To Be Argued By:
MATTHEW D. INGBER
Time Requested: 30 Minutes

APL-2022-00165
New York County Clerk's Index Nos. 654443/2015, 654442/2015, 654439/2015, and 654438/2015

Court of Appeals

STATE OF NEW YORK

Index No. 654443/2015

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

Plaintiffs-Respondents,

—against—

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

(*Caption continued on inside cover*)

BRIEF FOR DEFENDANTS-APPELLANTS

MATTHEW D. INGBER
CHRISTOPHER J. HOUPT
RORY K. SCHNEIDER
CHRISTOPHER J. MIKESH
MAYER BROWN LLP
1221 Avenue of the Americas
New York, New York 10020
Telephone: (212) 506-2500
Facsimile: (212) 262-1910
mingber@mayerbrown.com
choupt@mayerbrown.com
rschneider@mayerbrown.com
cmikesh@mayerbrown.com

Attorneys for Defendants-Appellants The Bank of New York (n/k/a The Bank of New York Mellon), The Bank of New York Trust Company, N.A. (n/k/a The Bank of New York Mellon Trust Company, N.A.), and The Bank of New York Mellon Trust Company, N.A. (654438/2015)

HOWARD F. SIDMAN
RYAN J. ANDREOLI
AMANDA L. DOLLINGER
JONES DAY
250 Vesey Street
New York, New York 10281
Telephone: (212) 326-3939
Facsimile: (212) 755-7306
hfsidman@jonesday.com
randreoli@jonesday.com
adollinger@jonesday.com

Attorneys for Defendants-Appellants Wells Fargo Bank, N.A. and Wells Fargo Bank, N.A. as successor-by-merger to Wells Fargo Bank Minnesota, N.A. (654443/2015)

(*Counsel continued on inside cover*)

January 19, 2023

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. 654442/2015

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.

MICHAEL S. KRAUT
KEVIN J. BIRON
BRYAN P. GOFF
MORGAN LEWIS & BOCKIUS, LLP
101 Park Avenue
New York, New York 10178
Telephone: (212) 309-6000
Facsimile: (212) 309-6001
michael.kraut@morganlewis.com
kevin.biron@morganlewis.com
bryan.goff@morganlewis.com

Attorneys for Defendants-Appellants Deutsche Bank National Trust Company and Deutsche Bank Trust Company Americas (654439/2015)

DAVID F. ADLER
MICHAEL T. MARCUCCI
JONES DAY
250 Vesey Street
New York, New York 10281
Telephone: (212) 326-3939
Facsimile: (212) 755-7306
dfadler@jonesday.com
mmarcucci@jonesday.com

LOUIS A. CHAITEN
AMANDA R. PARKER
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
lachaiten@jonesday.com
arparker@jonesday.com

Attorneys for Defendants-Appellants U.S. Bank National Association and U.S. Bank Trust National Association (654442/2015)

CORPORATE DISCLOSURE STATEMENTS

CORPORATE DISCLOSURE STATEMENT OF WELLS FARGO BANK, N.A.

Defendant-Appellant Wells Fargo Bank, N.A. states that Wells Fargo Bank, N.A. is an indirectly wholly-owned subsidiary of Wells Fargo & Company. Wells Fargo & Company has no parent corporation, and no publicly held corporation owns 10% or more of Wells Fargo & Company's stock.

Wells Fargo further states that a list of its corporate subsidiaries reported to the Federal Reserve is available online via the National Information Center of the Federal Reserve System on the "Organization Hierarchy" link at the following address: https://www.ffiec.gov/npw/Institution/Profile/451965?dt=20201001.

CORPORATE DISCLOSURE STATEMENT OF U.S. BANK NATIONAL ASSOCIATION

Pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals, U.S. Bank National Association hereby states that it is a wholly owned subsidiary of U.S. Bancorp, and that it has the following subsidiaries and affiliates:

1003 College Station, LLC
111 Tower Investors, Inc.
1823 SouthPark LLC
3812 -3825 Branding Iron Place, LLC
4110 Midland, LLC
4905 Waco, LLC
910 NE Third Avenue, Inc.
Banctech Processing Services, LLC
BEG Homes, LLC
Bento Technologies, Inc.
BondResource Partners, LLC
BondResource Partners, LP
CC 223 Andover Park East, Tukwila, LLC
CC Merrillville, LLC
CenPOS, LLC
C'est La Vie, Inc.
Daimler Title Co.
DM Liens Inc.
DSL Service Company
Eclipse Funding LLC
EFS Depositary Nominees Limited
Elavon Canada Company
Elavon Digital (GB) Limited
Elavon Digital Europe Limited
Elavon European Holdings B.V.
Elavon Financial Services DAC
Elavon Puerto Rico, Inc.
Elavon, Inc.
Fairfield Financial Group, Inc.
Finn Title Co.
First Bank LaCrosse Building Corp.

First LaCrosse Properties
First Payment System Holdings, Inc.
First Payment Systems, LLC
Firstar Realty, L.L.C.
Forecom Challenger, Inc.
Forecom Properties, Inc.
FSV Payment Systems, Inc.
HTD Leasing LLC
HVT, Inc.
Integrated Logistics, LLC
Long Beach 4th Place, LLC
M.S. Homes, LLC
Mercantile Mortgage Financial Company
MMCA Lease Services, Inc.
Norse Nordics AB
North Pullman 111th Inc.
Northwest Boulevard, Inc.
NuMaMe, LLC
One Eleven Investors LLC
Park Bank Initiatives, Inc.
Park National Deferred Exchange Corporation
PFM Asset Management LLC
PFM Financial Services, LLC
Pomona Financial Services, Inc.
Pullman Transformation, Inc.
Red Sky Risk Services, LLC
RTRT, Inc.
SA California Group, Inc.
SA Challenger, Inc.
SA Group Properties, Inc.
San Jacinto Property Holdings, LLC
SCBD, LLC
SCDA, LLC
SCFD LLC
SFS Lien Agent, LLC
Silver Oaks Homes, LLC
Talech International Limited
Talech Lithuania, UAB
Talech, Inc.
Telluride Financial Center Owners' Association, Inc.

TLT Leasing Corp.
TMTT, Inc.
U.S. Bancorp Asset Management, Inc.
U.S. Bancorp Community Development Corporation
U.S. Bancorp Fund Services, LLC
U.S. Bancorp Government Leasing and Finance, Inc.
U.S. Bancorp Insurance Company, Inc.
U.S. Bancorp Missouri Low-Income Housing Tax Credit Fund, L.L.C.
U.S. Bancorp Municipal Lending and Finance, Inc.
U.S. Bank Global Corporate Trust Limited
U.S. Bank Global Fund Services (Cayman) Limited
U.S. Bank Global Fund Services (Guernsey) Limited
U.S. Bank Global Fund Services (Ireland) Limited
U.S. Bank Global Fund Services (Luxembourg) S.a.r.l.
U.S. Bank Trust Company, National Association
U.S. Bank Trust National Association
U.S. Bank Trust National Association SD
U.S. Bank Trustees Limited
USB Americas Holdings Company
USB European Holdings Company
USB Investment Services (Holdings) Limited
USB Leasing LLC
USB Leasing LT
USB Nominees (GCT) Limited
USB Nominees (UK) Limited
USB Realty Corp.
USB Securities Data Services Limited
USBCDE, LLC
VT Inc.
Wideworld Payment Solutions, LLC

CORPORATE DISCLOSURE STATEMENT OF DEFENDANTS-APPELLANTS DEUTSCHE BANK NATIONAL TRUST COMPANY AND DEUTSCHE BANK TRUST COMPANY AMERICAS

Defendant-Appellant Deutsche Bank National Trust Company is a wholly owned subsidiary of Deutsche Bank Holdings, Inc., which is a wholly-owned subsidiary of Deutsche Bank Trust Corporation, which is a wholly owned subsidiary of DB USA Corporation, which is a wholly owned subsidiary of Deutsche Bank AG, a publicly held banking corporation organized under the laws of the Federal Republic of Germany, and no publicly held company owns 10% or more of Deutsche Bank AG's stock.

Defendant-Appellant Deutsche Bank Trust Company Americas is a wholly owned subsidiary of Deutsche Bank Trust Corporation, which is a wholly owned subsidiary of DB USA Corporation, which is a wholly owned subsidiary of Deutsche Bank AG, a publicly held banking corporation organized under the laws of the Federal Republic of Germany, and no publicly held company owns 10% or more of Deutsche Bank AG's stock.

CORPORATE DISCLOSURE STATEMENT OF DEFENDANTS-APPELLANTS THE BANK OF NEW YORK MELLON AND THE BANK OF NEW YORK MELLON TRUST COMPANY N.A.

Defendants-Appellants The Bank of New York Mellon (formerly known as The Bank of New York) and The Bank of New York Mellon Trust Company, N.A. (formerly known as The Bank of New York Trust Company, N.A.) state that their ultimate corporate parent is The Bank of New York Mellon Corporation, The Bank of New York Mellon Corporation has no parent corporation, and no publicly held corporation owns 10% or more of The Bank of New York Mellon Corporation's stock.

STATEMENT OF RELATED LITIGATION

Defendants have appealed to the Appellate Division, First Department from the Orders of the Supreme Court denying Defendants' Motions for Application of the German Statute of Limitations. *See* Appellate Division Case Nos. 2022-04133, 2022-04134, 2022-04178, and 2022-04194. Other proceedings in these cases continue in the Supreme Court. *See* Supreme Court Index Nos. 654443/2015, 654442/2015, 654439/2015, and 654438/2015. The parties are currently involved in fact discovery, with a deadline of May 31, 2023.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This case concerns the meaning of agreements that govern residential mortgage-backed securities ("RMBS") trusts. Those agreements carefully limit both the duties of RMBS Trustees prior to a contractually defined Event of Default ("EOD") and the ability of certificateholders in a given trust to unilaterally institute litigation. In the decision below, the First Department misread the governing contracts in two respects: it imposed duties on the Trustees that do not appear in, and are inconsistent with, the contracts' terms; and it excused Plaintiffs' admitted failure to abide by the contracts' express conditions on their ability to sue. The Court should reverse and hold these sophisticated parties to the plain terms of the contracts to which they agreed to be bound.

As this Court has recognized, RMBS Trustees are unlike common-law trustees. Rather than serving as fiduciaries charged with advancing the interests of beneficiaries, RMBS Trustees have limited and precisely defined duties under the Pooling and Servicing Agreements ("PSAs") that govern RMBS trusts. Prior to a contractually defined EOD, those agreements require the Trustee to perform clearly specified ministerial functions in return for a concomitantly small fee, and exempt the Trustee from the sorts of expansive obligations for which the RMBS investors would have had to pay considerably more out of their returns. The contracts also provide that these investors, who bear the economic risks associated with the

transactions, may direct the Trustee to take actions it is not obligated to take by the PSAs—but only if enough investors band together to do so, and only if they offer the Trustee a reasonable indemnity. The PSAs thus create an investor-driven remedial scheme. The First Department departed from these principles and the PSA terms in multiple respects.

a. Over the dissent of two justices, the panel held that a PSA provision in which the Trustee "agree[d] to hold the Trust Fund and exercise the rights referred to above for the benefit" of investors imposes a pre-EOD duty on the Trustee to enforce other parties' obligations to repurchase allegedly defective loans (*i.e.*, loans with missing or defective mortgage-file documents or for which obligated parties breached their representations and warranties ("R&Ws")). But that language imposes no affirmative duties upon the Trustee at all. By nevertheless imposing a pre-EOD enforcement duty on the Trustee, the decision impermissibly expands the Trustee's role and exposes the Trustee to risks from which the PSA drafters intended to protect the Trustee.

As the majority of jurists have concluded, the Trustee's agreement to "hold the Trust Fund and exercise [trust] rights" for the benefit of all certificateholders merely reflects the Trustee's commitment to serve the interests of the trusts' beneficiaries (and not their own interests) when they exercise trust rights, thereby satisfying a basic requirement of trust law. The provision bears no resemblance to

those in which the Trustee's duties are actually imposed and spelled out with requisite detail, including ones in which repurchase protocols are described and where any supposed enforcement duty would most naturally appear. Interpreting this language to nonetheless impose a pre-EOD duty to enforce departs from the PSAs' requirement that all pre-EOD duties be "expressly" and "specifically set forth" and effectively erases the critical distinction between the Trustee's role before and after an EOD (which, as the contracts state, is the only time the Trustee is obligated to exercise rights as opposed to carrying out specifically enumerated duties).

b. In addition, the panel disregarded conditions on Plaintiffs' right to sue that the PSAs indisputably do set forth. Because differently situated RMBS investors may have divergent interests, the PSAs impose strict limitations on individual investors' ability to institute litigation that could impact trust assets (and other investors). These limits include "no-action" clauses that prohibit investors from suing any party with respect to the PSA unless, among other things, they (1) make a demand on the Trustee to sue and (2) have the support of holders of RMBS certificates representing at least 25% of the total voting rights. Plaintiffs indisputably satisfied neither requirement.

With respect to the first requirement, the panel nonetheless found that Plaintiffs' claims were not barred on the premise that it would have been futile to

demand that the Trustees sue themselves. But Plaintiffs put themselves in the position of having to demand that the Trustees sue themselves by failing in the first instance to make a demand that the Trustees take action against the third-party obligated parties who allegedly breached R&Ws. And even setting that problem aside, the panel's reasoning does not support its summary deletion of the second requirement. At most, its reasoning justifies excusing only Plaintiffs' failure to abide by the demand requirement. It offers no basis for also excusing Plaintiffs' undisputed failure to obtain the support of the required percentage of investors before filing suit—a separate and independent requirement that serves the vital function of preventing lawsuits that are not supported (or are opposed) by many (or even a substantial majority of) investors, and that could deplete trust assets and distract trustees.

c. The panel also erred for an additional reason: it permitted Plaintiffs to litigate tort claims seeking to remedy the same breaches and injury alleged in connection with their contract claims. This Court's precedent bars that sort of alchemical conversion of contract into substantively identical tort claims.

The Court should reverse and vacate the First Department's determinations that: (1) Section 2.06 of the PSAs obligates the Trustee to enforce repurchase obligations prior to an EOD; (2) the no-action clause can be excised from the PSAs; and (3) New York law does not foreclose Plaintiffs' tort claims.

QUESTIONS PRESENTED

1. Does an RMBS Trustee's agreement in Section 2.06 of the governing agreements "to hold the Trust Fund and exercise the rights referred to above" for the benefit of all certificateholders "specifically set forth" a pre-EOD duty that requires the Trustee to enforce the obligations of other parties to substitute or repurchase mortgage loans?

The court below held yes.

2. May Plaintiffs prosecute this suit where they have indisputably failed to comply with the no-action clauses contained in the governing agreements?

The court below held yes.

3. Are Plaintiffs' tort claims barred where those claims are based on the same alleged breaches and seek the same damages as their contract claims?

The court below held no.

JURISDICTIONAL STATEMENT

This action originated in the Supreme Court, New York County. The Court has jurisdiction over this appeal from a nonfinal Order of the Appellate Division under CPLR § 5602(b)(1). The Appellate Division, First Department granted Defendants permission to appeal to this Court under CPLR § 5713, and certified the following question of law: "Was the order of Supreme Court, which was partially

modified and otherwise affirmed by this Court, properly made?" R.39157.[1] The questions presented have been preserved for the Court's review. *See* Brief For Defendants-Appellants-Respondents, Doc. No. 65, *IKB Int'l, S.A. et al. v. Wells Fargo Bank, N.A., et al.*, No. 2021-01661 (1st Dep't Oct. 15, 2021), at 11-16 (rights referred to above), 30-40 (no-action clauses), 27-30 (tort claims).

STATEMENT OF THE CASE

I. BACKGROUND ON RMBS TRUSTS

A. The Duties Of An RMBS Trustee Are Expressly Limited To Those Specifically Set Forth In The PSAs.

This case involves 95 RMBS trusts for which four separate sets of Defendants serve as Trustee. The RMBS securitization process is by now familiar to this Court—it "involves the bundling of mortgage loans into a pool that is sold to an affiliated purchaser, which then places the loans into a trust for securitization purposes." *Deutsche Bank Nat'l Tr. Co. v. Barclays Bank PLC*, 34 N.Y.3d 327, 331-32 (2019). In each securitization, a "sponsor" or "seller" forms a pool of loans acquired from "originators." (We refer to sponsors, sellers, and originators together as "obligated parties.") The sponsor or seller then transfers the pooled loans to a "depositor," who in turn conveys them to the trust. "The trust then issues certificates that are purchased by investors, or certificateholders." *Id.* at 332.

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

Each at-issue trust is governed by a PSA or similar contract. R.454 (¶¶ 50-51).[2] "The terms of the securitization trusts as well as the rights, duties, and obligations of the trustee [and other deal parties] are set forth" in these contracts. *Ret. Bd. of Policemen's Annuity & Benefit Fund of Chi. v. Bank of N.Y. Mellon*, 775 F.3d 154, 156 (2d Cir. 2014).

Plaintiffs' claims here concern Defendants' duties as RMBS Trustees. As this Court has recognized, a "corporate trustee has very little in common with the ordinary trustee." *AG Cap. Funding Partners, L.P. v. State St. Bank & Tr. Co.*, 11 N.Y.3d 146, 156 (2008). Instead, an RMBS Trustee's duties are defined "exclusively by the terms of the agreement." *Id.*; *see also Elliott Assocs. v. J. Henry Schroder Bank & Tr. Co.*, 838 F.2d 66, 71 (2d Cir. 1988) (RMBS trustee's duties "strictly defined and limited to the terms of" the agreement).

The PSAs specifically confirm that principle. They make explicit—in a section titled "Duties of the Trustee"—that, absent a known EOD, the Trustee's duties "shall be determined solely by the express provisions of th[e] Agreement," and that the Trustee shall not be liable "except for the performance of such duties and obligations as are specifically set forth in th[e] Agreement." *See, e.g.*, R.39388

[2] Throughout, we use the complaint from the *Wells Fargo* action (Index No. 654443/2015) as representative.

(§ 8.01(i))[3]; *see also* R.39388 (§ 8.01) ("The Trustee, prior to the occurrence of an Event of Default . . . , shall undertake to perform such duties and only such duties as are specifically set forth in this Agreement."). The PSAs further emphasize that "no implied covenants or obligations shall be read into th[e] Agreement against the Trustee." R.39388 (§ 8.01(i)).

Before a known EOD, the Trustee generally only has "limited, 'ministerial' functions," *Racepoint Partners, LLC v. JPMorgan Chase Bank, N.A.*, 14 N.Y.3d 419, 425 (2010), such as processing payments and relaying certain reports to investors, R.39276 (§ 3.06(e)), R.39311 (§ 4.04(a))—for which it earns a concomitantly small fee. The Trustee neither "police[s] the[] investments" nor "act[s] as a fiduciary or guarantor" for certificateholders. *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). In short, the Trustee has no "generalized duty to advance [certificateholders'] interest." *CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F. Supp. 2d 450, 473 (S.D.N.Y. 2010); *see W. & S. Life Ins. Co. v. U.S. Bank Nat'l Ass'n*, 209 A.D.3d 6, 13 (1st Dep't 2022).

[3] We use the HEAT 2006-2 PSA as representative. For the Court's convenience, we have included that PSA in the Record. The remaining at-issue governing agreements have been submitted in disc format, as the parties did below. When relying on governing agreements other than the HEAT 2006-2 PSA, the brief cites directly to those agreements.

The PSAs reinforce the Trustee's limited role through specific contractual limitations and protections. Among other things, the Trustee "may request and conclusively rely upon and shall be protected in acting or refraining from acting upon any . . . document believed by it to be genuine," R.39339 (§ 8.02(i)); "shall not be bound to make any investigation . . . unless requested in writing so to do by Holders of Certificates evidencing not less than 25% of the Voting Rights," R.39339 (§ 8.02(iv)); and "shall be under no obligation to exercise any of the trusts, rights or powers . . . or to institute, conduct or defend any litigation . . . at the request, order or direction of any of the Certificateholders" absent an offer of reasonable indemnity, R.39340 (§ 8.02(ix)). Finally, "the rights of the Trustee to perform any discretionary act . . . shall not be construed as a duty." R.39340 (§ 8.02(x)).

The Trustee's role changes only after a known EOD—only then does the Trustee have a duty to "exercise such of the rights and powers vested in it by this Agreement, and 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." R.39338 (§ 8.01). But absent a known EOD, the Trustee's duties are limited to those specifically and expressly set forth, and it has no duty to exercise discretionary rights.

B. Certificateholders May Direct, And Have Directed, Pursuit Of Remedies Against Obligated Parties Under The PSAs.

While the PSAs limit the Trustee's duties, they permit certificateholders to direct the Trustee to take certain actions it is not otherwise obligated to take, provided (among other things) that a critical mass of investors support the direction and the Trustee is properly indemnified by the investors. For instance, the Trustee has no duty "to make any investigation" into whether another party breached its contractual obligations. R.39339 (§ 8.02(iv)). But "the Holders of Certificates entitled to at least 25% of the Voting Rights" may direct the Trustee to conduct such an investigation. *Id.* Certificateholders also may band together to take other actions that affect Trustee responsibilities, including to give notice to servicers of the underlying mortgage loans of alleged breaches, which can trigger an EOD. R.39332 (§ 7.01(ii)). These provisions give investors, who hold the economic risk in the transactions, control over how trust rights are exercised and trust assets are used.

Investors effectively utilized these, and other, remedial measures following the economic crisis that began in 2007. Starting in about 2010, for example, some of the world's largest institutional RMBS investors banded together to negotiate settlements (for the benefit of all certificateholders) totaling more than $15 billion against obligated parties, alleging that they breached R&Ws concerning the quality and characteristics of the securitized loans. *See, e.g.*, *In re Bank of N.Y. Mellon*, 127 A.D.3d 120, 123-25 (1st Dep't 2015) (approving $8.5 billion settlement of repurchase claims in various RMBS trusts); R.477-79 (¶¶ 125-29) (citing *In re Bank*

of N.Y. Mellon, Index No. 651786/2011 (N.Y. Sup. Ct.)). Around the same time, groups of large institutional investors also began directing RMBS Trustees (including Defendants) to sue obligated parties for R&W breaches (or to seek tolling agreements from obligated parties). *See, e.g.*, Compl., *U.S. Bank Nat'l Ass'n v. Equifirst Corp.*, Index No. 650692/2013 (noting trustee is "acting at the direction of a certain holder of the trust")). These "repurchase actions" ultimately flooded New York courts. *See* Master Filing Order, *In re: Part 60 RMBS Put-Back Litig.*, Index No. 777000/2015 (N.Y. Sup. Ct. Oct., 21, 2015) (creating master file for repurchase actions).

II. THE AGREEMENTS AND CLAIMS AT ISSUE

In 2015, Plaintiffs instituted this litigation,[4] seeking damages they allegedly suffered as a result of the 2008 financial crisis and its aftermath. Plaintiffs allege that Defendants breached various contractual, tort, and statutory duties. Most relevant here, Plaintiffs maintain that, even before an EOD, Defendants were duty-bound to enforce the obligations of other parties to repurchase loans with missing or defective loan documents or with R&W breaches. R.570-72 (¶¶ 416-25).

[4] Plaintiffs initially filed six lawsuits, but later dismissed two with prejudice. *See* Stipulation of Discontinuance with Prejudice, *IKB Int'l, S.A. v. LaSalle Bank N.A.*, Index No. 654436/2015 (N.Y. Sup. Ct. Jan. 5, 2022); Stipulation of Voluntary Discontinuance with Prejudice, *IKB Int'l, S.A. v. HSBC Bank, N.A.*, Index No. 654440/2015 (N.Y. Sup. Ct. July 15, 2022). "Defendants" here thus refers to the four sets of Trustees remaining.

Two sets of PSA provisions are at issue in this appeal. The first set appears in Article II, and relates to Plaintiffs' theory that Section 2.06 imposes on the Trustee a pre-EOD enforcement duty. The second set concerns prerequisites to Plaintiffs' right to commence litigation under the PSAs, which they admittedly did not satisfy. We address these in turn.

A. Article II Addresses Conveyance Of Assets And Rights To Be Held In Trust.

Located in Article II and titled "Execution and Delivery of Certificates," Section 2.06 provides:

> The Trustee acknowledges the receipt . . . of [specified loan] documents . . . and the amounts required to be deposited into [certain accounts] and, concurrently with such receipt, has executed and delivered to or upon the order of the Depositor, the Certificates in authorized denominations evidencing directly or indirectly the entire ownership of the Trust Fund. *The Trustee agrees to hold the Trust Fund and exercise the rights referred to above for the benefit of all present and future Holders of the Certificates* and to perform the duties set forth in this Agreement according to its terms.

R.39268 (§ 2.06) (emphasis added). Thus, in Section 2.06, the Trustee acknowledges that, through the described conveyances, it has received the property constituting the "entire" Trust Fund, and it agrees that it will "hold the Trust Fund and exercise the rights referred to above for the benefit of" certificateholders. *Id.*

The provisions "above" Section 2.06 are those in Article II, titled "Conveyance of Mortgage Loans; Representations and Warranties." R.39255.

Article II details the specific assets and related rights conveyed to the Trustee to be held and exercised in trust.

a. *Section 2.01, "Conveyance of Mortgage Loans."* Section 2.01 establishes that the Depositor has conveyed to the Trustee "all the right, title and interest" in the mortgage loans that make up the trust. R.39255 (§ 2.01(a)). Section 2.01(a), for example, states that the "Depositor, concurrently with the execution and delivery hereof, hereby sells, transfers, assigns, sets over and otherwise conveys to the Trustee in trust for the benefit of the Certificateholders, without recourse, all the right, title and interest of the Depositor in and to . . . each Initial Mortgage Loan, including all interest and principal received or receivable on or with respect to such Initial Mortgage Loans," R.39255 (§ 2.01(a))—the loans conveyed to the Trust Fund on the Closing Date, R.39228. Section 2.01(b) then speaks to the conveyance of "documents or instruments" associated with the "Mortgage Loan[s]"—for example, the mortgage note, assignment, and title insurance (which we refer to collectively as the "mortgage file")—and provides that those documents shall be "delivered to" the custodian or the Trustee, also "for the benefit of the Certificateholders." R.39255-56 (§ 2.01(b)). The rest of Section 2.01 includes similar conveyance provisions regarding "Subsequent Mortgage Loans" (*i.e.*, any loans conveyed to the trust after the Closing Date). R.39258 (§ 2.01(c)).

b. *Section 2.02, "Acceptance by the Trustee of the Mortgage Loans."* Section 2.02 in turn reflects the Trustee's acceptance of the mortgage loans and the associated mortgage files. In the first subsection, the Trustee "declares that it holds and will hold . . . such documents and the other documents delivered to it," along with "such other assets as are included in the Trust Fund, in trust for the exclusive use and benefit of all present and future Certificateholders." R.39262 (§ 2.02(a)).

The balance of Section 2.02(a) addresses missing and defective mortgage-file documents. It first provides that the Trustee will deliver to the other parties certifications acknowledging receipt of the mortgage files and noting any exceptions (*i.e.*, any missing or defective documents). *Id.* It then requires the relevant obligated party to "promptly correct or cure [any] defect within 90 days." *Id.* If the obligated party "does not correct or cure such defect within such period," then the party either must "substitute" the loan or "purchase" the loan "from the Trustee" within 90 days from the date it was notified of the issue. R.39262-63 (§ 2.02(a)).

c. *Section 2.03, "Representations and Warranties of the Seller and the Servicers."* Subsections (a) and (b) of Section 2.03 address obligated parties' R&Ws concerning the mortgage loans. R.39265 (§§ 2.03(a), (b)). Subsection (d) then provides that, "[u]pon discovery by any of the parties hereto of a breach of a[n] [R&W] made pursuant to Section 2.03(b) that materially and adversely affects the interests of the Certificateholders in any Mortgage Loan, the party discovering such

breach shall give prompt notice thereof to the other parties." R.39265 (§ 2.03(d)). Once the obligated party receives written notice of an R&W breach (or discovers the breach on its own), it must cure the breach. And if the obligated party fails to cure it within 90 days, it must "remove such Mortgage Loan . . . from the Trust Fund" and "substitute in its place" a complying loan, or "repurchase the affected Mortgage Loan or Mortgage Loans from the Trustee." *Id*.

Sections 2.02 and 2.03 also address loan substitution or repurchase. Substitute loans "shall [be] deliver[ed] to the Trustee for the benefit of the Certificateholders." R.39266 (§ 2.03(d)). As for "repurchased" loans, the proceeds from the repurchase "shall be deposited" into the "Collection Account," *i.e.*, the account established by the Servicer with funds comprised of the "principal" and "interest" payments on the "Mortgage Loans" and "held in trust for the Certificateholders." R.39275-76. Together, then, Sections 2.02 and 2.03 outline how the Trustee may acquire new loans or the proceeds of repurchased loans from obligated parties to compensate for any deficiencies in the original conveyance made in Section 2.01.

Remaining sections. In Section 2.04, the Depositor represents that it has not encumbered any loans before conveying them to the Trustee. R.39267 (§ 2.04)). Section 2.05 addresses further details about loan substitution, including when a substitution requires an opinion of counsel. R.39267-68 (§ 2.05). And as already explained, in Section 2.06, the Trustee acknowledges that, through the preceding

conveyances, it has received all of the property constituting the entire Trust Fund, and agrees that it will "hold the Trust Fund and exercise the rights referred to above for the benefit of all present and future" certificateholders. R.39268 (§ 2.06).

B. The PSAs' No-Action Clauses Place Express Limitations On Certificateholders' Rights To Bring Suit.

Certificates are issued in various tranches, with each tranche reflecting a different level of risk and reward. The senior tranches are lower-risk, lower-reward investments; the junior tranches are higher-risk, higher-reward investments. That is because senior tranches generally are entitled to payment in full ahead of junior tranches, and losses from shortfalls in principal and interest payments are generally allocated first to junior tranches. *Phoenix Light SF Ltd. v. U.S. Bank Nat'l Ass'n*, 2016 WL 1169515, at *1 (S.D.N.Y. Mar. 22, 2016). As a result, certificateholders in different tranches may have different views regarding what steps should be taken and what expenses the trust should incur to address any problems that arise. The PSAs therefore limit how and when certificateholders may exercise their rights in ways that affect other certificateholders.

In addition to qualifying the circumstances in which certificateholders may direct the Trustee to investigate or institute litigation, the PSAs set forth a series of conditions on certificateholders' ability to bring suit to ensure that a lone certificateholder cannot impair the interests of other holders. These conditions appear in a provision titled "Limitations on Rights of Certificateholders"—and

colloquially known as a "no-action clause." R.39358-59 (§ 10.08). In full, the no-action clause provides:

> 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; it being understood and intended, and being expressly covenanted by each Certificateholder with every other Certificateholder and the Trustee, that no one or more Holders of Certificates shall have any right in any manner whatever by virtue or by availing itself or themselves of any provisions of this Agreement to affect, disturb or prejudice the rights of the Holders of any other of the Certificates, or to obtain or seek to obtain priority over or preference to any other such Holder or to enforce any right under this Agreement, except in the manner herein provided and for the common benefit of all Certificateholders.

R.39359 (§ 10.08).

By its terms, then, the no-action clause imposes a "limitation on [the] rights of certificateholders" to "institute any suit, action or proceeding," unless they

comply with each of the specified conditions. Among those is the requirement that a certificateholder gather the support of a specified percentage of voting rights—typically "not less than 25%." Then, on behalf of those voting rights, the certificateholder must "have given to the Trustee a written notice" and a demand that the Trustee institute the action. If the Trustee does not sue within a specified time, the certificateholder itself may sue. *See id.*

The language immediately following these conditions explains their purpose. Like the other provisions giving certificateholders rights but simultaneously limiting them, these conditions ensure that a certificateholder with insubstantial holdings does not impair other holders' interests: it is for "the common benefit of all Certificateholders." R.39359 (§ 10.08). Specifically, the clause prevents a small minority of holders from taking actions—for example, filing a lawsuit—that a majority of investors does not support and that will cause the trust (and hence the rest of the holders) to spend trust assets. *See Quadrant Structured Prod. Co. v. Vertin,* 23 N.Y.3d 549, 565 (2014).

C. The Panel Below Excused Plaintiffs' Failure To Comply With The No-Action Clause And Construed Section 2.06 As Imposing A Pre-EOD Enforcement Duty.

Despite conceding that they did not comply with the no-action clause's requirements, R.448-49 (¶¶ 24-25), Plaintiffs sued Defendants in 2015. Although Plaintiffs filed separate cases against Defendants, given the overlap in Plaintiffs'

allegations, the trial court ordered that the parties coordinate the cases, including for motion-to-dismiss purposes. Tr. 11, 27, Index No. 654443/2015, NYSCEF No. 18 (Aug. 5, 2016).

Most relevant here, Plaintiffs assert that Defendants breached the contracts by failing to enforce obligated parties' duty to repurchase loans with R&W breaches or with mortgage-file defects. R.570-72 (¶¶ 416-25). Plaintiffs also allege that Defendants are liable in tort for, among other things, failing to avoid conflicts of interest and violating their post-EOD fiduciary duties. R.578-81 (¶¶ 443-54).

Defendants moved to dismiss the cases on multiple grounds. R.622. The trial court dismissed several claims, but allowed others to move forward. R.78-79. Both sides appealed. R.10, R.80, R.221, R.356; R.13, R.85, R.223, R.360. The First Department affirmed in part and reversed in part. Three holdings are relevant here.

First, the panel held "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 [pre-EOD] duty on the trustees to enforce" obligated parties' duties to repurchase. R.39169 (omission and all but third alteration in original). It did so despite acknowledging that "a separate panel," "in deciding an appeal involving the same provision," had unanimously "reached the opposite conclusion" weeks earlier. R.39170 n.2.

The majority concluded that neither "[t]he fact that no enforcement mechanism is expressed within the repurchase protocol" nor the fact that many other RMBS PSAs do "specify the party responsible for enforcement of the repurchase protocol" was relevant to interpreting Section 2.06. R.39171.

Instead, according to the majority, because the Trustee agreed to "exercise the rights referred to above" and those rights include "the right to have noncompliant loans repurchased," the Trustee had a pre-EOD enforcement duty. R.39169-70. It reasoned that a contrary interpretation would create a "commercially unreasonable" result because "[i]f no party to the agreement has the obligation to enforce the repurchase protocol," "the repurchase protocol is effectively nullified." R.39173.

The dissent criticized the majority for "creat[ing] an affirmative duty not found in the agreements," R.39178 (Singh, J., dissenting), observing that "the drafters understood what language to use to impose an affirmative duty on the trustee," R.39184, and notably had not "specifically set forth" any duty to enforce as required by Section 8 of the PSAs, R.39181-82. According to the dissent, Section 2.06 merely "refers generally to 'rights,' stating for whom—'all present and future' certificateholders—the trustee 'agrees to' exercise the rights and to perform duties." R.39180.

Second, the panel below held that "Plaintiffs' noncompliance with the no-action clauses" did not bar their claims. R.39168. Relying solely on its previous

decision in *Blackrock Balanced Capital Portfolio (FI) v. U.S. Bank, Nat'l Ass'n*, 165 A.D.3d 526 (1st Dep't 2018), it concluded that "Plaintiffs' compliance was excused because 'it would be futile to demand that the trustee commence an action against itself.'" R.39168 (quoting *Blackrock*, 165 A.D.3d at 528).

Third, the panel upheld most of Plaintiffs' tort claims. It concluded that a "subset" of the conflict-of-interest and post-EOD fiduciary-duty claims survived, because they "flow from the violation of extracontractual, professional duties" and allege damages "separate from the damages caused by the breaches of their contractual duties," even though those damages were "of the same type." R.39177.

Following the First Department's decision, Defendants sought leave to appeal to this Court, which the First Department granted.[5] That order permitted Defendants to appeal each issue on which the First Department ruled against them. R.39157. Nonetheless, Defendants limit this appeal to three issues of law on which this Court's guidance is especially necessary, given their impact on both this case and RMBS trustee litigation more generally: (1) whether Section 2.06's "rights referred to above" language creates a pre-EOD Trustee duty to enforce other parties' obligations to repurchase loans; (2) whether Plaintiffs may sue despite their conceded failure to comply with any of the contracts' preconditions to suit; and (3)

[5] Plaintiffs also moved for leave to appeal and, in the alternative, for reargument. The First Department denied Plaintiffs' motion.

whether Plaintiffs may assert tort claims arising from the same alleged failures underlying their contract claims and seeking recovery for the same alleged harm.

ARGUMENT

The panel erred on each issue, and the Court should reverse.

First, most decisions interpreting Section 2.06 have properly concluded that the Trustee's agreement "to hold the Trust Fund and exercise the rights referred to above for the benefit of all present and future" certificateholders merely confirms that the Trustee possesses trust assets and exercises trust rights for beneficiaries, rather than for its own benefit. In disregarding those decisions, departing from the provision's plain language, and interpreting Section 2.06 as a virtually boundless source of pre-EOD Trustee duties, the panel violated the command that the Trustee's duties be strictly limited to those that are "expressly" and "specifically set forth" in the PSAs.

Section 2.06 does not specifically require the Trustee to enforce repurchase obligations; in fact, it does not mention enforcement at all. The provisions in which the repurchase protocols are described in painstaking detail—and where any enforcement duty would most naturally be set forth—include several other specific Trustee obligations, but none requiring the Trustee to enforce repurchase. In fact, many of the PSAs at issue specifically state that the Trustee "shall not be . . . obligated to effectuate repurchases" even when the Trustee takes on greater

responsibility post-EOD. R.39273 (§ 3.05). The decision below therefore both multiplies the Trustee's pre-EOD duties far beyond those that the Trustee agreed to assume and exposes the Trustee to a risk of uncertainty about the nature of their pre-EOD duties—both outcomes that the PSAs sought to eliminate.

Second, the panel below erroneously excused Plaintiffs' undisputed failure to satisfy the conditions that the no-action clause requires be met before a certificateholder may sue under the PSAs. The panel concluded that the supposed absurdity of requiring a certificateholder to demand that the Trustee sue itself compelled discarding the no-action clause in its entirety, including the separate requirement that enough certificateholders support the desired action. In doing so, the panel misapplied the absurdity doctrine and ignored the PSA's severability clause—both of which demand that contractual provisions be preserved to the maximum extent possible, consistent with the parties' intent. Neither accordingly permits the no-action clause's certificateholder-approval requirement be cast aside.

As this Court and others have repeatedly recognized, the certificateholder-approval requirement serves the important objective of protecting trusts from lone certificateholders instituting unpopular lawsuits that can prejudice the interests of their fellow investors. In fact, absent enforcement of this condition, such a certificateholder who lacks the support needed to direct the Trustee to take a particular action it is not obligated to take could achieve effectively the same result

by suing the Trustee for failing to take that action. That is repugnant to the structure and intent of the PSAs, and should be corrected.

Third, the panel erred in permitting Plaintiffs to pursue their tort claims. New York law precludes a plaintiff from recasting what is obviously a contract claim as a tort claim predicated on the same breaches and injury. That is precisely what Plaintiffs' tort claims do; indeed, their tort claims are expressly based on alleged breaches of Defendants' "duties *under the Governing Agreements*." *E.g.*, R.566 (¶ 401).

I. THE FIRST DEPARTMENT ERRED IN INTERPRETING SECTION 2.06.

The First Department erred in holding that Section 2.06 imposes a pre-EOD Trustee duty to enforce obligated parties' repurchase obligations. Section 2.06 cannot be read to impose a Trustee enforcement duty. Instead, consistent with basic trust law, it ensures that the Trustee exercises its rights for certificateholders' benefit, not for its own. The First Department's reasons for reaching a contrary result are unpersuasive. This Court should reverse.

A. Rather Than Impose An Enforcement Duty, Section 2.06 Requires That The Trustee Hold Rights In Trust.

The Trustee's agreement in Section 2.06 "to hold the Trust Fund and exercise the rights referred to above" for the benefit of certificateholders does not impose a pre-EOD Trustee duty to enforce obligated parties' obligations to repurchase loans

with R&W breaches or missing or defective mortgage-file documents. Section 2.06 does not satisfy the requirement that any pre-EOD Trustee duty be "specifically set forth" and appear in "express provisions." Reading Section 2.06 to impose a Trustee enforcement duty, moreover, conflicts with other specific provisions in and the overall structure of the PSAs. Rather than impose a Trustee enforcement duty, Section 2.06 merely clarifies basic elements of trust law by requiring that, when the Trustee exercises a right, it does so for the benefit of all investors and not for its own benefit—as many well-reasoned decisions have concluded.

1. Section 2.06 does not impose an enforcement duty.

a. Reading Section 2.06 as imposing an enforcement duty cannot be squared with the PSAs' requirements regarding Trustee duties.

As this Court has held, a corporate trustee "has very little in common with the ordinary trustee. The trustee under a corporate indenture has his or her rights and duties defined, not by the fiduciary relationship, but exclusively by the terms of the agreement." *AG Cap. Funding Partners*, 11 N.Y.3d at 156 (alteration omitted); *accord Meckel v. Cont'l Res. Co.*, 758 F.2d 811, 816 (2d Cir. 1985). Absent a known EOD, the trustee has "limited, 'ministerial' functions" defined by the contract. *Racepoint Partners*, 14 N.Y.3d at 425 (rejecting an interpretation that would "expand[] indenture trustees' recognized administrative duties far beyond anything found in the contract").

The contracts here are no exception. They expressly provide that, absent a known EOD, "the duties and obligations of the Trustee shall be determined *solely by the express provisions* of this Agreement, the Trustee shall not be liable except for the performance of such duties and obligations as are *specifically set forth* in this Agreement, [and] *no implied covenants or obligations* shall be read into this Agreement against the Trustee." R.39338 (§ 8.01(i)) (emphases added). For a duty to be stated "expressly," it must be "[c]learly and unmistakably communicated" or "stated with directness and clarity." *Express*, *Black's Law Dictionary* (11th ed. 2019), Westlaw. And the term "specific" means "[o]f, relating to, or designating a particular or defined thing; *explicit*." *Specific*, *Black's Law Dictionary* (11th ed. 2019), Westlaw (emphasis added).

In light of these interpretive rules, Section 2.06 cannot be interpreted to either expressly or specifically set forth a pre-EOD Trustee duty to enforce obligated parties' obligation to repurchase loans. Section 2.06 states only that the Trustee agrees to "exercise the rights referred to above for the benefit of all present and future" certificateholders. That language does not "specifically" or "expressly" set forth a pre-EOD Trustee enforcement duty. As the dissent below observed, "[u]nlike other provisions, [it] is *silent* as to the trustee's duties regarding the repurchase protocol." R.39180 (Singh, J., dissenting) (emphasis added). Section 2.06 nowhere even mentions enforcement, much less enforcement of other parties' obligation to

repurchase. It instead generally alludes to some unparticular, undefined, and unnamed set of rights, located somewhere above. *See id.* (noting that Section 2.06 "refers generally to 'rights'"). The absence of any specifically expressed duty in the PSAs to enforce repurchase obligations is dispositive.

In fact, in the PSAs for most of the trusts here, the relevant sentence in Section 2.06 states in full: "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 according to its terms*." R.39268 (§ 2.06) (emphasis added). The contracting parties, in other words, specifically addressed the Trustee's duties in a neighboring part of Section 2.06 that, by contrast, expressly refers to "duties"—as distinct from "rights." Interpreting the Trustee's agreement to exercise rights for the benefit of certificateholders as creating a duty, thus imposing a single duty in Section 2.06 itself, blurs the distinction that the parties clearly bore in mind. Further reflecting the importance of that distinction to the parties is that many of at-issue PSAs provide that "[t]he rights of the Trustee . . . shall *not* be construed as a duty." R.39340 (§ 8.02(x)) (emphasis added).

That Section 2.06 does not impose a Trustee enforcement duty becomes particularly apparent when contrasted with provisions that *do* specifically and expressly impose duties.

Consider first provisions relating to loan repurchases. These provisions include extensive detail regarding when the party must act, under what circumstances, and what the party must do. For example, Section 2.02 addresses loans with missing or defective mortgage-file documents. It first specifically imposes on the Trustee the duty to prepare mortgage-file reports, at clearly identified times: "The Trustee agrees to deliver as of 10:00 am (New York time) on the Closing Date to the Depositor and the Servicers Initial Certifications." R.39262 (§ 2.02(a)). And "[n]ot later than 90 days after the Closing Date, the Trustee shall deliver to the Depositor, the Seller and the Servicers a Final Certification, with any applicable exceptions noted thereon." R.39262-63 (§ 2.02(a)). If the exceptions are not cured within 90 days, then the obligated party must substitute or repurchase the loan within that period. *Id.* Notably, Section 2.02's "expressly" and "specifically set forth" duties for the Trustee in relation to missing or defective mortgage-file documents concern only the generation of exception reports—not loan repurchases.

The provision addressing repurchase of loans with R&W breaches is similar. Under Section 2.03, "the party discovering" an R&W breach "*shall* give prompt notice," and, following notice and failure to cure, the obligated party "*shall* cure such breach" or "repurchase" the affected loan. *See* R.39265 (§ 2.03(d)) (emphases added). The agreements thus impose a specific and express duty on discovering parties (including, if applicable, the Trustee) to give *notice*, and a similarly specific

and express duty on the *obligated party* to cure or repurchase. Thus, as the dissent below observed, "[t]he drafters understood what language to employ when it was intended that a party, including the trustee, assumed a pre-EOD duty." R.39181 (Singh, J., dissenting). But nowhere do the PSAs say that the Trustee "shall," "must," or even "agrees to" enforce repurchase. And had the agreements included that duty, it would most naturally appear alongside these other repurchase protocol duties—and not in a provision several sections later titled "Execution and Delivery of Certificates."

The Trustee's pre-EOD duties are similarly set forth specifically and expressly in other relevant provisions of the agreements. For example, the section identifying the documents that the Depositor is supposed to deliver to the Trustee imposes clear, detailed requirements for what the Trustee must do with those documents. *See* R.39257 (§ 2.01(b)) ("the Trustee shall . . . (i) affix the Trustee's name to each Assignment of Mortgage, as the assignee thereof [and] (ii) cause such Assignment of Mortgage to be completed in proper form for recording"). Similarly, the section addressing the servicer's duties to collect funds from borrowers expressly obligates the Trustee to open accounts to hold such funds. *See, e.g.*, R.39276 (§ 3.06 (e)) ("On or prior to the Closing Date, the Trustee shall establish and maintain, on behalf of the Certificateholders, the Certificate Account"). Similar examples

abound. As these provisions show, when the PSA imposes a duty, it details when the party with the duty must act and how they must act.

Section 2.06 does none of that—nowhere does it say when the Trustee must exercise the rights referred to above or under what circumstances the Trustee must exercise those rights. Nor does it say what the Trustee must do to fulfill that supposed duty.

Reading Section 2.06 as imposing a Trustee enforcement duty therefore would leave the Trustee to guess whether and when its duty had arisen. And that fails to preserve the limited role the parties envisioned for the Trustee before an EOD, and which the Trustee accepted in return for a relatively modest fee. The greater the uncertainty around what the Trustee must do, the greater the necessity that it take actions well beyond its ministerial tasks to avoid liability and for which it may be reimbursed out of investors' returns. For the Trustee to effectively perform the role that the parties intended, it is essential that the Trustee have clarity about its duties. *See Uribe v. Merchs. Bank*, 91 N.Y.2d 336, 341-42 (1998) (explaining that contracts are not meant to be interpreted by "resort to a magnifying glass" and instead are interpreted by reference to the "reasonable expectation and purpose of the ordinary businessperson") (alteration omitted). But Section 2.06 provides no such clarity with respect to enforcement of repurchase obligations—it neither specifically nor expressly sets forth a Trustee enforcement duty. Under the PSA's own interpretive

rules, that means the duty does not exist. To find otherwise, after decades of litigation and numerous court decisions to the contrary, would upset the balance reflected in the PSAs' structure and expose the Trustee to precisely the sort of risks that the parties sought to eliminate.

b. Reading Section 2.06 as imposing an enforcement duty cannot be squared with other PSA provisions.

That Section 2.06 does not specifically and expressly set forth any duty to enforce is dispositive of the question at hand, and alone warrants reversal. But an equally compelling reason for not imposing a duty to enforce is that doing so is contrary to other provisions in the governing agreements, in two ways. *See Kolbe v. Tibbetts*, 22 N.Y.3d 344, 353 (2013) ("It is well established that when reviewing a contract, particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties manifested thereby.") (alteration omitted).

The first is that reading Section 2.06 to impose a Trustee duty to enforce *repurchase* obligations cannot be squared with the limits on the Trustee's role when it assumes *servicing* obligations. In many at-issue PSAs, even when the Trustee "shall assume all of the rights and obligations of such Servicer" (including "by reason of an Event of Default")—a situation that dramatically expands the Trustee's role to include the servicing of mortgage loans—the Trustee "shall *not* be . . . obligated 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." R.39273 (§ 3.05) (emphasis added). And if the Trustee has no duty to effectuate loan repurchases even when its obligations are expanded, it cannot be that it has that duty at all times. Finding otherwise would render meaningless the language in Section 3.05, in violation of well-settled contract principles. *See, e.g.*, *150 Broadway N.Y. Assocs., L.P. v. Bodner*, 14 A.D.3d 1, 64 (1st Dep't 2004) ("It is a cardinal rule of contract construction that a court should 'avoid an interpretation that would leave contractual clauses meaningless.'").

The second is that reading Section 2.06 as imposing on the Trustee a pre-EOD duty to enforce repurchase would conflict with the crucial distinction between the Trustee's role before and after a known EOD. Section 8.01 provides that, "[i]n case an Event of Default has occurred and remains uncured and not waived, the Trustee *shall exercise* such of the rights and powers vested in it by this Agreement, and 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." R.39338 (§ 8.01) (emphasis added). Unlike Section 2.06, that language does specifically set forth a duty on the Trustee to exercise rights. Interpreting the Trustee's agreement in Section 2.06 to "exercise the rights referred to above for the benefit of all" certificateholders as imposing an equivalent duty that applies *at all times* (including pre-EOD) would erase the distinction between the Trustee's pre-

and post-EOD roles; the Trustee would be liable if it failed to exercise a purported right to enforce even before post-EOD prudent-person duties attached.

In sum, Section 2.06 cannot be read as imposing a pre-EOD Trustee duty to enforce obligated parties' duties to repurchase loans. The First Department erred in concluding otherwise, requiring reversal.

2. Section 2.06 provides that the certificateholders are the beneficiaries of the contract rights, as well as of the "Trust Fund."

Rather than create a pre-EOD Trustee enforcement duty, Section 2.06 merely describes *for whose benefit* the Trustee acts. As a matter of trust law, any irrevocable trust must include "an expression of intent that property be held, at least in part, for the benefit of one other than the settlor." George Gleason Bogert et al., *Bogert's The Law of Trusts & Trustees* § 1, Westlaw (emphasis added) (database updated June 2021). As another appellate court analyzing this provision has found, Section 2.06 merely "delineates that the trustee holds the trust fund for the benefit of the investors rather than for the trustee's own benefit or the benefit of any other party to the PSA." *W. & S. Life Ins. Co. v. Bank of N.Y. Mellon*, 129 N.E.3d 1085, 1093-94 (Ohio Ct. App. 2019).

That Section 2.06 refers not only to the Trustee's possession of the Trust Fund but also its exercise of "rights referred to above" is unsurprising in light of the preceding provisions of Article II memorializing the conveyance of the Trust Fund

to the Trustee. Specifically, in Section 2.01—entitled "Conveyance of Mortgage Loans"—the Depositor "sells, transfers, assigns, sets over and otherwise conveys to the Trustee in trust for the benefit of the Certificateholders, without recourse, all the *right*, title and interest of the Depositor in and to," among other things, each "Mortgage Loan, including all interest and principal received or receivable on or with respect to such Initial Mortgage Loans," and "the Depositor's *rights* under the Assignment and Assumption Agreement" (pursuant to which the Depositor acquired the mortgage loans). R.39255, R.39258 (§ 2.01(a), (c)) (emphases added). In other words, the Trustee is not only granted title to the assets in the Trust Fund but also rights related to those assets, 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. *See Phoenix Light SF Ltd. v. Deutsche Bank Nat'l Tr. Co.*, 585 F. Supp. 3d 540, 591 (S.D.N.Y. 2022) ("The 'rights referred to above' language is properly understood to 'delineate that the trustee holds the trust fund for the benefit of the investor rather than for the trustee's own benefit or the benefit of any other party to the PSA,' rather than to generate any implied duties." (quoting *W. & S. Life Ins. Co.*, 129 N.E.3d at 1094)).

And that is the only natural reading of Section 2.06, which provides that the Trustee "agrees to hold the Trust Fund *and* exercise the rights referred to above *for the benefit*" of investors. In context, this language is not naturally understood to

impose on the Trustee an obligation to hold trust assets or to exercise rights; instead, the provision's obvious point is to specify that the Trustee performs both of those functions "for the benefit" of others. Whether and under what conditions the Trustee acquires the trust fund and must exercise those rights is fully described elsewhere in express provisions of the PSAs, including in the terms governing certificateholder directions and indemnities and post-EOD duties. *See, e.g.*, R.39338 (§ 8.01(i)) ("[N]o implied covenants or obligations shall be read into this Agreement against the Trustee"); *see also CFIP Master Fund, Ltd*, 738 F. Supp. 2d at 472-73 ("for the benefit of" language does not create a "generalized duty to advance the Fund's economic interests in any manner other than with respect to the narrowly circumscribed responsibilities identified in the trust agreement").

That Section 2.06 simply confirms that the Trustee holds these assets and rights for the benefit of certificateholders is further confirmed by the fact that other provisions of the PSAs afford the Trustee certain benefits that are *not* for certificateholders' benefit. For example, Section 3.06(f) authorizes the Trustee to make investments of funds in a certain account, and provides that "[a]ll income and gain realized from [such] investment[s] . . . shall be for the benefit *of the Trustee*." R.39276-77 (§ 3.06(f)) (emphasis added). Section 2.06 accordingly eliminates any ambiguity that the trust fund and trust rights conveyed through Article II are not for the Trustee's benefit.

***

For all these reasons, the great majority of jurists (including a unanimous panel of the First Department that addressed this issue weeks before the decision below) who have considered the question have read Section 2.06 not to impose a Trustee duty to enforce. *See W. & S. Life Ins. Co.*, 209 A.D.3d at 10-14; *Phoenix Light SF Ltd. v. Wells Fargo Bank, N.A.*, 2022 WL 2702616, at *23 n.30 (S.D.N.Y. July 12, 2022); *Phoenix Light*, 585 F. Supp. 3d at 591; *Phoenix Light SF Ltd. v. Wells Fargo Bank, N.A.*, 2021 WL 7082193, at *20 n.11 (S.D.N.Y. Dec. 6, 2021), *adopted in relevant part by* 2022 WL 2702616, at *23 n.30 (S.D.N.Y. July 12, 2022); *Commerzbank AG v. U.S. Bank Nat'l Ass'n*, 457 F. Supp. 3d 233, 257-58 (S.D.N.Y. 2020), *modified on other grounds by* 2022 WL 4124509 (S.D.N.Y. Sept. 9, 2021); *W. & S. Life Ins. Co.*, 129 N.E.3d at 1093-94, *aff'g* 2017 WL 3392855, at *5, *9 (Ohio Ct. Com. Pl. Aug. 4, 2017); *see also Pac. Life Ins. Co. v. U.S. Bank Nat'l Ass'n*, 2022 WL 11305628, at *32 n.41 (S.D.N.Y. Oct. 19, 2022) (rejecting the First Department's decision below, and following *Western & Southern*). This Court should as well.

B. The Divided Panel's Contrary Decision Rests On Several Errors.

For all the reasons just discussed, the First Department erred in holding that Section 2.06 creates a pre-EOD Trustee duty to enforce obligated parties' repurchase

obligations. The First Department's reasoning in support of its decision only reinforces that error.

1. The majority erred by excising "exercise the rights referred to above" from Section 2.06.

The majority below rejected the argument that Section 2.06 merely expressed a trust-law requirement on the ground that "[t]he provision already satisfies that criterion by stating that '[t]he Trustee agrees to hold the Trust Fund . . . for the benefit of all present and future [certificateholders].'" R.39171 (all but first alteration in original). According to the majority, Defendants' proposed interpretation would "improperly 'excise' the remaining portion of the sentence in which the trustee agrees to 'exercise the rights referred to above.'" R.39171. That is not so. To the contrary: The ellipsis in the court's quotation of Section 2.06 suggests that, if anything, it improperly excised the "exercise the rights referred to above" clause and concluded that it is not similarly qualified by the "for the benefit" clause.

But the entire point of Section 2.06 is to make clear that *both* the Trustee's possession of the Trust Fund *and its exercise of trust rights* must be for certificateholders' benefit. Section 2.06 begins with the Trustee's "acknowledge[ment]" of "the transfer and assignment to it of the Trust Fund." R.39268 (§ 2.06). It then 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." As noted above, this reflects the Trustee's

acceptance of the trust. *Restatement (Second) of Trusts* § 35 cmt. c (Am. Law Inst. 1959). The first phrase ("hold the Trust Fund") does not impose any duty to act; it simply describes the nature of the Trustee's property interest in the assets. The operative language is that the Trustee holds the Trust Fund "for the benefit of" investors, not for itself. The same reading also applies to the parallel "exercise" phrase. That clause was necessary because the "Trust Fund" does not include any rights created in the PSA itself. The language at issue thereby ensures that those rights are held in trust for certificateholders, just as the Trust Fund is, and that any exercise shall be for certificateholders' benefit.

2. The majority erred in imposing a duty to avoid "nullifying" the repurchase protocol.

The majority also imposed a Trustee duty to enforce based on its conclusion that, if no party is obligated to enforce the repurchase protocol, then the result would be "absurd, commercially unreasonable or contrary to the reasonable expectations of the parties." R.39169 (quoting *In re Lipper Holdings, LLC*, 1 A.D.3d 170, 171 (1st Dep't 2003)). But this, too, is incorrect.

There is nothing inherently unreasonable about leaving enforcement to the discretion of the parties, and contracts regularly do so. Here, the PSAs require the obligated party to repurchase loans, and the obligated party remains obligated to do so even absent an assigned enforcement party. The PSAs expressly provide for certificateholders like Plaintiffs to direct the Trustee to address the obligated parties'

breaches, R.39340 (§ 8.02(ix)); *see U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc.*, 147 A.D.3d 79, 84 (1st Dep't 2016) (suit against the obligated party by "Trustee at the direction of the Certificateholder"), and they also allow certificateholders themselves to bring certain claims relating to these breaches R.39359 (§ 10.08); *see Walnut Place LLC v. Countrywide Home Loans, Inc.*, 96 A.D.3d 684, 684 (1st Dep't 2012).[6] Thus, even if no party is contractually required to enforce the obligated party's repurchase duties, many mechanisms exist to address the obligated party's failure to fulfill those duties.

The majority's reasoning also ignores that all parties to the PSAs were commercially sophisticated entities who understood exactly how to establish a pre-EOD duty, including as to the Trustee. Had they intended to obligate the Trustee to enforce repurchase obligations, the PSA would have "specifically set forth" such a duty. R.39338 (§ 8.01). It is Plaintiffs' claims alleging that Defendants as Trustees are responsible for the obligated parties' contractual obligations that would upset the reasonable expectations of the parties.

[6] As the Court knows, there is no shortage of investor-directed RMBS litigation. *See, e.g.*, *Matter of Part 60 Put-Back Litig.*, 36 N.Y.3d 342, 424, 426 (2020) (Rivera, J., dissenting) (recognizing that RMBS litigation "typically" brought by trustees of RMBS trusts or investors has been "robust" and has "consumed New York courts for more than a decade.").

3. The majority erred in declining to consider other PSAs with "shall enforce" language.

Further showing that the First Department erred, other PSAs *do* "specify the party responsible for enforcement of the repurchase protocol," R.39171—and they do so in the same sections that set forth the obligation to repurchase, providing that "the Trustee *shall enforce* the obligations of the related [obligated party] . . . to repurchase," *see, e.g.*, MSM 2007-3XS § 2.05(a) (emphasis added). And as this Court has stated, "[i]f [as here] parties to a contract omit terms—particularly, terms that are readily found in other, similar contracts—the inescapable conclusion is that the parties intended the omission." *Quadrant*, 23 N.Y.3d at 560; *see also* R.39182-83 (Singh, J., dissenting) ("The majority's holding is also inconsistent with the established contractual principle that where the parties omit terms found in the same or similar agreements, the omission was intentional."). Omission of an enforcement obligation from the PSAs at issue therefore should be dispositive.

Indeed, the "shall enforce" language appears even in PSAs that include the "rights referred to above" language. *See, e.g.*, Cardenas Ex. 59, *MLRN LLC v. U.S. Bank Nat'l Ass'n*, Index No. 652712/2018 (N.Y. Sup. Ct. Sept. 10, 2021), NYSCEF No. 765 (GSAMP 2006-HE6 PSA §§ 2.03, 2.08). That confirms the "rights referred to above" language cannot create a Trustee enforcement duty—otherwise, including "shall enforce" in the repurchase protocols would be redundant (or worse, inconsistent, if the governing agreements designated a different party other than the

Trustee as the enforcing party). *See Columbus Park Corp. v. Dep't of Hous. Pres. & Dev.*, 80 N.Y.2d 19, 31 (1992). The "rights referred to above" language should have the same meaning and purpose across PSAs. *See GPIF-I Equity Co. v. HDG Mansur Inv. Servs., Inc.*, 2013 WL 3989041, at *3 (S.D.N.Y. Aug. 1, 2013) (the "presumptions of consistent usage and meaningful variation" are "settled principles of contract construction").

Nevertheless, the First Department refused to consider those PSAs, for two reasons. Both are wrong.

First, the panel thought any comparator PSAs needed to be executed at the same time, because "separate writings 'must be read together as one' when they 'were executed at substantially the same time, related to the same subject-matter, were contemporaneous writings[,] . . . effectuate the same purpose and formed a part of the same transaction.'" R.39172 (quoting *Nau v. Vulcan Rail & Constr. Co.*, 286 N.Y. 188, 197 (1941)). But Defendants never maintained that the "shall enforce" PSAs "must be read together as one." Rather, the point is that under *Quadrant* and similar decisions, the other PSAs are indisputably "similar" contracts: they "seek to effectuate the same commercial purpose—the securitization of bundled mortgage loans—and have provisions that are substantially similar." R.39184 (Singh, J., dissenting). And those PSAs demonstrate that RMBS transaction parties: (1) knew how to impose Trustee enforcement duties, and (2) did not use language similar to

Section 2.06 to do so. That the "shall enforce" PSAs were "executed on different days" and often "involved different parties" is irrelevant. In fact, the same was true of the no-action clauses in *Quadrant*—they appeared in different indentures executed at different times, in different cases, with different parties. *See* 23 N.Y.3d at 560-64 (noting that, unlike other indentures, the at-issue no-action clause referred only to claims under the indenture rather than "to both the indenture and the securities"). As the dissent explained in addressing the majority's departure from *Quadrant*, "[i]n current RMBS litigation, courts often compare PSAs to ascertain their meaning." R.39183 (Singh, J., dissenting) (citing cases); *Commerzbank*, 457 F. Supp. 3d at 257.

Second, *Quadrant* is not restricted to instances in which a contract is found to be ambiguous, as the majority suggested below. R.39172. *Quadrant* compared indentures *after* finding the contract "*un*ambiguous." 23 N.Y.3d at 560-64 (emphasis added). Indeed, the principle this Court invoked—*expressio unius est exclusio alterius*, *id.* at 560—"applies as a tool of contract construction" even where the contract is "plain and unambiguous," *Salerno v. Coach, Inc.*, 144 A.D.3d 449, 450 (1st Dep't 2016). *Quadrant* is therefore directly on point.

In sum, the First Department erred in holding that Section 2.06 imposes a pre-EOD Trustee enforcement duty.

II. THE FIRST DEPARTMENT ERRONEOUSLY EXCISED THE PSAS' NO-ACTION CLAUSES.

The First Department separately erred by excusing Plaintiffs' undisputed failure to comply with the express conditions of the PSAs' no-action clauses, which are procedural prerequisites to Plaintiffs' claims in this case. Contract clauses procedurally limiting parties' remedies have been consistently enforced by this Court, "because those provisions represent the parties' agreement on the allocation of the risk of economic loss in certain eventualities." *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Cap.*, 38 N.Y.3d 169, 178 (2022). "[I]n the RMBS context" in particular, this Court has "repeatedly enforced" similar "sole remedy provisions—a typical component of these transactions—in accordance with their plain terms" because such terms are a "'procedural prerequisite to suit' and, absent satisfaction of this contractual condition precedent, an action is not validly commenced." *Id.* The same "bedrock principles" of contract interpretation demand enforcement of the PSAs' no-action clauses here. *Id.*

A. The Plain Language Of The PSAs' No-Action Clauses Precludes Plaintiffs' Claims.

The PSAs' no-action clauses provide that certificateholders may not "institute any suit, action or proceeding in equity or at law upon or under or with respect to" the PSAs, unless they satisfy, among other things, two main conditions. R.39359 (§ 10.08).

First is the Trustee-demand condition. Certificateholders seeking to sue under the agreements must provide the Trustee "written notice of an Event of Default," and make a demand on the Trustee to take action. If the Trustee does not sue or take any similar action within 60 days after receiving the notice and demand, the certificateholder may then file its own lawsuit. R.39359 (§ 10.08).

Second is the certificateholder-approval condition. Under that clause, "Holders of Certificates evidencing not less than 25% of the Voting Rights evidenced by the Certificates" must join in the demand that the Trustee take action to enforce certificateholders' rights under the PSA. *Id.* A certificateholder may not sue "unless" a "written request" to file suit is made "to the Trustee to institute such action, suit or proceeding in its own name as Trustee hereunder" in compliance with both conditions. *Id.* If the would-be plaintiff certificateholder has not met "all the stated pre-conditions," its suit is barred. *Akanthos Cap. Mgmt., LLC v. CompuCredit Holdings Corp.*, 677 F.3d 1286, 1296 (11th Cir. 2012) (applying New York law).

There is no dispute that Plaintiffs' suit here is "upon or under or with respect to" the PSAs and falls squarely within the terms of the no-action clauses. 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.

B. The First Department Erroneously Excused Plaintiffs' Non-Compliance With The Trustee-Demand Requirement.

This Court holds that courts should "read a no-action clause to give effect to the precise words and language used," but the panel majority below erroneously gave no effect whatsoever to the PSAs' no action clauses. *Quadrant*, 23 N.Y.3d at 560. The First Department held that "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.

That conclusion has no foundation in reasoned analysis. The First Department merely recycled its prior holding from *Blackrock*, 165 A.D.3d at 528, which, like the opinion below, reached the same conclusion without undertaking any substantive

analysis. There, the First Department presumed that compliance with a no-action clause could be "excused" based on *dicta* from this Court's opinion in *Quadrant*, in which this Court observed that the Second Circuit had, in a different context, held that "it would be absurd to require the debenture holders to ask the Trustee to sue itself." 23 N.Y.3d at 566 (quoting *Cruden v. Bank of New York*, 957 F.2d 961, 968 (2d Cir. 1992)).[7] Excusing compliance with an express condition precedent is a dramatic departure from the contracts' plain terms and in serious tension with basic rules of contract interpretation.

Those rules weigh heavily in favor of applying the no-action clauses' plain terms as written. As this Court has held, "[a]bsent some violation of law or transgression of a strong public policy, the parties to a contract are basically free to make whatever agreement they wish," *Rowe v. Great Atl. & Pac. Tea Co*., 46 N.Y.2d 62, 67-68 (1978), and "[f]reedom of contract prevails in an arm's length transaction between sophisticated parties" such that courts generally may not "relieve them of

[7] In *Cruden*, the no-action clause was being used affirmatively by plaintiffs to overcome statute-of-limitations problems and excuse their delay in filing suit. *Cruden*, 957 F.2d at 968. According to the debenture holder plaintiffs there, the statute of limitations could not have commenced at a time when the no-action clause would have, by its terms, prevented suit. *Id.* The Second Circuit held that, for this purpose, the no-action clause properly applied to debenture holders as against the issuer/guarantor, and so tolled the statute of limitations for such a claim, but did not apply against the indenture trustees as "it would be absurd to require the debenture holders to ask the Trustee to sue itself," and so the statute of limitations was not tolled for purposes of such claims. *Id.*

the consequences of their bargain," *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co*., 86 N.Y.2d 685, 695 (1995). No one contends that applying the Trustee-demand condition here would be *illegal* or violate public policy. It should therefore be enforced, particularly since doing so would not impose any significant burden on certificateholders.

C. The Certificateholder-Approval Condition Is Fully Enforceable.

Even if enforcing the Trustee-demand condition in these suits would be "futile" or "absurd," as the First Department assumed, that would not justify its decision to excuse compliance with the no-action clauses in their entirety, including the certificate-holder approval condition, in suits against the Trustee. And even if the First Department had the authority to dispense with the Trustee-demand condition here, "courts may as a matter of interpretation" reject or supply words in a contract only as far as necessary to effectuate the parties' intent—and no further—and avoid rendering the contract "unenforceable either in whole or in part." *Wallace v. 600 Partners Co*., 86 N.Y.2d 543, 547-48 (1995); *see, e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 234 (2012). The First Department here went much further than necessary and improperly overrode key contractual priorities in the rush to remove prerequisites to suits that the parties to these agreements consciously chose to include.

1. The certificateholder-approval condition serves important contractual purposes.

The certificateholder-approval condition is essential to the parties' contractual purposes, as expressly stated in the no-action clause itself. The clause safeguards "the common benefit of all Certificateholders" by preventing a small minority faction of certificateholders from "prejudic[ing] the rights" of other certificateholders through a lawsuit the others reject. R.39359 (§ 10.08). As this Court has explained, a no-action clause prevents "individual bondholders [from] bring[ing] suits that are unpopular with their fellow bondholders." *Quadrant*, 23 N.Y.3d at 566; *see Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 184 (S.D.N.Y. 2011) (no-action clause guards against the risk that "a small group of certificateholders" will bring an action "that most investors would consider not to be in their collective economic interest").

An unpopular lawsuit can prejudice the rights of other certificateholders in at least two ways. For one, it imposes financial costs on the trust, and thus costs on all certificateholders, *e.g.*, ABSHE 2006-HE5 § 8.05(a) (entitling Trustee to indemnification from the Trust Fund for lawsuits it pursues or defends)—costs that are presumably unwanted by the majority of certificateholders who elected *not* to bring suit. For another, it allows a lone certificateholder to impose on other certificateholders its idiosyncratic view of the parties' duties under the PSA. Before

such costs and views are imposed, the no-action clause requires some threshold of certificateholders to sign on to the lawsuit.

The certificateholder-approval condition therefore is critical to the no-action clause's aim of preventing unpopular lawsuits that could deplete trust assets without the consent of a substantial portion of the certificateholders. "The theory [behind the condition] is that if the suit is worthwhile, 25% of the [certificate]holders would be willing to join in sponsoring it." *UPIC & Co. v. Kinder-Care Learning Ctrs., Inc.*, 793 F. Supp. 448, 454 (S.D.N.Y. 1992). Without the condition, a certificateholder could freely bring not just an "unpopular" lawsuit, *Quadrant*, 23 N.Y.3d at 566, but one that is supported by literally none of the trust's voting rights. That is why "even if Plaintiffs' had plausibly alleged an excuse for ignoring the no-action clause's [Trustee-]demand requirement"—even if, that is, the Trustee-demand condition is excused—"that would not justify [a] failure to comply with the 25% requirement." *Waxman v. Cliffs Nat. Res. Inc.*, 222 F. Supp. 3d 281, 293 (S.D.N.Y. 2016).

Manifestly, therefore, the certificateholder-approval condition cannot be set aside as "absurd," and the First Department should have interpreted the no-action clause so as to preserve the Parties' intent to require support of at least 25% of the

Voting Rights for an action related to the PSA.[8] Instead, the First Department assumed—again without analysis—that if the Trustee-demand condition must be excused, then so too must all the other no-action clause requirements. That assumption is unfounded and also requires reversal.

2. The certificateholder-approval condition should be enforced independently of the Trustee-demand condition.

While the First Department is not alone in assuming that excusing the Trustee-demand condition automatically excuses the remainder of the no-action clause, 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." *Blackrock Core Bond Portfolio v. U.S. Bank Nat'l Ass'n*, 165 F. Supp. 3d 80, 96 (S.D.N.Y. 2016) (collecting no-action clause cases and explaining that, "[t]aken together, these cases demonstrate the powerful effect of an echo chamber"). While that court reached the wrong conclusion, it at least asked the right question: "What principle of contract law would require that when one provision in a multi-

[8] By preventing lone ranger lawsuits, the certificateholder-approval condition also furthers the no-action clause's aim to "avoid a multiplicity of lawsuits and to make certain that any recovery goes for the equal and ratable benefit of all the bondholders." *In re Enron Corp. Sec., Derivative & ERSIA Litig.*, 2008 WL 744823, at *9 (S.D. Tex. Mar. 19, 2008). The many lawsuits against RMBS trustees clogging the dockets of New York courts illustrate what happens without this requirement—individual plaintiffs are free to file their own lawsuits seeking recovery for themselves. As one example, one Trustee has been sued in six different lawsuits by different investors pursuing essentially the same theory with respect to the same trust.

part section is deemed inapplicable/unenforceable, the entire provision must be deemed inapplicable/unenforceable?" *Id.* at 97. The correct answer is: None.

Purporting to apply "basic principles of contract interpretation," the district court in *Blackrock* reasoned that "the content of the no-action clause evinces an intent to have all subparts read as sequential building blocks, each necessary to construct an integrated whole," such that if one step is excused, they must all be excused. *Id.* That argument might have some force with respect to *other* requirements in the no-action clauses that must be satisfied *after* an investor demands that a Trustee take action, but does not logically apply to the certificateholder-approval condition. For example, if investors are excused from making a demand to the Trustee, it arguably would be odd to require them to wait for 60 days after issuing that nonexistent demand. *See id.* at 98 ("The waiting period . . . make[s] sense only when one follows the steps that have preceded."). But securing a majority of the outstanding certificates is a necessary step *before* an investor can make a demand in the first place. So even if removing the demand "rung" of the no-action-clause "ladder" could cause the higher rungs to fall as well, it does not justify dispensing with the *lower-rung* requirement of securing the necessary support of other investors.

Moreover, the *Blackrock* court's reasoning, like the First Department's below, contradicts the PSAs themselves, which expressly state that if "any one or more of

the covenants, agreements, provisions, or terms of this Agreement shall be . . . held invalid, then such covenants, agreements, provisions, or terms shall be deemed severable" such that the loss of one term "shall in no way affect the validity" of any other. *E.g.*, R.39358 (§ 10.06). The parties thus expressed their intention that while the Court may sever any offending terms from the PSAs, it *must* preserve any non-offending terms. *See Christian v. Christian*, 42 N.Y.2d 63, 73 (1977). The First Department disregarded the parties' unambiguous expression of their intent.

Contrary to the district court's reasoning in *Blackrock*, it is irrelevant that the no-action clauses' conditions are expressed as requirements that build on one other. The PSA's severance clause directs the Court to take whatever interpretive steps are needed to give meaning and effect to all terms not found to be unenforceable. It is unnecessary to consider whether "the invalid portion was so divisible that it could be mechanically severed," because this Court has rejected "that rigid requirement of strict divisibility." *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 395 (1999). Instead, as with all questions of contract interpretation, the ultimate questions of whether and how to sever an unenforceable provision of a contract is a "question of intention, to be determined from the language employed by the parties." *Christian*, 42 N.Y.2d at 73; *see Donohue v. Cuomo*, 38 N.Y.3d 1, 12 (2022). The First Department did not do so here—it did not even make the attempt.

Applying these principles here, even if the Trustee-demand condition could properly be ignored by the court as "absurd" or "futile," the First Department was required to sever the Trustee-demand condition and enforce the rest of the no-action clause, including the certificateholder-approval condition. Indeed, "there is little room for construction," since the parties answered the "question of intention" by "expressly stipulating" to a severability clause. *Christian*, 42 N.Y.2d at 73.

Were there any doubt about the parties' intent, the no-action clause itself eliminates it. After the no-action clause sets forth the conditions to suit, it goes on to explain its ultimate object:

> it being *understood and intended*, and being expressly covenanted by each Certificateholder with every other Certificateholder and the Trustee that *no one or more Holders of Certificates* shall have *any right in any manner whatever* by virtue or by availing itself or themselves of any provisions of this Agreement to affect, *disturb or prejudice the rights of the Holders of any other of the Certificates*, or to obtain or seek to obtain priority over or preference to any other such Holder or *to enforce any right under this Agreement*, *except* in the manner herein provided and *for the common benefit of all Certificateholders*.

R.39359 (§ 10.08) (emphases added). The parties thus expressed that, in limiting certificateholders' right to sue by imposing conditions to suit, their "underst[anding] and inten[tion]" was to prevent individual certificateholder suits that "in any manner whatever" might "disturb or prejudice the rights" of other certificateholders. In other words, they intended to prevent "lone ranger" suits like this one. *See id.* Enforcing

the certificateholder-approval requirement furthers that ultimate purpose—a purpose the Court should honor here.

This purpose is no less important in cases against the Trustee. Failing to enforce this condition when certificateholders sue the Trustee would undermine not just the purpose of the no-action clause, but also many similar requirements the parties included throughout the agreements to protect certificateholders. For example, a certificateholder must marshal the support of other certificateholders before directing the Trustee to investigate, R.39339 (§ 8.02(iv)); before giving notices of breaches that could trigger an EOD, R.39332 (§ 7.01(ii)); and before directing the Trustee to take certain post-EOD action, R.39334 (§ 7.01). These provisions ensure that holders of a *de minimis* percentage of voting rights may not do things that affect the majority of holders. This requirement guarantees, for example, that junior holders may not affect senior holders' rights without senior holders' support—the capital structure of the agreements is designed so that junior holders need some senior-holder support to reach the 25% threshold.

The no-action clause, with its parallel certificateholder-approval condition, is pivotal to upholding this structure. Absent enforcement of this condition, a lone certificateholder without the support needed to *direct* the Trustee to take a particular action could achieve the same result by *suing* the Trustee for failing to take that action. This lawsuit is the perfect illustration of that very dynamic. Plaintiffs here

assert that Defendants breached the agreements by, among other things, failing to investigate whether obligated parties had breached R&Ws regarding the mortgage loans. *E.g.*, R.1182-83. But if Plaintiffs thought that Defendants needed to take that step, Plaintiffs could have gathered the necessary 25% support and directed Defendants to investigate (and indemnified them against the costs of that investigation). *See* R.39339 (§ 8.02(v)). They did not. And they should not be able to use this lawsuit as an end-run around the agreements' direction requirements.

Indeed, if the Court upholds the First Department's conclusion that certificateholders need not comply with no-action clauses in cases against the Trustee, certificateholders would have no reason to comply with the agreements' many certificateholder-approval requirements (or the related indemnification requirements)—they could simply sue the Trustee on their own to accomplish the same thing, to the detriment of the collective interests of the majority of certificateholders. The no-action clause's certificateholder-approval condition is thus critical not only to the no-action clause's purpose, but to the structure of the agreements as a whole. Accordingly, the First Department erred in failing to require compliance with the no-action clause's certificateholder-approval condition.

Reversal is required for all these reasons. This Court should hold that the plain language of the certificateholder-approval condition in the no-action clause is

fully enforceable and that Plaintiffs' failure to comply requires their actions against Defendants to be dismissed as a matter of law.

III. THE FIRST DEPARTMENT ERRED IN ALLOWING PLAINTIFFS TO MAINTAIN TORT CLAIMS ARISING FROM THE SAME ALLEGED ECONOMIC HARM AS THEIR CONTRACT CLAIMS.

Finally, all of Plaintiffs' tort claims fail because they duplicate the contract claims and are barred by the economic-loss doctrine.

Tort claims fail where "the nature of the injury, how the injury occurred and the harm it caused" are the same as in the contract claims involving the same parties—in other words, where the tort claims "essentially seek[] enforcement of [a contractual] bargain." *Dormitory Auth. v. Samson Constr. Co.*, 30 N.Y.3d 704, 711-13 (2018); *see also Bd. of Managers of St. Tropez Condo. v. JMA Consultants, Inc.*, 191 A.D.3d 402, 402-03 (1st Dep't 2021) (affirming dismissal of negligence claim where it was based on "same underlying facts and [sought] the same damages" as contract claim); *Bakal v. U.S. Bank Nat'l Ass'n*, 747 F. App'x 32, 37 (2d Cir. 2019) (affirming dismissal of fiduciary-duty claim arising from same "allegation that gives rise to the Certificateholders' breach of contract claim").

That describes Plaintiffs' tort claims here—they are "merely a restatement, albeit in slightly different language," of the alleged "contractual obligations." *Dormitory Auth.*, 30 N.Y.3d at 711. Indeed, with respect both to the alleged

misconduct and the harm it allegedly caused, the allegations underlying Plaintiffs' tort claims are virtually identical to those underlying their contract claims.

Consider first Plaintiffs' allegations regarding how the injury allegedly occurred. For their conflict-of-interest claims, Plaintiffs allege their injury occurred when Defendants "failed to perform [their] duties under the Governing Agreements" by "refraining from enforcing the Trusts' rights for breaches of a representation or warranty regarding the mortgage loans and for Servicer defaults." R.566, R.580-81 (¶¶ 401, 452). That is the same way Plaintiffs say their alleged contract injuries occurred—according to Plaintiffs, Defendants "breached each Governing Agreement" by "failing to enforce the Sellers'" obligations to repurchase mortgage loans with "breaches of the Sellers' mortgage loan representations and warranties," R.572 (¶ 423), and by failing to take action regarding "defaults by the Servicers," R.577 (¶ 436).

The same is true for Plaintiffs' fiduciary-duty claims. Plaintiffs allege that Defendants breached post-EOD fiduciary duties by failing to comply with their "'prudent person' obligations" to "enforce the Sellers' obligation to cure, repurchase, or substitute mortgage loans with defective mortgage files and mortgage loans affected by breaches of the Sellers' representations and warranties." R.579 (¶ 446). That very same failure underlies Plaintiffs' post-EOD contract claims—Plaintiffs allege that Defendants failed to "observe 'prudent person' obligations" when they

failed to take action "with respect to the Sellers," allowing the Trusts "to be filled with defective mortgage loans." R.577 (¶¶ 537-38); *compare also* R.579-80 (¶ 447) (fiduciary-duty breach based on failure to address servicers' breaches of servicing obligations), *with* R.577 (¶ 438) (contract breach based on failure to "enforce[] the Servicers' prudent servicing obligations").

Take next the harm that the tort and contract breaches allegedly caused. According to Plaintiffs, 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." *See, e.g.*, R.571-72, R.578 (¶¶ 420, 425, 439) (contract); R.580 (¶ 448) (fiduciary duty); R.581 (¶ 454). Accordingly, there is "no injury alleged . . . that a separate [tort] claim would include that is not already encompassed in [the] contract claim." *Dormitory Auth.*, 30 N.Y.3d at 713. Plaintiffs' tort claims therefore fail.

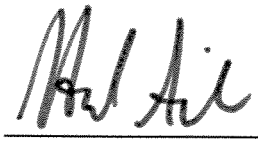
The First Department nonetheless permitted Plaintiffs' "breach of conflict of interest and [certain] post-EOD breach of fiduciary duty claims" to survive on the ground that those claims "flow from the violation of extracontractual, professional duties." R.39177. That was error. Tort claims cannot survive merely because they arise from extracontractual duties—indeed, in *Dormitory*, this Court held that a negligence claim failed where "the factual allegations set forth in [the negligence and contract] cause[s] of action [were] *identical*, except that the negligence claim is

framed in terms of [the defendant's] failure to comply with professional standards of care." 30 N.Y.3d at 711-12.

The First Department further erred in analyzing Plaintiffs' damages. The First Department recognized that the damages Plaintiffs sought in tort were "of the same type" as their contract damages, but concluded that "does not matter." R.39177. But when the damages are "of the same type," *id.*, there can be "no injury" in tort "that is not already encompassed in [the] contract claim." *Dormitory Auth.*, 30 N.Y.3d at 713. And that precludes Plaintiffs' tort claims. Plaintiffs' conflict of interest and post-EOD breach of fiduciary duty claims should be dismissed in full.

CONCLUSION

For these reasons, this Court should reverse the First Department's holding that Section 2.06 imposes a Trustee duty to enforce; that Plaintiffs are excused from complying with the PSAs' no-action clauses; and that Plaintiffs' tort claims are independent of their contract claims.



JONES DAY
Howard F. Sidman
Ryan J. Andreoli
Amanda L. Dollinger
250 Vesey Street
New York, New York 10281
Telephone: (212) 326-3939
Facsimile: (212) 755-7306
hfsidman@jonesday.com
randreoli@jonesday.com
adollinger@jonesday.com

Attorneys for Defendants-Appellants Wells Fargo Bank, N.A. and Wells Fargo Bank, N.A. as successor-by-merger to Wells Fargo Bank Minnesota, N.A. (654443/2015)

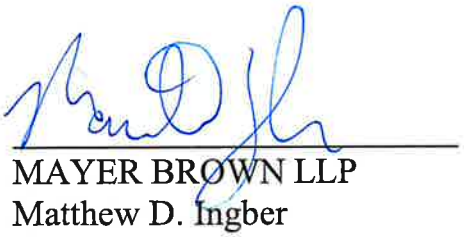
JONES DAY
David F. Adler
Michael T. Marcucci
250 Vesey Street
New York, New York 10281
Telephone: (212) 326-3939
Facsimile: (212) 755-7306
dfadler@jonesday.com
mmarcucci@jonesday.com

Louis A. Chaiten
Amanda R. Parker
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
lachaiten@jonesday.com
arparker@jonesday.com

Attorneys for Defendants-Appellants
U.S. Bank National Association and
U.S. Bank Trust National Association
(654442/2015)

MORGAN, LEWIS & BOCKIUS, LLP
Michael S. Kraut
Kevin J. Biron
Bryan P. Goff
101 Park Avenue
New York, New York 10178
Telephone: (212) 309-6000
Facsimile: (212) 309-6001
michael.kraut@morganlewis.com
kevin.biron@morganlewis.com
bryan.goff@morganlewis.com

Attorneys for Defendants-Appellants Deutsche Bank National Trust Company and Deutsche Bank Trust Company Americas (654439/2015)



MAYER BROWN LLP
Matthew D. Ingber
Christopher J. Houpt
Rory K. Schneider
Christopher J. Mikesh
1221 Avenue of the Americas
New York, New York 10020
Telephone: (212) 506-2500
Facsimile: (212) 262-1910
mingber@mayerbrown.com
choupt@mayerbrown.com
rschneider@mayerbrown.com
cmikesh@mayerbrown.com

Attorneys for Defendants-Appellants The Bank of New York (n/k/a The Bank of New York Mellon), The Bank of New York Trust Company, N.A. (n/k/a The Bank of New York Mellon Trust Company, N.A.), and The Bank of New York Mellon Trust Company, N.A.
(654438/2015)

PRINTING SPECIFICATIONS CERTIFICATION

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

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in this brief, exclusive of this Certification and those portions of the brief permitted to be excluded by Rule 500.13(c)(3), is 13,932.

Dated: January 18, 2023

Michael T. Marcucci

Attorney for Defendants-Appellants
U.S. Bank National Association
and U.S. Bank Trust National
Association (654442/2015)