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

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

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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 brief in response to Defendants-Appellants' brief ("Defs. Br.") and in support of Plaintiffs' cross-appeal from the Decision and Order entered in the Supreme Court of the State of New York, County of New York (Hon. Marcy S. Friedman, J.) (the "Motion Court") on January 27, 2021, which granted in part and denied in part Defendants' motions to dismiss Plaintiffs' Complaints in these actions (the "Order").

PRELIMINARY STATEMENT

These actions charge Defendants, the Trustees of various residential mortgage-backed securities ("RMBS") trusts (the "Trusts") that issued securities Plaintiffs purchased (the "Bonds" or "Certificates"), to comply with their duties as Trustees to protect the Trusts' assets.

The Motion Court, for the most part, correctly denied Defendants' motions to dismiss Plaintiffs' core breach of contract claims. The Motion Court recognized that no heightened pleading standard applies on a motion to dismiss a breach of contract action, and that Plaintiffs need not plead specific breaches or defects in the Trusts, or precisely how Defendants knew of these specific issues as to particular loans or even particular Trusts. Accordingly, the Motion Court correctly denied Defendants' motions to dismiss as to most of Plaintiffs' breach of contract claims,

both for breach of the Trustees' duties prior to Events of Default ("EOD") in the Trusts (the "Pre-EOD Claims"), as well as breach of the Trustees' heightened post-EOD duties (the "Post-EOD Claims").

Further, the Motion Court correctly denied Defendants' motions to dismiss Plaintiffs' Pre-EOD Claims relating to breaches of the representations and warranties ("R&W Breaches") regarding the loans underlying the Trusts (the "Mortgage Loans"), which R&Ws are set forth in the offering documents for the Trusts. Pursuant to the Pooling and Servicing Agreements, Indentures, or other documents governing the Trusts (the "Governing Agreements"), upon discovery of R&W Breaches, the Trustee was required to protect the Trusts by demanding that the parties responsible for curing such breaches, the originator or seller of the loans to the Trust (the "Obligors"), repurchase or substitute the defective loans (the Obligors' "Repurchase Obligations") and, if they failed to do so, to enforce their obligation to do so by bringing litigation against the Obligors. Plaintiffs allege that Defendants breached these duties (the "R&W Breach Repurchase Enforcement Claims").

The Motion Court made one crucial error, however. Plaintiffs allege that the Governing Agreements set forth a nearly identical duty to enforce the Obligors' Repurchase Obligations when the Trustees discovered that there were documents missing from the "Mortgage Files" which were to be provided to the Trusts upon

their creation ("Document Defects"). Just like with R&W Breaches, upon discovery of Document Defects, the Trustees were required to demand that the Obligors cure the defects or otherwise comply with their Repurchase Obligations. If the Obligors failed to do so, the Trustees were obligated to enforce that failure, again by bringing litigation against the Obligors, which Plaintiffs allege Defendants failed to do (the "Document Defect Repurchase Enforcement Claims").[1]

The Motion Court erroneously held that the Document Defect Repurchase Enforcement Claims were untimely because the Mortgage Files were to be received, reviewed, and inventoried by the Trustee, or a Custodian acting on behalf of the Trustee, around the time of the Trusts' closing, which occurred more than six years ago. But this mischaracterizes Plaintiffs' Document Defect Repurchase Enforcement Claims. The Document Defect Repurchase Enforcement Claims were not based on the initial failure of the Trustee to receive, review, or inventory Mortgage Files. Rather, Plaintiffs allege that the Trustees either did such a review and inventory and learned of missing documents in the Mortgage Files, or that they

[1] In addition to this issue, Plaintiffs also cross-appeal on the Motion Court's refusal to hold that Defendants are barred from arguing that there were no Events of Default in the Trusts, when it was the Defendants' own failure to provide written notice of defaults in the Trusts that prevented the occurrence of Events of Default, a legal argument known as the "prevention doctrine."

received certified inventories showing that there were such Document Defects and that, in many circumstances, Defendant Trustees notified the Obligors of these defects and demanded they be cured. However, exactly as Plaintiffs allege regarding R&W Breaches, when the Obligors failed to cure these Document Defects, the Trustees failed to enforce these obligations by bringing putback litigation against the Obligors.

The Trustees had six years from when the Obligors breached their Repurchase Obligations to bring claims against the Obligors, and in some limited cases, the Trustees did so—generally at or near the expiration of the six-year limitations period for these claims. It was only when the Trustees failed to bring putback litigation against the Obligors within the statute of limitations for those claims that they breached their duty to enforce the Obligors' Repurchase Obligations. Thus, Plaintiffs' six-year statute of limitations on the Document Defect Repurchase Enforcement Claims did not accrue until this date, and then ran for another six years ("Six-Plus-Six" statute of limitations).

The Motion Court erred by holding that Plaintiffs' Document Defect Repurchase Enforcement Claims had expired six years from the Trusts' closing—the same time at which the statute of limitations expired on the Trustees' own claims against the Obligors—while at the same time correctly allowing the nearly identical R&W Breach Repurchase Enforcement Claims to proceed. The

Motion Court's decision runs counter to persuasive authority in the RMBS and other contexts, as well as contrary to Defendants' own conduct as Trustees for the past fifteen years.

Defendants' arguments as to why Plaintiffs' other contract and tort claims should have been dismissed fail. As the Motion Court correctly held, Plaintiffs' allegations are sufficient at this stage of the proceedings, and Defendants' arguments require the resolution of complex factual issues not appropriate on a motion to dismiss.

This Court should reverse the Motion Court's erroneous dismissal of Plaintiffs' Document Defect Repurchase Enforcement Claims and refusal to apply the prevention doctrine, and otherwise affirm the Order in its entirety.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Do Plaintiffs allege timely Document Defect Repurchase Enforcement Claims, where the Defendants had six years from the date of the Obligors' failure to cure Document Defects to bring repurchase or putback litigation against the Obligors, and Plaintiffs had an additional six years from the date that Defendants' time to bring such actions expired to bring these claims, or twelve years total?

The Motion Court incorrectly answered No.

2. Do Plaintiff sufficiently allege that Defendants discovered R&W Breaches in the Trusts and took no action to remedy them by seeking putback or

repurchase of defective loans state a claim for breach of Defendants' pre-EOD contractual duties?

The Motion Court correctly answered Yes.

3. Do Plaintiffs sufficiently allege that the Trusts' Servicers or Master Servicers received written notice or had actual knowledge of deficiencies in the Trusts that created EODs in the Trusts?

The Motion Court correctly answered Yes.

4. Do Plaintiffs sufficiently allege that Defendants had actual knowledge of EODs in the Trusts, or, for the Trusts that required it, received written notice of EODs in the Trusts, sufficient to trigger their Post-EOD duties?

The Motion Court correctly answered Yes.

5. Are Defendants prevented from arguing that they had no Post-EOD duties because EODs did not occur in the Trusts, where Plaintiffs allege there were pervasive deficiencies in the Trusts that would have ripened into EODs had the Defendants not failed to give written notice as required by the Governing Agreements (*i.e.* the "prevention doctrine")?

The Motion Court incorrectly answered No.

6. Do Plaintiffs sufficiently allege that Defendants breached their heightened post-EOD contractual duties?

The Motion Court correctly answered Yes.

7. Do Plaintiffs sufficiently allege conflict of interest and post-EOD breach of fiduciary duty claims that arise from separate duties and created separate harm than Plaintiffs' breach of contract claims?

The Motion Court correctly answered Yes.

8. Are Plaintiffs excused from complying with the Governing Agreements' "No-Action Clauses," including all parts of those clauses, where Defendants are the entities to whom notice would have had to have been given, or where there are conflicts of interest between Defendants and the notice parties?

The Motion Court correctly answered Yes.

9. Is there a question of fact as to the timeliness of IKB S.A.'s claims against Defendant Bank of New York Mellon ("BNYM") where the Trusts at issue, or other RMBS trusts within the same shelf as the Trusts, are currently or have been in the past tolled by their involvement in class action lawsuits, pursuant to class action tolling, and where Defendants may be equitably estopped?

The Motion Court correctly answered Yes.

STATEMENT OF THE FACTS AND THE CASE

A. Case Background.

Across the six actions, Plaintiffs alleged they purchased more than one billion dollars-worth of RMBS certificates issued by 163 Trusts for which

Defendants were Trustees or Co-Trustees.[2] (*See, e.g.*, R. 6385 (¶ 1).)[3] Plaintiffs allege that Defendants breached their duties as Trustees and, as a result, those securities are essentially worthless today. (*Id.* ¶ 2.)

1. The Alleged Breaches.

a) Breach of Contract.

The Governing Agreement set forth the Trustees' duties, all of which were designed to ensure that the Trusts were protected. Generally, the Trustees' duties fell into two buckets: (i) Pre-EOD duties, or the duties that the Trustee was obligated to perform before it was aware of any EODs in each Trust (which includes Document Defect Duties, R&W Breach Duties, and Servicing Failure Duties); and (ii) heightened Post-EOD duties. Plaintiffs allege that Defendants breached both their Pre-EOD and Post-EOD duties. (R. 6545 – 6550.)

(1) Pre-EOD Claims.

(i) Document Defect Claims.

The Complaints allege that the Trustees had two specific types of contractual duties relating to Document Defects.

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[2] Plaintiffs have subsequently voluntarily dismissed their claims on a number of these Trusts.

[3] Because the allegations discussed in this Statement of Facts are similar in each of the six Complaints, Plaintiff cite to the U.S. Bank Complaint (R. 6385 – 6665) as a model. Paragraphs of the U.S. Bank Complaint are cited herein as "¶ __." Where Plaintiffs reference a Complaint from another action, the name of the Defendant is provided (*e.g.*, "BNYM Compl.").

First, the Trustee or Custodian had a "Ministerial Obligation" to receive the Mortgage Files at or close to the time of each Trust's closing, "to review (or cause to be reviewed) each of the Mortgage Files for the mortgage loans and certify that the documentation for each of the loans was accurate and complete," (R. 6403 (¶ 69)) and "[i]f there was a defect with any mortgage file, . . . to demand that the Obligor cure the defect leading to the exception or repurchase or replace the defective loans" (the Obligors' "Repurchase Obligations"). (R. 6404 (¶ 74).)

Second, the Trustees had Document Defect Repurchase Enforcement Obligations. If the Obligor failed or refused to cure Document Defects, then the Trustee had a contractual duty "to enforce its rights for the benefit of investors to ensure that mortgage loans lacking complete Mortgage Files were removed from the mortgage pools underlying the securities." (R. 6413 (¶ 108).)[4] This duty required the Trustees to take action (including by asserting claims against the Obligor in putback actions, if necessary), to enforce the Obligors' Repurchase Obligations. The Trustees' failure to enforce the Obligors' Repurchase Obligations is distinct from its failure to perform its Ministerial Obligations.

[4] *See also* R. 5556 (ACE 2006-OP2 PSA Section 2.03(a)) ("the Trustee shall enforce the obligations of the Sponsor under the Mortgage Loan Purchase Agreement to repurchase such Mortgage Loan . . . . ").

The relevant allegations from the U.S. Bank Complaint are set forth below (emphases added).[5]

Ministerial Obligations Allegations:

> 69. U.S. Bank had a contractual obligation under the Governing Agreements to review (or cause to be reviewed) each of the mortgage files for the mortgage loans and certify that the documentation for each of the loans was accurate and complete. U.S. Bank also had a common law duty to perform those acts with due care.
>
> . . .
>
> 74. If there was a defect with any mortgage file, U.S. Bank was obligated to demand that the Seller cure the defect leading to the exception or repurchase or replace the defective loans. This is set forth in Section 2.03 of the Residential Capital PSA. *See* Exhibit 6 Table 1. The Governing Agreements for the other Trusts contained substantially similar requirements. *See* Exhibit 6 Table 7.

Document Defect Repurchase Enforcement Allegations:

> 108. . . . The Seller was required to substitute compliant loans for the loans with incomplete files or else repurchase the loans. U.S. Bank, however, systematically disregarded its contractual and fiduciary duties to enforce [the trusts'] rights for the benefit of investors to ensure that mortgage loans lacking complete mortgage files were removed from the mortgage pools underlying the securities.

(R. 6403, 6404, 6413.)

[5] *See also* R. 26702, 26703, 26709 (BofA Compl. ¶¶ 65, 70, 93); R. 32451, 32452, 32458 (BNYM Compl. ¶¶ 76, 81, 104); R. 19310, 19311, 19318 (Deutsche Bank Compl. ¶¶ 64, 69, 92); R. 13447, 13448, 13454 (HSBC Compl. ¶¶ 64, 69, 92); R. 460, 461, 467 (Wells Fargo Compl. ¶¶ 66, 71, 94).

(ii) R&W Breach Claims.

Plaintiffs allege the existence of R&Ws regarding, among other things, compliance with underwriting standards and practices, owner occupancy statistics, appraisal procedures, loan-to-value ("LTV") and combined loan-to-value ("CLTV"). (R.6440 (¶ 188).) Similar to Document Defects, Plaintiffs then allege that Defendants had two sets of duties relating to R&W Breaches—first, to identify and provide notice of such R&W Breaches, and second, to enforce the Obligors' failure comply with their Repurchase Obligations ("R&W Repurchase Enforcement Obligations"). (R. 6390, 6404 – 6405 (¶¶ 27, 75 – 76).)

Plaintiffs then make detailed allegations of Defendants' breach of each of these duties, including:

- That "each of the Trusts' loan pools contained a high percentage of loans that materially breached the . . . representations and warranties." (R. 6439 (¶ 187).)
- That Defendants "had an obligation to provide notice of breaches of these representations and warranties and such notice triggered the [Obligors'] obligation to repurchase or substitute the defective loan." (R. 6440 (¶ 189).)
- That these R&Ws were breached. (*See* R. 6440 – 6506 (¶¶ 190 – 421).)
- That Defendants knew that these breaches had occurred and provided notice of these breaches. (*See* R. 6506 – 6517 (¶¶ 422 – 453).)
- That Defendants failed to enforce the Obligors' Repurchase Obligations. (*See* R. 6403 (¶ 27).)

(iii) Servicing Failure Claims.

The Trustees also had a duty to take steps to protect the Trusts whenever they became aware of uncured loan servicing failures by the Servicers to the Trusts. (R. 6416 (¶ 117).) For example, it is public knowledge that Servicers regularly overcharged for various default services provided in connection with the mortgage loans, and often failed to, for example, properly enforce payment defaults, foreclose defaulted properties, maintain foreclosed properties or conduct foreclosure sales. (*Id.*) While such servicing failures may have ripened into EODs, which then would have triggered a "prudent person" standard, even if they did not ripen into EODs, the Trustees still had pre-EOD duties to address specific loan servicing failures when they discovered them. Plaintiffs allege that Defendants breached their duties to enforce the Servicers' obligations to cure such defects, despite the Trustees being aware of such failures by the specific Servicers for the Trusts. (*Id.*)

(2) Post-EOD Claims

Each of the Governing Agreements sets forth a definition of an EOD that includes multiple types of potential EODs, referenced in this brief as lowercase "defaults." (R. 4065 – 4671.)

Some of these defined EODs first required a default by a Trust Party, like the Servicer or Master Servicer, which would ripen into EODs in two different

circumstances, depending on the trust: (i) either the Trustee, other Trust Parties, or in some cases a certain percentage of certficateholders, provided written notice of the default to the Servicer or Master Servicer ("written notice" EODS); or (ii) the Servicer or Master Servicer had actual knowledge of the defaults ("actual knowledge" EODs). If there was written notice or actual knowledge of a Servicer default, then that lowercase "default" ripened into an EOD. (*Id*.)

Other EODs were triggered merely by the occurrence of some objective criteria or event (or lack thereof), meaning that, upon the occurrence of that event (such as a Servicer bankruptcy (*see, e.g.*, R. 4065 (CWHL 2005-HYB9 Indenture §§ 6.01(iii) – (v)), or the mortgage loans failing to hit certain performance criteria (*see, e.g.*, R. 4146 (ACCR 2005-3 PSA §§ 7.01(vii) – (viii)), there was an EOD even without written notice or actual knowledge to or by the Trustee.

Regardless of the type of EOD, once an EOD occurred, so long as the Trustee had actual knowledge of the EOD (or, for some Trusts, received written notice of the EOD), the Trustee was required to exercise an even higher degree of care to the Trust. Specifically, after an EOD occurred, Defendants owed a duty to act with the same degree of care "as a prudent person would exercise or use under the circumstances in the conduct of his or her own affairs." (R. 6386, 6401 – 6402, 6406, 6564 – 6565 (¶¶ 5, 62 – 64, 81, 595 – 600).) Plaintiffs allege that

Defendants repeatedly breached this duty. (R. 6546 – 6547, 6557 (¶¶ 532 – 534; 572 – 575).)

b) Common Law Breaches.

In addition to their contract claims, Plaintiffs allege that Defendants breached their common law duties in two ways. First, Plaintiffs alleged that Defendants breached their common law fiduciary duty to act as a prudent person would once they had actual knowledge that Events of Default had occurred. (R. 6564 – 6565 (¶¶ 595 – 600).) Second, Plaintiffs allege that Defendants breached their duty to avoid conflicts of interest while acting as trustee, a duty that New York courts, including the First Department, repeatedly have recognized. (R. 6550 – 6553 (¶¶ 545 – 555).)

B. The Motion Court's Decision.

The Motion Court issued its decision on January 27, 2021. (R. 20 – 79.) In relevant part, the Motion Court resolved the motions to dismiss as follows: [6]

— This Motion Court denied the motions as to Plaintiffs' cause of action for breach of contract against all Defendants, except to the extent of dismissing as untimely nearly all breach of contract claims relating to Document Defects. (R. 78.)

— The Motion Court denied the motions as to Plaintiffs' causes of action for breach of fiduciary duty and conflicts of interest except to the

[6] The Motion Court also dismissed most of Plaintiffs' statutory claims. In the interest of narrowing the issues on appeal, Plaintiffs do not challenge those holdings here.

extent of dismissing Plaintiffs' pre-EOD breach of fiduciary duty claims. (*Id.*)

ARGUMENT

PART I: PLAINTIFFS' CROSS-APPEAL[7]

I. THE MOTION COURT ERRONEOUSLY DISMISSED PLAINTIFFS' DOCUMENT DEFECT CLAIMS AS TIME BARRED

A. Plaintiffs' Document Defect Repurchase Enforcement Claims Are Timely.

1. Document Defect Repurchase Enforcement Claims Are Substantively Identical to R&W Breach Repurchase Enforcement Claims.

The Governing Agreements provide the Trustees have Repurchase Enforcement Obligations both where there are Document Defects as well as when there are R&W Breaches.

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. There is no basis to distinguish the timeliness of Repurchase Enforcement Claims based on whether they arise from Document Defects or R&W Breaches, because Defendants' duty in either case was identical. Indeed, the Motion Court acknowledged that Repurchase Enforcement Claims

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[7] Plaintiffs also cross-appeal from the Motion Court's refusal to apply the prevention doctrine to hold that the Defendants cannot argue that there were no Events of Default in the Trusts where it was their own conduct that created this result. For purposes of clarity, this argument is addressed in Section III.A.3, regarding Defendants' Post-EOD breaches.

stemming from R&W Breaches and those stemming from document defects are two sides of the same coin—they are both claims for "enforcement of repurchase rights." (R. 45.)

For many of the Trusts, the provisions setting forth the Trustees' Document Defect Repurchase Enforcement Obligations are the exact same provisions as apply to the R&W Breach Repurchase Enforcement Obligations. For example, Section 2.03(a) of the ACE 2006-OP2 PSA provides:

> Upon discovery or receipt of notice of any materially defective document in, or that a document is missing from, a Mortgage File *or* of a breach by the Sponsor of any representation, warranty or covenant under the Mortgage Loan Purchase Agreement in respect of any Mortgage Loan that materially and adversely affects the value of such Mortgage Loan or the interest therein of the Certificateholders, 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, and if the Sponsor does not deliver such missing document or cure such defect or breach in all material respects during such period, the Trustee shall enforce the obligations of the Sponsor under the Mortgage Loan Purchase Agreement to repurchase such Mortgage Loan . . . .

(R. 5556 (emphases added).)

Thus, whether the Obligors' Repurchase Obligations arose based on Document Defects or R&W Breaches, the Trustees' duty was the same: if the Obligors failed to comply with their Repurchase Obligations, the Trustee was obligated to enforce that obligation by bringing putback actions. And Plaintiffs'

time to bring claims for breach of both of these duties arose at the same time: Six-Plus-Six years from the Obligors' breach of its Repurchase Obligations.

2. The Proper Statute of Limitations for Repurchase Enforcement Claims is "Six-Plus-Six."

At least two recent decisions have expressly upheld Document Defect Repurchase Enforcement Claims based on the "Six-Plus-Six" statute of limitations. In *MLRN LLC v. US Bank NA*, Index No. 652712/2018, 2019 N.Y. Misc. LEXIS 6085 (Sup. Ct. N.Y. Cnty. Nov. 14, 2019), Justice Borrok explained:

> MLRN claims that US Bank had six years from the closing of each securitization to enforce the repurchase obligations and that, where US Bank breached its obligations by allowing these claims to lapse, MLRN then has an additional six years to bring any claims against US Bank for breach of such contractual obligations.

Id. at *8 – 9. Justice Borrok then considered other factual considerations in determining timeliness, including the potential application of class action tolling. Justice Borrok then returned to the Six-Plus-Six argument, holding:

> However, not all of MLRN's claims necessarily survive even at this pleading stage. As is clear from the complaint, at least one of the RMBS trusts closed as far back as 2004 (*e.g.*, PPSI 2004-WWF1) and another several trusts as far back as 2005 (*e.g.*, TTTS 2005- 8HE and TMTS 2005-11). Put another way, taking all of the allegations set forth in the complaint as true and assuming that US Bank breached its duty to enforce the repurchase of defective loans contained in the RMBS trusts, which time would have ran by 2010 and 2011, respectively, and then breached its duties by allowing these repurchase claims to lapse, which claim would have become untimely by 2016 and 2017, and this action having not commenced until 2018, the court holds that to the extent that any such RMBS trusts were not involved in a class action lawsuit such that the statute of limitations would be tolled pursuant to

> class action tolling as articulated in *American Pipe*, supra, any claims relating to such RMBS trusts are dismissed as untimely.

Id. at *11.[8]

Similarly, in *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. Cnty. Nov. 5, 2020) ("*W&S*"), Justice Cohen recognized that, distinct from any Ministerial Claims, the plaintiff also asserted "claims based on US Bank's alleged failure to enforce repurchase obligations," which the court found to "present additional fact issues further precluding dismissal at this stage." *Id*. at *18 – 19.

Justice Cohen then discussed the parties' arguments regarding the timeliness of such claims, and, applying Justice Borrok's reasoning in *MLRN*, held that the question was premature on a motion to dismiss:

> [T]he question whether Plaintiffs' claims accrued when US Bank first allegedly discovered a breach in 2008 (as US Bank contends) or when US Bank allegedly permitted its repurchase rights under the PSA to 'lapse' six years after the breach (as Plaintiffs contend), or sometime in between, is not one that can be decided on the pleadings.
>
> Plaintiffs have alleged that US Bank filed lawsuits relating to similar trusts, not in the case, seeking repurchase of loans just prior to the expiration of the limitations period and should have done the same for the trusts here . . . . Even crediting US Bank's argument that the enforcement-related completeness claims should be tied to the same accrual date as the notice-related completeness claims, the latter remains subject to dispute for the reasons noted above. 'Simply put,

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[8] Because Plaintiffs' actions here were brought in 2015, rather than 2018 as was the case in *MLRN*, claims on 2004 and 2005 trusts are timely brought here.

> [a]t this stage, Plaintiffs are not required to specify precisely when, and precisely on what basis, [US Bank] breached each of its contractual obligations' . . . .
>
> Taking Plaintiffs' allegations as true for purposes of this motion, the outer boundary of the limitations period is 12 years from the date of the underlying R & W breach (*i.e.*, six years for US Bank to assert its repurchase rights plus six years for Plaintiffs to sue US Bank for permitting those rights to lapse) (*see* MLRN, 2019 N.Y. Misc. LEXIS 6085, 2019 NY Slip Op 33379[U], 7 [dismissing claims that exceeded the 'six plus six' year period]). The earliest trust in this case closed less than 12 years before the parties entered into a tolling agreement . . . . Accordingly, unlike in MLRN, none of Plaintiffs' claims can be dismissed as untimely on their face.

Id. at *19 – 20 (emphasis added) (internal citations omitted).

While the Motion Court cited *MLRN* and *W&S* elsewhere in its Order (R. 32), it erred in failing to consider those cases' holdings on this issue.

3. Case Law Supports Plaintiffs' Statute of Limitations Argument.

In addition to *MLRN* and *W&S*, case law in analogous situations makes clear that, when there is an agency or trust relationship, the beneficiary cannot claim that agent breached its contract to the beneficiary based on a failure to take some affirmative action on the beneficiary's behalf unless and until the agent's time to take that action has expired because, until that time, the beneficiary had not suffered any injury.

For example, in *Rad & D'Aprile Inc. v. Arnell Construction Corp*., 49 Misc. 3d 189, 201 (Sup. Ct. Kings Cnty. 2015) (Demarest, J.), the plaintiff, a

subcontractor, entered into an agreement with defendant, a contractor, that made the contractor responsible for "pass[ing] through" certain claims held by the plaintiff against the City and Department of Sanitation. In other words, the contractor, *i.e.* the agent, took on an obligation to assert claims on behalf of the subcontractor, *i.e.* the beneficiary. *Id.* at 197 – 198. The court held that the plaintiff's claim against contractor "accrued when the statute of limitations ran on [the subcontractor]'s claims so that [the contractor] could no longer perform its contractual duty" to assert the claims on the subcontractor's behalf. *Id.* at 202; *see also Matter of Davidson*, 2017 N.Y.L.J. LEXIS 3050, at *28 (Sur. Ct. N.Y. Cnty. Oct. 25, 2017) (claim that trustee failed to protect trust by asserting breach of contract claim on behalf of trust does not begin to accrue until the statute of limitation on the underlying claim expires).

The same is true on a claim for legal malpractice which "accrue[s] at the time of [the client's] injury." *Gerschel v. Christensen*, 143 A.D.3d 555, 556 (1st Dep't 2016). The Court of Appeals has held at least twice that the "time of injury" for a claim based on a failure timely to assert claims accrues "when the Statute of Limitations had expired on the underlying breach of contract action plaintiffs retained [counsel] to commence." *Shumsky v. Eisenstein*, 96 N.Y.2d 164, 166 (2001) (citing *Glamm v. Allen*, 57 N.Y.2d 87, 95 (1982)); *see also Schrull v. Weis*, 166 A.D.3d 829, 832 (2d Dep't 2018) (legal malpractice claim expires six years

from when the statute of limitations expired on the claim plaintiff alleged lawyer failed to timely bring on his behalf).

Plaintiffs' claims, like those in the above-cited cases, did not accrue until Plaintiffs (through the Trusts) suffered an injury. That occurred when the Trustees allowed the Trusts' repurchase rights to lapse without bringing suit against the Obligors within six years.

4. Defendants' Conduct Shows That They Had Six Years From the Obligors' Breach to Enforce the Obligors' Repurchase Obligations.

While the Defendants, like most RMBS trustees, brought a woefully insufficient number of putback actions, and, generally failed to do so for the Trusts at issue in these actions, some of the Defendants did bring at least some putback actions against Obligors for some RMBS trusts. Nearly all of these putback actions were brought near the end of the six-year period following the relevant trusts' closing dates. In some of these putback actions, the Trustees expressly alleged that the sellers had breached their Repurchase Obligations which arose not only out of R&W Breaches, but also out of Document Defects.

The Trustees' practice of filing of putback actions in the fifth or often sixth years following a trust's closing shows that even the Trustees do not agree that their obligations to enforce the Trusts' putback rights here accrued at or around the time of the Trusts' closing. For example, in one putback action which U.S. Bank

filed in September 2011 (five years after the closing date of that trust), U.S. Bank alleged:

> 16. The PSA also provided that, upon receiving written notice from MASTR, the Servicer or Wells Fargo of either defective or missing documentation in the Mortgage Files or of the breach by the Originators of any representation, warranty, or covenant under the Assignment Agreements or Purchase Agreements "in respect of any Mortgage Loan that materially adversely affects the value of such Mortgage Loan or the interest therein of the Certificateholders," the Trustee shall request that the Originator of that Loan cure such breach within ninety (90) days. See Exhibit 1, § 2.03(a).
>
> 17. The PSA further provided that if the Trustee receives written notice from MASTR, the Servicer or Wells Fargo that the Originator "has not delivered such missing document or cured such defect or breach in all material respects during such [90 day] period, the Trustee shall enforce the obligations of such Originator . . . as applicable, under the related [Purchase] Agreement or Assignment Agreement to repurchase such Mortgage Loan . . . ." *See id.*, § 2.03(a).
>
> 18. Accordingly, after the lapse of the 90-day cure period, Plaintiff, as Trustee, has the right to enforce the obligations of the Originators to remedy material breaches in their representations and warranties by compelling those Originators to repurchase the Defective Loans.

See Complaint, *MASTR Asset-Backed Sec. Tr. 2006-HE3 v. WMC Mortg. Corp.*, No. 11-cv-02542-JRT-TNL (D. Minn. Sept. 2, 2011) (emphases added).[9]

[9] The other Defendants have nearly all brought putback claims to enforce Obligors' obligations many years after the closing of the transactions or the failure of the seller to cure defective loans. *See, e.g., The Bank of New York Mellon v. WMC Mortgage, LLC,* Index No. 653831/2013 (Sup. Ct. N.Y. Cnty.); *Deutsche Bank National Trust Co. v. Quicken Loan, Inc.*, Index No. 653048/2013 (Sup Ct. N.Y. Cnty.); *ACE Securities Corp. Home Equity Loan Trust, Series 2006FM1, by HSBC Bank USA, National Association, as Trustee v. DB Structured Products, Inc*., Index No. 652985/2012 (Sup. Ct. N.Y. Cnty.).

Thus, the Trustees have acknowledged, as did U.S. Bank in the action discussed above, that their right to enforce the Obligors' failure to comply with their Repurchase Obligations does not start until after the Obligors' 90 days to cure has expired without the Obligors' having complied with its Repurchase Obligations.[10] The Trustees, through their own actions, have also acknowledged that they had six years from this date to bring putback actions (as U.S. Bank did five years after the closing of the trust discussed above). This is persuasive evidence that the Motion Court erred. *See Federal Ins. Co. v. Americas Ins. Co.*, 258 A.D.2d 39, 44 (1st Dep't 1999) (the "parties' course of performance under the contract is . . . the most persuasive evidence of the agreed intention of the parties").

The Motion Court's holding would mean that Plaintiffs' time to sue the Trustee for failing to comply with its Repurchase Enforcement Obligations began to accrue at the same time as the Trustee's own time to sue to enforce the Obligors' Repurchase Obligations. This cannot possibly be the case—for example, if certificateholders in MASTR 2006-HE3 had sued U.S. Bank in August 2011, U.S.

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[10] This 90-day cure period began after the Trustee demanded the Obligor cure the defect; however, the Governing Agreements place no limitation on when the Trustees could demand that Document Defects be cured. If the Trustees made such demands well after the Trusts' closing, which the Governing Agreements entitled them to do, then their time to bring putback actions after the Obligors failed to cure the Document Defects was even longer than six years after the Trusts' closing, possibly years later. Whether or not this occurred is a question of fact that cannot be resolved on a motion to dismiss.

Bank would have moved to dismiss on the grounds that there was no injury because it could still bring a putback action against the Obligor, which it subsequently did.

Indeed, in *Bakal v. U.S. Bank Nat'l Ass'n*, 747 F. App'x 32, 36 (2d Cir. 2019), an action against U.S. Bank as trustee of MASTR 2006-OA2, plaintiff alleged that the trustee had an obligation to enforce the trust's putback rights "expeditiously" upon learning (or being on constructive notice) of R&W breaches. Instead, the trustee waited six years from the closing of the trust to bring the putback action. The Second Circuit affirmed the dismissal of plaintiff's breach of contract claim against U.S. Bank.

In so holding, the Second Circuit rejected plaintiff's argument that U.S. Bank's delay in bringing that claim until 2012, six years after the trust had closed, had damaged plaintiff, because U.S. Bank had eventually brought the putback action before the limitations period had expired.[11] This makes clear that there is no claim against a trustee for failure to bring a putback action prior to the expiration of the limitations period for bringing such a putback action. There was no injury to

[11] That putback action was not dismissed as untimely. To the contrary, it proceeded to bench trial, after which the district court largely found in U.S. Bank's favor, showing how the Trustees could have benefitted the Trusts had they brought more putback actions against Obligors. *See U.S. Bank, Nat'l Ass'n v. UBS Real Estate Sec. Inc*., 205 F. Supp. 3d 386, 527 (S.D.N.Y. 2016).

certificateholders, and thus certificateholders' claim against U.S. Bank did not begin to accrue, until U.S. Bank failed to bring a putback action within six years of the Obligors' failure to cure.

B. The Cases Cited by the Motion Court Do Not Support Its Decision.

The two cases the Motion Court cited in support of its decision dismissing the Document Defect Enforcement Claims are inapposite, because they only dealt with Ministerial Claims.

First, the Motion Court cited *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. Cnty. 2017). But in *Fixed Income*, Justice Ramos noted that the plaintiff had asserted multiple, separate, claims for breach of contract against the trustee, including for breach of the trustee's duty to "ensure delivery of the mortgage loan files" and separately for breach of the trustee's duty to "enforce the sellers' obligations to repurchase, substitute, or cure such defective mortgage loans." 2017 NY Slip Op 50877(U), ¶ 1 (emphases added).

Justice Ramos then held that only the first category of breach of contract claims—based on the "Trustee's initial failure to deliver mortgage loan files at or near the time the Trusts closed"—was subject to dismissal on the basis of the statute of limitations:

> To the extent that the claim is based on the Trustee's initial failure to deliver mortgage loan files at or near the time the Trusts closed, it is time-barred under a six-year statute of limitations (MTG Enterprises, Inc. v Berkowitz, 182 AD2d 388, 582 N.Y.S.2d 130 [1st Dept 1992]).

Id. (emphasis added). Accordingly, the plaintiff's claim that the Trustee "fail[ed] to . . . enforce the sellers' obligations to repurchase, substitute or cure such defective mortgage loans"—*i.e.* Repurchase Enforcement Claims—survived.[12]

Second, the Motion Court cited *Royal Park Invs. SA/NV v. HSBC Bank USA, Nat'l Ass'n*, 109 F. Supp. 3d 587, 607 – 608 (S.D.N.Y. 2015). But in *Royal Park*, like in *Fixed Income*, Judge Scheindlin made clear that the court was only dismissing the breach of contract claim "relating to HSBC's alleged duties to make certifications pursuant to Regulation AB, taking physical possession of mortgage loan files, and preparing and delivering certification and exception reports"—*i.e.* what she called the "initial document obligations" which "set a time period during which HSBC must undertake these duties—within 60 to 90 days after the closing

[12] The applicable complaint in *Fixed Income* shows that the claim that the trustee breached its duty to enforce the trusts repurchase rights was, as it is here, based on repurchase rights that arose based on "deficiencies in mortgage loan files" as well as "breaches of the sellers' representations and warranties." *See* Amended Complaint ¶¶ 312 – 313, *Fixed Income Shares: Series M v. Citibank, N.A.*, Index No. 653891/2015 (Sup. Ct. N.Y. Cnty. Aug. 5, 2016) (NYSCEF No. 86). This was pleaded separate and apart from claims related to "Failure in the Delivery of Mortgage Files." *Id.* ¶¶ 309 – 311. The Appellate Division "may take judicial notice of undisputed court records and files." *Pramer S.C.A. v. Abaplus Int'l Corp.*, 76 A.D.3d 89, 102 (1st Dep't 2010).

date of the trust." *Id.* (emphasis added). Thus, again, Judge Scheindlin dismissed Ministerial Claims, not Repurchase Enforcement Claims.

Accordingly, neither *Fixed Income* nor *Royal Park* supports the Motion Court's dismissal of Document Defect Repurchase Enforcement Claims. Plaintiffs are not aware of any other decision dismissing such claims as untimely on a motion to dismiss—and Defendants cite none.

PART II: RESPONSE TO DEFENDANTS' APPEAL

II. THE MOTION COURT CORRECTLY DENIED DEFENDANTS' MOTIONS TO DISMISS PLAINTIFFS' PRE-EOD R&W BREACH CLAIMS

Defendants argue that the Motion Court erred in denying their motions to dismiss Plaintiffs' R&W Breach Repurchase Enforcement Claims. According to Defendants, the Motion Court improperly held that the obligation in the Governing Agreements that the Trustees "hold the trust fund and exercise the rights referred to above for the benefit of . . . [Certificateholders]" imposed an obligation on the Defendants to enforce the Obligors' duty to repurchase loans that had R&W Breaches. Defendants claim they had no such duty. (Defs. Br. at 11.)

To begin, not all of the Trusts rely on this language to impose a duty on the Trustee to enforce the Obligors' Repurchase Obligations. Defendants acknowledge, as they must, that many of the Governing Agreements expressly state that the Trustee, or a party that is the agent of the Trustee, must enforce these

rights, while others expressly provide that the Trustee must give notice of R&W Breaches to another party, which then must enforce the Repurchase Obligations on the Trustees' behalf (something that the Trustees failed to do, thus breaching this provision regardless of whether they had a separate duty to enforce the Repurchase Obligations). (R. 3528 – 3536; 3632 – 4057).) This Court therefore must affirm as to these Trusts.

For the Trusts that do rely on the Governing Agreement language quoted by the Motion Court to place an affirmative duty on the Trustee to enforce Repurchase Obligations, Defendants misrepresent why the Motion Court, and other New York courts, have held that this language imposed an affirmative duty on the Trustees. Throughout their brief, Defendants call this provision the "for the benefit of" provision and discuss the meaning only of that portion of the provision, stating that the Trustee must act "for the benefit of Certificateholders." (Defs. Br. at 11 – 16.) The implication is that this language only concerns the protection of Certificateholders and has nothing to do with the imposition of duties on the Defendant Trustees.

However, as Justice Cohen recognized in *W&S*, 69 Misc. 3d 1213[A], the key language in the provision quoted by the Motion Court is <u>not</u> the requirement that the Trustee act "for the benefit" of certificateholders, but rather that the

Trustee is required to "exercise the rights referred to above." As Justice Cohen explained:

> Under Section 2.06 of the HEMT 2005-5 PSA, US Bank 'agree[d] to hold the Trust Fund and exercise the rights referred to above for the benefit of all present and future' certificateholders (Fitzgerald Aff. Ex. 9 [NYSCEF 66]). Undisputedly, the 'rights referred to above' include the right to enforce the repurchase protocol in Section 2.03. And in 'agree[ing] to . . . exercise the rights referred to above,' US Bank assumed an affirmative duty to enforce the repurchase obligation (see *Royal Park Invs. SA/NV v Deutsche Bank Nat'l Tr. Co.*, 2016 U.S. Dist. LEXIS 12982, 2016 WL 439020, at *4 [SD NY Feb. 3, 2016] [analyzing substantively identical provision and holding that it imposed obligation upon RMBS trustee to enforce the repurchase obligations]). While the PSA forbids 'implied covenants or obligations' to be 'read into [the PSA] against the Trustee' (HEMT 2005-5 PSA, §8.01 [i] [NYSCEF 83]), Section 2.06 evinces an express obligation on US Bank's part to exercise certain rights (see id. ['[T]he duties and obligations of the Trustee shall be determined solely by the express provisions of this Agreement']).

Id. at *14 – 15 (emphases added). Thus, contrary to Defendants' arguments, neither Plaintiffs nor the Motion Court sought to impose an implied duty on the Trustees; it is this express language in the Governing Agreements that imposed an express duty on the Trustees to "exercise the rights referred to above," (*id.*) which, as Justice Friedman noted, "undisputed[ly] included the right to enforce Repurchase Obligations." (R. 120.) Defendants breached this duty when they failed to exercise the "rights referred to above," including the rights to enforce the Obligors' Repurchase Obligations.

Defendants argue that a number of cases support their position that the Trustees' duty to "exercise the rights referred to above" does not impose an affirmative duty on the Trustee to exercise the Trusts' right to enforce the Obligors' Repurchase Obligations. But each of these cases is inapposite, from a different jurisdiction, or from a different procedural posture from this action. Indeed, Defendants do not cite a single RMBS case that dismissed R&W Breach Repurchase Enforcement Claims on a motion to dismiss:

- Defendants claim that the First Department's decision in *ASR Levensverzekering NV v. Breithorn ABS Funding plc*, 102 A.D.3d 556, 557 (1st Dep't 2013), is "controlling precedent." (Defs. Br. at 16.) But the question and relevant language in that case have nothing to do with the issue here. There, the question was whether the plaintiff was a third-party beneficiary to all of the relevant agreements, based on a provision in one of the agreements that an assignment was done "for the benefit of" plaintiffs. 102 A.D.3d at 557; *see also* Decision/Order, NYSCEF No. 105, *ASR Levensverzekering NV v. Swiss RE Fin. Prods.*, Index No. 650557/09 (Sup. Ct. N.Y. Cnty. Oct. 17, 2011). The court held that this language did not make plaintiffs a third-party beneficiary to all of the agreements. Not only does this decision have nothing to do with whether a certain provision may expressly impose a duty on an RMBS trustee, but the contractual provision at issue did not even contain the same "exercise the rights referred to above" language, which is what imposes an affirmative duty on Defendants here.

- The relevant "for the benefit of" language in *CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F. Supp. 2d 450, 470 (S.D.N.Y. 2010), similarly does not contain "the rights referred to above" language, and is thus inapposite here.

- *Commerzbank AG v. U.S. Bank Nat'l Ass'n*, 457 F. Supp. 3d 233, 258 (S.D.N.Y. 2020), was a decision on a motion for summary judgment. On the motion to dismiss in that case, the court upheld Plaintiffs' pre-EOD R&W-based breach of contract claim. This appeal, of course, arises on a

motion to dismiss. In any event, this non-binding decision was wrongly decided.

- Similarly, the decision of the Ohio courts in *Western & Southern Life Insurance Co. v. Bank of New York Mellon*, No. A1302490, 2017 WL 3392855, at *4 (Ohio Com. Pl. Aug. 4, 2017), and *Western & Southern Life Insurance Co. v. Bank of New York Mellon*, 129 N.E.3d 1085, 1093-94 (Ohio Ct. App. 2019), were findings of fact and law following a bench trial. Again, this appeal arises on a motion to dismiss, and these Ohio decisions were wrongly decided in any event.

Accordingly, this Court should affirm the Motion Court's decision denying Defendants' motions to dismiss Plaintiffs' claim for breach of the Trustees' pre-EOD duties relating to R&W Breaches.[13]

III. THE MOTION COURT CORRECTLY DENIED DEFENDANTS' MOTIONS TO DISMISS PLAINTIFFS' POST-EOD BREACH OF CONTRACT CLAIMS

Defendants spend much of their brief arguing that the Motion Court should have dismissed some or all of Plaintiffs' post-EOD contract claims. They assert that Plaintiffs either did not sufficiently allege that EODs occurred, or did not sufficiently allege that Defendants had actual knowledge or (in some cases) received written notice of EODs sufficient to trigger their heightened post-EOD duties. (Defs. Br. at 16 – 26.) Both arguments are without merit.

[13] There appears to be no dispute that Plaintiffs' claims that the Defendants breached their Pre-EOD duties regarding servicing failures remain in these cases, and so Plaintiffs do not address those claims here.

The Motion Court correctly held that Plaintiffs sufficiently alleged both that EODs occurred, and that Defendants' post-EOD duties were triggered. (R. 50 – 65.) Moreover, to the extent the Motion Court erred in some of its reasoning, this Court can and should affirm the denial of the motions to dismiss Plaintiffs' post-EOD claims on other grounds. *See Fenton v. Consolidated Edison Co*., 165 A.D.2d 121, 125 (1st Dep't 1991) ("plaintiff is entitled to have the determination affirmed on any ground he properly raised before the IAS court").

A. The Motion Court Correctly Held That Plaintiffs Sufficiently Alleged that EODs Occurred.

1. For Many of the Trusts, Occurrence of Certain EODs Do Not Require Written Notice.

Not all defaults required written notice, or even actual knowledge, in order to ripen into Events of Default. Instead, for many of the Trusts, many EODs were automatically triggered once an objective event took place, regardless of whether the Servicer or Master Servicer received written notice, or even had actual knowledge. These are specifically set forth in the Governing Agreements' definitions of EODs. For example:

- For many of the Trusts, an EOD occurred, without any requirement for written notice or actual knowledge, if a Servicer to the Trust became insolvent, entered bankruptcy, had appointed a conservator, receiver or liquidator, or admitted in writing their inability to pay debts. (*See, e.g.*, R. 4065 (CWHL 2005-HYB9 Indenture §§ 6.01(iii) – (v)); R. 4146 (ACCR 2005-3 PSA §§ 7.01(iv) – (vi)); R. 4383 (CBASS 2006-CB6 PSA §§ 7.01(iii) – (iv)).)

— For some of the Trusts, an EOD occurred, without any requirement for written notice or actual knowledge, if the Delinquency Ratio or Cumulative Realized Lost Percentage for the Mortgage Loans in the Trust exceeded certain percentages. (*See, e.g.*, R. 4146 (ACCR 2005-3 PSA §§ 7.01(vii) – (viii); R. 4292 (ACCR 2005-4 PSA §§ 7.01(vii) – (viii); R. 4382 (CBASS 2006-CB6 PSA §§ 7.01(v)).

— For some of the Trusts, an EOD occurred, without any requirement for written notice or actual knowledge, if a Servicer's rating by one of the ratings agencies was downgraded below a certain rating. (*See*, *e.g.*, R. 4240 (MSAC 2005-HE6 PSA § 7.01(g)); R. 4243 (MSAC 2005-HE7 PSA § 7.01(g)); R. 4440 (HEAT 2005-5 PSA § 7.01(vi)); R. 4449 (HEAT 2005-9 PSA § 7.01(vi)).)

— For some of the Trusts, an EOD occurred, without any requirement for written notice or actual knowledge, if a Servicer failed to meet certain qualifications, such as FNMA or FHLMC qualifications. (*See*, *e.g.*, R. 4440 (HEAT 2005-5 PSA § 7.01(x); R. 4444 (HEAT 2005-8 PSA § 7.01(x)); R. 4556 (SASC 2005-GEL1 Trust Agreement § 6.14(ix)).)

For these EODS, Defendants' arguments that Plaintiffs' post-EOD claims fail because Plaintiffs have failed to allege written notice or actual knowledge are, of course, meritless. Indeed, in *W&S*, Justice Cohen upheld nearly identical allegations of breaches of post-EOD duties based on EODs arising from objective events that did not require actual knowledge *or* written notice, holding that "Plaintiffs also allege post-EOD claims based on two kinds of EODs that can be triggered without notice to the servicers, based on (i) servicers' false compliance statements and (ii) servicer ratings downgrades. These post-EOD claims survive the motion to dismiss." 2020 NY Slip Op 51307(U), ¶ 9. This Court should affirm on the same grounds.

2. For Those EODs That Required Written Notice or Actual Knowledge, the Motion Court Properly Held That Plaintiffs' Allegations Are Sufficient.

a) Plaintiffs Sufficiently Alleged EODs Based on Servicers' Actual Knowledge.

The Motion Court correctly held that, "[f]or a significant portion of the PSA Trusts, the definitions of the Governing Agreements of EOD do not require written notice to the servicer. Rather, an event of default may also occur upon the servicer's failure to cure the servicer's 'actual knowledge' of the servicing failures," and that Plaintiffs sufficiently alleged the Servicers' actual knowledge based on many allegations, including that the Servicers prepared written reports that would have revealed the extent of these servicing failures. (R. 55.) Defendants do not challenge this holding in their brief, and instead limit their argument to whether written notice was provided. Thus, this Court should not disturb the Motion Court's holding that Plaintiffs sufficiently alleged that, for those defaults that ripened into EODs upon the actual knowledge of a servicing failure by the Servicer or a Servicing Officer, Plaintiffs' allegations are sufficient.

b) Plaintiffs Sufficiently Allege EODs Based on Written Notice.

The Motion Court also correctly held that Plaintiffs alleged EODs for "Trusts for which the definition of EOD requires written notice to the servicer, without providing that an EOD may also occur upon the servicer's actual knowledge of the failure." (R. 57.) As the Motion Court correctly noted, "Plaintiffs' complaints

allege numerous written disclosures to the servicers of servicing failures, including, for example, notices from investors and monoline insurers." (*Id.*)

Defendants seize on this final statement to argue that written notices from monoline insurers could not be the written notice required to trigger EODs for "written notice EODs" and thus that this Court should reverse the Motion Court. (Defs. Br. at 20 – 21.) But even if this is true, it does not require reversal. As the Motion Court correctly noted, Plaintiffs alleged widespread notices to servicers of widespread servicing issues with the trusts, including "other written notices to the servicers that may be identified in discovery." (R. 57.) And, as the Motion Court noted, "[n]umerous issues of law and fact exist as to whether these writings . . . satisfy the notice requirements that must be met, including the requirements as to which parties must provide notice, in order to give rise to servicer failure EODs pursuant to the Governing Agreements." (*Id.*) Accordingly, the Motion Court was correct to hold that these issues preclude dismissal of these claims on a motion to dismiss, particularly where this is a breach of contract action with a notice pleading standard and where the very documents that would show that there was written notice of EODs is solely in Defendants' possession.

This Court's decision in *Blackrock Balanced Capital Portfolio (FI) v. U.S. Bank N.A.*, 165 A.D.3d 526, 528 (1st Dep't 2018), does not suggest otherwise. In *Blackrock*, this Court held only that, under the specific PSA language at issue, the

trustee was not the party required to send a written notice to the servicer, and so held that the plaintiff could not assert a separate claim against the trustee for failing to send such notice. *Id.* But Plaintiffs' claims here do not require that the Court hold that the Trustees were required to send written notice. Plaintiffs are not asserting a separate claim that the Trustees breached an obligation to provide written notice of servicing failures that could lead to events of default. Instead, Plaintiffs allege 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. If that is the case, which ongoing discovery will show, then there were EODs in the Trusts, and the Trustees' prudent person duties were triggered. Plaintiffs did not need to allege the specific EODs to survive a motion to dismiss.

3. For Written Notice EODs, This Court Should Reconsider Its Prevention Doctrine Jurisprudence[14]

While the Motion Court did not dismiss any of Plaintiffs' post-EOD breach of contract claims based on the points raised above, the Motion Court found that it was bound by this Court's precedent in *Fixed Income Shares: Series M v. Citibank, N.A.*, 157 A.D.3d 541 (1st Dep't 2018), and *Blackrock*, 165 A.D.3d at 528, on the

[14] This argument is made on Plaintiffs' cross-appeal, but included in this section as it is directly relevant to Plaintiffs' post-EOD breach of contract claims.

question of application of the prevention doctrine. If the prevention doctrine applies, then Plaintiffs did not need to allege that there was written notice of deficiencies in order to trigger EODs, even in "written notice" Trusts.

The prevention doctrine provides "that a party cannot argue that its performance under a contract has not been triggered by a condition precedent, when the party itself prevented the triggering of that condition precedent." *National Credit Union Admin. Bd. v. Deutsche Bank Nat'l Tr. Co.*, 410 F. Supp. 3d 662, 682 (S.D.N.Y. 2019). In the RMBS context, this means that a defendant trustee cannot argue that its heightened, post-EOD duties were not triggered where the failure to trigger those duties occurred only because the trustee (or another trust party acting on the trustee's behalf) failed to give written notice of deficiencies in the trusts that, had the trustee provided written notice, would have ripened into EODs and thus triggered the trustees' heightened post-EOD duties. As the Motion Court correctly noted, "[f]ederal courts have consistently held that the prevention doctrine precludes RMBS trustees from relying on their failure to give notice to prevent an Event of Default from occurring" in order to avoid claims for breach of their post-EOD duties. (R. 53 (citing federal cases applying prevention doctrine).) However, the Motion Court found that it was bound by this Court's decisions in *Fixed Income* and *Blackrock*.

Plaintiffs respectfully submit that *Fixed Income* and *Blackrock* were incorrectly decided on this issue, and that this Court should consider new evidence and arguments to overrule this prior precedent. As one S.D.N.Y. court recently explained:

> [T]wo judges in this district have rejected the First Department's reasoning in *Blackrock Balanced Capital Portfolio (FI) and Fixed Income Shares: Series M. See Nat'l Credit Union Admin. Bd. v. Deutsche Bank Nat'l Tr. Co.*, 410 F. Supp. 3d 662, 685 (S.D.N.Y. 2019); *Pac. Life Ins. Co. v. Bank of New York Mellon*, 2018 U.S. Dist. LEXIS 64271, 2018 WL 1871174, at *1 (S.D.N.Y. Apr. 17, 2018). In *Nat'l Credit Union Admin. Bd.*, Judge Stein questioned the First Department's reasoning, acknowledging that '[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.' *Nat'l Credit Union Admin. Bd.*, 410 F. Supp. 3d at 685. Because the First Department's explanation was perfunctory, Judge Stein was persuaded[ed] that 'the [New York] Court of Appeals would decide otherwise.' *Nat'l Credit Union Admin. Bd.*, 410 F. Supp. 3d at 685 (quoting *Reddington v. Staten Island Univ. Hosp.*, 511 F.3d 126, 133 (2d Cir. 2007)).
>
> This Court also believes that the New York Court of Appeals would not affirm these First Department decisions. One of the primary purposes of a Trustee in the RMBS context is to evaluate Servicer performance and cure any Servicer deficiencies. It would be counterintuitive to hold that a Trustee could avoid these 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. Such a proposition would frustrate the intent behind the PSAs' imposition of duties on a Trustee.

Commerzbank AG v U.S. Bank N.A., 457 F. Supp. 3d 233, 249-50 (S.D.N.Y. 2020).

Indeed, Plaintiffs believe that discovery, which is ongoing, may show that the Trustees' failure to provide the written notice necessary to create EODs was not some mere inactive conduct or oversight. Instead, discovery may show that at least some of the Trustees had policies specifically designed to avoid creating EODs, in order to avoid triggering their heightened duty.

For example, in one RMBS trustee action against the Bank of New York Mellon pending in the S.D.N.Y., the plaintiff, Pacific Life Insurance Company, recently cited documentary evidence in support of their motion for summary judgment (and in opposition to BNYM's motion) showing that it was BNYM's policy to avoid creating EODs in order to avoid triggering prudent person duties. *See* Plaintiffs' Counter-Statement of Undisputed Facts Pursuant to Rule 56.1 of the Local Civil Rules of the Southern District of New York in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiffs' Cross-Motion for Summary Judgment, ECF No. 260, *Pacific Life Ins. Co. v. The Bank of N.Y. Mellon*, No. 17-cv-1388 (S.D.N.Y), at ¶¶ 29, 31 (quoting internal BNYM e-mails stating that BNYM had "[been] working hard to AVOID a formal declaration of an EOD" because once there is an EOD "'the Trustee's standard of

care changes to a prudent man standard' and allows 'wildmen to jump into the fray'").[15]

Discovery in this action will almost certainly reveal the same, for BNYM and other Defendants. Regardless of whether this Court's decision in *Blackrock* was correct that "active conduct" is necessary to trigger the prevention doctrine and that a Trustee's mere failure to provide written notice is not such "active conduct," a policy that Trustees refused to provide written notice of EODs, as the Governing Agreements required them to do, for the specific purpose of not triggering their prudent person standard of care undeniably constituted active conduct. The Court should reverse the Motion Court's decision that the prevention doctrine does not apply here.

4. Plaintiffs Sufficiently Alleged EODs for Indenture Trusts.

Defendants' argument that Plaintiffs did not sufficiently allege EODs for Indenture Trusts because they purportedly did not allege any conduct by the Issuers is without merit. Indeed, the core of Defendants' argument amounts to a rehash of its argument that Plaintiffs did not sufficiently allege "known and unremedied Seller and Servicer defaults." (Defs. Br. at 23.) As discussed above, that is exactly what Plaintiffs allege here.

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[15] The court may take judicial notice of these papers. *See Pramer S.C.A.*, 76 A.D.3d at 102.

As the Motion Court correctly noted, the Indenture Trust Governing Agreements required the Issuers to "cause the Indenture Trustee or Master Servicer to enforce any of the rights to the Mortgage Loans." (R. 59.) Thus, as in *Royal Park*, 109 F. Supp. 3d 587, the same underlying allegations supporting the Motion Court's holding that Plaintiffs sufficiently pleaded "R&W breaches and servicing failures, and the failure of both the Trustees and servicers or master servicers to pursue remedies on behalf of the Trusts with respect to those breaches . . . [also] plead the issuers' failure to cause the Trustees and master servicers or servicers to enforce rights on behalf of the Trust, as required by the Indentures." (*Id*.) In other words, if the Issuer was required to cause the Indenture Trustee or Master Servicer to take action on behalf of the Trusts, and the Indenture Trustee or Master Servicer failed to take such action, then the Issuers failed to perform their duties. Accordingly, Plaintiffs' claims for the Indenture Trustees' breach of their post-EOD duties should be affirmed.

B. The Motion Court Correctly Held That Plaintiffs Sufficiently Allege Written Notice or Actual Knowledge of EODs, Triggering Heightened Post-EOD Duties.

Having held that Plaintiffs sufficiently alleged the existence of EODs, the Motion Court next held, correctly, that Plaintiffs sufficiently alleged that the Trustees received written notice of these EODs (where such notice was required by

the Governing Agreements), or that the Trustees had actual knowledge of EODs (where written notice was not required). (R. 60 – 65.)

While Defendants assert *ipse dixit* that Plaintiffs have not alleged that the Trustees has actual knowledge of EODs (for those Trusts for which actual knowledge is sufficient), they offer virtually no argument. Instead, Defendants' argument focuses on the assertion that Plaintiffs have not adequately alleged that the Trustees received written notice of EODs. Thus, at the very least, this Court should affirm the Motion Court's decision that Plaintiffs' allegations are sufficient for those Trusts for which actual knowledge, and not written notice, of EODs is required.

Defendants' arguments as to written notice Trusts are without merit. The Motion Court cited numerous federal courts holding that allegations similar to those made by Plaintiffs here were sufficient to "create a reasonable expectation that Defendant's Responsible Officers had received written notices of Events of Default in accordance with [the Governing Agreements]." (R. 61 (quoting *Pacific Life*, 2018 WL 1382105, at *9 – 10).) As the Motion Court held, quoting *Pacific Life* as "persuasive authority," "[t]hough [such allegations] do not prove that the Responsible Officers at Defendant had received written notice, such proof is not

required at the pleading stage, particularly where—as here—the information may well be uniquely in the possession of defendants." *Id.*[16]

Rather than dispute any of this authority, Defendants claim simply that the Motion Court's decision is inconsistent with this Court's decisions in *Commerce Bank* v. *Bank of New York Mellon*, 141 A.D.3d 413 (1st Dep't 2016), and *Arrowgrass Master Fund Ltd. v. Bank of New York Mellon*, 106 A.D.3d 582 (1st Dep't 2013). This is the identical argument that Defendants made, and the Motion Court rejected, below.

First, the Motion Court expressly considered and, in a footnote, distinguished this Court's decision in *Commerce Bank*. As the Motion Court held:

> [T]he court rejects defendants' contention that, according to Commerce Bank, investor letters identifying servicer breaches "do not constitute notice of an EOD, but rather merely 'notice of events that, with time, might ripen into Events of Default.'" (Defs.' Joint Memo. In Supp., at 25, n 8, quoting Commerce Bank, 141 AD3d at 415.) Importantly, in Commerce Bank, the Appellate Division held that a settlement approved by the court "rendered the letter inoperative, i.e., as if never sent." (141 AD3d at 415.) Commerce Bank is therefore not necessarily in conflict with the extensive federal authority discussed above and below in this decision, which upholds pleading of notice or knowledge based on investor letters. In any event, the investor letter was the only written notice pleaded in Commerce Bank whereas, here, plaintiffs

[16] S*ee also* R. 59 – 60 (citing *Royal Park Invs. SA/NV v. Deutsche Bank Nat'l Tr. Co.*, 2016 WL 439020; *Phoenix Light SF Ltd. v. Deutsche Bank Nat'l Tr. Co.*, 172 F. Supp. 3d 700, 715-16 (S.D.N.Y. 2016); *Royal Park Invs. SA/NV v. Bank of N.Y. Mellon*, 2016 WL 899320, at *6 (S.D.N.Y. 2016); *Fixed Income Shares: Series M v. Citibank N.A.*, 130 F. Supp. 3d 842, 856 (S.D.N.Y. 2015)).

plead numerous forms of written notice which disclosed pervasive and continuing servicing failures.

The Motion Court was correct. As the Motion Court noted, and as Plaintiffs argued below, *Commerce Bank* does not have wide application, but stands solely for the proposition that, in that case, where there was no allegation of any specific servicing failure of which there was notice, "written or otherwise, sufficient to constitute an event of default," (2015 WL 5770467, at *5), and where the only "written notice" alleged was a letter rendered inoperative by a related settlement, (141 A.D.3d at 415), sufficient notice of an EOD was not alleged. *Commerce Bank* does not stand for the proposition that the numerous forms of written notice that Plaintiffs allege here are insufficient; instead, as the numerous federal cases the Motion Court cited make clear, Plaintiffs' allegations are sufficient.

Second, Defendant again cite *Arrowgrass*, as they did below (and which the Motion Court correctly ignored) because the case is entirely inapposite. *Arrowgrass* was not an RMBS case and, in any event, the *Arrowgrass* court merely held that conclusory allegations of actual knowledge, pleaded in just two paragraphs, were insufficient. *Arrowgrass* accordingly has nothing to do with whether Plaintiffs' detailed allegations are sufficient in this case.

It is telling that more than five years after Defendants' motions to dismiss were fully briefed, Defendants do not cite a single decision from the courts of this State or a federal court within this State that supports their argument that Plaintiffs'

detailed allegations that the Trustees received written notice of and had actual knowledge of EODs are insufficient. This Court should look to the persuasive authority of decisions by New York federal courts cited by the Motion Court and find that Plaintiffs' allegations are sufficient.

IV. THE MOTION COURT CORRECTLY DENIED DEFENDANTS' MOTIONS TO DISMISS PLAINTIFFS' CONFLICT OF INTEREST AND POST-EOD FIDUCIARY DUTY CLAIMS BASED ON THE ECONOMIC LOSS DOCTRINE

Defendants argue that the Motion Court wrongly allowed Plaintiffs' claims for conflict of interest and post-EOD breach of the Trustees' fiduciary duties, because these claims are purportedly barred by the economic loss doctrine. (Defs. Br. at 27 – 30.)

As courts in the Southern District of New York have recognized in other RMBS trustee actions making similar claims, "[c]ourts in this District have split with regard to the application of the economic-loss doctrine to tort claims brought against an RMBS trustee. Dispositive in each case has been the nature of the plaintiff's claims: Does plaintiff allege damages that flow from the violation of a professional duty, or merely from the violation of the governing agreements?" *See Blackrock Allocation Target Shares: Series S Portfolio v. Wells Fargo Bank*, 247 F. Supp. 3d 377, 399 (S.D.N.Y. 2017). The court cited in particular *Phoenix Light SF Ltd. v. Deutsche Bank National Trust Co.*, 172 F. Supp. 3d 700, 719 (S.D.N.Y. 2016), and *Royal Park Investments SA/NV v. HSBC Bank USA, Nat'l Ass'n*, 109 F.

Supp. 3d 587, 599 (S.D.N.Y. 2015), as actions in which conflict of interest and pre-EOD fiduciary duty claims were not dismissed based on economic loss doctrine because the claims were found to flow from violation of a professional duty. 247 F. Supp. 3d at 399; *see also Pac. Life Ins. Co. v. Bank of N.Y. Mellon*, 2018 U.S. Dist. LEXIS 43602, at *40 (S.D.N.Y. Mar. 16, 2018) ("Just as was true in *BlackRock Series S*, 247 F. Supp. 3d at 400, here the economic loss doctrine does not require dismissal of Plaintiffs' due care and conflict of interest claims because Plaintiffs have pleaded that Defendant breached extra-contractual duties for which Plaintiffs are owed damages that do not lie simply in the enforcement of Defendant's contractual obligation.").

Defendants argue that this Court's decision in *Blackrock v. U.S. Bank*, 165 A.D.3d 526, should have required the Motion Court to dismiss Plaintiffs' tort claims based on the economic loss doctrine. The specific allegations in that action were different from the allegations here, however. There, the trial court dismissed the fiduciary duty and breach of contract claims because it found that the damages that plaintiffs alleged on those causes of action arose entirely from U.S. Bank's contractual obligations. Here, to the contrary, Plaintiffs plainly allege that the Trustees had *extra-contractual* fiduciary duties and duties to avoid conflicts of interest, and that 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. *See*, *e.g.*, R. 579 (Wells Fargo Compl. ¶ 445) ("Wells Fargo's fiduciary duty went beyond its contractual obligations under the Governing Agreements"); R. 580 (*id.* ¶ 448) ("Wells Fargo's breach of its fiduciary duty has directly and proximately caused injury to all investors, including Plaintiffs, in that they have diminished the value of the assets owned by the Trusts and have diminished the principal and interest payments generated by those assets."); *id.* ¶ 450 ("Under New York law (and, for the Indenture Trusts, Delaware law), Wells Fargo, as Trustee, has certain extra-contractual duties to the Trusts and all investors in them. These duties include the absolute, unwaivable duty to give the Trusts and their investors undivided loyalty, free from any conflicting self-interest."); R. 581 (*id.* ¶ 454) ("Wells Fargo's breaches of its duty to avoid conflicts of interest have injured all investors, including Plaintiffs, in that they have diminished the value of the assets owned by the Trusts and have diminished the principal and interest payments generated by those assets.").

Defendants' argument that these claims are barred by the economic loss doctrine bars Plaintiffs' tort claims because "the manner in which [Plaintiffs] claim to have been injured and the nature of the alleged harm are identical as between the tort and conflict claims" misses the point. (Defs. Br. at 29.) The economic loss doctrine does not bar tort claims that might have the same *type* of damages of contract claims. It only holds that such claims are barred if the damages flow from

the breach of contract. *See Blackrock*, 247 F. Supp. 3d at 399. That both Plaintiffs' breach of contract claims and its claims for breach of fiduciary duty and conflict of interest both damaged the Trusts in the same manner (causing diminishment to the principal and interest payments generated by the Trusts' assets) does not mean that the damages for these claims stem from Defendants' breach of contract. Instead, it is entirely possible that, by way of oversimplified example, if Defendants' overall wrongful conduct caused $100 of damages to one of the Trusts, $70 of that loss may have been caused by Defendants' failure to demand the Obligors put back specific loans with R&W Breaches, while $30 of that loss was caused by Defendants' breach of its fiduciary duties or conflicts of interest. These are distinct damages and thus the Motion Court correctly held that these claims were not barred by the economic loss doctrine.

V. THE MOTION COURT CORRECTLY REJECTED DEFENDANTS' ARGUMENTS ON THE NO-ACTION CLAUSES

Plaintiffs' argument as to application of the No-Action Clauses asks this Court to reconsider settled law, including this Court's own precedent from just three years ago, in *Blackrock v. U.S. Bank*, 165 A.D.3d 526, and even more recently from earlier this year, in *MLRN LLC v. U.S. Bank Nat'l Ass'n*, 190 A.D.3d 426 (1st Dep't 2021).

Defendants admit that in *Blackrock*, this Court held, as have many other courts in the S.D.N.Y. and other jurisdictions, that "[o]nce performance of the

demand requirement in the no-action clause is excused, performance of the entire provision is excused, including the requirement that demand be made by 25% of the certificate holders." 165 A.D.3d at 528; *see* Defs. Br. at 36 – 40. This should end the inquiry. Instead, Defendants argue that this Court is not required to adhere to its prior decision based on *stare decisis* because *Blackrock* was a class action, while the claims here are brought individually. This is a meaningless distinction, and also wrong as a matter of law and this Court's recent precedent.

Putting to one side that there is no substantive basis for this distinction, this Court's recent decision in *MLRN* forecloses this interpretation. As Defendants concede, in *MLRN*, this Court held that U.S. Bank was barred from making the same arguments Defendants make here based on the Court's decision in *Blackrock*. 190 A.D.3d at 426. Defendants concede that this would bar U.S. Bank from relitigating the issue, but argue that the other Defendants still can, because they did not have a full and fair opportunity to contest the issue in *MLRN*. (Defs. Br. at 40.) But while Defendants may not be collaterally estopped from making the argument, the decision in *MLRN* did more than just bar U.S. Bank from relitigating the issue.

Specifically, while Defendants argue that *Blackrock* does not apply here because it was a class and not an individual action, MLRN was an individual action. By applying *Blackrock* in *MLRN*, and specifically, by holding that U.S. Bank was collaterally estopped from re-litigating the issue, this Court necessarily

found that there was an identity of issues between *Blackrock* and *MLRN*. And by applying collateral estoppel in *MLRN*, this Court has already decided that *Blackrock*'s rule— when compliance with one part of a No-Action Clause is excused the entire clause is excused—applies regardless of whether the action is a class or individual action. 190 A.D.3d at 426 (citing *Buechel v. Bain*, 97 N.Y.2d 295, 303 (2001)); *see also Brown v. Sears Roebuck & Co*., 297 A.D.2d 205, 208 (1st Dep't 2002) (application of collateral estoppel "necessarily requires an identity of issues between the earlier determination and the matter *sub judice*"). If, as Defendants argue, the question of whether the No-Action Clauses apply in individual actions is distinct from and raises different issues than the same question in class actions, then there would have been no identity of issues, and thus no collateral estoppel.

Indeed, Defendant U.S. Bank recently made this very argument in its brief in this Court in *MLRN*. In *MLRN*, U.S. Bank argued that *Blackrock* was distinguishable because it "was a putative class action," whereas *MLRN* was a case brought by "a vulture investor, acting alone." Appellants' Brief, *MLRN LLC v. U.S. Bank Nat'l Ass'n*, Case No. 2020-00886 (1st Dep't May 15, 2020), NYSCEF No. 11, at 33 – 34. This Court correctly rejected that argument. 190 A.D.3d at 426. Accordingly, accepting Defendants' position would require this Court not only to distinguish on meaningless grounds its *Blackrock* decision from three years

ago, but also to overrule the decision the Court made in *MLRN* earlier this year. Plainly, the Court should not do so.

VI. THE MOTION COURT CORRECTLY FOUND QUESTIONS OF FACT ON THE TIMELINESS OF IKB S.A.'S CLAIMS AGAINST BNYM

BNYM argues that the Motion Court erroneously held that IKB S.A.'s claims against them were timely. BNYM argues that: (i) class action does not apply to some of BNYM's specific trusts, and (ii) equitable estoppel does not apply. Both arguments fail.[17]

A. Class Action Tolling.

BNYM argues that because only eight of the 27 trusts on which Plaintiffs sued BNYM appear in the class actions identified by Plaintiffs as tolling the statute of limitations, "IKB S.A. cannot invoke class action tolling with respect to the remaining 19 BNYM trusts in this action." (Defs. Br. at 42 n.13). This analysis is incorrect.

While BNYM makes an offhanded remark about the validity of the Motion Court's decision on class action tolling writ large, BNYM does not seriously contest that class action tolling, including cross-jurisdictional class action tolling may apply here, as is clear from the case law. *See Chavez v Occidental Chem. Corp*., 35 N.Y.3d 492, 508 (2020) (recognizing cross-jurisdictional tolling);

[17] These same arguments apply as to BofA's nearly identical arguments about the application of tolling to their Trusts.

Cambridge House Tenants' Ass'n v. Cambridge Dev., LLC, No. 106632/2009, 2012 N.Y. Misc. LEXIS 226 (Sup. Ct. N.Y. Cnty. Jan. 19, 2012); *see also MLRN*, 2019 N.Y. Misc. LEXIS 6085 at *11 (recognizing application of class action tolling in RMBS trustee litigation).

Instead, BNYM only argues that only class actions that cover the exact Trusts at issue here could toll Plaintiffs' claims. This is wrong. First, BNYM's assertion that 19 of its Trusts are not covered by any class action is made without any citation or authority whatsoever, and thus the Motion Court was correct to hold that the factual record was not sufficiently developed for it to dismiss these claims on a motion to dismiss. Moreover, among the 19 Trusts BNYM identifies, 17 are from the same "shelf" as trusts at issue in one of the class actions, *i.e.* issued by the same issuer, and typically including loans originated by the same loan originator(s), the "CWL" shelf. (Defs. Br. at 42 n.13.) Case law supports the application of class action tolling in this situation, because the injuries to Plaintiffs here, as owners of RMBS certificates issued by CWL trusts, "raise a sufficiently similar set of concerns" to those at issue in the class actions covering other CWL trusts. *See NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 162, 164 (2d Cir. 2012) (holding that the district court was in "error" when it required plaintiffs to "show that its injuries are *the same* as those allegedly suffered by purchasers of Certificates from outlying Trusts backed by distinct sets

of loans," and that "to the extent certain Offerings were backed by loans originated by originators common to those backing the [other offerings within the same shelf], NECA's claims raise a sufficiently similar set of concerns to permit it to purport to represent Certificate-holders from those offerings.").

Under *NECA*, class representatives can sue "on behalf of absent class members whose investments, though different, were backed by loans from the same originators and included nearly identical misrepresentations in separate offering documents as the named plaintiff's investments." *Moreno v Deutsche Bank Ams. Holding Corp*., 2017 U.S. Dist. LEXIS 143208, at *29 (S.D.N.Y. Sep. 5, 2017); *see also Fernandez v UBS AG*, 222 F. Supp. 3d 358, 373 (S.D.N.Y 2016) (including in a class persons who purchased investments that the class representatives did not purchase).

"When named plaintiffs commence a putative class action, defendants are made aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class and [t]herefore, tolling the statute of limitations creates no potential for unfair surprise, regardless of the method class members choose to enforce their rights upon denial of class certification." *Chavez*, 35 N.Y.3d at 502 – 503 (internal quotations and citations omitted).

Plaintiffs are unaware of a New York court applying *NECA* to class action tolling, but following the logic of *NECA* and *Chavez*, the claims

of certificateholders in trusts that were in the same shelves and had the same Obligors, as here, should toll the statute of limitations for claims by holders of certificates in any of those shelves, regardless of whether they were named in the class action because the claims address the "same set of concerns" BNYM was on fair notice of which trusts implicated those concerns. This principle is illustrated in decisions by other courts granting class action tolling to plaintiffs that were not in an earlier named class "when the earlier-filed class action unquestionably put the Defendants on notice of the plaintiff's claims." *Practice Mgt. Support Servs. v. Cirque du Soleil, Inc*., 146 F. Supp. 3d 997, 1004 (N.D. Ill. 2015).

Trusts from the CWL shelf appear in two of the thirteen class actions identified by Plaintiffs, *Blackrock v BNYM,* No. 14-CV-9372 (S.D.N.Y.) and *Retirement Bd. of the Policemen's Annuity & Benefit Fund of Chicago v. The Bank of N.Y. Mellon,* No. 11-cv-5459 (S.D.N.Y.). (*See* R. 5233 – 5344; *see also* ECF No. 1-1 in 14-CV-9372 (S.D.N.Y); ECF No. 1-1 in 11-CV-5459 (S.D.N.Y.).) Class action tolling should be extended to those trusts for purposes of BNYM's motion to dismiss.

Finally, the 13 class actions identified by Plaintiffs, including the three brought specifically against BNYM, were each brought against BNYM or another Defendant here for breach of RMBS-related duties and thus, even if they do not cover the exact Trusts at issue here, or even trusts in the same shelf (which is true

only for the RASC 2001-KS2 and CHL 2005-HYB9 Trusts), they still address the "same set of concerns." *NECA*, 693 F.3d at 162. The question of whether class action claims address "'the same set of concerns' as the conduct alleged to have caused injury to other members of the putative class" in class actions filed against Defendants is deeply fact-bound and involves an inquiry into, for example, whether the same Obligors or Servicers are at issue, information which is Defendants' control and are not reasonably accessible to Plaintiffs. The Motion Court was correct to reserve judgement on the question of tolling pending discovery regarding the extent to which IKB S.A.'s claims are tolled. *See, e.g.*, *Drummond v. Petito*, 271 A.D.2d 208, 209 (1st Dep't 2000).

B. Equitable Estoppel

Citing *Bank of New York Mellon v. WMC Mortgage, LLC,* 39 N.Y.S.3d 892, 896-97 (Sup. Ct., N.Y. Cnty. 2016), BNYM argues that equitable tolling cannot apply because Plaintiffs' allegations regarding Defendants' failures to disclose are "a basis of the underlying claims, not an excuse for not suing earlier." (Defs. Br. at 44.)

Contrary to BNYM's arguments, there can be no more apt application of this doctrine than here, where Defendants, as Trustees, were in sole possession of the information that was necessary for Plaintiffs to have learned of their claims, and took affirmative steps to prevent certificateholders like Plaintiffs from learning of

them. Indeed, as set forth in the discussion on the prevention doctrine (Section III.A.3, *supra*), discovery in this action, as it has in other actions will show that the Trustees, including, specifically BNYM, the only Defendant to protest the application of equitable estoppel on this appeal, affirmatively and intentionally avoided the declaration of Events of Default, in order to avoid triggering their prudent person duties.[18] Such formal declaration of Events of Default also would have required notice to the Certificateholders, which would have alerted certificateholders to Plaintiffs of the fact that the Trusts were struggling, and put them on notice that the Trustees now had heightened duties to protect the Trusts. This not only highlights BNYM's affirmative conduct to keep Plaintiffs from learning of their claims, but makes clear exactly why the Motion Court was correct to hold that, at the very least, there are questions of fact about Defendants' actions and whether they could lead to the application of equitable estoppel that can only be resolved through discovery, making resolution of this question inappropriate on a motion to dismiss. (R. 75.)

Finally, Defendants argue that, to the extent equitable estoppel was applicable—and it is—such tolling would "ceased no later than November 20,

[18] Indeed, the statement by BNYM's representative that the declaration of formal EODs permit "wildmen to jump into the fray" is almost certainly a reference to avoiding potential actions by certificateholders, like Plaintiffs.

2008," when IKB S.A. sold its certificates. (Defs. Br. at 45.) But any equitable tolling would be taken in conjunction with class action tolling, as discussed above. IKB S.A.'s claims were thus timely filed.

CONCLUSION

For all the above reasons, Plaintiffs respectfully request that this Court: (a) affirm the Decision and Order of the Motion Court insofar as it denied Defendants' motions to dismiss the Complaints in these actions; (b) reverse the Decision and Order of the Motion Court insofar as it dismissed Plaintiffs' Document Defect Repurchase Enforcement Claims as time-barred; and (c) reverse the Decision and Order of the Motion Court insofar as it rejected the application of the prevention doctrine.

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Respectfully submitted,

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