To be Argued by:
ZACHARY W. MAZIN
(Time Requested: 30 Minutes)

APL-2020-00126
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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 FOR PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule 500.1(f), Plaintiff-Appellant HSBC Bank USA, National Association (the "Trustee") hereby states that it is a wholly-owned subsidiary of HSBC USA, Inc., which is an indirect, wholly-owned subsidiary of HSBC Holdings plc, a United Kingdom corporation. The shares of HSBC Holdings plc are publicly traded on certain foreign stock exchanges and are traded in the United States as American Depository Shares on the New York Stock Exchange. No publicly held corporation owns ten percent or more of the stock of HSBC Holdings plc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

This case involves the application of CPLR 205(a) to the Trustee of a residential mortgage-backed securities ("RMBS") trust. In a seminal RMBS opinion in a prior action (the "Original Action") against this same defendant, DB Structured Products, Inc. ("DBSP"), regarding this same ACE 2006-SL2 trust (the "Trust"), this Court affirmed a dismissal without prejudice based upon a curable failure to fulfill a condition precedent.[1] Having cured that defect, the Trustee commenced the instant "Revival Action" pursuant to CPLR 205(a) – only to have the case dismissed because the Trustee (acting on behalf of all Trust certificateholders) is a different "plaintiff" from the particular certificateholders (who also sought to act on behalf of all Trust certificateholders) that commenced the Original Action (the "Certificateholders"). Although this CPLR 205(a) issue happens to arise in the context of RMBS, a reversal and reinstatement of the complaint actually requires little more than a straightforward application of this Court's CPLR 205(a) jurisprudence.

In holding that the Trustee is a different "plaintiff," as that term is used in CPLR 205(a), from the Certificateholders that initially and timely acted to assert the Trust's claims, the Appellate Division either (i) ignored decades of this Court's

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[1] *See ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v. DB Structured Prods., Inc.*, 25 N.Y.3d 581 (2015) ("*ACE 2006-SL2 – COA*").

caselaw establishing who is a proper "plaintiff" in a CPLR 205(a) action, or (ii) distinguished, for no legitimate reason, RMBS trustees from other representative plaintiffs (*e.g.*, bankruptcy trustees, executors, and administrators) that have been deemed proper "plaintiffs" under CPLR 205(a). In either case, the Appellate Division did so *sub silentio* and without explanation.

The Appellate Division's ruling was incorrect and should be reversed because the named plaintiffs in the Original Action and this Revival Action acted to enforce the exact *same rights* each time – those afforded to the Trust by the securitization agreements that DBSP sponsored. That the Certificateholders were later deemed contractually incapable of acting on behalf of the Trust might have doomed the Original Action, but it is precisely the kind of non-fatal defect that CPLR 205(a) anticipates and allows to be corrected. In cases where the defect lies in the identity of the plaintiff, the proper person or entity can refile the same action on behalf of the same true party in interest and that action will be considered timely if the antecedent action was commenced before the limitations period expired. That is the case here.

For its part, DBSP will endeavor to convince the Court that it should instead focus on the unremarkable fact that the Trustee is not the same corporate entity as the Certificateholders. DBSP will identify all of the ways in which the interests of the Trustee do not always align with those of the Certificateholders. DBSP will

even argue that the Trustee should be precluded from invoking CPLR 205(a) because the Trustee was not a "diligent suitor" in 2012 when the limitations period expired on the Trust's claims against DBSP.

But all of these arguments rely on a fiction. DBSP depends on the false premise that the Certificateholders were acting for themselves, rather than derivatively for the Trust, when they commenced the Original Action. Likewise, DBSP will argue as though any recovery achieved from the Revival Action will redound to the Trustee, rather than to the Trust. DBSP will paint this picture so as to make it seem inequitable and absurd that the Trustee be allowed to benefit from the Certificateholders' filing and CPLR 205(a)'s savings provision.

The Court need not adopt this fiction. The Trustee would not benefit from CPLR 205(a) here; the *Trust* would. That result would be entirely equitable because the Original Action was commenced by the Certificateholders *on behalf of the Trust*, just as this Revival Action was commenced by the Trustee *on behalf of the Trust*. In each of the two actions, the same rights were invoked, the same allegations were made, and the same relief was sought on behalf of the same true party in interest. Indeed, that is the "common thread" running through this Court's

robust precedent holding that CPLR 205(a) applies when "it is the same person *or entity whose rights are sought to be vindicated* in both actions."[2]

The Appellate Division's order should be reversed and this case remanded so that DBSP might finally be held to account for its contractual promise to make the Trust whole with respect to the extraordinary number of defective mortgage loans that DBSP dumped into it.

QUESTION PRESENTED

1. Does CPLR 205(a) enable the trustee of an RMBS trust to refile an action that was previously timely commenced derivatively on behalf of that trust by trust beneficiaries, but which was terminated because the trust beneficiaries lacked capacity to sue, when both actions assert the same claims arising out of the same facts and seek the same relief for the benefit of the same true party in interest?

The Appellate Division erred in holding that the trustee of an RMBS trust is not the "plaintiff" within the meaning of CPLR 205(a) because the prior action was commenced by two of the trust's Certificateholders on behalf of the trust.

[2] *Reliance Ins. Co. v. PolyVision Corp.*, 9 N.Y.3d 52, 57 (2007) (emphasis added).

JURISDICTION

The Court has jurisdiction over this appeal pursuant to CPLR § 5602(a)(1)(i) and CPLR § 5611 because the underlying action originated in the Supreme Court, New York County (R.6), the decision below is an order of the Appellate Division, First Department, entered on November 19, 2019 that finally determines the action and is not appealable as a matter of right (R.515), and this Court granted leave to appeal on September 1, 2020 (R.513).

STATEMENT OF THE CASE

In 2005 and 2006, DBSP purchased massive amounts of mortgage loans from lenders for the purpose of packaging and selling tranches of those loans to investors. For the ACE 2006-SL2 transaction, DBSP collected approximately 9,000 mortgage loans,[3] pooled them into the Trust, and arranged for the Trust to issue securities that entitle the purchasers to a portion of the principal and interest payments made by the borrowers on the underlying loans. The transaction was

[3] Over 90 percent of the loans were originated by just two companies: Long Beach Mortgage Company and Fremont Investment and Loan. (R.424, 441 (Compl. ¶¶ 2, 35).) In 2007, a federal regulator issued Fremont a cease and desist order for "operating with inadequate underwriting criteria and excessive risk in relation to the quality of assets held;" "operating with a large volume of poor quality loans;" and "engaging in unsatisfactory lending practices." (R.441-42 (Compl. ¶ 37).) In 2008, another federal regulator included both companies in its report on the "Worst Ten" mortgage originators in the "Worst Ten" metropolitan areas. (R.441 (Compl. ¶ 36).)

effectuated by a Pooling and Servicing Agreement (the "PSA") and a Mortgage Loan Purchase Agreement (the "MLPA," and together with the PSA, the "Agreements"). DBSP made representations and warranties in the Agreements concerning the credit quality and characteristics of the loans, and further covenanted that, if those representations were discovered to be materially false, DBSP would cure or repurchase those loans within a defined period of time (the "Notice and Cure Period"). (R.132.)

A few years after the Agreements closed in March 2006, borrower defaults and delinquencies on individual mortgage loans caused some $330 million in losses to the Trust and, in turn, to certificateholders. (R.427, 443 (Compl. ¶¶ 11, 40).) In response, two certificate-holding investment funds, the Certificateholders, hired an independent forensic mortgage loan review firm to undertake the time-consuming and costly task of reviewing more than 1,600 of the loans in the Trust.[4] (R.432 (Compl. ¶ 28).) This loan-by-loan investigation revealed that fully 99% of the loans reviewed failed to comply with at least one of the representations and warranties in the MLPA. (R.426, 432 (Compl. ¶¶ 8, 28).) After receiving notice

[4] When the reunderwriting began, the Certificateholders together held 25% of the voting certificates. (R.385.) Thus, fully 75% of the certificates were held by other investors, most if not all presumably of whom lacked the resources to undertake such an arduous process themselves. Of course, all certificateholders, not just the two investment funds who undertook the loan-by-loan investigation, stand to benefit from enforcement of DBSP's obligation to repurchase defective loans.

from the Certificateholders of results of the forensic review, in accordance with the Agreements, the Trustee promptly sent DBSP a series of letters between February and July 2012 notifying it of the defective loans and demanding that DBSP comply with its cure or repurchase obligation. (R.442 (Compl. ¶ 38).) To date, DBSP has not cured or repurchased a single loan in response to those notices. (R.442 (Compl. ¶ 39).)

On March 28, 2012, the sixth anniversary of the execution of the Agreements, the Certificateholders commenced the Original Action by filing a summons with notice (the "SWN"). (R.384-87.) Invoking the exception within the PSA's "no action clause" that permits direct action by certificateholders in certain circumstances,[5] the Certificateholders purported to sue derivatively, "*on*

[5] Section 12.03 of the PSA provides, in relevant part:

> No Certificateholder shall have any right by virtue of any provision of this Agreement to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement, unless such Holder previously shall have given to the Trustee a written notice of default and of the continuance thereof, as hereinbefore provided, and unless also the Holders of Certificates entitled to at least 25% of the Voting Rights shall have made written request upon the Trustee to institute such action, suit or proceeding in its own name as Trustee hereunder and shall have offered such Trustee such reasonable indemnity as it may require against the costs, expenses and liabilities to be incurred therein or thereby, and the Trustee, for 15 days after its receipt of such notice, request and offer of indemnity, shall have neglected or refused to institute any such action, suit or proceeding. (R.225-26.)

behalf of the Trust and all of the [c]ertificate holders," seeking specific performance of DBSP's obligation to cure or repurchase breaching loans, damages and other relief. (R.385 (SWN at 2) (emphasis added).) The SWN named the Trustee as a nominal defendant. (R.384 (SWN at 1).) Service was thereafter effected consistent with CPLR 306-b (R.423 (Aff. of Service)), and, on August 24, 2012, DBSP appeared and demanded a complaint (R.44 (Compl. ¶ 2)). In response to that demand, the Trustee, substituting for the Certificateholders as named plaintiff,[6] filed the complaint on September 13, 2012 on behalf of the Trust and all of its certificateholders. (*Id.*)

DBSP's motion to dismiss the Trustee's complaint was denied by the IAS Court. (*Id.*) On December 19, 2013, however, the Appellate Division reversed and dismissed the Original Action. *See ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v. DB Structured Prods., Inc.*, 112 A.D.3d 522 (1st Dep't 2013). In a brief opinion, the Appellate Division held, *inter alia*, that the SWN was a "nullity" because (i) the PSA's "no action clause" did not empower the

[6] The PSA provides for certain conditions that must be satisfied when litigation is to be commenced by the Trustee. (R.212-13 (PSA § 9.02(a)(iii), (v)).) Those conditions have nothing to do with any interests of DBSP. Instead, they are designed to ensure that the Trustee does not act to benefit one certificateholder or class of certificateholders over others. The Trustee's entry into the Original Action via the complaint was tantamount to a ratification of the claims initially made by the Certificateholders on behalf of the entire Trust.

Certificateholders to initiate an action for the Trust against DBSP and (ii) the SWN was filed prior to the expiration of the PSA's Notice and Cure Period. *Id*. at 523.

Regarding capacity to sue, the court held – based upon a decision *issued after the SWN was filed* – that "the 'defaults' enumerated in the PSA concern failures of performance by the servicer or master servicer only," not defaults arising from DBSP's breaches of representations and warranties. *Id.* (citing *Walnut Place LLC v. Countrywide Home Loans, Inc.*, 96 A.D.3d 684 (1st Dep't 2012)).[7]

As for timeliness, the intermediate court rejected the Trustee's argument that the claims accrued upon DBSP's refusal to repurchase, instead finding that they accrued on the March 28, 2006 closing of the transaction, "when any breach of the representations and warranties … occurred[.]" *Id*. In response to the Trustee's argument that its complaint could "relate back" to and be given the benefit of the Certificateholders' timely SWN *under CPLR 203(f)*, the Appellate Division held that the SWN was "a nullity" because the Certificateholders had "fail[ed] to comply with a condition precedent to commencing suit" – namely, the expiration

[7] *Walnut Place* interpreted a contract that explicitly defined and limited the kinds of defaults that could be noticed by certificateholders – something that the PSA here does not do. *See supra*, p.5 n.5. The Appellate Division's decision did not account for this distinction.

of the Notice and Cure Period. *Id.* Notably, the Original Action was *not* dismissed with prejudice. *Id.*

On January 21, 2014, the Trustee moved the Appellate Division for reconsideration or leave to appeal to this Court, which was denied on March 20, 2014. On April 21, 2014, the Trustee moved this Court for leave to appeal. While that motion was pending, the Trustee commenced the instant Revival Action on June 18, 2014 (*i.e.*, within six months of the Appellate Division's dismissal of the Original Action) by filing and serving a summons and Complaint. (R.41-65 (Compl.).) After this Court granted the Trustee's motion for leave to appeal in the Original Action on June 26, 2014, the parties stipulated to stay the Revival Action pending the determination of the Original Action.

On June 11, 2015, this Court affirmed the dismissal of the Original Action. *ACE 2006-SL2 – COA*, 25 N.Y.3d at 593-99. As it had below, the Trustee argued that the Notice and Cure Period is a "substantive condition precedent" to suit, such that the Trust's claims did not accrue until it expired without DBSP curing or repurchasing a noticed loan. *Id.* at 597. This Court disagreed, holding that the Trust's claims accrued upon the Agreements' closing date. *Id.* at 593-97. As such, and assuming *arguendo* the Certificateholders' ability to act on the Trust's behalf, this Court went on to hold that the failure to fulfill the condition precedent – *i.e.*, the failure to allow the Notice and Cure Period to expire before commencing the

Original Action – rendered the Original Action subject to dismissal. *Id.* at 597-99. This Court said nothing about the availability of CPLR 205(a), but by simply affirming the Appellate Division's order, the lower court's dismissal "without prejudice" was left undisturbed. *Id.* at 599.

This Court's determination of the Original Action lifted the stay of the Revival Action, which, of course, was commenced after expiration of the Notice and Cure Period. DBSP moved to dismiss the Revival Action on July 30, 2015. (R.360-61.) On March 29, 2016, the IAS Court (Freidman, J.) granted DBSP's motion for two related reasons. (R.6-40.) *First*, according to the IAS Court, "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.) The IAS Court did not explain what "circumstances" in particular led it to that conclusion.[8] *Second*, the IAS Court improperly evaluated the timeliness of the Trustee's *complaint* in the Original Action (rather than the SWN) and concluded that,

[8] DBSP's attempt, in prior briefing to this Court, to buttress the IAS Court's reasoning provided no additional clarity as to the "circumstances" upon which the IAS Court's ruling turned. *See* Brief for DBSP in Opposition to the Trustee's Motion for Leave to Appeal to the Court of Appeals, dated March 27, 2020 ("Leave Opp. Br."), pp.8-9 (the materials relating to the Trustee's motion for leave to appeal have, of course, already been provided to the Court; the Trustee can provide additional copies upon request). The only reasonable reading of the decision is that the IAS Court's holding was driven by the bare fact that the Certificateholders and the Trustee are different entities.

because "the [Original] action was untimely under [the Appellate Division's] holdings [in the Original Action], which were not reached by the Court of Appeals and by which this court remains bound, relief is not available to the Trustee under CPLR 205(a)." (R.11.)

DBSP served the Trustee with notice of entry of the IAS Court's order on April 1, 2016, and the Trustee timely noticed its appeal on April 29, 2016. (R.4-7.) On November 19, 2019, the Appellate Division affirmed the IAS Court's order dismissing the Revival Action with prejudice, citing its decision in *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 141 A.D.3d 431 (1st Dep't 2016), *aff'd on other grounds*, 33 N.Y.3d 84 (2019) ("*HEAT 2006-5*"), and finding no reason to disturb that ruling on *stare decisis* grounds (the "Order"). (R.515-17.) DBSP served the notice of entry of the Appellate Division's Order upon the Trustee the same day.

On December 19, 2019, the Trustee moved the Appellate Division for leave to appeal to this Court. The Appellate Division denied that motion on February 13, 2020 and DBSP served notice of entry of that order on the same day. (R.514.) The Trustee timely sought leave to appeal the Order from this Court, and on September 1, 2020, that motion was granted. (R.513.)

ARGUMENT

The sole question for this Court is whether the Revival Action was properly filed pursuant to CPLR 205(a). Entitled "New action by plaintiff," CPLR 205(a) provides, in pertinent part:

> If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon the defendant is effected within such six-month period. …

By refusing to apply CPLR 205(a) to this action, the appealed-from Order adopts an understanding of the savings statute that disregards decades of this Court's jurisprudence interpreting CPLR 205(a) and its predecessor statutes. The savings statute is a foundational and well-settled rule of New York law. *See Reliance*, 9 N.Y.3d at 56 ("[T]he remedial concept embodied in CPLR 205(a) has existed in New York law since at least 1788[.]"). As this Court recently reiterated in *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.* ("*ABSHE*"), "[t]he statute is remedial in nature and, where applicable, '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.'" 33 N.Y.3d 72, 78 (2019) (quoting *Malay v. City of Syracuse*, 25 N.Y.3d 323, 329 (2015)); *see also Goldstein v. N.Y. State Urban Dev. Corp.*, 13 N.Y.3d 511, 521 (2009) (same). Over 100 years ago, Judge Cardozo admonished his brethren and lower courts that the saving statute's "broad and liberal purpose is not to be frittered away by any narrow construction." *Gaines v. City of N.Y.*, 215 N.Y. 533, 539 (1915). That instruction remains just as compelling today.

I. CPLR 205(a) GIVES THE REVIVAL ACTION THE BENEFIT OF THE ORIGINAL ACTION'S FILING DATE

A. A Plaintiff With Capacity To Sue May Replace A Plaintiff Without Capacity, So Long As Each Invokes The Same Rights

The Revival Action is entitled to the benefit of a six-month extension of the limitations period because it meets all of the requirements provided for in CPLR 205(a). In short, the Revival Action would have been timely had it been commenced at the time that the Original Action was commenced, it reasserts claims that were not dismissed on the merits,[9] and it was commenced on behalf of the same party in interest – the Trust – as was the Original Action. But because the nominal plaintiff acting here on behalf of the Trust is not the same as the nominal

[9] DBSP has suggested that the Original Action was "dismissed as untimely." *See* Leave Opp. Br., p.2. That is simply not the case, as explained in detail below. *See infra*, Part II.B.

plaintiffs that attempted to act on behalf of the Trust in the Original Action, the lower courts refused to afford the Trust's claims the benefits provided by the statute. That was reversible error.

Indeed, it was needless error too, given that this Court has addressed this precise issue many times before. Surveying its jurisprudence interpreting CPLR 205(a)'s reference to "the plaintiff," this Court in 2007 crystalized its holdings as follows:

> [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.

Reliance, 9 N.Y.3d at 57 (emphasis added) (quoting lower court).

Reliance rejected an attempt to invoke CPLR 205(a), but in so holding, *Reliance* distinguished its facts from those at issue in *George v. Mt. Sinai Hosp.*, 47 N.Y.2d 170, 178 (1979) ("[I]n the instant case the defect in the prior action did not lie in the means of commencing the action, but rather in the identity of the named plaintiff. While the defect was fatal in the sense that the action was subject to dismissal, it was not the type of defect which precludes application of CPLR 205[a]."), where the CPLR 205(a) action was allowed to proceed. 9 N.Y.3d

at 57-8.[10] This Court should now engage in the same analysis as it did in *Reliance* and arrive at the same result as it did in *George*. The facts of *Reliance* illustrate how so.

The plaintiff in the original *Reliance* action was Reliance Insurance Company of New York ("RNY"), a subsidiary of the plaintiff in the subsequent CPLR 205(a) action, Reliance Insurance Company ("RIC") of Pennsylvania. *See* 9 N.Y.3d at 55. Each entity separately issued bonds insuring construction work within the Lindenhurst School District, but for projects occurring at different schools. 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*." *Id.* (emphasis added).[11]

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[10] *See also Carrick v. Cent. Gen. Hosp.*, 51 N.Y.2d 242, 249 (1980) ("Our opinion in *George* thus stands squarely for the proposition that the extension provisions of CPLR 205[a] are available to a plaintiff who seeks to recommence an action, notwithstanding that the prior action upon which the plaintiff relies was 'invalid' in the sense that it contained a fatal defect.").

[11] This 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." Leave Opp. Br., p.15. Each of the plaintiffs in *Reliance* sued on different bonds covering different construction projects. That is not the case here, where in each action the Trust's claims arising out of the Agreements have *always* been at issue and the *only* difference has been the identity of the nominal plaintiff acting on the Trust's behalf.

When the need arose to sue on RIC's bonds, "[f]or unknown reasons, RNY (the New York corporation) brought the action instead of the proper plaintiff, RIC." *Id.* That action wound up dismissed "on the ground that RNY was not the real party in interest." *Id.* Thereafter, upon commencing a new action after the expiration of the limitations period, RIC argued that it should get the benefit of the prior action's filing date merely because of its close corporate relationship with RNY, the incorrect plaintiff in the original action. *Id.* at 57.[12]

The *Reliance* Court could have merely considered whether the named plaintiff remained nominally consistent from the first action to the next, but it rejected that "same plaintiff" approach. Instead, it applied the "same rights" test: "*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." *Id.* at 57 (emphasis added). If the nominal identity of the two plaintiffs was determinative, the quoted sentence would be superfluous *dicta* undermining the actual rule. Instead, the quoted sentence is the linchpin of the holding in *Reliance*.

[12] In the Court's words, "RIC acknowledges that it is a different party plaintiff but asserts that, as RNY's parent corporation, it is not entirely different …." 9 N.Y.3d at 57. No such argument is being made by the Trustee here, as the Trust was and remains the true party in interest in each of the Original and Revival Actions. Any suggestion DBSP might make to the contrary is a strawman and should be ignored.

Indeed, the "pivotal" facts supporting dismissal in *Reliance* are likewise pivotal here, except they point to the opposite outcome. Unlike RIC and RNY, "the identity of the individual on whose behalf redress is sought" – *the Trust* – has remained the same from the Original Action to the Revival Action. *Id.* at 57-58. The test implicit in the "common thread" identified in *Reliance* requires an 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. The Appellate Division declined to engage in any such substantive analysis, however.[13] Instead, the Order institutes a formalistic bar that cannot be squared with this Court's holdings in *Reliance*, *Carrick*, and *George*, the many other New York cases that have allowed nominally distinct plaintiffs to invoke CPLR 205(a) where the true party in interest remains the same in both actions,[14] or this Court's repeated

[13] The Order invokes and refuses to depart from the Appellate Division's earlier holding in *HEAT 2006-5*, *supra*, p.12. However, this Court will find no more reasoning in *HEAT 2006-5* than is in the Order. In *HEAT 2006-5*, the Appellate Division merely stated in conclusory fashion that "the trustee is not entitled to refile claims under CPLR 205(a), because it is not a 'plaintiff' under that statute," citing *Reliance*, 9 N.Y.3d at 56-58, and its decision in the Original Action, 112 A.D.3d at 523. 141 A.D.3d at 433. The Appellate Division's decision was appealed, but this Court determined that the CPLR 205(a) issue had not been preserved. *HEAT 2006-5*, 33 N.Y.3d at 89.

[14] *See, e.g.*, *Van der Stegen v. Neuss, Hesslein & Co.*, 270 N.Y. 55, 60-63 (1936) (allowing a bankruptcy trustee's complaint to relate back to a debtor's pleading because the initial plaintiff filed the action on behalf of those the trustee represented). *See also infra*, p.22 n.19.

admonitions that CPLR 205(a) should be interpreted broadly to satisfy its liberal purpose. *See supra*, pp.13-14.

In contrast to *Reliance*, here, the rights being pursued *are* the same as those that were pursued in the Original Action: those of *the Trust* arising out of the Agreements. It is indisputable that the Trust's certificateholders hold the entire economic interest in the Trust, and that the Trustee is contractually authorized in its representative capacity to enforce the claims against DBSP for breach of its representations and warranties.[15] Irrespective of the nominal plaintiff's identity, all recoveries from the lawsuit are required to be paid into the same Trust accounts for distribution to the Trust's certificateholders, in accordance with the PSA. The Certificateholders did *not* assert any claims for their own account in the Original Action. Rather, they asserted only contract claims belonging to the Trust arising out of the Agreements. This Court has repeatedly acknowledged that RMBS put-back claims belong to the trust. *See Deutsche Bank National Trust Co. v. Barclays Bank PLC*, 34 N.Y.3d 327, 338 (2019) (Fahey, J.) ("*DBNT*") ("[A]lthough the

[15] Trustees hold property in trust for the benefit of the trust beneficiaries, who retain equitable title. *See* Restatement (Third) of Trusts § 2, cmt. d; *id.* § 3. The right to sue third parties on behalf of the beneficiaries "vests in the trustee as a representative." Bogert *et al.*, *The Law of Trusts and Trustees* § 869 (2019). The same is true here under the PSA. The PSA creates the Trust and grants the Trustee the right to enforce repurchase claims – claims the Trustee holds in trust for the certificateholders, who hold equitable title. (*See* R.48-49 (Compl. ¶¶ 22, 25).)

certificateholders may have suffered concrete economic injury due to defendants' alleged breaches, here plaintiff is suing solely in its capacity as the trustee *on behalf of the trusts* for alleged breach of contract, and the parties agree that certificateholders may have their own, separate claims.") (emphasis added);[16] *ACE 2006-SL2 – COA*, 25 N.Y.3d at 597 ("*The Trust* suffered a legal wrong at the moment DBSP allegedly breached the representations and warranties.") (emphasis added). Thus, if *Reliance* is properly applied, this CPLR 205(a) action by the Trustee should be permissible.

In holding without explanation that the Trustee was ineligible to invoke CPLR 205(a) to revive the Trust's claims, the Order is susceptible to two drastically different interpretations. The first, narrower interpretation is that RMBS and other corporate trustees are somehow different from other representative plaintiffs, such as bankruptcy trustees, that have been held to be "plaintiffs" within the meaning of CPLR 205(a) and are thus able to revive actions

[16] Writing in dissent in *DBNT* on behalf of himself and Judge Rivera, Judge Wilson stated that "[a] trustee, who by definition holds only bare legal title without equitable interest, is not injured by a diminished trust corpus. … I would hold that the trust itself, as an entity, sustained the injury." 34 N.Y.3d at 344. The Court disagreed in *DBNT* over whether the trust's injuries were sustained where the trustee was domiciled or where the trust was established. The Court was in accord, though, on the matter at issue here – *the Trust* has certain rights that must be pursued by a juridical entity acting on its behalf. That the Certificateholders were deemed an improper representative of the Trust in the Original Action does not mean a different "plaintiff" is pursuing this Revival Action.

improperly commenced by the persons or entities they represent. Under this interpretation of the Order, there is something peculiar (and unstated) about RMBS or other corporate trustees that materially distinguishes them from other representative plaintiffs.[17]

Endorsing this interpretation of the Appellate Division's holding would result in confusion and uncertainty. In some scenarios, trustees will be allowed to file revival actions on behalf of the true party in interest *even when* the plaintiff they are replacing lacked standing to sue. In other scenarios (or perhaps just in the RMBS context), trustees will not be able to file revival actions on behalf of the true party in interest *because* the plaintiff they are replacing lacked standing to sue. The Appellate Division provided trustees and beneficiaries, and others in analogous circumstances, with no basis for determining whether the Order simply bars RMBS trustees from availing themselves of CPLR 205(a), whether it also bars

[17] There is no substantive difference between a bankruptcy trustee and an RMBS trustee for purposes of CPLR 205(a). Bankruptcy trustees succeed to and bring claims on behalf of an estate for the benefit of the debtor and its creditors by operation of statute. RMBS trustees bring claims on behalf of a trust for the benefit of the trust's beneficiaries by operation of contract law. Because both a bankruptcy trustee and an RMBS trustee bring claims on behalf of the entities they represent (an estate and a trust, respectively) for the ultimate benefit of the underlying individuals who hold the economic interest (the debtor and creditors, and trust investors, respectively), they should be treated the same way for purposes of CPLR 205(a).

corporate trustees or other types of representative plaintiffs, or whether there is some case-specific fact or circumstance that dictated its result.

The second, more expansive interpretation of the Order – and the one advanced by DBSP when opposing the Trustee's motion for leave to appeal – is that the nominal identity of the plaintiff in the first action and in the revival action must remain consistent.[18] In other words, the Appellate Division can be understood to have pronounced a rule that a plaintiff who lacks standing to pursue the antecedent action can file a revival action, but only if the same specific person or entity somehow obtains standing after the commencement of the antecedent action and before the CPLR 205(a) action must be filed. This interpretation would make the Appellate Division's position inconsistent with *Reliance* and *George* and effectively overrule numerous First Department decisions.[19] Under this

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[18] DBSP wrote: "Far from endorsing some sort of case-by-case inquiry into the relationships between different corporate plaintiffs seeking to revive one another's claims, *Reliance* adopts a straightforward rule that one corporate plaintiff cannot benefit from another's filing." Leave Opp. Br., p.13. Contrary to what DBSP asserts, *Reliance* obviously depended upon an inquiry into the *different* rights and claims that RIC and RNY were acting upon. Indeed, this Court deemed those facts "pivotal" to its holding. *See supra*, pp.16-17.

[19] *See George*, 47 N.Y.2d at 178-79 ("[I]n the instant case the defect in the prior action did not lie in the means of commencing the action, but rather in the identity of the named plaintiff …. 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."). *See also, e.g.*, *Orr v. Urban*

interpretation, the Order simply ignores this Court's precedent allowing for revival because the true party in interest here is and has always been the Trust. *See Reliance*, 9 N.Y.3d at 57-58 ("[T]he plaintiff in the new lawsuit may appear in a different capacity … but the identity of the individual *on whose behalf redress is sought* must remain the same.") (emphasis added) (quotations omitted); *see also Lambert v. Sklar*, 30 A.D.3d 564, 566 (2d Dep't 2006) ("Under the facts of this case, the fundamental purpose of the statute was served. Even though the widow and the appellant are two different plaintiffs, it is clear that the *real party in interest*, the Estate, was the same in both actions.") (emphasis added); *Mendez v. Kyung Yoo*, 23 A.D.3d 354, 355 (2d Dep't 2005) (sustaining revival action because "[t]he *real party in interest* – the decedent's estate – was the same in both actions") (emphasis added); *Brown v. Lutheran Med. Ctr.*, 35 Misc. 3d 553, 556 (Sup Ct. Kings Cnty. Feb 6, 2012) ("[A]n 'error' relating to the identity of the named plaintiff in the first action does not bar recommencement of the action pursuant to CPLR 205(a) … even where the plaintiff who commences a lawsuit under CPLR

Am. Mgmt. Corp., 172 A.D.3d 512, 513 (1st Dep't 2019) (allowing a bankruptcy trustee to revive an earlier action brought by a debtor); *Rivera v. Markowitz*, 71 A.D.3d 449, 450 (1st Dep't 2010) (same); *Tellez v. Saranda Realty*, 197 A.D.2d 439, 439 (1st Dep't 1993) (allowing a revival action to proceed where two different people purported to act as administrator for a decedent in the original and revived actions).

205(a) is a completely different entity …, as long as the *real party in interest* is unchanged.") (emphasis added).

The "same rights" test enunciated in *Reliance* is consistent with the purposes of the statute of limitations, but a rigid "same plaintiff" test is not. Where the defendant has been given timely notice of a claim against it, CPLR 205(a) ensures that claims are heard on the merits rather than dismissed due to a fatal but curable flaw. *See Morris Invs., Inc. v. Comm'r of Fin. of City of N.Y.*, 69 N.Y.2d 933, 935-36 (1987). Here, DBSP indisputably had timely notice of the Trust's claims against it. As such, *Reliance* – indeed, the full weight of this Court's savings statute jurisprudence – dictates that the Order be reversed so that the Trust's claims can be considered on their merits.

B. The Order Must Be Reversed To Harmonize CPLR 205(a) Jurisprudence Throughout New York State

A further indication that the Order fails to keep faith with this Court's controlling authority lies in the irreconcilable conflict it creates among the savings statute jurisprudence of the Appellate Division's First and Second Departments. For example, in a case with facts materially similar to those here, the Second Department allowed a nominally different plaintiff to file a CPLR 205(a) action after dismissal of an antecedent action commenced by an entity that lacked standing. *See Chase Manhattan Bank, N.A. v. Wolowitz*, 272 A.D.2d 428

(2d Dep't 2000). In *Chase*, Chase was a mortgagee, and Citibank was an investor in the underlying mortgage loan.[20] Citibank commenced a foreclosure action based on the loan, but the action was dismissed because only Chase – the actual mortgagee – had the right to foreclose. Chase subsequently refiled the claim under CPLR 205(a). The Second Department sustained the second action, even though the identity of the plaintiff changed, because the Second Department concluded that the real party-in-interest and the rights being vindicated in the action (the mortgagee and its foreclosure rights) remained the same. *Id.* at 429.

This appeal presents the same material facts as *Chase*, yet the Order reached the opposite conclusion. Consistent with the remedial purposes of CPLR 205(a), *Chase* allowed the mortgagee to refile where the original plaintiff was not invoking any substantive rights distinct from the second plaintiff, and even though the original and revival plaintiffs were different entities. Moreover, *Chase* had nothing to do with administrators, executors, or successors. However, the Order, in direct conflict with *Chase*, effectively holds that at least one of those *Chase* facts prohibits relief under CPLR 205(a), but never identifies which one.

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[20] *See* Brief for Plaintiff-Respondent, *Chase*, 2000 WL 34548193, at *2 (Feb. 8, 2000) ("The ... action was dismissed ... since Citibank, N.A. was originally named as the plaintiff although the mortgage was held by Chase Manhattan Bank, N.A. at the time the action was commenced. Citibank, N.A. was an investor in the loan.").

More recently, in *Goodman v. Skanska USA Civil, Inc.*, 169 A.D.3d 1010 (2d Dep't 2019), the Second Department allowed a bankruptcy trustee to refile personal injury claims belonging to, and initially interposed by, the debtor. The court expressly applied *Reliance*'s "same rights" analysis to reject the defendants' argument that the trustee was not a qualified "plaintiff" under CPLR 205(a):

> Although, as a general matter, only the plaintiff in the original action is entitled to the benefits of CPLR 205(a), the Court of Appeals has nevertheless recognized an exception to this general rule under certain circumstances where the plaintiff in the new action is seeking to enforce "the rights of the plaintiff in the original action."

Id. at 1012 (quoting *Reliance*, 9 N.Y.3d at 57). Because both actions sought to recover based on the debtor's personal injury claims, the Second Department concluded that the bankruptcy trustee was "not seeking to enforce any rights separate and independent from those asserted by the debtor in the prior action," and therefore was entitled to the benefit of CPLR 205(a)'s savings provision. *Id.*

Likewise, in *Wells Fargo Bank, N.A. v. Eitani*, 148 A.D.3d 193 (2d Dep't 2017), the Second Department applied *Reliance*'s "same rights" test to a mortgage foreclosure action refiled by an assignee of the original mortgage, even though the original action was commenced by a nominally different plaintiff. The court held that, "[a]lthough the named plaintiff in the [original action] and the named plaintiff in [the revival] action … are different entities, they each brought suit to enforce the

very same right – *i.e.*, to foreclose on the subject property based on the same default on the subject note and mortgage." *Id.* at 202.[21]

As the foregoing demonstrates, the First Department's Order conflicts with the jurisprudence of Second Department on this significant issue. This Court should resolve the split in favor of the Second Department, in conformity with the weight of its own authority.[22]

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[21] DBSP has suggested that the outcome in *Wells Fargo* turned only upon the fact that Wells Fargo was assigned rights previously held by the original plaintiff. *See* Leave Opp. Br., p.24. That is incorrect. As the text of the decision illustrates – text that DBSP itself quotes – the outcome was driven by the fact that Wells Fargo was effectively "the true party plaintiff in the prior action." *Id.* (quoting *Wells Fargo*, 148 A.D.3d at 199). Here, the Trust was the "true party plaintiff in the [Original Action]," just as in the Revival Action.

[22] Reconfirming the *Reliance* "same rights" test also would keep New York in conformity with other states that have provisions similar to CPLR 205(a). Various treatises addressing similar statutes in other jurisdictions describe the consensus view that the plaintiffs in the underlying action and the revival action need not be identical if the same interests are being vindicated in both actions:

> A savings statute does not apply if the parties in the new action are not the same as the ones in the prior action .... However, the test is the substantial identity of essential parties .... [W]hile only the original plaintiff has a right to bring an action under a savings statute, a change of parties does not preclude an application of the statute if the change is merely nominal or the interest represented in the renewed action is identical with that in the original action.

Am. Jur. Limitations § 256; *see also* 13 A.L.R.3d 848 § 4 ("[A] number of courts have held or recognized that a change of the parties does not preclude an application of such statute where the change is nominal or the interest represented in the renewed action is identical with that in the original action."); 54 C.J.S. Limitations of Actions § 353 ("The plaintiff must be the same in both actions. It is

II. DBSP'S ANTICIPATED GROUNDS FOR AFFIRMANCE ARE INCORRECT, UNFOUNDED, AND UNAVAILING

DBSP's arguments to the lower courts and to this Court in its opposition to the Trustee's motion for leave to appeal provide a basis for anticipating the arguments that it might make in response to those appearing herein. *First*, DBSP will likely encourage this Court to construe the defects that led to dismissal of the Original Action as equally fatal here as there. *Second*, DBSP might again argue that, because the Trustee theoretically could have commenced the Original Action, it should be barred from invoking CPLR 205(a) to commence the Revival Action. *Third*, DBSP may point to non-germane instances of adversity between the Trustee and the Certificateholders to suggest that they are not sufficiently aligned for the former to benefit from the latter's commencement of the Original Action.

Each of these arguments rests on DBSP's faulty reading of this Court's jurisprudence, unfounded suppositions premised on "facts" for which there is no formal record of discovery in this or the Original Action, and willful blindness to the outcome determinative, inescapable, and judicially cognizable fact that both the Original and Revival Actions were filed to advance the Trust's claims against

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not essential, however, in all cases that the plaintiffs in both cases should be the same[,] ... but they must be substantially the same, suing on the same right ....").

DBSP, not any independent claims of either the Trustee or the Certificateholders. DBSP's forthcoming arguments in favor of affirming the Order should be rejected.

A. CPLR 205(a) Presumes The Existence Of Defects In The Antecedent Action; It Is Not Rendered Inapplicable Thereby

DBSP can be expected to argue, as it has to this Court before, that the flaws that rendered the Original Action's SWN "a nullity" for purposes of CPLR 203(f) likewise preclude this Revival Action from referring to the Original Action's commencement date for purposes of applying CPLR 205(a). *See* Leave Opp. Br., p.7; Brief for DBSP in Opposition to the National Credit Union Administration Board's and Freedom Trust 2011-2's Motion for Leave to File Brief as Amici Curiae in Support of the Trustee, dated May 8, 2020 ("Amici Opp. Br."), p.9 ("[T]he non-viability of the summons with notice that originally commenced the prior action was decided in that action and is now law of the case."). In DBSP's telling, the Original Action was deemed "untimely" and, as such, dismissed on its merits. DBSP will argue that this is so because the Trustee did not replace the Certificateholders as named plaintiff until after the limitations period expired. *See* Leave Opp. Br., p.7.

Of course, it is true that the Original Action was found to be defective in that the Notice and Cure Period had not expired prior to suit and the Certificateholders were deemed to lack capacity to act on the Trust's behalf. Those defects precluded

relation-back under CPLR 203(f) within the context of the Original Action, but they do not preclude the filing of a new action on the same claims under CPLR 205(a). This is why there are separate CPLR provisions to begin with – section 205(a) exists to save claims that would otherwise merit dismissal due to some defect that cannot be corrected via section 203(f):

> [CPLR 205(a)] by its very nature is applicable in those instances in which the prior action was properly dismissed because of some fatal flaw; thus, to suggest that it should not be applied simply because there was a deadly defect in the prior action seems nonsensical. … [A] necessary element of any attempt to utilize the 'relation-back' provisions of [CPLR 203] is the existence of a valid pre-existing action to which the amendment can relate back.

George, 47 N.Y.2d at 179; *see also ABSHE*, 33 N.Y.3d at 78 ("[CPLR 205(a)] by its very terms comes into operation in instances where a proceeding has been terminated for some fatal flaw unrelated to the merits of the underlying claims … and it is to be liberally construed.") (*quoting Morris*, *supra*, p.24).

What <u>*is*</u> relevant for CPLR 205(a) purposes is that all of the ministerial requirements provided for in the CPLR were met when the Original Action was commenced. *See Carrick*, 51 N.Y.2d at 249 ("[T]he fact that the prior action was so defective as to be 'tantamount to no suit whatsoever' simply does not preclude the use of that remedial provision to revive an otherwise time-barred cause of action, provided, of course, that a prior timely action, however flawed, actually was 'commenced' within the meaning of CPLR 304."); *George*, 47 N.Y.2d at 179

("In sum, a distinction must be drawn between a failure to commence an action, be it due to a failure of process or some similar reason, and a defect in that action which mandates dismissal. In the former case, CPLR 205[a] will be inapplicable, whereas in the latter case the statute will apply."); *S. Wine & Spirits of Am., Inc. v. Impact Envtl. Eng'g, PLLC*, 104 A.D.3d 613, 613 (1st Dep't 2013) (plaintiff's prior action timely commenced under CPLR 205(a) where original complaint filed within limitations period); *Bumpus v. N.Y. City Transit Auth.*, 66 A.D.3d 26, 30-31 (2d Dep't 2009) (filing of summons with notice "fixe[s] the point at which an action [is] commenced for statute of limitations purpose[s]"). The Certificateholders purchased an index number, filed their SWN prior to the expiration of the limitations period, and served it on DBSP all in compliance with Article 3 of the CPLR. (R.424-45.) DBSP has never contested those facts, because it cannot. The Original Action was therefore validly and timely commenced for CPLR 205(a) purposes by the filing of the SWN, irrespective of whether it provided a basis for relation-back under CPLR 203(f).

B. The Reason Why An Improper Plaintiff Commenced The Antecedent Action Does Not Matter; Only That The Defect Has Been Corrected

DBSP has also asserted that the Trustee "intentionally" "declined" to sue within the limitations period. *See* Leave Opp. Br., pp.1-3, 28-29. Those assertions

are not only outside the record,[23] but legally irrelevant. No prior decision of this Court or the Appellate Division applying CPLR 205(a) turns on *why* an improper plaintiff commenced the antecedent action or whether the proper plaintiff *could have* commenced it. Indeed, in *Reliance*, this Court expressly acknowledged that *it did not know* why the wrong corporate entity sued in the first case. *See* 9 N.Y.3d at 55 ("For unknown reasons, RNY … brought the action instead of the proper plaintiff, RIC."). That is because the governing inquiry is limited to two questions: (i) whether the defect was corrected; and (ii) whether the same rights were acted upon from one action to the next. *See supra*, Part I.

DBSP's effort to portray the Trustee as having "slept on its rights" elides the fact that the claims do not belong to the Trustee.[24] *See supra*, p.19. As this Court has repeatedly acknowledged, RMBS put-back claims belong to *the Trust*. *See supra*, pp.19-20. The Trust is the entity whose claims DBSP received timely notice of via the Original Action, and the Trust is the entity whose claims were refiled via this Revival Action. The esoteric question of whether the

[23] No factual record was ever developed in this Revival Action or the Original Action because neither case proceeded past DBSP's motion to dismiss (and subsequent appeals therefrom). Of course, as set out above, such facts do not matter. However, if this Court does deem relevant the circumstances under which the Certificateholders commenced the Original Action, the Revival Action should be remanded to the IAS Court so a full record can be compiled.

[24] It also ignores the fact that the Trustee does not have *carte blanche* to act however it likes. Instead, it is governed by the PSA. *See supra*, n.6.

Certificateholders were empowered by Section 12.03 of the PSA, subject to certain prerequisites, to act on the Trust's behalf to pursue claims arising out of a "default" by DBSP (as contrasted with an "Event of Default" by servicers, as in *Walnut Place*, *supra*) does not speak to the merits of the Trust's claims nor or alter the fact that they <u>are</u> the Trust's claims. DBSP has no answer for this, so it chooses to obfuscate instead.

To that end, DBSP will likely argue, as it has before, that the Original Action was "dismissed as untimely." *See* Leave Opp. Br., pp.2-3. Such a dismissal would have been "on the merits," thus rendering CPLR 205(a) unavailable. However, this Court recently rejected just that interpretation of its ruling in the Original Action when a different RMBS defendant offered it:

> Contrary to DLJ's interpretation of [*ACE 2006-SL2 – COA*], we held only that the notice and sole remedy provisions did not delay accrual for statute of limitations purposes. We did not expressly hold, and it is not implicit in our analysis, that failure to comply with those provisions before the expiration of the statute of limitations rendered the trustee's action untimely.

ABSHE, 33 N.Y.3d at 79 (internal citation omitted); *see also Carrick*, 51 N.Y.2d at 252 ("Like any condition precedent, the [satisfaction of the condition], while essential to the maintenance of the suit, is in no way related to the merits of the underlying claim. Thus, a dismissal due to the omission of this requirement must be regarded as a tangential matter not affecting the validity of the claim itself."); *Snodgrass v. Prof'l Radiology*, 50 A.D.3d 883, 884 (2d Dep't 2008) (original

action was timely commenced, "notwithstanding the lack of capacity of the plaintiff to pursue the claims," therefore, dismissal of original action was "not on the merits").

DBSP's anticipated argument regarding the scope of this Court's holding in the Original Action should be disregarded for the additional reason that it runs headlong into the arguments that DBSP itself invoked therein. Having argued to this Court that the Agreements' condition precedent was a procedural prerequisite to suit and won, DBSP is now judicially estopped from arguing that the Court issued a merits-based dismissal. *See Becerril v. City of N.Y. Dep't of Health & Mental Hygiene*, 110 A.D.3d 517, 519 (1st Dep't 2013) ("The doctrine of judicial estoppel prevents a party who assumed a certain position in a prior proceeding and secured a ruling in his or her favor from advancing a contrary position in another action, simply because his or her interests have changed.").

Respectfully, this Court should recognize DBSP's tactic for what it is, reject it, hew to its "same rights" test precedents, and reverse the Order.

C. The Trustee And The Certificateholders Share An Interest In Recovering Damages From DBSP For The Trust's Benefit

In prior briefing, DBSP has attempted to demonstrate that the Trustee is not the "same plaintiff" as the Certificateholders by pointing to instances in which the

interests of the Trustee and the Certificateholders have diverged.[25] This argument is a red herring, as the inquiry here does not depend on the relationship status of the Trustee and the Certificateholders. Instead, CPLR 205(a) applies because *the Trust's* claims have been at issue in each of the Original and Revival Actions.

But DBSP's argument is incorrect even on its own terms. DBSP's sophistry ignores the fact that the Trustee and the Certificateholders who commenced the action – indeed, all of the Trust's Certificateholders – share a common interest *vis-à-vis DBSP*. That is, there is no daylight between the Trustee and the Trust's certificateholders when it comes to recovering the ill-gotten gains totaling in the hundreds of millions of dollars that DBSP harvested by securitizing loans that it *knew* were defective. *See* Settlement Agreement between the United States Department of Justice ("DOJ") and Deutsche Bank, dated January 17, 2017, regarding the DOJ's investigation of the sale of RMBS by Deutsche Bank, Annex

[25] *See*, *e.g.*, Amici Opp. Br., p.4 ("The [Amici's] discussion of the different incentives and diverging interests between RMBS trustees and certificateholders only emphasizes that the [Certificateholders] and the Trustee are different plaintiffs and the Trustee cannot be characterized as the [Certificateholders] acting in a different capacity."), p.5 ("The [Amici's] discussion of the 'challenging and protracted negotiations' between certificateholders and trustees, and trustees' refusal to file suits without first obtaining a sufficient indemnity, underscores the fact that the Action is untimely not because of some mistake or misunderstanding, but rather because the Trustee – the only party with standing – deliberately declined to file a lawsuit during the limitations period.") (internal citations omitted).

1 (Statement of Facts), ¶8 ("Throughout 2006 and 2007, Deustche Bank intentionally made false representations and material omissions about key characteristics of mortgage loans that it securitized in certain RMBS."); ¶12 ("As a result of Deutsche Bank's misconduct, investors, including federally insured financial institutions, lost billions of dollars on their investments in Deutsche Bank RMBS.").[26]

Cases applying the "common interest exception" to the waiver of attorney-client privilege in the RMBS context are instructive on this point. It is axiomatic that the Trustee's and the Certificateholders' common interest against a third-party is not negated merely because they negotiated the terms of their own agreements aggressively and at arm's length, or even because litigation emerged among them. *See Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 628 (2016) ("When two or more parties are engaged in or reasonably anticipate litigation in which they share a common legal interest, the threat of mandatory disclosure may chill the parties' exchange of privileged information and therefore thwart any desire to coordinate legal strategy. In that situation, the common interest doctrine promotes candor that may otherwise have been inhibited."); *Natixis Real Estate Capital Trust 2007-HE2 v. Natixis Real Estate Cap., Inc.*,

[26] *Available at* https://www.justice.gov/opa/press-release/file/927271/download.

161 A.D.3d 436, 436-37 (1st Dep't 2018) ("In this residential mortgage-backed securities put-back action, the [trust's administrators, acting in an equivalent capacity to a trustee,] and the nonparty certificateholders[] shared the common legal interest of pursuing the mortgage put-back claims."); *ACE Sec. Corp., Home Equity Loan Trust, Series 2006-HE4 v. DB Structured Prods., Inc.*, 40 N.Y.S.3d 723, 735-36 (Sup. Ct. N.Y. Cnty. 2016) ("Here, the communications … were exchanged in furtherance of HSBC and the certificateholders' legal strategy to put back defective loans to DBSP. … This 'limited common purpose' is not vitiated simply because HSBC and [the certificateholder] may have been at odds with regards to other issues like the threshold vote by a percentage of certificateholders, or whether HSBC was provided sufficient indemnification.") (internal citations omitted).

The simple – and determinative – facts here are that each of the Original Action and the Revival Action was brought on behalf of the Trust pursuant to the same contracts, alleging the same breaches by DBSP, so that the proceeds of a recovery would flow through the Trust's "waterfall" payment provisions to its certificateholders. Any effort by DBSP to invoke additional, extraneous facts should be recognized as a deflection and disregarded accordingly.

CONCLUSION

The "same rights" rule is clear, well-settled, fulfills the liberal purpose of CPLR 205(a), and is consistent with New York policy favoring the resolution of disputes on the merits. In contrast, the Order's standard suggests unstated exceptions and rests on formal distinctions without any real difference. This Court should confirm its "same rights" test espoused in *Reliance*, which other cases have applied and upheld: where "the error in the dismissed action lies only in the 'identity' of the plaintiff," CPLR 205(a) applies as long as the true party in interest receiving the benefit of any recovery remains the same in both actions. 9 N.Y.3d at 57.

For the foregoing reasons, the Order of the Appellate Division, First Department, should be reversed.

Dated: New York, New York
October 30, 2020

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NEW YORK STATE COURT OF APPEALS
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