APL-2020-00126
New York County Clerk's Index No. 651854/14

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.

BRIEF OF LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

INTRODUCTION 3

ARGUMENT 4

I. Section 205(a) Allows Plaintiffs To Cure Excusable Mistakes 4

II. Allowing This Suit To Proceed Serves § 205(a)'s Purpose............................. 8

A. The Investors Made an Excusable Mistake... 9

B. DBSP Faces No Undue Prejudice 12

1. The Trustee Acted Diligently Under the Circumstances 12

2. DBSP Had Fair Notice of the Trustee's Claims 17

III. DBSP's Interpretation Undermines the Securitization Market 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

ACE Sec. Corp. v. DB Structured Prods., Inc.,
25 N.Y.3d 581 (2015) 3, 11, 14

Bermudez Chavez v. Occidental Chem. Corp.,
35 N.Y.3d 492 (2020) 5, 6

Buran v. Coupal,
87 N.Y.2d 173 (1995) 6, 8

Chase Manhattan Bank, N.A. v. Wolowitz,
272 A.D.2d 428 (2d Dep't 2000) 7

Duffy v. Horton Mem'l Hosp.,
66 N.Y.2d 473 (1985) 5

Fed. Hous. Fin. Agency v. JPMorgan Chase & Co.,
No. 11 Civ. 6188, 2012 WL 6000885 (S.D.N.Y. Dec. 3, 2012) 14

Gaines v. City of New York,
215 N.Y. 533 (1915) 5, 7

George v. Mt. Sinai Hosp.,
47 N.Y.2d 170 (1979) .... *passim*

Goldstein v. N.Y. State Urb. Dev. Corp.,
13 N.Y.3d 511 (2009) 5

Howe v. Bank of N.Y. Mellon,
783 F. Supp. 2d 466 (S.D.N.Y. 2011) 10

Malay v. City of Syracuse,
25 N.Y.3d 323 (2015) 6

Metro. W. Asset Mgmt., LLC v. Magnus Funding, Ltd.,
No. 03 Civ. 5539, 2004 WL 1444868 (S.D.N.Y. June 25, 2004) 10

Morris Invs., Inc. v. Comm'r of Fin. of City of N.Y.,
69 N.Y.2d 933 (1987) 6, 7

Reliance Ins. Co. v. PolyVision Corp.,
9 N.Y.3d 52 (2007) 11, 12

Streeter v. Graham & Norton Co.,
263 N.Y. 39 (1933) 11, 12

Syncora Guar., Inc. v. EMC Mortg. Corp.,
No. 09 Civ. 3106, 2011 WL 1135007 (S.D.N.Y. Mar. 25, 2011) 16

Tellez v. Saranda Realty,
197 A.D.2d 439 (1st Dep't 1993) 7

Walnut Place LLC v. Countrywide Home Loans, Inc.,
96 A.D.3d 684 (1st Dep't 2012) 9, 10, 17

Statutes and Rules

C.P.L.R. § 203(f) 5, 8

C.P.L.R. § 205(a) .... *passim*

22 N.Y.C.R.R. § 500.23 1

Other Authorities

Mark Adelson, *The Mortgage Meltdown and the Failure of Investor Protection*, J. Structured Fin. 63 (2020) 18

Luis A. Aguilar, *The Need for Effective Regulation of the Asset-Backed Securities Market*, Sec. and Exch. Comm'n (Aug. 28, 2013) 19

William W. Bratton & Adam J. Levitin, *A Tale of Two Markets: Regulation and Innovation in Post-Crisis Mortgage and Structured Finance Markets*, 2020 U. Ill. L. Rev. 47 (2020) 15, 19

Talcott J. Franklin & Thomas F. Nealon III, *Mortgage and Asset Backed Securities Litigation Handbook* (rev. 2021) 5

Brent J. Horton, *In Defense of Private-Label Mortgage-Backed Securities*, 61 Fla. L. Rev. 827 (2009) 19

Thomas E. Plank, *Sense and Sensibility in Securitization: A Prudent Legal Structure and a Fanciful Critique*, 30 Cardozo L. Rev. 617 (2008) 19

Steven Ramirez, *The Virtues of Private Securities Litigation: An Historic and Macroeconomic Perspective*, 45 Loy. U. Chi. L.J. 669 (2014)....................20, 21

June Rhee, *Getting Residential Mortgage-Backed Securities Right: Why Governance Matters*, 20 Stan. J.L. Bus. & Fin. 273 (2015)....................14, 15, 16, 19

Yuli Wang, *Cracks in the Foundation: A Transactional Study of Non-Agency Residential Mortgage-Backed Securities*, Harv. L. School Int'l Fin. Seminar (2009) 15

Amici Curiae Legal Scholars respectfully submit the following brief in support of Plaintiff-Appellant HSBC Bank USA, N.A., solely in its capacity as Trustee of the ACE 2006-SL2 Trust.

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

This case is about an issue of profound importance to the residential mortgage-backed securities ("RMBS") market—whether investors in RMBS will have a viable legal remedy against the financial institutions that sell mortgage loans to RMBS trusts. *Amici* are leading scholars with decades of experience in New York civil procedure and the laws governing financial institutions and markets. They thus have a strong interest in the sound development of the applicable law.

Robert Hockett is the Edward Cornell Professor of Law and Professor of Public Affairs at Cornell Law School and Cornell University. Professor Hockett's principal teaching, research, and writing interests lie in organizational, financial, and monetary law and economics. He serves as a consultant to the Federal Reserve Bank of New York and the International Monetary Fund, as well as to federal and state

[1] Pursuant to 22 N.Y.C.R.R. § 500.23, *amici curiae* state that no party or party's counsel contributed content to this brief, participated in preparing the brief in any other manner, or contributed money that was intended to fund preparation or submission of the brief. Non-parties ARI Investments LLC and Freedom Trust 2011-2 contributed money to fund the preparation and submission of this brief. *Amici curiae* have received no compensation for submitting or preparing this brief, and their views expressed in this brief do not depend on the contribution of ARI Investments or Freedom Trust.

legislators and local governments. He has also served as Chair of the Section on Financial Institutions of the Association of American Law Schools and is a Fellow of the Century Foundation.

John Patrick Hunt is a Professor of Law and Martin Luther King, Jr. Research Scholar at the University of California, Davis School of Law. Professor Hunt's research focuses on law and finance, including student-loan bankruptcy and municipal bankruptcy, as well as issues concerning credit rating agencies and mortgage securitization, transfer, and modification. Before joining the University of California, Davis faculty in 2009, Professor Hunt was the Research Director of the Law and Finance Program at the University of California Berkeley Center for Law and Business. He has also worked as a regulatory lawyer and litigator at two major law firms and as a credit derivatives research analyst.

Michael Hutter is a Professor of Law at Albany Law School. His primary teaching, writing, and research interests concern New York civil procedure, evidence, and business law. He has done extensive work in reforming and revising New York law, including serving on the New York Law Revision Commission, the Unified Court System's Committee on the Guide to New York Evidence, and the C.P.L.R. Committee of the New York State Bar Association. He is also a member of the State Commission on Judicial Nomination and Chair of the New York State Bar Association Trial Lawyers Section Trial Evidence Committee.

Amici respectfully submit this brief to offer their unique perspective on the important policy ramifications of the issues presented. The views expressed are those of the individual *amici* and not of their affiliated organizations.

INTRODUCTION

DB Structured Products, Inc. ("DBSP") sold thousands of mortgage loans to the ACE 2006-SL2 Trust (the "Trust"), well aware that those loans were rife with defects. DBSP then flouted its promises in the parties' contract to repurchase loans that breached its extensive representations and warranties. Despite receiving repeated notices that hundreds of its loans were in breach, DBSP refused to repurchase a single loan. The Trust has suffered over $300 million in losses from non-performing loans, R. 62, and may have incurred hundreds of millions of dollars more in damages and accrued interest from DBSP's breaches.

Investors timely filed an action to enforce DBSP's repurchase obligations on the Trust's behalf. But when later appellate rulings made clear that investors could not sue derivatively for the Trust, the Trustee substituted in as plaintiff and filed its own complaint. This Court held that the Trustee's complaint was, by itself, untimely. *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 25 N.Y.3d 581 (2015). Then, when the Trustee sought to refile this case by using the six-month savings period in C.P.L.R. § 205(a), the Supreme Court held that § 205(a) did not apply solely

because the investors brought the prior suit and not the Trustee, even though the investors' suit was on behalf of the Trust and sought relief solely for the Trust.

This Court should reverse. Section 205(a) allows plaintiffs to fix excusable procedural missteps if defendants receive fair notice of the claims against them and are not unfairly prejudiced. Allowing the Trustee to sue squarely fits that purpose. At worst, the investors made a reasonable mistake in seeking to sue derivatively on the Trust's behalf, given legal uncertainty at the time about whether they could bring such claims. No undue prejudice to DBSP would result from correcting that mistake. Given the hurdles involved in filing large-scale RMBS complaints like this one, the Trustee in this case acted diligently in filing its new complaint after the investors' suit was dismissed. More fundamentally, the investors' action—and the numerous breach notices DBSP received—unquestionably put DBSP on notice that it faced claims on the Trust's behalf to repurchase breaching loans from the Trust. And allowing the Trustee's suit would bolster the securitization market by recognizing the respective roles of investors and the Trustee in enforcing the rights of the Trust for the benefit of all investors. The Court should hold that § 205(a) applies and allow this suit to go forward.

ARGUMENT

I. SECTION 205(a) ALLOWS PLAINTIFFS TO CURE EXCUSABLE MISTAKES

The "policies underlying the application of statutes of limitations, generally—

[are] to balance the interests of *both* plaintiffs and defendants." *Bermudez Chavez v. Occidental Chem. Corp.*, 35 N.Y.3d 492, 508 (2020). Statutes of limitations protect defendants' "reasonable expectation[s]" that they will not face suit "where the 'evidence has been lost, memories have faded, and witnesses have disappeared.'" *Duffy v. Horton Mem'l Hosp.*, 66 N.Y.2d 473, 476 (1985). At the same time, the Legislature has created several exceptions that ensure plaintiffs have a fair chance to seek relief where they have acted reasonably. Those exceptions serve a "remedial benefit" and "implement[ ] the 'vitally important' policy preference for the determination of actions on the merits." *Goldstein v. N.Y. State Urb. Dev. Corp.*, 13 N.Y.3d 511, 521 (2009). As this Court has explained, "the important consideration" in permitting suit outside the limitations period is that "a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts." *George v. Mt. Sinai Hosp.*, 47 N.Y.2d 170, 177-78 (1979) (quoting *Gaines v. City of New York*, 215 N.Y. 533, 539 (1915)).

For example, C.P.L.R. § 203(f) allows a plaintiff to amend a complaint outside the limitations period "unless the original pleading does not give notice" of the relevant "transactions" or "occurrences" to defendants. Such amendments "merely add[ ] a new theory of recovery or defense arising out of a transaction or occurrence already in litigation" and thus "clearly do[ ] not conflict with the[ ] policies" behind statutes of limitations. *Duffy*, 66 N.Y.2d at 477. Section 203(f) also covers claims

against a new defendant who is "united in interest" with the original defendant, because "by reason of that relationship [the new defendant] can be charged with such notice of the institution of the action," and thus "will not be prejudiced in maintaining his defense on the merits." *Buran v. Coupal*, 87 N.Y.2d 173, 178 (1995) (quoting *Brock v. Bua*, 83 A.D.2d 61, 69 (2d Dep't 1981)). Another exception allows lawsuits to be tolled where plaintiffs "have not slept on their rights" and the "defendant receives fair notice of all claims that might arise." *Bermudez Chavez*, 35 N.Y.3d at 505-06 (class-action context). Each of these exceptions "'justify relaxation of limitations strictures . . . to facilitate decisions on the merits' if the correction will not cause undue prejudice to the plaintiff's adversary." *Buran*, 87 N.Y.2d at 178.

The Legislature also balanced those competing interests when it enacted C.P.L.R. § 205(a). That statute allows plaintiffs to cure "excusable mistake[s]" that cause the dismissal of pleadings filed within the limitations period. *George*, 47 N.Y.2d at 179 (quoting 1 Weinstein-Korn-Miller, N.Y. Civ. Prac., para. 205.03, at p. 2-134). Like other exceptions, § 205(a) "allow[s] plaintiffs to avoid the harsh consequences of the statute of limitations and have their claims determined on the merits where . . . a prior action was commenced within the limitations period, thus putting defendants on notice of the claims." *Malay v. City of Syracuse*, 25 N.Y.3d 323, 329 (2015); *see Morris Invs., Inc. v. Comm'r of Fin. of City of N.Y.*, 69 N.Y.2d

933, 935 (1987) (similar). When a litigant provides such timely notice, "a mistaken belief that the court has jurisdiction[ ] stands on the same plane as any other mistake of law." *Gaines*, 215 N.Y. at 539.

Given those policy goals, the application of § 205(a) does not depend on whether the original and later plaintiffs are the same, as DBSP suggests. To the contrary, "[i]t is well settled that where the [defendants] 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)*." *Chase Manhattan Bank, N.A. v. Wolowitz*, 272 A.D.2d 428, 429 (2d Dep't 2000) (emphasis added); *see also Tellez v. Saranda Realty*, 197 A.D.2d 439, 439 (1st Dep't 1993) (§ 205(a) applies if "a defendant is given timely notice of the nature of the claim in a prior action brought by the wrongly named party"). The Trustee describes several such examples in its opening brief. Trustee Br. 24-27.

That interpretation matches § 205(a)'s "broad and liberal purpose," which "is not to be frittered away by any narrow construction." *Morris*, 69 N.Y.2d at 935. Indeed, as this Court recognized over a century ago, § 205(a), which "has its roots in the distant past," has been "extended by an equitable construction to cases not strictly within its letter" of suits involving "the party plaintiff, his heirs, executors or administrators." *Gaines*, 215 N.Y. at 537. Rather than focusing on the plaintiff's precise

identity, courts instead evaluate whether the initial plaintiff made an "excusable mistake." *George*, 47 N.Y.2d at 178-79. As this Court has explained in a related context, a pleading error is an "excusable mistake" if the error was in fact inadvertent—rather than an intentional choice meant to gain tactical advantage—and if correcting that mistake would not unduly prejudice the defendant's rights. *Buran*, 87 N.Y.2d at 180 (addressing C.P.L.R. § 203(f)'s relation-back doctrine for pleadings that name the incorrect defendant).[2] As with other exceptions to statutes of limitations, "the important consideration" is that the initial suit gave the defendant adequate notice of the claims against her. *George*, 47 N.Y.2d at 177.

II. ALLOWING THIS SUIT TO PROCEED SERVES § 205(a)'S PURPOSE

The Court should permit the Trustee's suit to proceed under § 205(a). The investors made an excusable mistake in believing that they had standing to bring their initial case, as there was legal uncertainty about the proper plaintiff in RMBS putback cases at the time of their suit. Once courts ruled that the investors' case

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[2] In *Buran*, this Court held that, under § 203(f), a "mistake alone" as to the defendant's identity is enough to allow a claim against the proper defendant to relate back to the original complaint. 87 N.Y.2d at 176, 181. The mistake need not even be "excusable," as long as the plaintiff did not intentionally omit the proper defendant to gain a tactical advantage and the defendant is not unduly prejudiced by fixing the omission. *Id.* at 181. The need for consistency in pleading standards warrants treating "excusable mistake" under § 205(a) the same as a "mistake" under § 203(f). It would make little sense to allow a mistake as to the proper *defendant* to justify an exception to the statute of limitations while allowing an exception as to the proper *plaintiff* only if that mistake fits a narrow definition of "excusable."

could not proceed, the Trustee acted diligently to pursue the same claims. And finally, DBSP had ample notice of the Trustee's suit, which was based on the same facts, transactions, and claims first brought by the investors. Allowing this case to proceed thus serves the policy purposes of § 205(a) and encourages resolution on the merits. That result protects the integrity of the securities market and ensures that RMBS sponsors like DBSP are held accountable for their promises.

A. The Investors Made an Excusable Mistake

Section 205(a) applies here because the first suit was dismissed solely due to an excusable procedural error. When the investors first sued, there was substantial legal uncertainty as to who could pursue RMBS putback cases and when. The investors' choice to sue in their own name was, at worst, a reasonable mistake that did not prejudice DBSP.

In particular, at the time of the investors' suit, there had been extensive litigation over how to interpret "no-action" clauses in RMBS contracts that limit investors' right to pursue claims on behalf of the trusts. In *Walnut Place LLC v. Countrywide Home Loans, Inc.*, 96 A.D.3d 684 (1st Dep't 2012), the First Department held that the investors could not sue unless they first gave notice of a contractually defined "Event of Default" relating to the trust's master servicer, such as the servicer's failure to make a required payment. *Id.* at 684-85 (describing

typical events of default).[3] Some federal cases had held, however, that no-action clauses which specifically reference an "Event of Default" did not restrict investors from bringing other suits that do not concern those "Events of Default."[4] Investors thus asserted that they could bring RMBS putback claims directly, because those claims did not involve any alleged misconduct by the trusts' master servicers. *See, e.g.*, Br. for Plaintiffs-Appellants, *Walnut Place LLC v. Countrywide Home Loans, Inc.*, No. 650497/2011 (1st Dep't Apr. 11, 2012). Only in June 2012—months after the investors filed their suit in this case—did the First Department reject that argument and hold that a defined "Event of Default" was necessary before certificateholders could bring any type of suit on behalf of the trust. *See Walnut Place*, 96 A.D.3d at 684.

In addition, there was also uncertainty about when statutes of limitations on

[3] Uncertainty about the specific no-action clause in this PSA was particularly acute. By its terms, that clause only requires the certificateholders to provide a "written notice of default," not a defined "Event of Default" relating to the master servicer. *See, e.g.*, R. 225-226 (no-action clause in PSA § 12.03); *cf.* R. 205-209 (defining "Servicer Event of Default" and "Master Servicer Event of Default").

[4] *See Metro. W. Asset Mgmt., LLC v. Magnus Funding, Ltd.,* No. 03 Civ. 5539, 2004 WL 1444868, at *5 (S.D.N.Y. June 25, 2004) (holding that where "a 'no action' provision applies by its terms only to claims relating to an 'Event of Default' . . . such clauses do not prevent noteholders from bringing extra-contractual tort claims or breach of contract claims that are not of the type to which the 'no action' provision, by its terms, applies"); *Howe v. Bank of N.Y. Mellon*, 783 F. Supp. 2d 466, 473 (S.D.N.Y. 2011) (holding that a " 'no action' clause" that "relates to an Event of Default by its own terms . . . does not bar a plaintiff from seeking a remedy for a claim outside the scope of the 'no action' clause").

repurchase claims would run in RMBS suits. Indeed, whether limitations periods started when the transaction closed or when the sponsor refused to comply with repurchase obligations was later litigated in this very case all the way up to this Court. *See ACE*, 25 N.Y.3d at 581. Those areas of legal uncertainty made it reasonable to think that a trustee would have ample time to file suit even if an earlier investor's suit were dismissed. Given that courts had not fully clarified whether investors could sue directly—and when the trustee could later step in itself and sue, if need be—suing directly on behalf of the Trust was reasonable under the circumstances. Later legal developments showed that decision to be at most an inadvertent mistake rather than an intentional choice for tactical advantage.

DBSP relies on *Reliance Insurance Co. v. PolyVision Corp.*, 9 N.Y.3d 52 (2007), and *Streeter v. Graham & Norton Co.*, 263 N.Y. 39 (1933), to argue that §205(a) always requires the same plaintiff in the original and later lawsuits. *See, e.g.*, DBSP Br. 21-33. But that is not what those cases say. At most, *Reliance* and *Streeter* hold that a legal mistake about *who is entitled to relief*—not who may sue—is not excusable, because "the identity of the individual on whose behalf redress is sought, [must] remain[ ] the same." *Reliance*, 9 N.Y.3d at 57.

Reliance and *Streeter* carry out §205(a)'s fundamental purpose of allowing suit where the defendant has fair notice of to whom it might be liable. *See George*, 47 N.Y.2d at 177. For example, in *Reliance*, this Court's decision not to apply

§ 205(a) was based on the "[p]ivotal" reason that the second plaintiff was "seeking to enforce its own, separate rights, *rather than the rights of the plaintiff in the original action*." 9 N.Y.3d at 57 (emphasis added). Similarly, in *Streeter*, the Court also held that "a different party plaintiff, *representing in part different interests*," could not benefit from § 205(a). 263 N.Y. at 44 (emphasis added). That is not the situation here, because DBSP knew exactly who was entitled to relief. Both the investor's lawsuit and the Trustee's suit sought relief on behalf of the Trust and represented the interests of the Trust. Nor is there any dispute that DBSP had notice that it faced liability to the Trust for claims on the Trust's behalf. *See* pp. 17-18, *infra*. *Reliance* and *Streeter* therefore do not bar the application of § 205(a) to the Trustee's claim.

B. DBSP Faces No Undue Prejudice

Section 205(a) should also apply here because DBSP would not be unfairly prejudiced by allowing the Trustee's claim to go forward. The Trustee acted diligently under the circumstances in bringing its complaint once the investors' suit was dismissed. And DBSP has long had notice of the claims it faces in this case.

1. *The Trustee Acted Diligently Under the Circumstances*

Even if diligence in bringing suit were a factor in the § 205(a) analysis, that requirement would be easily met here. Once it was clear that the investors could not sue directly, the Trustee acted diligently in this case to bring its own suit. The

Trustee filed suit in September 2012, just six months after the investors' original suit, and again in 2014 after litigating DBSP's motion to dismiss the 2012 suit. R. 44. That brief delay is reasonable given the barriers to pursuing large-scale putback claims like this one.

One key barrier is arranging for and funding suit. Trustees typically take the view that RMBS governing agreements absolve them from needing to spend any personal assets on trust litigation, and some trustees have claimed that they need not pursue claims at all unless investors holding a large share of the trust's certificates direct them to do so and indemnify them for their costs. *See, e.g.*, NCUA Br. 6-7; R. 212 (indemnification provision in this trust at PSA § 9.02(a)(iii)); U.S. Bank Br. in Support of Mot. for Partial Summ. J., *Ambac Assur. Corp. v. U.S. Bank, N.A.*, No. 17 Civ. 2614, Dkt. 239 at 20 (S.D.N.Y. Nov. 9, 2021) (arguing that, under similar PSAs, "the trustee need not pursue litigation absent direction and indemnity").[5] These "direction and indemnity" agreements are complex and can take significant time to negotiate. Here, the Trustee acted diligently in bringing its

[5] Investors have challenged these claims and, in many instances, have brought suit against trustees for failing to adequately enforce the responsible parties' repurchase obligations. *See, e.g.*, Ambac Opp. to U.S. Bank Mot. for Partial Summ. J., *AMBAC Assur Corp. v. U.S. Bank, N.A.*, No. 17 Civ. 2164, Dkt. 250 at 17 (S.D.N.Y. Dec. 22, 2021) (arguing that the trustee's "obligation to enforce . . . requires no holder direction to be triggered"). Regardless of whether the trustees' claims are correct, however, those claims have, as a practical matter, slowed down the prosecution of RMBS putback claims.

claims in the timeframe it did, given its asserted need to first arrange such an agreement with investors.[6]

Another barrier to suit that RMBS trustees face is the time and cost of investigating claims. This Court has held that, to enforce repurchase obligations in an RMBS suit, a trustee must first serve a pre-suit repurchase demand giving notice of breaching loans. *See ACE*, 25 N.Y.3d at 598 (holding that breach notices are a "procedural prerequisite to suit"); *see, e.g.*, R. 132-133 (notice provision in this trust at PSA § 2.03(a)). Reviewing loans to uncover breaches in preparation of a breach notice is a "labor intensive and therefore costly" process, given that RMBS trusts often hold thousands of loans. *See Fed. Hous. Fin. Agency v. JPMorgan Chase & Co.*, No. 11 Civ. 6188, 2012 WL 6000885, at *1 (S.D.N.Y. Dec. 3, 2012) (noting that reviewing a single loan can "require[] at least 2-3 hours and cost[] approximately $300-$400"); *see, e.g.*, R. 46-47 (describing a pre-complaint review of 697 loan files). That review must often be done from scratch, because trustees may have no duty to review the mortgage loan files before securitization or monitor the trust for breaches of representations and warranties. *See, e.g.*, June Rhee, *Getting Residential Mortgage-Backed Securities Right: Why Governance Matters*, 20 Stan.

[6] Moreover, trustees take the view that certain direction and indemnity agreements may require court approval. *See, e.g.*, Petition, *In re Home Equity Asset Trust 2007-3*, No. 62-TR-CV-19-9 (Minn. Dist. Ct. Ramsey Cty. Mar. 8, 2019) (seeking approval to hire counsel for the trust, given that the PSA did not clearly authorize paying litigation costs with trust funds).

J.L. Bus. & Fin. 273, 276 (2015); Yuli Wang, *Cracks in the Foundation: A Transactional Study of Non-Agency Residential Mortgage-Backed Securities*, Harv. L. School Int'l Fin. Seminar, 35 (2009); R. 212-213 (PSA § 9.02(a)(v) providing that trustee generally has no obligation to "make any investigation into the facts or matters" concerning the securities). The need to perform a loan review and translate it into a complaint, too, will cause further delays in bringing trustee suits.

Before the financial crisis, the non-sponsor parties to RMBS governing agreements could not have foreseen how formidable these hurdles would be. At the time, the primary concern about RMBS trustees' duties would be that they might exercise *too much* discretion. Trustees were perceived to have a possible conflict of interest because they were often "selected and paid by the originator" and "removed by the servicer or the depositor." Rhee, *supra*, at 293; William W. Bratton & Adam J. Levitin, *A Tale of Two Markets: Regulation and Innovation in Post-Crisis Mortgage and Structured Finance Markets*, 2020 U. Ill. L. Rev. 47, 70 & n.126 (2020) (describing trustees' conflicts in pursuing suits against sponsors because "they relied on sponsors rather than investors for deal flow"). Moreover, RMBS governing agreements paid RMBS trustees minimal fees. *See* Rhee, *supra*, at 309; Talcott J. Franklin & Thomas F. Nealon III, *Mortgage and Asset Backed Securities Litigation Handbook* § 2:5 (rev. 2021) ("A corporate trustee's fees are infinitesimal compared to the trustee's theoretical potential liability."). By contrast, there was

relatively little concern about the need for trustees to actively monitor their trusts' collateral and quickly bring enforcement cases like this one.

Indeed, at the time, investors and other RMBS deal parties believed that repurchases would be rare. They rationally expected, as sponsors promised in their representations and warranties, that mortgage originators would approve loans according to industry standards, servicers would actively monitor the loans, and sponsors would provide accurate information to investors. Rhee, *supra*, at 302-05. RMBS deal parties thus rationally designed the repurchase remedy as a "low-powered sanction for bad mortgages that slip through the cracks"—in other words, a narrow "onesies and twosies" process meant to handle a few breaches at a time. *Syncora Guar., Inc. v. EMC Mortg. Corp.*, No. 09 Civ. 3106, 2011 WL 1135007, at *6 n.4 (S.D.N.Y. Mar. 25, 2011). But those expectations turned out to be wrong to a degree that trustees and investors in the industry could not have predicted. Rhee, *supra*, at 302-05. Instead, a tidal wave of systematic breaches in this trust and countless others imposed burdens far more onerous than trustees and investors could have foreseen. Given these constraints, the Trustee acted diligently when it filed suit in September 2012—just six months after the investors' original suit—and when it filed another action in June 2014 after litigating DBSP's motion to dismiss the 2012 suit.

2. *DBSP Had Fair Notice of the Trustee's Claims*

Finally, § 205(a) applies here because there is no undue prejudice to DBSP from the Trustee's complaint. DBSP has had full notice of the facts and claims underlying the Trustee's suit since the investors first sued in 2012. Both the investors' and the Trustee's suits alleged that DBSP breached its representations and warranties about the quality of the loans in the Trust, and that DBSP failed to repurchase those faulty loans or cure its breaches. *See* R. 43-68; R. 386-387. And DBSP has also received pre-suit notices outlining breaches in over a thousand mortgage loans. *See, e.g.*, R. 52, 62. DBSP, however, has consistently refused to repurchase a single loan. R. 62. DBSP rightly does not argue that it had no notice of the Trustee's claims, or that the application of § 205(a) violates its reliance interests—because it has none.

In addition, it would make no practical difference to DBSP whether it was sued by the investors or the Trustee. If *Walnut Place* had construed the "no-action clause" to permit direct investor suits, that provision would still compel the investors to act for the common benefit of *all* certificateholders—just as the Trustee would do. *See, e.g.*, R. 226 (PSA § 12.03 requiring investors to "enforce any right under this Agreement . . . in the manner herein provided and for the equal, ratable and common benefit of all Certificateholders"). Indeed, both the investors' and the Trustee's suits claimed damages for all investors in the Trust, to be paid to the Trust. *See* R. 384

(2012 Summons With Notice); R. 424 (2012 Complaint); R. 41 (2014 Summons and Complaint). And both suits sought the same measure of damages—the contractual Repurchase Price or an equivalent amount of damages. *See* R. 444 (2012 Complaint prayer for relief); R. 63-64 (2014 Complaint prayer for relief). No matter who was listed on the lawsuit's caption, DBSP faced the same cause of action for the same amount of damages to be paid to the same party. Given that reliance is "[t]he important consideration" in § 205(a), applying that savings clause here would serve the statute's remedial purposes. *George*, 47 N.Y.2d at 177.

III. DBSP's Interpretation Undermines The Securitization Market

DBSP's position also threatens serious harm to investors' ability to recover their losses and hold RMBS responsible parties accountable for their misconduct. The Trustee's suit seeks to benefit all investors in the Trust. Because investors made a reasonable mistake about whether they could sue directly, that the courts ultimately held they may not do so should not be used to punish all investors by barring suits later brought by trustees. That result would allow sponsors such as DBSP to get away with wrongdoing that led investors to suffer nearly $1 trillion in losses during the financial crisis. *See* Mark Adelson, *The Mortgage Meltdown and the Failure of Investor Protection*, J. Structured Fin. 63, 65 (2020). Enforcing sponsors' repurchase obligations through suit was critical, because sponsors often refused to honor those obligations voluntarily. Instead, just as DBSP has done here, they

stonewalled and chose to contest repurchase claims to the bitter end—as one bank's CEO put it, to fight putbacks "hand-to-hand." Bratton & Levitin, *supra*, at 70. In this context, allowing lawsuits like this one to proceed will protect the securitization market by ensuring that legal uncertainty over a technical question of who has standing to sue on a trust's behalf does not frustrate the enforcement of parties' contractual obligations.

Private lawsuits like this one are also critical to maintaining the integrity of the securities markets and "preserving its potential benefits." Luis A. Aguilar, *The Need for Effective Regulation of the Asset-Backed Securities Market*, Sec. and Exch. Comm'n (Aug. 28, 2013), https://www.sec.gov/news/public-statement/2013-spch082813laa. Securitization of mortgage loans is beneficial for the market because it "turns illiquid assets like mortgages, commercial loans, and other receivables into marketable securities." *Id.* In other words, "[b]y enabling banks and other lenders to free-up capital by selling the loans they originate, securitization increases the availability of credit for consumers and businesses alike." *Id.*[7]

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[7] *See, e.g.*, Rhee, *supra*, at 278 ("Securitization enabled the lenders to sell mortgage loans to other less regulated and more risk-tolerant entities and the mortgage market gained a new source of funding from these entities."); Brent J. Horton, *In Defense of Private-Label Mortgage-Backed Securities*, 61 Fla. L. Rev. 827, 842 (2009) (securitization "provides the bank with more liquidity (cash on hand) to facilitate the origination of still more mortgages"); Thomas E. Plank, *Sense and Sensibility in Securitization: A Prudent Legal Structure and a Fanciful Critique*, 30 Cardozo L. Rev. 617, 619 (2008) ("Securitization lowers the costs of financing for businesses

In addition, "[p]rivate securities litigation offers institutional advantages not available from public enforcement." Steven Ramirez, *The Virtues of Private Securities Litigation: An Historic and Macroeconomic Perspective*, 45 Loy. U. Chi. L.J. 669, 722 (2014). For one, private litigation is insulated from the politicization that affects public enforcement decisions. *Id.* It also conserves public resources: Private suits require no taxpayer expenditures on top of normal court costs and wield "market incentives" for private attorneys general to pursue cases regardless of whether public funding is available. *Id.* at 724. Private enforcement also "allow[s] a reduced reliance upon ex ante government regulation," which creates high barriers of entry and transaction costs for good actors. *Id.* at 725. Finally, while public enforcement does not focus on making the victim whole, "private litigation both strips the fraudfeasor of the benefits of their wrongdoing and compensates the victim," which "directly influences the risk/reward relationship" and "enhances investor confidence." *Id.* at 724-25. Private enforcement thus serves as a powerful "market-based mechanism" for protecting the securities market because it "naturally focus[es] first on the most wrongful actors, escape[s] open political pressure for permissiveness and [is] not likely to refrain from the pursuit of viable claims based

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and consumers and also enables some originators to obtain financing to fund their originations that would otherwise not be available.").

upon passing economic conditions." *Id.* at 725-26.[8]

Thus, applying § 205(a) in this case is not only consistent with the policies of the statute; it also has broader implications for the securitization market as a whole. Investors' advocacy is a critical tool to induce trustees to sue and thus to hold sponsors like DBSP accountable for their contractual promises. That, in turn, safeguards the securitization market.

CONCLUSION

The Order of the Appellate Division, First Department, should be reversed.

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[8] DBSP has suggested that investors are adequately protected under the federal securities laws. *See* DBSP Opp. to NCUA and Freedom Trust Mot. for Leave To File Br. as *Amici Curiae* 6 (May 8, 2020). But that does not mean that those federal securities laws should be the *only* enforcement mechanism in the RMBS securitization market or that DBSP should not be required to honor the contractual representations and warranties it made. The federal securities laws have certain limitations that are not present in the contractual repurchase remedy, which is ubiquitous in RMBS trusts precisely because it represents the main compact between sponsors and investors about the quality of the securitized loans.

March 4, 2022
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CERTIFICATION

Pursuant to 22 N.Y.C.R.R. § 500.13(c)(1), I certify that the total word count for all printed text in the body of this brief, exclusive of any statement of the status of related litigation, corporate disclosure statement, table of contents, table of cases and authorities, statement of questions presented required by subsection (a) of this section, and any addendum containing material required by subsection 500.1(h), is 5,318 words.

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