To Be Argued By:
WILLIAM T. RUSSELL, JR.
Time Requested: 30 Minutes

APL-2020-00126
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Court of Appeals

STATE 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-Appellant,

-against-

DB STRUCTURED PRODUCTS, INC.,

Defendant-Respondent.

BRIEF FOR DEFENDANT-RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule § 500.1(f) of the Rules of Practice of the Court of Appeals, Defendant-Respondent DB Structured Products, Inc. states that the publicly held indirect corporate parent of DB Structured Products, Inc. is Deutsche Bank Aktiengesellschaft.

The affiliates of DB Structured Products, Inc. are set forth in an addendum hereto. *See infra* page 55, *et seq.*

STATEMENT REGARDING RELATED ACTIONS

Pursuant to Rule § 500.13(a) of the Rules of Practice of the Court of Appeals, Defendant-Respondent DB Structured Products, Inc. states that there are no related actions.

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In a unanimous Decision and Order entered on November 19, 2019 (the "Decision"), the Appellate Division, First Department (Manzanet-Daniels, Tom, Kapnick, Gesmer, Singh, JJ.) affirmed the decision and order of the Supreme Court, New York County (Marcy Friedman, J.) dated March 29, 2016, granting the motion of Defendant-Respondent DB Structured Products, Inc. ("DBSP" or "Respondent") to dismiss with prejudice the complaint of Plaintiff-Appellant HSBC Bank USA, N.A. ("Plaintiff-Appellant," the "Trustee" or "HSBC"), and directed entry of judgment in favor of Respondent. In response to the brief of Appellant in support of its appeal, Respondent submits this answering brief and respectfully asks this Court to affirm the order and judgment below.

QUESTION PRESENTED

Q. Is CPLR 205(a) available to a trustee of a mortgage-backed securities trust to revive a prior breach of contract action brought by investors in the trust who were expressly prohibited from asserting the contract claims at issue?

A. No. CPLR 205(a) is unavailable because absent exceptions that are inapplicable here, the statute only permits revival out of time when the second action is commenced by the same plaintiff as in the prior action.

INTRODUCTION

Plaintiff-Appellant's interpretation of CPLR 205(a) is contrary to text of the statute, this Court's precedents, and New York public policy. According to Plaintiff-

Appellant, a party can intentionally decide not to bring suit within the limitations period and later revive a dismissed action filed by a third party that never had any right to sue. This is not and cannot be the law.

This case seeks to revive an action (the "Prior Action") that was previously dismissed by the First Department, *see ACE Securities Corp. v. DB Structured Prods., Inc.*, 112 A.D.3d 522 (1st Dep't 2013) ("*ACE I*"), which dismissal was subsequently affirmed by this Court, *see* 25 N.Y.3d 581 (2015) ("*ACE II*"). It involves claims for breaches of representations and warranties ("R&Ws") allegedly made by Respondent in connection with a residential mortgage-backed securities ("RMBS") transaction—ACE Securities Corp. Home Equity Loan Trust, Series 2006-SL2 ("ACE 2006-SL2" or the "Trust")—which were assigned at the closing of the transaction to Plaintiff-Appellant as the RMBS trustee. Thus, the claims at issue in this suit belong to, and have always belonged to, Plaintiff-Appellant as the Trustee.

In 2012, certain distressed debt hedge funds that had invested in certificates issued by the Trust requested that Plaintiff-Appellant bring suit for breach of the R&Ws, but Plaintiff-Appellant declined. As this Court explained, the original hedge fund plaintiffs "gave notice to [the Trustee] of 'breaches of representations and warranties'" and asked the Trustee to file suit, but the Trustee "neither sought a tolling agreement nor brought suit against DBSP" before the limitations period lapsed. *ACE II*, 25 N.Y.3d at 591. The hedge funds then filed a summons with notice

on the last day of the limitations period, and months later the Trustee sought to "substitute itself as plaintiff" and filed a complaint. *Id.* at 591–92. That action was dismissed, *inter alia*, because the hedge funds lacked standing and because the Trustee's complaint, which did not relate back to the hedge funds' summons, was untimely. *See ACE I*, 112 A.D.3d at 522–23. This Court affirmed the dismissal, but without reaching the standing and relation-back issues decided by the First Department. *See ACE II*, 25 N.Y.3d at 599. After dismissal, Plaintiff-Appellant filed this "revival" action, arguing that even though the Trustee is a different plaintiff than the hedge funds, and the hedge funds were expressly prohibited from suing for the R&W breaches, this suit can be deemed timely under CPLR 205(a) based on the filing date of the hedge funds' summons with notice.

This theory has no basis in the text of CPLR 205(a), which applies only to "the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator." Plaintiff-Appellant is not the same plaintiff as the hedge funds, nor is it their executor or administrator. Plaintiff-Appellant's construction of the statute is also plainly contrary to this Court's most recent decision on the matter, *Reliance Insurance Co. v. PolyVision Corp.*, which concluded that a suit filed by one corporate plaintiff could not be revived under CPLR 205(a) by a "different, related corporate entity" because "the benefit provided by the section is explicitly, and exclusively, bestowed on 'the plaintiff' who prosecuted the initial action." 9 N.Y.3d

52, 57–58 (2007) (quoting CPLR 205(a)). It would be an irrational result for the law to bar the *Reliance* plaintiff—a corporate plaintiff that sought to revive a contract claim mistakenly filed in the name of its wholly-owned subsidiary—from obtaining the benefit of CPLR 205(a), while granting that benefit to Plaintiff-Appellant, a corporate trustee that chose not to bring suit on its own contract claims within the limitations period and now seeks to revive claims brought by a completely different plaintiff. Nothing in New York law or policy suggests that parties who consciously choose not to file timely suits should be treated more favorably than parties who make mistakes.

Plaintiff-Appellant, however, proposes a standard of its own invention that it calls the "same rights" test, under which courts should consider whether the new plaintiff is asserting the same rights as the original plaintiff and whether the new plaintiff is seeking to vindicate rights for the benefit of the same ultimate beneficiaries or the same "true party in interest." This proposed standard is legally baseless and practically unworkable. In giving effect to the statutory language extending the benefit of CPLR 205(a) solely to "the plaintiff," *Reliance* opted for an easily administrable rule, and declined to "open a new tributary in the law" so as to grant a "'different, related corporate entity' the benefit of the statutory grace period, not knowing precisely what that means or portends." 9 N.Y.3d at 58. Plaintiff-Appellant's "same rights test," by contrast, would require courts to make ad hoc,

case-by-case inquiries into the nature of the relationship between the first plaintiff and the second plaintiff and the interests at stake in the litigation. Entitlement to CPLR 205(a) would become a mixed question of fact and law that potentially could not be resolved until trial. This is precisely the sort of legal uncertainty that *Reliance* sought to avoid.

These problems are not resolved by Plaintiff-Appellant's claim that, as a RMBS trustee, it is a "representative" plaintiff and thus sufficiently analogous to an executor or administrator (or a bankruptcy trustee, to which some lower courts have extended by analogy the benefits of CPLR 205(a)). Unlike those representative parties, the Trustee did not succeed to and then seek to pursue the hedge funds' claims. Rather, the claims at issue always belonged to the Trustee, which simply failed to timely pursue them.

It is true that the hedge funds, assuming they have not sold their RMBS certificates in the intervening years, would be among the potential financial beneficiaries of funds recovered by the Trustee, which would flow through the Trust's payment waterfall and be distributed to investors. But the hedge funds' potential financial interest in the Trustee's claims does not mean that extension of CPLR 205(a) to these circumstances is appropriate. A wide array of parties have financial interests in legal claims that belong to others; that does not mean that each of those parties, without standing, should be able to effectively extend the limitations

period by filing defective placeholder suits that are later subject to revival by a proper plaintiff who chose not to sue within the limitations period. Indeed, as Plaintiff-Appellant conceded at oral argument before the First Department, its interpretation would allow a complete stranger to a contract to file a facially defective claim that another plaintiff would then be able to revive after the limitations period lapsed.[1] If that were the case, *Reliance* would have been decided the other way.

Ultimately, Plaintiff-Appellant's appeal boils down to an attempt to avoid the basic legal principle that a party who chooses not to sue within the statute of limitations loses the right to later bring the claim. As this Court explained in *Reliance*, "[t]he diligent corporate suitor, represented by counsel, is of course well advised to operate with the minimal care necessary" to bring suit before the statute of limitations expires. 9 N.Y.3d at 58. Plaintiff-Appellant's attempt to rely on CPLR 205(a) was correctly rejected by the IAS Court and the First Department, and this Court should affirm.

[1] A video of the oral argument is available on the First Department's website at http://wowza.nycourts.gov/vod/vod.php?source=ad1&video=AD1_Archive2019_Oct23_13-58-32.mp4. The relevant discussion occurs at minutes 51 through 53.

COUNTER-STATEMENT OF THE CASE

A. The Prior Action

This action concerns ACE 2006-SL2, an RMBS trust sponsored by DBSP and for which Plaintiff-Appellant HSBC Bank USA, N.A. acts as trustee. A March 28, 2006 Mortgage Loan Purchase Agreement ("MLPA"), entered into between DBSP and a special purpose entity known as ACE Securities Corp. (the "Depositor"), contains R&Ws made by DBSP concerning the mortgage loans to be included in the Trust. *See* R. 306–11 (MLPA §§ 6, 7). The Depositor's rights under the MLPA were assigned at closing by the Depositor to the Trustee pursuant to a Pooling and Servicing Agreement ("PSA"), which contains a specific protocol for remedying alleged breaches. *See* R. 131, 132 (PSA §§ 2.01; 2.03(a)).

The PSA also contains a "no-action clause" that defines the limited rights that holders of certificates in the Trust have to bring suit for breaches of the governing agreements, as well as other provisions delineating the steps that certificateholders must take in order to direct the Trustee to bring suit. *See* R. 225–26; R. 212–13 (PSA §§ 12.03; 9.02(a)). In dismissing the Prior Action, the First Department noted that, pursuant to those provisions of the PSA "certificate holders lack[] standing to commence [an] action" for breaches of R&Ws. *ACE I*, 112 A.D.3d at 523. As a result, it is undisputed on this appeal the sole party with standing to bring suit against DBSP for breaches of R&Ws is the Trustee. *Id.*

The Prior Action was initiated by RMBS Recovery Holdings 4, LLC and VP Structured Products, LLC (the "Funds"), investment funds managed respectively by distressed debt hedge funds Fir Tree Capital Management LP ("Fir Tree") and Värde Partners LP ("Värde"). After the Trust experienced losses during and after the 2008 financial crisis, the Funds purchased certificates and "hired a forensic mortgage review firm to examine a portion of the loans in the trust." *ACE II*, 25 N.Y.3d at 591. The Funds then, "[b]y letter dated January 12, 2012, … gave notice to [the Trustee] of 'breaches of representations and warranties'" by DBSP. *Id.* The Funds "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.'" *Id.* (brackets omitted). The Trustee, however, "neither sought a tolling agreement nor brought suit against DBSP," and the Funds thereafter attempted to commence the Prior Action by filing a summons with notice (the "SWN") "on March 28, 2012—six years to the day from the date of contract execution." *Id.* at 592. In the SWN, the Funds further alleged that "[o]n March 8, 2012, [the Funds] directed the Trustee, and offered the Trustee reasonable indemnity, to enforce [DBSP's] repurchase obligations. The Trustee has not accepted [the Funds'] direction." R. 386 (SWN at 2). Almost six months later, "[o]n September 13, 2012, the trustee sought to

substitute for the certificateholders, and filed a complaint on the Trust's behalf." *ACE II*, 25 N.Y.3d at 592.

DBSP moved to dismiss, arguing 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 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." *Id*. The IAS Court denied the motion, and the First Department reversed, 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. As relevant here, the First Department held that (i) "the claims accrued on the closing date of the MLPA, March 28, 2006, when any breach of the representations and warranties contained therein occurred"; (ii) "the [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"; and (iii) "the 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.* at 522-23. The First Department also held, as alternative grounds for dismissal, that the

action was not validly commenced because "the 60- and 90-day periods for cure and repurchase had not yet elapsed" as of its filing. *Id.* at 523.

This Court granted leave to appeal, *see* 23 N.Y.3d 906 (2014), and unanimously affirmed. *See ACE II*, 25 N.Y.3d at 593. This Court held that the claims "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 589. Because this was sufficient grounds to affirm dismissal, this Court declined to "address the issues of standing and relation back disputed by the parties." *Id.* at 599.

After dismissal of the Prior Action was affirmed, one of the Funds, RMBS Recovery Holdings IV, LLC, along with certain other Fir Tree affiliates, filed suit against the Trustee in Virginia state court based, *inter alia*, on the Trustee's failure to timely commence the Prior Action. *See RMBS Recovery Holdings I, LLC v. HSBC Bank USA, N.A.*, No. 2017-7583 (Va. Cir. Ct., Fairfax Cnty.). In a ruling last year, the Virginia Supreme Court described the facts underlying that suit as follows:

> Beginning in 2011, the Funds reportedly notified HSBC that the Sponsors had breached their representations and warranties, and asked HSBC to enforce the Sponsors' repurchase obligations. HSBC responded that it would not act until the Funds agreed to a Confidentiality and Indemnification Agreement (CIA).

> In light of the impending statutes of limitations bar, the Funds filed derivative actions against the Sponsors (Repurchase Actions) prior to expiration of the limitations periods. The Funds and HSBC executed CIAs on July 12, 2012 and September 6, 2012. Both dates are after the statutes of limitations had expired on the claims against the Sponsors. After the CIAs were executed, HSBC was substituted into the Repurchase Actions as plaintiff. However, the Repurchase Actions, which were filed in New York, were dismissed as untimely because HSBC failed to intervene before the statutes of limitations ran.

RMBS Recovery Holdings I, LLC v. HSBC Bank USA, N.A., 827 S.E.2d 762, 765 (Va. 2019). In that suit, which remains pending, the plaintiffs claim that "HSBC 'knowingly let the statutes of limitations expire, depriving certificateholders of any recourse from the [S]ponsors.…'" *Id.*

B. The Instant Action

The Trustee filed the instant action on June 18, 2014, and on March 29, 2016, the IAS Court (Friedman, J.) granted DBSP's motion to dismiss in relevant part, ruling that "the Trustee is not, under the circumstances of this case, a 'plaintiff' entitled to avail itself of the benefits of the CPLR 205(a) savings provision." R. 10. Following *Reliance,* the IAS Court found that "[h]ere … the new Trustee plaintiff is not simply appearing in a different capacity than the [Funds]." R. 13.

The IAS Court explained that "the [Funds] cannot be found to have possessed a cause of action against [DBSP] to which the Trustee succeeded," and the Trustee "does not act, for purposes of this litigation, in a representative capacity akin to that

of" either "an administrator who succeeds to the decedent's own cause of action" or "a bankruptcy trustee." R. 15. In addition, the IAS Court found that "the purpose of CPLR 205(a) would not be served by making the statute available to the Trustee under the circumstances of this case." R. 16. CPLR 205(a) is intended to benefit a plaintiff whose case has been dismissed for a reason unrelated to the plaintiff's "willingness to prosecute in a timely fashion," but here the Trustee "declined to bring the action within the limitations period." R. 16.[2] Finally, the IAS Court concluded that Plaintiff-Appellant could not revive its own September 2012 complaint, because that complaint was filed outside the limitations period and did not relate back to the Funds' SWN. R. 39–40.

Plaintiff-Appellant appealed, and on November 19, 2019, a unanimous panel of the First Department affirmed in a joint opinion that also affirmed another order of the IAS Court presenting the same issue. R. 515–16. The First Department reaffirmed its prior decision in *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 141 A.D.3d 431 (1st Dep't 2016), which had concluded under materially

[2] Plaintiff-Appellant's brief incorrectly asserts that "[t]he IAS Court did not explain what 'circumstances' led to [its] conclusion." Br. 11. The next two paragraphs of the IAS Order, however, clearly articulate those circumstances, including the Trustee's decision not to file suit. *See* R. 16–17 (IAS Order at 8–9) ("[T]he statute does not afford relief to a plaintiff, like the Trustee, that declined to bring the action within the limitations period.").

indistinguishable circumstances that a RMBS trustee "[is] not entitled to refile claims" initially filed by a certificateholder because the trustee is "not a 'plaintiff'" for purposes of CPLR 205(a). R. 516. This Court granted Plaintiff-Appellant's request for leave to appeal on September 1, 2020.

ARGUMENT

I. THE FIRST DEPARTMENT PROPERLY INTERPRETED AND APPLIED CPLR 205(a)

A. The First Department's Decision Is Faithful To The Text Of CPLR 205(a) And This Court's Precedents

CPLR 205(a) provides a six-month post-dismissal grace period for a plaintiff who "timely commenced" a first action that suffers a non-merits dismissal to commence a new action on the same claims and have that second action be deemed timely to the same extent as the first action. The text of the statute makes clear that as long as the first plaintiff has not died, the plaintiff bringing the second action must be the same party as the plaintiff who "timely commenced" the first:

> 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….

CPLR 205(a) (emphasis added). Based on the clear language of CPLR 205(a) and its predecessors, this Court has long held that the limited right to refile out of time

"applies only where the second action is brought by the same plaintiff, 'or, if he dies and the cause of action survives, his representative.'" *Streeter v. Graham & Norton Co.*, 263 N.Y. 39, 43–44 (1933). And, in resolving disputes over whether particular parties are entitled to the benefits of the statute, this Court has stressed that this statutory text is of primary importance:

> 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, 9 N.Y.3d at 57 (emphasis added). Thus, rather than endorsing judicially-crafted extensions of this statute, this Court has "prefer[red] to read CPLR 205(a) as it was written by the Legislature and has consistently been applied by this Court." *Id.* at 58.

There are three primary precedents of this Court that address whether parties other than the individual or entity who was the plaintiff in the first action may avail themselves of CPLR 205(a). Each supports affirmance of the First Department's decision in this case.

This Court first addressed this issue in *Streeter v. Graham & Norton Co.*, a case Plaintiff-Appellant fails to mention. There, the plaintiff in the first action was

an insurer that brought suit as assignee of all but one estate beneficiary. 263 N.Y. at 43. That suit was dismissed because the insurer "was not the assignee of all the [beneficiaries] … and the cause of action could not be split." *Id.* The action instead had to be "brought through an administrator as the statutory trustee of the entire group of beneficiaries." *Id.* Thereafter, the administrator sought to refile the action in reliance on Section 23 of the Civil Practice Act, the predecessor to CPLR 205(a), arguing that the suit "is within the spirit if not within the letter of the section" which "contemplates that the diligent suitor shall have one adjudication upon the merits of his cause even though through mistake in form, forum or remedy, a prior action has failed." *Id.* This Court, however, rejected the argument, explaining that (i) the statute "applies only where the second action is brought by the same plaintiff, 'or if he dies and the cause of action survives, his representative'"; (ii) "[t]he present action was not brought by the same plaintiff or representative"; and (iii) "[t]o grant the right … 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 43–44.

Next, in *George v. Mt. Sinai Hosp.*, this Court permitted an action to proceed under CPLR 205(a) following a "comedy of errors" that occurred after an initial suit was erroneously commenced in the name of decedent rather than the administrator. 47 N.Y.2d 170, 173 (1979). The Court, however, was also careful to

recognize that its limited allowance for cases where "the claim is the same, and the subsequent claimant is acting as the representative of the named plaintiff in the prior action," did not amount to a broader rejection of the statute's command that the plaintiff in the first and second actions remain the same. *Id.* at 179. To the contrary: "Usually, of course, the fact that one party commenced an action which is subsequently dismissed, will not serve to justify application of the subdivision to support a later action by a different claimant." *Id.*

In *Reliance*, 9 N.Y.3d 52, this Court reaffirmed these precedents in the commercial litigation context. There, a corporation (Reliance Insurance Company, "RIC")) sought to rely on CPLR 205(a) to revive a prior action that had mistakenly been commenced in the name of its wholly-owned subsidiary (Reliance Insurance Company of New York ("RNY")). *See Reliance Ins. Co. v. Polyvision Corp.*, 390 F. Supp. 2d 269, 271–72 (E.D.N.Y. 2005). The claim in both actions was the same—"reimbursement for payments allegedly made as a surety on certain performance bonds"—but the first action had been "commenced by the wrong plaintiff," because "the performance bonds forming the basis of the action were issued not by the named plaintiff Reliance NY, but by its parent company, RIC," and had thus been dismissed for lack of standing. *Id.* at 270–71. The district court dismissed the parent's suit as time-barred, concluding that CPLR 205(a) could not be invoked by a "completely different entity from that which prosecuted" the original suit. *Id.* at 273. On appeal,

the Second Circuit certified to this Court the question: "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 plaintiff." 474 F.3d 54, 60 (2d Cir. 2007).

In answering this question in the negative, this Court explained that according to "the text of the statute, … the benefit provided by [CPLR 205(a)] is explicitly, and exclusively, bestowed on 'the plaintiff' who prosecuted the initial action." *Reliance,* 9 N.Y.3d at 57. It observed that outside of the one "representative context" specifically identified in the statute (involving suits commenced by executors or administrators), the Court "[has] not read 'the plaintiff' to include an individual or entity other than the original plaintiff." *Id.* at 57. The Court acknowledged RIC's arguments—(i) that RIC and RNY were parent and subsidiary, and thus "not entirely different"; (ii) that while the Court had "never before permitted a substitution of corporate plaintiffs, [it had] also never precluded it"; and (iii) that CPLR 205(a) "must be read generously to advance its remedial purpose"—but nonetheless "rejected RIC's conclusion." *Id.* Unlike cases such as *George,* in which "the plaintiff in the new lawsuit may appear in a different capacity, such as a duly appointed administrator," here, "RIC is not RNY in a different capacity." *Id.* at 57–58. Creating an exception that would allow RIC to revive RNY's action "would

open a new tributary in the law, presumably available to individuals as well as corporations, and breathe life into otherwise stale claims," which would have problematic "potential ramifications," because "[w]hat may be a genuine corporate twin or alter ego in one case could be a far-flung affiliate in another." *Id.* at 58.

Applying these precedents to this appeal is straightforward. The Funds and the Trustees are plainly not the same party plaintiff. Nor is the Trustee, as in *George*, bringing a claim that belonged to the Funds, "the named plaintiff[s] in the prior action," as their "representative." 47 N.Y.2d at 179. The Trustee also "is not [the Funds] in a different capacity." *Reliance*, 9 N.Y.3d at 58. Rather, as in *Streeter*, the Trustee is "a different party plaintiff, representing in part different interests" than the Funds. 263 N.Y. at 44. The Trustee's action, therefore, cannot be deemed timely by virtue of the Funds' filing date, and the orders of the lower courts dismissing this action with prejudice should be affirmed.

B. Plaintiff-Appellant's "Same Rights" Theory Has No Basis In The Statutory Text

Plaintiff-Appellant's contrary argument that one plaintiff may replace another for purposes of CPLR 205(a) "so long as each invokes the same rights" (Br. 14) is internally incoherent and irreconcilable with the text of the statute.

As an initial matter, the statute already requires that the "same rights" be asserted in both actions, because the claims in the second action must be based on

"the same transaction or occurrence" as the first. CPLR 205(a). Plaintiff-Appellant's "same rights" test adds nothing to this pre-existing statutory requirement. Indeed, if all the statute required was that the same rights be asserted in the two actions, the statute's explicit provision that "if the plaintiff dies, and the cause of action survives, his or her executor or administrator" may bring suit would be superfluous—the "same rights" are necessarily at issue in both such actions. Plaintiff-Appellant's proffered interpretation of CPLR 205(a) thus violates the long-standing principle of statutory construction that "unambiguous language should be construed pursuant to its plain meaning ..., giving effect to each component and avoiding a construction that treats a word or phrase as superfluous." *Matter of Lemma v. Nassau County Police Officer Indem. Bd.*, 31 N.Y.3d 523, 528 (2018).

By the same token, Plaintiff-Appellant's "same rights" test also violates the principle that "[w]here the legislature has addressed a subject and provided specific exceptions to a general rule—as it has done here—the maxim *expressio unius est exclusio alterius* applies." *Kimmel v. State*, 29 N.Y.3d 386, 394 (2017), citing McKinney's Cons. Laws of NY, Book 1, Statutes § 240 at 412–13 ("[W]here a statute creates provisos or exceptions as to certain matters the inclusion of such provisos or exceptions is generally considered to deny the existence of others not mentioned."). In other words, the fact that the legislature created a specific exception for executors and administrators means that executors and administrators are singled

out for special treatment not otherwise available under the statute. Under Plaintiff-Appellant's proposed approach, however, they would be treated no differently than any other party. Plaintiff-Appellant's "same rights" test thus violates basic principles of statutory construction and should be rejected on those grounds alone.

C. Plaintiff-Appellant's "Same Rights" Theory Is Inconsistent With This Court's Precedents

The primary authority on which Plaintiff-Appellant purports to rely as support for its "same rights" theory is an out-of-context *dictum* quoted in *Reliance* from the federal district court's earlier opinion. As Plaintiff-Appellant excerpts it, it provides that the "common thread running through cases applying CPLR 205 in cases where the error in the dismissed action lies only 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*." Br. 15 (quoting *Reliance*, 9 N.Y.3d at 57 (which, in turn, is quoting *Reliance (EDNY)*, 390 F. Supp. 2d at 273) (Plaintiff-Appellant's emphasis)).

Read in its full context, however, including the text omitted by Plaintiff-Appellant in its selective excerpt, this statement offers Plaintiff-Appellant no support:

> Pivotal here is that, unlike the scenario in *George*, RIC is seeking to enforce its own, separate rights, rather than the rights of the plaintiff in the original action. We agree with the conclusion of the District Court that "[t]he common thread running through cases applying CPLR 205 in cases where the error in the dismissed action lies only 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" (390 F. Supp. 2d 269, 273

> (E.D.N.Y. 2005)). As that court aptly stated, "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.*). That is the situation the Legislature addressed in CPLR 205(a), but that is not the case here. RIC is not RNY in a different capacity.

Reliance, 9 N.Y.3d at 57–58. Plaintiff-Appellant's selective quotation ignores the Court's statement that what was "[p]ivotal" to the analysis was the fact that, unlike in an executor/administrator case such as *George*, the parent corporation was "seeking to enforce its own, separate rights, rather than the rights of the plaintiff in the original action." *Reliance*, 9 N.Y.3d at 57. It also ignores that "identity" is set off in quotes to underscore that these cases involve changes in the original party's *capacity* rather than the substitution of a new party. *Id.* ("[T]he plaintiff in the new lawsuit may appear in a different capacity ..."). Thus, in *Reliance*, the fact that "RIC is not RNY in a different capacity" was dispositive. *Id.* at 57–58; *see also Reliance (EDNY)*, 390 F. Supp. 2d at 273 ("Here, on the other hand, Plaintiff is a completely different entity.").

Of course, HSBC, in its capacity as Trustee, is not the Funds "in a different capacity"; nor is HSBC "seeking to enforce the rights of [the Funds]" as "the plaintiff[s] in the original action." Instead, as in *Reliance*, the plaintiff in the second action (the Trustee), is seeking to enforce its own rights rather than the rights of the plaintiffs in the original action (the Funds), who attempted to enforce the Trustee's

rights but had no rights at all to enforce against DBSP. Just as the original plaintiff in *Reliance* never had the right to seek indemnification for bonds that it did not issue, the Funds had no right to assert the claims they asserted. That right always belonged to the Trustee.

Indeed, if CPLR 205(a) applied simply because both actions sought to vindicate the same rights but the original plaintiff lacked standing, both *Reliance* and *Streeter* would have come out the other way. In *Streeter*, the rights sought to be vindicated were specific claims belonging to the decedent and the estate beneficiaries; in *Reliance*, the rights sought to be vindicated in both actions were rights to reimbursement under certain surety bonds. But both initial suits failed for lack of standing, and the Court held that the proper parties could not thereafter revive the actions under CPLR 205(a). So too here.

In its attempt to avoid this conclusion, Plaintiff-Appellant gets the facts of *Reliance* wrong. Plaintiff-Appellant claims that "RIC insured work at Lindenhurst Senior High School and Junior High School, whereas RNY issued similar bonds with the same obligee—the Lindenhurst School District—to ensure performance of *a different elementary school construction project*.'" Br. 16, quoting *Reliance*, 9 N.Y.3d at 55 (Plaintiff-Appellant's emphasis). That much is true. But Plaintiff-Appellant then asserts that "[t]his fact conclusively refutes DBSP's prior suggestion to this Court that 'the plaintiffs in the first and second [*Reliance*] actions sought to

assert the "same rights" there as well,'" because it purportedly shows that "[e]ach of the plaintiffs in Reliance sued on different bonds covering different construction projects." Br. 16 n.11.[3] That is flatly incorrect. Both RNY and RIC sued for reimbursement based on the *same bonds*—the high school-related bonds issued by RIC. *See Reliance*, 9 N.Y.3d at 58 ("In the present case, the bonds naming RIC, rather than RNY, are part of the record."); *see also Reliance (CA2)*, 474 F.3d at 56 (explaining that the prior action was dismissed because "RNY's parent, RIC, actually issued the relevant bond, and that RNY has no right to seek indemnification for claims paid out under such bonds.") (internal quotations omitted). If RNY had sued on the separate bonds *issued by RNY*, RNY's case would not have been dismissed in the first instance, and RIC plainly would have been unable to "revive" RNY's suit under CPLR 205(a), because RIC's suit would have involved different claims on different bonds and thus failed the statute's "same transaction or occurrence" requirement.

Plaintiff-Appellant's efforts to distinguish *Reliance*, therefore, do not get off the starting blocks. In both cases, the first and second plaintiffs asserted the "same rights" by bringing identical claims under the same contracts. In both *Reliance* and

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[3] *See also* Br. 22 n.18 ("Contrary to what DBSP asserts, Reliance obviously depended upon an inquiry into the ***different*** rights and claims that RIC and RNY were acting upon.") (Plaintiff-Appellant's emphasis).

the present case, the party with standing to pursue those claims was the second plaintiff. And in both cases, the second plaintiff is properly precluded from utilizing CPLR 205(a) because it is "seeking to enforce its own, separate rights, rather than the rights of the plaintiff in the original action." *Reliance*, 9 N.Y.3d at 57. The only pertinent distinction is that the defect in the prior *Reliance* action was the result of a "mistake[]" on the part of the plaintiffs, *Reliance (CA2)*, 474 F.3d at 59, whereas here the Funds brought suit "after [Plaintiff-Appellant] refused to do so." *ACE I,* 112 A.D.3d at 523. The fact that the wrong plaintiff brought suit in Reliance because of a mistake whereas here the wrong plaintiff brought suit because Plaintiff-Appellant intentionally chose not to do so is a distinction that should not cut in Plaintiff-Appellant's favor.

D. Plaintiff-Appellant Cannot Satisfy Even Its Own "Same Rights" Test

Plaintiff-Appellant also attempts to distinguish *Reliance* on the grounds that both actions here were purportedly "commenced on behalf of the same party in interest – the Trust." Br. 14. In service of this theory, Plaintiff-Appellant asserts that the Funds and the Trustee are both mere "nominal plaintiffs" acting on behalf of the Trust, and that since the Trust has always been the "true party in interest," there is substantively no difference in the identity of the plaintiff in the first and second action. Br. 14–17. These arguments lack merit.

The Trust is a New York common law trust created by the PSA. R. 138–39 (PSA §§ 2.09, 2.10). "A New York common law trust is not a legal entity that can hold property or be sued." *Ballard v. U.S. Bank N.A.*, No. 20-CV-5129 (NSR), 2020 WL 6381134, at *5 n.1 (S.D.N.Y. Oct. 29, 2020).[4] Technically speaking, the Trust is not a "party" at all, and as between a trustee and a trust beneficiary, the trustee is the real party in interest. *See Henning v. Rando Mach. Corp.*, 207 A.D.2d 106, 110 (4th Dep't 1994) ("The trustees, rather than the beneficiaries of the trusts, are vested with legal title to the [] property and are the real parties in interest."); BOGERT'S THE LAW OF TRUSTS AND TRUSTEES ch. 41 § 869 (3d. rev. ed. 2009) ("Although the beneficiary is adversely affected by [wrongful] acts of a third person, no cause of action inures to him on that account."); *cf. Larchmont Pancake House v. Bd. of Assessors*, 33 N.Y.3d 228, 240 (2019) ("Nor is Portia DeGast an aggrieved party based on her status as a beneficiary of the Carfora Trust.").[5] Plaintiff-

[4] *See also Kirschbaum v. Elizabeth Ortman Trust of 1977*, 3 Misc. 3d 1110(A), 2004 N.Y. Slip Op. 50545(U), at 2 (Sup. Ct. Suffolk Cnty. 2004) ("The trustees as legal owners of the trust estate generally sue and are sued in their own capacity…. The trust itself does not have the capacity to sell the estate."); *see also* BOGERT'S THE LAW OF TRUSTS AND TRUSTEES ch. 33 § 712 (3d rev. ed. 2009) ("A trust is not a legal person, nor is the trust property.").

[5] *See also Orentreich v. Prudential Ins. Co. of Am.*, 275 A.D.2d 685, 685 (1st Dep't 2000) ("The action was properly dismissed on the ground that … only the trustee … may seek [] rescission or damages…"); *Levy v. Carver Fed. Sav. & Loan Ass'n*, 18 A.D.2d 1062, 1062 (1st Dep't 1963) (trustee, not "cestui que trust is … the real party in interest"); *Dye v. Lewis*, 67 Misc. 2d 426, 429–30 (Sup. Ct. Monroe Cnty. 1971)

Appellant's invocation of the Trust as the "real" or "true" party in interest thus lacks doctrinal grounding, and is merely a restatement of Plaintiff-Appellant's position that since the Funds sought to assert the same claims in the Prior Action as the Trustee now seeks to assert, CPLR 205(a) should apply.

Plaintiff-Appellant also argues that the First Department erred because it failed to conduct the "inquiry into matters of substance – that is, an identification of the rights and claims at issue and the persons who would receive redress for the harms alleged" that Plaintiff-Appellant claims *Reliance* requires. Br. 18. But the text of CPLR 205(a) contains no such requirements, and the ill-defined, fact-intensive inquiry Plaintiff-Appellant contemplates would open just the sort of new "tributary in the law" the *Reliance* Court sought to avoid. Indeed, Plaintiff-Appellant cannot even satisfy its own murky "same rights" test, and its slippery arguments as to why this action does satisfy its proposed standard demonstrate why the Court should not adopt such an unstable standard.

First, Plaintiff-Appellant asserts that that the identity of the "nominal plaintiff" (*i.e.,* the Funds versus the Trustee) is irrelevant because "the rights being pursued are … those of the Trust" and "all recoveries from the lawsuit are required

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("It is well settled that the beneficiary of a trust is not the real party in interest …. The trustees here alone possess the authority to take appropriate judicial proceedings for the enforcement of the rights of the bondholders.").

to be paid into the same Trust accounts for distribution to the Trust's certificateholders, in accordance with the PSA." Br. 19. As discussed, the former statement is incorrect—the rights at issue are contract claims that passed by assignment from the Depositor to the Trustee. And the latter statement has no factual or legal support. Plaintiff-Appellant presents no evidence or authority suggesting that the settlement of a lawsuit between the Funds and DBSP would be binding on the Trustee (or on other certificateholders), nor is it clear how the Funds would be "required" to pay over the sums they would receive in such a settlement to the appropriate Trust accounts. *Cf. Quadrant Structured Prod. Co. v. Vertin*, 23 N.Y.3d 549, 566 (2014) (parties channel bondholder litigation through the trustee rather than individual holders because it "ensure[s] that the proceeds of any litigation actually prosecuted will be shared ratably by all bondholders").

Second, Plaintiff-Appellant suggests that the Funds and the Trustee are merely "nominally distinct" as plaintiffs. Br. 18. Courts, however, have consistently held that corporate trustees' interests are not identical to the interests of investors in the financial instruments issued by the trusts. *See BNP Paribas Mortg. Corp. v. Bank of Am., N.A.*, 778 F. Supp. 2d 375, 409–10 (S.D.N.Y. 2011) ("Because an indenture trustee's interests are not identical to the noteholders' interests, it does not follow that rights assigned to an indenture trustee were intended to be enforced by noteholders." (citing *Elliot Assocs. v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d

66, 71 (2d Cir. 1988) (applying New York law)). As this Court has explained, corporate trustees and certificateholders do not have traditional fiduciary relationships or the resulting unity of interests:

> [T]he corporate trustee has very little in common with the ordinary trustee. The trustee under a corporate indenture has his or her rights and duties defined, not by the fiduciary relationship, but exclusively by the terms of the agreement. His or her status is more that of a stakeholder than one of a trustee.

AG Capital Funding Partners, L.P. v. State Street Bank & Trust Co., 11 N.Y.3d 146, 156 (2008) (quotations omitted), citing *Elliot Assocs.*, 838 F.2d at 71. Indeed, Plaintiff-Appellant has successfully argued that the limited nature of its duties bar certain claims against it by certificateholders. *See, e.g.*, *Royal Park Invs. SA/NV v. HSBC Bank USA, N.A.*, 109 F. Supp. 3d 587, 608–09 (S.D.N.Y. 2015) (agreeing that Plaintiff-Appellant "was not in a fiduciary relationship with the plaintiffs").

Third, Plaintiff-Appellant asserts that "[i]t is indisputable that the Trust's certificateholders hold the entire economic interest in the Trust." Br. 19. But that does not mean that the Funds' interests in bringing suit are identical to those of the Trust's other certificateholders, who did not join the Funds as plaintiffs. The Trust, like other RMBS offerings, issued certificates with different rights and payment priorities. *See* R. 70 (PSA, Preliminary Statement). Certificateholders thus hold certificates with different risk, return, and timing features, and so their interests are not always aligned. *See, e.g.*, *In the Matter of the Application of U.S. Bank Nat'l*

Ass'n, et al., No. 652382/2014, 2016 WL 9110399, at *12 (Sup. Ct. N.Y. Cnty. Aug. 12, 2016) (addressing objection by holders of "junior, or subordinated, classes of certificates" in RMBS trusts to settlement distribution pursuant to PSA provision under which "the settlement proceeds will have been exhausted by payments to senior certificateholders"). Indeed, this potential for divergent interests is a primary reason why the instruments governing debt investments, as here, typically contain no-action clauses and other provisions that circumscribe investors' rights to sue, and establish ownership thresholds and other procedural requirements that investors must meet before they can direct the trustee to sue.[6] Thus, no matter how the hedge funds who brought the first action styled their case caption, the fact that the Trustee represents all certificateholders while the Funds represent only themselves does not suggest some unity of interests that could support revival. *Streeter* is instructive in this regard. There, the first plaintiff had been assigned the interests of some but not

[6] *See, e.g.*, *Quadrant*, 23 N.Y.3d at 565 ("[G]enerally a no-action clause prevents minority securityholders from pursuing litigation against the issuer, in favor of a single action initiated by a Trustee upon request of a majority of the securityholders."); *RBC Capital Mkts., LLC v. Educ. Loan Tr. IV*, No. 6297-CS, 2011 WL 6152282, at *5 (Del. Ch. Dec. 6, 2011) (No-action clauses seek "to strike the right balance between enabling the effective enforcement of noteholder rights and the avoidance of capital-taxing suits that do not have the support of most noteholders.") (applying New York law); *cf.* Br. 8 n.6 (the PSA's requirements for directing the Trustee to sue "are designed to ensure that the Trustee does not act to benefit one certificateholder or class of certificateholders over others").

all beneficiaries and lacked standing because "the cause of action could not be split." *Streeter*, 263 N.Y. at 43. The second plaintiff, who served as the "statutory trustee of the entire group of beneficiaries," could not revive the action precisely because she represented all beneficiaries, and thus "represent[ed] in part different interests" than the first plaintiff. *Id.* at 43–44.[7] The same is true here.

In sum, even on Plaintiff-Appellant's own terms, its preferred "same rights" test does not show its entitlement to revival under CPLR 205(a). Instead of a straightforward approach that leads to a clear answer, Plaintiff-Appellant asks the Court to engage in an amorphous inquiry into a series of factually and legally complex, contestable issues, and to resolve those issues in Plaintiff-Appellant's favor based on its own *ipse dixit*. This Court should reject this invitation, and should continue to apply the statute as written.

II. THE APPELLATE DIVISION AUTHORITIES RELIED ON BY PLAINTIFF-APPELLANT DO NOT SUPPORT ITS POSITION

Plaintiff-Appellant next argues that Appellate Division caselaw construing CPLR 205(a) supports its position, relying on (i) cases involving bankruptcy trustees;

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[7] Plaintiff-Appellant makes passing assertions in the background section of its brief that the Funds filed suit "derivatively," and that the Trustee's "entry into the Original Action via the complaint was tantamount to a ratification" of the Funds' suit. Br. 3–4, 7–8. Plaintiff-Appellant fails to develop these points, so any such arguments are waived. In any event, these points go to the viability of the prior action, an issue that has been fully adjudicated and cannot be relitigated here.

(ii) cases involving executors and administrators, and (iii) a handful of suits by lenders involving assignments or other transfers of interest. Of course, the circumstances of these cases are not before this Court, and the holdings of lower courts are not binding on this Court, but in any event, these lower court precedents do not support Plaintiff-Appellant's position.

A. Cases Involving Bankruptcy Trustees

Certain lower court cases have authorized bankruptcy trustees to revive actions originally commenced in the name of their debtors. Plaintiff-Appellant claims that "there is no substantive difference between a bankruptcy trustee and a RMBS trustee for purposes of CPLR 205(a)" and so the reasoning of these cases (which this Court has never before adopted) should be extended to the circumstances of this appeal. Br. 21 n.17. This argument lacks merit.

The line of lower court cases authorizing revival by bankruptcy trustees involve actions originally commenced in the name of a debtor in bankruptcy that are subsequently revived by the bankruptcy trustee as the debtor's successor-in-interest. *E.g.*, *Goodman v. Skanska USA Civil, Inc.*, 169 A.D.3d 1010 (2d Dep't 2019). These cases trace back to *Goldberg v. Littauer Hosp. Ass'n*, 160 Misc. 2d 571 (Sup. Ct. Albany Cnty. 1994), in which the motion court analogized a bankruptcy trustee to an executor/administrator because a "bankrupt can be looked upon as 'legally' deceased with respect to his assets, a condition not significantly different from that of one

'physically' deceased." *Goldberg*, 160 Misc. 2d at 575.[8] *See also Genova v. Madani*, 283 A.D.2d 860, 861 (3d Dep't 2001) ("We agree with the conclusion … in *Goldberg* … subsequently adopted by the Second Department in *Pinto v. Ancona*, 262 A.D.2d 472 (2d Dep't 1999), and *Tulis v. Nyack Hosp.*, 271 A.D.2d 684 (2d Dep't 2000)"); *Rivera v. Markowitz*, 71 A.D.3d 449, 450 (1st Dep't 2010) (relying on *Genova*, *Tulis*, and *Pinto*); *Orr v. Urban Am. Mgmt. Corp.*, 172 A.D.3d 512, 513 (1st Dep't 2019) (relying on *Rivera*).

This line of authorities arose before this Court's decision in *Reliance*, and this Court has not had the opportunity to pass on its validity. The cases do extend by analogy the reach of CPLR 205(a) beyond its text, something *Reliance* suggests courts should be wary of doing despite the statute's remedial purpose. But the analogy of bankruptcy trustees to the express statutory exception for executors and administrators on which these cases depend is far more defensible than the further extension of the analogy Plaintiff-Appellant proposes, and affirmance of the First Department's ruling need not call those rulings into question. *See, e.g.*, *Goodman*,

[8] Plaintiff-Appellant suggests (Br. 18 n.14) that this Court recognized this exception for bankruptcy trustees in *Van Der Stegen v. Neuss, Hesslein & Co.*, 270 N.Y. 55 (1936). *Van Der Stegen*, however, permitted the plaintiff's "curators in bankruptcy" to substitute as plaintiffs in the original action; because of this, there was no need to file a revival action, and the Court's opinion "d[id] not touch upon the effect of section 23 of the Civil Practice Act," CPLR 205(a)'s predecessor statute. *Id.* at 63.

169 A.D.3d 1013–14 (Leventhal, J., concurring) (explaining that extending CPLR 205(a) to bankruptcy trustees is consistent with this Court's precedents, while further extensions are not).

In the executor/administrator context, the representative is the successor to a claim the decedent once had, and brings suit in that representative capacity. The same is true of bankruptcy trustees, who succeed to claims formerly held by their debtors as a matter of law. *See Goldberg*, 160 Misc. 2d at 575 (A bankruptcy trustee "stands in the shoes of the bankrupt no less than does an administrator of the estate of a deceased."); *Goodman*, 169 A.D.3d at 1012 (bankruptcy trustee is "the debtor's successor-in-interest"). This analogy breaks down, however, when applied to the Funds and the Trustee: the Funds *never* possessed the claims at issue, and no event caused the Funds to lose capacity and pass such claims to the Trustee. In other words, applying CPLR 205(a) in revival actions brought by bankruptcy trustees is broadly consistent with this Court's statement in *George* that CPLR 205(a) may authorize revival so long as "the claim is the same, and the subsequent claimant is acting as the representative of the named plaintiff in the prior action," whereas applying CPLR 205(a) in this case would not be. *George*, 47 N.Y.2d at 179. The First Department and IAS Court therefore correctly concluded that the Plaintiff-Appellant's attempt to revive the Funds' suit was not meaningfully similar to an executor's pursuit of a decedent's rights or a bankruptcy trustee's suit on a claim of a debtor who, but for

bankruptcy, would have been the proper plaintiff. *See* R. 15 ("As the certificateholders did not possess a cause of action to which the Trustee succeeded, however, the Trustee also fails to show that it is a representative akin to a bankruptcy trustee."); *U.S. Bank*, 141 A.D.3d at 433 (citing *Rivera*, 71 A.D.3d at 450).

B. Cases Involving Executors And Administrators

Plaintiff-Appellant also cites a number of CPLR 205(a) cases that directly involve executors and administrators. *Lambert v. Sklar*, 30 A.D.3d 564 (2d Dep't 2006) (Br. 23), involved revival by an administrator of an action commenced on behalf of an estate by the decedent's widow. *Tellez v. Saranda Realty*, 197 A.D.2d 439 (1st Dep't 1993) (Br. 22 n. 19) is a wrongful death case mistakenly brought in the name of the wrong administrator and then refiled to name the proper administrator. *Mendez v. Kyung Yoo*, 23 A.D.3d 354, 355 (2d Dep't 2005) (Br. 23) is a wrongful death action similar to *Tellez*. And *Brown v. Lutheran Med. Ctr.*, 35 Misc. 3d 553, 556 (Sup Ct. Kings Cnty. Feb 6, 2012) (Br. 23) involved a prior action filed by a "proposed guardian ad litem" and then revived by the same person, both individually and as administrator.

None of these cases advances Plaintiff-Appellant's argument. All are straightforward applications of this Court's executor/administrator precedents, as set forth in *George* and in *Carrick v. Central General Hosp.*, 51 N.Y.2d 242, 250 (1980). And *Reliance* makes clear that these precedents cannot be applied by analogy to

corporate plaintiffs in the commercial litigation context. *See Reliance*, 9 N.Y.3d at 57 ("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."). The unexceptional fact that New York's lower courts have applied *George* and *Carrick* in circumstances involving executors and administrators over the past thirty years says nothing about how this appeal is to be resolved. *Cf. Reliance (CA2)*, 474 F.3d at 58 (finding decisions within "the same [executor/administrator] genre" to be unhelpful).

C. Cases Involving Lenders And Assignees

Finally, Plaintiff-Appellant cites a handful of Appellate Division cases involving lenders and their assignees in which revival under CPLR 205(a) was permitted. Plaintiff-Appellant cites *Chase Manhattan Bank, N.A. v. Wolowitz* (Br. 24–25), a ruling in a foreclosure case consisting, as relevant here, of the single sentence: "It is well settled that where the appellants were given timely notice of the nature of the claim by proper service of a summons and complaint, an error relating to the identity of the named plaintiff in the original action will not bar recommencement under CPLR 205(a)." 272 A.D.2d 428, 429 (2d Dep't 2000). The district court in *Reliance* noted that *Wolowitz* "used broad language" regarding

"mistake[s] in 'the identity of the named plaintiff'" but found it unpersuasive. *Reliance (EDNY)*, 390 F. Supp. 2d at 273. The Second Circuit similarly noted that while the appellant relied heavily on *Wolowitz*, it "consists of a single paragraph that does not include any description of the underlying facts," making that court "unable to determine whether it supports [appellant's] position." *Reliance (CA2)*, 474 F.3d at 58. This Court's opinion in *Reliance* did not mention *Wolowitz*, and if *Wolowitz*'s statement that "an error relating to the identity of the named plaintiff in the original action will not bar recommencement under CPLR 205(a)" should be applied as broadly as Plaintiff-Appellant urges, *Reliance* would have come out the opposite way.

Unlike the *Reliance* courts, Plaintiff-Appellant is undeterred by *Wolowitz*'s lack of factual detail or legal analysis; instead, it attempts to reconstruct *Wolowitz*'s facts from one of the parties' briefs, and then claims that this appeal "presents the same material facts." *See* Br. 25 & n.20.[9] Plaintiff-Appellant also asserts that *Wolowitz*'s single-sentence CPLR 205(a) holding contains within it the implicit adoption of Plaintiff-Appellant's theories about "the real party-in-interest and the

[9] To the extent such materials are properly before the Court, this same briefing also states that "[a]lthough the prior action initially named Citibank, N.A. as the plaintiff, leave was granted to substitute Chase Manhattan Bank, N.A. *nunc pro tunc* as the plaintiff," which suffices to distinguish *Wolowitz* from the circumstances present here. Brief for Plaintiff-Respondent, *Wolowitz*, 2000 WL 34548193, at *7.

rights being vindicated in the action" (Br. 25), even though none of that is contained in the ruling. Of course, what an Appellate Division panel might have intended when it issue a single-paragraph affirmance of a foreclosure ruling—and which, apart from *Reliance*, has been cited only five times in the twenty years since its issuance—should have very little bearing on this Court's pronouncements of New York law. The weight Plaintiff-Appellant places on *Wolowitz* only demonstrates how lacking in support its position actually is.

Finally, Plaintiff-Appellant relies on *Wells Fargo v. Eitani*, 148 A.D.3d 193 (2d Dep't 2017), *appeal dismissed as non-final*, 29 N.Y.3d 1023 (2017), another foreclosure case. Br. 26-27. In *Eitani*, the first plaintiff, Argent, commenced a foreclosure action in 2005, and subsequently assigned the loan to Wells Fargo in 2008. 148 A.D.3d at 195–96. The action was pending but dormant five years later, when the Administrative Judge, "on a routine clearing of the docket," dismissed the action "as abandoned pursuant to CPLR 3215(c)." *Id.* at 196. Wells Fargo thereafter sought to revive the action under CPLR 205(a). A Second Department panel majority concluded, over a double dissent, that revival was available because, "as the assignee of the mortgage, Wells Fargo had a statutory right, pursuant to CPLR 1018, to continue the prior action in Argent's place, even in the absence of formal substitution." *Eitani*, 148 A.D.3d at 199. Because of this, the panel majority

concluded that at the time of dismissal "Wells Fargo was, in actuality, the true party plaintiff in the prior action, and is entitled to the benefit of CPLR 205(a)." *Id.*

Even assuming the *Eitani* majority was correct, and did not (as the dissenting Justices argued) extend the statute beyond what this Court's precedents have allowed, *Eitani* is distinguishable here. The Funds were not the proper plaintiffs at the time they commenced the Prior Action and there was no assignment of the Funds' rights to the Trustee, nor was there any substitution of parties within the limitations period, *see ACE I*, 112 A.D.3d at 523 ("Nor does the substitution of the trustee as plaintiff permit us to deem timely filed the trustee's complaint, which was filed September 13, 2012."). *Eitani* neither sheds any light on how this Court should construe CPLR 205(a) nor gives any further credence to Plaintiffs' theories; still less does *Eitani* somehow show that a "split" between the First and Second Departments exists on any relevant issue of law, as Plaintiffs vaguely contend.[10]

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[10] Plaintiff-Appellant also cites in a footnote three treatises it claims supports its position. Br. 27–28 n.22. These treatises do not meaningfully address the present circumstances. For instance, that other states' laws may permit revival where a "change [in parties] is nominal" (13 A.L.R.3d 848 § 4) says nothing about whether the difference between the Funds and the Trustee here should be considered "nominal." The same treatise enumerates the types of plaintiffs for which such "nominal" changes in parties have sometimes been permitted—spouses; partners; administrators; assignees; and guardians (13 A.L.R.3d 848 §§ 5–9)—and concludes by citing cases "which do[] not fall within any of the types treated in §§ 5–9" (which would include the instant action) in which savings statutes were "*not applicable* under the circumstances." *Id.* § 10 (emphasis added). The other cited treatises are similarly limited. *See* 51 Am. Jur. 2d § 256 (savings statute applies "where there

III. PLAINTIFF-APPELLANT'S PREEMPTIVE REBUTTALS OF ANTICIPATED ARGUMENTS LACK MERIT

In the final section of its brief, Plaintiff-Appellant purports to preemptively respond to arguments it anticipates DBSP will make. These strawman arguments do not merit extensive discussion.

First, Plaintiff-Appellant claims that DBSP will assert a procedural argument that turns on characterizing the Funds' SWN as a "nullity." Br. 29. DBSP, however, has not made that argument. While *ACE I* held that "[t]he certificate holders' failure to comply with a condition precedent to commencing suit [*i.e.*, providing pre-suit notice] rendered their summons with notice a nullity," 112 A.D.3d at 523, this Court subsequently held that failure to provide pre-suit notice does not prevent revival under CPLR 205(a). *See U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 33 N.Y.3d 72, 82 (2019). So did the IAS Court. *See* R. 39-40. The rulings on appeal at issue here have nothing to do with any failure to comply with the PSA's pre-suit notice provisions.

Second, Plaintiff-Appellant contends that the circumstances that resulted in the Prior Action being commenced by the Certificateholders as opposed to the

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would have been an opportunity in the original action to substitute a proper plaintiff"); 54 C.J.S. Limitations of Actions § 353 ("If there is no identity of right or privity of interest between plaintiffs in the first suit and plaintiffs in the second suit, the latter action is not within the spirit or the letter of the statute permitting a new action.").

Trustee are "outside the record" and "legally irrelevant." Br. 31–32. These circumstances, however, are set forth in prior judicial decisions in this action and the Prior Action, all of which are properly before this Court, as well as in the SWN itself. *See, e.g.*, R. 386 ("On March 8, 2012, [the Funds] directed the Trustee, and offered the Trustee reasonable indemnity, to enforce [DBSP's] repurchase obligations. The Trustee has not accepted [the Funds'] direction."). Plaintiff-Appellant cannot rely on the SWN as the basis for the purported timeliness of its claims while at the same time disavowing its contents. There is no need for fact-finding or the development of a "full record" (Br. 32 n.23) regarding these circumstances; the present record makes clear that Plaintiff-Appellant's decision not to file, and the Funds' commencement of the Prior Action, were conscious decisions made by different parties with distinct interests, not the product of mistake or inadvertence.

Third, Plaintiff-Appellant objects to the characterization of the Prior Action as having been "dismissed as untimely." Br. 33. But that characterization is entirely correct. As this Court recently reaffirmed, "[w]hat made the trustee's claims untimely in *ACE* was that the claims accrued when the underlying agreement was executed, and the trustee did not commence its action within six years of that date." *U.S. Bank Nat'l Ass'n*, 33 N.Y.3d at 79 (2019); *see also ACE I*, 112 A.D.3d at 522 ("This action is barred by the six-year statute of limitations on contract causes of action (CPLR 213 [2])"). The Funds' SWN did not commence a valid action because

the Funds lacked standing; the Trustee's complaint was untimely because it was filed after the statute of limitations expired. The question on this appeal is whether Plaintiff-Appellant can rely on the filing date of the Funds' SWN even though Plaintiff-Appellant and the Funds are not the same party.

Finally, Plaintiff-Appellant contends that precedents concerning the assertion of the "'common interest exception' to the waiver of attorney-client privilege in the RMBS context" are somehow "instructive" here. Br. 36–37. But the fact that the Trustee and different certificateholders have been found in another action to have shared a "limited common purpose" for purposes of discovery (Br. at 37) lacks any possible relevance to proper construction of CPLR 205(a). There is no reason to believe, for instance, that disclosure of privileged information by the parent to the subsidiary in *Reliance* would have resulted in the waiver of any applicable privilege or that consideration of that issue would have changed this Court's ruling in that case. The common interest doctrine simply serves different purposes than CPLR 205(a), and unlike the common interest doctrine, whose contours are shaped by common law, the boundaries of CPLR 205(a) are defined by its statutory text.

IV. THE FIRST DEPARTMENT'S DECISION IS CONSISTENT WITH NEW YORK PUBLIC POLICY

Plaintiff-Appellant claims that because CPLR 205(a) is a remedial statute with a "liberal purpose," it "should be interpreted broadly" to permit the Trustee to

revive the Prior Action. Br. 19; *see also* Br. 14 (quoting *Gaines v. City of New York*, 215 N.Y. 533, 539 (1915)). As this Court has recognized in connection with Section 205(a), however, such invocations of statutory purpose, of course, only go so far. *See Reliance*, 9 N.Y.3d at 57 (rejecting plaintiff's invocation of CPLR 205(a)'s "remedial purpose" due to countervailing "reasons of policy and precedent"). That CPLR 205(a) generally benefits plaintiffs does not mean any dispute concerning its scope should be resolved in favor of every plaintiff, as "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers [a] statute's primary objective must be the law." *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007) (emphasis in original).

Thus, there is no merit to Plaintiff-Appellant's contention that allowing revival under these circumstances would be "consistent with the purposes of the statute of limitations" because "DBSP indisputably had timely notice of the Trust's claims against it." Br. 24. DBSP had notice of claims asserted by parties that lacked standing bring those claims—as did the defendant in *Reliance*. *See Reliance (CA2)*, 474 F.3d at 58 ("On the one hand, … PolyVision cannot seriously argue that it did not have notice of the claim, which is identical to the previous RNY claim in all its crucial factual particulars. On the other hand, allowing RIC's claim to proceed arguably stretches § 205(a) beyond its literal language and existing New York caselaw."). And this Court has expressly criticized an approach to CPLR 205(a) that

would "emphasize the factor of actual notice." *George*, 47 N.Y.2d at 178. Such an approach would be "inconsistent with" this Court's prior precedent in *Smalley v. Hutcheon*, 296 N.Y. 68 (1946), in which this Court "refused to apply [the savings statute] where the prior action had been dismissed for lack of personal jurisdiction and yet the defendant had received actual notice by an improper means of service." *George*, 47 N.Y.2d at 178.

Moreover, Plaintiff-Appellant's appeals to statutory purpose also ignore that the purpose of CPLR 205(a) is not to authorize revival under any and all circumstances, but to do so only where claims were dismissed "for reasons other than ... a plaintiff's unwillingness to prosecute the claims in a diligent manner." *Norex Petroleum Ltd. v. Blavatnik*, 23 N.Y.3d 665, 668 (2014); *see also Gaines*, 215 N.Y. at 539 ("The statute is designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits."). As the Second Circuit has explained:

> In order to receive the benefit of 205(a) tolling, the litigant must have prosecuted his original claim diligently…. The New York courts have affirmed this point again and again: "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."

Doyle v. Am. Home Prods. Corp., 583 F.3d 167, 171 (2d Cir. 2009) (quoting *George*, 47 N.Y.2d at 178).

Here, as discussed above, the Prior Action was commenced by the Funds "after [the Trustee] refused to do so, on March 28, 2012, the last day of the limitations period." *ACE I*, 112 A.D.3d at 522. This conscious refusal to bring suit within the limitations period epitomizes the "unwillingness to prosecute … claims in a diligent manner," *Norex*, 23 N.Y.3d at 668, that properly renders CPLR 205(a) unavailable—particularly since Plaintiff-Appellant is a sophisticated financial institution at all times represented by experienced counsel. *See Reliance*, 9 N.Y.3d at 58 ("[T]he diligent corporate suitor, represented by counsel, is of course well advised to operate with the minimal care necessary" to bring suit within the limitations period).

Indeed, what animates New York law in this regard is a policy of liberality in allowing the correction of mistakes, particularly by individual litigants navigating the procedural complexities that arise in the executor/administrator context. *See, e.g.*, *Bernardez v. City of N.Y.*, 100 A.D.2d 798, 800 (1st Dep't 1984) (discussing difficulties posed to litigants by formalities of estate administration process); *George*, 47 N.Y.2d at 173 (permitting revival action following "comedy of errors"); *Gaines*, 215 N.Y. 539, 541 (1915) ("good faith ... error" by plaintiff "ought not to bar the prosecution of his action"). That same liberality does not apply to plaintiffs who make a conscious choice not to sue. *See Paramount Pictures Corp. v. Allianz Risk Transfer AG*, 31 N.Y.3d 64, 85 (2018) (Rivera, J., concurring) (rejecting litigant's attempt "to escape the consequences of the tactical decision it made"). To the

contrary, New York courts have held in a variety of contexts that "[w]hen a plaintiff intentionally decides not to assert a claim against a party known to be potentially liable, there has been no mistake and the plaintiff should not be given a second opportunity to assert that claim after the limitations period has expired." *Buran v. Coupal*, 87 N.Y.2d 173, 181 (1995).[11] As a matter of public policy, the same result should obtain here.

In sum, Plaintiff-Appellant's attempt to revive the Prior Action falls outside both the letter of the statute and its spirit. Plaintiff-Appellant is neither the same plaintiff as the Funds, nor their executor/administrator, and the very filing on which Plaintiff-Appellant seeks to rely to revive the Prior Action confirms that Plaintiff-Appellant refused to bring suit within the limitations period. Under these circumstances, the First Department was correct as a matter of both law and policy in declining to expand the scope of CPLR 205(a) beyond its text.

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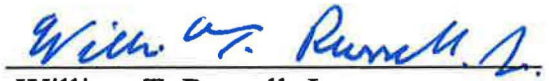
[11] *See also 15 E. 11th Apt. Corp. v. Elghanayan*, 232 A.D.2d 289, 289 (1st Dep't 1996) (intervention improper where "[t]he initial omission of appellants as plaintiffs ... was the result of a conscious strategic decision"); *Steinhardt Grp., Inc. v. Citicorp*, 303 A.D.2d 326, 327 (1st Dep't 2003) (affirming denial of leave to amend complaint to name "the sole real party in interest," in light of, *inter alia*, "plaintiffs' inexcusable delay" and the expiration of the limitations period); *Everhome Mortg. Co. v. Charter Oak Fire Ins. Co.*, No. 07-cv-98(RRM), 2012 WL 868961, at *12 (E.D.N.Y. Mar. 14, 2012) (CPLR did not "allow LaSalle the benefit of EverHome's filing date ... where [LaSalle] had ample notice and opportunity to bring claims ... within the statutory period").

CONCLUSION

For the foregoing reasons, the Decision and Order of the Appellate Division, First Department, entered on November 19, 2019, should be affirmed.

Dated: New York, New York
December 22, 2020

SIMPSON THACHER & BARTLETT LLP

By: 

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Attorneys for Defendant-Respondent DB Structured Products, Inc.

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared using Microsoft Word.

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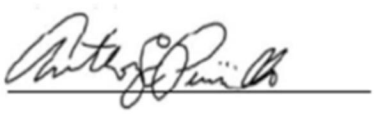
By: 
Anthony C. Piccirillo

ADDENDUM

Pursuant to Rule § 500.1(f) of the Rules of Practice of the Court of Appeals, Defendant-Respondent DB Structured Products, Inc. states that the publicly held indirect corporate parent of DB Structured Products, Inc. is Deutsche Bank Aktiengesellschaft.

The affiliates of DB Structured Products, Inc. are Deutsche Bank Aktiengesellschaft; ABFS I Incorporated; ABS MB Ltd.; Acacia (Luxembourg) S.à r.l.; Alex. Brown Financial Services Incorporated; Alex. Brown Investments Incorporated; Alfred Herrhausen Gesellschaft mbH; Ambidexter GmbH; Argent Incorporated; Baincor Nominees Pty Limited; Bainpro Nominees Pty Ltd ; Baldur Mortgages Limited; Bankers Trust Investments Limited; Bayan Delinquent Loan Recovery 1 (SPV-AMC), Inc.; Betriebs-Center für Banken AG; BHW - Gesellschaft für Wohnungswirtschaft mbH; BHW Bausparkasse Aktiengesellschaft; BHW Holding GmbH; Biomass Holdings S.à r.l.; Birch (Luxembourg) S.à r.l.; Blue Cork, Inc.; BNA Nominees Pty Limited; Borfield Sociedad Anonima; Breaking Wave DB Limited; BT Globenet Nominees Limited; BTAS Cayman GP; BTD Nominees Pty Limited; Cape Acquisition Corp.; CapeSuccess Inc.; CapeSuccess LLC; Cardales UK Limited; Career Blazers LLC; Career Blazers Management Company, Inc.; Career Blazers Personnel Services, Inc.; Caribbean Resort Holdings, Inc.; Cathay Advisory (Beijing) Co., Ltd.; Cathay Asset Management Company Limited; Cathay

Capital Company (No 2) Limited; Cedar (Luxembourg) S.à r.l.; Centennial River 2 Inc.; Centennial River Corpora on; China Recovery Fund, LLC; Cinda - DB NPL Securitization Trust 2003-1; Consumo Srl in Liquidazione; Cyrus J. Lawrence Capital Holdings, Inc.; D B Investments (GB) Limited; D&M Turnaround Partners Godo Kaisha; D.B. International Delaware, Inc.; DB (Barbados) SRL; DB (Malaysia) Nominee (Asing) Sdn. Bhd.; DB (Malaysia) Nominee (Tempatan) Sendirian Berhad; DB (Pacific) Limited; DB (Pacific) Limited, New York; DB Abalone LLC; DB Alex. Brown Holdings Incorporated; DB Alps Corporation; DB Aotearoa Investments Limited; DB Beteiligungs-Holding GmbH; DB Boracay LLC; DB Capital Investments Sàrl; DB Capital Markets (Deutschland) GmbH; DB Capital Partners, Inc.; DB Cartera de Inmuebles 1, S.A.U.; DB Chestnut Holdings Limited; DB Commodity Services LLC; DB Corporate Advisory (Malaysia) Sdn. Bhd.; DB Delaware Holdings (Europe) Limited; DB Direkt GmbH; DB Elara LLC; DB Energy Trading LLC; DB Enfield Infrastructure Holdings Limited; DB Equipment Leasing, Inc.; DB Equity Limited; DB Finance (Delaware), LLC; DB Global Technology SRL; DB Global Technology, Inc.; DB Group Services (UK) Limited; DB Holdings (New York), Inc.; DB Holdings (South America) Limited; DB HR Solutions GmbH; DB Impact Investment Fund I, L.P.; DB Industrial Holdings Beteiligungs GmbH & Co KG; DB Industrial Holdings GmbH; DB Intermezzo LLC; DB International (Asia) Limited; DB International Investments Limited; DB International Trust

(Singapore) Limited; DB Investment Managers, Inc.; DB Investment Partners, Inc.; DB Investment Resources (US) Corporation; DB Investment Resources Holdings Corp.; DB Investment Services GmbH; DB Io LP; DB IROC Leasing Corp.; DB London (Investor Services) Nominees Limited; DB Management Support GmbH; DB Nominees (Hong Kong) Limited; DB Nominees (Singapore) Pte Ltd; DB Omega BTV S.C.S.; DB Omega Holdings LLC; DB Omega Ltd.; DB Omega S.C.S.; DB Operaciones y Servicios Interactivos Agrupación de Interés Económico; DB Overseas Finance Delaware, Inc.; DB Overseas Holdings Limited; DB Print GmbH; DB Privat- und Firmenkundenbank AG; DB Private Clients Corp.; DB Private Wealth Mortgage Ltd.; DB Re S.A.; DB Service Centre Limited; DB Service Uruguay S.A.; DB Services Americas, Inc.; DB Servizi Amministrativi S.r.l.; DB Strategic Advisors, Inc.; DB Structured Derivative Products, LLC; DB Structured Products, Inc.; DB Trustee Services Limited; DB Trustees (Hong Kong) Limited; DB U.S. Financial Markets Holding Corporation; DB UK Bank Limited; DB UK Holdings Limited; DB UK PCAM Holdings Limited; DB USA Core Corporation; DB USA Corporation; DB Valoren S.à r.l.; DB Value S.à r.l.; DB VersicherungsManager GmbH; DB Vita S.A.; DBAH Capital, LLC; DBCIBZ1; DBCIBZ2; DBFIC, Inc.; DBNZ Overseas Investments (No.1) Limited; DBOI Global Services (UK) Limited; DBOI Global Services Private Limited; DBR Investments Co. Limited; DBRE Global Real Estate Management IA, Ltd.; DBRE

Global Real Estate Management IB, Ltd.; DBRMS4; DBRMSGP1; DBUK PCAM Limited; DBUKH No. 2 Limited; DBUSBZ1, LLC; DBUSBZ2, S.à r.l.; DBX Advisors LLC; DBX Strategic Advisors LLC; DBÖ Vermögensverwertung GmbH in Liqu.; De Meng Innova ve (Beijing) Consulting Company Limited; DEBEKO Immobilien GmbH & Co Grundbesitz OHG; DEE Deutsche Erneuerbare Energien GmbH; Delowrezham de México S. de R.L. de C.V.; DEUKONA Versicherungs-Vermi lungs-GmbH; Deutsche (Aotearoa) Capital Holdings New Zealand; Deutsche (Aotearoa) Foreign Investments New Zealand; Deutsche (Mauri us) Limited; Deutsche (New Munster) Holdings New Zealand Limited; Deutsche Access Investments Limited; Deutsche Aeolia Power Productio Société Anonyme; Deutsche Alt-A Securities, Inc.; Deutsche Alternative Asset Management (UK) Limited; Deutsche Asia Pacific Holdings Pte Ltd; Deutsche Asset Management (India) Private Limited; Deutsche Australia Limited; Deutsche Bank (Cayman) Limited; Deutsche Bank (Chile); Deutsche Bank (China) Co., Ltd.; Deutsche Bank (Suisse) SA; Deutsche Bank (Uruguay) Sociedad Anónima Instución Financiera Externa; DEUTSCHE BANK A.S.; Deutsche Bank Americas Holding Corp.; Deutsche Bank Europe GmbH; Deutsche Bank Financial Company; Deutsche Bank Holdings, Inc.; Deutsche Bank Insurance Agency Incorporated; Deutsche Bank Insurance Agency of Delaware; Deutsche Bank International Limited; Deutsche Bank Investments (Guernsey) Limited; Deutsche Bank Luxembourg S.A.; Deutsche Bank Mutui

S.p.A.; Deutsche Bank México, S.A., Institución de Banca Múltiple; Deutsche Bank National Trust Company; Deutsche Bank Nominees (Jersey) Limited; Deutsche Bank Polska Spólka Akcyjna; Deutsche Bank Representative Office Nigeria Limited; Deutsche Bank S.A. - Banco Alemão; Deutsche Bank Securities Inc.; Deutsche Bank Securities Limited; Deutsche Bank Services (Jersey) Limited; Deutsche Bank Società per Azioni; Deutsche Bank Trust Company Americas; Deutsche Bank Trust Company Delaware; Deutsche Bank Trust Company, National Association; Deutsche Bank Trust Corporation; Deutsche Bank, Sociedad Anónima Española; Deutsche Capital Finance (2000) Limited; Deutsche Capital Hong Kong Limited; Deutsche Capital Management Limited; Deutsche Capital Markets Australia Limited; Deutsche Capital Partners China Limited; Deutsche Cayman Ltd.; Deutsche CIB Centre Private Limited; Deutsche Custody N.V.; Deutsche Domus New Zealand Limited; Deutsche Equities India Private Limited; Deutsche Finance Co 1 Pty Limited; Deutsche Finance Co 2 Pty Limited; Deutsche Finance Co 3 Pty Limited; Deutsche Finance Co 4 Pty Limited; Deutsche Finance No. 2 Limited; Deutsche Foras New Zealand Limited; Deutsche Gesellschaft für Immobilien-Leasing mit beschränkter Haftungl Deutsche Global Markets Limited; Deutsche Group Holdings (SA) Proprietary Limited; Deutsche Group Services Pty Limited; Deutsche Grundbesitz Beteiligungsgesellschaft mbH i.L.; Deutsche Grundbesitz-Anlagegesellschaft mit beschränkter Haftung; Deutsche Holdings (BTI) Limited;

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Securities Menkul Degerler A.S.; Deutsche Securities S.A.; Deutsche Securities Saudi Arabia (a closed joint stock company); Deutsche Securities SpA; Deutsche Securities Venezuela S.A.; Deutsche Securities, S.A. de C.V., Casa de Bolsa; Deutsche Services Polska Sp. z o.o.; Deutsche StiftungsTrust GmbH; Deutsche Strategic Investment Holdings Yugen Kaisha; Deutsche Trust Company Limited Japan; Deutsche Trustee Company Limited; Deutsche Trustee Services (India) Private Limited; Deutsche Trustees Malaysia Berhad; Deutsche Wealth Management S.G.I.I.C., S.A.; Deutsches Ins tut für Altersvorsorge GmbH; DI Deutsche Immobilien Treuhandgesellschaft mbH; DISCA Beteiligungsgesellschaft mbH; DNU Nominees Pty Limited; DTS Nominees Pty Limited; Durian (Luxembourg) S.à r.l.; DWS Alternatives France; DWS Alternatives Global Limited; DWS Alternatives GmbH; DWS Asset Management (Korea) Company Limited; DWS Beteiligungs GmbH; DWS CH AG; DWS Distributors, Inc.; DWS Far Eastern Investments Limited; DWS Group GmbH & Co. KGaA; DWS Group Services UK Limited; DWS Grundbesitz GmbH; DWS International GmbH; DWS Investment GmbH; DWS Investment Management Americas, Inc.; DWS Investment S.A.; DWS Investments Australia Limited; DWS Investments Hong Kong Limited; DWS Investments Japan Limited; DWS Investments Shanghai Limited; DWS Investments Singapore Limited; DWS Investments UK Limited; DWS Management GmbH; DWS Real Estate GmbH; DWS Service Company; DWS Trust Company; DWS USA

Corporation; EC EUROPA IMMOBILIEN FONDS NR. 3 GmbH & CO. KG i.I.; Elizabethan Holdings Limited; Elizabethan Management Limited; European Value Added I (Alternate G.P.) LLP; FARAMIR Beteiligungs- und Verwaltungs GmbH; Fiduciaria Sant' Andrea S.r.L.; Finanzberatungsgesellschaft mbH der Deutschen Bank; Franz Urbig- und Oscar Schlitter-Stiftung Gesellschaft mit beschränkter Haftung; Fünfte SAB Treuhand und Verwaltung GmbH & Co. Suhl "Rimbachzentrum" KG; G Finance Holding Corp.; G918 Corp.; German American Capital Corporation; Greenwood Properties Corp.; Grundstücksgesellschaft Frankfurt Bockenheimer Landstraße GbR; Grundstücksgesellschaft Kerpen-Sindorf Vogelrutherfeld GbR; Grundstücksgesellschaft Leipzig Petersstraße GbR; Grundstücksgesellschaft Wiesbaden Luisenstraße/Kirchgasse GbR; HTB Spezial GmbH & Co. KG; Immobilienfonds Büro-Center Erfurt am Flughafen Bindersleben I GbR; Immobilienfonds Büro-Center Erfurt am Flughafen Bindersleben II GbR; Immobilienfonds Mietwohnhäuser Quadrath-Ichendorf GbR; Immobilienfonds Wohn- und Geschäftshaus Köln-Blumenberg V GbR; ISTRON Beteiligungs- und Verwaltungs-GmbH; IVAF I Manager, S.à r.l.; J R Nominees (Pty) Ltd; Joint Stock Company Deutsche Bank DBU; Jyogashima Godo Kaisha; KEBA Gesellschaft für interne Services mbH; Kidson Pte Ltd; Konsul Inkasso GmbH; LA Water Holdings Limited; LAWL Pte. Ltd.; Leasing Verwaltungsgesellschaft Waltersdorf; mbH; Leonardo III Ini al GP Limited; Maher Terminals Holdings (Toronto) Limited; MEF

I Manager, S. à r.l.; MHL Reinsurance Ltd.; MIT Holdings, Inc.; MortgageIT Securities Corp.; MortgageIT, Inc.; norisbank GmbH; OOO "Deutsche Bank TechCentre"; OOO "Deutsche Bank"; Opal Funds (Ireland) Public Limited Company (in liquidation); OPB Verwaltungs- und Beteiligungs-GmbH; OPB Verwaltungs- und Treuhand GmbH; OPB-Nona GmbH; OPB-Oktava GmbH; OPB-Quarta GmbH; OPB-Quinta GmbH; OPB-Sep ma GmbH; Oppenheim Capital Advisory GmbH; Oppenheim Flo enfonds V GmbH & Co. KG; Oppenheim Private Equity Manager GmbH; Oppenheim Private Equity Verwaltungsgesellschaft mbH; OPS Nominees Pty Limited; OVT Trust 1 GmbH; OVV Beteiligungs GmbH; PADUS Grundstücks-Vermietungsgesellschaft mbH; Pan Australian Nominees Pty Ltd; PB Factoring GmbH; PB Firmenkunden AG; PB International S.A.; PB Spezial-Investmentaktiengesellschaft mit Teilgesellschaft svermögen; PCC Services GmbH der Deutschen Bank; Planta on Bay, Inc.; Postbank Akademie und Service GmbH; Postbank Beteiligungen GmbH; Postbank Direkt GmbH; Postbank Filialvertrieb AG; Postbank Finanzberatung AG; Postbank Immobilien GmbH; Postbank Immobilien und Baumanagement GmbH; Postbank Leasing GmbH; Postbank Systems AG; PT Deutsche Sekuritas Indonesia; PT. Deutsche Verdhana Sekuritas Indonesia; R.B.M. Nominees Pty Ltd; REO Properties Corporation; RoPro U.S. Holding, Inc.; Route 28 Receivables, LLC; RREEF America L.L.C.; RREEF China REIT Management Limited; RREEF European Value Added I (G.P.) Limited;

RREEF Fund Holding Co.; RREEF India Advisors Private Limited; RREEF Management L.L.C.; RTS Nominees Pty Limited; SAB Real Estate Verwaltungs GmbH; SAGITA Grundstücks-Vermietungsgesellschaft mbH; Sal. Oppenheim AG; Sal. Oppenheim jr. & Cie. Beteiligungs GmbH; SAPIO Grundstücks-Vermietungsgesellschaft mbH; Sechste Salomon Beteiligungs- und Verwaltungsgesellschaft mbH; Service Company Four Limited; Sharps SP I LLC; Stelvio Immobiliare S.r.l.; Structured Finance Americas, LLC; Süddeutsche Vermögensverwaltung; Gesellschaft mit beschränkter Haftung; TELO Beteiligungsgesellschaft mbH; Tempurrite Leasing Limited; Thai Asset Enforcement and Recovery Asset Management Company Limited; Treuinvest Service GmbH; Triplereason Limited; Ullmann - Esch Grundstücksgesellschaft Kirchnerstraße GbR; Ullmann – Esch Grundstücksverwaltungsgesellschaft Disternich GbR; Vesta Real Estate S.r.l.; VÖB-ZVD Processing GmbH; Wealthspur Investment Ltd.; WEPLA Beteiligungsgesellschaft mbH; Whale Holdings S.à r.l.; World Trading (Delaware) Inc.

COURT OF APPEALS OF THE
STATE 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-Appellant,

-against-

DB STRUCTURED PRODUCTS, INC.,

Defendant-Respondent.

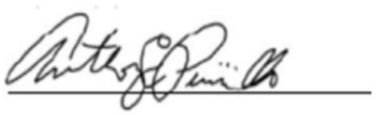
Index No. 651854/2014

AFFIRMATION OF SERVICE

I, Anthony C. Piccirillo, an attorney admitted to the Bar of the State of New York, and an associate at the law firm Simpson Thacher & Bartlett LLP hereby affirm under penalties of perjury that on December 22, 2020, I served three copies of the attached **APPELLATE BRIEF OF DEFENDANT-RESPONDENT** upon counsel of record for Plaintiff-Appellant 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, by FedEx delivery at the address indicated below:

Zachary W. Mazin, Esq.
McKool Smith PC
395 Ninth Avenue, 50th Floor
New York, New York 10001-8603

Dated: New York, New York
December 22, 2020



Anthony C. Piccirillo