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.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

MCKOOL SMITH PC
Attorneys for Plaintiff-Appellant
One Manhattan West
395 Ninth Avenue, 50th Floor
New York, New York 10001
Tel.: (212) 402-9400
Fax: (212) 402-9444

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

Plaintiff-Appellant HSBC Bank USA, National Association as Trustee[1] for the Trust, respectfully submits this reply brief in further support of its appeal from the Order of the Appellate Division, First Department, dated November 19, 2019, affirming the IAS Court's grant of Defendant-Respondent DBSP's motion to dismiss the Complaint.

INTRODUCTION

DBSP is asking to be relieved from its contractual promise to compensate the Trust for damages that now are believed to exceed a half-billion dollars. DBSP contends that this Court should affirm and make permanent the dismissal of the Trust's claims because of the bare fact that the Trustee is not the same corporate entity as the Certificateholders that commenced the Original Action. But this CPLR 205(a) Revival Action asserts the same claims arising out of the same facts seeking the same relief for the benefit of the same Trust beneficiaries as did the Original Action that was dismissed in 2015 because of technical defects.

DBSP's position is premised upon an ostrich-like insistence that the Trustee and the Certificateholders have been acting for their own accounts rather than as

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[1] Capitalized terms were defined in the Brief for Plaintiff-Appellant, dated October 30, 2020, which is referred to herein as the "Trustee Br." The Brief for Defendant-Respondent, dated December 22, 2020, is referred to as the "DBSP Br."

representatives of the Trust, a fundamentally flawed interpretation of CPLR 205(a)'s text, and a misleading exegesis of CPLR 205(a) jurisprudence.

Thus, in the guise of adhering to statutory text and precedent, DBSP invites this Court to apply a bright-line rule mandating that the plaintiff invoking CPLR 205(a) be identical to the plaintiff in the first action, except for all of the times when it need not. DBSP attempts to harmonize its purported rule with the litany of cases contradicting it by suggesting that there is an exception for executors and administrators – but which might also extend to bankruptcy trustees and assignees. DBSP's proffered rule-and-exception regime is unmoored from the statutory text, and this Court should reject it as an organizing theory for understanding its CPLR 205(a) jurisprudence.

The statutory text on which DBSP hinges its exception-based argument ("the plaintiff, *or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator*,") only addresses the scenario where the *correct* plaintiff in the antecedent action dies. CPLR 205(a) (emphasis added). The text upon which DBSP relies does not address what should happen when the *incorrect* plaintiff commences the initial action. The answer to that question, which controls here, is found elsewhere in CPLR 205(a)'s text ("If an action is timely commenced

and is terminated in *any* other manner than by" four grounds not applicable here). *Id.* (emphasis added).[2]

If a defect in the identity of the original plaintiff had been intended to preclude the application of CPLR 205(a), as DBSP contends, the statute would have said so. Because it does not, DBSP can prevail here only if it can find support in this Court's cases for its "same party (but also executors and administrators, and maybe bankruptcy trustees and assignees, but certainly not indenture trustees)" rule.

There is none. In fact, this Court expressly rejected focusing on the relationship between the two plaintiffs. What *is* required is that the same legal rights are invoked and prosecuted in the revival action as were asserted in the antecedent action. No further inquiry – *e.g.*, why there was a ministerial defect in the antecedent action, or whether the correct plaintiff could have brought the case in the first instance – is needed.

Here, the true party in interest – the Trust – *has* remained the same from the Original Action to the Revival Action. DBSP attempts to avoid this fact by characterizing the Original Action's SWN as having been filed by the Certificateholders for their own benefit, rather than derivatively for the benefit of

[2] Those grounds are "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." *Id.*

the Trust. But the only *actual* difference between the Original and the Revival Action is the identity of the entity acting ministerially on the Trust's behalf to assert its claims against DBSP.

DBSP cannot escape the fact that it received "timely notice of the claims being asserted … on behalf of the injured party."[3] That is the *sine qua non* underlying the statute of limitations and the rationale for CPLR 205(a)'s application here. Respectfully, this Court should reverse the Appellate Division's Order and remand this case so that it may proceed to discovery, trial, and judgment.

ARGUMENT

I. THE TEXT OF CPLR 205(a) ALLOWS FOR REVIVAL WHERE THE PRIOR ACTION NAMED AN INCORRECT PLAINTIFF

DBSP's primary argument against the application of CPLR 205(a) here is that the text of the statute prohibits it. (DBSP Br., 20-25.) According to DBSP, "[t]he text of the statute makes clear that as long as the first plaintiff has not died, the plaintiff bringing the second action must be the same party as the plaintiff who 'timely commenced' the first …." (*Id.*, 20.) Contrary to DBSP's blinkered interpretation, the text of the statute *supports* allowing an improper representative

[3] *George v. Mt. Sinai Hosp.*, 47 N.Y.2d 170, 177 (1979).

plaintiff to be replaced by the proper representative plaintiff in a subsequently-filed action.

DBSP's treatment of the text merely points to CPLR 205(a)'s use of the word "plaintiff" – and nothing more – to suggest that the statute allows for new actions only by the nominally identical party as appeared in the antecedent action, unless that plaintiff has died. (DBSP Br., 20-21.) But the statute expressly enumerates those defects in the antecedent action that preclude revival, and naming the incorrect representative plaintiff is not among them. (*Supra*, n.2.) Ergo, the Original Action's dismissal is covered by the statute's other bucket – those "terminated in any other manner" – where revival is appropriate. DBSP does not address this portion of the statute at all.

After announcing its "same party" rule, DBSP in the very next paragraph undermines it, citing three decisions of this Court that purportedly "address whether parties other than the individual or entity who was plaintiff in the first action may avail themselves of CPLR 205(a)." (DBSP Br., 21.) In fact, none of the cases DBSP cites "support[] affirmance of the First Department's decision in this case." (*Id*.)

First, DBSP argues that *Streeter v. Graham & Norton Co.*, 263 N.Y. 39 (1933), comports with its crabbed interpretation of CPLR 205(a)'s use of the word "plaintiff." (DBSP Br., 21-22.) In *Streeter*, an insurer's wrongful death action was

dismissed because there were next of kin entitled to share in the damages whose claims were not assigned to the insurer, which resulted in an improper splitting of the cause of action. *Id.* at 40. After an administrator commenced a second action under a different statute on behalf of *all* next of kin, including one whose interests had *not* been represented by the insurer, this Court held that the second action was untimely because the plaintiffs were not bringing "the same cause of action" and were "representing in part different interests." *Id*. at 44.[4] Thus, the key factor in *Streeter* was not the identity of the plaintiff in the caption, but whether the plaintiffs in the two actions pursued the same interests and claims. *See Producers Releasing Corp. v. Pathe Indus.*, 184 F.2d 1021, 1023 (2d Cir. 1950) (saving statute applies under *Streeter* where the plaintiffs "are identical in interest").

Second, DBSP invokes *George*, 47 N.Y.2d at 177-78, wherein this Court permitted an administrator to refile an action originally filed in the name of a *then-deceased* plaintiff. (DBSP Br., 22-23.) DBSP's treatment of *George* is limited to a recitation of boilerplate *dicta*; absent is any effort to grapple with *George*'s facts, analysis, or holding, all of which support the Trustee's position that a defect in the identity of the named plaintiff is not a type of defect that precludes the application

[4] DBSP quotes *Streeter*'s "representing in part different interests" language, but makes no effort to reconcile it with its claim that *Streeter* establishes a "same party" rule. (DBSP Br., 25.) Instead, *Streeter* helps establish the "same rights" rule as expressed in *Reliance Ins. Co. v. PolyVision Corp.*, 9 N.Y.3d 52, 57 (2007) (quoting same language from *Streeter*).

of CPLR 205(a). (Trustee Br., 15-20.) Because the initial action in *George* was *not* commenced by a proper plaintiff, the textual exception for administrators and executors does not apply. *See* 47 N.Y.2d at 173. *George*, therefore, provides no support for DBSP.

Third and last, DBSP finally addresses the *Reliance* case that was front-and-center throughout the Trustee's opening brief. (Trustee Br., 15-24.) Over three pages, DBSP recites its version of the facts and the supposedly operative analysis engaged in by the *Reliance* Court. (DBSP Br., 23-25.) Nowhere in those three pages, however, does DBSP address what this Court itself said was "pivotal" to the outcome: "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." 9 N.Y.3d at 57. Casting aside this Court's view of what was important in favor of its own, DBSP contends that what really mattered in *Reliance* was the "straightforward" fact that "[t]he [Certificateholders] and the Trustee[] are plainly

not the same party plaintiff."[5] (DBSP Br., 25.) DBSP simply misreads *Reliance* (and *Streeter* and *George*[6]), much the same as it misreads the statute itself.

DBSP has attempted to craft a "same party" rule out of authorities that expressly reject one.[7] If DBSP's "straightforward" "same party" interpretation of CPLR 205(a) were accurate, then all of these cases would have contained a single paragraph of analysis comparing the captions in the two cases, and if they were different, determining whether the plaintiff in the revival action succeeded to the original plaintiff's claims. But they do not. Instead, they consider whether the same rights were invoked to pursue the same claims from one action to the next.

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[5] DBSP returns to *Reliance* later in its brief, somehow arguing that *the Trustee* does not sufficiently credit the Court's "pivotal" holding. (DBSP Br., 27-31.) DBSP's critique is baseless, as the Trustee's Brief hinged its argument on *Reliance* and, in particular, the sentence DBSP accuses the Trustee of "ignor[ing]." (Trustee Br., 17-20.) Indeed, the moniker "same rights" test is grounded in the very sentence DBSP accuses the Trustee of ignoring.

[6] DBSP also argues that CPLR 205(a) does not apply here because the Trustee is not, "as in *George*, bringing a claim that belonged to the Funds, 'the named plaintiff[s] in the prior action,' as their 'representative'" (DBSP Br., 25 (quoting *George*, 47 N.Y.2d at 179)), and the Trustee and the Certificateholders "represent[] in part different interests" (DBSP Br., 25 (quoting *Streeter*, 263 N.Y. at 44).) These assertions are false – the *Trust's* claims have always been at issue here. (Trustee Br., 19-20, 34-37.)

[7] DBSP's last-ditch textual argument suggests that the "same rights" inquiry actually arises out of a different portion of CPLR 205(a) – the requirement that "the claims in the second action must be based on 'the same transaction or occurrence' as the first." (DBSP Br., 25-27 (quoting CPLR 205(a)).) This shell game is based upon the same misreading of the "executors and administrators" provision in CPLR 205(a) as are the passages of DBSP's brief discussed above.

On that question, the cases are clear and they support allowing this Revival Action to proceed.

II. PRECEDENT PROVIDES FOR REVIVAL WHERE THE PRIOR ACTION NAMED AN INCORRECT PLAINTIFF

New York courts have long allowed an action to be refiled under CPLR 205(a) by a nominally distinct plaintiff so long as the two actions assert the same claims seeking to vindicate the same rights on behalf of the same entity. That rule is the "common thread" running through decades of saving statute jurisprudence that this Court identified and adopted in *Reliance*. (Trustee Br., 14-19.) DBSP's formalistic "same party" requirement cannot be squared with the holding in *Reliance*, the numerous New York cases cited in and citing to *Reliance*, or this Court's repeated admonitions that CPLR 205(a) should be interpreted broadly to satisfy its liberal purpose. *See, e.g.*, *Malay v. City of Syracuse*, 25 N.Y.3d 323, 329 (2015); *Gaines v. City of New York*, 215 N.Y. 533, 539 (1915).

A. *Reliance* Permits An Action To Be Refiled By A Nominally Distinct Plaintiff If The Same Rights Are Being Enforced On Behalf Of The Same Interests

DBSP's attempts to retrofit the caselaw to match its "same party" theory are predicated on a misreading of *Reliance*. (DBSP Br., 27-31.) DBSP interprets *Reliance*, which disallowed revival based on facts there, as narrowly limiting relief under CPLR 205(a) to the same named plaintiff that filed the initial action, unless

the second plaintiff succeeded to the claim from the original plaintiff. (DBSP Br., 23-25, 27-31.) This Court could not have stated the operative test more clearly:

> *Pivotal* here is that, unlike the scenario in George, RIC is seeking to enforce its own, separate rights, rather than the rights of the plaintiff in the original action. We agree with the conclusion of the District Court that "[t]he common thread running through cases applying CPLR 205 in cases where the error in the dismissed action lies only in the 'identity' of the plaintiff, is the fact that it is the *same* person or *entity whose rights are sought to be vindicated* in both actions."

Reliance, 9 N.Y.3d at 57 (quoting lower court) (emphasis added). This analysis requires a focus on the entities or persons whose rights are being asserted, *not* the entity formally named in the caption. This Court could have announced a different test, but it did not do so.

To support its contention that *Reliance* adopted a narrow, bright-line rule, DBSP quotes this Court's statement that the corporate plaintiff seeking revival "is not [the subsidiary] in a different capacity." (DBSP Br., 28 (quoting *Reliance,* 9 N.Y. 3d at 57-58).) However, that was merely an observation supporting the conclusion that the plaintiffs in *Reliance* were not vindicating the same rights.

Here, the opposite is true, and the relief the Trustee seeks is fully consistent with the *Reliance* test. It is clear from both the SWN filed in the Original Action by the Certificateholders and the Complaint filed in the Revival Action by the Trustee, the "entity whose rights are sought to be vindicated" is the same: the Trust. (R.41-65, 384-87.) DBSP cannot seriously dispute that the Trustee holds

property and exercises certain rights for the Trust for all certificateholders, *i.e.*, the trust beneficiaries, who retain equitable rights to and the economic interest in the Trust property. (R.131-32 (PSA § 2.01).)[8] And DBSP cannot seriously dispute that all recoveries will go to those same certificateholders, no matter the formal name of the plaintiff. Thus, in the Original Action brought by the Certificateholders and in the Revival Action brought by the Trustee, the rights, claims, remedies, and parties to whom relief would flow are entirely the same, which is no different than if the Trustee had commenced the Original Action.

DBSP proceeds to tie itself in knots attempting to establish that the Trustee "gets the facts of *Reliance* wrong" and that "[b]oth RNY and RIC sued for reimbursement based on the same bonds – the high school-related bonds issued by RIC." (*Compare* DBSP Br., 29-31 (citing *Reliance*, 9 N.Y.3d at 58; *Reliance Ins.*

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[8] Section 2.01 of the PSA provides:

> The Depositor, concurrently with the execution and delivery hereof, does hereby transfer, assign, set over and otherwise convey to the Trustee, *on behalf of the Trust*, without recourse, *for the benefit of the Certificateholders*, all the right, title and interest of the Depositor, including any security interest therein for the benefit of the Depositor, in and to the Mortgage Loans identified on the Mortgage Loan Schedule, the rights of the Depositor under the Mortgage Loan Purchase Agreement (including, without limitation the right to enforce the obligations of the other parties thereto thereunder), the right to any Net Swap Payment and any Swap Termination Payment made by the Swap Provider and all other assets included or to be included in REMIC I.

(R.131 (emphasis added).)

Co. v. PolyVision Corp., 474 F.3d 54, 57 (2d Cir. 2007) ("*Reliance (CA2)*")) *with* Trustee Br., 16-19.) This itself is flatly wrong. *First*, *Reliance* unambiguously states that RIC was seeking to enforce "its own, separate rights" in the CPLR 205(a) action, not the rights RNY asserted "in the original action." 9 N.Y. 3d at 57. *Second*, it is clear from the Court's recitation of the facts that there was confusion as to which bonds were at issue because RNY mistakenly filed multiple amended complaints over the course of several years that should have been filed by RIC. *See id.* at 55; *Reliance (CA2)*, 474 F.3d at 57. *Third*, DBSP's analysis is fatally compromised by its failure to acknowledge that, here, the Trust's claims have always been at issue.

In short, and as set out in the Trustee's opening brief (Trustee Br., 15-20), the analysis performed by this Court in *Reliance* was sound and consistent with the CPLR 205(a) jurisprudence that preceded it. Rather than merely adopting the *Reliance* court's <u>*result*</u>, as DBSP would have this Court do, its <u>*analysis*</u> should be applied to reach a different conclusion here than the one reached there: the Revival Action should be allowed to proceed.

B. The Trustee Is Pursuing The Same Rights As The Certificateholders Did In The Original Action

DBSP next argues that the Trustee cannot satisfy "its" "same rights" test, grasping for a work-around for the incontrovertible fact that the only rights either

nominal plaintiff has ever pursued are those which entitle the Trust to obtain monetary relief from DBSP for its breaches of its representations and warranties in connection with the defective loans that DBSP sold to the Trust. (DBSP Br., 31-37.)

DBSP first posits that it is impossible for the Trust to be "a 'party' at all, and as between a trustee and a trust beneficiary, the trustee is the real party in interest." (DBSP Br., 32-33.) DBSP seeks support from inapposite authorities, none of which addresses or arises out of CPLR 205(a), and concludes that the Trustee's "invocation of the Trust as the 'real' or 'true' party in interest thus lacks doctrinal grounding." (*Id.*)[9]

Of course the Trust cannot act for itself. (Trustee Br., 19-20.) But DBSP's authorities establish nothing more than that. In the context of this case, DBSP's argument merely illustrates why it is that *Reliance*, eschewing formalism, focuses on whether "it is the same … entity whose rights are sought to be vindicated in both actions." 9 N.Y.3d at 57.

DBSP next points out that the PSA assigns the rights at issue from the Depositor to *the Trustee*, rather than the Trust, and, because the Certificateholders

[9] In contrast, DBSP says nothing about this Court's precedents cited in the Trustee's opening brief that acknowledge that RMBS put-back claims belong to the trust. (Trustee Br., 19-20.)

never possessed those rights, they cannot have remained the same. (DBSP Br., 33-34.) This argument suffers from three flaws. *First*, as noted above, the PSA assigns the relevant rights to the Trustee to hold in trust for the benefit of all certificateholders, not for itself. (*Supra*, n.8.) DBSP may choose to ignore this aspect of the contractual regime, but the Court need not. *Second*, DBSP's argument reads the no-action clause out of the PSA. Section 12.03 establishes that certificateholders can act for the Trust without the involvement of the Trustee under certain circumstances, further reflecting the reality that the rights belong to the Trust.[10] If DBSP's understanding were correct, the certificateholders would

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[10] Section 12.03 states, in pertinent 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, <u>unless</u> such Holder previously shall have given to the Trustee a written notice of default and of the continuance thereof, as hereinbefore provided, and <u>unless also</u> 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 to the 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 (emphasis added).) It is irrelevant that a different PSA has been interpreted to restrict certificateholders' ability to act only to cases against servicers, not sponsors. (Trustee Br., 9 n.7.) The PSA's presupposition that certificateholders can act <u>at all</u> for the Trust refutes the idea that the claims here belong to the Trustee.

never be entitled to sue. *Third*, it is axiomatic that derivative actions allow "a [stakeholder] to take the role of the corporate entity and to enforce the corporation's right by requesting relief the [stakeholder] could not demand in his or her own right .... Any recovery in a derivative action belongs to the [corporate entity], not the individual [stakeholders] who bring suit." 1 Moore's Manual – Fed. Practice and Procedure §14A.110 (2019). The PSA specifically provides that any funds recovered in an action by certificateholders on behalf of the trust must be shared ratably for the common benefit of all holders.[11] DBSP's feigned concern over the payment of "the sums [the Certificateholders] would receive in [] a

[11] Section 12.03 of the PSA again provides the relevant language:

> It is understood and intended, and expressly covenanted by each Certificateholder with every other Certificateholder, and the Trustee, that no one or more Holders of Certificates shall have any right in any manner whatsoever by virtue of any provision of this Agreement to affect, disturb or prejudice the rights of the Holders of any other of such Certificates, or to obtain or seek to obtain priority over or preference to any other such Holder, or to enforce any right under this Agreement, except in the manner herein provided and for the equal, ratable and common benefit of all Certificateholders. For the protection and enforcement of the provisions of this Section, each and every Certificateholder and the Trustee shall be entitled to such relief as can be given either at law or in equity.

(R.226.)

settlement to the appropriate Trust accounts" is therefore mooted by the Trust's governing agreement. (DBSP Br., 34.).[12]

DBSP next argues that the Trustee and the Certificateholders have different interests because a corporate trustee's interests are different than those of investors in the trust.[13] But DBSP fails to provide any specific examples of how that might be the case here. (DBSP Br., 34-35.) Furthermore, none of the cases DBSP cites to support its argument involve a certificateholder filing derivatively on behalf of the trust where the trustee later seeks to be substituted into the action. (*Id*.) In any event, and as has been repeated often, the Complaint filed by the Trustee in the Revival Action seeks the same relief for the same breaches on behalf of the same stakeholders as did the Certificateholders' SWN in the Original Action. (R.41-65, 384-87.)

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[12] DBSP argues in a footnote that the Trustee waived the argument that the Certificateholders filed the Original Acton derivatively because the Trustee only "makes passing assertions in the background section of its brief that the [Certificateholders] filed suit 'derivatively.'" (DBSP Br., 37 n.1.) The Trustee waived nothing. From beginning to end, the Trustee's opening brief argues that the Certificateholders attempted to act on behalf of the Trust, just as the Trustee is now acting on behalf of the Trust. (Trustee Br., 1-4, 14, 18-20, 28-29, 32-37.)

[13] DBSP accords significance to the fact that the Trustee "has successfully argued that the limited nature of its duties bar certain claims against it by Certificateholders." (DBSP Br., 35.) This Court should not. What matters here is that they share a common interest in the Trust's claims against DBSP. (Trustee Br., 34-37.)

Finally, DBSP speculates that the Certificateholders' interests in bringing suit might not be "identical to those of the Trust's other certificateholders, who did not join the [Certificateholders] as plaintiffs." (DBSP Br., 35-37.) But, no matter the identity of the nominal plaintiff, any relief obtained will flow to the Trust and pass through to certificateholders pursuant to the PSA. (Trustee Br., 19; *supra*, 14-15.) That investors who purchased different tranches of Certificates will share in the recovery based on their priority in the "waterfall" does not render any certificateholder adverse to another. They all share the same interest – maximizing the Trust's recovery from DBSP.[14] They likewise share that same interest with the Trustee, notwithstanding DBSP's repeated – and incorrect – insistence that "the [Certificateholders] represent[ed] only themselves." (DBSP Br., 36.)

DBSP's arguments in Part I.D of its brief ultimately speak to the Certificateholders' standing to commence the Original Action – precisely the type of curable defect that CPLR 205(a) is intended to address. It would be nonsensical and jurisprudentially wrong to dismiss revived actions such as this one because of the very same defect that led to dismissal of the prior action. (Trustee Br., 29-31.)

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[14] DBSP goes on to laud no-action clauses' salutary effect on intra-certificateholder relations. (DBSP Br., 36.) The reality is that the Trustee ultimately received a direction to pursue this suit from holders of more than 25% of the Trust's Voting Rights (as that term is defined in the PSA). (R.225-26.) DBSP has repeatedly invited this Court to prejudge issues that are irrelevant to begin with without a fully developed record. (Trustee Br., 32 n.23.)

C. Adopting DBSP's Bright-Line Test Would Overrule Reams Of New York Cases

DBSP devotes eight pages of its brief to trying to neutralize the Appellate Division cases that the Trustee cites in its brief (DBSP Br., 37-45). Nowhere in those eight pages does DBSP cite a single case of its own to support its "same party" or successor theories. Of course, that is because controlling authority issued by this Court permits CPLR 205(a) actions notwithstanding a defect in the identity of the original plaintiff so long as the correct plaintiff asserts the same claims on behalf of the same entities as the original plaintiff. *See, e.g.*, *Carrick v. Cent. Gen. Hosp.*, 51 N.Y.2d 242, 247-50 (1980) (applying CPLR 205(a) even though the antecedent action was commenced by a "proposed administratrix" who knowingly failed to comply with the requirement that a wrongful death action be commenced by a court-appointed administrator); *supra*, 12-17. DBSP essentially argues that *Reliance* synthesized the "common thread" incorrectly and that New York courts have silently been applying some other test. But New York's lower courts have been and remain quite capable of faithfully applying this Court's existing CPLR 205(a) precedent. The issue here is not the test; it is the Order's adherence to it.

DBSP tries to minimize the effect of, or otherwise distinguish, the remainder of the Appellate Division's jurisprudence simply by pointing to the kinds of

plaintiffs in those cases. Just as with its treatment of *Reliance*, DBSP ignores the rationales actually provided in the cases in favor of its own.

For instance, DBSP argues, incorrectly, that the long line of bankruptcy trustee cases permitting a change in plaintiffs under CPLR 205(a), although inconsistent with its interpretation of *Reliance,* are all distinguishable because they "involve actions originally commenced in the name of the debtor in bankruptcy that are subsequently revived by the bankruptcy trustee as the debtor's successor-in-interest." (DBSP Br., 38.) This is incorrect. As an initial matter, it bears repeating that DBSP's flawed understanding of these cases derives from its flawed understanding of the statute. (*Supra,* Part I.) DBSP's analysis misses the mark because the Trustee's cases do not involve an initially-correct plaintiff dying (or entering bankruptcy or assigning their claims) after the antecedent suit was commenced. Rather, they establish that an incorrect plaintiff can be replaced by a correct plaintiff via CPLR 205(a). (Trustee Br., 23-27; *infra*.)

DBSP's discussion of the Trustee's cases involving bankruptcy trustees allows that there might be a basis in the law for treating them like executors and administrators, and pivots to argue that, here, the Trustee did not succeed to any rights of the Certificateholders. (DBSP Br., 38-41.) But *Goodman v. Skanska USA Civil, Inc.*, 169 A.D.3d 1010 (2d Dep't 2019), was not decided on the basis of

a bankruptcy trustee's succession to an otherwise proper plaintiff's claims.[15] Instead, the Appellate Division premised its holding on the reasoning that "the plaintiff is not seeking to enforce any rights separate and independent from those asserted by the debtor in the prior action." *Id.* at 1012. The bankruptcy trustee's status as a successor-in-interest to the debtor was a component part of that reasoning; not the reason itself. *Id.* That is because the original plaintiff in *Goodman* did not enter bankruptcy *after* properly commencing the antecedent action in his individual capacity, as CPLR 205(a) presumes in the instance where a proper plaintiff dies mid-suit. Instead, the plaintiff in *Goodman* filed his bankruptcy petition *prior to* filing his personal injury action, which negated his standing from the outset. *Id.* at 1010. The facts in *Goodman* therefore comport with those here, in that an incorrect plaintiff commenced the antecedent action, rather than DBSP's manufactured "successor-in-interest" rationale. *See id.* at 1012 ("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

[15] DBSP claims that the *Goodman* ruling "trace[s] back to *Goldberg v. Littauer Hosp. Ass'n*, 160 Misc. 2d 571 (Sup. Ct. Albany Cnty. 1994)." (DBSP Br., 38.) *Goodman* does not cite *Goldberg*. Instead, it cites the same cases as the Trustee – *Reliance*, *Carrick*, *George*, *etc*. 169 A.D.3d at 1012.

the new action is seeking to enforce 'the rights of the plaintiff in the original action.'") (quoting *Reliance*, 9 N.Y.3d at 57).

DBSP affirmatively cites *Genova v. Madani*, 283 A.D.2d 860, 861 (3d Dep't 2001), and the cases cited therein, as further support for its successor-in-interest rationale in the bankruptcy context, but even that effort is self-defeating. (DBSP Br., 38-39.) *Genova*, in text DBSP carefully avoids reproducing in its brief, indicates that CPLR 205(a) *does* apply where antecedent actions are commenced by incorrect plaintiffs:

> We agree with the conclusion … in *Goldberg*, subsequently adopted by the Second Department … that the "broad and liberal purpose" of CPLR 205(a) is furthered by permitting the trustee in bankruptcy to pursue the action that was originally *erroneously commenced* in the name of the bankrupts.

283 A.D.2d at 861 (emphasis added) (internal citations omitted).[16]

DBSP then addresses the Trustee's cases allowing revival in the executor-administrator context. DBSP asserts that the rulings in *Lambert v. Sklar*,

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[16] Some cases cited by DBSP *appear* to involve a properly-filed action that later became subject to dismissal because of a bankruptcy filing. (DBSP Br., 39). Of course, there is no inconsistency between the "same rights" test expressed in *Reliance* and allowing a bankruptcy trustee to recommence an action initially commenced by someone who later filed for protection. This is analogous to a plaintiff who dies mid-suit, as imagined in CPLR 205(a). But these cases neither express the rule DBSP invents, nor do they negate the cases cited by the Trustee that allow revival where an incorrect plaintiff commences the initial action. These cases can stand alongside a reversal here, whereas affirming the Order will call into question the precedential value of an unknowable number of cases.

30 A.D.3d 564 (2d Dep't 2006), *Mendez v. Kyung Yoo*, 23 A.D.3d 354 (2d Dep't 2005), *Tellez v. Saranda Realty*, 197 A.D.2d 439 (1st Dep't 1993), and *Brown v. Lutheran Med. Ctr.*, 35 Misc.3d 553 (Sup. Ct. Kings Cnty. Feb. 6, 2012) are inapposite *merely* because they involved executors and administrators, as provided for in the text of CPLR 205(a). (DBSP Br., 41-42). DBSP goes on to proffer the conclusion that all of these cases "are straightforward applications of this Court's executor/administrator precedents, as set forth in *George* and in *Carrick*," indicating DBSP's view that they remain good law. (DBSP Br., 41 (internal citation omitted).)

But DBSP's brief provides the reason why its own analysis is faulty. For example, DBSP notes that the first action in *Lambert* was commenced by an incorrect plaintiff, the "decedent's widow," rather than the decedent's estate. (DBSP Br., 41.) The original plaintiff did not die in the midst of litigating the antecedent action, as the text of CPLR 205(a) presumes. *See Lambert*, 30 A.D.3d at 565-56 ("Even though the widow and the appellant [the administrator of decedent's estate] are two different plaintiffs, it is clear that the real party in interest, the Estate, was the same in both actions.").

DBSP likewise describes *Tellez* as a "wrongful death case *mistakenly brought in the name of the wrong administrator* and then refiled to name the proper administrator." (DBSP Br., 41 (emphasis added).) *Tellez* involved an

initial filing by the very same "complete stranger" to the estate that DBSP suggests renders the Trustee's understanding of CPLR 205(a) so outlandish (DBSP Br., 13). *See Tellez*, 197 A.D.2d at 439 ("CPLR 205(a) is a remedial statute and where a defendant is given timely notice of the nature of the claim in a prior action brought by the wrongly named party, the benefit of that statute will be applied unless the prior action was dismissed for the reasons specifically stated in CPLR 205(a).") (internal citation omitted).

The circumstances of *Mendez* and *Brown* are no different. The first *Mendez* action was commenced by a proposed administrator of an estate, whereas the subsequent, and allowed, action was filed by the duly-appointed administrator, who was a different person from the first plaintiff. 23 A.D.3d at 355 (2d Dep't 2005). DBSP's "same party" rule would dictate dismissal. Similarly, *Brown* was initially commenced by an incorrect plaintiff – a "proposed guardian ad litem," as noted by DBSP (DBSP Br., 41) – rather than a duly appointed administrator, as in the CPLR 205(a) action. 35 Misc. 3d at 554. In sum, not one of the foregoing cases applied the narrow rationale advocated by DBSP.

Lastly, DBSP addresses cases relied upon by the Trustee which involved "lenders and assignees," though again, their status as such had no bearing on the courts' reasoning. (DBSP Br., 42-45.) In *Chase Manhattan Bank, N.A. v. Wolowitz*, 272 A.D.2d 428, 429 (2d Dep't 2000) a mortgagee was allowed to

maintain a revival action where the original complaint was brought by a mortgage participant. DBSP dismisses the import of *Chase* by arguing that *Reliance* did not discuss it and that the opinion is only a single paragraph. (DBSP Br., 43-44.) But the trial court in *Reliance* cited *Chase* with approval when synthesizing the "common thread running through" decisions applying CPLR 205(a), *Reliance Ins. Co. v. PolyVision Corp.*, 390 F. Supp. 2d 269, 272-73 (E.D.N.Y. 2005), and this Court expressly adopted the trial court's formulation of that "common thread." 9 N.Y.3d at 57.

That being the case, DBSP's effort to distinguish *Wells Fargo Bank, N.A. v. Eitani*, 148 A.D.3d 193 (2d Dep't 2017), fails. (DBSP Br., 44-45.) There, the Second Department applied *Reliance* to a mortgage foreclosure action refiled by an assignee of the original mortgagee, even though the original action was commenced by a different plaintiff. 148 A.D. 3d at 199. DBSP contends *Wells Fargo* is consistent with its theory on the ground that the assignee acquired its rights from the initial plaintiff. However, the Second Department's rationale was not premised on that theory; instead it applied the interpretation of *Reliance* urged by the Trustee: "Although the named plaintiff in the [original action] and the named plaintiff in [the refiled] 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. The Court

reasoned that, "[u]nlike [the] corporate affiliates seeking to enforce different interests" in *Reliance,* the plaintiff in the refiled action "is not seeking to enforce any rights separate and independent from those asserted by [the plaintiff] in the prior action." *Id.*

Even leaving aside the foregoing, DBSP fails to articulate any persuasive reason why "succession" should make any difference. So long as both plaintiffs are vindicating the same interests, imposing an additional succession requirement does not further the purposes of the statute of limitations or CPLR 205(a). To the contrary, DBSP's successor standard would elevate form over substance and contradict longstanding CPLR 205(a) jurisprudence holding that the overriding consideration is whether "the defendant has been given timely notice of the claim being asserted by *or on behalf of* the injured party." *George*, 47 N.Y.2d at 177 (emphasis added).

But even were this Court to consider succession as a factor, the facts here are akin to successorship in several important respects. (Trustee Br., 6-8.) The certificateholders, not the Trustee, are the economic stakeholders in the Trust, having collectively paid DBSP hundreds of millions of dollars for the Trust's assets. To protect the interests of the certificateholders in those assets, the governing agreements create claims against DBSP that are part of the Trust corpus and are held in trust for the benefit of all certificateholders. The certificateholders

thus retain equitable rights to the claims as the beneficiaries of the Trust. The Trustee receives legal title to the claims and brings them for the benefit of certificateholders. DBSP's argument appears to be that its succession test would be satisfied only if the transactions had been structured so that legal title to the claims was passed from the certificateholders to the Trustee in a separate agreement. However, CPLR 205(a) does not (and should not) turn on such formalities.

III. NEW YORK'S PUBLIC POLICY UNDERLYING THE STATUTE OF LIMITATIONS AND CPLR 205(a) SUPPORT ALLOWING THIS ACTION TO PROCEED

Decades of CPLR 205(a) jurisprudence holds that a nominal change in plaintiff is irrelevant if both plaintiffs sue on behalf of the same injured entity. At bottom, DBSP's arguments (DBSP Br., 48-53) are contrary to the central purpose served by CPLR 205(a), which is to ensure that timely claims are heard on the merits. *Supra*, 9.

Here, there is no practical difference in the rights and claims being asserted. The ultimate beneficiaries of any recovery, irrespective of the named plaintiff, are the certificateholders and not the Trustee. DBSP provides no valid reason why the Trust and its beneficiaries should be deprived of a decision on the merits simply because of a change in the named plaintiff on the pleadings.

Similarly, there is no validity to DBSP's contention that the Trustee should be precluded from prosecuting these actions based on its alleged lack of "diligence." (DBSP Br., 50-52.) Courts do not determine diligence on an *ad hoc* basis. Rather, the Legislature has defined precisely the diligence required to invoke CPLR 205(a): a plaintiff must "timely commence" the original action by filing a summons with notice or a complaint in accordance with CPLR 304 and within the applicable statute of limitations.[17] The Legislature also requires that, once the original action is "timely commenced," the plaintiff pursue it diligently such that the action is not terminated "by a voluntary discontinuance" or "a dismissal of the complaint for neglect to prosecute the action." CPLR 205(a). The statute contains no other "diligence" requirements.[18]

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[17] DBSP, as expected, infuses its brief with suggestions that the Original Action was dismissed as untimely because the Trustee's substitution as plaintiff there occurred after the limitations period had run (DBSP Br., 9-10, 15-16, 46-48, 51-52). The Original Action was not untimely and it can serve as a predicate for a CPLR 205(a) action. (Trustee Br., 29-34.) DBSP does not bother to address the authority cited in the Trustee's opening brief on this point, nor does it dispute the fact that the SWN that commenced the Original Action complied with all relevant provisions of Article 3 of the CPLR and that it was filed within the six-year limitations period. (R.384-87.)

[18] *Doyle v. Am. Home Prods. Corp.,* relied on by DBSP (DBSP Br., 50), was dismissed due to the plaintiff's failure to prosecute his first action, not because of some amorphous "diligence" requirement. *See* 583 F. 3d 167, 171-72 (2d Cir. 2009). The only other CPLR 205(a) case cited by DBSP likewise did not apply a diligence requirement – the only issue was whether the original action was timely filed. *See Norex Petroleum Ltd. v. Blavatnik*, 23 N.Y.3d 665, 668 (2014).

More fundamentally, the rule the Trustee urges the Court to reaffirm 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, DBSP's proposed standard is riddled with exceptions and rests on formal distinctions without any real difference.

This Court should reject DBSP's unworkable contention that CPLR 205(a) is only available to a formally identical plaintiff, unless the initial plaintiff dies after the litigation begins (as the statute expressly permits), *or* the second plaintiff is a bankruptcy trustee (but *not* other types of trustees), *or* the second plaintiff succeeded to the claim held by the initial plaintiff (an entirely new consideration never before considered by this Court).

The remaining cases cited by DBSP do not consider the application of CPLR 205(a) and are apparently cited for the uncontroversial proposition that would-be plaintiffs should file their actions within the applicable limitations period. (DBSP Br., 51-52.)

CONCLUSION

For the reasons stated above and in the Trustee's opening brief, the Trustee respectfully requests that this Court reverse the Order.

Dated: New York, New York
January 15, 2021

MCKOOL SMITH PC

By: _____
Christopher P. Johnson
Zachary W. Mazin
Daniel J. Fleming
Lara Sofia Romero Jain

One Manhattan West
395 9th Avenue, 50th Floor
New York, New York 10001
(212) 402-9400

Attorneys for Plaintiff-Appellant

NEW YORK STATE COURT OF APPEALS
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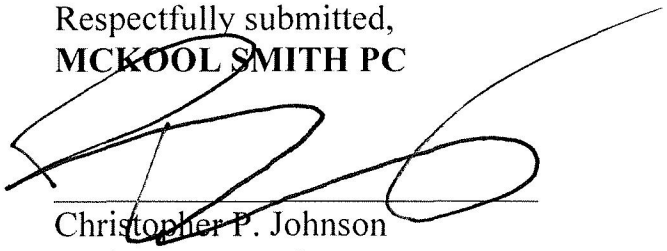
January 15, 2021

Respectfully submitted,
MCKOOL SMITH PC



Christopher P. Johnson
Zachary W. Mazin
Daniel J. Fleming
Lara Sofia Romero Ines
One Manhattan West
395 Ninth Avenue, 50th Floor
New York, New York 10001
(212) 402-9400
Attorneys for Plaintiff-Appellant