APL-2022-00165
New York County Clerk's Index Nos.
654443/2015, 654442/15, 654439/15, and 654438/15

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—

(*Caption continued on inside cover*)

AMICUS BRIEF OF THE AMERICAN BANKERS ASSOCIATION IN SUPPORT OF THE DEFENDANTS-APPELLANTS

Clay J. Pierce
FAEGRE DRINKER BIDDLE & REATH LLP
1177 Avenue of the Americas, 41st Floor
New York, NY 10036
(212) 248-3186
Clay.Pierce@faegredrinker.com

Attorneys for the American Bankers Association

April 6, 2023

WELLS FARGO BANK, N.A., as Trustee (and any predecessors and successors thereto); WELLS FARGO BANK MINNESOTA, N.A., as Trustee (and any predecessors and successors thereto); WELLS FARGO BANK, N.A., as Successor by Merger to WELLS FARGO BANK MINNESOTA, N.A., as Trustee (and any predecessors or successors thereto),

Defendants-Appellants,

—and—

ABFC 2006-OPT1 TRUST; ABFC 2006-OPT3 TRUST; CARRINGTON MORTGAGE LOAN TRUST, SERIES 2006-NC5; CARRINGTON MORTGAGE LOAN TRUST, SERIES 2006-OPT1; CARRINGTON MORTGAGE LOAN TRUST, SERIES 2006-RFC1; CITIGROUP MORTGAGE LOAN TRUST, SERIES 2005-OPT4; FIRST FRANKLIN MORTGAGE LOAN TRUST 2004-FF6; IMPAC CMB TRUST SERIES 2005-6; MORGAN STANLEY ABS CAPITAL I INC. TRUST 2004-OP1; MORGAN STANLEY ABS CAPITAL I INC. TRUST 2005-HE3; MORGAN STANLEY ABS CAPITAL I INC. 2005-WMC6; MORGAN STANLEY ABS CAPITAL I INC. TRUST 2007-HE5; OPTION ONE MORTGAGE LOAN TRUST 2005-3; OPTION ONE MORTGAGE LOAN TRUST 2005-4; OPTION ONE MORTGAGE LOAN TRUST 2005-5; OPTION ONE MORTGAGE LOAN TRUST 2007-6; SECURITIZED ASSET BACKED RECEIVABLES LLC TRUST 2006-OP1; STRUCTURED ASSET SECURITIES CORPORATION TRUST PASS-THROUGH CERTIFICATES, SERIES 2002-AL1; SOUNDVIEW HOME LOAN TRUST 2007-OPT3,

Nominal Defendants.

Index No. 654442/15

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

Plaintiffs-Respondents,

—against—

U.S. BANK, N.A., as Trustee (and any predecessors or successors thereto); U.S. BANK TRUST, N.A., as Trustee (and any predecessors or successors thereto),

Defendants-Appellants,

—and—

ASSET BACKED SECURITIES CORP. HOME EQUITY LOAN TRUST, SERIES OOMC 2006-HE5; ACCREDITED MORTGAGE LOAN TRUST 2004-3; ACCREDITED MORTGAGE LOAN TRUST 2005-3; ACCREDITED MORTGAGE LOAN TRUST 2005-4; ACCREDITED MORTGAGE LOAN TRUST 2006-1; ACCREDITED MORTGAGE LOAN TRUST 2006-2; BAYVIEW FINANCIAL MORTGAGE PASS-THROUGH TRUST 2006-A; BEAR STEARNS ASSET BACKED SECURITIES I TRUST 2005-AC9; BEAR STEARNS ASSET BACKED SECURITIES I TRUST 2007-HE4; BEAR STEARNS ASSET BACKED SECURITIES I TRUST 2007-HE5; BEAR STEARNS ARM TRUST 2005-10; BEAR STEARNS ARM TRUST 2005-12; CBASS 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.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules of Practice 500.1(f) and 500.21(f), the undersigned counsel hereby certifies that the American Bankers Association ("ABA") does not have any parents or subsidiaries. The ABA has one affiliate, the American Bankers Association Education Foundation.

STATEMENT OF INTEREST OF AMICI CURIAE

The ABA is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $23 trillion banking industry and its two million employees. ABA members—located in each of the fifty states and the District of Columbia—include financial institutions of all sizes and types. The ABA often appears as amicus curiae in litigation that affects the banking industry.

The ABA has a particular interest in this appeal because it presents issues that go to the heart of market participants'—including ABA members'—expectations about key structural features of residential mortgage backed securities ("RMBS") trusts. Perhaps unique among financial services-related industry associations, the ABA's diverse membership includes investors in RMBS trusts, trustees of RMBS trusts, and other RMBS industry participants.

The ABA's members hold a substantial majority of domestic assets of the banking industry and are leaders in all forms of financial services. Relevant here, members of the ABA's Corporate Trust Committee, which focuses on the role of banks in providing corporate trust services, provide more than 95 percent of corporate trust services in the United States and are recognized in the industry as the leaders in offering corporate trust services.

In sum, the ABA has a strong interest in safeguarding industry participants' expectations about structural protections in RMBS trusts such as those at issue in this appeal.

PRELIMINARY STATEMENT

The ABA submits this *amicus curiae* brief to urge the Court to enforce the terms of no-action clauses contained in the agreements that govern RMBS trusts. No-action clauses protect the interests of both investors and trustee parties and are necessary to make RMBS structures efficient and effective.

No-action clauses typically provide that investors may not commence a suit based on their interests in an RMBS trust without the support of investors holding at least 25% of the trust's voting rights (the "Investor-Support Requirement"). The Investor-Support Requirement protects investors from rogue actors who might otherwise file costly litigation that would deplete trust assets or otherwise circumvent the trust's direction provisions. The no-action clauses at issue in this case include the Investor-Support Requirement. While the parties seeking to enforce the no-action clauses in this case are trustees, the relief they seek protects the interests of all trust parties.

No-action clauses, particularly those that include an Investor-Support Requirement, serve investors' interests in three principal ways. First, they ensure that a significant portion of investors have a say in deciding whether to bring

litigation that could affect all investors' rights or recoveries. Second, they reduce the costs of administering RMBS trusts and thereby preserve value for investors. Without no-action clauses, trust recoveries would be diluted by the payment of additional funds to indemnify trustees, securities administrators, master servicers, and other deal parties. Third, no-action clauses guard against the risk that a lone investor, or those holding a narrow minority of trust interests, will hijack the trust to threaten other investors with costly litigation against the trustee and force a cost-of-defense settlement, circumvent the trust's structure (i.e., the governing agreements' direction clauses), or impose unilateral views on the trust and its members and beneficiaries.

Actors in capital markets who consider participating in RMBS structures base their decisions on the terms of the governing contracts. They depend on courts to enforce those terms when disputes arise. When courts depart from the terms of the governing agreements, it upsets the parties' balance of rights, distorts incentives, and undermines the market's efficient functioning. The courts below offered no justification for departing from the contractual terms here—particularly with respect to their failure to enforce the Investor-Support Requirement. This Court should reverse.

BACKGROUND

Residential mortgage-backed securities ("RMBS") are created by "bundling [] 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, 332–33 (2019). "The trust then issues certificates that are purchased by investors, or certificateholders." *Id.* at 333. "The individual mortgage loans serve[] as collateral for the certificates, which pa[y] principal and interest to certificateholders from the cash flow generated by the mortgage loan pool; that is, certificateholders ma[ke] money when the borrowers ma[ke] payments on their loans." *Id.* (internal quotation and citation omitted); *see also, e.g.*, *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569, 575–76 (2018); *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 290 (1st Dept. 2011).

Investors' RMBS interests are represented by certificates, notes, or bonds (collectively, "Certificates"). Holders in RMBS transactions—i.e., the investors who buy Certificates—are typically large, sophisticated financial institutions, such as banks, pension funds, mutual funds, and hedge funds. Different levels—or "tranches"—of Certificates give their respective Holders different levels of priority in receiving portions of the cash flow generated by the principal and interest payments from the underlying mortgage loans.

Participants in RMBS trusts have varying appetites for risk and expectations of return on their investments. Investors therefore review offering documents, governing agreements, and interest rates and buy the class of Certificates that most closely matches their risk-reward profile. Generally, the most junior tranches in an RMBS trust offer the highest returns but are the most vulnerable to declining performance in the underlying pool of mortgages. If mortgage assets perform poorly, the Holders of the junior Certificates may lose their entitlement to payment entirely. Senior tranches of securities typically offer lower returns but provide much higher certainty because they enjoy the first right to payments received from the mortgage pool.

The rights of Holders and all the parties that participate in creating and administering an RMBS trust are set forth in painstaking detail by a document that is typically called a pooling and servicing agreement, indenture, or trust agreement (a "Governing Agreement"). The entities creating an RMBS structure typically include one or more originators, servicers, depositors, and sponsors, as well as a trustee. The originators are the entities who first originate the mortgage loans. Often, the originator sells the loan to a third party, which may sell it to another party, known as a sponsor, to be bundled with other loans. The sponsor, or its affiliate known as a depositor, deposits the mortgage loans into a trust. Some RMBS trusts

include mortgage loans originated by a single entity; others include mortgage loans originated by multiple entities.[1]

One or more servicers service the mortgage loan on behalf of the trust. Servicers typically collect the homeowners' monthly mortgage loan payments, remit those payments to the trust after deducting their servicing fees and any reimbursable expenses or advances, and manage borrower defaults. For RMBS trusts that include loans handled by multiple servicers, a master servicer may be responsible for overseeing the servicers and collecting monthly remittances from them for the trust.

A trustee in an RMBS transaction may have a variety of largely administrative functions. These may include, among other things: (i) holding the assets of the trust for the benefit of the investors; (ii) calculating and making payments to investors; (iii) preparing and providing reports to investors; (iv) maintaining a register of security holders; and (v) delivering notices. Trustees also may exercise certain rights granted to them under the transaction documents, including rights with respect to the mortgage loans. These rights are exercised by the RMBS trustee for the benefit of the investors in the trust. Often a deal may have a securities administrator, or trust

[1] Typically, one or more of the mortgage loan originators, the sponsor, and the depositor makes representations and warranties concerning the nature and quality of the mortgage loans and agree to repurchase the mortgage loans (or substitute new mortgage loans) if they materially breach any of their representations and warranties related to the mortgage loan.

administrator, who performs functions relating to calculation and distribution of payments and prepares reports in lieu of the trustee.

To prevent RMBS trusts from being pulled in multiple directions and wasting funds on actions that do not serve all investors, and in many cases as required to comply with Federal tax law, individual investors typically have no rights to take action with respect to the trust's corpus except as expressly provided in the Governing Agreement and related documents. For example, typical Governing Agreements require at least 25% of a trust's voting rights to direct the Trustee to take action or make investigations.

In addition, and particularly relevant here, the Governing Agreements contain what is known as a "no-action" clause that precludes investors from asserting legal claims unless the investors meet certain requirements set forth in the documents. *See, e.g.*, R.39359, § 10.08 ("No Certificateholder shall have any right . . . to institute any suit . . . unless such Holder previously shall have given to the Trustee a written notice of an Event of Default . . . 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[.]"). No-action clauses are commonplace in many other financial documents, such as corporate and municipal bond indentures.

Under the typical Governing Agreement at issue in this appeal, a Holder may not initiate a suit seeking relief under the Agreement unless: (i) the Holder provides the trustee with notice of an event of default; (ii) the Holder joins together with other Holders who own "not less than 25%" of the voting rights in the Trust (i.e., the Investor-Support Requirement); and (iii) the Holders give the trustee a written request to bring suit to address the event of default and a reasonable indemnity to address the costs, expenses, and liabilities the Trustee may incur doing so. *See id.*

Plaintiffs IKB International, S.A. and IKB Deutsche Industriebank A.G. (together, "Plaintiffs") are Holders with interests in RMBS trusts (collectively, the "Trusts"). In an attempt to recover losses they suffered following the 2008 financial crisis, Plaintiffs sued Wells Fargo Bank, N.A., Wells Fargo Bank Minnesota, N.A., and Wells Fargo Bank, N.A. as Successor by Merger to Wells Fargo Bank Minnesota, N.A., U.S. Bank, N.A., U.S. Bank Trust, N.A., Deutsche Bank National Trust Company, Deutsche Bank Trust Company Americas, The Bank of New York, BNY Western Trust Company, The Bank of New York Trust Company, N.A., The Bank of New York Mellon Corporation, N.A., The Bank of New York Mellon Trust Company, N.A., as Successor by Merger to The Bank of New York, The Bank of New York Mellon Trust Company, N.A., as Successor by Merger to BNY Western Trust Company, and The Bank of New York Mellon Trust Company, N.A., as Successor by Merger to the Bank of New York Trust Company, N.A. (collectively,

the "Trustees"), asserting contract, tort, and statutory claims. Plaintiffs did not, however, comply with the Trusts' no-action clauses—they did not give the Trustees notice of an event of default, they did not join with Holders collectively owning 25% of the Trusts' voting rights, and they did not give the Trustees a demand to pursue suit and an indemnity for doing so.

The Trustees moved to dismiss Plaintiffs' suits based on their failure to abide by the Trusts' no-action clauses (among other reasons). The trial court denied the Trustees' motions to dismiss on this ground, based on the rationale that requiring Plaintiffs to ask the Trustees to sue themselves would have been futile and that once this requirement of the no-action clause is excused, the remaining requirements must be excused as well—*including the requirement that holders of 25% of the voting rights support the suit*. *See* Sup. Ct. Order at 12–13. On appeal, the Appellate Division similarly found that Plaintiffs' "compliance [with the no-action clauses] was excused because it would be futile to demand that the trustee commence an action against itself" and that "once 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." App. Div. Op. at 2.

ARGUMENT

I. RMBS Holders Should Be Required To Meet Contractual Preconditions For Filing Suit, Which Protect Investors' Interests as a Whole

This Court should reverse the decision below and direct the dismissal of Plaintiffs' claims based on their undisputed failure to comply with the Governing Agreements' no-action clauses. The ABA disagrees with the lower courts' conclusion that enforcing the demand requirement in suits against trustees would be futile or absurd. However, even if the Court ultimately were to decide that the demand requirement is unenforceable, it should not discard the remaining requirements—in particular the Investor-Support Requirement, which conditions Holders' ability to bring suit on obtaining the consent of at least 25% of the Trusts' voting rights. The Investor-Support Requirement is an independent, material contractual term that is essential to preventing waste of the Trusts' assets. By failing to enforce this term, the ruling below exposes holders to nuisance suits, to litigation threats aimed at coercing changes to the negotiated priorities between senior and junior tranches of Certificates, and to suits designed to side-step Governing Agreements' direction provisions requiring investor support for the issuance of directions to the trustee.

This Court should reverse the decision below and affirm the requirement that prospective plaintiffs obtain consent from a substantial percentage of Holders before filing suit.

A. Requiring the support of a substantial percentage of Holders preserves assets for investors and prevents races to the courthouse.

The vast majority of agreements governing RMBS trusts include provisions limiting the ability of individual Holders to commence litigation. *See McMahan & Co. v. Wherehouse Entertainment*, 65 F.3d 1044, 1050-51 (2d Cir. 1995) ("[N]o-action clauses frequently are included in indentures to limit suits arising from those agreements."). Those provisions are included because they serve the common good. They "protect issuers from the expense involved in defending lawsuits that are either frivolous or otherwise not in the economic interest of the Corporation and its creditors." *See Quadrant Structures Prods. Co., Ltd. v. Vertin*, 23 N.Y.3d 549, 565 (N.Y. 2014) (internal quotations omitted). In the same vein, they prevent any one Holder "from pursuing an individual course of action and thus harassing their common debtor and jeopardizing the fund provided for the common benefit." *Walnut Place LLC v Countrywide Home Loans, Inc.*, Index No. 650497/11, 35 Misc. 3d 1207(A), 2012 WL 1138863, at *3 (Sup. Ct. N.Y. Co. Mar. 28, 2012), aff'd, 96 A.D.3d 684 (1st Dep't 2012); *see also, e.g.*, *Quadrant*, 23 N.Y.3d at 565.

At the outset, when investors' interests are aligned, they agree to terms that protect the common good of the investors as a whole. Each investor expressly gives up the right to act in its own self-interest if that interest diverges from the good of the group—but it simultaneously gains protection against other investors doing the same. *See, e.g.*, R.39359, § 10.08. To put it simply, "a no-action clause makes it

more difficult for individual bondholders to bring suits that are unpopular with their fellow bondholders." *Quadrant*, 23 N.Y.3d at 565-66 (internal quotations omitted).

Requiring substantial Holder support for an investor suit brings additional benefits by encouraging cooperative resolution among investor and Trustee parties, protecting against duplicative litigation, and preventing costly races to the courthouse. If any Holder can sue, then every Holder has the incentive to be the first to sue to select the forum and frame the issues. Other Holders may file their own parallel suits and jockey for position. None of this serves the interests of the Holders as a whole because duplicative litigation against trust parties entitled to indemnity from trust funds for their defense costs—such as the Trustee here—dissipates the assets of the RMBS trust. The wisdom of the no-action clause is to create incentives for investors to resolve claims among themselves and build coalitions. Many suits will be avoided entirely, and the smaller numbers of suits that attract widespread Holder support will be much more likely to serve the collective interest.

Requiring Holders to generate collective support for a suit is also not unduly burdensome, because the Governing Agreements often provide a mechanism for Holders to communicate among themselves. For example, Governing Agreements typically permit a small number of Holders to obtain a list of all parties holding Certificates. Armed with that list, Holders can contact other investors and negotiate their support for the proposed litigation. The benefits of this process—discouraging

frivolous lawsuits—greatly outweighs its burden, which is minimal. Requiring substantial support for investor suits also prevents a lone Holder from collaterally estopping others who had no say in the prior litigation. *See Bank of N.Y. Mellon v. Chamoula*, 170 A.D. 3d 788, 790 (2d Dep't, 2019) (explaining elements of collateral estoppel).

A no-action clause also precludes a lone Holder from circumventing the Trusts' direction provisions. As is typically the case, most of the Governing Agreements in this matter require the support of at least 25% of Holders' voting interests before the Trustee may be directed to exercise its rights or powers. If a lone Holder could file suit without recruiting at least 25% of the Trusts' voting population to join him, he could circumvent these direction provisions by filing suit, thereby pressuring the Trustee to take actions or adopt policies contrary to the interests of investors as a whole. That would upend the order and structure of RMBS trusts upon which investors rely.

B. Requiring substantial Holder support protects the hierarchy of rights between senior and junior Holders.

In addition to protecting Holders generally, Investor-Support Requirements are often critical pieces of bargained-for protection for senior Holders. Because of how the rights in RMBS Certificates are divided into tranches, the interests of junior and senior Holders often diverge if the pool of mortgages begins to perform poorly. The most senior Holders, who are guaranteed to get their payments unless the

performance completely collapses, will have no interest in authorizing the trustee to bring suit unless and until there is a threat to their interests. Until then, the cost of the suit will simply increase their risk by using trust assets on litigation. In addition, because of how investor voting rights are allocated, Investor-Support Requirements guarantee that at least some senior Holders must support litigation. This deal structure intentionally protects senior Holders against the ability of junior Holders to force the trustee to file suit that would benefit only the junior Holders at the senior Holders' expense.

The most junior Holders have starkly different interests. Because Junior Holders are typically in a "first loss" position, they have every reason to pressure a trustee to file suit whenever the Trust's mortgage assets incur losses. If the suit is successful, they will share in the upside, provided the recovery is large enough to reach their tranches. If the suit is unsuccessful, on the other hand, its costs will be borne solely by the more senior Holders (whose Certificates will incur losses only when more junior classes have been wiped out). Notably, under the Governing Agreements the expenses associated with such suits typically are deducted from the Trusts' revenues *before* distributions are made to Holders.

Without a no-action provision to restrain it, the risk of deleterious litigation is remarkably high. Suits against trustees tend to occur only after something has gone wrong—typically after a trust's Holders have already suffered substantial write-

downs. After junior classes have been written down, the recoveries of the classes immediately above them (i.e., the classes in the "next loss" position) can suffer significant losses due to litigation expenses, a factor that will further push down those classes' trading prices in the secondary markets. This is yet another reason why the failure to enforce provisions restricting the litigation rights of Holders, like the Investor-Support Requirement, harms the collective interests of investors in RMBS trusts. Absent the enforcement of no-action clauses' Investor-Support Requirement, it is all but certain that the Trustee's ability to manage the trust will be paralyzed by conflicting investor suits (which any single investor could file regardless of whether it is supported by other holders).

C. No-action clause requirements make securities more efficient.

An Investor-Support Requirement in a no-action clause protects not only investors' interests but also the interests of other parties to the transactions. If deal parties are faced with the persistent threat of litigation by lone Holders, they will respond by demanding higher fees and larger caps on reimbursable expenses. That is both because of the increased activity required for the trust and also because of the increased risk of the role as trustee. These dollars will flow out of investors' hands and into the hands of trustees, master servicers, paying agents, and securities administrators. That outflow will not bring any attendant benefit to Holders.

This dynamic will ultimately depress RMBS markets and cause broader negative effects: investors will pay less for RMBS securities, so mortgages will become more expensive for borrowers. And all this harm provides no discernible offsetting benefit to Holders' common interests. The decisions below offered no policy justification for their decision to ignore the plain terms of the 25% support requirement, and no such justification exists.

CONCLUSION

For the reasons described above, the Court should reverse the decision below and remand for dismissal of Plaintiffs' suit for failure to comply with the no-action clauses.

Dated: April 6, 2023
New York, New York

Respectfully submitted,

FAEGRE DRINKER BIDDLE & REATH LLP

By: _____
Clay J. Pierce

1177 Avenue of the Americas
41st Floor
New York, NY 10036
(212) 248-3186
Clay.Pierce@faegredrinker.com

Attorneys for American Bankers Association

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FAEGRE DRINKER BIDDLE & REATH LLP

By: _____
Clay J. Pierce

1177 Avenue of the Americas
41st Floor
New York, NY 10036
(212) 248-3186
Clay.Pierce@faegredrinker.com

Attorneys for American Bankers Association

AFFIRMATION OF SERVICE

Under penalty of perjury, I hereby affirm that on April 6, 2023 I caused the foregoing document to be served via overnight mail on the following parties:

Seth D. Allen
Richard H. Dolan
Erik S. Groothuis
Niall D. O'Murchadha
Alexandra M.C. Douglas
SCHLAM STONE & DOLAN LLP
Attorneys for Plaintiffs-Respondents
26 Broadway, 19th Floor
New York, New York 10004
(212) 344-5400
sallen@schlamstone.com
rhd@schlamstone.com
egroothuis@schlamstone.com
nomurchadha@schlamstone.com
adouglas@schlamstone.com

Matthew D. Ingber
Christopher J. Houpt
Rory K. Schneider
Christopher J. Mikesh
MAYER BROWN LLP
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)
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

John J.D. McFerrin-Clancy
Attorney for Plaintiff-Respondent
17 State Street, 40th Floor
New York, New York 10004
646) 771-7377
jmc@mcferrin-clancy.com

Howard F. Sidman
Ryan J. Andreoli
Amanda L. Dollinger
JONES DAY
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)
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

David F. Adler
Michael T. Marcucci
JONES DAY
100 High Street
Boston, Massachusetts 02110
Telephone: (617) 449-3930
dfadler@jonesday.com
mmarcucci@jonesday.com
Louis A. Chaiten
Amanda R. Parker
JONES DAY
Attorneys for Defendants-Appellants
U.S. Bank National Association
and U.S. Bank Trust National
Association (654442/2015)
901 Lakeside Avenue, North Point
Cleveland, Ohio 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
lachaiten@jonesday.com
arparker@jonesday.com

Michael S. Kraut
Kevin J. Biron
Bryan P. Goff
MORGAN LEWIS & BOCKIUS, LLP
Attorneys for Defendants-Appellants
Deutsche Bank National Trust
Company and Deutsche Bank Trust
Company Americas (654439/2015)
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

[*Signature follows on next page*.]

Dated: April 6, 2023
New York, New York

FAEGRE DRINKER BIDDLE & REATH LLP

By: _____
Clay J. Pierce

1177 Avenue of the Americas
41st Floor
New York, NY 10036
(212) 248-3186
Clay.Pierce@faegredrinker.com

Attorneys for American Bankers Association