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

New York County Clerk's Index Nos. 654443/2015,
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New York Supreme Court

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

(*Caption continued on inside cover*)

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

REPLY BRIEF AND RESPONSE TO CROSS-APPEAL BY DEFENDANTS-APPELLANTS-RESPONDENTS

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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. 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

Defendants' appeal concerns straightforward contract-interpretation rules. And cases like this one "dealing with residential mortgage-backed securities (RMBS)" share "a consistent theme: does the contract mean what it says?" *Matter of Part 60 Put-Back Litig.*, 36 N.Y.3d 342, 348 (2020). The Court of Appeals has time and again answered that question in the affirmative. *Id.* Because the trial court sustained several claims that contravene the contractual text, this Court should reverse.

Plaintiffs' cross-appeal concerns straightforward accrual rules. A breach-of-contract claim "accrues at the time of the breach … though no damage occurs until later." *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 402 (1993). Here, Plaintiffs allege that the trustees failed to enforce repurchase rights based on missing or defective documents around when the trusts closed, more than six years before Plaintiffs sued. That the trustees had the ability to take action *until repurchase claims expired* says nothing about when they *first allegedly breached* by failing to do so. The trial court's straightforward application of accrual rules to Plaintiffs' allegations should be affirmed.

ARGUMENT

I. The Trial Court Erred In Sustaining Plaintiffs' Remaining Claims.

A. Defendants Had No Pre-EOD Duty To Enforce Repurchase Obligations Absent Text Specifically Obligating Them To Do So.

The Governing Agreements here fall into four categories with respect to the pre-Event of Default (EOD) enforcement of repurchase obligations. Agreements in three categories specifically impose an enforcement duty on a transaction participant. But, as the trial court recognized, agreements in the fourth category "*do not specifically assign* the obligation to enforce put-back rights to any specific deal party." R.46 (emphasis added). The trial court erred by not dismissing Plaintiffs' pre-EOD enforcement claims as to this fourth category because the Governing Agreements provide that "[t]he Trustee … undertakes to perform … *only such duties as are specifically set forth* in this Agreement" in its "express provisions." Appellants' Br. (Br.) 11 (citation omitted; emphasis added).

In defending this mistake, Plaintiffs do not dispute that (i) the trustees only have the duties that are "express" and "specifically set forth" in the Governing Agreements; (ii) courts cannot impose additional duties; or (iii) that the trial court's interpretation renders other contractual language superfluous. *See* Br.12-14. Rather, Plaintiffs contend that, despite this *specific* limitation on the trustees' duties, *general* language elsewhere in the agreements stating that the trustees "hold the Trust Fund and exercise the rights referred to above for the benefit of [certificateholders]," *e.g.*,

R.23502-96, imposes "an express duty on the Trustees to 'exercise the rights referred to above,'" including the right to enforce repurchase obligations. Respondents' Br. (IKB.Br.) 29. Neither the "for the benefit of" clauses nor the PSAs as a whole can support that interpretation.

Most fundamentally, imposing such an amorphous obligation on the trustees contravenes the language limiting the trustees' duties to those that are "express" and "specifically set forth," as well as long-established precedent affirming the limited, ministerial role of corporate trustees. *See* Br.12-13, 15-16. The general language Plaintiffs invoke merely satisfies the requirement that a trust instrument include "an expression of intent" that the trustee hold and use trust property "for the benefit of one other than the settlor" to create an irrevocable trust. Br.13-14. In other words, it generally references the trustees' "rights" in order to clarify for whom the trustee exercises those rights.

And that the trustees may have a "right" to enforce is irrelevant, because (again) the trustees have only "*duties*" that are both "express" and "specifically set forth." The PSAs further reinforce this by commanding that the trustees' rights "shall not be construed as" duties. Br.12 (citation omitted). And even if this language could be read in "duty" terms, it cannot be read as imposing an "express" duty, let alone one that is "specifically set forth." Plaintiffs' primary support—an unpublished trial-court opinion—made the same mistake as the trial court here by

failing to give effect to the unambiguous provisions limiting the trustees' duties. *W. & S. Life Ins. Co. v. U.S. Bank Nat'l Ass'n*, No. 650259/2019, 2020 WL 6534496, at *4 (Sup. Ct., N.Y. Cty. Nov. 5, 2020) (cleaned up) (appeal pending); *see* IKB.Br.29; Br.12.

Finally, Plaintiffs offer no meaningful distinction for the multiple cases that reject their view of "for the benefit of" provisions. *See* Br.15-16; IKB.Br.30-31. For example, Plaintiffs do not deny that their position cannot be squared with decisions by Ohio courts and the Southern District addressing materially identical language in RMBS agreements governed by New York law—as evidenced by their conclusory assertion that those cases were "wrongly decided." IKB.Br.30-31; *see* Br.15 (citing, *e.g.*, *Commerzbank AG v. U.S. Bank Nat'l Ass'n*, 457 F. Supp. 3d 233, 257–58 (S.D.N.Y. 2020)). That those decisions occurred at the summary-judgment or trial stages (IKB.Br.30-31) is irrelevant because there was no indication the courts considered extrinsic evidence.

B. Plaintiffs Did Not Plead Necessary Elements Of Their EOD Claims.

As Defendants explained (Br.16-27), the trial court committed multiple errors in addressing Plaintiffs' post-EOD contract claims. In response, Plaintiffs urge this Court to repeat those mistakes, including by following federal decisions that refused to apply this Court's precedents. This Court should not do so.

1. Plaintiffs Failed To Plead That EODs Occurred.

a. For many of the PSA trusts, Plaintiffs failed to plead written notice to the servicer or master servicer of a breach that might ripen into an EOD, an essential element of some of their EOD claims. Br.19-22. Plaintiffs respond by pointing to *different* EODs or contracts that do *not* require written notice or require only actual knowledge of a breach. IKB.Br.32-34. But Defendants have not appealed the trial court's rulings on those EOD theories.

When Plaintiffs actually reach the issue on appeal, they do not dispute that many of their EOD theories *do* require that the servicer or master servicer receive written notice of a breach (and an opportunity to cure) before it can ripen into an EOD. *See* IKB.Br.34-36. They nevertheless urge this Court to affirm based on an unpled "allegation" that it is "possible that the Trustees, or the proper percentage of certificateholders, or some other party who was authorized to provide the written notice of servicing failures necessary to ripen a 'default' into an Event of Default actually did so." IKB.Br.36. That allegation is not in the complaints, and speculation that a fact might exist is not a basis for alleging it. *See, e.g.*, *Jones v. Voskresenskaya*, 125 A.D.3d 532, 534 (1st Dep't 2015) (speculative allegations are insufficient to support breach of contract).

What Plaintiffs *did* allege—"written notices *from investors* regarding servicing failures" and notice from "*monoline insurers* … of pervasive breaches by

the Sellers," R.56-57 (emphases added)—is insufficient. As the trial court noted, "[i]t is unclear whether these written investor notices were specifically addressed [to] any of the Trusts at issue here," R.56 n.15, and Plaintiffs have not alleged that these investors held the requisite percentage of voting rights to send such a notice, Br.20. Plaintiffs also do not deny that monoline insurers are not authorized to provide notice of a breach capable of triggering an EOD. IKB.Br.35. And "pervasive breaches by the *Sellers*" cannot ripen into an EOD under the PSA trusts, which address breaches only by *servicers or master servicers*. R.56-57 (emphasis added).

As the cases Defendants cited make clear, the failure to allege notice by the specific parties authorized to provide such notice defeats a claim that an EOD occurred. *See* Br.20-22; *see also Bakal v. U.S. Bank*, 747 F. App'x 32, 35 (2d Cir. 2019) ("the alleged failures of the Master Servicer did not ripen" into an EOD when there was no allegation "that such notice was given *by any of those parties*") (emphasis added). Plaintiffs address only *one* of these decisions—*Blackrock Balanced Capital Portfolio (FI) v. U.S. Bank N.A.*, 165 A.D.3d 526, 528 (1st Dep't 2018)—arguing that *Blackrock* "held only" that because "the trustee was not the party required to send a written notice" under the PSA there, "the plaintiff could not assert a separate claim against the trustee for failing to send such notice." IKB.Br.35-36. But in *Blackrock*, this Court observed that there was no dispute that

"notice of servicing breaches was sent on behalf of investors in 77 of the trusts," and that "investors held more than 25% of the voting rights in 21 of the 77 trusts." 165 A.D.3d at 527. Because those investors did not hold 25% of the voting rights in the other trusts, the notice did not trigger an EOD for those trusts.

b. Relying solely on federal district-court decisions and unpled allegations, Plaintiffs also urge this Court to overturn two prior decisions holding that the prevention doctrine does not preclude an RMBS trustee from challenging a post-EOD claim based on a plaintiff's failure to allege notice to the servicer of a breach that, if not cured, could ripen into an EOD. *See Fixed Income Shares: Series M v. Citibank, N.A.*, 157 A.D.3d 541, 542-43 (1st Dep't 2018); *BlackRock*, 165 A.D.3d at 527; IKB.Br.36-40. Neither is a compelling basis for doing so.

First, the federal rulings Plaintiffs invoke—two of which were decided before this Court's 2018 rulings—cannot be squared with precedent from the Court of Appeals, which has long held that the prevention doctrine "requires the party's 'active conduct preventing or hindering the fulfillment of the condition.'" *Fixed Income*, 157 A.D.3d at 542 (quoting *Amies v. Wesnofske*, 255 N.Y. 156, 163 (1931)) (ellipsis omitted). So while the federal decisions Plaintiffs cite thought it "counterintuitive to hold that a Trustee could avoid [post-EOD] duties by claiming it did not send written notice to an appropriate deal party when the Trustee is the only party in a position to learn of a servicer breach," *Commerzbank*, 457 F. Supp.

3d at 250, the Court of Appeals has made clear that a party's duty "is fulfilled if he remain passive and neutral" and a condition "is waived only where the [party] is active to prevent or hinder its performance," *Amies*, 255 N.Y. at 163; *see also In re Bankers Trust Co.*, 450 F.3d 121, 128 (2d Cir. 2006) ("[O]nly active conduct by the promisor to frustrate the occurrence of the condition precedent constitutes waiver of that condition precedent."). In any event, that concern is absent here: Other parties (including certificateholders like Plaintiffs) not only had the same access as Defendants to the public reports of servicer misconduct, Plaintiffs allege those parties actually sent such notices. *E.g.*, R.559-51. Accordingly, the trustees here were *not* "the only part[ies] in a position to learn of a servicer breach." *Commerzbank*, 457 F. Supp. 3d at 250.

Second, Plaintiffs' speculation that discovery "may show" that the trustees' failure to provide written notice was the result of "policies specifically designed to avoid creating EODs" cannot trigger the prevention doctrine. IKB.Br.39. Even assuming *arguendo* that Defendants had such a policy, Plaintiffs have not pointed to anything that Defendants did to actively frustrate or hinder *other* authorized deal parties' ability to send notice of an EOD. At most, they (propose to) allege that Defendants had a policy not to do something that they were not required to do. But that is not enough to state a claim.

c. With respect to Plaintiffs' EOD claims under the Indenture Trusts, Plaintiffs failed to allege a breach by the *issuers* of such trusts, the only party to those trusts whose conduct is capable of triggering an EOD. Br.22-23. Plaintiffs nonetheless urge this Court to allow those claims to proceed based on alleged failures by *different* parties, whose conduct *cannot* trigger an EOD under the Indentures. IKB.Br.40-41. Invoking *Royal Park Invs. SA/NV v. HSBC Bank USA*, 109 F. Supp. 3d 587 (S.D.N.Y. 2015), Plaintiffs contend that "the same" allegations supporting the trial court's conclusion that they had pleaded "R&W breaches and servicing failures" also "plead the issuers' failure to cause the trustees and master servicers or servicers to enforce rights.' " IKB.Br.41 (citation omitted). But *Royal Park* requires pleading seller and servicer defaults that were "known and unremedied" by the issuers. 109 F. Supp. 3d at 604. Plaintiffs do not point to any allegations concerning the issuers at all.

2. Plaintiffs Failed To Allege That Defendants Received Written Notice Or Had Actual Knowledge That EODs Occurred.

Plaintiffs' EOD claims also should have been dismissed due to their failure to allege "that the trustees had either actual knowledge or written notice that any purported servicing breach *had ripened* into an EOD." Br.24 (emphasis added). Plaintiffs alleged only that Defendants received written notice or had actual knowledge of purported servicing breaches that *could ripen* into an EOD. *Id.* On appeal, Plaintiffs continue to overlook this critical distinction.

a. Plaintiffs wrongly claim that Defendants "offer virtually no argument" "for those Trusts for which actual knowledge is sufficient." IKB.Br.42. Defendants observed that the trial court "did not address" *Arrowgrass Master Fund Ltd. v. BNYM*, 106 A.D.3d 582 (1st Dep't 2013), *lv. denied*, 22 N.Y.3d 858 (2013), "which involved an indenture requiring that the trustee have either actual knowledge or written notice of an EOD before post-EOD duties could arise." Br.26-27. As Defendants explained, the trial court in *Arrowgrass* held that, where an indenture required the indenture trustee to have "actual knowledge" or "written notice" of a default before any post-EOD duties could arise, allegations concerning the trustee's "knowledge of facts from news reports and documents relevant to the" default were insufficient to plead actual knowledge. *Arrowgrass Master Fund Ltd. v. BNYM*, 2012 WL 8700416, at *4, *9 (Sup. Ct., N.Y. Cty. Feb. 24, 2012) (cleaned up). The trial court in *Arrowgrass* ruled that "plaintiffs are conflating the issue of whether" a default occurred "with the separate question as to whether [the trustee] had 'actual knowledge,'" *id.* at *9—the same error made by Plaintiffs here. This Court affirmed, rejecting "plaintiffs' argument that the complaint sufficiently alleges defendant's actual knowledge of a default or event of default." 106 A.D.3d at 583.

Plaintiffs argue that *Arrowgrass* is "inapposite" because it "was not an RMBS case." IKB.Br.44. But the indenture in *Arrowgrass* contained provisions nearly identical to those here, and Plaintiffs offer no reason why the meaning of those words

should vary depending on the type of collateral at issue. *Compare, e.g.*, R.928 *with Arrowgrass*, 2012 WL 8700416, at *4; *see Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982) (standard clauses "must be given a consistent, uniform interpretation"). Plaintiffs also claim that *Arrowgrass* involved "conclusory allegations of actual knowledge," whereas they have offered "detailed allegations." IKB.Br.44. Tellingly, however, Plaintiffs fail to point to a single allegation in their own complaints concerning Defendants' actual knowledge that an EOD had actually occurred and was continuing, because there is none.

b. Plaintiffs are even less persuasive when it comes to trusts requiring that the trustee receive written notice of an EOD. As Defendants explained, the trial court erred when it disregarded *Commerce Bank v. BYNM*, 141 A.D.3d 413 (1st Dep't 2016), and held that generalized allegations relating to the trustees' receipt of servicing reports, investor letters, and news materials relating to unspecified "servicing failures" can plead a specific written notice of an EOD. Br.24-25. That is because after receiving notice of a servicing breach, a servicer or master servicer has the right to remedy that breach within a contractual cure period before it can ripen into an EOD. If the breach is cured, no EOD will ever occur. And the trustee may not even *know* whether the servicer or master service has cured, which is all the more reason to require specific written notice. Thus, even if allegations concerning notice of servicing breaches that *could ripen* into EODs are somehow sufficient to

plead that EODs *occurred*, they cannot plead that Defendants received *written notice* that those EODs did in fact occur.

Plaintiffs respond that *Commerce Bank* did not involve an "allegation of any specific servicing failure of which there was notice … sufficient to constitute an [EOD],'" and "the only 'written notice' alleged was a letter rendered inoperative by a related settlement." IKB.Br.44 (citations omitted). But the letter in *Commerce Bank* was insufficient because it stated only that an EOD *would occur* if the identified breaches went unremedied, and not that an EOD *had occurred*. *Commerce Bank v. BNYM*, 2015 WL 5770467, at *4 (Sup. Ct., N.Y. Cty., Oct. 2, 2015). Plaintiffs appear to misapprehend this Court's reasoned distinction between a "notice of an Event of Default" and "a notice of events [*i.e.*, servicing breaches] that, with time, might ripen into Events of Default." *Commerce Bank*, 141 A.D.3d at 415. And, in any event, Plaintiffs' allegations that Defendants received notice of breaches here do not even say that the breaches *could* give rise to an EOD.

C. The Economic Loss Doctrine Bars Tort Claims Seeking Recovery Of The Benefit Of The Bargain.

As explained (Br.27-28), this Court held in *BlackRock* that tort claims virtually identical to the ones here were barred by the economic loss doctrine. Plaintiffs attempt to distinguish *Blackrock* by arguing the plaintiffs there pleaded no extra-contractual duties, whereas here "the Trustees had *extra-contractual* fiduciary duties," and "the Trustees' breach of these duties caused damages to the Trusts above

and beyond any damages caused by the Trustees' breach of their contractual duties." IKB.Br.46–47. But Plaintiffs pled no facts in the Complaints to support that conclusory assertion. Moreover, the focus of the economic loss doctrine is on the source of the damages, not the source of the breached duty. Plaintiffs' damages allegations are identical as between their tort and contract claims. *Compare, e.g.*, R.13471–2 (HSBC Compl. ¶¶ 405, 411), *with* R.13469 (HSBC Compl. ¶¶ 395–96). All of the damages allegedly stemming from both Plaintiffs' contract and tort claims amount to the diminution in cash flows from Plaintiffs' investments. Recovery in tort is not available for such purely economic losses. IKB.Br.48. Because Plaintiffs' tort claims seek "only a benefit of the bargain recovery" in tort, *17 Vista Fee Assocs. v. Teachers Ins. & Annuity Ass'n of Am.*, 259 A.D.2d 75, 83 (1st Dep't 1999), those claims are barred.

Even the Southern District cases Plaintiffs cite for support are mixed on whether claims substantially similar to theirs can proceed. For example, in *BlackRock Allocation Target Shares: Series S Portfolio v. Wells Fargo Bank, N.A.*, 247 F. Supp. 3d 377 (S.D.N.Y. 2017), the court qualified that the plaintiffs in that case "pleaded that Defendant breached extracontractual duties, for which *Plaintiffs are owed damages that do not lie simply in the enforcement of Defendant's contractual obligations*." *Id.* at 400 (emphasis added). Here, Plaintiffs alleged no facts suggesting they are owed damages that do not lie simply in the enforcement of

Defendants' contractual obligations. Instead, they allege that Defendants' actions led to the diminution of the value of their investments. These allegations seek only redress for the same economic loss contemplated by their breach of contract claims.

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

Plaintiffs tellingly offer no response to the trustees' arguments that the Governing Agreements' no-action clauses bar Plaintiffs' claims on the merits. Br.30-36. Instead, they merely insist that *Blackrock* "should end the inquiry." IKB.Br.49. But *Blackrock* does not apply to individual actions such as this one, and if it does, then it should be overruled. Br.36-40.

While Plaintiffs concede *Blackrock* involved "a class action, while the claims here are brought individually," they dismiss this distinction as irrelevant. IKB.Br.49. But Plaintiffs ignore that the *Blackrock* plaintiffs purported to represent the common interests of not just 25% of certificateholders, but *all* certificateholders, whereas in this individual action, Plaintiffs have not, and cannot, allege any basis for satisfying the 25% threshold. Br.36-37. By the same token, they do not contest that only the investor-support requirements can protect the collective interest of all certificateholders here. *See* Br.37. And Plaintiffs do not even mention, much less grapple with, this Court's precedent distinguishing between individual and representative actions in the context of investor-support requirements. *See Campbell v. Hudson & Manhattan R.R. Co.*, 277 A.D. 731, 735 (1st Dep't 1951); Br.37-38.

Plaintiffs' only argument for rejecting the distinction between individual and representative actions in the context of investor-support requirements is to contend that *MLRN LLC v. U.S. Bank Nat'l Ass'n*, 190 A.D.3d 426 (1st Dep't 2021), held as much. *See* IKB.Br.49-51. But *MLRN*'s one-paragraph opinion says not a word on the subject. *See MLRN*, 190 A.D.3d at 426. Rather, this Court held only that because the trustee there, U.S. Bank, "was also the defendant in *Blackrock*," it could "not relitigate the issue that it raised therein and that was decided against it." *Id.*

Faced with that silence, Plaintiffs observe that *MLRN* involved "an individual action," and that U.S. Bank distinguished between individual and representative suits "in its brief." IKB.Br.49-50. But this Court never addressed that distinction, and it is blackletter law that "[q]uestions which 'merely lurk in the record' are not resolved, and no resolution of them may be inferred." *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979) (internal citations omitted).

Plaintiffs therefore pivot to contending that because *MLRN* held that U.S. Bank was collaterally estopped from relitigating *Blackrock*, it also "necessarily" decided that *Blackrock* "applies regardless of whether the action is a class or individual action." IKB.Br.49-50. But "*stare decisis*" applies only if the earlier decision "squarely addressed the issue," and *MLRN* did not even mention the distinction between individual and class actions, much less directly reject it. *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993); *see, e.g.*, *Friends of the E. Hampton*

Airport, Inc. v. Town of E. Hampton, 841 F.3d 133, 153 (2d Cir. 2016) (explaining that "a *sub silentio* holding is not binding precedent").

Indeed, transforming a *sub silentio* holding into binding precedent would be particularly problematic here. As Plaintiffs acknowledge, all of the trustees save for U.S. Bank "did not have a full and fair opportunity to contest the issue in *MLRN*," and therefore cannot be "collaterally estopped from making that argument." IKB.Br.49. Yet Plaintiffs' reading of *MLRN* would have the same effect. This Court should reject Plaintiffs' invitation to apply collateral estoppel by another name, albeit a variant that takes no account of considerations of "fairness to the parties." *Buechel v. Bain*, 97 N.Y.2d 295, 304 (2001).

In any event, if this Court concludes that Plaintiffs' reading of *MLRN* and *Blackrock* is the only available one, then it should overrule those decisions. The trustees have already explained why *Blackrock*'s no-action-clause holding is both conclusory and clearly erroneous—and why the issue here is important and recurring—thereby making this ruling a prime candidate for reconsideration. *See* Br.38-40. In response, Plaintiffs do not even try to defend *Blackrock* as an original matter, let alone explain why this flawed but significant holding should stand. Instead, they emphasize its "recent[]" nature, IKB.Br.48, but erroneous decisions "do not merit application of 'a mechanical formula of adherence'[] just because of their recency," *People v. Hobson*, 39 N.Y.2d 479, 487 (1976).

E. IKB S.A.'s Claims Against BNYM In 19 Trusts Are Time-Barred.

The trial court erred when it refused to dismiss untimely claims asserted by IKB, S.A. Br.40-46. On appeal, Plaintiffs urge this Court to extend class-action tolling far beyond the limits that any court has ever endorsed, and to consider allegations in support of its equitable-tolling arguments that neither were pleaded nor are legally sufficient. IKB.Br.51-57. This Court should refuse the invitation.

1. Class-Action Tolling Applies Only To Class Members.

Class-action tolling does not apply to 19 of the trusts for which IKB, S.A. asserts claims against BNYM because none of those trusts was involved in any of the class actions identified. Br.42. As a result, IKB, S.A. was never a member of even an uncertified, putative class.

Plaintiffs do not dispute this, arguing instead that 17 of those trusts "are from the same 'shelf' as trusts at issue in one of the class actions." IKB.Br.52. But even assuming that trusts from the same shelf "appear in two of the thirteen class actions identified," IKB.Br.54, class-action tolling would be unavailable because Plaintiffs were never putative class members, and the class actions on which they rely asserted no claims as to these trusts. Under New York law, the first element for class-action tolling is that Plaintiffs were *members* of the earlier class—not simply that the class raised claims in the general vicinity of Plaintiffs' complaint. "Since they are not"

former class members, "application of *American Pipe* is foreclosed." *Singer v. Eli Lilly & Co.*, 153 A.D.2d 210, 217-18 (1st Dep't 1990).

While Plaintiffs concede that no New York court has ever applied class-action tolling to non-class members, they argue that tolling is appropriate here—even when the class actions they identify were against different defendants—because the prior class actions raised a "sufficiently similar set of concerns." IKB.Br.52; *see* IKB.Br.54-55. But the "same set of concerns" is the standard for class *standing*, not *tolling*. *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 148-49 (2d Cir. 2012). Moreover, one of Plaintiffs' own cases held that the class plaintiffs' "claims *do not* implicate the 'same set of concerns' as those of absent class members"—like Plaintiffs here—"who purchased certificates issued by trusts in which no named Plaintiff invested." *Retirement Bd. of the Policemen's Annuity & Benefit Fund v. BNYM,* 775 F.3d 154, 163 (2d Cir. 2014) (emphasis added). As the Second Circuit observed, claims that a trustee breached different PSAs are not even the same claim. *Id.* at 162.

Although Plaintiffs contend (IKB.Br.54) that *Practice Management Support Services, Inc. v. Cirque Du Soleil Inc.*, 146 F. Supp. 3d 997 (N.D. Ill. 2015), supports their novel theory, that case did not grant tolling to non-class-member *plaintiffs*. Instead, it allowed tolling against new *defendants*, because "the parties against

whom tolling is sought are the wholly-owned and jointly-controlled subsidiaries of their earlier-sued parent." *Id.* at 1004.

2. Plaintiffs Failed To Plead Facts Supporting Equitable Tolling.

After noting that other investors brought the same claims as early as 2011, Plaintiffs contend that it was impossible to bring those claims because the relevant information was concealed by Defendants. IKB.Br.55-56. But to benefit from equitable tolling Plaintiffs must plead that the information *was in fact concealed*. And Plaintiffs fail to point to a single fact alleged in the complaint that they could not have learned from the same news reports, investigations, and litigation involving RMBS dating back to 2011 that they rely on to allege breaches in the first place. Indeed, virtually all of their allegations are based on news articles dating back to 2010 or earlier, most of which was copied from similar complaints brought over a decade ago. In fact, the *only* "evidence" that Plaintiffs identify is a filing in an action against BNYM by another plaintiff that was not publicly available until August 19, 2021. *See* IKB.Br.56; Dkt. 260, *Pacific Life Ins. Co. v. BNYM*, No. 17-cv-01388 (S.D.N.Y.). Yet Plaintiffs managed to commence this action a full six years earlier, showing the allegedly "concealed" evidence was not the reason for their delay.

II. The Trial Court Correctly Dismissed Untimely Document-Defect Claims.

Plaintiffs' cross appeal challenges the dismissal of their document-defect claims as barred by New York's six-year statute of limitations for breach of contract.

The trial court twice rejected their arguments on this point. They are no more effective this time around.

A. Plaintiffs' Claims Accrued When The Trustees First Allegedly Failed To Address Document Defects, No Later Than 2008.

By way of background, the Governing Agreements spell out the process relating to document defects. At closing, the depositor delivers to the trustee or a "custodian" a set of documents relating to each underlying loan—together, the "mortgage file." R.6402-04, 6608-10. Within a specified time after closing, the trustee or custodian reviews each mortgage file and either certifies it is complete or identifies any "exceptions." *Id.*

Here, Plaintiffs claim that the trustees were required to "demand" that the sponsor, seller, or originator—the obligated party—"cure the defect leading to the exception or repurchase or replace the defective loans." *E.g.*, R.6404; *see* IKB.Br.16. Plaintiffs allege that the trustees became aware of document defects when they (or the separate custodian) reviewed the mortgage files and prepared certifications identifying "exceptions" around the trusts' closing. *E.g.*, R.35, 6402-04, 6421, 6608-10. They say that the trustees breached when they "accepted incomplete mortgage files" without requiring the obligated parties "to cure document defects or to substitute or repurchase those loans." *E.g.*, R.6419. Because the trusts closed between 2004 and 2007, and Plaintiffs did not sue until December

30, 2015, the trustees moved to dismiss these claims as barred by New York's six-year limitations period. *See* R.35-36, 651, 670, 682, 688, 19586, 27236.

In response, Plaintiffs argued that their claims accrued not when the certifications identified purported exceptions and the trustees *first failed* to require obligated parties to cure or repurchase, but when the trustees *lost the ability* to require obligated parties to cure or repurchase—*i.e.*, the day claims against the obligated parties expired. Plaintiffs thus asserted that their claims against the trustees accrued "six years from the day the loan files were delivered" and then expired six years later, giving Plaintiffs *twelve* years to sue "after the initial breach." R.1234-35.

The trial court rejected this "six-plus-six" theory, explaining that "[t]he alleged breaches occurred on the dates on which the Trustees were first required … to seek repurchase," and that "[t]he limitations period began at the time of those breaches, not at the time the Trustees were precluded from curing the breaches because they could no longer initiate timely repurchase actions." R.36. Plaintiffs sought re-argument, and the court rejected their theory again. NYSCEF 182, 189.

The trial court got it right. New York's six-year limitations period for contract claims runs "from the date of the initial alleged breach." *Welwart v. Dataware Elecs. Corp.*, 277 A.D.2d 372, 373 (2d Dep't 2000); *accord Maloul v. New Colombia Res., Inc.*, 2017 WL 2992202, at *6-7 (S.D.N.Y. July 13, 2017). That is because, given

the availability of nominal damages, all "elements necessary to maintain a lawsuit and obtain relief in court" are "present at the time of the alleged breach." *Ely-Cruikshank*, 81 N.Y.2d at 402.

Plaintiffs' claims that the trustees failed to address document defects thus accrued when the trustees were *first* required to address document defects but failed to do so. *See, e.g.*, *Phoenix Light SF Ltd. v. Wells Fargo Bank, N.A.*, 2021 U.S. Dist. LEXIS 233418, at *58-62 (S.D.N.Y. Dec. 6, 2021) (report and recommendation advising dismissal of identical claims under the same contractual provisions); *Guzman v. 188-190 HDFC*, 37 A.D.3d 295, 297 (1st Dep't 2007) (limitations period began to run when party "omitted performance of an obligation under the" contract); *Derringer v. F.G.G. Prods. Inc.*, 2020 WL 6801985, at *7–8 (Sup. Ct., N.Y. Cty. Nov. 18, 2020). The contracts say that the trustee must address document defects upon "discovery or receipt of notice" of those defects. *E.g.*, IKB.Br.16 (citation omitted). Plaintiffs say the trustees discovered document defects during the mortgage-file review performed around the trusts' closing. *Supra* at 22. The trusts all closed by the end of 2007. *Id.* Thus, plaintiffs' allegations, when paired with the contracts, reveal that Defendants would have "breached by 2008, at the latest" for all trusts. R.36. So Plaintiffs' claims for all trusts expired by the end of 2014, at the latest. *Id.* Because Plaintiffs did not sue until December 2015, their document-defect claims for all trusts are time barred. *Id.*

B. Plaintiffs' Arguments For A Later Accrual Date Fail.

1. Plaintiffs' Six-Plus-Six Theory Ignores Accrual Principles.

Plaintiffs nevertheless insist their claims accrued only when the trustees could no longer file repurchase litigation—six years after closing. But that six-plus-six theory ignores New York's well-settled accrual rules. By focusing on when the trustees "no longer were able to" take action against obligated parties, R.1235, Plaintiffs "overlook[] the distinction between a breach and the ability to cure a breach." *First Am. Title Ins. Co. v. Fiserv Fulfillment Servs., Inc.*, 2008 WL 3833831, at *2 (S.D.N.Y. Aug. 14, 2008) (holding that "defendant's failure to record the mortgages was a breach of contract that occurred in the first few days after the real estate closings at issue," even though defendant "'could have' recorded the mortgages until doing so would have been ineffective under the record statute"); *see Mindspirit, LLC v. Evalueserve Ltd.*, 346 F. Supp. 3d 552, 593 (S.D.N.Y. 2018) (subsequent alleged breaches did not restart limitations period because they "constitute[d] a failure to cure the breach, rather than the breach itself"). The trial court recognized this distinction, holding that "[t]he limitations period began at the time of those breaches, not at the time the Trustees were *precluded from curing the breaches* because they could no longer initiate timely repurchase actions." R.36 (emphasis added).

2. The Six-Plus-Six Theory Does Not Govern *R&W* Repurchase Claims.

Plaintiffs insist that "New York courts, including the Motion Court here, have consistently ruled that R&W Breach Repurchase Enforcement Claims are subject to the 'Six-Plus-Six' limitations period," and "[t]here is no basis to distinguish" those claims from the ones here. IKB.Br.15. But Plaintiffs never identify where the trial court held that a six-plus-six theory applies to R&W repurchase claims—because there is no such holding. In fact, the trustees *did not even move* to dismiss R&W claims as untimely. NYSCEF 183 at 11-13; R.670.

Nor did two recent trial-court decisions definitively hold that R&W claims "are subject to" the "Six-Plus-Six limitations period." IKB.Br.15. At most, those decisions stated that the longest potential limitations period for pleading purposes in those cases was twelve years. *See MLRN LLC v. U.S. Bank Nat'l Ass'n*, 2019 WL 5963202, at *4 (Sup. Ct., N.Y. Cty. Nov. 13, 2019); *W. & S. Life*, 2020 WL 6534496, at *7. In any event, the trial court here was not required to follow suit. Plaintiffs allege the trustees were required (but failed) to take action against obligated parties once they discovered document defects—which Plaintiffs allege was at or soon after closing. And "when [Plaintiffs'] claim accrued based on the pleaded facts" is a "legal question," *Melcher v. Greenberg Traurig, LLP*, 23 N.Y.3d 10, 13 (2014), which is why courts decide these issues on motions to dismiss. *E.g.*, *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009). Likewise, because

Plaintiffs' six-plus-six theory is a "legal conclusion[]," it is "not entitled to be accepted as true on a motion to dismiss." *Aristy-Farer v. New York*, 29 N.Y.3d 501, 517 (2017).

3. Plaintiffs' Other Cases Do Not Help Them.

Plaintiffs observe that *tort* claims do not "accrue until Plaintiffs … suffered an injury." IKB.Br.21; *see* IKB.Br.20-21; *see, e.g.*, *Gerschel v. Christensen*, 143 A.D.3d 555, 556 (1st Dep't 2016) (malpractice and other tort claims). But that rule has no application to Plaintiffs' *contract* claims, for which the limitations period "runs from the time of the breach *though no damage occurs until later*." *Ely-Cruikshank*, 81 N.Y.2d at 402 (emphasis added). The Court of Appeals has noted the "fundamental differences between tort and contract principles" when it comes to accrual—"a tort cause of action cannot accrue until an injury is sustained," whereas "[n]ominal damages are always available in breach of contract actions." *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94-95 (1993). Thus, the clock starts to run on contract claims when the breach occurs, because all of the "elements necessary to maintain a lawsuit and obtain relief in court" are "present" then. *Ely-Cruikshank*, 81 N.Y.2d at 402. And Plaintiffs' sole contract case—*Rad & D'Aprile Inc. v. Arnell Construction Corp.*, 49 Misc. 3d 189 (Sup. Ct., N.Y. Cty. 2015)—rested on the mistaken assumption that contract claims accrue upon the plaintiff's injury rather than upon the breach. *See id.* at 201-02; IKB.Br.20.

4. Plaintiffs' Attacks On The Cases Cited By The Trial Court Fail.

Plaintiffs also dismiss two cases cited by the trial court—*Fixed Income Shares: Series M v. Citibank, N.A.*, 61 N.Y.S.3d 190 (Sup. Ct., N.Y. Cty. 2017), and *Royal Park*, 109 F. Supp. 3d 587—as "inapposite." IKB.Br.at 25-27. Not so. That those decisions did not involve the specific repurchase claims at issue here matters little—they still support the principle that claims based on duties arising from "failure[s]" occurring "at or near the time the Trusts closed" (like the claims here) are "time-barred." *Fixed Income*, 61 N.Y.S. 3d at *2; *see Royal Park*, 109 F. Supp. 3d at 608 (dismissing claims where breaches "occurred at or near the time the trusts closed"). And Plaintiffs are wrong to suggest that repurchase claims "survived" the motions to dismiss in those cases, IKB.Br.26—the defendants simply did not move on the timeliness of those claims. *See* Index No. 653891/2015, NYSCEF 106 at 19 (*Fixed Income*); 2015 WL 3549198 (*Royal Park*).

5. Plaintiffs' Remaining Arguments Lack Merit.

Plaintiffs contend that the trustees have "acknowledged that they had six years" to "bring putback actions" because they brought repurchase litigation—for other trusts not at issue—"near the end of the six-year period following the relevant trusts' closing dates." IKB.Br.21, 23. But the fact that trustees *could* take action up until their repurchase claims expired says nothing about *when*, under Plaintiffs' theory, the trustees first *breached* the agreement by failing to take action.

Plaintiffs next contend that if they had sued the trustees in 2011, the trustees "would have moved to dismiss on the grounds that there was no injury." IKB.Br.at 23-24. To the extent Plaintiffs suggest they could not have sued until they suffered damages, that is wrong. *See Chelsea Piers L.P. v. Hudson River Park Tr.*, 106 A.D.3d 410, 412 (1st Dep't 2013) (rejecting "Plaintiff's argument that it could not have sued for breach of contract before 2009 because it had sustained no damages," as "a breach of contract cause of action accrues at the time of the breach,' even if no damage occurs until later"). Thus, Plaintiffs could have brought timely claims here, they simply failed to do so.

Plaintiffs' only authority here is not to the contrary. In *Bakal*, the plaintiff asserted—and so the court accepted—that damages were an element of its breach-of-contract claim against the trustee. *See Bakal*, 747 F. App'x at 34, 36; Appellants' Br. at 45-46, *Bakal*, 2018 WL 3311455; IKB.Br.24. And as a result, the court affirmed dismissal of the plaintiff's claims for failure to allege that the trustee "caused them damages." *Id.* at 36 (emphasis omitted). *Bakal* thus says nothing about when Plaintiffs' claims here expired—indeed, *Bakal* nowhere addressed any statute-of-limitations issues at all.

Plaintiffs further suggest that the trustees' "right to enforce" does not start until "after the Obligors' 90 days to cure has expired." IKB.Br.23. But the "right" to enforce is no more relevant than the *ability* to enforce—the question here is when

the trustees had a *duty* to enforce (if at all). And even accepting that premise changes nothing: adding 90 days does not render Plaintiffs' claims timely. Again, Plaintiffs' claims came over *a year* too late for even the *latest* closing trust. *See supra* at 24.

Finally, Plaintiffs' assertion that the "Governing Agreements place no limitation on when the Trustees could demand that Document Defects be cured" is wrong. IKB.Br.23 n.10. The trustees were required to do so "[u]pon discovery or receipt of notice of" document defects, IKB.Br.16, which (again) Plaintiffs allege occurred during the mortgage-file review around the trusts' closing. *See supra* at 22; *see also Phoenix Light*, 2021 U.S. Dist. LEXIS 233418, at *59-60 (rejecting the argument that "none of the PSAs expressly specifies deadlines for [the trustee's] duty to provide notice or enforce repurchase").[1]

[1] In the same footnote, Plaintiffs also state that the trustees' "time to bring putback actions after the Obligors failed to cure the Document Defects was even longer than six years after the Trusts' closing." IKB.Br.at 23 n.10. To the extent Plaintiffs contend that the limitations period on the putback actions did not begin to run until the obligated parties refused to cure or repurchase, they cite nothing for that proposition. And they are mistaken—that period would have started to run when the obligated party first breached its duty to deliver complete mortgage files at closing, not when it later refused to cure or repurchase. *See ACE Sec. Corp. v. DB Structured Prods., Inc.*, 25 N.Y.3d 581, 599 (2015) (holding that the "cure or repurchase obligation" is merely the "remedy" for the breach—it is not an "independently enforceable right" triggering the limitations period).

CONCLUSION

The trial court's ruling should be affirmed insofar as it dismissed Plaintiffs' document-defect claims, but reversed insofar as it allowed Plaintiffs' remaining claims to proceed.

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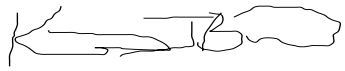

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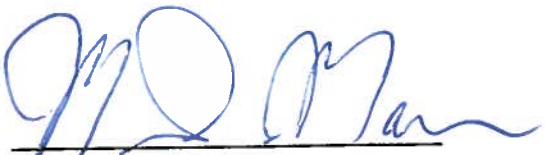

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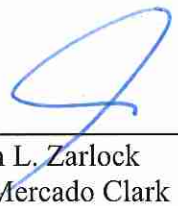

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