 closing of the transaction, "when any breach of the representations and warranties … occurred[.]" *Id.* at 523. In response to the Trustee's argument that, under CPLR 203(f), its complaint could "relate back" to and be given the benefit of the summons that the Certificateholders timely filed, the First Department held that that summons was "a nullity," because the Certificateholders had "fail[ed] to comply with a condition precedent to commencing suit" – namely, giving DBSP a full 60 days to cure the breaches the Trustee identified in its February 8, 2012 notice, or 90 days to repurchase the breaching loans, before commencing the Original Action on March 28, 2012. *Id.* The First Department also held that, in any event, "the 'defaults' enumerated in the PSA concern failures of performance by the servicer or master servicer only," such that the Certificateholders lacked standing to notice "defaults" from the "sponsor's breaches of the representations" or to initiate the action on the Trust's behalf. *Id.* The First Department did not dismiss the Original Action "with prejudice." *Id.*

On January 21, 2014, the Trustee moved the First Department for reconsideration or leave to appeal to the Court of Appeals, which motion was denied on March 20, 2014. On April 21, 2014, the Trustee then moved the Court of Appeals for leave to appeal. While that motion was pending, the Trustee commenced the instant revival action on June 18, 2014 (*i.e.*, within six months of the First Department's dismissal) by filing and serving a summons and the

Complaint. (Doc. Nos. 1, 8, 9, 10) When the Court of Appeals then granted the Trustee's motion for leave to appeal on June 26, 2014, the parties stipulated to stay the instant action pending the Court of Appeals' determination of the Original Action. (Doc. No. 15)

On June 11, 2015, the Court of Appeals affirmed the dismissal of the Original Action, again not "with prejudice." *ACE 2006-SL2 – COA*, 25 N.Y.3d at 599. The Court of Appeals first held that the Cure or Repurchase Obligation did not constitute a "continuing obligation" that could lead to ongoing breaches and accrual of claims. *Id.* at 595. The Court of Appeals then held that the Cure or Repurchase Obligation "was not a substantive condition precedent that deferred accrual of the Trust's claim; instead it was a procedural prerequisite to suit." *Id.* at 599. Because of the failure to fulfill that condition precedent – *i.e.*, the failure to allow the cure and repurchase periods to expire – prior to commencing the Original Action, the Court of Appeals expressly dismissed the Original Action for "fail[ure] 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 589. With the Court of Appeals' decision causing the stay of this action to lift, DBSP filed the instant motion to dismiss on July 30, 2015. (Doc. No. 53)

ARGUMENT

Although DBSP invokes CPLR 3211(a)(5) and (a)(7), its motion focuses solely on whether the Complaint comports with CPLR 205(a). In *Carmenate,* the First Department succinctly identified the CPLR 205(a) inquiry as follows:

> [T]he *only* factors necessary for invoking CPLR 205(a) are that there has been a prior timely commenced action, providing the defendants with notice of the claims against them asserted by or on behalf of the injured party, and that the dismissal was not on the merits but for reason of a defect such as the lack of qualified administrator …. No additional factors are mandated by *Carrick* or the authority derived therefrom.

59 A.D.3d at 163 (emphasis added) (citing *Carrick v. Cent. Gen. Hosp.*, 51 N.Y.2d 242 (1980)).

The First Department's admonition that "[n]o additional factors are mandated" derives from the Court of Appeals' earlier instruction in *Carrick* and *George* that CPLR 205(a) "by its very nature is applicable in those instances in which the prior action was properly dismissed because of some fatal flaw; thus to suggest that it should not be applied simply because there was a deadly defect in the prior action seems nonsensical." *Carrick*, 51 N.Y.2d at 248 (quoting *George*, 47 N.Y.2d at 179). In the words of the First Department, "cases should be decided on the merits, wherever possible, and not on the basis of technical procedural requirements." *Wattson v. TMC Holdings Corp.*, 135 A.D.2d 375, 378 (1st Dep't 1987).[4]

While DBSP may have succeeded in establishing defects in the Original Action, the defects it established were, under CPLR 205(a), curable. Controlling authority abundantly demonstrates that the failure of the Original Action to have satisfied a procedural condition precedent and any lack of standing are the types of defects that allow for revival under CPLR 205(a). Thus, the Trustee satisfies each of the *Carmenate* factors:

- the Original Action, "however flawed, actually was 'commenced' within the meaning of CPLR 304" (*Carrick*, 51 N.Y.2d at 249) in a timely fashion;
- the Original Action was dismissed "not on the merits but for reason of a defect" (*Carmenate*, 59 A.D.3d at 163) – specifically, the failure to satisfy a condition precedent to suit; and
- the Original Action provided DBSP with "notice of the claims against [it] asserted … on behalf of the injured party" (*id.*) – *i.e.*, the Trust and all its certificateholders.

[4] *See also Matter of Goldstein v. N.Y. State Urban Dev. Corp.*, 13 N.Y.3d 511, 521 (2009) (CPLR 205(a) serves "the broad and liberal purpose of remedying what might otherwise be the harsh consequence of applying a limitations period where the defending party has had timely notice of the action.") (internal citations omitted); *Winston v. Freshwater Wetlands Appeals Bd.*, 224 A.D.2d 160, 164 n.2 (2d Dep't 1996) ("The statute has been described in a number of ways, all attesting to its redemptive character, designed to prevent claims from being irreversibly extinguished following technical-type dismissals. The statute is remedial, or ameliorative in that it tolls, extends, saves, revives, reinstitutes, and even resuscitates.").

For these reasons, discussed further below, this Court should deny DBSP's motion to dismiss.

I. THE ORIGINAL ACTION WAS TIMELY COMMENCED WITHIN SIX YEARS OF THE TRANSACTION'S CLOSING

The first *Carmenate* factor – the existence of a timely-commenced prior action – is established here by the Court of Appeals' binding conclusions in the Original Action. *First*, the Court concluded that the Trust's breach claims against DBSP accrued on March 28, 2006, when the Trust transaction closed. *ACE 2006-SL2 – COA*, 25 N.Y.3d at 589. *Second*, the Court concluded that "the two certificateholders sued DBSP on March 28, 2012 – six years to the day from the date of contract execution – by filing a summons with notice on behalf of the Trust." *Id.* at 591-92. Those two facts together establish that the Original Action, "however flawed," was timely commenced. *See Carrick*, 51 N.Y.2d at 249 (action need only comply with CPLR 304 to be "commenced" under CPLR 205(a)); *S. Wine & Spirits of Am., Inc. v. Impact Envtl. Eng'g, PLLC*, 104 A.D.3d 613, 613 (1st Dep't 2013) ("*S. Wine II*") (plaintiff's prior action "timely commenced" under CPLR 205(a) where original complaint was filed within limitations period). *Accord Dorchester Fin. Sec., Inc. v. Banco BRJ S.A.*, Case No. 11-cv-1529, 2014 U.S. Dist. LEXIS 150372, at *11 (S.D.N.Y. Oct. 22, 2014) ("timely commenced" under section 205(a) means "timely filed"); *Bumpus v. N.Y. City Tr. Auth.*, 66 A.D.3d 26, 30-31 (2d Dep't 2009) (filing of summons with notice "fixe[s] the point at which an action [is] commenced for statute of limitations purpose[s]"). Accordingly, the Trustee has satisfied the first *Carmenate* factor.[5]

In its continuing attempt to avoid addressing this action on the merits, DBSP asserts a variety of scattershot arguments, including that: (i) the Original Action was dismissed as

[5] Because the Original Action here was timely commenced, DBSP's reliance on *Oriskany Cent. Sch. Dist. v. Edmund J. Booth Architects*, 85 N.Y.2d 995 (1995), is entirely unavailing. There, the original action was not commenced until after the limitations period expired. *Id.* at 997.

untimely, rather than for failure of a condition precedent; (ii) the Certificateholders' timely summons with notice was a "nullity" that (iii) did not "validly commence" the Original Action in a timely fashion, and (iv) that summons failed to secure personal jurisdiction over DBSP. Each of these arguments is grossly flawed, and none can prevent revival.

A. The Original Action Was Dismissed Not As Untimely, But Solely Because The Cure Or Repurchase Period Had Not Lapsed As Of Its Commencement

As noted, the Court of Appeals expressly dismissed the Original Action for "fail[ure] 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." *ACE 2006-SL2 – COA*, 25 N.Y.3d at 589. DBSP's assertion to the contrary – *i.e.*, that "the Appellate Division and the Court of Appeals expressly held that the [Original Action] was *not* timely commenced" (DBSP Br. at 7 (emphasis in original); *see also* DBSP Br. at 8-10) – is a false, litigation-driven misreading of those courts' respective opinions.

DBSP, for example, tries to ascribe significance to the First Department's statement that the Original Action was "barred by the six-year statute of limitations on contract causes of action." *ACE 2006-SL2 – 1AD*, 112 A.D.3d at 522. In doing so, DBSP ignores that, because the First Department had held that the Trustee's complaint there could not benefit under CPLR 203(f) from the filing date of the Certificateholders' summons, the First Department's timeliness comments related only to the *Trustee's complaint* – not the Certificateholders' earlier-filed summons. Under CPLR 205(a), however, the Complaint in *this* action can benefit from the filing date of the Certificateholders' summons in the Original Action, as discussed *infra* at Sections I.C and III.B. In context, the language upon which DBSP relies is irrelevant here.

Moreover, this Court has already considered – and roundly rejected – precisely the argument DBSP advances here to characterize the First Department's opinion in the Original

Action. In deciding a motion to dismiss in *ABSHE 2006-HE7*, this Court found "unpersuasive[]" DLJ's assertion that the First Department had "dismissed the [ACE 2006-SL2] action as time barred – precisely because the action had been commenced before the full cure and repurchase periods had run." 2015 N.Y. Misc. LEXIS 872, at *17-18. In unmistakable language, this Court held:

> The [First Department's] ACE decision [] did not state, or hold, that the failure to comply with the condition precedent of service of a repurchase demand rendered the action "untimely." Nor, in this court's opinion, would such a holding be consistent with the authority under CPLR 205(a) cited [herein].

Id., at *18. In reaching this conclusion, this Court relied upon *Carrick*, *George*, *S. Wine II*, *S. Wine & Spirits of Am., Inc. v. Impact Envtl. Eng'g, PLLC*, 80 A.D.3d 505 (1st Dep't 2011) ("*S. Wine I*"), and *Alouette Fashions, Inc. v. Consol. Edison Co. of New York, Inc.*, 119 A.D.2d 481 (1st Dep't 1986). If DBSP were correct, that would mean that the Court of Appeals' decision in the Original Action overruled, *sub silentio*, <u>each</u> of the authorities on which this Court's *ABSHE 2006-HE7* decision relied. That did not happen. In short, this Court's analysis in *ABSHE 2006-HE7* was correct, and it guts DBSP's attempt here to suggest that the First Department dismissed the Original Action on "timeliness" grounds.

Likewise, the Court of Appeals did not rule that the Original Action was untimely. As explained above, *supra* at 7, the Court of Appeals' decision consisted <u>solely</u> of rejecting the Trustee's "continuing obligation" and "substantive condition precedent" arguments, *ACE 2006-SL2 – COA*, 25 N.Y.3d at 594-98, and then dismissing the Original Action because the Certificateholders had "fail[ed] 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 589. DBSP, however, plucks out of the Court of Appeals' opinion a single sentence – "The Trust simply failed to pursue its contractual remedy within six

years of the alleged breach" – and then ignores that it was part of the court's discussion of "substantive" versus "procedural" conditions precedent. *Id.* at 598. Indeed, the sentence upon which DBSP relies reflects merely the court's ruling that the Cure or Repurchase Period was not triggered in time to expire prior to the six-year anniversary of the Trust's closing. It says nothing about whether the Original Action "actually was 'commenced' within the meaning of CPLR 304" within six years of the Trust's closing, *Carrick*, 51 N.Y.2d at 249 – as it certainly was.[6]

Accordingly, notwithstanding DBSP's attempt to spin to the contrary, there can be no serious dispute that the Court of Appeals' decision rested entirely on the "fail[ure] to fulfill the condition precedent" – a failure that, as this Court noted in *ABSHE 2006-HE7*, can be cured. There is no basis, in either the First Department's or the Court of Appeals' opinions, for DBSP's contention that the Original Action was dismissed on timeliness grounds.

B. The Original Action's Summons With Notice Was Not A "Nullity" Because CPLR 203(f)'s "Nullity" Concept Does Not Apply To CPLR 205(a)

In an attempt to bolster its empty argument that the Original Action was "untimely," DBSP tries to disregard the Certificateholders' timely March 28, 2012 summons with notice that commenced the Original Action. According to DBSP, that summons with notice was a "nullity" that did not "validly commence" an action. (DBSP Br. at 9) DBSP's argument confuses CPLR sections and is completely wrong on the law.

To begin, the concept of a summons being a "nullity" is something specific to CPLR 203(f) and has no meaning for purposes of CPLR 205(a). For statute of limitations purposes, CPLR 203(f) permits a later pleading to "relate back" to the date of filing of an earlier pleading. If, however, the earlier pleading was defective for some reason – such as failure of a

[6] The filing and service upon DBSP of the summons in the Original Action complied with CPLR 304, 305, 306 and 306-b, and DBSP has never suggested otherwise – nor could it. (Woll Aff. Ex. A; Mazin Aff. Ex. A)

condition precedent or lack of standing – that earlier pleading is deemed a "nullity," such that there is nothing to which the later pleading can "relate back." *See George*, 47 N.Y.2d at 179 ("[A] necessary element of any attempt to utilize the 'relation-back' provisions of [CPLR 203] is the existence of a valid pre-existing action to which the amendment can relate back."). Many of the circumstances that may render an earlier pleading a "nullity" for purposes of CPLR 203(f), however, are *precisely* the circumstances under which New York courts have permitted CPLR 205(a) revival actions. *See, e.g., Snodgrass v. Prof'l Radiology*, 50 A.D.3d 883, 884 (2d Dep't 2008) (original action was timely commenced, "notwithstanding lack of capacity of plaintiff to pursue claims," therefore, dismissal of original action was "not on the merits"); *Barahona v. Marcus*, Index No. 805268/2013, 2014 N.Y. Misc. LEXIS 3699, at *4-5 (Sup. Ct. N.Y. Cnty. Aug. 7, 2014) (dismissing original action for plaintiff's admitted lack of standing, but expressly providing that dismissal was "without prejudice to plaintiff's right to commence a new action" because "[t]he authority here is clear" that "CPLR § 205(a) does apply in these circumstances"); *see also infra* at Section III.

In *Carrick*, the New York Court of Appeals drew this distinction between CPLR 203(f) and CPLR 205(a). Quoting its earlier decision in *George*, the *Carrick* Court held that, "[w]hile the relation-back provisions of CPLR 203 are dependent on the existence of a valid pre-existing action, CPLR 205(subd [a]) was created to serve in those cases in which the prior action was defective and so had to be dismissed." 51 N.Y.2d at 248-49 (quoting *George*, 47 N.Y.2d at 179-80). Therefore, according to *Carrick*, "the fact that the prior action was so defective as to be 'tantamount to no suit whatsoever,' simply does not preclude the use of that remedial provision [CPLR 205(a)] to revive an otherwise time-barred cause of action, provided, of course, that a prior timely action, however flawed, actually was 'commenced' within the meaning of

CPLR 304." 51 N.Y.2d at 249. Far from reconciling its argument with this controlling authority, DBSP does not even acknowledge *Carrick* on this point.

This Court also drew this same distinction between CPLR 203(f) and CPLR 205(a) in *ABSHE 2006-HE7*, and correctly echoed *Carrick*'s mandate that the requirements of CPLR 205(a) cannot be conflated with those of CPLR 203(f):

> It is noted that the Court of Appeals has criticized the use of the term "nullity" to characterize an action which has been properly dismissed, but may be recommenced pursuant to CPLR 205(a). In *George* [*supra*], an action brought by an administrator pursuant to CPLR 205(a) after the dismissal of a prior action commenced by a deceased plaintiff, the Court rejected the defendant's argument that "the prior action was a 'nullity' rather than an action, and thus there was in fact no prior action." The Court reasoned that "the relation-back provisions of CPLR 203 are dependent on the existence of a <u>*valid*</u> pre-existing action," but that CPLR 205(a) permits commencement of a new action where "the prior action was defective and so had to be dismissed" but where the prior action otherwise complied with the requirements of CPLR 205(a), including timely commencement.

2015 N.Y. Misc. LEXIS 872, at *17 n.5 (internal citations omitted) (emphasis in original). Accordingly, as this Court concluded, "this Department has held that where the original complaint is timely filed and a condition precedent has not been complied with, a new action may be filed pursuant to CPLR 205(a), provided the original action was dismissed on grounds permitted by the savings clause." *Id.*, at *15-16. That is the exact circumstance presented here, and DBSP does not even address this Court's prior ruling, much less provide any basis for the Court to depart from its correct conclusion.

C. <u>The Certificateholders Validly Commenced The Original Action</u>

Because DBSP has confused CPLR sections, there is no basis for DBSP's corollary contention that the Certificateholders' summons with notice failed to "validly commence" the Original Action. (DBSP Br. at 9) DBSP's argument is not just flawed; it is misleading, in that it tries to link the First Department's CPLR 203(f) "nullity" holding to the Court of Appeals'

holding that the Original Action was not "validly commence[d]," when there is no connection whatsoever. In fact, DBSP's attempt to link those concepts depends on simply disregarding the Court of Appeals' actual holding – *i.e.*, that the Original Action was not "validly commence[d] … <u>because [the Certificateholders] failed to comply with the contractual condition to suit</u>." *ACE 2006-SL2* – COA, 25 N.Y.3d at 589 (emphasis added); *see also* DBSP Br. at 9 (quoting same). In other words, the Court of Appeals plainly dismissed the Original Action because of a curable defect, not due to a failure to comply with any requirement of Article 3 of the CPLR.

Because there is no merit to DBSP's contention that the Original Action was not "validly commence[d]," it removes the predicate for DBSP's footnoted *res judicata* argument. (DBSP Br. at 8, 9 n.6) Stated simply, because the Court of Appeals did <u>not</u> make the "validly commence[d]" holding DBSP has misread into the opinion, that non-existent holding cannot possibly have "preclusive effect here." In this regard, the Third Department's opinion in *De Ronda v. Greater Amsterdam Sch. Dist.* is instructive:

> [A]n order dismissing an action is *res judicata* of only whatever it actually decides; it will not preclude a new action which meets and overcomes the particular objection …. Dismissal for failure to fulfill a condition precedent is not a final judgment on the merits, and, therefore, a six-month extension of the time limit is available under CPLR 205(subd [a]).

91 A.D.2d 1088, 1089-90 (3d Dep't 1983). In short, the Court of Appeals' <u>*actual*</u> holding confirms that this case was properly revived under CPLR 205(a).

Lest there be any doubt as to whether the Certificateholders "validly commence[d]" the Original Action, one need only consider the circumstances – none relevant here – where courts have concluded that an original action had not been validly commenced, thereby precluding revival. The cases cited in *Carrick* are instructive. In *Smalley v. Hutcheon*, "[n]o action was commenced and none was pending against the defendant within the time limited by statute", because the plaintiff had not properly effected service upon the out-of-state administrator.

296 N.Y. 68, 73 (1946). Likewise, in *Erickson v. Macy*, the prior action had not been "commenced" because "no pretense [was] made of personal service" and "[n]o publication was had pursuant to an order" consistent with the rules then in place for instituting an action. 236 N.Y. 412, 414-15 (1923). DBSP, meanwhile, cites to *Goldenberg v. Westchester Cnty. Health Care Corp.*, 68 A.D.3d 1056 (2d Dep't 2009), where a complaint was served but never filed, and *Sciarabba v. State*, 152 A.D.2d 229, 231 (3d Dep't 1989), which involved a defect in service. Not one of these cases has any relation to the facts here, where the Certificateholders purchased an index number, filed their summons with notice prior to expiration of the limitations period, and served it on DBSP, all in compliance with Article 3 of the CPLR (*see supra* at n.6) – thereby validly commencing the Original Action.

D. This Court Obtained Personal Jurisdiction Over DBSP In The Original Action And, In Any Event, DBSP Waived Any Personal Jurisdiction Defense

Building off of its erroneous conclusion that the Original Action's summons with notice was a "nullity," DBSP also asserts that "the summons with notice was fundamentally defective and, as such, did not confer jurisdiction over the defendant." (DBSP Br. at 9-10) Because, as noted, the summons as "nullity" is a CPLR 203(f) concept that is foreign to CPLR 205(a), there is no basis for DBSP's personal jurisdiction argument.[7]

Moreover, DBSP accepted service of the Original Action's summons with notice, and demanded a complaint in that Original Action without ever having contested personal

[7] DBSP again cites authorities that bear no resemblance to the facts of this case. *Roth v. State Univ. of N.Y.*, 61 A.D.3d 476 (1st Dep't 2009), involved a failure to comply with CPLR 305(b)'s notice requirements – something DBSP argued and lost in the Original Action. *See infra* at n.8. Likewise, *Bloomingdale Rd. Judgment Recovery v. Wise*, 29 Misc. 3d 1078 (Sup. Ct. Kings Cnty. 2010), turned on technical defects associated with the summons with notice that are not alleged to be present here.

jurisdiction as they do now.[8] Thus, under CPLR 3211(e), DBSP waived any personal jurisdiction defense by making a CPLR 3211(a) motion that did not assert lack of personal jurisdiction as one of its grounds. CPLR 3211(e) is clear on this issue:

> An objection based upon a ground specified in paragraph eight ["the court has not jurisdiction of the person of the defendant"] or nine ["the court has not jurisdiction in an action where service was made under section 314 or 315] of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection ….

See Addesso v. Shemtob, 70 N.Y.2d 689 (1987); *Interlink Metals & Chems., Inc. v. Kazdan*, 222 A.D.2d 55, 58 (1st Dep't 1996) ("A defense based upon lack of personal jurisdiction is deemed waived if the defendant fails to assert it, *with specificity*, in its answer *or in connection with a pre-answer motion* based upon a ground set forth in CPLR 3211(a)."") (emphasis added). Having accepted the court's jurisdiction over it in the Original Action, DBSP cannot avoid the instant revival by arguing now there was no personal jurisdiction in the Original Action.

II. THE ORIGINAL ACTION WAS DISMISSED NOT ON THE MERITS, BUT FOR REASON OF A CURABLE DEFECT

The second *Carmenate* factor allows for revival where the prior action was dismissed "not on the merits but for reason of a defect." 59 A.D.3d at 163. As noted, the Court of Appeals dismissed the Original Action for "fail[ure] 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." *ACE 2006-SL2 – COA*, 25 N.Y.3d at 589. Such a failure to comply with a condition precedent presents a curable defect, not a dismissal on the merits. Thus, the second *Carmenate* factor is also satisfied here.

[8] DBSP moved to dismiss the Original Action on the ground that the summons with notice did not adequately provide notice of the claims asserted against it, and thus was jurisdictionally defective; it did not assert the argument it now makes in this action. In any event, Justice Kornreich did not dismiss the Original Action because of insufficient notice, and DBSP did not appeal that aspect of the ruling.

DBSP contests this factor in a footnote, asserting that the Original Action's "dismissal on statute of limitations grounds" was a "final judgment upon the merits," which precludes revival. (DBSP Br. at 8 n.5) This argument fails of its own weight. *First*, as established *supra* at Section I, the Original Action simply was not dismissed on statute of limitations grounds.

Second, the only support DBSP cites for its proposition is *Yonkers Contr. Co. v. Port Auth. Trans-Hudson Corp.*, which involves a *substantive* condition precedent to suit – *i.e.*, one that constitutes an element of the underlying cause of action. 93 N.Y.2d 375, 378-79 (1999).[9] Because the Court of Appeals has conclusively ruled that the Cure or Repurchase Obligation is a "*procedural* prerequisite to suit," *ACE 2006-SL2 - COA*, 25 N.Y.3d at 598 (emphasis added), this line of argument is unavailing to DBSP. *See Carrick*, 51 N.Y.2d at 252 ("Like any condition precedent, the [satisfaction of the condition], while essential to the maintenance of the suit, is in no way related to the merits of the underlying claim. Thus, a dismissal due to the omission of this requirement must be regarded as a tangential matter not affecting the validity of the claim itself."); *S. Wine II*, 104 A.D.3d at 613 ("[D]ismissal of the prior action for plaintiffs' failure to comply with a condition precedent was not a judgment on the merits.").[10]

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[9] This distinction is clear from the *Yonkers Contracting* court's explanation that "[c]ase law distinguishes between a Statute of Limitations and a statutory time restriction on commencement of suit. The former merely suspends the remedy provided by a right of action, but the latter *conditions* the existence of a right of action, thereby creating a substantive limitation on the right. Both CPLR 205(a) and its equivalent predecessor statutes have been held to be inapplicable when the statutory time bar to the commencement of the second action falls into the latter category, as a condition precedent. The requirement to bring an action within one year under Unconsolidated Laws § 7107 is such a condition precedent to suit, which cannot be tolled under CPLR 205(a)." 93 N.Y.2d at 378 (emphasis in original) (internal citations omitted).

[10] Having argued that the condition precedent here was procedural, and won, DBSP is now judicially estopped from arguing that the condition precedent was substantive. *See Becerril v. City of N.Y. Dep't of Health & Mental Hygiene*, 110 A.D.3d 517, 519 (1st Dep't 2013) ("The doctrine of judicial estoppel prevents a party who assumed a certain position in a prior proceeding and secured a ruling in his or her favor from advancing a contrary position in another action, simply because his or her interests have changed.").

Third, neither the First Department nor the Court of Appeals dismissed the Original Action with prejudice, such that neither decision was "on the merits." *See* CPLR 5013.[11] Thus, the Original Action can be revived under CPLR 205(a).

III. THE ORIGINAL ACTION PROVIDED DBSP WITH NOTICE OF THE CLAIMS ASSERTED AGAINST IT ON BEHALF OF THE TRUST

As for the third and final *Carmenate* factor, the sole issue is whether the Original Action provided DBSP with "notice of the claims against [it] asserted by or on behalf of the injured party." *Carmenate*, 59 A.D.3d at 163. There can be no question that it did. The Certificateholders' summons with notice clearly stated that it sought "relief on behalf of the Trust and all of the Certificateholders in the form of specific performance to repurchase the defective Loans in the Trust, as well as compensatory damages in an amount to be determined at trial, and such other relief as may be just and proper." (Woll Aff. Ex. A at 3) It sought precisely the same relief, on behalf of the same real parties-in-interest (the Trust and its certificateholders) as that sought in the instant revival action. The only difference is in the name of the entity asserting the claims on behalf of the real parties-in-interest, but that difference is of no moment under CPLR 205(a).

Thus, for example, in *George*, the Court of Appeals permitted an administrator to revive a prior action that was dismissed because the plaintiff was deceased. 47 N.Y.2d at 170.

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[11] Even if, contrary to fact, the Original Action had been dismissed "with prejudice," such a dismissal would not preclude revival by the Trustee here. *See Carrick*, 51 N.Y.2d at 252 ("[F]or purposes of applying CPLR 205 (subd [a]), a 'final judgment upon the merits' does not necessarily result every time a cause of action is dismissed for want of a formal, albeit essential, element of the claim. Although the prior dismissal may operate as a 'direct estoppel' in the sense that a subsequent action between the same parties based upon identical allegations would be barred by traditional *res judicata* principles, the dismissal does not constitute a 'final judgment upon the merits' precluding application of CPLR 205 (subd [a]) to a subsequently commenced action unless it actually represents a definitive adjudication of the factual or legal merits of the underlying claim.") (internal citations omitted).

Although the identity of the nominal plaintiff had changed, the Court of Appeals allowed the new action because, *inter alia*, "the defendant ha[d] been given timely notice of the claim being asserted by or on behalf of the injured party." *Id*. at 177-78. According to *George*:

> Usually, of course, the fact that one party commenced an action which is subsequently dismissed, will not serve to justify application of the subdivision so as to support a later action by a different claimant. Where, however, as here, the claim is the same, and the subsequent claimant is acting as the representative of the named plaintiff in the prior action, no such difficulty arises.

47 N.Y.2d at 179. Because DBSP likewise had timely notice of the precise claims the Trustee is reviving here, the last *Carmenate* factor is satisfied.

A. There Is No "Explicit, Bright-Line" Rule Restricting CPLR 205(a) Only To Administrators And Executors

Notwithstanding *George*'s focus on the identity of the "injured party," DBSP tortures the language and reasoning of *George* and the Court of Appeals' later opinion in *Reliance*, *supra*, in an attempt to restrict CPLR 205(a) solely to administrators or executors who file on behalf of a deceased plaintiff's estate. (DBSP Br. at 10-16) According to DBSP, "*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)." (DBSP Br. at 13) Yet, nothing in *George*, *Reliance*, or any of their progeny support DBSP's "explicit, bright-line rule" for CPLR 205(a). Indeed, even *Reliance* disavows any such "bright-line rule" and supports revival here.

In *Reliance*, the New York Court of Appeals reviewed the following question certified to it by the United States Court of Appeals for the Second Circuit:

> Does New York CPLR § 205(a) allow a corporation to refile an action within six months when a previous, timely-filed action has mistakenly been commenced in the name of a different, related corporate entity, and has been dismissed for naming the wrong corporate plaintiff?

9 N.Y.3d at 52. The Court of Appeals held that CPLR 205(a) does not so allow. *Id.* at 54. If *Reliance* had really established the "explicit, bright-line rule" DBSP contends it had, then *Reliance* would have been a single-sentence opinion stating that, because the corporate plaintiff was neither an executor nor an administrator, CPLR 205(a) does not apply. The mere fact that the Court of Appeals did not answer the Second Circuit's question in that summary fashion alone annihilates DBSP's contention that CPLR 205(a) applies only to executors and administrators.

Far from announcing any "explicit, bright-line rule," the *Reliance* court engaged in a nuanced analysis of CPLR 205(a) – an analysis that DBSP completely and inexplicably omitted from its brief. Specifically, in rejecting the parent company's argument that CPLR 205(a) should apply to it, so as to advance its remedial purpose, the Court of Appeals held that CPLR 205(a) did not allow revived claims to be brought by a different, albeit related, corporate entity from the plaintiff that originally commenced the action. *Id.* at 57. In reaching this conclusion, the Court endorsed the lower court's observation that:

> [T]he common thread running through cases applying CPLR 205 in cases where the error in the dismissed action lies in the "identity" of the plaintiff, is the fact that *it is the same person or entity whose rights are sought to be vindicated* in both actions.

Id. (emphasis added). Distinguishing *George*, however, the *Reliance* court noted that, in *Reliance*'s revival action, the parent company was seeking to enforce "*its own, separate rights*," rather than the rights of the subsidiary that were asserted in the original action. *Id.* (emphasis added). Thus, *Reliance* held that "the plaintiff in the new lawsuit may appear in a different capacity, *such as* a duly appointed administrator, but the *identity of the individual on whose behalf redress is sought must remain the same*." *Id.* (emphasis added).

In short, a duly appointed administrator is but one example of the type of plaintiff that can take advantage of CPLR 205(a). More to the point, because the identity of the entities "on

whose behalf redress is sought" here – all of the Trust's certificateholders – is *identical* in the summons in the Original Action and in the instant complaint, DBSP's principal authority actually supports the Trustee's revival action.[12]

As if this were not enough, DBSP's purported "bright-line rule" would conflict with cases in which bankruptcy trustees (*i.e.*, not an administrator or an executor) were permitted to revive dismissed actions that had been commenced by a debtor who lacked capacity to sue. *See*, *e.g.*, *Rivera v. Markowitz*, 71 A.D.3d 449, 449-50 (1st Dep't 2010) (affirming dismissal of action commenced by bankruptcy debtors found to lack capacity to sue, but modifying the order "to the extent of dismissing without prejudice *so that it may be commenced by the trustee pursuant to CPLR 205(a)*") (emphasis added); *Genova v. Madani*, 283 A.D.2d 860, 860 (3d Dep't 2001) (affirming denial of a motion to dismiss where a bankruptcy trustee commenced an action under CPLR 205(a) to revive one previously dismissed for plaintiff's failure to include the underlying claim on a bankruptcy petition); *Pinto v. Ancona*, 262 A.D.2d 472, 473 (2d Dep't 1999) (where plaintiff's causes of action vested in the bankruptcy trustee, thereby divesting plaintiff of capacity to sue, trustee was instructed to "commence a new action in a representative capacity on behalf of [the plaintiff's] bankruptcy estate and, in doing so, … will receive the benefit of the 6-month extension embodied in CPLR 205") (internal citations omitted).

[12] For this reason, DBSP's reliance on *Streeter v. Graham & Norton Co.*, 263 N.Y. 39 (1933), is entirely misplaced. There, a decedent's widow assigned her claim for her husband's death to an insurance carrier. Because state law precluded that assignment, the carrier's lawsuit was dismissed. Two years later, after the limitations period expired, the widow re-filed the claim as administratrix, arguing that the estate could benefit from the filing date of the carrier's prior suit under a predecessor to CPLR 205(a). The Court of Appeals rejected the widow's revival claim because the carrier "was not the assignee of *all* the persons entitled to share in the damages recovered for the negligent death." *Id.* at 43 (emphasis added). Accordingly, unlike here, the revival action asserted a different scope of interests from those in the original action.

While DBSP at least acknowledges *Genova*, it suggests, without support, that it was "likely overruled" by *Reliance*, and then allows that it "at least involves a representative plaintiff in some ways analogous to an executor or administrator." (DBSP Br. at 14 n.8) The First Department's *Rivera* decision, however, post-dates *Reliance* and thus rebuts any notion that *Reliance* overruled *Genova*. In any event, there is no reason why a Trustee appointed to represent a Trust and all its certificateholders is any less "a representative plaintiff" than a bankruptcy trustee is of a debtor's estate. DBSP's own analysis again supports revival here.

Moreover, while DBSP correctly notes that many cases applying CPLR 205(a) involve executors or administrators, DBSP simply reads too much into that fact. Many, if not all, of those cases focus not on the identity of the reviving plaintiff, but on whether the revival action actually sought to vindicate the rights of the same real party-in-interest. *See Lambert v. Sklar*, 30 A.D.3d 564, 566 (2d Dep't 2006) ("Under the facts of this case, the fundamental purpose of the statute was served. Even though the widow and the appellant are two different plaintiffs, it is clear that the *real party in interest*, the Estate, was the same in both actions.") (emphasis added); *Mendez v. Kyung Yoo*, 23 A.D.3d 354, 355 (2d Dep't 2005) (sustaining revival action because "[t]he *real party in interest* – the decedent's estate – was the same in both actions") (emphasis added); *Brown v. Lutheran Med. Ctr.*, 35 Misc. 3d 553, 556 (Sup. Ct. Kings Cnty. 2012) ("[A]n 'error' relating to the identity of the named plaintiff in the first action does not bar recommencement of the action pursuant to CPLR 205(a) … even where the plaintiff who commences a lawsuit under CPLR 205(a) is a completely different entity …, as long as the *real party in interest* is unchanged.") (emphasis added). Just as the estate was the real party-in-interest in both the original and revived versions of those cases, the Trust and all its certificateholders have always been the real parties-in-interest in the original and revived

versions of this case. DBSP can point to no substantive difference; thus, the Trustee can revive, on behalf of the Trust, the Original Action that was timely commenced on behalf of the Trust.

B. The Certificateholders' Lack Of Standing In Commencing The Original Action Is A Curable Defect That The Trustee's Revival Has Now Cured

Finally, DBSP makes much of the First Department's holding that the Certificateholders "lacked standing to commence the action on behalf of the [T]rust." 112 A.D.3d at 523. Because the Court of Appeals declined to address this issue, DBSP argues that this holding "remain[s] binding on this Court and [is] preclusive in this action." (DBSP Br. at 5) This is sound and fury that signifies nothing, because the Trustee is not now contesting – and, more importantly, need not contest – the First Department's holding regarding the Certificateholders' standing. Instead, DBSP's argument misses the fact that, under CPLR 205(a), standing is itself a defect that can be cured, and that the Trustee's instant action has now been cured. *See Snodgrass*, 50 A.D.3d at 884 (original action was "timely commenced notwithstanding the lack of capacity of the plaintiff to pursue the claims," therefore, dismissal of original action was "not on the merits"); *Brown*, 35 Misc. 3d at 556 ("[A] party's lack of standing does not constitute a jurisdictional defect" and a "plaintiff's lack of capacity to pursue the claims … is not a dismissal on the merits and does not bar relief under section 205(a).").[13] Indeed, the point of *George* is that actions dismissed because they were commenced by plaintiffs without standing, such as deceased persons or bankrupts, can be revived under CPLR 205(a) by persons who, like estate administrators or the Trustee here, *do* have standing.

The Court likewise should not accord any weight to DBSP's assertion that the Trustee affirmatively declined to assert the claims on the eve of the Trust's six-year anniversary (DBSP

[13] For purposes of a motion to dismiss, "standing and capacity to sue are sufficiently related that they should be afforded identical treatment." *Wells Fargo Bank Minn. v. Mastropaolo*, 42 A.D.3d 239, 243 (2d Dep't 2007).

Br. at 15-16) because this argument depends upon purported facts that are entirely outside the record. *See Rosenblum v. Fairfield Cnty. Bank Ins. Servs.*, Index No. 98/2014, 2015 N.Y. Misc. LEXIS 37, at *4 (Sup. Ct. Put. Cnty. Jan. 9, 2015). More importantly, *why* the Certificateholders commenced the Original Action when they did is irrelevant to CPLR 205(a). CPLR 205(a) jurisprudence pays no heed to the original or revival plaintiff's motives.

Putting DBSP's misdirection aside, the only issue relevant to the third *Carmenate* factor is whether the revival action, by a plaintiff with standing, asserts, on behalf of the same real parties-in-interest, the same claims that were asserted in the original action. The Trustee has standing, is asserting claims on behalf of the same real parties-in-interest as in the Original Action, and, thus, is legally entitled to revive those claims. Accordingly, the third *Carmenate* factor is amply satisfied here.

CONCLUSION

Because the Trustee's instant action cures any defects in the Original Action, this Court should deny in its entirety DBSP's motion to dismiss the complaint.

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Respectfully submitted,

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