To be Argued by:
JOHN J.D. MCFERRIN-CLANCY
(Time Requested: 30 Minutes)

APL-2022-00165
New York County Clerk's Index Nos. 654443/15, 654442/15, 654439/15 and 654438/15

Court of Appeals

of the

State of New York

Index No. 654443/15

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

Plaintiffs-Respondents,

(For Continuation of Caption See Inside Cover)

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

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– 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,

– 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

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

Plaintiffs-Respondents,

– 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,

– 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. 654439/2015

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

Plaintiffs-Respondents,

– 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,

– and –

ACCREDITED MORTGAGE LOAN TRUST 2004-3; ACCREDITED MORTGAGE LOAN TRUST 2005-4; ACCREDITED MORTGAGE LOAN TRUST 2006-1; ACCREDITED MORTGAGE LOAN TRUST 2006-2; ARGENT SECURITIES INC., ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2005-W2; CITIGROUP MORTGAGE LOAN TRUST, SERIES 2005-OPT3; EQUIFIRST MORTGAGE LOAN TRUST 2004-2; FIRST FRANKLIN MORTGAGE LOAN TRUST 2005-FFH3; FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF8; GSAMP TRUST 2006-HE1; HSI ASSET SECURITIZATION CORP. TRUST 2006-OPT2; IMPAC SECURED ASSETS CORP MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-3; IMPAC CMP TRUST SERIES 2004-5; IMPAC CMB TRUST SERIES 2005-5; IMPAC CMB TRUST SERIES 2005-8; IMPAC SECURED ASSETS CORP., MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-1; IMPAC SECURED ASSETS CORP., MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-2; INDYMAC INDX MORTGAGE LOAN TRUST 2005-AR21; INDYMAC INDX MORTGAGE LOAN TRUST 2006-AR9; J.P. MORGAN MORTGAGE ACQUISITION TRUST 2007-CH1; J.P. MORGAN MORTGAGE ACQUISITION TRUST 2007-HE1; LONG BEACH MORTGAGE LOAN TRUST 2004-2; MORGAN STANLEY ABS CAPITAL I INC. TRUST 2005-HE3; MORGAN STANLEY ABS CAPITAL I INC. TRUST 2005-HE6; MORGAN STANLEY ABS CAPITAL I INC. TRUST 2005-HE7; MORGAN STANLEY ABS CAPITAL I INC. TRUST 2005-NC1; MORGAN STANLEY CAPITAL I INC. TRUST 2006-NC2; MORGAN STANLEY ABS CAPITAL I INC. TRUST 2007-HE5; MORGAN STANLEY HOME EQUITY LOAN TRUST 2006-1; MORGAN STANLEY HOME EQUITY LOAN TRUST 2006-3; NEW CENTURY HOME EQUITY LOAN TRUST, SERIES 2005-C; NEW CENTURY HOME EQUITY LOAN TRUST SERIES 2005-D; POPULAR ABS MORTGAGE PASS-THROUGH TRUST 2007-A; SAXON ASSET SECURITIES TRUST 2006-3; SAXON ASSET SECURITIES TRUST 2007-2; SOUNDVIEW HOME LOAN TRUST 2006-EQ1; WAMU SERIES 2007-HE1 TRUST,

Nominal Defendants.

Index No. 654438/2015

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

Plaintiffs-Respondents,

– 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,

– 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.

CORPORATE DISCLSOURE STATEMENT OF PLAINTIFFS-RESPONDENTS IKB INTERNATIONAL, S.A., IN LIQUIDATION AND IKB DEUTSCHE INDUSTRIEBANK AG

Plaintiff-Respondent IKB International, S.A., in Liquidation, states that it is a wholly-owned subsidiary of IKB Deutsche Industriebank AG.

Plaintiff-Respondent IKB Deutsche Industriebank AG states that it has no parent that is a corporation, and that no publicly held corporation owns ten percent or more of its stock.

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PRELIMINARY STATEMENT

The four actions consolidated on this appeal are just four of many litigations filed over the past decade against the trustees of residential mortgage-backed security ("RMBS") trusts for their utter failure to fulfill their duties to protect the trusts for which they served as trustees and to protect the certificateholders of those trusts.

Throughout the last decade, while there have been some outliers, New York state courts have established a clear weight of authority on most of the issues that arise in similar actions when interpreting the agreements that dictate the duties and obligations of the various trust parties (the "Governing Agreements"). Here, the four defendants ("Defendants" or "Trustees") ask this Court to overturn the clear weight of authority on two central issues regarding the Governing Agreements, destroying a decade of reliance on this well-established and well-reasoned case law.

First, Defendants ask this Court to reject the clear weight of authority in New York state courts holding that when an RMBS trustee agrees to "exercise the rights referred to above" for the "benefit of Certificateholders," and the "rights referred to above" include the right of the Trust[1] to force an entity that sold loans

[1] The capitalized terms "Trust" or "Trusts" used herein refers to the 86 RMBS trusts that remain at issue across these four actions as of the date of this filing.

into the RMBS trust (the "Obligor") to repurchase defective loans based on "document defects" or "representation and warranty breaches," the Trustee has an affirmative and explicit duty towards the certificateholders to enforce the Trust's right against the Obligors to require repurchase.

Second, Defendants ask this Court to reject unanimous authority, not only in New York state courts but also in the Second Circuit, that when an RMBS investor sues a Trustee, the investor is excused from complying with any provision of the "no-action clauses" found in the Governing Agreements. As courts have uniformly held, compliance with the no-action clauses must be excused in their entirety because it would be absurd to require plaintiffs to ask the Trustees to sue themselves, and it would be even more absurd to force plaintiffs to collect 25% of certificateholders before asking the Trustees to do so in their own name. Dozens of RMBS certificateholders have brought suits against Trustees over the past decade in reliance on this bright-line rule, all of which would be brought into question by a decision by this Court that plaintiffs in RMBS trustee actions must comply with any portion of a no-action clause.

Taken together, Defendants ask this Court to hold that RMBS trustees such as themselves (i) had no duty to ensure that defective loans be cured (via repurchase or substitution) even when the Trustees knew that the Obligors had not complied with their repurchase obligations, the Trusts were being harmed by the

Obligors' failure to repurchase defective loans, and the Trustees were the only party who could enforce the Trusts' right to have the Obligor repurchase the defective loans; and (ii) cannot be sued for breaching any of their obligations under the Governing Agreements unless the Trustees agree to sue themselves. These positions are not only illogical and counter to the great weight of authority in New York, but also require the Court to twist the plain language and structure of the Governing Agreements and ignore multiple well-established canons of contract interpretation.

Finally, Defendants ask this Court to overturn both the Motion Court and the unanimous First Department panel by dismissing Plaintiffs' breach of fiduciary duty and conflict of interest claims as duplicative. This Court should not overturn the well-reasoned decisions below concluding that Plaintiffs have sufficiently alleged torts and damages separate and distinct from their contract claims.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Do Governing Agreement provisions setting forth the right of the Trust and Trustee to have the Obligors repurchase defective loans, just above provisions in which the Trustee "agrees to . . . exercise the rights referred to above for the benefit of all present and future" certificateholders, impose an affirmative duty on the Trustee to enforce the Trusts' right to have the Obligors repurchase defective loans?

The First Department correctly held Yes.

2. Have all New York State and Federal Courts, including the Motion Court and First Department below, correctly held that compliance with the entirety of a no-action clause is excused when bringing an action against RMBS Trustees?

The First Department correctly held Yes.

3. Have Plaintiffs asserted non-duplicative tort claims for breach of fiduciary duty and conflicts of interest where they assert misconduct separate and apart from the Trustees' breach of their contractual duties and damages that flow separately from the breach of contract and tort claims?

The First Department correctly held Yes.

STATEMENT OF THE FACTS AND THE CASE

A. Case Background.

Across the four actions, Plaintiffs purchased RMBS certificates issued by 86 Trusts for which Defendants were Trustees.[2] (*See, e.g.*, R. 6385 (¶ 1).)[3] Plaintiffs

[2] Plaintiffs have voluntarily dismissed their claims on a number of Trusts included in their complaints, leaving 86 Trusts at issue as of today.

[3] Because the allegations discussed in this Statement of Facts are similar in each of the six Complaints, Plaintiffs 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.").

allege that Defendants breached their duties as Trustees and, as a result, those securities are essentially worthless today. (*Id.* ¶ 2.)

1. <u>The Alleged Breaches.</u>

a) <u>Breach of Contract.</u>

The Governing Agreement set forth the Trustees' duties, all of which were designed to ensure that the Trusts and their investors were protected. Generally, the Trustees' duties fell into two buckets: (1) Pre-Event of Default ("EOD") duties, or the duties that the Trustee was obligated to perform before it was aware of any EODs in each Trust; and (2) heightened Post-EOD duties. Plaintiffs allege that Defendants breached both their Pre-EOD and Post-EOD duties (R. 6545 – 6550), but only Pre-EOD contractual duties are at issue on this appeal.[4]

Specifically, this appeal deals with two pre-EOD issues that arose frequently in the Trusts: (1) document defects, meaning that documents supporting the mortgage loans underlying the Trusts (the "Mortgage Files") were missing, incomplete or incorrect; and (2) representation and warranty ("R&W") breaches in the underlying mortgage loans, meaning that the loans were not of the quality that had been represented upon being deposited into the Trusts (*e.g.*, had a higher debt

[4] The only Post-EOD duty at issue on this appeal is Defendants' breach of their Post-EOD fiduciary duty to act as a prudent person would in the same circumstances once an EOD was declared in a Trust.

to equity ratio, or were made to a borrower with a lower FICO score than represented, among other examples).

The presence of either document defects or representation and warranty breaches in its mortgage loans created a significant risk to a Trust whose entire value stems from of the ability to collect principal and interest on those mortgage loans. The Governing Agreements recognize as much, by providing the Trusts the unambiguous and undisputed right to require the Obligors to repurchase or substitute loans that are found to contain document defects or breaches of representations and warranties. (R. 39262 – 39267 (HEAT 2006-2 PSA§§ 2.02, 2.03).)

(1) Document Defect Claims.

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

First, the Trustee or Custodian had a duty 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." (R. 6404 (¶ 74).)

Second, the Trustees had 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).) This duty required the Trustees to act (including through litigation against the Obligor, if necessary), to enforce the Trusts' right to have the Obligors repurchase defective loans.

(2) 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") ratios. (R.6440 (¶ 188).) Similar to Document Defects, 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 Trusts' right to have the Obligors repurchase defective loans if the Obligors failed to do so voluntarily. (R. 6390, 6404 – 6405 (¶¶ 27, 75 – 76).)

(3) The Enforcement Provisions.

For all of the Trusts, the Trustee had the obligation to enforce the Trust's right to have the Obligors repurchase defective loans, whether the Obligors' repurchase obligations stemmed from document defects or R&W breaches. (R.

6403 ¶ 108; R. 6403 (¶ 27).) However, with regard to Defendants' appeal on the issue of the Trustees' duty to enforce the Trusts' right to have the Obligors repurchase defective loans, only 25 of the Trusts are at issue.

These allegations are based on specific provisions in the Governing Agreements that placed a duty on the Trustees to enforce the Trusts' right to compel the Obligors to repurchase defective loans. There are many variations in the language creating these duties, and only one of the many iterations is at issue here.

First, the Governing Agreements for 31[5] of the 86 Trusts at issue in this action state that the Trustee "shall enforce" the Obligors' repurchase obligations. While those provisions differ slightly in their exact wording, they generally provided:

> "[I]f the Seller does not deliver such missing document or cure such defect or breach in all material respects during such period, and such missing document, defect or breach will have a material and adverse effect on the Certificateholders, the Trustee shall enforce the Seller's obligation under the Mortgage Loan Purchase Agreement and inform the Seller of its obligation

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[5] ABFC 2006-OPT1; ABFC 2006-OPT3; ABSHE 2006-HE5; ARSI 2005-W2; BSARM 2005-10; BSARM 2005-12; CARR 2006-NC5; CARR 2006-RFC1; CBASS 2006-CB6; CBASS 2006-CB8; CBASS 2007-CB1; CMLTI 2006-WFH4; CMLTI 2007-AHL1; CMLTI 2007-AMC4; CMLTI 2007-WFH1; CMLTI 2007-WFH2; JPALT 2006-S4; JPMAC 2007-HE1; NSTR 2007-A; NSTR 2007-B; OOMLT 2005-3; OOMLT 2005-4; OOMLT 2005-5; OOMLT 2007-6; SARM 2006-5; SASC 2006-EQ1A; SASC 2006-WF2; SASC 2006-WF3; SAST 2006-3; SVHE 2006-EQ1; SVHE 2007-OPT3.

> to repurchase such Mortgage Loan from the Trust Fund at the Purchase Price . . . ."

(CBASS 2006-CB8 Pooling and Servicing Agreement ("PSA") § 2.03.)[6] Trusts with this or a similar provision are not at issue on this appeal.

Second, the Governing Agreements for 21[7] of the 86 Trusts at issue in this action state that some other Trust Party, acting on the Trustees' behalf, "shall enforce" the Obligors' repurchase obligations. Plaintiffs allege that these provisions placed an affirmative duty on the Trustee to ensure the enforcement of repurchase obligations, neither the Motion Court nor the First Department has disagreed with this argument, and Defendants do not raise that issue on appeal. For example:

> If the Originator does not deliver such missing document or cure such defect or breach in all material respects during such period, the Securities Administrator on behalf of the Trustee shall enforce the obligations of the Originator under the Mortgage Loan Purchase Agreement and the Assignment and Assumption Agreement to repurchase such Mortgage Loan from the Trust Fund at the Purchase Price . . . .

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[6] Complete copies of all Governing Agreements are part of the record and were provided by the Trustees on CD-ROM, as they were before the Motion Court and First Department. (Defs. Br. at 8 n.3.)

[7] ACCR 2006-1; CFLX 2006-2; FFML 2006-FF8; JPMAC 2005-OPT2; JPMAC 2006-CW1; JPMAC 2006-CW2; RAMP 2005-EFC5; RAMP 2005-EFC6; RAMP 2006-EFC2; RASC 2005-AHL2; RASC 2005-EMX3; RASC 2005-EMX4; RASC 2005-KS11; RASC 2005-KS12; RASC 2006-EMX2; RASC 2006-EMX3; RASC 2006-EMX4; RASC 2006-EMX7; RASC 2006-EMX9; RASC 2006-KS1; RASC 2006-KS2.

(JPMAC 2005-OPT2 PSA § 2.03.)[8]

Third, 9[9] of the 86 Trusts include some other variation of language that Plaintiffs allege placed an affirmative duty on the Trustees to enforce the Trusts' right to have defective loans repurchased. Neither the Motion Court nor the First Department has disagreed with this argument, and Defendants do not raise that issue on appeal. For example:

> The Trustee shall pursue all legal remedies available to the Trustee against the applicable Responsible Party or the Depositor, as applicable, under this Agreement, if the Trustee has received written notice from the Depositor directing the Trustee to pursue such remedies (and without such notice against the Depositor in the case of a Depositor Mortgage Loan).

(MSAC 2005-HE3 PSA § 2.03(g).)

It is only the 25[10] Trusts that contain none of the language above that are at issue on this appeal. For those Trusts, Plaintiffs allege that the Trustees had an

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[8] One of the indenture trusts at issue, ACCR 2006-1, provide that the "issuer" or "issuing entity" "will take such other action as may be necessary or advisable to . . . enforce any of the Mortgage Loans or the Sale and Servicing Agreement." (R. 37798 – 37816.) As Plaintiffs showed below, US Bank, as Owner Trustee, was responsible for performing the duties of the issuer for these trusts. (R. 37725 – 37737.)

[9] CSAB 2006-3; CSAB 2006-4 CWHL 2005-HYB9; MSAC 2005-HE3; MSAC 2005-HE6; MSAC 2005-HE7; MSAC 2007-HE5; MSHEL 2006-1; MSHEL 2006-3.

[10] BSABS 2005-AC9; BSABS 2007-HE4 BSABS 2007-HE5; CWHL 2006-HYB1; CWL 2005-14; CWL 2005-AB4; CWL 2005-IM1; CWL 2005-IM3; CWL 2006-13; CWL 2006-18; CWL 2006-19; CWL 2006-SPS1; CWL 2006-SPS2; HASC 2006-OPT2; HEAT 2005-8; HEAT 2005-9; HEAT 2006-1; HEAT 2006-2; HEAT

affirmative duty to enforce the Trusts' right to have defective loans repurchased based on the following provision, generally found in Section 2.06 of the relevant Governing Agreements:

> The Trustee agrees to hold the Trust Fund and exercise the rights referred to above for the benefit of all present and future Holders of the Certificates and to perform the duties set forth in this Agreement in accordance with its terms.

(BSABS 2007-HE4 PSA § 2.06.)

In each of these Trusts, Section 2.06 follows the Governing Agreement provisions that set forth the Trusts' right to have the Obligors repurchase defective loans arising from document defects or R&W breaches (generally Sections 2.02, 2.03 and/or 2.04). Accordingly, the Trustees' agreement to "exercise the rights referred to above for the benefit of all present and future Holders of the Certificates" is, quite literally, an agreement that the Trustee will exercise the right of the Trusts to have the Obligors repurchase defective loans for the benefit of certificateholders as set forth above Section 2.06 in the Governing Agreements.

b) Other 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 would a prudent

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2006-4; HEMT 2006-4; MSAC 2006-NC2; POPLR 2006-E; POPLR 2007-A; SABR 2006-OP1; SAST 2007-2.

person, 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. No-Action Clauses.

The Governing Agreements prohibit certificateholders from bringing actions against third parties relating to the Trusts without first making a written demand upon the Trustee to bring that action. For example:

> No Certificateholder shall have any right by virtue or by availing itself of any provisions of this Agreement to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement, unless such Holder previously shall have given to the Trustee a written notice of an Event of Default and of the continuance thereof, as herein provided, and unless the Holders of Certificates evidencing not less than 25% of the Voting Rights evidenced by the Certificates shall also have made written request to the Trustee to institute such action, suit or proceeding in its own name as Trustee hereunder and shall have offered to the Trustee such reasonable indemnity as it may require against the costs, expenses, and liabilities to be incurred therein or thereby, and the Trustee, for 60 days after its receipt of such notice, request and offer of indemnity shall have neglected or refused to institute any such action, suit or proceeding . . .

(R. 39359 (HEAT 2006-2 PSA § 10.08) (emphasis added).)

C. The Decisions Below.

1. The Motion Court's Decision.

In relevant part, the Motion Court resolved the motions to dismiss as follows:

— denied the motions as to the breach of contract claims, rejecting, among others, Defendants' theory that the Trustees did not have a duty to enforce the Trusts' right to have the Obligors repurchase defective loans for "rights referred to above" Trusts.

— denied the motions insofar as they alleged Plaintiffs lacked standing due to their failure to comply with the no-action clauses in the Governing Agreements, recognizing the long line of authority holding that compliance with the no-action clauses is excused in its entirety in suits against an RMBS trustee.

— denied the motions as to the breach of fiduciary duty and conflict of interest claims.

(R. 20 – 79.)

2. The First Department's Decision.

As to the issues Defendants raise on this appeal, the First Department held as follows:

a) Duty to Enforce.

The First Department held that the "Supreme Court correctly found that the provision that '[t]he Trustee agrees to . . . exercise the rights referred to above for the benefit of all present and future [certificateholders]' imposed an express duty on the trustees to enforce the repurchase protocol for the benefit of the investors." (R. 39169.)

This holding rested on a number of findings:

First, the First Department noted that "defendants do not dispute plaintiffs' assertion that 'the rights referred to above' include the right to have noncompliant loans repurchased." (*Id.*)

Second, the First Department held that the Governing Agreements expressly create a duty for the Trustees to enforce this right, and that "this express language is not discretionary." (R. 39170.) The Court explained its reasoning as follows:

a. The language "agrees to" is "language of commitment." (*Id.* (citing *Davies, Hardy, Ives & Lawther v. Abbott*, 38 N.Y.2d 216, 219 (1975)).)

b. "[T]he provision could have, but did not, provide that the trustee 'may' or 'has the discretion to' exercise the rights," and that it could not "add such discretionary language to the governing agreements where none exists." (*Id.*)

c. "Because we find [the duty to enforce the Trusts' right to repurchase] is specifically set forth in the agreements, we read this provision in harmony with Section 8 [which provides there shall be no implied duties] and do not ignore that section." *Id.*

d. Because the agreements are not ambiguous, it is improper to look at other agreements or documents outside of the PSAs. (R. 39170 – 39171.)

e. Finally, the First Department noted that its interpretation "avoids a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties," because "[i]f no party to the agreement has the obligation to enforce the repurchase protocol in the event of the obligor's breach, the repurchase protocol is effectively nullified." (R. 39173) (internal citations and quotations omitted).)

b) No-Action Clauses.

As to the no-action clauses, the First Department held, citing its prior decision in *Blackrock Balanced Capital Portfolio (FI) v. U.S. Bank N.A.*, 165 A.D.3d 526, 528 (1st Dep't 2018), that "Plaintiffs' noncompliance with the no-action clauses in the governing agreements is not a ground for dismissal of the complaints. Plaintiffs' compliance was excused because 'it would be futile to demand that the trustee commence an action against itself,' [and] '[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." (R. 39168.)

c) Economic Loss Doctrine.

As to the economic loss doctrine, the First Department held that "[t]he [motion] court correctly declined to dismiss the breach of conflict of interest and post-EOD breach of fiduciary duty claims on the basis of the economic loss doctrine—except insofar as the latter set of claims is based on defendants' failure to act as contractually required." (R. 39176 – 39177.) The First Department further explained, "[c]ontrary to defendants' contention, plaintiffs allege that the breach of these extracontractual duties caused damages separate from the damages caused by the breaches of their contractual duties. That these damages may be of

the same type does not matter, so long as they did not flow from the breach of contract." (*Id.*)

ARGUMENT

I. THE DECISIONS BELOW CORRECTLY HELD THAT DEFENDANTS HAD A DUTY TO ENFORCE THE TRUSTS' RIGHT TO HAVE THE OBLIGORS REPURCHASE DEFECTIVE LOANS

A. Defendants Cannot Show That the Governing Agreements Are Unambiguously in Their Favor.

Notably absent from Defendants' brief is any discussion of this action's procedural posture, or the burden that Defendants bear at this stage. On this motion to dismiss, Defendants must show that the relevant contractual provisions unambiguously placed no duty on Defendants. If the agreements are ambiguous or inconclusive, then the claims should not be dismissed, and this Court should affirm. *See LDIR, LLC v. DB Structured Prod., Inc*., 172 A.D.3d 1, 5–6 (1st Dep't 2019) (in deciding motion to dismiss action brought by HSBC as RMBS trustee requiring interpretation of PSA, holding that "because the disputed provision is reasonably susceptible to more than one interpretation, it cannot be construed as a matter of law, and dismissal . . . is not appropriate") (internal quotations omitted).

B. The Great Weight of New York Authority Supports the First Department.

1. New York's Lower Courts are Firmly on Plaintiffs' Side.

The overwhelming majority of New York state court decisions, including the Motion Court and First Department here, have held that the language "[t]he

Trustee agrees to . . . exercise the rights referred to above for the benefit of all present and future" Certificateholders imposed an express duty on the trustees to enforce the repurchase protocol for the benefit of the investors. *See IKB Int'l, S.A. v. Lasalle Bank N.A.*, 2021 WL 358318, at *11 (Sup. Ct. N.Y. Cty. Jan. 27, 2021) (R. 16 – 79) *affirmed in relevant part* 208 A.D.3d 423, 425 (1st Dep't 2022) (internal quotations omitted) (emphasis added) (R. 39163 – 39188); *see also Zittman v. The Bank of N.Y. Mellon*, 2022 WL 1471261, at *5, (Sup. Ct. N.Y. Cty. Nov. 5, 2020), *Finkelstein v. U.S. Bank, N.*A., 75 Misc. 3d 1202(A), at *5 (Sup. Ct. N.Y. Cty. May 2, 2022); *W. & S. Life Ins. Co. v. U.S. Bank N.A.*, 69 Misc. 3d 1213(A), at *5 (Sup. Ct. N.Y. Cty. Nov. 5, 2020), *reversed in relevant part*, 209 A.D.3d 6 (1st Dep't 2022). All three current or former New York County Commercial Division judges to consider the issue—Justices Cohen, Borrok and Friedman—agree that Section 2.06 placed an affirmative and explicit duty on the trustee to enforce the repurchase protocol.[11]

[11] A fourth Commercial Division justice, Justice Margaret Chan, also noted that the trustee's agreement to "'exercise the rights referred to above', that is, the right to enforce repurchase as provided in a previous section" might "'evince[] an *express* obligation on U.S. Bank' to enforce the repurchase obligations", but did not reach the issue because "such language is absent from the PSAs here*." Park Royal I LLC v. HSBC Bank USA, N.A.*, 2022 WL 1689873, at *7 (Sup. Ct. N.Y. Cty. May 25, 2022) (quoting *Western & Southern,* 69 Misc. 3d 1213(A)) (emphasis in original).

The reasoning for these decisions is a straightforward interpretation of the contractual language and structure, as described by Justice Cohen in *Western & Southern*: the trustee "agree[d] to hold the Trust Fund and exercise the rights referred to above for the benefit of all present and future" certificateholders. 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." 69 Misc. 3d 1213(A), at *5.

2. Defendants' Only New York State Case is an Outlier, and Their Other Cases Can be Distinguished Easily.

Defendants cite only one decision from a New York state court, the First Department's decision in *Western & Southern*, 209 A.D.3d 6, which reversed the Supreme Court and held that "rights referred to above" language does not impose an affirmative duty on the trustee. (Defs. Br. at 36.) But as the First Department majority in this action carefully explained when expressly considering and rejecting the prior panel's reasoning, *Western & Southern* simply got it wrong. Among other serious flaws, it ignored that the Trustees "agreed to" exercise the rights referred to above, which is "language of commitment"; ignored that the "rights referred to above" undisputedly includes the Trusts' right to require repurchase of defective loans; ignored that the Trustees agreed not only to "hold the Trust Fund," but also to "exercise the rights referred to above" for the benefit

of certificateholders; and ignores that the Trustees' interpretation leads to a result that is "absurd, commercially unreasonable or contrary to the reasonable expectations of the parties," because "[i]f no party to the agreement has the obligation to enforce the repurchase protocol in the event of the obligor's breach, the repurchase protocol is effectively nullified." 208 A.D.3d at 425; *see also Uribe v. Merchs. Bank*, 91 N.Y.2d 336, 341 – 342 (1998) (relied upon by Defendants and holding that contracts are to be interpreted by reference to the "reasonable expectation and purpose of the ordinary businessperson").

Defendants cite numerous decisions from the Southern District of New York and Ohio state courts (Defs. Br. at 36) holding that the Trustees' agreement to "exercise the rights referred to above" did not impose an affirmative duty on the Trustee, but none of them should have any persuasive effect on this Court. *Commerzbank AG v. U.S. Bank Nat'l Ass'n*, 457 F. Supp. 3d 233, 257-58 (S.D.N.Y. 2020) relies solely on an Ohio state court decision for its holding on this question, *see id*., *citing W. & S. Life Ins. Co. v. Bank of N.Y. Mellon*, 129 N.E.3d 1085, 1093-94 (Ohio Ct. App. 2019), and *Phoenix Light SF Ltd. v. Deutsche Bank Nat'l Tr. Co*., 585 F. Supp. 3d 540, 591 (S.D.N.Y. 2022), in turn relies solely on *Commerzbank* and the same Ohio decision. Indeed, this *Phoenix Light* decision both acknowledges that "Courts confronted with the question . . . have come to different conclusions" and explicitly ignores New York state case law in favor of

Ohio's interpretation of New York law. *See id*. at 591. And *Phoenix Light SF Ltd. v. Wells Fargo Bank, N.A.*, 2022 WL 2702616, at *22 n.30 (S.D.N.Y. July 12, 2022) focuses solely on language stating that the "Trustee shall request" the Obligors to repurchase, with no real analysis of the "rights referred to above" provision, nor does the Report & Recommendation it affirmed contain any further analysis. *See Phoenix Light SF Ltd. v. Wells Fargo Bank, N.A.*, 2021 WL 7082193, at *20 n.11 (S.D.N.Y. Dec. 6, 2021).

Each of these decisions is flawed for the same reasons as the *Western & Southern* panel's decision. Additionally, all but one of the decisions Defendants cite on page 36 of their brief were made when the case was at a different procedural posture—on a motion for summary judgment or following trial—where the fact finder could rely on the full record to resolve any issues of contractual ambiguity. In contrast, Defendants at here must show that the PSAs are unambiguous, on their faces, as a matter of law, a much heavier burden. *See Phoenix Light v. Deutsche Bank*, 585 F. Supp. 3d 540 (summary judgment); *Phoenix Light Wells Fargo*. 2021 WL 7082193, at *2, *report and recommendation adopted in part, rejected in part*, 2022 WL 2702616 (summary judgment); *Commerzbank*, 457 F. Supp. 3d at 257-58 (summary judgment); *W. & S.*, 129 N.E.3d at 1093-94, *aff'g* 2017 WL 3392855, at *5 (post-trial).

Just one of these cases, *Pac. Life Ins. Co. v. US Bank Nat'l Ass'n*, 2022 WL 11305628, at *32 (S.D.N.Y. Oct. 19, 2022), was on a motion to dismiss, and there the court specifically noted that "[g]iven the conflicting First Department decisions, and . . . the fact that the New York Court of Appeals has not addressed this issue, this Court is not bound to follow the reasoning of the majority in IKB." Thus, that case is far from dispositive. Indeed, it invites this Court to reach its own conclusion and indicates that, should this Court decide to follow the majority below, Southern District courts will follow. Moreover, to the extent Defendants suggest that Southern District courts have unanimously held in their favor, that is wrong. The cases there reach mixed results just as the First Department has. *See, e.g.*, *Royal Park Invs. SA/NV v. Deutsche Bank Nat'l Tr. Co*., 2016 WL 439020, at *4 (S.D.N.Y. Feb. 3, 2016) (analyzing PSA structure and determining that the "rights referred to above" include the Trusts' right "to enforce the substitution and repurchasing remedies").

More generally, Defendants' suggestion that because they are corporate trustees, the Governing Agreements should be read to impose only limited, ministerial duties (Defs. Br, at 25 – 26) has no support in this Court's jurisprudence. For example, Defendants rely upon *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 11 N.Y.3d 146 (2008), ignoring that in *AG Capital Partners*, this Court recognized that even though a trustee's pre-EOD

duties were contractual, a corporate trustee had additional extra-contractual duties to investors. *Id*. at 156 – 157. Defendants cherry-pick quotes from decisions discussing trustees' limited, ministerial functions, (Defs.' Br. at 25), but ignore this Court's explanation in *Quadrant Structured Prods. Co. v. Vertin*, 23 N.Y.3d 549, 559 (2014), that "[a] trust indenture is a contract, and under New York law interpretation of indenture provisions is a matter of basic contract law." As such, whether Defendants' duties were ministerial or substantive depends solely on the Governing Agreements' plain language, not unspecific, generic characterizations of RMBS PSAs in general. And, as in *AG Capital Funding*, in *Quadrant Structured Products*, this Court held that trustees were held to a higher, not a lower, standard, explaining that despite the general wording of an indenture's no-action clause, the clause could not be used to bar "claims against the trustee." *Quadrant* 23 N.Y.3d at 566.

3. This Court's Decision in *DLJ* Supports the Order.

This Court's recent decision in *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Cap*., 38 N.Y.3d 169, 178 (2022), supports the First Department majority here.

In *DLJ*, this Court was asked to interpret language in the relevant trust agreement provisions providing that "upon discovery . . . of a breach of a representation or warranty . . . that materially and adversely affects the interest of the Certificateholders in any Mortgage Loan, the party discovering such breach

shall give prompt notice thereof to the other parties." *Id*. The specific question was whether this language required the trustee, U.S. Bank, to provide notice to the loan seller, DLJ, of each specific loan that had R&W breaches, or whether notice to DLJ naming many specific loans that were in breach, together with the statement that likely many other loans were also breaching, was sufficient notice to require DLJ to repurchase loans that were not specifically named in the notice but that U.S. Bank later identified through expert testimony. *Id.*

This Court concluded that loan-specific notice was required. In so holding, while citing the general rule that contracts must be interpreted according to their plain meaning, without adding or excising any terms, this Court based its holding on its finding that "the parties could only reasonably have intended and understood the notice requirement to operate on a loan-by-loan basis." *Id.* at 179 – 180. This Court then examined the language used in the provision, which requires that, upon notice of a breach "in any mortgage loan," the party discovering "such breach shall give prompt notice thereof to the other parties." The majority determined that the use of the singular "mortgage loan" and "such breach" meant that any notice of breaches must be loan specific. *Id.*

As this Court noted in *DLJ*, it was not "reading language into the agreement"—rather, it was merely applying the cannon of statutory interpretation that contracts must be interpreted not solely by their exact language but "in light of

the contractual obligation as a whole and the intention of the parties manifested thereby." *Id.* at 180 (quoting *Cortland St. Recovery Corp. v. Bonderman*, 31 N.Y.3d 30, 39 (2018)).

While the "loan by loan" language was not found in the PSAs, this Court determined that the only way the provisions made sense as a whole and in connection with the whole agreement, and thus the only thing the parties could reasonably have intended, was that U.S. Bank was required to identify each loan it wanted DLJ to repurchase. *See also Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 331 (2007) (holding that the agreements relating to a loan consortium did not allow an individual lender to sue the borrower, even though there was no explicit provision preventing it from doing so).

That is exactly what the First Department did here. The First Department neither added nor excised words from Section 2.06. To the contrary, it simply interpreted that provision accordingly to its plain meaning, in light of the contract as a whole and the intention of the parties. Section 2.06 provides that the Trustees "agreed" to "exercise the rights referred to above for the benefit of certificateholders." As the First Department correctly held, to "agree" to do something, by its plain terms, means that the Trustees will do it—an "affirmative commitment"—thus placing an affirmative duty on them. And, reading the contract as a whole, the "rights referred to above," as Defendants conceded below,

include the Trusts' rights to have the Obligors repurchase defective loans, which was literally set forth above in the Governing Agreements. Finally, the First Department determined that it would lead to an untenable and commercially unreasonable result—and thus could not be a proper interpretation—that, despite (i) the clearly set forth obligation of the sellers to repurchase defective loans; (ii) the right of the Trusts to enforce that obligation; and (iii) the Trustees' express agreement to exercise that right for the benefit of the certificateholders, the PSAs did not place an affirmative duty on the Trustees, thus leaving the Obligors' repurchase obligations as entirely hypothetical and unable to be enforced by any party.

C. Defendants' Interpretation of Section 2.06 is Wrong.

1. Defendants' Interpretation Requires Reading Terms Out of Section 2.06 or Rewriting the Provision Entirely.

a) Defendants' Argument Reads "Agrees To" Out of Section 2.06 and Replaces it With Discretionary Language.

Section 2.06 "states that the Trustee will (1) 'hold the Trust Fund' and (2) 'exercise the rights referred to above,' both 'for the benefit of all present and future Holders of the Certificates." (Defs. Br. at 37.) According to Defendants, "[t]he operative language is that the Trustee holds the Trust Fund 'for the benefit of' investors, not for itself," and "[t]he same reading also applies to the parallel 'exercise' phrase." (*Id.*) Thus, Defendants argue that both the "hold the Trust

Fund" and "exercise the rights referred to above" provisions do "not impose any duty to act; it simply describes the nature of the Trustee's property interest in the assets." (*Id.*)

This argument intentionally omits—and requires the Court to read out of Section 2.06—the Trustees' agreement to hold the Trust Fund and exercise the rights referred to above. Defendants' quotation is misleading insofar as it omits the phrase "agrees to"—what the First Department called "language of commitment." (R. 39170.)

The Trustees' agreement to "hold the Trust Fund . . . for the benefit of Certificateholders" imposed an affirmative duty on the Trustees to hold the Trust Fund. Otherwise, according to Defendants, the Trustees could simply sell, or transfer, or otherwise dissipate the Trust Fund, and there would be no remedy against it because it had no duty to hold the Trust Fund, only that if the Trustees did decide to hold the Trust Fund, they did so for the benefit of Certificateholders.

Similarly, the Trustees' agreement to "exercise the rights referred to above . . . for the benefit of Certificateholders" places an affirmative duty on the Trustees to exercise those rights. It does not mean, as Defendants argue, merely that if the Trustees choose to exercise the rights referred to above, they must do so for the benefit of Certificateholders.

This is precisely what the First Department majority meant when it stated that "Defendants' explanation that the provision was merely meant 'for whom' the trustee exercises rights undermines their argument by acknowledging that there are in fact rights to exercise", and that the Trustees' agreement to exercise those rights was an "affirmative commitment." (R. 39171.)

If Section 2.06 meant what Defendants say, it would have had to have been written entirely differently, using discretionary language. The Governing Agreements for the relevant Trusts could easily have been written to say: "If the Trustee chooses to exercise any of the rights referred to above, it does so for the benefit of Certificateholders." But, as the majority below explained, that is not what the relevant Governing Agreements say. (R. 39170 ("Notably, the provision could have, but did not, provide that the trustee 'may' or 'has the discretion to' exercise the right . . . . Nor can we add such discretionary language to the governing agreements where none exists.").)

b) Defendants' Argument Renders the "Rights Referred to Above" Clause Superfluous.

Defendants' argument also requires reading out of Section 2.06 the "rights referred to above" language or giving it superfluous meaning. The Trustees argue that Section 2.06 was only intended to clarify that the Trustees were "granted . . . rights related to [the Trust Fund], including the right to receive certain amounts associated with the mortgage loans that make up the Trust Fund, all of which it

holds and exercises for the benefit of the certificateholders." (Defs. Br. at 34 (citing *Phoenix Light SF*, 585 F. Supp. 3d at 591).)

However, reading "the rights referred to above" as only referring to the right of the Trust to "receive certain amounts associated with the mortgage loans" makes this provision duplicative of the requirement that the Trustee "hold the Trust Fund" and otherwise makes no sense.

As defined in the Governing Agreements, the "Trust Fund" is "[t]he corpus of the trust hereunder consisting of (i) the Mortgage Loans and all interest and principal received on or with respect thereto after their Cut-off Dates" as well as the amounts in certain accounts associated with the Trust. (R. 39253 (emphasis added).) In other words, the Trustees' agreement to "hold the Trust Fund . . . for the benefit of Certificateholders" already includes the Trusts' rights to the interest and principal payments on the Mortgage Loans, which are part of the Trust Fund.

Because Section 2.06 separately lists the Trustees' agreement to (i) hold the Trust Fund; and also to (ii) exercise the rights referred to above, the "rights referred to above," as the First Department recognized, must mean something other than the Trusts' passive right to the principal and interest payments, which are already part of the Trust Fund. *See Patrolmen's Benevolent Ass'n of City of N. Y., Inc. v. City of N. Y.*, 46 A.D.3d 378, 380 (1st Dep't 2007) (noting "the canon of contract interpretation that every clause and word should be given meaning").

Instead, this must mean that there are other rights, which are "referred to above," that the Trustees "agree to . . . exercise." The rights set forth "above" Section 2.06, in Sections 2.02, 2.03 and/or 2.04, include the right to have the Obligors repurchase defective loans, and the Trustees agreed to exercise those rights.

c) Defendants' Interpretation Reads "Exercise" Out of Section 2.06.

Finally, if Defendants were correct that the only "right[] referred to above" referenced by Section 2.06 was the right to receive principal and interest payments on the Mortgage Loans, then the Trustees' agreement to "exercise" those rights is meaningless. The Trustees do not "exercise" the right to receive money from the mortgage loans—it is a passive endeavor and exercise is an affirmative action. Thus, the Trustee's agreement to "exercise" the "rights referred to above" must reference rights which require the Trustee to take some affirmative action.

To summarize, if Defendants' interpretation were correct, Section 2.06 should read "the Trust Fund is held by the Trustee for the benefit of Certificateholders."[12] This would unambiguously provide that the Trustees'

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[12] Yet that very same obligation is already set forth previously in the Governing Agreements, even in the PSA Defendants use as a model. (*See, e.g.*, R. 39262 (HEAT 2006-2 PSA § 2.02) ("The Trustee . . . declares that it . . . holds or will hold or will cause its agent to hold such other assets as are included in the Trust Fund, in trust for the exclusive use and benefit of all present and future Certificateholders.").) Thus, Section 2.06 must mean that the Trustee is agreeing

holding of the Trust Fund, including the principal and interest payments on the Mortgage Loans which are part of the Trust Fund, was done for the benefit of Certificateholders, not itself. But the Governing Agreements actually say that the Trustee (i) agrees to; (ii) exercise; (iii) the rights referred to above; (iv) for the benefit of Certificateholders. The only way to give each of these terms meaning is through Plaintiffs' (and the Motion Court and First Department majority's) interpretation—that this provision imposes an affirmative duty on the Trustees to exercise specific rights set forth in the preceding provisions of the Governing Agreements above and beyond passively receiving payments on the Mortgage Loans, including enforcement of the Trusts' right to have the Obligors repurchase defective loans.

2. The First Department Correctly Decided That Defendants' Interpretation Would Nullify the Repurchase Protocol.

The First Department majority held that it would be "absurd, commercially unreasonable or contrary to the reasonable expectations of the parties" to hold that the Trustees had no duty to enforce the repurchase protocol in "rights referred to

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to do something more than just hold the Trust Fund for the benefit of certificateholders, otherwise it is entirely superfluous of Section 2.02. *See Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 573 (1986). This makes it even more clear that the key part of Section 2.06, and the thing that sets it apart from its prior agreement in Section 2.02 to hold the Trust Fund for the benefit of certificateholders, is the Trustees' agreement to exercise the rights referred to above.

above" Trusts because then no party would have the ability to enforce the Obligors' duty to repurchase defective loans, nullifying the repurchase protocol.

The Trustees' central argument in response is that sophisticated contract parties are free to contract however they would like. This might be a defensible argument if the Governing Agreements included clear language that on its face provided that the Trustees were not responsible for enforcing the Trusts' right to have the Obligors repurchase defective loans. This could have been accomplished with a clear provision stating plainly "the Trustee has no duty to take any action to enforce the Obligors' obligation to repurchase defective loans," or in any other formulation. The Trustees were parties to the Governing Agreements and had every right and ability to negotiate for such a provision. But they did not do so. Instead, the Trustees are left to argue that despite the plain language of the Governing Agreements, which set forth clearly the Trusts' right to have the Obligors repurchase defective loans, and then provide that the Trustees agree to exercise those rights for the benefit of certificateholders, the parties did not intend this to place a duty on the Trustees to actually exercise those rights. The First Department was perfectly correct to hold that it cannot accept the Trustees' interpretation because it leads to a commercially unreasonable and untenable result. Under these circumstances, the Court should not defer to the self-serving, *post hoc* interpretation of the Trustees, parties to the agreements, who had every

ability to influence their drafting. To the contrary, it is well established that ambiguous contract provisions should be interpreted against the provisions' drafters for this very reason. *See Rentways, Inc. v. O'Neill Milk & Cream Co*., 308 N.Y. 342, 348 (1955) (quoting *Mutual Life Ins. Co. of N.Y. v. Hurni Packing Co*., 263 U.S. 167, 174 (1923)). While at this stage there may be a factual question as to the extent the Trustees participated in the drafting of these agreements, they at the very least had the opportunity to do so, which the certificateholders did not.

3. Plaintiffs' Interpretation Does Not Conflict With Provisions in Some Governing Agreements Providing That the Trustee "Shall Enforce" the Obligors' Repurchase Obligations.

Defendants' argument that the fact that the Governing Agreements for other Trusts expressly provide that the Trustee is required to enforce the repurchase protocol (Defs. Br. at 40) also fails, for the same reasons that Justice Borrok previously explained in one of his two decisions rejecting the same arguments Defendants make here:

> The fact that this obligation is articulated differently in the PSAs and that certain of these documents contain 'belt and suspender' language that specifically indicates in Section 2.02 of the PSAs that the Trustee must enforce the Sellers' obligation to repurchase and other PSAs do not contain such language is immaterial under the circumstances . . . .

Finkelstein, 75 Misc. 3d 1202[A], at *2. The fact that different drafters expressed the same obligation using different words in other documents is not a reason to ignore the unambiguous language of the Governing Agreements applicable here.

Moreover, as the First Department noted, "the numerous agreements at issue involved different parties, were executed on different days, and effectuate different purposes. Accordingly, they cannot be read together to reach our partially dissenting colleagues' conclusion that the drafters omitted a pre-EOD duty of the trustee." (R. 39172.)

D. Defendants' Other Arguments Are Meritless.

1. Plaintiffs' Interpretation Does Not Conflict With the Requirement That the Trustees' Duty Must be Specifically Set Forth.

As discussed above, Section 2.06 unambiguously provides that the Trustee "agrees to . . . exercise" certain rights. As the First Department correctly noted, by "agreeing to" exercise the rights referred to above, the Trustees were "manifesting a commitment to some obligation." (Order at 6 (citing *Davies*, 38 N.Y.2d at 219).)

This is, by its plain language, an agreement to do something—*i.e.*, an affirmative commitment creating an express duty. Thus, Plaintiffs' interpretation does not violate the Governing Agreements' general admonishment against implying duties to the Trustees. As Justice Cohen explained in *Western & Southern*, 69 Misc. 3d 1213(A):

> 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 . . . . 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.

> While the PSA forbids 'implied covenants or obligations' to be 'read into [the PSA] against the Trustee'), Section 2.06 evinces an express obligation on US Bank's part to exercise certain rights.

Id. at *14 – 15 (emphases added, internal citations omitted).

Thus, neither IKB, the Motion Court, nor the First Department imposed an implied duty on the Trustees. Rather, the Governing Agreements 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; *see also* R. 39170.) Defendants breached this express duty when they failed to exercise the "rights referred to above," including the Trusts' right to have the Obligors repurchase defective loans. Indeed, Defendants recognize that Section 2.03 of the PSAs impose a "specific and express duty on the obligated party to cure or repurchase." (Defs. Br. at 28.) Put differently, the Trusts have a "specific and express" right to require the Obligor to cure or repurchase. And this is one of the Trusts' rights that Trustees agreed to exercise.

2. Plaintiffs' Interpretation Does Not Conflict with Section 3.05

Defendants argue that the "exercise the rights referred to above" language could not have placed a duty on the Trustees to enforce the Obligors' repurchase obligations because a separate provision, contained in an indeterminate number of Governing Agreements not identified by Defendants, provides that the Trustee

does not have the obligation to "effectuate repurchases or substitutions of Mortgage Loans hereunder including, but not limited to, repurchases or substitutions of Mortgage loans pursuant to Section 2.02 or 2.03" after taking over servicing duties in the event of a servicer bankruptcy or the servicer otherwise resigning or being terminated as servicer. (Defs. Br. at 31 – 32 (quoting R. 39273) (emphasis added).)

This is the first time the Defendants have made this argument or even mentioned Section 3.05 despite the "exercise the rights referred to above" issue having been fully briefed before the Motion Court and the First Department. "It is well settled that this court will not, for the purpose of reversing a judgment, entertain questions not raised or argued at the trial or upon the intermediate appeal." *Martin v. Home Bank*, 160 N.Y. 190, 199 (1899). The Court should decline to consider this new argument.

In any event, Defendants' argument misreads this provision, which Defendants only identify as existing in a single Governing Agreement, and which appear to appear in only a small number of others, as discussed below. (Defs. Br. at 35.) The purpose of these provisions is to clarify that, when the Trustee takes over as Servicer, the Trustee is not required to take on other duties that the same party that previously acted as Servicer might also have as a result of its serving in

other roles in the Trust, such as the duty to "effectuate"—*i.e.* actually repurchase defective loans—where the Servicer was also the Obligor.

This is made clear in the PSA for the Trust SABR 2006-OP1, at issue in the *Wells Fargo* case. In that Trust, Option One Mortgage Company was both the Servicer and Responsible Party, *i.e.* the Obligor. Section 2.03(d) of the PSA for that Trust provided that the "Responsible Party", *i.e.* Option One, was required to repurchase loans found to have breached representations and warranties. Then, Section 3.24 of that agreement provides that "[i]n the event that the Servicer shall for any reason no longer be the Servicer hereunder . . . the Trustee or its successor shall thereupon assume all of the rights and obligations of the Servicer hereunder arising thereafter, except that the Trustee shall not be . . . obligated to effectuate repurchases or substitutions of Mortgage Loans hereunder, including but not limited to repurchases pursuant to Section 2.03 in Option One Mortgage Corporation's capacity as Responsible Party hereunder." (Emphasis added.) In other words, by taking over the role of the Servicer from Option One, Wells Fargo would not be required to actually repurchase loans out of the Trust Fund, as Option One was required in its role as Obligor. But this says nothing about whether Wells Fargo was required to enforce the Obligor's duty to repurchase defective loans.

Other Governing Agreement also include this language where the Servicer that the Trustee would be replacing was also an Obligor (or a related entity of an

Obligor). (*E.g.*, CWHL 2006-HYB1 PSA Cover Page, Definitions and § 3.04 (Trustee not obligated to "effectuate repurchases or substitutions" after taking over from Countrywide as Master Servicer, where Countrywide served both as Master Servicer and Seller responsible for repurchasing defective loans pursuant to Section 2.03"); CWL 2005-14 PSA Cover Page, Definitions and § 3.04 (same); SAST 2007-2 PSA Cover Page, Definitions and § 3.4 (same where Saxon entities acted as Servicer, Seller and Depositor).) These provisions indicate that the inclusion of Section 3.05 in the HEAT 2006-2 PSA was likely the result of sloppy drafting, not any intent.[13] Indeed, the HEAT 2006-2 PSA does not place any duty on the Servicer to enforce repurchase obligations in the first instance. It makes no sense to say that the Trustee, when taking over as Servicer, does not have a duty to do something the Servicer never had the duty to do in the first place.

[13] As Justice Cohen noted in *Finkelstein*, 75 Misc. 3d 1202[A], at *2, most of the Governing Agreements were "form agreement[s]", which may have led to provisions being included in the PSA for a Trust that did not actually apply and should have been "duped out." At best, this provision is ambiguous, and the Court can draw no conclusions from an ambiguous contract provision at this stage of the proceedings. *See New York Univ. v. Pfizer Inc*., 151 A.D.3d 42, 48 (1st Dep't 2017) (where contract provision is ambiguous, "we cannot determine on this motion to dismiss that either party's interpretation of the agreement controls as a matter of law").

3. Plaintiffs' Interpretation Does Not Conflict With the Trustees' Heightened Post-EOD Duties.

Defendants' argument that the additional duties set forth in Section 8.01 following an Event of Default somehow negates Section 2.06 is equally baseless. (Defs. Br. at 32.)

In Section 2.06, the Trustee agreed to "exercise the rights referred to above for the benefit of all present and future Holders of the Certificates. (R. 39268.) However, pursuant to Section 8.01, when there is an EOD, the Defendants' duties are heightened. Thus, once there is an EOD, the Defendant still must "exercise such of the rights and powers vested in it by the Agreement." Post-EOD, Section 8.01 imposes additional duties, those of a common law trustee to "use the same degree of care and skill in their exercise as a prudent person would exercise or use under the circumstances in the conduct of such person's own affairs." (Defs. Br. at 32.)

In other words, after an EOD, a trustee has a duty to investigate and look for representation and warranty breaches and enforce the trust's right to a cure for those breaches. But this does not contradict that, even prior to an EOD, the Trustee has the duty to cure representation and warranty breaches when it has notice of them.

Moreover, to the extent that Defendants' argument is that the Court should read a difference between the phrase "the Trustee agrees to . . . exercise" (Section

2.06) and "the Trustee shall exercise" (Section 8.01), this is a distinction without a difference. Indeed, that argument is undercut by their own brief and the language of the very Governing Agreements they rely on. On page 28 of the Trustees' brief, they confirm that language in Section 2.02 of some of the Governing Agreements that "[t]he Trustee agrees to deliver as of 10:00 am (New York time) on the Closing Date to the Depositor and the Servicers Initial Certifications" "imposes on the Trustee the duty to prepare mortgage-file reports." (Defs. Br. at 28 (emphases added).) The Governing Agreements have many numerous provisions in addition to the one the Trustees themselves identify providing that one trust party or another "agrees to" do something, which clearly imposes a duty on that party. (*E.g.*, R. 39284 (HEAT 2006-2 PSA § 3.10) (Servicer "agrees to" pay hazard insurance policies and "agrees to" present claims under such insurance policies); R. 27662 (NSTR 2007-A PSA § 3.06) ("Trustee agrees to execute and deliver" an acknowledgment of the receipt of the underlying mortgage loans); R. 30300 (BSABS 2007-HE4 PSA § 8.01 (upon termination, Master Servicer "agrees to cooperate with the Trustee" in effecting termination, including "the transfer to the applicable Successor Master Servicer" the amount remaining in certain

accounts).)[14] There is no meaningful distinction between the Trustee agreeing to exercise a right, and the statement that the Trustee "shall" exercise that right—in both cases, the Trustee has made an affirmative commitment to exercise the right. And of course, because both Sections 2.06 and 8.01 use the term "exercise," there can be no doubt that to "exercise" means something that the Trustee must affirmatively do.

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

A. Defendants' Arguments Contradict Long-Established Precedent on Which New York State and Federal Courts and Plaintiffs Have Relied.

Defendants want this Court to reconsider extremely well-settled law on no-action clauses. As this Court held nearly a decade ago in *Quadrant*, 23 N.Y.3d at 566, "[t]here are claims which, by law, cannot be prohibited by a no-action clause, most notably claims against the trustee" such as Plaintiffs have made here. *Id.* Both before and after *Quadrant*, "[c]ourts applying New York law have consistently refused to apply no-action clauses to block claims against trustees." *BNP Paribas v. Bank of N.Y. Tr. Co., N.*A., 2012 WL 13059498, at *5 (S.D.N.Y.

[14] By contrast, the parties to the Governing Agreements clearly knew how to expressly state when a Trustee has discretion to perform (or not perform) a given task. (*E.g.*, R. 39333 – 39334 (HEAT 2006-2 PSA § 7.01) (Trustee "may" terminate a servicer upon the occurrence of an EOD, unless directed by 51% of certificateholders).)

Mar. 28, 2012); *see also, e.g., Borg v. New York Majestic Corp*., 139 N.Y.S.2d 72, 77 – 78 (Sup. Ct. N.Y. Cty. 1954) (same).

Indeed, citing *Quadrant*, the Appellate Division reached the same result in *Blackrock Balanced Capital Portfolio v. U.S. Bank N.A.*, 165 A.D.3d 526, 528 (1st Dep't 2018), and even more recently in *MLRN LLC v. U.S. Bank Nat'l Ass'n*, 190 A.D.3d 426 (1st Dep't 2021), as well as for a third time in the First Department's decision in this action. Notably, this portion of the First Department's decision was not subject to a dissent—the panel unanimously affirmed the Supreme Court's ruling in Plaintiffs' favor on the no-action clause.

This is unsurprising, given that for the past decade, New York state trial courts (including the Motion Court here), as well as the United States District Court for the Southern District of New York have repeatedly held that failure to comply with a no-action clause does not bar a suit against an RMBS trustee. *See, e.g.*, *Finkelstein*, 75 Misc. 3d 1202(A); *W. & S.*, 69 Misc. 3d 1213(A); *MLRN LLC v. U.S. Bank Nat'l Ass'n*, 2019 WL 5963202, at *8 (Sup. Ct. N.Y. Cty. Nov. 13, 2019); *Pac. Life v. US Bank*, 2022 WL 11305628, at *48; *Nat'l Credit Union Admin. Bd. v. U.S. Bank Nat'l Ass'n*, 439 F. Supp. 3d 275, 280 (S.D.N.Y. 2020); *Phoenix Light SF Ltd. v. Deutsche Bank Nat'l Tr. Co.*, 172 F. Supp. 3d 700, 717 (S.D.N.Y. 2016); *Blackrock Core Bond Portfolio v. U.S. Bank Nat'l Ass'n*, 165 F. Supp. 3d 80, 95 (S.D.N.Y. 2016); *Royal Park Invs. SA/NV v. HSBC Bank USA*,

Nat'l Ass'n, 109 F. Supp. 3d 587, 606 (S.D.N.Y. 2015). These decisions all reject both the pre-suit demand provision and the 25% provisions; none of the plaintiffs in any of these cases made any demand on the trustee, whether individually or together with 25% of certificateholders. Thus, by holding that compliance with the no-action clauses was excused and thus did not bar these suits, each of these decisions, either implicitly or explicitly, also excused compliance with the 25% requirement.

Defendants ask this Court to overturn this decade-long, unanimous line of precedent and be the first New York court to hold that failure to comply with a no-action clause bars an RMBS investor from suing an RMBS trustee. This decision would have far-reaching effects, requiring reconsideration or reargument of motions to dismiss and for summary judgment in every RMBS trustee action currently pending in New York state courts, and either a similar outcome in each of the S.D.N.Y. actions noted above or a split between the New York State courts and the New York Federal courts. The interests of judicial consistency and instilling confidence and reliance on judicial decisions alone warrants denying Defendants' request to overturn this substantial precedent. *See Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1, 23 (2016); *Higby v. Mahoney*, 48 N.Y.2d 15, 18 (1979).

B. Defendants' Interpretation of the No-Action Clauses is Absurd and Impossible.

The question before the Motion Court, the First Department, and this Court is whether the no-action clauses bar Plaintiffs' lawsuit here because Plaintiffs did not ask the Trustees to sue themselves. But, for the first time on appeal, Defendants argue:

> Plaintiffs' claim, among other things, is that Defendants breached their contractual obligations by failing to take action against obligated parties (including through litigation) to enforce repurchase remedies and for defects in mortgage loan files. The no-action clauses delimit Plaintiffs' remedies in exactly this situation. Under the no-action clauses, Plaintiffs had an opportunity to make demand on the Trustees to take action against the obligated parties with the support of at least 25% of the Voting Rights. If the Trustees thereafter declined to act, Plaintiffs could then have filed the actions themselves against the allegedly breaching obligated parties.
>
> They did not do so. Plaintiffs now seek to circumvent the no-action clauses' conditions by suing the Trustees instead of suing the obligated parties. That stratagem should be rejected. Under the plain language of the PSAs, Plaintiffs' lawsuit is barred, and nothing excuses Plaintiffs' non-compliance.

(Defs. Br. at 45 (emphasis added).) What Defendants are arguing here is not that Plaintiffs should have demanded that the Trustee sue itself—which would of course be absurd, as every court to consider it has held—but rather that Plaintiffs never could have sued the Trustees at all. Defendants claim the only option Plaintiffs had was to demand that the Trustees sue other obligated parties at the time of their breaches, and if the Trustees refused, then Plaintiffs could have sued

the other obligated parties themselves, but, according to the Trustees, never the Trustees directly.

This is a straw man. If this were a suit by Plaintiffs directly against one of the Servicers of the Trusts, or against one of the Obligors, then that party could have responded that Plaintiffs had no standing to bring that suit because they failed to comply with the no-action clauses. But Defendants' argument concerning third-party suits has no relation to the application of the no-action clause here. It is telling that the Defendants' primary argument is that they were entirely insulated from being sued for any reason whatsoever.

1. Requiring Plaintiffs to Demand That the Trustees Sue Themselves is Absurd.

Defendants offer barely any showing as to why the first requirement of the no-action clauses—that notice be given to the Trustee before action is taken—is not absurd when the action sought to be taken is suing the Trustee itself. Defendants, concede, as they must that this is the law, from this Court in *Quadrant*, to the Second Circuit in *Cruden v. Bank of N.Y.*, 957 F.2d 961 (2d Cir. 1992), to many other courts including, repeatedly, the First Department. Asking a Trustee to sue itself for failing to perform its duties as a trustee is no less absurd than applying the demand requirement in the context of a shareholder derivative suit against an interested board of directors of a corporation. *See Bansbach v. Zinn*, 1 N.Y.3d 1, 9 (2003). When demand would be futile—because of course an

interested board of directors would never agree to sue itself on a matter in which it was interested—demand is excused. *See In re Lipper Holdings, LLC*, 1 A.D.3d 170, 171 (1st Dep't 2003). The same is true here. Demanding that the Trustee sue itself would be futile and absurd, and so it is excused.

Defendants' only argument against excusing the first prong of the no-action clauses is that parties have freedom of contract and that "parties to a contract are basically free to make whatever agreement they wish." (Defs Br. at 46 (quoting *Rowe v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 67-68 (1978)).) This is entirely beside the point based on the precedent above. While parties might be able to make any agreement they wish, courts cannot and will not enforce contracts that are absurd or lead to absurd results. Courts have set aside the plain language of a contract every time they refused to enforce a no-action clause based on the straightforward and common-sense reasoning discussed above, and this Court should do the same.

2. Compliance With the "25% of Certificateholders" Requirement is Also Excused.

a) There is No Way to Enforce the "25% of Certificateholders" Requirement Without Completely Re-Writing the No-Action Clauses.

Putting aside their half-hearted attempt to have this Court go against more than a decade of precedent, basic contract interpretation and common sense, Defendants' real argument as to the no-action clauses is that the Court should sever

the "25% of Certificateholders" requirement from the "Trustee Demand" requirement and enforce the former even if compliance with the latter is excused. This too is an argument that has been repeatedly rejected by the First Department and New York state courts. *See MLRN*, 190 A.D.3d at 426; *Blackrock Balanced Capital Portfolio v. U.S. Bank N.A.*, 165 A.D.3d 526, 528 (1st Dep't 2018); *Park Royal*, 2022 WL 1689873, at *4; *Finkelstein*, 75 Misc. 3d 1202(A), at *5. Indeed, as noted above, Defendants cite no court that has ever approved this position, whether in the New York Supreme Court, Appellate Division, or the S.D.N.Y. To the contrary, the Trustees acknowledge that "only one court has actually 'analyzed as a matter of contract interpretation [whether] the non-demand provisions of no-action clauses should or can apply to actions against the trustee.'" (Defs. Br. at 50 (quoting *Blackrock*, 165 F. Supp. 3d at 96).) As that court concluded, "[t]here can be no real doubt that once subsection (ii) is eliminated (*e.g.*, in claims involving a trustee), the provisions that follow from subsection (ii) make no sense." *Id*. This Court should reach the same conclusion.

After providing that "certificateholders are required to give a Trustee written notice of an Event of Default before "institut[ing] any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement," the no-action clauses provide that "Holders of Certificates evidencing not less than 25% of the Voting Rights evidenced by the Certificates shall also have made written requests

to the Trustee to institute such action, suit or proceeding in its own name as Trustee hereunder . . . ." (Defs. Br. at 17 (quoting R. 39359 (§ 10.08)) (emphasis added).)

This requirement cannot possibly be "severed" from the absurd requirement that a written request must be given to the Trustee, because that requirement is incorporated into the "25% of Certificateholders" requirement. That is, what 25% of the Certificateholders must do is ask the Trustee to bring a suit against itself in its own name. To hold that Plaintiffs are excused from making a written request that the Trustee sue itself, only to then hold that Plaintiffs were required to join with other Certificateholders representing 25% of the Trust to make the very same demand the Court just excused, is the very definition of absurd and illogical. As it would be absurd for a single Certificateholder to be required to ask the Trustees to sue themselves, surely it is just as absurd to require that Certificateholder to muster the support of other Certificateholders representing 25% of the Certificates in that Trust to demand that the Trustee sue itself in its own name.

Instead, what Defendants are really saying is that the Court should re-write this requirement to say: "Holders of Certificates evidencing not less than 25% of the Voting Rights evidenced by the Certificates shall be required to bring a suit against a Trustee where it would be absurd to demand the Trustee sue itself." Of course, asking the Court to completely re-write a provision from what is written in

the agreement to something entirely different breaches the canon of contract interpretation, as expressed by this Court, that "[t]he court's role is limited to interpretation and enforcement of the terms agreed to by the parties; it does not include the rewriting of their contract and the imposition of additional terms." *Salvano v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 85 N.Y.2d 173, 182 (1995).[15]

b) Defendants' Policy Considerations for the 25% Demand Requirement Do Not Apply Here.

Defendants' arguments regarding the "policy" purposes underlying the 25% requirement do not apply when the action is one against the Trustee breached its obligations under the Governing Agreements. In contrast to an action brought by a sole certificateholder against another trust party, for example a Servicer or Obligor, asserting rights (and seeking damages) that are owed to the trust, breach of contract actions against RMBS trustees are not a zero-sum game. Plaintiffs in actions against Trustees are seeking the amounts of principal and interest payments that would have been paid on their Certificates but for the Trustees' breaches. These are direct damages, not derivative Trust damages. And these payments are to be

[15] Defendants do not raise it, but for the sake of completeness, the third requirement of the no-action clause—the offer of indemnification—is similarly absurd, because the indemnification requirement relates to a lawsuit brought by the trustee in its own name against a third party at the request of certificateholders, not to a lawsuit brought against the trustee by a certificateholder.

paid by the Trustees out of their own funds, not out of the Trust Fund. Thus, Plaintiffs' recovery has no impact on the performance of the Trust generally, or on the ability of any other certificateholder in any of the Trusts at issue in this action to assert their own claims against the Trustee for the certificates they hold in that trust.

Indeed, that this is the case is made clear by the large number of "trustee actions" brought by certificateholders in RMBS trusts over the past decade, ranging, for example, from individuals (Stephen Finkelstein and Mark Zittman), to large banks (Commerzbank, Phoenix Light) to investment funds (BlackRock, Park Royal I and II, MLRN, VRS Holdings), to pension funds (Retirement Board of the Policeman's Annuity and Beneficiary Fund of the City of Chicago), to insurance companies (Pacific Life, Western & Southern, Reliance Standard), to quasi-governmental agencies (NCUA), among others. Each of these plaintiffs brought breach of contract actions against RMBS trustees without having compiled 25% of certificateholders to ask the Trustee to bring that action in its own name as the no-action clauses, by their plain language, would require, because each understood (and relied on the well-established precedent) that it would be absurd to do so. And Plaintiffs are unaware of any complaint, let alone any legal action, taken by any other certificateholder in any of the RMBS trusts at issue in these litigations complaining about the action or that the action by such certificateholders is

negatively impacting the Trust or other certificateholders' rights. And many of these actions involve overlapping trusts, making clear that any certificateholder may bring an action against an RMBS trustee, even if another certificateholder has already brought an action relating to the same Trust.

To the extent that the Trustees argue that indemnification from the Trust Funds for their defense costs impacts the Trusts, as set forth in footnote 15, the no-action clauses permit indemnification only when the Trustee brings a lawsuit on behalf of the Trust in its own name, not where the Truste is sued itself, and any indemnification the Trustees are currently taking to defend actions against themselves as Trustees are a blatant breach of the Govenring Agreements. Moreover, the Govenring Agreements also make clear that, for any purposes, indemnification is permitted only if the Trustee can establish it did not act in "willful misfeasance, bad faith or negligence in the performance of any of the Trustee's duties hereunder." (R. 39341.) It is well-established that "[i]ndemnification agreements are unenforceable as violative of public policy only to the extent that they purport to indemnify a party for damages flowing from the intentional causation of injury." *Austro v. Niagara Mohawk Power Corp*., 66 N.Y.2d 674, 676 (1985). If Defendants intentionally breached their duties as Trustees, they will not be entitled to any indemnification. Thus, there is no harm to any other Certificateholders.

III. 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 and First Department wrongly allowed Plaintiffs' claims for conflict of interest and post-EOD breach of the Trustees' fiduciary duties to proceed, because these claims are barred by the economic loss doctrine. (Defs. Br. at 56 – 59.)

As courts in the Southern District of New York have recognized when considering this issue in other RMBS trustee actions, "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 there cited in particular *Phoenix Light v. Deutsche Bank.*, 172 F. Supp. 3d at 719, and *Royal Park v. HSBC*, 109 F. Supp. 3d at 599, 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 WL 1382105, at *14 (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.").

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.").)

The Trustees' unwaivable duty to give the Trusts and their investors undivided loyalty and to avoid conflicts of interest does not arise from the Governing Agreements. It arises separately, just as whenever party states a claim for breach of fiduciary duty in addition to breach of contract. *See 37 E. 50th St. Corp. v. Rest. Grp. Mgmt. Servs., L.L.C.*, 156 A.D.3d 569, 571 (1st Dep't 2017) ("While these claims concern some of the same underlying conduct as the breach of contract claim, the allegations concern a breach of a duty that is independent of the contract, and therefore not subject to dismissal as duplicative."). Nothing in this Court's decision in *Dormitory Auth. v. Samson Constr. Co*., 30 N.Y.3d 704, 713 (2018), cited by Defendants (Defs. Br. at 56) changes this. There, the Court expressly noted that there could be a separate tort claim where there were "potential catastrophic consequences of a failure to exercise due care," and where those consequences were "not contemplated by the contracting parties." *Id.* That is exactly the case here, as the Motion Court and the First Department held.

Defendants' argument that these claims are barred by the economic loss doctrine because "the alleged injury caused by both contract and tort claims is that Defendants' alleged breaches diminished the value of the assets owned by the Trusts and have diminished the principal and interest payments generated by those

assets" misses the point. (Defs. Br. at 58.) The economic loss doctrine does not bar tort claims merely because they have the same type of damages as contract claims, only that such claims are barred if the damages flow from the breach of contract. *See Blackrock*, 247 F. Supp. 3d at 399. That Defendants' breaches of contract claims and breaches of fiduciary duty and conflicts of interest damaged the Trusts by diminishing 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.

For example, while Plaintiffs disagree with the holding, the First Department has held that RMBS trustees had no duty to send written notice of servicer breaches to servicers, which are necessary to trigger Events of Default in certain circumstances. *See Blackrock Balanced Cap. Portfolio (FI) v. U.S. Bank Nat'l Ass'n*, 165 A.D.3d 526, 527 (1st Dep't 2018) ("[W]e reject plaintiffs' argument

that defendant had an obligation to send notices to cure to servicers as the PSAs do not require US Bank to send a notice to cure."). If, however, discovery uncovers that a Trustee refused to send notices to cure to servicers because of a conflict of interest with that servicer, then that would be a breach of that Trustee's duty to avoid conflicts of interest, even if it was not a breach of any specific contractual duty (at least according to the First Department's current jurisprudence). And any damages stemming from the Trustee's failure to send a notice to cure to that servicer would be separate and distinct from any contractual breach.

Similarly, while the Trustees' post-EOD duties are heightened, some of their specific post-EOD duties were discretionary, not mandatory. For example, Section 7.01 of the HEAT 2006-2 PSA (on which Defendants rely throughout their brief) provides that, for certain EODs, "if an Event of Default shall occur and a Responsible Officer of the Trustee has knowledge thereof, then, and in each and every such case, so long as such Event of Default shall not have been remedied, the Trustee, may, or at the direction of the Holders of Certificates evidencing not less than 51 % of the Voting Rights evidenced by the Certificates, the Trustee shall by notice in writing to that Servicer (with a copy to each Rating Agency), terminate all of the rights and obligations of such Servicer under this Agreement and in and to the related Mortgage Loans and the proceeds thereof." (R. 39333 – 39334 (emphases added).) In other words, unless directed to by 51% of

certificateholders, this provision of the PSA gives the Trustee the discretion to terminate (or not terminate) the servicer. Thus, if the Trustee chose not to terminate the servicer, then it would not be a breach of the PSA. However, the Trustee also has a separate, independent fiduciary duty to act as a prudent person would. Thus, although not a breach of contract, the Trustee's failure to terminate the servicer very well might be contrary to how a prudent person would have acted, and thus be a breach of the separate post-EOD fiduciary duty. And any damages stemming from the Trustees' failure to terminate the servicer would be a direct result of the breach of fiduciary duty, not the breach of contract, claim.

Accordingly, neither the fiduciary duty nor the conflict-of-interest claims are wholly duplicative of the breach of contract claims, nor are the damages for these claims the exact same as for the breach of contract claims. Accordingly, both the Motion Court and the First Department were correct in refusing to dismiss these claims, and this Court should affirm those decisions.

CONCLUSION

For all the above reasons, Plaintiffs-Respondents respectfully request that this Court affirm the First Department's Order to the extent appealed from by Defendants.

Dated: New York, New York
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Respectfully submitted,

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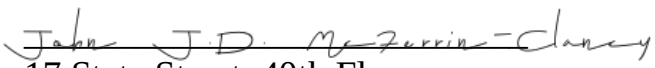
By: 

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On March 3, 2023

deponent served the within: **Brief for Plaintiffs-Respondents IKB International S.A. in Liquidation and IKB Deutsch Industriebank A.G.**

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the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

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