FILED: APPELLATE DIVISION - 1ST DEPT 10/05/2021 08:53 PM 2021-01661
NYSCEF DOC. NO. 65 RECEIVED NYSCEF: 10/05/2021

To Be Argued By:
MATTHEW D. INGBER
Time Requested: 15 Minutes

New York County Clerk's Index Nos. 654443/2015, 654442/2015, 654440/2015, 654439/2015, 654436/2015, 654438/2015

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

CASE NOS.
2021-01661
2021-01667
2021-01680
2021-01813
2021-01816
2021-01988

Index No. 654443/2015
Case No. 2021-01661

IKB INTERNATIONAL, S.A. in Liquidation and IKB DEUTSCHE INDUSTRIEBANK A.G.,

Plaintiffs-Respondents-Appellants,

—against—

WELLS FARGO BANK, N.A., as Trustee (and any predecessors and successors thereto); WELLS FARGO BANK MINNESOTA, N.A., as Trustee (and any predecessors

(*Caption continued on inside cover*)

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and successors thereto); WELLS FARGO BANK, N.A., as Successor by Merger to WELLS FARGO BANK MINNESOTA, N.A., as Trustee (and any predecessors or successors thereto),

Defendants-Appellants-Respondents,

—and—

ABFC 2006-OPT1 TRUST; ABFC 2006-OPT3 TRUST; CARRINGTON MORTGAGE LOAN TRUST, SERIES 2006-NC5; CARRINGTON MORTGAGE LOAN TRUST, SERIES 2006-OPT1; CARRINGTON MORTGAGE LOAN TRUST, SERIES 2006-RFC1; CITIGROUP MORTGAGE LOAN TRUST, SERIES 2005-OPT4; FIRST FRANKLIN MORTGAGE LOAN TRUST 2004-FF6; IMPAC CMB TRUST SERIES 2005-6; MORGAN STANLEY ABS CAPITAL I INC. TRUST 2004-OP1; MORGAN STANLEY ABS CAPITAL I INC. TRUST 2005-HE3; MORGAN STANLEY ABS CAPITAL I INC. 2005-WMC6; MORGAN STANLEY ABS CAPITAL I INC. TRUST 2007-HE5; OPTION ONE MORTGAGE LOAN TRUST 2005-3; OPTION ONE MORTGAGE LOAN TRUST 2005-4; OPTION ONE MORTGAGE LOAN TRUST 2005-5; OPTION ONE MORTGAGE LOAN TRUST 2007-6; SECURITIZED ASSET BACKED RECEIVABLES LLC TRUST 2006-OP1; STRUCTURED ASSET SECURITIES CORPORATION TRUST PASS-THROUGH CERTIFICATES, SERIES 2002-AL1; SOUNDVIEW HOME LOAN TRUST 2007-OPT3,

Nominal Defendants.

Index No. 654442/2015
Case No. 2021-01667

IKB INTERNATIONAL, S.A. in Liquidation
and IKB DEUTSCHE INDUSTRIEBANK A.G.,

Plaintiffs-Respondents-Appellants,

—against—

U.S. BANK, N.A., as Trustee (and any predecessors or successors thereto);
U.S. BANK TRUST, N.A., as Trustee (and any predecessors or successors thereto),

Defendants-Appellants-Respondents,

—and—

ASSET BACKED SECURITIES CORP. HOME EQUITY LOAN TRUST, SERIES OOMC 2006-HE5; ACCREDITED MORTGAGE LOAN TRUST 2004-3; ACCREDITED MORTGAGE LOAN TRUST 2005-3; ACCREDITED MORTGAGE LOAN TRUST 2005-4; ACCREDITED MORTGAGE LOAN TRUST 2006-1; ACCREDITED MORTGAGE LOAN TRUST 2006-2; BAYVIEW FINANCIAL MORTGAGE PASS-THROUGH TRUST 2006-A; BEAR STEARNS ASSET BACKED SECURITIES I TRUST 2005-AC9; BEAR STEARNS ASSET BACKED SECURITIES I TRUST 2007-HE4; BEAR STEARNS ASSET BACKED SECURITIES I TRUST 2007-HE5; BEAR STEARNS ARM TRUST 2005-10; BEAR STEARNS ARM TRUST 2005-12; C-BASS 2006-CB6 TRUST; C-BASS 2006-CB8 TRUST; C-BASS TRUST 2006-CB9; C-BASS 2007-CB1 TRUST; CHASEFLEX TRUST SERIES 2006-2; CITIGROUP MORTGAGE LOAN TRUST 2006-WFHE1; CITIGROUP MORTGAGE LOAN TRUST

2006-WFHE3; CITIGROUP MORTGAGE LOAN TRUST 2006-WFHE4; CITIGROUP MORTGAGE LOAN TRUST 2007-AHL1; CITIGROUP MORTGAGE LOAN TRUST 2007-AMC4; CITIGROUP MORTGAGE LOAN TRUST 2007-WFHE1; CITIGROUP MORTGAGE LOAN TRUST 2007-WFHE2; CITICORP RESIDENTIAL MORTGAGE TRUST SERIES 2007-2; CSAB MORTGAGE-BACKED TRUST 2006-3; CSAB MORTGAGE-BACKED TRUST 2006-4; CSMC MORTGAGE BACKED TRUST SERIES 2007-1; FIRST FRANKLIN MORTGAGE LOAN TRUST, SERIES 2005-FF7; FIRST FRANKLIN MORTGAGE LOAN TRUST, SERIES 2005-FFH2; GSAMP TRUST 2006-HE6; GSAMP TRUST 2006-HE7; HOME EQUITY ASSET TRUST 2005-5; HOME EQUITY ASSET TRUST 2005-8; HOME EQUITY ASSET TRUST 2005-9; HOME EQUITY ASSET TRUST 2006-1; HOME EQUITY ASSET TRUST 2006-2; HOME EQUITY ASSET TRUST 2006-4; HOME EQUITY MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-4; J.P. MORGAN ALTERNATIVE LOAN TRUST 2006-S4; J.P. MORGAN MORTGAGE ACQUISITION CORP 2005-OPT2; J.P. MORGAN MORTGAGE ACQUISITION TRUST 2006-CW1; J.P. MORGAN MORTGAGE ACQUISITION TRUST 2006-CW2; J.P. MORGAN MORTGAGE ACQUISITION CORP 2006-FRE2; MERRILL LYNCH MORTGAGE INVESTORS TRUST SERIES 2005-SL3; MORGAN STANLEY MORTGAGE LOAN TRUST 2007-3XS; NEW CENTURY ALTERNATIVE MORTGAGE LOAN TRUST 2006-ALT2; RAMP SERIES 2005-EFC2 TRUST; RAMP SERIES 2005-EFC5 TRUST; RAMP SERIES 2005-EFC6 TRUST; RAMP SERIES 2006-EFC2 TRUST; RASC SERIES 2005-AHL2 TRUST; RASC SERIES 2005-AHL3 TRUST; RASC SERIES 2005-EMX3 TRUST; RASC SERIES 2005 EMX4 TRUST; RASC SERIES 2005-KS11 TRUST; RASC SERIES 2005-KS12 TRUST; RASC SERIES 2005-KS9 TRUST; RASC SERIES 2006-EMX2 TRUST; RASC SERIES 2006-EMX3 TRUST; RASC SERIES 2006-EMX4 TRUST; RASC SERIES 2006-EMX7 TRUST; RASC SERIES 2006-EMX9 TRUST; RASC SERIES 2006-KS1 TRUST; RASC SERIES 2006-KS2 TRUST; STRUCTURED ADJUSTABLE RATE MORTGAGE LOAN TRUST SERIES 2006-5; SASCO MORTGAGE LOAN TRUST SERIES 2005-GEL1; STRUCTURED ASSET SECURITIES CORP 2005-WF4; STRUCTURED ASSET SECURITIES CORP MORTGAGE LOAN TRUST 2006-EQ1; STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE LOAN TRUST 2006-WF2; STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE LOAN TRUST 2006-WF3,

Nominal Defendants.

Index No. 654440/2015
Case No. 2021-01680

IKB INTERNATIONAL, S.A. in Liquidation
and IKB DEUTSCHE INDUSTRIEBANK A.G.,

Plaintiffs-Respondents-Appellants,

—against—

HSBC BANK USA, N.A., as Trustee (and any
predecessors or successors thereto),

Defendant-Appellant-Respondent,

—and—

ACE Securities Corp. Home Equity Loan Trust, Series 2006-OP2; GSAA Home Equity Trust 2005-15; Nomura Home Equity Loan Trust, Series 2005-HE1; Nomura Home Equity Loan, Inc.; Home Equity Loan Trust Series 2006-WF1; Renaissance Home Equity Loan Trust 2004-4; Renaissance Home Equity Loan Trust 2005-1; Renaissance Home Equity Loan Trust 2005-4; Renaissance Home Equity Loan Trust 2006-1; Renaissance Home Equity Loan Trust 2006-2; Renaissance Home Equity Loan Trust 2006-3; Renaissance Home Equity Loan Trust 2006-4; Renaissance Home Equity Loan Trust 2007-1; Renaissance Home Equity Loan Trust 2007-2; Wells Fargo Home Equity Asset-Backed Securities 2005-2 Trust; Wells Fargo Home Equity Asset-Backed Securities 2006-1 Trust,

Nominal Defendants.

Index No. 654439/2015
Case No. 2021-01813

IKB International, S.A. in Liquidation
and IKB Deutsche Industriebank A.G.,

Plaintiffs-Respondents-Appellants,

—against—

Deutsche Bank National Trust Company, as Trustee (and any predecessors or successors thereto); Deutsche Bank Trust Company Americas, as Trustee (and any predecessors or successors thereto),

Defendants-Appellants-Respondents,

—and—

Accredited Mortgage Loan Trust 2004-3; Accredited Mortgage Loan Trust 2005-4; Accredited Mortgage Loan Trust 2006-1; Accredited Mortgage Loan Trust 2006-2; Argent Securities Inc., Asset-Backed Pass-Through Certificates, Series 2005-W2; Citigroup Mortgage Loan Trust, Series 2005-OPT3; Equifirst Mortgage Loan Trust 2004-2; First Franklin Mortgage Loan Trust 2005-FFH3; First Franklin Mortgage Loan Trust 2006-FF8; GSAMP Trust 2006-HE1; HSI Asset Securitization Corp. Trust 2006-OPT2; IMPAC Secured Assets Corp Mortgage Pass-Through Certificates, Series 2004-3; IMPAC CMP Trust Series 2004-5; IMPAC CMB Trust Series 2005-5; IMPAC CMB Trust Series 2005-8; IMPAC Secured Assets Corp., Mortgage Pass-Through Certificates, Series 2006-1; IMPAC Secured Assets Corp., Mortgage Pass-Through Certificates, Series 2006-2; IndyMac INDX Mortgage Loan Trust 2005-AR21; IndyMac INDX Mortgage Loan Trust 2006-AR9; J.P. Morgan Mortgage Acquisition Trust 2007-CH1; J.P. Morgan Mortgage Acquisition Trust 2007-HE1; Long Beach Mortgage Loan Trust 2004-2; Morgan Stanley ABS Capital I Inc. Trust 2005-HE3; Morgan Stanley ABS Capital I Inc. Trust 2005-HE6; Morgan Stanley ABS Capital I Inc. Trust 2005-HE7; Morgan Stanley ABS Capital I Inc. Trust 2005-NC1; Morgan Stanley Capital I Inc.

TRUST 2006-NC2; MORGAN STANLEY ABS CAPITAL I INC. TRUST 2007-HE5; MORGAN STANLEY HOME EQUITY LOAN TRUST 2006-1; MORGAN STANLEY HOME EQUITY LOAN TRUST 2006-3; NEW CENTURY HOME EQUITY LOAN TRUST, SERIES 2005-C; NEW CENTURY HOME EQUITY LOAN TRUST SERIES 2005-D; POPULAR ABS MORTGAGE PASS-THROUGH TRUST 2007-A; SAXON ASSET SECURITIES TRUST 2006-3; SAXON ASSET SECURITIES TRUST 2007-2; SOUNDVIEW HOME LOAN TRUST 2006-EQ1; WAMU SERIES 2007-HE1 TRUST,

Nominal Defendants.

Index No. 654436/2015
CASE NO. 2021-01816

IKB INTERNATIONAL, S.A. in Liquidation
and IKB DEUTSCHE INDUSTRIEBANK A.G.,

Plaintiffs-Respondents-Appellants,

—against—

LASALLE BANK N.A. AS TRUSTEE (and any predecessors or successors thereto); BANK OF AMERICA, N.A. as successor by merger to LASALLE BANK, N.A. as Trustee (and any predecessors or successors thereto),

Defendants-Appellants-Respondents,

—and—

ACCREDITED MORTGAGE LOAN TRUST 2005-3; BEAR STEARNS ASSET BACKED SECURITIES I TRUST 2007-HE4; BEAR STEARNS ASSET BACKED SECURITIES I TRUST 2007-HE5; C-BASS TRUST 2006-CB9; GSAMP TRUST 2006-HE7; MERRILL LYNCH MORTGAGE INVESTORS TRUST SERIES 2005-SL3; and MORGAN STANLEY MORTGAGE LOAN TRUST 2007-3XS,

Nominal Defendants.

Index No. 654438/2015
CASE NO. 2021-01988

IKB INTERNATIONAL, S.A. in Liquidation
and IKB DEUTSCHE INDUSTRIEBANK A.G.,

Plaintiffs-Respondents-Appellants,

—against—

THE BANK OF NEW YORK, as Trustee (and any predecessors or successors thereto); BNY WESTERN TRUST COMPANY, as Trustee (and any predecessors or successors thereto); THE BANK OF NEW YORK TRUST COMPANY, N.A., as Trustee (and any predecessors or successors thereto); THE BANK OF NEW YORK MELLON CORPORATION, N.A., as Trustee (and any predecessors or successors thereto); THE BANK OF NEW YORK MELLON CORPORATION, N.A., as Successor by Merger to THE BANK OF NEW YORK, as Trustee (and any predecessors or successors thereto); THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., as Successor by Merger to BNY WESTERN TRUST COMPANY, as Trustee (and any predecessors or successors

thereto); THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., as Successor by Merger to THE BANK OF NEW YORK TRUST COMPANY, N.A., as Trustee (and any predecessors or successors thereto),

Defendants-Appellants-Respondents,

—and—

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PRELIMINARY STATEMENT

This appeal involves a group of lawsuits brought by two sophisticated purchasers—IKB International, S.A. (IKB, S.A.) and IKB Deutsche International Industriebank A.G.—to recover losses they allegedly suffered on residential mortgage-backed securities (RMBS) during the 2008 financial crisis. These lawsuits do not seek recovery against the originators of the mortgage loans held in the RMBS trusts or even from the parties who created the RMBS trusts or sold RMBS certificates to investors. Instead, Plaintiffs seek recovery from six contractual trustees for the RMBS trusts, allegedly for failing to police and take certain actions against other parties associated with the trusts. But the contracts governing the trusts impose only limited duties on the RMBS trustees. Plaintiffs' claims rest on a hindsight-informed view of what they wish the RMBS contracts *had* said, rather than what the contracts actually *do* say. Plaintiffs' claims should have been dismissed in their entirety, and the court below erred in concluding otherwise.

QUESTIONS PRESENTED

1. Does a reference in a Pooling and Servicing Agreement (PSA) stating that a securitization trustee agrees to hold the trust fund and "exercise the rights referred to above" for the benefit of certificateholders impose an affirmative duty on the trustee to enforce obligations of other parties to repurchase loans where the PSA does not explicitly assign such a duty to the trustee? The court below held yes.

2. Does an investor adequately plead that a trustee had post-Event of Default duties without pleading each element of an Event of Default as defined in the contracts, and without pleading facts showing that the trustee received written notice or had actual knowledge of an Event of Default? The court below held yes.

3. Are Plaintiffs' conflict-of-interest and post-Event of Default breach of fiduciary duty claims barred by the economic loss doctrine because they claim exclusively economic harm and seek damages that replicate breach-of-contract damages? The court below held no.

4. Even if Plaintiffs are excused from complying with the pre-suit demand requirement in the governing agreements' "no-action" clauses, are Plaintiffs separately excused from complying with the other pre-requisites to bringing suit set forth in those "no-action" clauses? The court below held yes.

5. Are IKB, S.A.'s claims barred under the applicable statutes of limitations when the longest possible limitations period is six years, and Plaintiffs have specifically pled that they sold their securities more than seven years before suing? The court below held no.

NATURE OF THE CASE AND STATEMENT OF FACTS

A. RMBS Trusts

1. These cases involve 163 RMBS trusts for which six separate sets of defendants serve or previously served as trustees.[1] Through a process known as securitization, mortgage loans are bundled and sold to RMBS trusts and interests in the resulting revenue streams from the trust assets are sold to investors. The process begins with a "sponsor" or "seller" forming a pool of mortgage loans that it originated or that it acquired from "originators." The sponsor or seller then transfers that pool of loans to a "depositor," which segments the revenue streams from the loans into "tranches" with varying degrees of risk and return.

The loan pools are then conveyed to a trust. The originators, sponsors, depositors and/or sellers make representations and warranties (R&Ws) concerning the characteristics of the mortgage loans sold to the trust, and the depositor transfers certain files related to the mortgage loans—including the mortgage note, assignment, and title policy—to the trustee or a "custodian" on behalf of the trust. The trust then issues various classes of securities (certificates) to the depositor, which sells them to investors (certificateholders). The different classes of certificates correspond to the different tranches of the revenue stream generated by the loan pools.

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[1] Defendant Bank of America, N.A. ("BANA") is no longer serving as trustee of any trust, and sold its trustee business to Defendant U.S. Bank National Association more than a decade ago.

Once the securitization transaction closes, a "servicer," typically appointed by the sponsor (and sometimes overseen by a "master servicer"), interacts with borrowers, collects the principal and interest payments on the underlying mortgage loans, and deposits them in a trust account. The trustee or a "paying agent"[2] then distributes the money (net of trust expenses) to investors based on an allocation "waterfall" set forth in the trusts' governing agreements. Senior certificateholders are typically entitled to payment in full ahead of junior certificateholders, and losses caused by shortfalls in principal and interest payments are generally allocated first to the junior tranches.

2. Each of the RMBS trusts at issue here is governed by a PSA or a similar contract called an Indenture (together with the PSAs, the "Governing Agreements"). "The terms of the[se] securitization trusts as well as the rights, duties, and obligations of the trustee [and other parties] are set forth in" these contracts. *Ret. Bd. of the Policemen's Annuity & Benefit Fund of Chi. v. Bank of N.Y. Mellon*, 775 F.3d 154, 156 (2d Cir. 2014) (citation omitted).

a. An RMBS trustee's role "differs from that of an ordinary trustee." *Magten Asset Mgmt. Corp. v. Bank of N.Y.*, 15 Misc. 3d 1132(A), 2007 N.Y. Slip

[2] For example, HSBC acted only as trustee in the trusts at issue in its lawsuit. It did not act as custodian, securities administrator or paying agent and had no responsibility for the functions of those separate parties.

Op. 50951(U), at *6 (Sup. Ct., N.Y. County May 8, 2007). Unlike an ordinary trustee, an RMBS trustee typically has only "limited, ministerial functions" defined by contract. *Racepoint Partners, LLC v. JPMorgan Chase Bank, N.A.*, 14 N.Y.3d 419, 425 (2010) (internal quotation marks omitted). Specifically, the Governing Agreements provide that the RMBS trustee agrees "to perform such duties and only such duties as are specifically set forth in this Agreement," "the duties and obligations of the Trustee shall be determined solely by the *express* provisions of this Agreement," and "*no implied covenants* or obligations shall be read into this Agreement against the Trustee." *E.g.*, CARR 2006-NC5 PSA § 8.01(a), (c)(i) (emphasis added); *see also Fixed Income Shares: Series M v. Citibank, N.A.*, 157 A.D.3d 541, 542 (1st Dep't 2018) (holding that no implied covenants can be enforced against the trustee).[3]

An RMBS trustee shall exercise its rights and powers under the Governing Agreements as would a prudent person only if a contractually defined Event of Default (EOD) has occurred and certain other conditions are satisfied.[4] As relevant here, the Governing Agreements provide that an EOD occurs only if a servicer or

[3] In light of their voluminous size, the Governing Agreements were submitted to the trial court in disc format. The trustees have taken the same approach in this Court. For the Court's convenience, this brief cites directly to the Governing Agreements.

[4] Not all EODs trigger this requirement. The Governing Agreements define which EODs do.

master servicer[5] (1) materially breaches its obligations, (2) receives written notice of that breach from a designated party, and (3) fails to cure in a specified time. *See* CARR 2006-NC5 PSA § 7.01(a); CWL 2005-14 PSA § 7.01(2). Moreover, even if all three predicates of an EOD have occurred, the "prudent person" standard does not apply unless and until the trustee receives written notice of the EOD, has actual knowledge of the EOD, or, in some trusts, receives written notice *or* has actual knowledge. Unless and until such conditions are met, the trustee's duties are limited to "the performance of such duties and obligations as are specifically set forth" in the PSAs. *E.g.*, CARR 2006-NC5 PSA § 8.01(c)(i).

b. In addition to setting forth the rights and duties of the parties to the RMBS trusts, the Governing Agreements also grant certificateholders the ability to direct certain parties to act. Recognizing that different certificateholders may have different views as to the best course of action, the Agreements carefully circumscribe how, when, and under what conditions the certificateholders may direct the trustee to act in ways that may impact other certificateholders, such as by incurring costs at a trust's expense. For instance, an RMBS trustee typically has no duty "to make any investigation" into other deal parties' compliance with their own contractual obligations, but certificateholders holding a certain percentage of voting rights

[5] In many trusts, the failure of a servicer is insufficient to trigger an EOD that requires the trustee to exercise its powers as would a prudent person.

(typically 25% or greater) may direct the trustee to perform that investigation. *E.g.*, *id.* § 8.02(a)(v).

The Governing Agreements also frequently place additional conditions on certificateholders before they may direct certain actions. With respect to any demand for an investigation by the trustee, for example, the certificateholders must first provide reasonable indemnity satisfactory to the trustee against the "expense[s] or liabilit[ies]" that the trustee may incur in taking that action. *E.g.*, *id*.

Similar preconditions are also placed on the certificateholders' limited right to sue with respect to the Governing Agreements, which are formally set forth in contractual provisions entitled "Limitation on Rights of Certificateholders," *e.g.*, *id.* § 13.03, and often referred to as "no-action clause[s]." Certificateholders may sue "upon or under or with respect to" the Governing Agreements only if the certificateholders (i) obtain the support of a requisite number of investors, typically between 25 and 50%; and (ii) deliver to a specified deal party (often the trustee, but sometimes another party) a written demand to commence litigation with adequate indemnity and afford it an opportunity to commence the action itself. *Id*. These provisions ensure that a minority investor cannot embroil the trust or the trustee in an expensive or unpopular lawsuit and thereby deplete the trust and harm other investors.

B. Procedural History

In December 2015, Plaintiffs sued six separate sets of trustees alleging breaches of contractual, fiduciary, and statutory duties. Although the trial court dismissed many of Plaintiffs' claims, it allowed others to proceed. In doing so, the trial court made five rulings that are relevant here.

First, for certain trusts, the trial court declined to dismiss claims alleging that prior to any EOD, the trustees should have enforced "repurchase rights"—"the seller's and/or originator's obligation to substitute or repurchase mortgage loans that do not conform to the seller's R&W's"—even though the Governing Agreements did not expressly require the trustees to do so. R.45[6] (capitalization omitted). While acknowledging that the Governing Agreements were "silen[t]" concerning "the particular party that is to enforce this specific remedy," the trial court concluded that the trustees were compelled to do so based on generic language in the Agreements requiring each trustee "to hold the Trust Fund and 'exercise the rights referred to above' for the benefit of certificateholders. " R.46–47.

Second, turning to whether post-EOD duties arose under the Governing Agreements, the trial court rejected the trustees' arguments that Plaintiffs had failed to plead either an occurrence of an EOD or the trustees' actual knowledge or written

[6] Material in the Record on Appeal is cited as "R.__."

notice of such an event. R.50–65. With respect to whether an EOD had occurred, the court determined that Plaintiffs' allegations that servicers had received written notice of their alleged servicer breaches—a mandatory element of an EOD—sufficed even though Plaintiffs did not allege that any such written notice had been sent by a party that was contractually authorized to do so. R.52. With respect to whether the RMBS trustees had received written notice of an EOD—a separate requirement before post-EOD duties can arise—the trial court concluded that Plaintiffs' allegations created a reasonable expectation that the trustees had received notice of purported servicing failures from monthly servicing reports and other publicly available sources. R.60–61.

Third, addressing Plaintiffs' tort claims, the trial court acknowledged that under the economic loss doctrine, "a plaintiff cannot seek damages by bringing a tort claim when the injury alleged is primarily the result of economic injury for which a breach of contract claim is available." R.66. (citation omitted). The court nevertheless allowed Plaintiffs' post-EOD fiduciary-duty and conflict-of-interest claims to proceed on the theory that these claims were based on "independent" duties unrelated to the trustees' contractual responsibilities. R.66–67.

Fourth, the trial court rejected the trustees' argument that all of Plaintiffs' claims must be dismissed due to Plaintiffs' failure to adhere to the investor-support and demand requirements of the Governing Agreements' no-action clauses.

Although the court acknowledged that Plaintiffs "did not comply with" these requirements, it excused them from failing to satisfy the contractual demand requirement on the theory that "it would be futile to demand that the trustee"—or even a third party such as a servicer—commence an action against the trustee. R.31–32 (citation omitted). Turning to the investor-support requirement, the court invoked this Court's statement in *Blackrock Balanced Capital Portfolio (FI) v. U.S. Bank National Ass'n*, 165 A.D.3d 526 (1st Dep't 2018), that "[o]nce performance of the demand requirement in the no-action clause is excused, performance of the entire provision is excused." *Id.* at 528; *see* R.33.

Finally, the trial court rejected the trustees' argument that IKB, S.A.'s claims with respect to securities it sold more than seven years before filing this case are time barred. R.74–75.

STANDARD OF REVIEW

This Court reviews *de novo* all questions arising from an order on a motion to dismiss. CPLR 5501(c). In a contract case like this one, "the provisions of the contract delineating the rights of the parties prevail over the allegations set forth in the complaint." *Ark Bryant Park Corp. v. Bryant Park Restoration Corp.*, 285 A.D.2d 143, 150 (1st Dep't 2001).

ARGUMENT

I. Defendants' Agreements To "Hold the Trust Fund and Exercise the Rights Referred to Above for the Benefit of . . . [Certificateholders]" Do Not Create A Pre-EOD Duty To Enforce R&W Repurchase Obligations.

When the contracting parties wanted to impose a duty on a transaction participant to enforce repurchase obligations, they expressly said so. As the trial court recognized, the Governing Agreements for the at-issue trusts:

> fall into four general categories: (i) Governing Agreements that do not specifically assign the obligation to enforce put-back rights to any specific deal party…; (ii) Governing Agreements that assign the duty to another party…; (iii) Governing Agreements that provide for the Trustee to enforce put-back rights only upon the failure of the servicer to do so…; and (iv) Governing Agreements that require written notice to the Trustee….

R.46. But the trial court nevertheless concluded that general language in the Agreements stating the trustees will "hold the trust fund and exercise the rights referred to above for the benefit of [certificateholders]" somehow created an additional, implied duty to enforce repurchase obligations. *See* R.47. That holding was in error and should be reversed.

All of the Governing Agreements provide that prior to an EOD, "[t]he Trustee . . . undertakes to perform such duties and only such duties as are *specifically set forth* in this Agreement"; "the duties and obligations of the Trustee shall be determined solely by the *express* provisions of this Agreement"; and "*no implied covenants* or obligations shall be read into this Agreement against the Trustee." *E.g.*,

FFML 2005-FFH3 PSA § 8.01 (emphasis added). And many reiterate: "the right of the Trustee to perform any discretionary act enumerated in this Agreement shall not be construed as a duty . . . ." *See, e.g.*, *id.* § 8.02(a)(viii).

New York law squarely holds that this language means what it says. The law is well settled that a corporate trustee, like the trustees here, "has very little in common with the ordinary trustee . . . . The trustee under a corporate indenture . . . has [its] rights and duties defined, not by the fiduciary relationship, but exclusively by the terms of the agreement. [Its] status is more that of a stakeholder than one of a trustee." *AG Cap. Funding Partners, L.P. v. State St. Bank & Tr. Co.*, 11 N.Y.3d 146, 156 (2008) (quoting *Hazzard v. Chase Nat'l Bank*, 287 N.Y.S. 541, 570 (Sup. Ct., N.Y. County 1936)); *accord Meckel v. Cont'l Res. Co.*, 758 F.2d 811, 816 (2d Cir. 1985). Because of an indenture trustee's narrowly defined role, courts "have consistently rejected the imposition of additional duties on the trustee." *Magten*, 2007 N.Y. Slip Op. 50951(U), at *6 (quoting *Elliott Assocs. v. J. Henry Schroder Bank & Tr. Co.*, 838 F.2d 66, 71 (2d Cir. 1988)); *accord Racepoint Partners*, 14 N.Y.3d at 425 (rejecting a plaintiff's argument on the grounds that it would "expand[] indenture trustees' recognized administrative duties far beyond anything found in the contract"); *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 192 (S.D.N.Y. 2011) (A securitization "PSA expressly limits the trustee's duties to those enumerated within the agreement.").

The Governing Agreements for many of the trusts do *not* specifically set forth any duty on the trustees to enforce repurchase obligations for R&W breaches. *See* R.46. That is dispositive of this issue with respect to those trusts. *See, e.g.*, *AG Cap. Funding Partners, L.P.*, 11 N.Y.3d at 146; *Magten*, 2007 N.Y. Slip Op. 50951(U), at *6.

Moreover, the context and applicable trust law confirm that the parties did not intend for the general language cited by the trial court to impose enforcement obligations on the trustees. The Governing Agreement for every trust includes "for the benefit of" language, standard in corporate trust agreements, which often appears in a clause like the following:

> Section 2.04. Execution and Delivery of Certificates. The Trustee acknowledges the transfer and assignment to it of the Trust Fund and, concurrently with such transfer and assignment, has executed and delivered to or upon the order of the Depositor, the Certificates in authorized denominations evidencing directly or indirectly the entire ownership of the Trust Fund. *The Trustee agrees to hold the Trust Fund and exercise the rights referred to above for the benefit of all present and future Holders of the Certificates*.

MSAC 2005-NC1 PSA § 2.04 (emphasis added); *see also, e.g.*, R.23502–96. This language is necessary to satisfy the trust law requirement that an instrument creating an irrevocable trust include "an expression of intent that property be held, at least in part, *for the benefit of one other than the settlor*." George Gleason Bogert et al., *Bogert's The Law of Trusts & Trustees* § 1 (updated June 2021) (avail. at Westlaw BOGERT § 1); *see also* Restatement (Third) of Trusts § 2 (2003) (elements of a trust

include a trustee who agrees to hold and use trust property "*for the benefit of one or more others*"). The language clearly was *not* intended to place unspecified duties on trustees to take unspecified actions under unspecified circumstances, including the enforcement of repurchase obligations—particularly in light of the Governing Agreements' unambiguous directive that "[t]he Trustee . . . undertake[s] to perform such duties and only such duties as are *specifically set forth* in this Agreement." (emphasis added).

The trial court's interpretation of the general "for the benefit of" provisions would improperly render specific language in some Governing Agreements superfluous and contradict specific language in others (*see supra* at 11), upsetting the intent and bargain of sophisticated parties. *See, e.g.*, *150 Broadway N.Y. Assocs., L.P. v. Bodner*, 784 N.Y.S.2d 63, 66 (1st Dep't 2004) ("It is a cardinal rule of contract construction that a court should 'avoid an interpretation that would leave contractual clauses meaningless.'") (quoting *Two Guys from Harrison–N.Y. v. S.F.R. Realty Assocs.*, 63 N.Y.2d 396, 403 (1984)); *see also Kolbe v. Tibbetts*, 22 N.Y.3d 344, 353 (2013) ("It is well established that when reviewing a contract, particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties manifested thereby.") (internal quotation and citation omitted).

Confirming the point, at least one other appellate court and multiple trial courts that have analyzed "for the benefit of" provisions like those at issue here, governed by New York law, have rejected the expansive interpretation adopted by the trial court in this case. *See, e.g.*, *W. & S. Life Ins. Co. v. Bank of New York Mellon*, 129 N.E.3d 1085, 1093–94 (Ohio Ct. App. 2019) (holding that the "for the benefit of" provision "does not clearly set out the detail required to impose a duty on [defendant RMBS trustee]" to enforce repurchase obligations); *Commerzbank AG v. U.S. Bank Nat'l Ass'n,* 457 F. Supp. 3d 233, 257–58 (S.D.N.Y. 2020) (holding the "for the benefit of" provision "does not require [defendant RMBS trustee] to enforce the obligations of other deal parties to repurchase loans"), *reconsideration denied*, No. 16CV4569, 2021 WL 603045 (S.D.N.Y. Feb. 16, 2021); *W. & S. Life Ins. Co. v. Bank of New York Mellon*, No. A1302490, 2017 WL 3392855, at *4 (Ohio Com. Pl. Aug. 4, 2017) (The "for the benefit of" provision in an RMBS governing agreement "means that the Trustee holds the trust property, which includes not only a right to payment on each mortgage loan, but also various other contract rights, for the benefit of investors rather than for the Trustee's own benefit[.] It does not impose any other duties beyond those 'set forth in this Agreement.'"); *CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F. Supp. 2d 450, 472–73 (S.D.N.Y. 2010) (holding "for the benefit of" language in a credit default swap trust agreement did not charge the trustee "with a generalized duty to advance the Fund's economic interests in any manner

other than with respect to the narrowly circumscribed responsibilities identified in the trust agreement").

Finally, the trial court's reading conflicts with controlling precedent from this Court. In *ASR Levensverzekering v. Breithorn ABS*, this Court rejected an "attempt to impose fiduciary obligations upon . . . an indenture trustee with ministerial duties" under an indenture agreement that assigned rights to the indenture trustee "for the benefit of" the secured parties. 102 A.D.3d 556, 557 (1st Dep't 2013) (*citing Racepoint Partners*, 14 N.Y.3d 425). Here, the trial court's reading would effectively impose fiduciary obligations on the trustees to determine whether it should take action to attempt to enforce repurchase obligations.

For all of these reasons, the trial court erred in holding the generalized "for the benefit of" language creates an implied duty and overrides the other provisions that expressly limit the trustees' duties to those specifically set forth in the Governing Agreements. The Decision should be reversed on this issue.

II. Plaintiffs Have Not Adequately Pled That Post-EOD Duties Arose.

The post-EOD standard can arise only if an EOD occurs and the trustee has actual knowledge or receives written notice—from specified parties—that the EOD has occurred and is continuing. Plaintiffs failed to adequately plead that EODs even occurred in many trusts and, for all trusts, Plaintiffs failed to plead that the trustees

had actual knowledge or received the requisite written notice thereof. The trial court erred in holding otherwise.

First, for many trusts, the trial court erred in holding that Plaintiffs alleged the existence of an EOD in the first place, ignoring that Plaintiffs failed to allege that servicers and master servicers received written notice of material breaches that, if not cured, could give rise to an EOD. R.57. The court further erred in holding that Plaintiffs had alleged that EODs occurred in trusts governed by Indentures, despite Plaintiffs' failure to allege any conduct by the issuer[7] that could give rise to an EOD under the Indentures—a required element of an EOD in the Indenture Trusts. R.59.

Second, for all trusts, the trial court compounded its error by concluding that issues of law and fact exist as to whether the trustees had actual knowledge of an EOD, and whether "writings" mentioned in the Complaints are sufficient to adequately plead written notice of an EOD. R.61–63. This Court has expressly rejected such allegations as insufficient in no fewer than three prior decisions at the pleading stage, recognizing, for example, that writings which do not meet the contractually-defined requirements cannot, as a matter of law, give rise to post-EOD

[7] In the Indenture Trusts, the issuer is a special-purpose vehicle that holds the loans. It has no operations or employees, and all of its income is directed to make payments under the Indenture.

duties. *See Commerce Bank v. Bank of New York Mellon*, 141 A.D.3d 413 (1st Dep't 2016); *Fixed Income*, 157 A.D.3d 541; *Blackrock*, 165 A.D.3d 526.

For the reasons that follow, the trial court's decision should be reversed and Plaintiffs' post-EOD claims dismissed.

A. For Many Trusts, Plaintiffs Failed To Plead That An EOD Occurred.

While the precise requirements vary, all of the PSA Trusts require at least the following for an EOD to occur: (1) the servicer or master servicer must materially breach a specific duty set forth in the PSA; (2) the servicer or master servicer must receive written notice of that breach from a party authorized to provide such notice under the PSA (or, in some trusts, a responsible officer of the servicer or master servicer must have actual knowledge of the breach); and (3) the servicer or master servicer must fail to remedy the breach within a cure period specified in the PSA. *See* R.51; *see also, e.g.*, BSABS 2007-HE4 PSA § 8.01(iii). In the Indenture Trusts, on the other hand, only the conduct of the issuer can result in a breach giving rise to an EOD. R.58. The trial court erred in finding that Plaintiffs had alleged (1) written notice to servicers or master servicers; or (2) an issuer breach that could give rise to an EOD.

1. Plaintiffs Failed To Allege That Servicers Received Written Notice of Breaches.

For the trusts that require written notice to the servicer or master servicer before a breach can ripen into an EOD, the trial court held that Plaintiffs adequately alleged that servicers received written notice of their alleged breaches—a distinct element of an EOD—in the form of "numerous written disclosures to the servicers of servicing failures." R.56. But in reaching this holding, the court disregarded contractual requirements setting forth the notice to servicers or master servicers that can lead to an EOD.

Each Governing Agreement identifies the specific parties that are authorized to send notice of alleged breaches that may eventually result in an EOD—typically, the depositor, the trustee, and a specified percentage of certificateholders. For example, the trial court quoted an EOD definition providing that notice may be "given to the Master Servicer by the Trustee or the Depositor, or to the Trustee and the Master Servicer by the Holders of Certificates evidencing not less than 25% of the Voting Rights evidenced by the Certificates." R.56 (quoting BSABS 2007-HE4 PSA § 8.01(ii)).

The trial court erred, therefore, in holding that "written disclosures to the servicers of servicing failures" sent by *insurers* or by certificateholders with *less* than 25% of voting rights could trigger EODs. R.56–58. Pointing to allegations that certain servicers were "specifically notified by monoline insurers . . . of pervasive

breaches," that they "received written notices from investors regarding servicing failures," and that "the servicers themselves prepared written reports that disclosed extensive servicing failures," the court concluded that "issues of law and fact exist as to whether these writings, and any other written notices to the servicers that may be identified in discovery, satisfy the notice requirements that must be met" to trigger an EOD, "including the requirements as to which parties must provide notice." *Id.* at R.56–57.

That analysis is incorrect. A notice from an *insurer* is *not* a notice "by the *Trustee* or the *Depositor*" or "by the *Holders of Certificates* evidencing not less than 25% of the Voting Rights" *E.g.*, BSABS 2007-HE4 PSA § 8.01(ii) (emphasis added). *E.g., Millennium Partners, L.P. v. U.S. Bank N.A.*, 2013 WL 1655990, at *4 (S.D.N.Y. Apr. 17, 2013) (plaintiffs' letter to servicer describing breaches did not trigger EOD "because they do not allege that they owned 50% of the Aggregate Voting Interests necessary to satisfy the notice requirement"), *aff'd sub nom. Millennium Partners, L.P. v. Wells Fargo Bank, N.A.*, 654 F. App'x 507 (2d Cir. 2016).

Indeed, this Court has held that allegations of notice sent to a servicer do not plead an EOD where the party that sent the notice was not contractually authorized to do so. For example, in *Blackrock*, plaintiff-certificateholders alleged that they themselves had provided written breach notices to servicers. This Court affirmed

the dismissal of claims as to 56 of those trusts because they had not alleged that they possessed the requisite holdings to send such notices under the agreements. *Blackrock*, 165 A.D.3d at 527; *see also Alden Glob. Value Recovery Master Fund, L.P. v. KeyBank N.A.*, 159 A.D.3d 618, 627–28 (1st Dep't 2018) (plaintiffs failed to plead an EOD where "the record is devoid of any documentary evidence that plaintiff provided any [] written notice to the Master Servicer and the Special Servicer" as required by terms of PSA); *Elkind v. Chase Nat'l Bank of City of N.Y.*, 259 A.D. 661, 666 (1st Dep't 1940) (dismissing breach claims where "the indenture expressly provides that unless the trustee receive written notice from the holders of not less than ten per cent of bonds outstanding, the trustee may conclusively assume that no default has occurred" and the "complaint alleges no facts complying with these conditions").

Other courts agree. In *Millennium Partners*, the plaintiffs alleged that they had "notified [the Master Servicer] of its breach of the PSA by failure to distribute its payments in accordance therewith." 2013 WL 1655990, at *4. Applying New York law, the district court rejected this argument, noting that while the plaintiffs were certificateholders, they did "not plead that the requisite written notice was given to trigger an Event of Default because they do not allege that they owned 50% of the Aggregate Voting Interests necessary to satisfy the notice requirement"

defined in the PSA. *Id.* The Second Circuit affirmed. *See Millennium Partners L.P. v. Wells Fargo Bank, N.A.*, 654 F. App'x 507 (2d Cir. 2016).

Here, as in *Millennium Partners* and *Blackrock*, Plaintiffs failed to allege that any of the alleged "written disclosures" to the servicers identified by Plaintiffs "satisfy the [undisputed] notice requirements that must be met, including the requirements as to which parties must provide notice, in order to give rise to servicer failure EODs" under the PSAs. R.56–57.

2. <u>Plaintiffs Failed To Allege Specific Issuer Breaches Under The Terms Of The Indenture Trusts.</u>

The trial court also erred in holding that Plaintiffs alleged the kind of breaches required to trigger EODs in the Indenture Trusts. As the trial court recognized, "unlike the PSAs, . . . the Indentures define a Default and an EOD . . . to encompass only the conduct of the *Issuer*," a legal entity separate and distinct from servicers, whose breaches can give rise to EODs under the PSAs. R.58; *see also, e.g.*, SAST 2006-3 Indenture §§ 1.01, 5.01(a)(iv). In Defendants' joint Motion to Dismiss, they explained that under the terms of the Indentures, the conduct of other parties cannot cause an EOD. R.657. Plaintiffs did not dispute this, but instead argued that the "Indentures require Issuers to enforce any rights to the mortgage loans and to 'preserve and defend title' to the mortgage loans," and that the existence of servicer breaches necessarily means that the Issuers failed to enforce those rights. R.1198 (internal quotation marks omitted).

Agreeing with Plaintiffs, the trial court reasoned that because they had pled the existence of R&W breaches and servicing failures, it necessarily followed that the issuers had breached the indentures by failing to cause the trustees or servicers to enforce the trust's rights. R.59. The court relied on a federal court's reasoning in *Royal Park Invs. SA/NV v. HSBC Bank USA, N.A.*, 109 F. Supp. 3d 587, 604–05 (S.D.N.Y. 2015). R.59. This was error, and the court's reliance on *Royal Park* was misplaced, because that case involved an actual allegation of an issuer breach. *See Royal Park*, 109 F. Supp. 3d at 604–05. Moreover, the plaintiffs in *Royal Park* argued, and the court agreed, that pleading "*known and unremedied* Seller and Servicer defaults" was sufficient to allege "a violation of the issuer's duties under the Indenture." *Id.* at 604 (emphasis added). Here, Plaintiffs failed to allege any specific seller or servicer defaults, let alone that issuers had knowledge of any such defaults. Indeed, the Complaints contain no allegations concerning the issuers' conduct *whatsoever*. The court could not draw reasonable inferences regarding the issuers' conduct from allegations that do not exist. The lower court's ruling that Plaintiffs adequately pled breaches resulting in EODs in the Indenture Trusts was error and should be reversed.

B. Plaintiffs Failed To Plead That The Trustees Had Actual Knowledge Or Received Written Notice Of An EOD.

The Governing Agreements impose another hurdle that Plaintiffs' pleadings fail to meet: Plaintiffs must also allege that the trustees had *actual knowledge* that

an EOD had occurred and was continuing,[8] that they received *written notice* of the same,[9] or for some trusts, that the trustees either received written notice *or* had actual knowledge.[10] The purpose of such requirements is simple: "to specify a particular single act . . . which must occur before [the trustee] is charged with knowledge of the default or obliged to exercise any remedies, rather than leaving questions of the timing and amount of its knowledge (and hence its obligation to act) to the uncertainties of later litigation over when such knowledge should be imputed." *Argonaut P'ship L.P. v. Bankers Trustee Co.*, 2001 WL 585519, at *2 (S.D.N.Y. May 30, 2001).

Plaintiffs' claims fail under *all* versions of the Governing Agreements because Plaintiffs do not allege that the trustees had *either* actual knowledge or written notice that any purported servicing breach had ripened into an EOD, as opposed to alleged breaches that *could* ripen into an EOD. As this Court has recognized, the requirement that the trustee have written notice or actual knowledge of an EOD is separate from the requirement that a plaintiff plead all the elements of an EOD,

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[8] *See, e.g.*, BSABS 2007-HE4 PSA § 9.01(d)(iv) ("The Trustee shall not . . . be deemed to have notice or knowledge of any default or Event of Default unless a Responsible Officer of the Trustee shall have actual knowledge thereof[.]").

[9] *See, e.g.*, CWL 2005-14 PSA § 8.02(a)(8) ("Trustee shall not be deemed to have knowledge of an Event of Default until a Responsible Officer of the Trustee shall have received written notice thereof.").

[10] *See, e.g.*, MSM 2007-3XS PSA § 6.01(c)(2).

including notice to the servicer or master servicer of a material breach. The trial court nevertheless found sufficient Plaintiffs' generalized allegations that some trustees received servicing reports, investor letters, or news materials, along with their awareness of government enforcement proceedings against certain servicers, all of which related only to unspecified "servicing failures" that were "continuing unremedied." R.60–61.

This holding is flatly inconsistent with this Court's decisions in *Commerce Bank* and *Arrowgrass Master Fund Ltd. v. Bank of N.Y. Mellon*, 106 A.D.3d 582 (1st Dep't 2013), both of which rejected allegations much closer to written notice than anything alleged here. In *Commerce Bank*, the trial court rejected post-EOD claims that were based on allegations that the trustee and master servicer had received a letter from holders of more than 25% of certificates in the relevant trusts alleging master servicer breaches based on "various sources including government investigations and lawsuits, private lawsuits, and news media reports." *Commerce Bank v. The Bank of New York Mellon*, 2015 WL 5770467, at *4 (Sup. Ct., N.Y. County, Oct. 2, 2015). While the court observed that the letter "gave notice to the trustee . . . of the failure of the master servicer to perform" under the section of the agreement defining EODs, the court held that "the letter was not a written notice of an event of default" because it merely stated that "if these failures to perform continue for an additional sixty days from the date of this letter, each of them

independently will constitute an Event of Default." *Id*. This Court affirmed, agreeing that the letter "was not a notice of an event of default" because it merely identified "events that, with time, *might ripen into* Events of Default" and did not disclose that EODs had already occurred. *Commerce Bank*, 141 A.D.3d at 415 (emphasis added). The trial court sought to distinguish *Commerce Bank*, noting that this Court "held that a settlement approved by the court 'rendered the letter [at issue in *Commerce Bank*] inoperative, i.e., as if never sent'" R.61 n.19 (quoting 141 A.D.3d at 415)). But that does not change this Court's holding that a letter identifying "events that, with time, *might* ripen into Events of Default" is insufficient to meet a plaintiff's burden to plead written notice of an EOD. *See* 141 A.D.3d at 415.

Moreover, the trial court did not address *Arrowgrass,* which involved an indenture requiring that the trustee have either actual knowledge or written notice of an EOD before post-EOD duties could arise. In that case, the court held that allegations that an indenture trustee had actual "knowledge of facts" giving rise to a default based upon "news reports and documents relevant to the transaction" that described events allegedly constituting a default were insufficient to show actual knowledge of a default under the indenture. *Arrowgrass Master Fund Ltd. v. The Bank of New York Mellon*, 2012 WL 8700416, at *9 (Sup. Ct., N.Y. County, Feb. 24, 2012). The court reasoned that "plaintiffs' allegations establish, at most, [the

trustee's] knowledge of" those *events*, but "not any knowledge by" the trustee that "a default had occurred under the Indenture" as a result. *Id.* Once again, this Court affirmed. 106 A.D.3d at 583.

Thus, *Commerce Bank* and *Arrowgrass* make clear what should be an unremarkable proposition—when a contract requires that a party receive written notice or have actual knowledge of an EOD, a plaintiff must allege facts that, taken as true, show that the defendant received such notice or had such knowledge. As discussed above, Plaintiffs' generalized allegations about purported "pervasive and systematic" servicer breaches based on news reports, government investigations, and third-party litigation are insufficient to allege that each element of an EOD in fact occurred or that the trustee knew about them. And even if allegations in news reports, government investigations, or investor litigation involve breaches that could give rise to EODs, this Court confirmed in *Arrowgrass* that such generalized documents and reports cannot satisfy Plaintiffs' separate burden of pleading actual knowledge by, or written notice to, trustees of those EODs. The trial court's decision should be reversed.

III. Plaintiffs' Tort Claims Are Barred By The Economic Loss Doctrine.

Blackrock Balanced Capital Portfolio (FI) v. U.S. Bank National Association involved virtually identical claims against one of the trustees here. In *BlackRock*, this Court held that "the tort claims are barred by the economic loss doctrine." 165

A.D.3d at 528; *see also Blackrock Balanced Capital Portfolio (FI) v. U.S. Bank Nat'l Ass'n*, 2018 WL 452001, at *1 (Sup. Ct., N.Y. County Jan. 17, 2018) (lower court opinion describing the claims and allegations at issue). The trial court here, by contrast, held that Plaintiffs' conflict-of-interest claims and post-EOD fiduciary duty claims were "maintainable" notwithstanding the economic loss doctrine. R.67. The trial court did not acknowledge this Court's on-point ruling, nor did the court articulate any basis for departing from it. This is despite the fact that the trial court repeatedly cited *Blackrock* for unrelated points. R.32, 33, 38, 44, 55, 57. The trial court's ruling was error.

The economic loss doctrine holds that "a contracting party seeking only a benefit of the bargain recovery, viz., economic loss under the contract, may not sue in tort." *17 Vista Fee Assocs. v. Teachers Ins. & Annuity Ass'n*, 259 A.D.2d 75, 83 (1st Dep't 1999); *accord Delaware Art Museum v. Ann Beha Architects, Inc.*, 2007 WL 2601472, at *2 (D. Del. Sept. 11, 2007) (Delaware law). The doctrine's application turns on the nature of the harm the plaintiff allegedly suffered, not the nature of the duty the defendant allegedly breached. Thus, even if "the duty breached . . . is independent of any contract between the parties[,] [that] merely prevents th[e] claim from being dismissed as duplicative . . . . It does not allow evasion of the economic loss rule, which presents a second, distinct barrier."

Manhattan Motorcars, Inc. v. Automobili Lamborghini, S.p.A., 244 F.R.D. 204, 220 (S.D.N.Y. 2007).

The trial court did not address or even acknowledge this fundamental distinction. Instead, the court focused entirely on the issue of duty, assessing whether the purported tort duties Defendants allegedly breached were duplicative of contractual duties under the Governing Agreements. (*See* R.65–67.) This was error, for as noted, the economic loss doctrine focuses on the nature of the *harm*, not the nature of the duty. The trial court similarly erred in ruling that Plaintiffs' conflict-of-interest claims could proceed because they had alleged a "quid pro quo" situation this Court discussed in *Commerce Bank*. R.67 (quoting *Commerce Bank*, 141 A.D.3d at 416). This comment on whether Plaintiffs had pleaded the *elements* of such claims says nothing about whether the claims are barred by the economic loss doctrine. *See Commerce Bank*, 141 A.D.3d at 416.

Plaintiffs did not and cannot dispute that the manner in which they claim to have been injured and the nature of the alleged harm are identical as between the tort and contract claims. (*Compare, e.g.*, R.26803, 26808 (BANA Compl. ¶¶ 392, 405) *with* R.26811–22 (*id*. ¶ 421).) Nor can Plaintiffs dispute that their tort claims seek only a benefit-of-the-bargain recovery, the standard measure of contract damages—indeed, Plaintiffs' damages prayers on their fiduciary duty and conflict-of-interest claims are verbatim identical to their damages prayers on their contract claims.

(*Compare, e.g.*, R.26802, 26803–04 (BANA Compl. ¶¶ 389, 394) *with* R.26811, 26812 (*id.* ¶¶ 417, 423).) The fiduciary duty and conflict-of-interest claims therefore should have been dismissed in their entirety, as this Court held in *Blackrock*, and as numerous other courts have held in cases against RMBS trustees. *See, e.g.*, *Blackrock Core Bond Portfolio v. U.S. Bank Nat'l Ass'n*, 165 F. Supp. 3d 80, 106 (S.D.N.Y. 2016) ("[W]hile the cause of action for breach of fiduciary duty may arise from common law duties and not from the contractual agreements, the injury and the manner in which the injury occurred and the damages sought persuade us that plaintiffs' remedy lies in the enforcement of contract obligations, and are barred by the economic loss doctrine.") (internal quotation marks and citations omitted); *National Credit Union Admin. Bd. v. U.S. Bank Nat'l Ass'n*, 2016 WL 796850, at *11 (S.D.N.Y. Feb. 25, 2016) (same); *cf. Dormitory Auth. v. Samson Constr. Co.*, 30 N.Y.3d 704, 711–13 (2018) (ordering summary judgment on negligence claim where "there was no injury alleged . . . that a separate negligence claim would include that is not already encompassed in [plaintiff's] contract claim").

IV. The No-Action Clauses Bar Plaintiffs' Claims.

A. The Governing Agreements Require Dismissal.

More fundamentally, the Governing Agreements' no-action clauses bar Plaintiffs' claims entirely. Plaintiffs admit that each Governing Agreement contains such a clause providing that no investor may "institute any suit, action or proceeding

in equity or at law upon or under or with respect to" the agreement "unless" the investor first satisfies certain prerequisites. *E.g.*, CARR 2006-NC5 PSA § 13.03; *see* R.448–49 (WF Compl.) ¶ 24. Specifically, an investor (or group of investors) must, among other things, (1) hold a specified percentage of the voting rights (25% or sometimes more) and (2) deliver to a specified deal party (often the trustee, but sometimes another party) a written demand to commence litigation with an offer of indemnity and afford it an opportunity to commence the action itself. *E.g.*, CARR 2006-NC5 PSA § 13.03. Only if an investor meets "all the stated pre-conditions" can it overcome the bar to litigation imposed by a no-action clause. *Akanthos Capital Mgmt., LLC v. CompuCredit Holdings Corp.*, 677 F.3d 1286, 1296 (11th Cir. 2012) (applying New York law).

It is undisputed that Plaintiffs failed to comply with either of these requirements before filing the lawsuits here. Nor do Plaintiffs deny that these "suit[s]" rely on the "provisions" of the Agreements and are therefore presumptively barred by the no-action clauses. *E.g.*, CARR 2006-NC5 PSA § 13.03. And they do not (and cannot) maintain that these clauses are unenforceable. *See Cedarwoods CRE CDO II, Ltd. v. Galante Holdings, Inc.*, 96 A.D.3d 581, 582 (1st Dep't 2012) (affirming denial of preliminary-injunction motion because plaintiffs held an interest "far less than the required 25%"). Plaintiffs' failure to abide by the terms of the contracts on which they sued should have been the end of this case.

The trial court nevertheless "excused" Plaintiffs' failure, reasoning that it would be "absurd" or "futile" for Plaintiffs to demand that the trustee sue itself. R.32–33 & n.5 (citations omitted); *see Quadrant Structured Prods. Co., Ltd. v. Vertin*, 23 N.Y.3d 549, 565 (2014) (stating in dicta that "it would be absurd to require" an investor "to ask the Trustee to sue itself") (quoting *Cruden v. Bank of N.Y.*, 957 F.2d 961, 968 (2d Cir. 1992)). In doing so, the court relied on the absurdity doctrine, which provides that if applying the words of a legal instrument "would involve any absurdity," the text at issue may be disregarded or corrected "so as to avoid that absurdity"—"but no further." *Smith v. People*, 47 N.Y. 330, 342 (1872); *see New York State Psychiatric Ass'n, Inc. v. New York State Dep't of Health*, 19 N.Y.3d 17, 25 (2012) (noting that the absurdity doctrine may be used when application of a text would lead to "futile results").

But excusing the *demand* requirement does not excuse Plaintiffs from complying with the no-action clauses' *separate* requirement that Plaintiffs secure the required *investor support* for litigation that could impact the trust. There is nothing illogical about enforcing a contractual requirement that investors hold a threshold percentage of voting rights (or secure the requisite support from fellow investors) before initiating a lawsuit against a trustee. To the contrary, demanding that investors garner some baseline level of support furthers one of the key purposes of no-action clauses—namely, "to deter individual" investors "from bringing

independent law suits for unworthy or unjustifiable reasons, causing expense" to the trust "and diminishing its assets." *Quadrant*, 23 N.Y.3d at 565–66 (citation omitted); *see Akanthos*, 677 F.3d at 1295 (observing that the investor-support requirement "protect[s] against the exercise of poor judgment by a single bondholder or a small group of bondholders, who might otherwise bring a suit . . . that most bondholders would consider not to be in their collective economic interest") (citation omitted); Am. Bar Found., *Commentaries on Model Debenture Indenture Provisions* 232 (1971) ("The theory is that if the suit is worthwhile, 25% of the debentureholders would be willing to join in sponsoring it.").

As this case illustrates, this risk to the common interest—and the need for this requirement—does not vanish when an investor decides to sue a trustee as opposed to someone else. Plaintiffs' peculiar and expansive view of the trustees' obligations, were it to carry the day, would cost other investors money that they—having elected *not* to bring suit—presumably do not want to spend. Under Plaintiffs' sweeping position, the trustees were required to (for example) spend trust money to investigate other deal parties and monitor servicers regardless of investor direction or support for those actions. If a court were to mandate that trustees expend trust resources to investigate every matter presented by an individual investor, the trustees would have to take on a costlier role in these trusts, thereby harming investors' collective economic interest without their collective say. Investors, however, are entitled to

assume that trustees will not expend trust resources to investigate every matter presented to them, since the Governing Agreements provide that trustees have no duty to investigate in the absence of direction from a minimum threshold of investors. *See, e.g.*, CARR 2006-NC5 PSA § 8.02(a)(v). Declining to enforce the contracts' requirements would ensure that Plaintiffs' meritless challenges will cost the trusts—and hence other investors—money that they may not wish to spend.

Because enforcing the no-action clauses' investor-support requirement would not be absurd, but rather would advance the purpose of such provisions, the trial court should not have excused Plaintiffs from complying with the requirement. It is blackletter law that a court may invoke the absurdity doctrine to disregard unambiguous contractual text "so as to avoid th[e] absurdity"—"but no further." *Smith*, 47 N.Y. at 342; *accord* Restatement (First) of Contracts § 235 cmt. b (1932); 11 Williston on Contracts § 32:3 n.2 (4th ed. 2021). That is because the absurdity doctrine does not give courts *carte blanche* to rewrite legal instruments, but rather merely seeks to effectuate the intent of the contracting parties. *See Smith*, 47 N.Y. at 342 (explaining that the doctrine is justified because "we may predicate that the words never could have been used by the framers of the law in such a sense"). Thus, once a court has applied the absurdity doctrine to the minimum extent necessary to avoid the absurdity, the court must return to its ordinary role of "giv[ing] effect to the precise words and language used" in a contract—investor-support requirements

included. *Quadrant*, 23 N.Y.3d at 560 (emphasizing that this approach applies when "read[ing] a no-action clause").

Enforcing the investor-support requirement is particularly warranted here because each Governing Agreement contains a severability clause providing that if "any one" of its provisions is held to be unenforceable "for any reason whatsoever," that provision "shall be deemed severable from"—and "shall in no way affect the validity or enforceability of"—"the other provisions of this Agreement." *E.g.*, CARR 2006-NC5 PSA § 13.06. Such severability clauses leave "little room for construction"; the "contract terms" make clear that the enforceability of the demand requirement here should have no "consequential effect on the remainder of the writing." *Christian v. Christian*, 42 N.Y.2d 63, 73 (1977).

All of this explains why a federal court applying New York law held that "even if Plaintiffs had plausibly alleged an excuse for ignoring the no-action clause's demand requirement, that would not justify their failure to comply with the 25% requirement." *Waxman v. Cliffs Nat. Res. Inc.*, 222 F. Supp. 3d 281, 293 (S.D.N.Y. 2016). While the plaintiffs in that case sought to dispense with the demand requirement on the ground that the trustee had a "conflict of interest preventing it from bringing claims"—as opposed to the theory that the suit was against the trustee itself—the point remains the same: "[W]hen the trustee" for whatever reason "cannot properly pursue a remedy for trust beneficiaries," the beneficiaries need not

make an idle demand, but they still must "satisfy that threshold" of investor support. *Id.* at 292–93.

B. This Court's Decision In *BlackRock* Does Not Apply To Individual Claims.

Rather than addressing the text of the applicable contract terms and the limited applicability of the absurdity doctrine, the trial court concluded that it was bound by the following sentence in *Blackrock*: "Once performance of the demand requirement in the no-action clause is excused, performance of the entire provision is excused, including the requirement that demand be made by 25% of the certificate holders." 165 A.D.3d at 528; *see* R.33. That statement from *Blackrock*, however, does not dictate the outcome here.

Unlike this case, *Blackrock* involved a putative class action brought by hundreds of investors on behalf of "*all* current owners of certificates." Am. Class Action Compl. ¶ 179, *BlackRock Balanced Capital Portfolio (FI) v. U.S. Bank Nat'l Ass'n*, No. 652204/2015 (Sup. Ct., N.Y. County Sept. 12, 2016), NYSCEF No. 124 (Blackrock Compl.) (emphasis added). The *Blackrock* plaintiffs therefore sought to sue "as representative parties on behalf of all" investors, CPLR 901(a), by alleging that their claims were "typical" of all investors' claims, Blackrock Compl. ¶ 181; that all investors "suffered similar harm," *id.*; that all investors had a "common" interest in the central issues in the case, *id.* ¶ 183; and that the plaintiffs would "fairly and adequately protect" all investors, *id.* ¶ 182. In other words, the *Blackrock*

plaintiffs were attempting to represent *hundreds* of investors, and could proceed in their putative class action only if the lawsuit was in the "collective economic interest" of all investors. *Akanthos*, 677 F.3d at 1295.

Here, by contrast, Plaintiffs' lawsuits concern their *individual* rights and are not brought "for the common benefit of all Certificateholders," to quote the no-action clauses. *E.g.*, CARR 2006-NC5 PSA § 13.03. To the contrary, Plaintiffs are under no obligation to act on behalf of their fellow investors, and nothing stops them from taking actions "jeopardizing the fund provided for the common benefit." *Batchelder v. Council Grove Water Co.*, 131 N.Y. 42, 46 (1892). Given the inapplicability of any class-action requirements here, it is either the preconditions of the no-action clauses *or nothing* when it comes to "protect[ing] the majority interests." *Quadrant*, 23 N.Y.3d at 567.

This distinction between individual and representative actions is nothing new. Seventy years ago, this Court drew a similar line in *Campbell v. Hudson & Manhattan Railroad Co.*, 277 A.D. 731 (1st Dep't 1951), where it explained that while the investor-support requirement of no-action clauses governs actions by bondholders to enforce "their individual rights," those requirements do not apply to "derivative bondholders' actions" in which the plaintiffs are "acting in the status of the trustee." *Id.* at 735. Given this background, *Blackrock* is best understood as dispensing with the investor-support requirement in the class-action context because

the class plaintiffs there were, in essence, pursuing an action for "themselves and others similarly situated," rather than solely "in their own individual rights as bondholders." *Id.*

Because the *Blackrock* Court had no need to resolve whether individual investors suing a trustee solely on their own behalf could dispense with the investor-support requirement, it cannot be read as having decided that question. It is blackletter law that "[d]ecisions are precedents only where the essential facts are similar; and in construing the opinion of a court, it is limited by the facts of the case under consideration when it was rendered, and not extended to cases where different facts exist." *City of New York v. Fifth Ave. Coach Co.*, 237 A.D. 383, 416 (1st Dep't), *aff'd*, 262 N.Y. 481 (1933). In overreading *Blackrock*, the trial court lost sight of this fundamental principle.

If this Court nevertheless concludes that *Blackrock*'s no-action-clause holding must be read to cover individual lawsuits against trustees, then it should overrule that holding. *Blackrock* offered no explanation for how courts could disregard unambiguous contractual requirements in a context where they play a critical role. Instead, the only support it offered for its conclusion was the following: "Under the plain language of the no-action clause, there is no basis for requiring that the suit be supported by 25% of certificate holders." 165 A.D.3d at 528. That assertion is incorrect, because the plain language of the no-action clause explicitly requires the

support of at least 25% of certificateholders. The absurdity doctrine does not give a court *carte blanche* to rewrite all terms of an agreement on the basis of a single phrase to which the doctrine arguably applies. *See Smith*, 47 N.Y. at 342.

BlackRock also cited a federal district court decision, also captioned "*BlackRock*." *See Blackrock*, 165 A.D.3d at 528 (citing *Blackrock*, 165 F. Supp. 3d 80 (S.D.N.Y. 2016)). But that federal *Blackrock* decision failed to correctly apply New York law. In holding that "when the demand requirement falls, the entire [no-action clause] falls," the federal court did not even mention the established principle that the absurdity doctrine must be applied no further than necessary, much less attempt to reconcile that rule with its "one and all" approach. 165 F. Supp. 3d at 99.

Nothing compels this Court to adhere to a federal district-court decision that badly misapplied New York law, even if it did so once before. "[T]he doctrine of *stare decisis* . . . does not apply to a case where it can be shown that the law has been misunderstood or misapplied"; to the contrary, "in such cases it is the duty of courts to re-examine the question." *Rumsey v. N.Y. & New England R.R. Co.*, 133 N.Y. 79, 85 (1892).

Stare decisis is not an obstacle to reversal here. Especially when applied outside the class action context, *Blackrock*'s brief no-action-clause holding is irreconcilable with the plain text of the contracts, the purposes of no-action clauses, and the limits of the absurdity doctrine. Its analysis "is little more than an ipse dixit"

or “conclusory assertion of result.” *People v. Hobson*, 39 N.Y.2d 479, 490 (1976) (explaining that “precedent is less binding” under such circumstances). And the issue is an important and recurring one. A “no-action clause . . . is a standard provision present in many trust indentures,” *Akanthos*, 677 F.3d at 1298, and contracting parties need to know whether any of the requirements of these clauses will be enforced in lawsuits against trustees. Indeed, just this year, this Court was presented with the question whether *Blackrock* should be extended to lawsuits brought by a lone investor or be overruled. *See MLRN LLC v. U.S. Bank Nat'l Ass'n*, 190 A.D.3d 426 (1st Dep't 2021). It declined to resolve that issue solely because the trustee there “was also the defendant in *Blackrock*” and hence unable to “relitigate the issue . . . that was decided against it.” *Id.* at 426. Here, by contrast, all of the trustee defendants, except for U.S. Bank, were not parties to the *Blackrock* case and thus lacked “a full and fair opportunity to contest the decision now said to be controlling.” *Buechel v. Bain*, 97 N.Y.2d 295, 304 (2001). This case therefore presents an excellent opportunity to clarify or correct *Blackrock*.

V. IKB, S.A.'s Claims Against BANA And BNYM Are Barred By The Statutes Of Limitations.[11]

One of the Plaintiffs, IKB, S.A., sold all of its RMBS certificates on or before

[11] Bank of New York Mellon (“BNYM”) joins BANA in this portion of Defendants' appeal and notes below minor factual differences that affect BNYM's particular posture below.

November 20, 2008, such that it is impossible for Defendants to have breached any duty to IKB, S.A., or for IKB, S.A. to have suffered any injury, after that date. *See, e.g.*, R.26690 (BANA Compl.) ¶ 10. IKB, S.A. is not alleged to have received an assignment of claims at any time. Therefore, because Plaintiffs did not file this lawsuit until more than six years after the last possible date of breach or injury, all of IKB, S.A.'s claims are time-barred on the face of the Complaints.[12] This placed the burden on IKB, S.A. "to aver evidentiary facts establishing that [its] . . . cause[s] of action fall[] within an exception to the statute of limitations." *Romanelli v. Disilvio*, 76 A.D.3d 553, 554 (2d Dep't 2010). Plaintiffs' Complaints did nothing to meet this burden, and IKB, S.A.'s claims therefore should have been dismissed.

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[12] The statutes of limitations applicable to Plaintiffs' various claims range from no more than three to six years, running from breach or injury depending on the claim and the applicable statute. *See* CPLR 213 (no more than six years for contract claims, and potentially less under the borrowing statute); CPLR 214 (three years for tort claims); CPLR 214(2) (three years for liabilities created by statute); *Cruden*, 957 F.2d at 967 (period applicable to contract claims also applicable to Trust Indenture Act claims); *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 1594085, at *12 (Del. Ch. June 29, 2005) (three years for "tort, contract, and fiduciary duty claim[s]" under Delaware law (which applies to some trusts here), running from "the time of the wrongful act, even if the plaintiff is ignorant of the cause of action"); *see also Ace Sec. Corp. v. DB Structured Prods., Inc.*, 25 N.Y.3d 581 (2015) (statute of limitations for contract claims runs from breach); *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 139 (2009) (statute of limitations for tort claims runs from injury); *Gaidon v. Guardian Life Ins. Co.*, 96 N.Y.2d 201, 210 (2001) (statute of limitations for statutory claims runs from violation).

In Plaintiffs' opposition to the trustees' motions, however, IKB, S.A. sought to invoke class action tolling from what it called "thirteen class actions against a Defendant here in which Plaintiffs are putative class members and which address the 'same set of concerns.'" (R.27314 (quoting *NECA-IBEW Health & Welfare Fund & Goldman Sachs & Co.*, 693 F.3d 145, 162 (2d Cir. 2012)). The trial court relied on this vague assertion to punt on the trustees' statute-of-limitations arguments, holding that "the extent to which plaintiffs are putative class members of the class actions that have been filed" was too "factual and legal" to decide at the pleading stage. R.75. But however valid or invalid the court's conclusion may have been as a general matter, it is untenable as to BANA (and as to BNYM with respect to 19 trusts).

Plaintiffs did not identify *any* class action that included *any* of the RMBS trusts on which IKB, S.A. has sued BANA,[13] and thus, did not identify any class

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[13] Of the thirteen class actions Plaintiffs claim toll the statute of limitations, only three involve claims against BNYM. Only 8 trusts from those three class actions overlap with the 27 BNYM trusts at issue in this action. Therefore, IKB, S.A. cannot invoke class action tolling with respect to the remaining 19 BNYM trusts in this action. Those 19 trusts are: CHL 2005-HYB9, CWL 2004-4, CWL 2005-13, CWL 2005-14, CWL 2005-15, CWL 2005-AB4, CWL 2005-BC5, CWL 2005-IM1, CWL 2005-IM3, CWL 2006-1, CWL 2006-13, CWL 2006-18, CWL 2006-19, CWL 2006-3, CWL 2006-5, CWL 2006-SPS1, CWL 2006-SPS2, CWL 2007-4, and RASC 2001-KS2.

action in which IKB, S.A.'s rights in this case were asserted.[14] *See MLRN LLC v. U.S. Bank Nat'l Ass'n*, 2019 WL 5963202, at *4 (Sup. Ct., N.Y. County Nov. 13, 2019) (holding that class action tolling could apply where "the RMBS trusts at issue in this action were involved" in a separate class action); *see also Police & Fire Ret. Sys. v. IndyMac MBS, Inc.*, 721 F.3d 95, 105 (2d Cir. 2013) (stating that the "tolling rule applies . . . to would-be class members who later file their own independent actions"—not strangers to the class action litigation); *In re Nat'l Australia Bank Sec. Litig.*, 2006 WL 3844463, at *4 (S.D.N.Y. Nov. 8, 2006) ("The Supreme Court's [class action] tolling rule is designed to protect the interests of *class members* who are not only entitled, but encouraged, to rely on the class representative's claim up until and through class certification."). Unsurprisingly, therefore, Plaintiffs never explained how IKB, S.A. can invoke tolling as to BANA or BNYM; instead, Plaintiffs merely waved their hands about class actions filed against "*a* Defendant here." (R.27314 (emphasis added).) The trial court likewise did not explain how there could be tolling as to BANA (or BNYM for 19 trusts); instead, the court broad-brushed all tolling issues as too "factual and legal." R.75.

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[14] Plaintiffs voluntarily dismissed certain BANA trusts, such that at the time of the ruling on the motions to dismiss, only five BANA trusts remained at issue: ACCR 2005-3, BSABS 2007-HE4, BSABS 2007-HE5, MLMI 2005-SL3, MSM 2007-3XS.

Nor was there any basis for declining to dismiss IKB, S.A.'s claims on the grounds that "defendants are estopped from relying on the statute of limitations 'because Defendants are fiduciaries who *failed to disclose the misconduct* that forms the basis for Plaintiffs' claims.'" R.75 (quoting Pls. Opp'n at 62 (R.27299)) (emphasis added). Equitable estoppel requires more than a defendant's mere failure to actively disclose its alleged misconduct—it requires separate acts of concealment or fraud that are designed to prevent the plaintiff from filing suit. *See Bank of N.Y. Mellon v. WMC Mortg., LLC*, 39 N.Y.S.3d 892, 896–97 (Sup. Ct., N.Y. County 2016) (holding that "a failure to notify [a plaintiff] of . . . non-conforming loans in the Trust" "cannot be used as a predicate for equitably tolling the statute of limitations"; "[t]his type of failure to notify, which contravenes the [defendant's] obligations under . . . the PSA, is nothing more than [a] failure to disclose the wrongs [] committed [and therefore] is insufficient to warrant equitable tolling"). Moreover, it is blackletter law that equitable estoppel does not apply unless "[t]he affirmative wrongdoing [giving rise to the estoppel is] separate and apart from the underlying claim." *Bobash, Inc. v. Festinger*, 57 A.D.3d 464, 467 (2d Dep't 2008). That is not the case here because Plaintiffs make their allegations of "failure to disclose" a basis of the underlying claims, not an excuse for not suing earlier. (*See, e.g.*, R.26809

¶ 411 (alleging "disclosure failures concerning breaches of representations and warranties")).[15]

In any event, to the extent Defendants could be said to be fiduciaries with associated disclosure duties—a dubious proposition[16]—any such duties to IKB, S.A. ceased no later than November 20, 2008, when IKB, S.A. sold its certificates and thereby severed its relationship with Defendants. Because that was more than six years before this lawsuit was filed, equitable tolling cannot save IKB, S.A.'s claims. *See Zumpano v. Quinn*, 6 N.Y.3d 666, 675–76 (2006) ("[P]laintiffs were required to proceed with their lawsuit, or at least an inquiry into the facts, within the statutory limitations period computed from the time the conduct relied on as a basis for equitable estoppel ceases to be operational.") (internal quotation marks, citation, and brackets omitted); *Simcuski v. Saeli*, 44 N.Y.2d 442, 450–51 (1978) ("[I]n no event will [estoppel be applied if the plaintiff's] action is deferred beyond the date which would be marked by the reapplication of the statutory period" once "the facts giving rise to the estoppel have ceased to be operational."); *cf. Wagley v. JP Morgan Chase Bank, N.A.*, 2020 WL 5768688, at *6 (S.D.N.Y. Sept. 26, 2020) (tolling under the

[15] Here, BNYM is identically situated to BANA. *See, e.g.*, R.32546 ¶ 390 (alleging "disclosure failures concerning breaches of representations and warranties"). As a result, the statute of limitations cannot be tolled with respect to any of the 27 BNYM trusts at issue in this action.

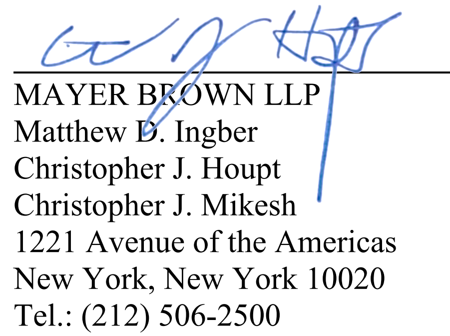
[16] Corporate or indenture trustees are not fiduciaries. *See, e.g.*, *Meckel*, 758 F.2d at 816; *AG Capital*, 11 N.Y.3d at 157.

"open repudiation doctrine" ceases once "the fiduciary has openly repudiated his or her obligation *or* the relationship has been otherwise terminated") (emphasis added) (citation omitted).

IKB, S.A.'s claims against BANA (and against BNYM as to 19 trusts) manifestly are time-barred, and should have been dismissed in their entirety.

CONCLUSION

The trial court's order should be reversed, and the trial court should be directed to dismiss Plaintiffs' remaining claims.



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PRINTING SPECIFICATION STATEMENT

This computer generated brief was prepared using a proportionally spaced typeface.

Name of typeface: Times New Roman

Point size: 14 Points

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, printing specification statement, or any authorized addendum is 11,135.

STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

Index No. 654443/2015
Case No. 2021-01661

IKB INTERNATIONAL, S.A., in Liquidation
and IKB DEUTSCHE INDUSTRIEBANK A.G.,

Plaintiffs-Respondents-Appellants,

—against—

WELLS FARGO BANK, N.A., AS TRUSTEE (and any predecessors and successors thereto); WELLS FARGO BANK MINNESOTA, N.A., AS TRUSTEE (and any predecessors and successors thereto); WELLS FARGO BANK, N.A., AS SUCCESSOR BY MERGER TO WELLS FARGO BANK MINNESOTA, N.A., AS TRUSTEE (and any predecessors or successors thereto),

Defendants-Appellants-Respondents,

—and—

ABFC 2006-OPT1 TRUST; ABGC 2006-OPT3 TRUST; CARRINGTON MORTGAGE LOAN TRUST, SERIES 2006-NC5; CARRINGTON MORTGAGE LOAN TRUST, SERIES 2006-OPT1; CARRINGTON MORTGAGE LOAN TRUST, SERIES 2006-RFC1; CITIGROUP MORTGAGE LOAN TRUST, SERIES 2005-OPT4; FIRST FRANKLIN MORTGAGE LOAN TRUST 2004-FF6; IMPAC CMB TRUST SERIES 2005-6; MORGAN STANLEY ABS CAPITAL I INC. TRUST 2004-OP1; MORGAN STANLEY ABS CAPITAL I INC. TRUST 2005-HE3; MORGAN STANLEY ABS CAPITAL I INC. 2005-WMC6; MORGAN STANLEY ABS CAPITAL I INC. TRUST 2007-HE5; OPTION ONE MORTGAGE LOAN TRUST 2005-3; OPTION ONE MORTGAGE LOAN TRUST

New York County Clerk's Index Nos. 654443/2015, 654442/2015, 654440/2015, 654439/2015, 654436/2015, 654438/2015

Appellate Division Case Nos. 2021-01661, 2021-01667, 2021-01680, 2021-01813, 2021-01816, 2021-01988

2005-4; OPTION ONE MORTGAGE LOAN TRUST 2005-5; OPTION ONE MORTGAGE LOAN TRUST 2007-6; SECURITIZED ASSET BACKED RECEIVABLES LLC TRUST 2006-OP1; STRUCTURED ASSET SECURITIES CORPORATION TRUST PASS-THROUGH CERTIFICATES, SERIES 2002-AL1; SOUNDVIEW HOME LOAN TRUST 2007-OPT3,

Defendants.

Index No. 654442/2015
Case No. 2021-01667

IKB INTERNATIONAL, S.A., in Liquidation and IKB DEUTSCHE INDUSTRIEBANK A.G.,

Plaintiffs-Respondents-Appellants,

U.S. BANK, N.A., AS TRUSTEE (and any predecessors or successors thereto); U.S. BANK TRUST, N.A., AS TRUSTEE (and any predecessors or successors thereto),

Defendants-Appellants-Respondents,

—and—

ASSET BACKED SECURITIES CORP. HOME EQUITY LOAN TRUST, SERIES OOMC 2006-HE5; ACCREDITED MORTGAGE LOAN TRUST 2004-3; ACCREDITED MORTGAGE LOAN TRUST 2005-3; ACCREDITED MORTGAGE LOAN TRUST 2005-4; ACCREDITED MORTGAGE LOAN TRUST 2006-1; ACCREDITED MORTGAGE LOAN TRUST 2006-2; BAYVIEW FINANCIAL MORTGAGE PASS-THROUGH TRUST 2006-A; BEAR STEARNS ASSET BACKED SECURITIES I TRUST 2005-AC9; BEAR STEARNS ASSET BACKED SECURITIES I TRUST 2007-HE4; BEAR STEARNS ASSET BACKED SECURITIES I TRUST 2007-HE5; BEAR STEARNS ARM TRUST 2005-10; BEAR STEARNS ARM TRUST 2005-12; C-BASS 2006-CB6 TRUST; C-BASS 2006-CB8 TRUST; C-BASS TRUST 2006-CB9; C-BASS 2007-CB1 TRUST; CHASEFLEX TRUST SERIES 2006-2; CITIGROUP MORTGAGE LOAN TRUST 2006-WFHE1; CITIGROUP MORTGAGE LOAN TRUST 2006-WFHE3; CITIGROUP

MORTGAGE LOAN TRUST 2006-WFHE4; CITIGROUP MORTGAGE LOAN TRUST 2007-AHL1; CITIGROUP MORTGAGE LOAN TRUST 2007-AMC4; CITIGROUP MORTGAGE LOAN TRUST 2007-WFHE1; CITIGROUP MORTGAGE LOAN TRUST 2007-WFHE2; CITICORP RESIDENTIAL MORTGAGE TRUST SERIES 2007-2; CSAB MORTGAGE-BACKED TRUST 2006-3; CSAB MORTGAGE-BACKED TRUST 2006-4; CSMC MORTGAGE BACKED TRUST SERIES 2007-1; FIRST FRANKLIN MORTGAGE LOAN TRUST, SERIES 2005-FF7; FIRST FRANKLIN MORTGAGE LOAN TRUST, SERIES 2005-FFH2; GSAMP TRUST 2006-HE6; GSAMP TRUST 2006-HE7; HOME EQUITY ASSET TRUST 2005-5; HOME EQUITY ASSET TRUST 2005-8; HOME EQUITY ASSET TRUST 2005-9; HOME EQUITY ASSET TRUST 2006-1; HOME EQUITY ASSET TRUST 2006-2; HOME EQUITY ASSET TRUST 2006-4; HOME EQUITY MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-4; J.P. MORGAN ALTERNATIVE LOAN TRUST 2006-S4; J.P. MORGAN MORTGAGE ACQUISITION CORP 2005-OPT2; J.P. MORGAN MORTGAGE ACQUISITION TRUST 2006-CW1; J.P. MORGAN MORTGAGE ACQUISITION TRUST 2006-CW2; J.P. MORGAN MORTGAGE ACQUISITION CORP 2006-FRE2; MERRILL LYNCH MORTGAGE INVESTORS TRUST SERIES 2005-SL3; MORGAN STANLEY MORTGAGE LOAN TRUST 2007-3XS; NEW CENTURY ALTERNATIVE MORTGAGE LOAN TRUST 2006-ALT2; RAMP SERIES 2005-EFC2 TRUST; RAMP SERIES 2005-EFC5 TRUST; RAMP SERIES 2005-EFC6 TRUST; RAMP SERIES 2006-EFC2 TRUST; RASC SERIES 2005-AHL2 TRUST; RASC SERIES 2005-AHL3 TRUST; RASC SERIES 2005-EMX3 TRUST; RASC SERIES 2005 EMX4 TRUST; RASC SERIES 2005-KS11 TRUST; RASC SERIES 2005-KS12 TRUST; RASC SERIES 2005-KS9 TRUST; RASC SERIES 2006-EMX2 TRUST; RASC SERIES 2006-EMX3 TRUST; RASC SERIES 2006-EMX4 TRUST; RASC SERIES 2006-EMX7 TRUST; RASC SERIES 2006-EMX9 TRUST; RASC SERIES 2006-KS1 TRUST; RASC SERIES 2006-KS2 TRUST; STRUCTURED ADJUSTABLE RATE

MORTGAGE LOAN TRUST SERIES 2006-5; SASCO MORTGAGE LOAN TRUST SERIES 2005-GEL1; STRUCTURED ASSET SECURITIES CORP 2005-WF4; STRUCTURED ASSET SECURITIES CORP MORTGAGE LOAN TRUST 2006-EQ1; STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE LOAN TRUST 2006-WF2; STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE LOAN TRUST 2006-WF3,

Nominal Defendants.

Index No. 654440/2015
Case No. 2021-01680

IKB INTERNATIONAL, S.A., in Liquidation
and IKB DEUTSCHE INDUSTRIEBANK A.G.,

Plaintiffs-Respondents-Appellants,

—against—

HSBC BANK USA, N.A., as Trustee (and any predecessors or successors thereto,

Defendants-Appellants-Respondents,

—and—

ACE SECURITIES CORP. HOME EQUITY LOAN TRUST, SERIES 2006-OP2; GSAA HOME EQUITY TRUST 2005-15; NOMURA HOME EQUITY LOAN TRUST, SERIES 2005-HE1; NOMURA HOME EQUITY LOAN, INC., HOME EQUITY LOAN TRUST SERIES 2006-WF1; RENAISSANCE HOME EQUITY LOAN TRUST 2004-4; RENAISSANCE HOME EQUITY LOAN TRUST 2005-1; RENAISSANCE HOME EQUITY LOAN TRUST 2005-4; RENAISSANCE HOME EQUITY LOAN TRUST 2006-1; RENAISSANCE HOME EQUITY LOAN TRUST 2006-2; RENAISSANCE HOME EQUITY LOAN TRUST 2006-3; RENAISSANCE HOME EQUITY LOAN TRUST 2006-4; RENAISSANCE HOME EQUITY LOAN TRUST 2007-1; RENAISSANCE HOME EQUITY LOAN TRUST 2007-2; WELLS FARGO HOME

EQUITY ASSET-BACKED SECURITIES 2005-2 TRUST; WELLS FARGO HOME EQUITY ASSET-BACKED SECURITIES 2006-1 TRUST,

Nominal Defendants.

Index No. 654439/2015
Case No. 2021-01813

IKB INTERNATIONAL, S.A., in Liquidation and IKB DEUTSCHE INDUSTRIEBANK A.G.,

Plaintiffs-Respondents-Appellants,

—against—

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee (and any Predecessors or successors thereto); DEUTSCHE BANK TRUST COMPANY AMERICAS, as Trustee (and any predecessors or successors thereto),

Defendants-Appellants-Respondents.

—and—

ACCREDITED MORTGAGE LOAN TRUST 2004-3; ACCREDITED MORTGAGE LOAN TRUST 2005-4; ACCREDITED MORTGAGE LOAN TRUST 2006-1; ACCREDITEDMORTGAGE LOAN TRUST 2006-2; ARGENT SECURITIES INC., ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2005-W2; CITIGROUP MORTGAGE LOAN TRUST, SERIES 2005-OPT3; EQUIFIRST MORTGAGE LOAN TRUST 2004-2; FIRST FRANKLIN MORTGAGE LOAN TRUST 2005-FFH3; FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF8; GSAMP TRUST 2006-HE1; HSI ASSET SECURITIZATION CORP. TRUST 2006-OPT2; IMPAC SECURED ASSETS CORP MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-3; IMPAC CMP TRUST SERIES 2004-5; IMPAC CMB TRUST SERIES 2005-5; IMPAC CMB TRUST SERIES 2005-8; IMPAC SECURED ASSETS CORP., MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-1; IMPAC SECURED ASSETS CORP., MORTGAGE PASS-THROUGH

CERTIFICATES, SERIES 2006-2; INDYMAC INDX MORTGAGE LOAN TRUST 2005-AR21; INDYMAC INDX MORTGAGE LOAN TRUST 2006-AR9; J.P. MORGAN MORTGAGE ACQUISITION TRUST 2007-CH1; J.P. MORGAN MORTGAGE ACQUISITION TRUST 2007-HE1; LONG BEACH MORTGAGE LOAN TRUST 2004-2; MORGAN STANLEY ABS CAPITAL I INC. TRUST 2005-HE3; MORGAN STANLEY ABS CAPITAL I INC. TRUST 2005-HE6; MORGAN STANLEY ABS CAPITAL I INC. TRUST 2005-HE7; MORGAN STANLEY ABS CAPITAL I INC. TRUST 2005-NC1; MORGAN STANLEY CAPITAL I INC. TRUST 2006-NC2; MORGAN STANLEY ABS CAPITAL I INC. TRUST 2007-HE5; MORGAN STANLEY HOME EQUITY LOAN TRUST 2006-1; MORGAN STANLEY HOME EQUITY LOAN TRUST 2006-3; NEW CENTURY HOME EQUITY LOAN TRUST, SERIES 2005-C; NEW CENTURY HOME EQUITY LOAN TRUST SERIES 2005-D; POPULAR ABS MORTGAGE PASS-THROUGH TRUST 2007-A; SAXON ASSET SECURITIES TRUST 2006-3; SAXON ASSET SECURITIES TRUST 2007-2; SOUNDVIEW HOME LOAN TRUST 2006-EQ1; WAMU SERIES 2007-HE1 TRUST,

Nominal Defendants.

Index No. 654436/2015
Case No. 2021-01816

IKB INTERNATIONAL, S.A., in Liquidation
and IKB DEUTSCHE INDUSTRIEBANK A.G.,

Plaintiffs-Respondents-Appellants,

—against—

LASALLE BANK N.A. as Trustee (and any predecessors or successors thereto); BANK OF AMERICA, N.A. as successor by merger to LASALLE BANK, N.A. as Trustee (and any predecessors or successors thereto),

Defendants-Appellants-Respondents,

—and—

ACCREDITED MORTGAGE LOAN TRUST 2005-3; BEAR STEARNS ASSET BACKED SECURITIES I TRUST 2007-HE4; BEAR STEARNS ASSET BACKED SECURITIES I TRUST 2007-HE5; C-BASS TRUST 2006-CB9; GSAMP TRUST 2006-HE7; MERRILL LYNCH MORTGAGE INVESTORS TRUST SERIES 2005-SL3; and MORGAN STANLEY MORTGAGE LOAN TRUST 2007-3XS,

Nominal Defendants.

Index No. 654438/2015
Case No. 2021-01988

IKB INTERNATIONAL, S.A., in Liquidation and IKB DEUTSCHE INDUSTRIEBANK A.G.,

Plaintiffs-Respondents-Appellants,

—against—

THE BANK OF NEW YORK, as Trustee (and any predecessors or successors thereto); BNY WESTERN TRUST COMPANY, as Trustee (and any predecessors or successors thereto); THE BANK OF NEW YORK TRUST COMPANY, N.A., as Trustee (and any predecessors or successors thereto); THE BANK OF NEW YORK MELLON CORPORATION, N.A., as Trustee (and any predecessors or successors thereto); THE BANK OF NEW YORK MELLON CORPORATION, N.A., as Successor by Merger to THE BANK OF NEW YORK, as Trustee (and any predecessors or successors thereto); THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., as Successor by Merger to BNY WESTERN TRUST COMPANY, as Trustee (and any predecessors or successors thereto); THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., as Successor by Merger to THE BANK OF NEW YORK TRUST COMPANY, N.A., as Trustee (and any predecessors or successors thereto),

Defendants-Appellants-Respondents,

—and—

CENTEX HOME EQUITY LOAN TRUST 2004-B; CWABS TRUST 2005-HYB9; CHL MORTGAGE PASS-THROUGH TRUST 2006-HYB1; CWABS INC. ASSET BACKED CERTIFICATES SERIES 2004-4; CWABS INC. ASSET BACKED CERTIFICATES SERIES 2005-13; CWABS INC. ASSET BACKED CERTIFICATES SERIES 2005-14; CWABS INC. ASSET BACKED CERTIFICATES SERIES 2005-15; CWABS ASSET BACKED CERTIFICATES TRUST 2005-AB4; CWABS ASSET-BACKED CERTIFICATES TRUST 2005-BC5; CWABS INC. ASSET-BACKED CERTIFICATES TRUST 2005-IM1; CWABS ASSET-BACKED CERTIFICATES TRUST 2005-IM3; CWABS ASSET-BACKED CERTIFICATES TRUST 2006-1; CWABS ASSET-BACKED CERTIFICATES TRUST 2006-10; CWABS ASSET-BACKED CERTIFICATES TRUST 2006-13; CWABS ASSET-BACKED CERTIFICATES TRUST 2006-18; CWABS ASSET-BACKED CERTIFICATES TRUST 2006-19; CWABS ASSET-BACKED CERTIFICATES TRUST 2006-3; CWABS ASSET-BACKED CERTIFICATES TRUST 2006-5; CWABS ASSET-BACKED CERTIFICATES TRUST 2006-SPS1; CWABS ASSET-BACKED CERTIFICATES TRUST 2006-SPS2; CWABS ASSET-BACKED CERTIFICATES TRUST 2007-4; HOME EQUITY LOAN TRUST 2007-FRE1; NATIONSTAR HOME EQUITY LOAN TRUST 2007-A; NATIONSTAR HOME EQUITY LOAN TRUST 2007-B; NATIONSTAR HOME EQUITY LOAN TRUST 2007-C; POPULAR ABS MORTGAGE PASS-THROUGH TRUST 2006-E; RASC SERIES 2001-KS2 TRUST,

Nominal Defendants.

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1. The index numbers of the cases are 654443/2015, 654442/2015, 654440/2015, 654439/2015, 654436/2015, 654438/2015.

2. The full names of the original parties are as set forth above. There has been no change in the parties.

3. The actions were commenced in Supreme Court, New York County.

4. The actions were commenced on December 30, 2015 and October 5, 2016, by service of summons with notice, and May 27, 2016 by service of complaint; the answers of Defendants were served on April 9, 2021 and May 13, 2021.

5. The nature and object of the action are breaches of contractual, fiduciary and statutory duties.

6. These appeals and cross-appeals arise from the Decision and Orders of Honorable Marcy S. Friedman, entered on January 28, 2021 which granted in part and denied in part Defendants' Motions to Dismiss Plaintiffs' complaints.

7. The appeals are on a full reproduced record.