To be Argued by:
JOHN J.D. MCFERRIN-CLANCY
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

Index No. 654443/15
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,

(For Continuation of Caption See Inside Cover)

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

RELY BRIEF FOR PLAINTIFFS-RESPONDENTS-APPELLANTS IKB INTERNATIONAL S.A., IN LIQUIDATION AND IKB DEUTSCHE INDUSTRIEBANK A.G.

JOHN J.D. MCFERRIN-CLANCY, ESQ.
17 State Street, 40th Floor
New York, New York 10004
(646) 771-7377
jmc@mcferrin-clancy.com

RICHARD H. DOLAN
ERIK S. GROOTHUIS
DAVID J. GOLDSMITH
SETH D. ALLEN
SCHLAM STONE & DOLAN LLP
26 Broadway, 19th Floor
New York, New York 10004
(212) 344-5400
rdolan@schlamstone.com
egroothuis@schlamstone.com
dgoldsmith@schlamstone.com
sallen@schlamstone.com

Attorneys for Plaintiffs-Respondents-Appellants IKB International S.A., in Liquidation and IKB Deutsche Industriebank A.G.

New York County Clerk's Index Nos. 654443/15, 654442/15, 654440/15, 654439/15, 654436/15 & 654438/15

– 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. 654442/15
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. 654440/15
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. 654439/15
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. 654436/15
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. 654438/15
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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Plaintiffs-Respondents and Cross-Appellants IKB International, S.A., in Liquidation ("IKB S.A.") and IKB Deutsche Industriebank AG ("IKB AG," and together with IKB S.A., "Plaintiffs") respectfully submit this reply brief in further support of Plaintiffs' cross-appeal from the Order.[1]

PRELIMINARY STATEMENT

Plaintiffs cross-appeal from two discrete errors made by the Motion Court. *First*, the Motion Court erred when it dismissed all of Plaintiffs' Document Defect related claims as time-barred, conflating the Trustees' two distinct types of Document Defect claims and thus dismissing Plaintiffs' Repurchase Enforcement Claims, which did not and could not have begun to accrue until at least six years after the closing of the Trusts.[2] *Second*, the Motion Court incorrectly refused to apply the Prevention Doctrine to hold that the Trustees could not be excused from

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[1] Capitalized terms and abbreviations used herein shall have the same meanings ascribed to them in Plaintiffs' Brief in Opposition to Defendants' Appeal and in Support of Plaintiffs' Cross-Appeal ("Pls. Br.").

[2] The Trustees, citing *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 25 N.Y.3d 581, 599 (2015), object to Plaintiffs' references to the possibility that the Trustees' repurchase claims against the Obligors may not have accrued until after the Trusts' closings, and thus that Plaintiffs' Document Defect Repurchase Enforcement Claims may be timely even if brought more than 12 years after the Trusts' closings. (Defs. Br. at 28 n.1, citing Pls. Br. at 23 n.10.) While Plaintiffs dispute the applicability of *ACE* to the claims at issue here, the Court need not decide the issue because all of Plaintiffs' Repurchase Enforcement Claims were brought within 12 years of each Trust's closing date.

failing to perform their post-EOD Duties by affirmatively refusing to perform a condition precedent that prevented EODs from occurring in the Trusts.

The Trustees' response to Plaintiffs' cross-appeal fails to provide any good reason why this Court should affirm these erroneous results.

First, as to the Document Defect claims, the Trustees continue to conflate their two distinct types of Document Defect Obligations—their Ministerial Obligations and their Repurchase Enforcement Obligations. The Trustees continue to insist that Plaintiffs allege only a single Document Defect obligation, and thus only a single breach by the Trustees, which the Trustees argue "accrued when the trustees were *first* required to address document defects but failed to do so." (Defs. Br. at 22.) But as a matter of factual pleading, this is wrong, nor is it what the contracts provide. Rather, the Governing Agreements provide that the Trustees' Repurchase Enforcement Obligations did not even arise unless and until the Trustees complied with their Ministerial Obligations and put the Obligors on notice of Document Defects. And Plaintiffs allege that the Trustees indeed did address document defects when they were "*first* required" to (Defs. Br. at 22), by noting such defects in Certifications and notifying the Obligors of these defects. It is only after the Trustees complied with their Ministerial Obligations, and put the Obligors on notice of Document Defects, that the Obligors' Repurchase Obligations were triggered, and thus that the Trustees' separate and distinct duty to enforce the

Obligors' Repurchase Obligations arose. The Trustee could not possibly have breached this separate and distinct duty at the same time they were required to give the Obligors' the notice necessary to trigger the Obligors' Repurchase Obligations in the first place. Rather, the Trustees did not breach their Repurchase Enforcement Obligations until the statute of limitations on their claims against the Obligors expired six years later. Based on the black-letter law, which the Trustees themselves cite, that a breach of contract claim accrues at the time of the breach, this is when Plaintiffs' Repurchase Enforcement Claims accrued.

Moreover, even if the Trustees were correct that they somehow breached their Repurchased Enforcement Obligations when they failed to bring putback actions on day one after the Obligors breached their Repurchase Obligations, the statute of limitations here was extended. This is because the Trustees' ongoing failure to bring putback actions during the six years they had to bring such actions was a "continuing wrong that is not referable exclusively to the day the original wrong was committed," and thus extends the statute of limitations because "the contract imposes a continuing duty on the breaching party." *See Kaymakcian v. Board of Mgrs. of the Charles House Condominium*, 49 A.D.3d 407, 407 (1st Dep't 2008); *Henry v. Bank of Am*., 147 A.D.3d 599, 601 (1st Dep't 2017).

The Trustees' other arguments are equally without merit. The Trustees do not and cannot dispute that two recent Supreme Court cases have refused to

dismiss, on motions to dismiss, the same Repurchase Enforcement Claims Plaintiffs assert here based on the same "Six-Plus-Six" theory asserted here. And the Trustees concede that the cases that the Motion Court cited in dismissing Plaintiffs' Repurchase Enforcement Claims didn't discuss Repurchase Enforcement Claims at all. Nor can the Trustees disclaim their own prior conduct, which is entirely consistent with Plaintiffs' arguments here.

Finally, this Court should reconsider its prior jurisprudence on the Prevention Doctrine. As multiple federal courts have recognized since the Court's decisions in *Fixed Income Shares: Series M v. Citibank, N.A.*, 157 A.D.3d 541 (1st Dep't 2018) and *Blackrock Balanced Capital Portfolio (FI) v. U.S. Bank N.A.,*165 A.D.3d 526 (1st Dep't 2018), even if this Court were correct that "active conduct" was required to invoke the Prevention Doctrine, the Trustees' affirmative policy of refusing to notify Servicers or other Trust Parties of deficiencies that would trigger EODs for the express purpose of avoiding triggering the Trustees' heightened duties is the very essence of active conduct. At the very least, the Court should permit this argument to survive the motion to dismiss in order to allow discovery into what policies the Trustees had and what actions the Trustee took to prevent the declaration of EODs in order to avoid triggering their heightened pre-EOD duties.

Accordingly, the Court should reverse the Order as to the dismissal of the Repurchased Enforcement Claims and as to the Prevention Doctrine, and should otherwise affirm the Order.

ARGUMENT

I. PLAINTIFFS' REPURCHASE ENFORCEMENT CLAIMS ARE TIMELY

A. The Trustees Wrongly Conflate Their Ministerial Obligations With Their Repurchase Enforcement Obligations.

The Trustees argue that, because they were required to perform their Ministerial Obligations—receiving the Mortgage Files, reviewing them, certifying their completeness and notifying the Obligors of any missing documents or defects in those files—"[u]pon discovery or receipt of notice" of Document Defects at or near the time of the Trusts' closings, this means that all the Trustees' Document Defect Obligations accrued at the same time. (Defs. Br. at 20 – 21.)

But this completely misreads the relevant contractual provisions, which set forth two distinct sets of duties, one which arises "[u]pon discovery or receipt of notice" of Document Defects, and the other, which are at issue here, which do not arise unless and until the Obligors refused to repurchase defective loans. For example, Section 2.03(a) of the ACE 2006-OP2 PSA provides [u]pon discovery or receipt of notice of any materially defective document in, or that a document is missing from, a Mortgage File . . . the Trustee shall promptly notify the Sponsor

and the Servicer of such defect, missing document or breach and request that the Sponsor deliver such missing document, cure such defect or breach within sixty (60) days from the date the Sponsor was notified of such missing document, defect or breach." (R. 5556 (emphases added).) Then, it is only "if the Sponsor does not deliver such missing document or cure such defect or breach in all material respects during such period" that "the Trustee shall enforce the obligations of the Sponsor under the Mortgage Loan Purchase Agreement to repurchase such Mortgage Loan . . . ." (*Id.*)

Thus, the contractual language provides that "[u]pon discovery or receipt of notice" of Document Defects, the Trustee must "promptly notify" the Obligor of the Document Defects and request that the Obligor the missing document or cure the defect or breach within 60 days of this notification. As Plaintiffs allege, these are part of the Trustees' Ministerial Duties. (*See* Pls. Br. at 10.) However, if the Trustees notified the Obligors of Document Defects and demanded the Obligors cure these defects, and yet Obligors failed to do so, the Trustee then had a second, distinct duty to "enforce the obligations of the [Obligors] to repurchase" the defective loans. This is an entirely separate duty—the Repurchase Enforcement Obligation—which does not, and could not, arise "upon discovery or receipt of notice" of Document Defects because it is not until the Obligors breach their own Repurchase Obligations that the Trustee even has the right to take any action to

enforce them. This is exactly what Plaintiffs allege in their Complaints. (Pls. Br. at 10; citing R. 6403, 6404, 6413.)

B. Repurchase Enforcement Claims Accrue When the Trustees' Time to Bring Putback Actions Expired.

As discussed above, unlike the Ministerial Obligations, which the Governing Agreements provide must be completed "[u]pon discovery or receipt of notice," the Governing Agreements do not set forth a specific time period in which the Trustees must enforce the Obligors' breach of their Repurchase Obligations. Instead, they merely provide that if the Obligors fail to repurchase defective loans, then the Trustees "shall enforce the obligations of the [Obligor] to repurchase such Mortgage Loans." (R. 5556 (emphases added).)

Unless the Obligors willingly repurchased loans as soon as they were notified of Document Defects (which thus would have required no "enforcement" by the Trustees), the only way for the Trustees to enforce the Obligors' breach of their Repurchase Obligations was to bring putback actions, or "repurchase litigation," against the Obligors, demanding that they repurchase the defective loans. Under the well-established rule that the Trustees themselves cite that contract claims accrue when the contractual duty is breached, the Repurchase Enforcement Claims accrued when their duty to bring putback actions was breached. *See, e.g.*, *Welwart v. Dataware Elecs. Corp.*, 277 A.D.2d 372, 373 (2d Dep't 2000).

Thus, the question is when did the Trustees breach their contractual duty to bring putback actions against the Obligors who had breached their Repurchase Obligations. Did the Trustees breach their Repurchase Enforcement Obligations on the first day after the Obligors failed to repurchase defective loans, if they failed to bring a putback action on that date? This is illogical—it would mean the Trustees would have breached their Repurchase Enforcement Obligations even if they were in the process of drafting a complaint against the breaching Obligor.

Because there is no specific requirement in the Governing Agreements as to when the Trustees were required to bring putback actions, the only reasonable reading of the Governing Agreements is that the Trustees did not breach their Repurchase Enforcement Obligations unless and until they missed out on their chance to bring putback actions—*i.e.*, when the statute of limitations expired on the Trustees' claims against the Obligors. Until the statute of limitations expired on the Trustees' putback rights, there was no breach. Thus, the Repurchase Enforcement Claims accrued when this statute of limitations expired. *See Welwart*, 277 A.D.2d at 373.

To the extent that the Trustees argue that the Repurchase Enforcement Claims accrued not on the first day that the Obligors breached their Repurchase Obligations, but rather on some later date on which the Trustees made a decision not to bring putback litigation, there is no evidence of any such date in the record.

Accordingly, the Trustees fail to "establish[], prima facie, that the time in which to sue has expired," including by "demonstrate[ing] when the claim accrued." *Healy v. Carriage House LLC*, 2021 N.Y. Misc. LEXIS 1230, 2021 N.Y. Slip. Op. 30883[U], *7 (Sup. Ct. N.Y. Cty. March 22, 2021) (quoting and citing *Norddeutsche Landesbank Girozentrale v. Tilton*, 149 A.D.3d 152, 158 (1st Dep't 2017); *Benn v. Benn*, 82 A.D.3d 548, 548 (1st Dep't 2011); *Lebedev v. Blavatnik*, 144 A.D.3d 24 (1st Dep't 2016)). The Trustees thus fail to "demonstrate when the claim accrued"—indeed, a careful reading of their brief makes clear that they never suggest the specific date on which they allege the Trustees breached their Repurchase Enforcement Obligations. *Id.*

The case law supports Plaintiffs' argument. The Trustees barely attempt to distinguish *Rad & D'Aprile Inc. v. Arnell Construction Corp*., 49 Misc. 3d 189, 201 (Sup. Ct. Kings Cty. 2015) (Demarest, J.), which Plaintiffs cited for the proposition that a claim for breach of a party's contractual duty to bring certain litigation does not accrue until the time for bringing that litigation has expired. The Trustees argue that this case "rested on the mistaken assumption that contracts accrue upon the plaintiff's injury rather than upon the breach." (Defs. Br. at 25.) To the contrary, Justice Demarest reasoned that "[i]t was defendant's failure to timely commence the legal action required under the liquidating agreement that plaintiff claims constitutes defendant's breach in performance of that contract." 49

Misc. 3d at 201 (emphases added). Thus, Justice Demarest held that the plaintiff's breach of contract claim accrued when the statute of limitations expired for the litigation that defendant was contractually required to bring because that is when the defendant breached its contractual obligation, not because that is when the plaintiff was injured. The same is true here. Plaintiffs' claim for breach of the Trustees' Repurchase Enforcement Obligations accrued upon the expiration of the Trustees' statute of limitations to bring putback actions, not because that is when Plaintiffs were injured, but because that is when the Trustees breached their Repurchase Enforcement Obligations.

This logic also dispenses with the Trustees' misguided claim that Plaintiffs are wrongly arguing that the statute of limitations accrued not when the breach occurred, but when Plaintiffs suffered damages. That is not correct. Plaintiffs do not that the Repurchase Enforcement Claims did not accrue until Plaintiffs were damaged as opposed to when the Trustees breached their Repurchase Enforcement Obligations. Rather, Plaintiffs argue that the claims accrued when the Trustees' breached their duty, which did not occur until the Trustees' statute of limitations expired. Until that point, there was both no breach and no damages to Plaintiffs, because the Trustees time to comply with their contractual duty to bring putback actions to enforce the Obligors' Repurchase Obligations had not yet expired. The Trustees' claim that they were in breach of their Repurchase Enforcement

Obligations as of the first day that the Obligors failed to repurchase defective loans, despite the fact that the Trustees still had years to timely bring putback actions, defies logic and the law.[3]

C. The Trustees' Failure to Comply With Their Repurchase Enforcement Obligations Was Not a Failure to Cure But a Wholly Distinct Breach of Contract.

The Trustees also wrongly conflate the duties of the Obligors (and the Obligors' breach of their duties) with the Trustees' own distinct duties and breaches. The Trustees argue that their duty to enforce the Obligors' Repurchase Obligations was merely a "cure" and that Plaintiffs' Repurchase Enforcement claims against the Trustees claims accrued when the Obligors' first breached their Repurchase Obligations, and not when the Trustees "were precluded from curing the breaches because they could no longer initiate timely repurchase actions." (Defs. Br. at 21.)

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[3] The Trustees argue that Plaintiffs' citation to various tort cases, including legal malpractice cases, proves that Plaintiffs are asking this Court to hold that the statute of limitations accrued at the time of their injury, not at the time of the breach. This misses the point entirely. While tort claims accrue at the time of injury and contract claims accrue at the time of breach, the reasoning of the malpractice cases Plaintiffs cited applies here because, until the defendant attorney's time to take a certain action had expired, there was no malpractice, let alone any injury. *See*, *e.g.*, *Schrull v. Weis*, 166 A.D.3d 829, 831 (2d Dep't 2018) (holding that "[a] cause of action [alleging] legal malpractice accrues when the malpractice is committed" and that, where the malpractice claimed was the failure to timely file a personally injury claim, this was "when the statute of limitations on the personal injury claim expired").

There is no support for the Trustees' argument that the timeliness of Plaintiffs' claim against them can be determined based on when the Obligors, third-parties to this action, breached their own duties. Instead, the cases that the Trustees rely on to support their argument that the statute of limitations accrues from the time of the breach, and not the curing of that breach, merely refer to actions that would cure the prior breach by the same party, not a third-party. (Defs. Br. at 23.)

For example, in *First Am. Tit. Ins. Co. v. Fiserv Fulfillment Servs*., 2008 U.S. Dist. LEXIS 63010, at *7 (S.D.N.Y. Aug. 14, 2008), there was uncontroverted sworn evidence that the defendant was required to record the mortgage "within 3 days after the document was received." *Id.* Thus, the court held that the contract was breached when the defendant failed to record this mortgage within this time period, thus breaching the contract, not when the defendant failed to later cure their own prior breach by filing the mortgage outside of this required three-day period. Similarly, in *Mindspirit, LLC v. Evalueserve Ltd*., 346 F. Supp. 3d 552, 593 (S.D.N.Y. 2018), it was undisputed that there was a breach of contract when the defendant transferred certain stock options to two individuals without the plaintiff's consent, which undisputedly occurred in 2002, and the parties agreed that this breach of contract claim accrued at that time. However, the plaintiff argued that the defendant's subsequent breaches of the same

contract—refusing to permit the wrongly issued options to be exercised by plaintiff as a nominee or for plaintiff to be offered the buy-back program offered to option holders—were "independent, distinct wrongs" which accrued at a later date. The court rejected this argument on summary judgment, and held that these later failures "relate back to the original alleged breach" because they were merely ways the defendant could have cured the defendant's own initial breach. Thus, the court held that these claims accrued at the same time as the initial breach. In neither case was there a prior breach by a third-party that the defendant then later failed to cure, as the Trustees argue here.

The Trustees do not cite a single case suggesting that a claim that a party breached a contractual duty to correct the wrongful conduct of a different party accrues not when the party failed to comply with its contractual duty to enforce the third-party's actions, but when that third-party engaged in wrongful conduct in the first place. Nor can they—when the statute of limitations begins to run on a claim against a party accrues when that party breached, not based on any conduct by a third-party.

Here, the Trustees never state what prior breach of their own they are curing when they comply with their Repurchase Enforcement Obligations. That is because they cannot—as discussed above, if the Trustees had breached their Ministerial Obligations, then their Repurchase Enforcement Obligations never

even arose. The doctrine that a breach of contract claim accrues upon the breach and not upon a later failure to cure has no applicability here.

Finally, it is well established that when there is anticipatory repudiation of a contractual duty—*i.e.* when a party to a contract states it will not comply with its contractual duties before the time for performance is due—"the statute of limitations ordinarily does not begin to run, and the cause of action does not accrue, until the date of the actual breach; that is, until the date on which performance is due." *Ramey v. Dist. 141 Int'l Ass'n of Machinists & Aerospace Workers*, 378 F.3d 269 (2nd Cir. 2004); *see also Cary Oil Co. v. MG Refiningand Marketing*, 90 F. Supp. 2d 401, 412 (S.D.N.Y. 2000) (holding that where there is anticipatory repudiation of a contract, "N.Y. U.C.C. Law § 2-610(a)-(b) . . . unquestionably gives an aggrieved party the choice to sue or await performance, at least for a commercially reasonable time."). Thus, even if it is the Trustees' position that they repudiated their contractual duty to cure the Obligors' breach of their Repurchase Obligations when they did not bring suit immediately after the Obligors' breaches, the statute of limitations on Plaintiffs' claims against the Trustees did not begin to run immediately, and Plaintiffs had a "commercially reasonable time" to bring suit. It is commercially reasonable to wait until the Trustees' time to bring putback actions has expired before filing suit.

D. The "Continuing Wrong" Doctrine Applies.

Even if the Trustees were correct that they first breached their Repurchase Enforcement Obligations the minute the Obligors' failed to repurchase defective loans, they are still wrong as to when Plaintiffs' Repurchase Enforcement Claim accrued. That is because it is well-established that, where an agreement places a continuing duty on a party to perform, that continuing duty extends the statute of limitations beyond the first breach, to all subsequent breaches of that continuing duty. *See*, *e.g.*, *Henry v. Bank of Am*., 147 A.D.3d 599, 601 (1st Dep't 2017) ("In contract actions, the [continuing wrong] doctrine is applied to extend the statute of limitations when the contract imposes a continuing duty on the breaching party."). One vital consideration in distinguishing between a single act and ongoing wrongful conduct is in the "degree of permanence" of the action taken. *Cowell v. Palmer Twp*., 263 F.3d 286, 292 (3d Cir. 2001) ("The consideration of 'degree of permanence' is the most important of the factors"); accord *1050 Tenants Corp. v. Lapidus*, 289 A.D.2d 145, 146 (1st Dep't 2001) ("The rule that a cause of action accrues anew every day, or for each injury, applies whenever one unlawfully produces some condition which is not necessarily of a permanent character, and which results in intermittent and recurring injuries to another").

Here, by imposing on the Trustees the duty to enforce the Obligors' Repurchase Obligations without setting forth any specific time frame in which this

must be done, the Governing Agreements placed on the Trustees a continuing duty to enforce the Obligors' Repurchase Obligations—one that continued every day from when the Obligors first breached until the Trustees' time to bring putback actions had expired. Moreover, even if the Trustees could show that, at some point prior to the expiration of the statute of limitations they had decided not to bring putback actions (evidence of which does not exist in this record), that decision would not be permanent unless and until the statute of limitations expired, because the Trustees always could have changed their mind and brought putback actions later. Under these circumstances, even if the Trustees were correct that they somehow breached their Repurchase Enforcement Obligations around the time of the Trusts' closings, the continuing wrong doctrine applies to extend Plaintiffs' statute of limitations.

E. The Trustees' Interpretation of the Case Law is Wrong.

The Trustees double down on their argument that: (i) the decisions applying Six-Plus-Six Tolling to Repurchase Enforcement Obligations Claims in *MLRN LLC v. US Bank NA*, Index No. 652712/2018, 2019 N.Y. Misc. LEXIS 6085 (Sup. Ct. N.Y. Cty. Nov. 14, 2019), and *Western & Southern Life Insurance Co. v. U.S. Bank N.A.*, 69 Misc. 3d 1213[A], 2020 NY Slip Op 51307[U] (Sup. Ct. N.Y. Cty. Nov. 5, 2020) are not applicable here or should not be followed; and (ii) the decisions in *Fixed Income Shares: Series M v. Citibank, N.A.*, 2017 NY Slip Op

50877(U), ¶ 1, 56 Misc. 3d 1205(A), 61 N.Y.S.3d 190 (Sup. Ct. N.Y. Cty. 2017) and *Royal Park Invs. SA/NV v. HSBC Bank USA, Nat'l Ass'n*, 109 F. Supp. 3d 587, 607-08 (S.D.N.Y. 2015), support the Motion Court's decision. Both arguments are without merit.

First, the Trustees attempt to distinguish *MLRN* and *W&S* by arguing that "[a]t most, those decisions stated that the longest potential limitations period for pleading purposes in those cases was twelve years." (Defs. Br. at 24.) But the Trustees make no effort to explain why that should not have been the result here as well, which, like those decisions, was on a motion to dismiss. Thus, just as Justice Cohen did in *W&*S, the Motion Court should have accepted "Plaintiffs' allegations as true for purposes of this motion" and then determined whether the claims were brought within "the outer boundary of the limitations period," or 12 years. The Motion Court erred in failing to do so.

While the Trustees are correct that "[w]hen Plaintiffs' claims accrued based on the pleaded facts" is a "legal question" that can theoretically be determined on a motion to dismiss (Defs. Br. at 24), that is the case only where the defendants meet their burden to prove, *prima facie*, when, factually, the claims accrued —which the Trustees have not and cannot do here. *See Lebedev*, 144 A.D.3d at 28. Indeed, the parties agree, as a legal matter, when the claims accrued—when the Trustees' contractual duty was breached—and they also agree on the length of the statute of

limitations—six years from that date. However, the parties disagree as to when the Trustees' breach occurred as a factual matter. Plaintiffs argue the claims accrued six years from the date that the Obligors' breached their Repurchases Obligations, when the Trustees could no longer bring putback actions in order to comply with their Repurchase Enforcement Obligations. Defendants appear to argue the claims accrued on the same date the Obligors breached their Repurchase Obligations if the Trustees failed to bring a putback action on that date. But resolving this issue requires discovery as to when the Trustees decided that they would not comply with their Repurchase Enforcement Obligations and would allow the Obligors to decline to repurchase defective loans without initiating putback litigation. Just as Justices Cohen and Borrock previously held, such a factual dispute about when the claims accrued cannot be resolved on a motion to dismiss.

Second, the Trustees' argument that the decisions in *Fixed Income* and *Royal Park/HSBC* are applicable here are equally without merit. The Trustees admit that neither case involves the same "specific repurchase claims at issue here," and further admit that neither defendant in those cases even moved to dismiss the claims that at issue here. (Defs. Br. at 26.) But the Trustees argue that these cases "support the principle that claims based on duties arising from 'failure[s]' occurring 'at or near the time the Trusts closed' . . . are 'time barred.'" *Id.* This continues to conflate the two distinct types of Document Defect Claims. By

conceding that these two cases dealt only with Ministerial Obligations and did not address the "specific repurchase claims at issue here," the Trustees in fact concede that there are two distinct types of Document Defect Claims that arise at district times. These cases say nothing about when RMBS trustees' duty to bring putback action first arose or when claims that the RMBS trustees breached this duty accrued. Thus, the Motion Court was wrong to rely on wholly inapposite cases as the sole legal authority for its decision.

F. The Trustees' Disclaimer of Their Own Conduct Defies Credulity.

Finally, the Trustees ask this Court to ignore the fact that they have brought putback actions within six years from the Obligors' breach of their Repurchase Obligations because "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." (Defs. Br. at 26.)

While the Trustees protest throughout this appeal that Plaintiffs are attempting to imply extra-contractual duties on them, it is the Trustees themselves who are asking this Court to hold them to a much more stringent contractual standard than is present in the plain language of the Governing Agreements. According to the Trustees, if the Trustees did everything right and yet the Obligors failed to repurchase defective loans, the Trustee was required to bring a putback action on the very day the Obligors' 60 or 90-day window to cure document

defects expired. If they failed to do so, the Trustees argue, then they were in immediate breach of their Repurchase Enforcement Obligations—a breach that could be filed by later filing a putback action, but a breach nonetheless. This is an irrational standard not found anywhere in the Governing Agreements, nor is it supported by the Trustees' own conduct. Moreover, it appears to open the door to litigation against RMBS trustees, even on Trusts for which they brought putback actions, based on the argument that the Trustees' failure to bring a putback action was a breach that, even if later cured, potentially caused damages to the trusts by not having been brought sooner.

The better answer is to ignore the Trustees' *post-hoc* arguments here, and instead look to their own contemporaneous conduct, which showed that the Trustees believed they had, and did in fact have, six years to bring putback litigations. It was only when they failed to do so within those six years that they breached their Repurchase Enforcement Obligations. And so it is only at that time that Plaintiffs' claims for breach of the obligation accrued.

The Trustees also argue that the Motion Court did not decide that Plaintiffs' R&W Breach Repurchase Enforcement Claims are timely pursuant to the Six-Plus-Six theory, because "the trustees *did not even move* to dismiss R&W claims as untimely." (Defs. Br. at 24.) But this is far from the "gotcha" that the Trustees believe. That the Trustees did not even believe they had a case for dismissing

R&W Breach Repurchase Enforcement Claims proves their inconsistency on this issue. Again, the Court should ignore the Trustees' *post-hoc* rationalizations, and should instead look to their contemporaneous conduct, which shows that even they did not think these claims were untimely.

II. THIS COURT SHOULD RECONSIDER ITS PREVENTION DOCTRINE JURSIPRUDENCE

Finally, Plaintiffs ask this Court to overturn its prior jurisprudence on the Prevention Doctrine, in which this Court held that an RMBS trustees' refusal to undertake the conditions precedent to EODs being declared in their trusts is insufficient as a matter of law to invoke the Prevention Doctrine. (Defs. Br. at 7-8.) As set forth in Plaintiffs' brief, several federal courts have rejected this jurisprudence. (Pls. Br. at 38.) While the Trustees argue that two of these cases were decided before this Court's 2018 decisions (which is irrelevant if this Court's decisions were incorrectly decided), at least two other cases were decided after 2018 and specifically explained why they disagreed with this Court's reasoning. *See Commerzbank AG v. U.S. Bank N.A.*, 457 F. Supp. 3d 233, 249-50 (S.D.N.Y. 2020); *National Credit Union Admin. Bd. v. Deutsche Bank Nat'l Tr. Co.*, 410 F. Supp. 3d 662, 682 (S.D.N.Y. 2019) ("*NCUA*").

As the Southern District explained in one of those cases, "[t]he First Department decisions do not explain why failure to send notice is not 'active conduct' when such failure could plausibly have been intentional or due to active

frustration by the trustee nor did the decisions explain why 'active conduct' is required to apply the logic of the prevention doctrine," and thus these courts stated that they "believe[] that the New York Court of Appeals would not affirm these First Department decisions." *NCUA*, 410 F. Supp. 3d at 682. Respectfully, this argument is correct. If the Trustees made an intentional, active decision not to notify the Servicers of EODs in order to avoid triggering the Trustees' heightened post-EOD duties, then this is plainly active conduct that should trigger the Prevention Doctrine, even if such active conduct is required. (*See* Pls. Br. at 39.) Indeed, the Motion Court noted that "the reasoning of the federal courts is compelling," but that it was "bound to follow the Appellate Division's decision." (R. 127.)

The Trustees also argue that the Prevention Doctrine would not be triggered even if they had an explicit policy of refusing to declare EODs to avoid triggering their heightened duties because "other authorized deal parties" like Plaintiffs had the ability to provide the notice necessary to trigger EODs. But other courts have rejected this very same argument. *See Royal Park Invs. SA/NV v. Deutsche Bank Natl. Trust Co*., No. 14-CV-4394 (AJN), 2016 U.S. Dist. LEXIS 12982, at *25 (S.D.N.Y. Feb. 3, 2016); *Royal Park Invs. SA/NV v. HSBC Bank USA, N.A.,* 109 F. Supp. 3d 587, 605 (S.D.N.Y. 2015). That is because, if the Trustee had knowledge of servicer breaches that, if the Trustee gave notice of, would ripen into Events of

Default, that action by the Trustee prevented EODs from occurring, regardless of whether other Trust Parties, if they had learned of the same servicer breaches, could also have triggered EODs. *Id.* And, in the internal e-mail submitted on summary judgment in the *Pacific Life v. BNYM* case discussed in Plaintiffs' opening brief, BNYM employees stated that they had been "working hard to AVOID a formal declaration of an EOD," a statement that could reference not only refusing to provide notice on behalf of BNYM, but taking other steps to prevent other Trust Parties from taking actions that would trigger EODS. (Pls. Br. at 39-40.) At the very least, these issue raise questions of fact and discovery should be permitted to determine exactly what the Trustees knew and what steps they took in order to prevent the declaration of EODs and thus avoid triggering their heightened prudent person duties.

Accordingly, the Court should reverse its prior prevention doctrine decisions.

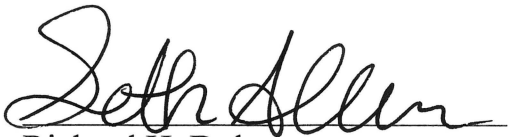
CONCLUSION

For the foregoing reasons, the Court should reverse the Order insofar as it dismissed Plaintiffs' Document Defect Repurchase Enforcement Claims as time-barred and rejected the application of the Prevention Doctrine, and affirm in all other respects.

Dated: New York, New York
March 4, 2022

Respectfully submitted,

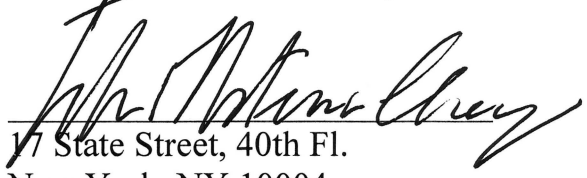
SCHLAM STONE & DOLAN LLP

By: 

Richard H. Dolan
Erik S. Groothuis
David J. Goldsmith
Seth D. Allen
26 Broadway
New York, NY 10004
Tel.: (212) 344-5400
Fax: (212) 344-7677
rdolan@schlamstone.com
egroothuis@schlamstone.com
dgoldsmith@schlamstone.com
sallen@schlamstone.com

-and-

John J.D. McFerrin-Clancy

By: 

17 State Street, 40th Fl.
New York, NY 10004
Tel.: (646) 771-7377
jmc@mcferrin-clancy.com

Attorneys for Plaintiffs-Respondents and Plaintiffs-Cross-Appellants IKB International, S.A. and IKB Deutsche Industriebank AG

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SCHLAM STONE & DOLAN LLP
Seth D. Allen
26 Broadway
New York, NY 10004
Tel.: (212) 344-5400
Fax: (212) 344-7677
sallen@schlamstone.com

Attorneys for Plaintiffs-Respondents
and Plaintiffs-Cross-Appellants
IKB International, S.A. and
IKB Deutsche Industriebank AG