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

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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*)

REPLY 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*)

March 20, 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)

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PRELIMINARY STATEMENT

Like the RMBS cases this Court already has decided, "this controversy presents a question of contract interpretation fitting within a consistent theme: does the contract mean what it says?" *U.S. Bank, N.A. v. DLJ Mtge. Cap., Inc.*, 38 N.Y.3d 169, 177 (2022). The Court has consistently directed that "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." *Id.* at 177-78. Plaintiffs nonetheless ask this Court to affirm the First Department's decision to: (1) impose on the Trustees an expansive duty to enforce other parties' repurchase obligations that nowhere appears in the agreements; and (2) excuse Plaintiffs' undisputed failure to satisfy the agreements' no-action clauses. Far from supporting either result, Plaintiffs' opposition brief confirms why neither should stand. Nor does it meaningfully distinguish Plaintiffs' tort claims from their contract claims.

ARGUMENT

I. THE MAJORITY BELOW ERRED IN INTERPRETING SECTION 2.06 AS IMPOSING AN ENFORCEMENT DUTY.

A. Section 2.06 Does Not Impose An Enforcement Duty.

1. Interpreting Section 2.06 As Imposing An Enforcement Duty Is Inconsistent With Contractual Limits On Trustee Duties.

The Trustees' agreement in Section 2.06—entitled "Execution and Delivery of Certificates"—to "hold the Trust Fund and exercise the rights referred to above" for the benefit of all certificateholders does not expressly or specifically set forth a

pre-EOD duty to enforce the repurchase obligations of other parties. Defs.' Opening Br. ("OB") 24-42. In interpreting that provision to impose such a duty, the majority below accordingly departed from the contractual requirements that such duties "be determined solely by the express provisions of th[e] Agreement[s]" and that the Trustees "shall not be liable except for the performance of such duties and obligations as are specifically set forth [therein]." R.39388 (§ 8.01(i)).

Plaintiffs ignore this dispositive contractual requirement. They do not dispute that the PSAs expressly limit the Trustees' pre-EOD duties to those specifically set forth in express provisions. Nor do Plaintiffs deny that, under the plain meaning of "express" and "specifically", any duty must be explicit and unmistakably communicated. OB 26. Plaintiffs just repeatedly state that the phrase "agrees to" manifests a commitment. Pls.' Br. ("PB") 33. But the question is not whether "agrees to" imposes a commitment. The question is what commitment it expressly and specifically sets forth. A commitment to hold Trust assets and exercise certain Trust rights *for investors' benefit* does not expressly and specifically articulate a duty to enforce repurchase obligations of other parties.

Plaintiffs ignore how enforcement of repurchase obligations is not mentioned anywhere—let alone explicitly and unmistakably—in Section 2.06. Section 2.06 simply mentions "rights referred to above" in general terms without identifying what those rights are. And as explained (OB 29), with no response from Plaintiffs, had

the drafters meant to obligate the Trustees to enforce repurchases, they would have done so in the provisions specifically addressing repurchases (Sections 2.02 and 2.03). Indeed, that is how the obligation is imposed in PSAs containing express "shall enforce" language. *See infra* at 13-14.

Plaintiffs' emphasis (PB 34) on how Section 2.03 "impose[s] a specific and express duty on the obligated party to cure or repurchase" confirms the point. In contrast to Section 2.06's general language, Section 2.03 expressly and specifically states 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)). Thus, Section 2.03 clearly and unmistakably tells the Trustees what they must do (give notice to other parties), when (promptly), and under what circumstances (upon discovering a material breach). Section 2.06 does none of those things.

Other PSA provisions imposing duties on the Trustees related to repurchases use similarly clear and explicit language. OB 28. For example, Section 2.02—concerning mortgage-file documentation issues—provides that "[t]he Trustee agrees to deliver as of 10:00 a.m. (New York time) on the Closing Date to the Depositor and the Servicers Initial Certifications from each Custodian in the form annexed hereto as Exhibit G (or a substantially similar form)." R.39262 (§ 2.02(a)). It

continues: "No later than 90 days after the Closing Date, the Trustee shall deliver to the Depositor, the Seller and the Servicers a Final Certification in the form annexed hereto as Exhibit H (or a substantially similar form), with any applicable exceptions noted thereon." *Id.* Like Section 2.03, Section 2.02 leaves no doubt about what the Trustees must do, and when and how.

Plaintiffs make no attempt to, and cannot, demonstrate any similarity between Section 2.06 and provisions that do set forth duties specifically and expressly.

2. Interpreting Section 2.06 As Imposing An Enforcement Duty Is Inconsistent With Other Provisions In The PSAs.

As explained, Plaintiffs' interpretation of Section 2.06 also conflicts with other provisions of the PSAs. OB 25-33. Plaintiffs offer no persuasive response.

First, reading Section 2.06 as imposing a general pre-EOD enforcement duty is inconsistent with the agreements' essential distinction in Section 8.01 between the Trustees' pre- and post-EOD roles. It is only post-EOD that the Trustees "*shall exercise* such of the rights and powers vested in [them] by th[e] Agreement[s]." OB 32 (quoting R.39338 (§ 8.01)) (emphasis added). If, as Plaintiffs contend, Section 2.06 imposes a Trustee duty to exercise rights under the PSAs at all times, the express directive to do so post-EOD would be mere surplusage.

Plaintiffs' arguments *highlight* that their approach would collapse the Trustee's pre- and post-EOD roles. According to Plaintiffs, "once there is an EOD, the Defendant *still* must exercise such of the rights and powers vested in it by the

Agreement," just as Section 2.06 supposedly obligates it to have done pre-EOD. PB 38 (emphasis added). Plaintiffs thus read Section 2.06 as imposing, before an EOD, the same duty that Section 8.01 expressly and specifically reserves for after an EOD. Plaintiffs also state that "to the extent that Defendants' argument is that the Court should read a difference between the phrase 'the Trustee agrees to … exercise' (Section 2.06) and 'the Trustee shall exercise' (Section 8.01), this is a distinction without a difference." PB 38-39. But it is precisely because "agrees to" and "shall" mean similar things that what *follows* those terms must be distinct to preserve the Trustees' different roles pre- and post-EOD.

Plaintiffs only respond that, post-EOD, the Trustees have "additional duties," including "a duty to investigate and look for [R&W] breaches and enforce the right to a cure for those breaches." PB 38. Plaintiffs contend that this "does not contradict that, even prior to an EOD, the Trustee has the duty to cure [R&W] breaches when it has notice of them." *Id.* But Section 2.06 does not provide that the Trustees' agreement "to exercise the rights referred to above" is triggered only by notice of a breach, making Plaintiffs' distinction illusory.

To fulfil its supposed pre-EOD enforcement duty, the Trustees would have to undertake the same steps that Plaintiffs say the Trustees must undertake post-EOD—investigating whether any breach exists that warrants repurchase, contrary to other provisions expressly providing that "the Trustee shall not be bound to make any

investigation into the facts or matters stated in any … notice … or other paper or document, unless requested in writing so to do by Holders of Certificates evidencing not less than 25% of the Voting Rights allocated to each Class of Certificates." R.39339 (§ 8.02(iv)). The agreements also are clear that, pre-EOD, "the Trustee shall not be required to risk or expend its own funds or otherwise incur any financial liability in the performance of any of its duties or in the exercise of any of its rights or powers" if it reasonably believes that reimbursement is not assured. R.39340 (§ 8.02(vi)). Recognition of Plaintiffs' proposed pre-EOD enforcement duty would abrogate both of those limits.

Second, Plaintiffs ignore that many PSAs make clear that, pre-EOD, the Trustees' rights are distinct from, and not to be construed as, affirmative duties. *See* OB 9 (citing R.39340 (§ 8.02(x))).

Third, recognizing an enforcement duty contradicts language in Sections 3.04, 3.05, or 3.24 of 19 of the 24 PSAs here that expressly *disavows* such a duty even when the Trustees have enhanced responsibilities.[1] Those provisions provide that, even when an EOD has occurred and a Trustee steps in as the Servicer or Master Servicer, it has no obligation "to effectuate repurchases or substitutions … including, but not limited to, repurchases or substitutions of Mortgage Loans pursuant to

[1] We use "Section 3.04" to refer to these provisions, unless citing a PSA in which it is located elsewhere.

Section 2.02 or 2.03." *See* OB 31-32; R.39273 (§ 3.05). Each of Plaintiffs' attempts to downplay the significance of that language fails.[2]

Plaintiffs argue that "effectuate" means to "actually repurchase," and that Section 3.04 therefore disavows only repurchase obligations that a servicer *itself* may have. PB 36-37. But when the contracts require a party to repurchase a loan, they direct the party to "repurchase," not to "effectuate a repurchase." *See, e.g.*, R.39265 (§ 2.03(d)). The latter formulation contemplates efforts to cause a repurchase, including *by another party*—"effectuate" means "to cause or bring about (something); to put (something) into effect or operation." *Effectuate*, Merriam-Webster.com (accessed Mar. 10, 2023).

Plaintiffs also wrongly suggest that the Servicer or Master Servicer is generally required to repurchase loans. For most of the Trusts that Plaintiffs identify (PB 37), the entity responsible for repurchases is distinct from the entity acting as

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[2] Contrary to Plaintiffs' assertion (PB 35), the Trustees have not raised a new question on appeal; Section 3.04 just further reflects how the majority below erred in interpreting Section 2.06. In any event, "a party can make any argument in support of [a properly presented] claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). And "a new argument may be raised for the first time in the Court of Appeals if [as here] it could not have been obviated or cured by factual showings or legal countersteps in the court of first instance." *Rivera v. Smith*, 63 N.Y.2d 501, 516 n.5 (1984); *see also Telaro v. Telaro*, 25 N.Y.2d 433, 439 (1969) ("[I]f a conclusive question is presented on appeal, it does not matter that the question is a new one not previously suggested. No party should prevail on appeal, given an unimpeachable showing that he had no case in the trial court.") (quotation marks omitted).

Servicer or Master Servicer. For example, in CWHL 2006-HYB1, the Seller (obligated to repurchase) was "Countrywide Home Loans, Inc." and the Master Servicer was "Countrywide Home Loans Servicing LP." *See* CWHL 2006-HYB1 PSA § 2.03(c) ("Each *Seller* hereby covenants that … it shall … repurchase ….") (emphasis added). But even when the Servicer has a direct repurchase obligation, as in the outlier example Plaintiffs emphasize, the disavowal of the obligation to "effectuate repurchases" "includ[es] *but* [*is*] *not limited to*" that direct repurchase obligation—and thereby also extends to any other potential obligation to bring about repurchases. *See* PB 36 (quoting SABR 2006-OP1 PSA § 3.24).

Plaintiffs cannot avoid the impact of Section 3.04 by arguing that it "was likely the result of sloppy drafting, not any intent." PB 37. That contention is an implicit concession that Section 3.04 cannot be reconciled with Plaintiffs' proposed interpretation of Section 2.06. And as this Court has repeatedly stated, RMBS agreements "mean[] [what] they say[]." *In re Part 60 Put-Back Litig.*, 36 N.Y.3d 342, 348 (2020).

3. Section 2.06 Confirms That Certificateholders Are The Beneficiaries Of Contractual Rights.

As explained, Section 2.06's actual purpose is to satisfy the basic trust-law requirement that trusts contain an express statement of intent that property is held for the benefit of another. OB 33. Plaintiffs do not even mention that trust-law requirement, much less dispute its existence or that Section 2.06 satisfies it.

That Section 2.06 mentions the Trustees' exercise of rights for the benefit of certificateholders—in addition to their possession of the Trust Fund for certificateholders' benefit—makes sense, given that the PSAs convey to the Trustees "rights" held by the Depositor prior to closing. OB 34. Plaintiffs respond by focusing on our statement that the rights conveyed to the Trustees include "the right to receive certain amounts associated with the mortgage loans that make up the Trust Fund." PB 27. Because the "Trust Fund" already includes "all interest and principal received on or with respect" to the mortgages making up the Trust Fund, Plaintiffs maintain, the phrase "rights referred to above" in Section 2.06 must refer to something other than a "passive right to the principal and interest payments." PB 28.

Plaintiffs misunderstand our argument and how the PSAs operate. We did not say that the right to receive principal and interest is the *only* right conveyed to the Trustees and "referred to above." We explained (OB 38) that the reference to "rights referred to above" was necessary because the term "Trust Fund" does not include rights created in the PSAs themselves—a point Plaintiffs ignore. There is a difference between owning property and having a right to bring a claim that enhances the value of that property. The Trust Fund comprises the actual mortgage loans in the Trust. The PSAs give the Trustees the right—which owning the loans does not—to seek repurchase of some loans for cash. Section 2.06 simply makes clear that

when the Trustees exercise that or any other Trust right, they do so for the benefit of certificateholders, and not for their own benefit or the benefit of another party.

B. The Majority's Contrary Decision Is Erroneous.

1. The Majority Excised "Exercise The Rights Referred To Above" From The Rest Of Section 2.06.

As explained (OB 37-38), the majority erroneously rejected our trust-law argument on the ground that Section 2.06 "already satisfies that criterion by stating that '[t]he Trustee agrees to hold the Trust Fund … for all present and future [certificateholders].'" R.39171 (all but first alteration in original). But the point—obscured by the ellipsis in the majority's quotation of Section 2.06—is that the "for the benefit" language covers both the Trustees' possession of the Trust Fund *and* their exercise of Trust rights. OB 37-38.

Plaintiffs argue that Section 2.06 "does not mean … merely that if the Trustees choose to exercise the rights referred to above, they must do so for the benefit of Certificateholders" because the Trustees' "agreement to exercise those rights was an 'affirmative commitment.'" PB 26-27. But that argument assumes the answer to the dispositive question: whether Section 2.06 encompasses an "affirmative commitment" to exercise Trust rights, or instead a commitment to do so for certificateholders' benefit when such an exercise is otherwise appropriate (for example, following a demand and offer of indemnity by enough certificateholders).

Plaintiffs contend, like the majority below, that if Section 2.06 were not meant to impose an enforcement duty, the drafters "could have, but did not, provide that the trustee 'may' or 'has the discretion to' exercise the right." PB 27 (quoting R.39170). But, again, that overlooks that the relevant agreement in Section 2.06 is to "exercise the rights referred to above *for the benefit of all present and future" certificateholders*. R.39268 (§ 2.06) (emphasis added). If Section 2.06 were read to mean that the Trustees "*have discretion* to exercise the rights referred to above for the benefit of all present and future" certificateholders, it would mean that the Trustees also have discretion to exercise those rights for their own benefit or for the benefit of someone other than certificateholders. That would be nonsensical.

2. The Majority Erred By Imposing An Enforcement Duty To Avoid Nullifying The Repurchase Protocol.

Plaintiffs argue that the majority correctly determined that "it would be absurd, commercially unreasonable or contrary to the reasonable expectations of the parties to hold that the Trustees had no duty to enforce the repurchase protocol … because then no party would have the ability to enforce the Obligors' duty to repurchase." PB 30-31. But the fact that no party was *obligated* to enforce repurchases does not mean that no party had the *ability* to do so. Contracts routinely leave enforcement to the parties' discretion, and here the PSAs give certificateholders, who have the economic interest in the transaction, the ability to dictate whether and when to enforce rights. OB 38-39.

Plaintiffs do not dispute that contracts often do not designate an enforcing party. Nor do Plaintiffs acknowledge the certificateholders' ability to direct the Trustees to address other parties' breaches. Plaintiffs instead focus on our argument that the PSAs' sophisticated drafters easily could have set forth an express pre-EOD duty to enforce repurchase, contending that "this might be a defensible argument if the Governing Agreements included clear language that on its face provided that the Trustee were not responsible for enforcing the Trusts' right to have the Obligors repurchase defective loans." PB 31. But this is a non-sequitur: even if Plaintiffs were right that the parties did not expressly disclaim an enforcement duty, that would not establish that the repurchase protocol is ineffective absent a mandatory enforcement obligation.

The PSAs, in any event, *do* expressly disclaim a pre-EOD duty to enforce repurchases. Rather than attempt to catalog and disavow every duty the Trustees do *not* have (an impossible task), the drafters disavowed *every* duty that is not expressly and "specifically set forth." *See supra* at 1-4. And the PSAs further disclaimed Trustee duties that would be necessary components of fulfilling a duty to enforce repurchases under Section 2.06, like conducting investigations or expending Trustee funds. R.39339-40 (§§ 8.02(iv), (vi)). Plaintiffs' argument is thus wholly inconsistent with the structure of the PSAs.

3. The Majority Erred By Declining To Consider "Shall Enforce" Language In Similar PSAs.

In holding that Section 2.06 imposes an enforcement duty, the majority below refused to consider other, similar PSAs that *do* impose such an express and specific Trustee duty by using "shall enforce" language. Plaintiffs have no response to *Quadrant* and similar cases, under which the omission of a term in similar contracts is considered intentional. OB 40-42. They just matter-of-factly state, like the majority below, that the agreements were "executed by different parties, on different days, and effectuate different purposes." PB 33.

But, as explained, those are the criteria used to determine whether separately executed agreements should be read together as a single contract. OB 41. All that is required for the omission of "shall enforce" language to be considered intentional is that the PSAs containing such language be "similar." And as the dissent below observed, those PSAs indisputably are "similar" contracts, entered into by overlapping parties, that "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).

Plaintiffs also fail to address the fact that the Section 2.06 language at issue also appears in PSAs with "shall enforce" language, demonstrating that Section 2.06's purpose must be distinct from that "shall enforce" language. OB 40-41. Plaintiffs just quote from *Finkelstein v. U.S. Bank*, which concluded that "[t]he fact

that this obligation is articulated differently in the PSAs and that certain of these documents contain 'belt and suspender' language that specifically indicates … that the Trustee must enforce the Seller's obligation to repurchase … is immaterial under the circumstances." 75 Misc. 3d 1202[A], at *2 (Sup. Ct. N.Y. Cnty. May 2, 2022). But, respectfully, that analysis is flawed. As Plaintiffs themselves acknowledge (PB 29-30 n.12), interpretations that render provisions superfluous are "unsupportable under standard principles of contract interpretation." *Lawyers' Fund for Client Prot. v. Bank Leumi Tr. Co.*, 94 N.Y.2d 398, 404 (2000). And if the "shall enforce" language in some PSAs is merely "belt-and-suspender[s]" with no independent effect, by definition it is superfluous.[3]

C. Plaintiffs' Other Arguments Are Without Merit.

1. Plaintiffs' Attempts To Distinguish Cases Holding That Section 2.06 Does Not Impose An Enforcement Duty Fail.

As explained, the great majority of jurists to consider whether Section 2.06 imposes an enforcement duty have concluded that it does not. OB 36. Plaintiffs respond that three Justices of the Commercial Division, in four decisions, reached the opposite conclusion. PB 16-17. One decision, from Justice Friedman—*IKB*

[3] Nor did *Finkelstein* or Plaintiffs here identify any reason why drafters of the "shall enforce" PSAs would have taken a belt-and-suspenders approach. "[T]he inescapable conclusion is that the parties intended the omission" of "terms that are readily found in other, similar contracts." *Quadrant Structured Prods. Co. v. Vertin*, 23 N.Y.3d 549, 560 (2014).

International, S.A. v. Lasalle Bank N.A.—is on appeal here. Two more decisions, from Justice Borrok, relied on the *IKB* decision. *See Zittman v. Bank of N.Y. Mellon*, 2022 WL 1471261, at *5 (Sup. Ct. N.Y. Cnty. May 10, 2022) (Borrok, J.) (citing *IKB*, 2021 WL 358318, at *11 (Sup. Ct. N.Y. Cnty. Jan. 27, 2021)); *Finkelstein*, 75 Misc. 3d 1202(A), at *5 (Borrok, J.) (same). And the fourth decision, *Western & Southern Life Insurance Company v. U.S. Bank, N.A.*, 69 Misc. 3d 1213(A) (Sup. Ct. N.Y. Cnty. Nov. 5, 2020) (Cohen, J.), was reversed by a *unanimous* First Department panel just days before the divided decision below. *See* 209 A.D.3d 6, 13-14 (1st Dep't Aug. 9, 2022). Thus, Plaintiffs' assertion that "[t]he overwhelming majority of New York state court decisions" have held that Section 2.06 imposes an enforcement duty is misleading.

Plaintiffs get no further in seeking to distinguish the many decisions from the Southern District of New York and Ohio courts. Plaintiffs say that "all but one … were made when the case was at a different procedural posture—on a motion for summary judgment or following trial—where the fact finder could rely on the full record to resolve any issues of contractual ambiguity." PB 20. That distinction is immaterial; neither Plaintiffs, nor any litigants in those cases, contended that the contracts are ambiguous. And even if the procedural posture were relevant, Plaintiffs' argument shows only that decisions finding Section 2.06 not to impose an

enforcement duty were based on a more complete record and should therefore be given *more* weight, not less.

2. The Court's Decision In *DLJ* Does Not Support Plaintiffs' Position.

Plaintiffs spend an entire section of their brief arguing that this Court's decision in *DLJ* supports the decision below. *See* PB 22-25. Of course, *DLJ* did not address whether Section 2.06 imposes a Trustee enforcement duty. But to the extent *DLJ* informs the Court's interpretation of Section 2.06 here, it supports the Trustees' arguments.

In *DLJ*, the Court held "that loan-specific notice is [] required" under the PSAs, rejecting the plaintiffs' contrary contention as "inconsistent with the … language of the repurchase protocol" and explaining that "[t]he framework for repurchase is consistently phrased in a singular and individualized manner." 38 N.Y.3d at 179. The Court thus construed the repurchase provisions strictly, rejecting an interpretation that would be inconsistent with the express language and overall structure of those agreements. The majority and Plaintiffs do the opposite, creating a repurchase enforcement duty that is not set forth in the relevant provisions governing such repurchases and that is inconsistent with Sections 8.01 and 8.02 of the PSAs. *See supra* at 1-8.

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

The no-action clauses say that certificateholders may not "institute any suit, action or proceeding … under or with respect to" the PSAs, unless they satisfy two conditions (among others): the Trustee-demand condition and the certificateholder-approval condition. OB 43-44. As this Court has repeatedly concluded, RMBS contracts "mean[] what [they] say[]." *DLJ*, 38 N.Y.3d at 182. Here, the contracts say that Plaintiffs had to satisfy both the Trustee-demand condition and the certificateholder-approval condition before suing. They satisfied neither. That failure requires dismissal.

The First Department nonetheless declined to enforce the no-action clauses because, in its view, enforcement of the Trustee-demand condition would be absurd. We explained why that is wrong as a matter of contract interpretation principles. OB 45-47. Plaintiffs respond that "excus[ing]" the Trustee-demand condition would be no different than excusing a statutory "demand requirement" in "a shareholder derivative suit." PB 44-45. But in the derivative-suit context, there is no contract, and the statute imposing the demand requirement contemplates the possibility of excusing the requirement on futility grounds. *See* N.Y. Bus. Corp. Law § 626(c); *Marx v. Akers*, 88 N.Y.2d 189, 193 (1996). And although shareholders may not direct corporate action or sue absent futility, Plaintiffs and other certificateholders can do both—they just need sufficient certificateholder support.

But even if the Trustee-demand condition were unenforceable as absurd, that cannot justify the First Department's decision to disregard the no-action clauses in their entirety—Plaintiffs still had to satisfy the certificateholder-approval condition. And neither the First Department's decision nor Plaintiffs' response justifies eliminating that additional condition.

A. The Certificateholder-Approval Condition Is Enforceable.

Plaintiffs do not dispute that their claims are barred under the plain text of the no-action clauses, because they did not satisfy the certificateholder-approval condition. The only question, then, is whether this Court may set aside that condition. It may not, for at least two reasons.

First, the condition is not absurd. As explained, "where some absurdity has been identified," "courts may as a matter of interpretation" alter the parties' agreement—but only to avoid that absurdity. *Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 547-48 (1995). And no absurdity results from requiring "Holders of Certificates evidencing not less than 25% of the Voting Rights" to support the lawsuit. Indeed, that condition is essential to the purpose of no-action clauses: preventing "individual bondholders [from] bring[ing] suits that are unpopular with their fellow bondholders." *Quadrant*, 23 N.Y.3d at 566. The First Department therefore lacked authority to reject the certificateholder-approval condition.

Second, finding the Trustee-demand condition unenforceable would not make the rest of the no-action clause unenforceable, because the Trustee-demand condition is severable. Severability is a "question of intention, to be determined from the language employed by the parties." *Christian v. Christian*, 42 N.Y.2d 63, 73 (1977); OB 51-52. Here, the parties' language reflects their intention to sever, if necessary, the Trustee-demand condition and enforce the certificateholder-approval condition. OB 51-54. For one thing, the parties provided in the severability clause that "[i]f any one or more of the … provisions or terms" is "held invalid," they "shall be deemed severable from the remaining … provisions or terms" and "shall in no way affect the validity or enforceability of the other[s]." R.39358 (§ 10.06); *see also Karpinski v. Ingrasci*, 28 N.Y.2d 45, 48, 53 (1971) (severing one prohibition while enforcing the rest of a provision). For another, the no-action clauses themselves state that the parties "intended … that no one or more Holders of Certificates shall have any right" to "enforce any right under this Agreement, except … for the common benefit of all Certificateholders." R.39359 (§ 10.08). Failing to sever here would nullify the severability clause and disregard the no-action clauses' express intent.

B. Plaintiffs' Contrary Arguments Are Unconvincing.

Plaintiffs do not argue that the certificateholder-approval condition itself is absurd. OB 48-50. And they do not seriously dispute either the limits on courts'

authority to void contract terms on absurdity grounds (OB 47), or that the parties intended to sever the Trustee-demand condition to the extent unenforceable (OB 51-54). The scattershot arguments that Plaintiffs do offer against nevertheless enforcing the no-action clauses are unconvincing and largely irrelevant, as a matter of both fact and law.

1. Plaintiffs' Arguments Regarding Severability Fail.

Late in their briefing Plaintiffs assert that the "real" issue here is whether "the Court should sever the '25% of Certificateholders' requirement from the 'Trustee Demand' requirement and enforce the former even if compliance with the latter is excused." PB 45-46. Plaintiffs do not dispute that severability is a "question of intention." Yet they also do not rebut the proposition that the contracts here reflect the parties' intent that the certificateholder-approval condition be enforced even if the Trustee-demand condition is invalid. That should end the severability analysis.

Plaintiffs contend that severing the Trustee-demand condition is inappropriate because the Trustee-demand condition is "incorporated into the '25% of Certificateholders' requirement." PB 47. But "incorporation" is not the standard for severability. To the contrary, this Court has expressly rejected the sort of standard Plaintiffs propose—it has held that whether "the invalid portion [of a contract is] so divisible that it could be mechanically severed" from the otherwise-

valid portion is irrelevant to the severability analysis. *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 395 (1999).

Plaintiffs are also wrong in asserting that, if the Trustee-demand condition is unenforceable, it would be "absurd and illogical" to "hold that Plaintiffs were required to join with other Certificateholders representing 25% of the Trust to make the very same demand the Court just excused." PB 47. Rather than arguing that Plaintiffs need certificateholder approval "to make the very same demand," we argued that, even if demand is excused, Plaintiffs cannot sue unless they have the support of "Holders of Certificates evidencing not less than 25% of the Voting Rights." R.39359 (§ 10.08). Contrary to Plaintiffs' accusation that doing so would amount to "rewrit[ing]" the contracts (PB 47-49), the argument is just about how to interpret and enforce the certificateholder-approval requirement in the absence of the Trustee-demand requirement—the roles Plaintiffs acknowledge the Court should play: If the Court sets aside the Trustee-demand condition as absurd, it should *interpret* the plain language of the severability and no-action clauses to *enforce* the certificateholder-approval condition. It should not "rewrite" the contracts by throwing out the no-action clauses in their entirety like Plaintiffs request.

2. Plaintiffs' Remaining Arguments Are Inconsequential.

Plaintiffs' three remaining arguments are likewise unconvincing.

Precedent. Plaintiffs' lead argument is that Defendants' position "has been repeatedly rejected by the First Department and New York state courts," and that this Court should not "overturn this substantial precedent." PB 40-42, 46. There are at least three problems with that argument.

First, none of these decisions is precedent; this Court has never decided the question here. Plaintiffs' contention that *Quadrant* decided that no-action clauses do not apply to "claims against the trustee" (PB 40) takes this Court's statements out of context. *Quadrant*'s actual holding was that a no-action clause covering claims "upon or under or with respect to this Indenture," but omitting reference to claims under the "Securities," did not bar common-law and statutory claims. *Quadrant*, 23 N.Y.3d at 552, 557, 567. Any suggestion in the decision that "claims against the trustee" "cannot be prohibited by a no-action clause" because "it would be absurd to require the debenture holders to ask the Trustee to sue itself" is therefore dicta. *Id.* at 566 (quotation marks omitted); *see* OB 46. That dicta also does not answer the question here—whether, if the Trustee-demand condition is unenforceable, the certificateholder-approval requirement must be disregarded too.

Second, only one of Plaintiffs' decisions—from a federal district court—actually analyzed whether to enforce "the non-demand provisions of no-action clauses." *Blackrock Core Bond Portfolio v. U.S. Bank Nat'l Ass'n*, 165 F. Supp. 3d 80, 96 (S.D.N.Y. 2016). The rest simply followed that decision (or others that

themselves followed *Blackrock*), with little or no analysis. Rather than creating a chorus of authority, Plaintiffs' cases "demonstrate the powerful effect of an echo chamber." *Id.* Plaintiffs' arguments do the same, asking the Court to adopt *Blackrock*'s conclusion but offering no defense of its reasoning (PB 46)—reasoning that we showed in detail to be unpersuasive (OB 51-52).

Third, the decisions are not as one-sided as Plaintiffs claim. At least one case rejected their argument. *Waxman v. Cliffs Nat. Res. Inc.*, 222 F. Supp. 3d 281, 293 (S.D.N.Y. 2016) ("[E]ven if Plaintiffs had plausibly alleged an excuse for ignoring the no-action clause's demand requirement, that would not justify their failure to comply with the 25% requirement."). And more generally, many decisions have dismissed claims for failure to satisfy a no-action clause. *E.g.*, *Commerzbank AG v. U.S. Bank Nat'l Ass'n*, 277 F. Supp. 3d 483, 495-96 (S.D.N.Y. 2017) (dismissing claims against RMBS Trustee for failure to make demand on party other than Trustee), *appeal docketed*, No. 22-854 (2d Cir. Apr. 19, 2022); *Freedom Tr. 2011-2, ex rel. Ace Sec. Corp. Home Equity Loan Tr. Series 2006-FM1 v. DB Structured Prods., Inc.*, 2023 WL 2316139, at *1 (1st Dep't Mar. 2, 2023) ("the no-action clause does not include any exception"); *Walnut Place LLC v. Countrywide Home Loans, Inc.*, 96 A.D.3d 684, 685 (1st Dep't 2012) (refusing to excuse compliance with "'Event of Default' provision" in no-action clause).

For similar reasons, there is nothing to Plaintiffs' complaint that enforcing the no-action clauses would undermine "reliance on judicial decisions." PB 42. Unlike Plaintiffs' cases, this case does not ask whether "the doctrine of stare decisis warrants retention of [a] rule" from this Court. *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1, 23 (2016) (cited at PB 42). It instead presents an issue of first impression for this Court. And that a decision requiring compliance with the no-action clauses may "have far-reaching effects" on RMBS trustee litigation (PB 42) is hardly a reason to depart from the contracts' plain language—which this Court has consistently applied whatever the impact. *E.g.*, *In re Part 60 Put-Back Litig.*, 36 N.Y.3d at 348.

"Straw Man." Plaintiffs next attack what they call a "straw man"—our supposed position that "Plaintiffs never could have sued the Trustees at all," and that "the only option Plaintiffs had was to demand that the Trustees sue other obligated parties." PB 43- 44 (emphasis in original). But it is Plaintiffs that create the straw man. Our argument is that Plaintiffs may sue the Trustees so long as they satisfy the contracts' conditions. That Plaintiffs earlier failed to demand that the Trustees take action against obligated parties does not itself bar Plaintiffs' suits, but instead illustrates the importance of the certificateholder-approval condition in cases against Trustees—absent enforcement, a lone certificateholder without the support needed to *direct* a Trustee to take a particular action could achieve the same result by *suing*

that Trustee for failing to take that action, as these lawsuits themselves illustrate. OB 54. Plaintiffs ignore that issue.

Policy. Plaintiffs' final argument is that the "'policy' purposes underlying the 25% requirement do not apply when the action is one against the Trustee." PB 48. According to Plaintiffs, this suit "has no impact on the performance of the Trust," because Trustees are not entitled to indemnification from the Trust Fund. *Id.*

That is wrong. The PSAs say that Trustees "shall be indemnified by the Trust Fund and held harmless against any loss, liability or expense … incurred by the Trustee [] in connection with any claim or legal action … arising out of or in connection with … its obligations and duties under this Agreement." *E.g.*, ABSHE 2005-HE6 PSA § 8.05(a). As Plaintiffs recognize (PB 50), the Trustees lose that right only if there is a finding of, for example, "willful misfeasance, bad faith or negligence." Absent such a showing at trial, then, the Trustees may be entitled to indemnification from the Trusts and Plaintiffs' suit could affect other certificateholders.

Plaintiffs' other policy arguments likewise reinforce the importance of the no-action clause in actions against Trustees. Unlike in suits against other parties, Plaintiffs assert, any recovery in actions against Trustees goes solely to the suing certificateholders. PB 48-49. But that is the problem with actions like this one: non-suing certificateholders stand only to be harmed by suits against Trustees because

they bear the downside risk of indemnification without the potential upside of any recovery. That would be contrary to holders' "express[] covenant[]" not to "affect, disturb or prejudice the rights" of other certificateholders (R.39359 (§ 10.08)), which the no-action clause reinforces.

Plaintiffs fare no better listing the many suits against Trustees, including, as Plaintiffs observe, suits involving overlapping trusts. PB 49. If anything, their list proves our point that failing to enforce the certificateholder-approval condition has undermined the no-action clause's purpose of preventing "a multiplicity of lawsuits." OB 50 n.8.

Plaintiffs, moreover, nowhere address the other problems that would result from failing to enforce the certificateholder-approval condition. As explained, absent enforcement, an individual certificateholder could bring the "unpopular" lawsuits the no-action clause seeks to prevent. Certificateholders could also use suits to circumvent the contracts' other protections against individual-certificateholder action, as illustrated by Plaintiffs' action here. As we explained, if Plaintiffs (or other certificateholders) thought that a Trustee needed to investigate R&W breaches or take other actions, they could have gathered 25% of certificateholders and directed the Trustee to take those actions. *See* R.39339 (§ 8.02(iv)). But they did not; presumably because there were not 25% of certificateholders who thought those actions worthwhile. Yet Plaintiffs now sue the Trustees for failing to take those

same actions. *See, e.g.*, R.1182-83. Permitting this end-run would ultimately undermine the no-action clause's purpose—preventing "individuals asserting claims that foster the interests of minority securityholders at the potential expense of the majority's interest." *Quadrant*, 23 N.Y.3d at 565.

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

Plaintiffs' tort claims fail because they "essentially seek[] enforcement of [a contractual] bargain." *Dormitory Auth. v. Samson Constr. Co.*, 30 N.Y.3d 704, 711 (2018) ("*Dormitory*"); *see* OB 56-59. Plaintiffs' contrary arguments are wrong.

First, we did not argue that the tort claims fail "merely because they have the same type of damages as contract claims." PB 53-54. Instead, we showed that "the nature of the injury, how the injury occurred and the harm it caused" is the same for Plaintiffs' tort and contract claims. OB 56 (quoting *Dormitory*, 30 N.Y.3d at 711). Plaintiffs allegedly were injured because the Trustees failed to enforce repurchase of breaching loans and failed to act prudently post-EOD, and those failures allegedly "diminished the value of the assets owned by the Trusts and … the principal and interest payments generated by those assets." OB 56-59. The same asserted failures underlie both the tort and contract claims.

Second, Plaintiffs' assertion (PB 52-54) that they alleged damages "above and beyond" contract damages is false. Plaintiffs baldly alleged that they were damaged

by breaches of "extracontractual" duties (*see* R.579-581 (¶¶445, 448, 450, 454)), and they specifically alleged that the Trustees breached those extracontractual duties by not performing their contractual obligations. OB 57-58 (quoting Complaint). Regardless, seeking "additional unspecified … damages" for a tort is insufficient to save claims where, like here, the Complaint "fails to include a single allegation that contains any distinction between the damages applicable" to the tort and contract claims. *Dormitory*, 30 N.Y.3d at 712.

Third, Plaintiffs proffer two hypothetical breaches (untethered to allegations in the Complaints) of extracontractual duties they argue would not be duplicative of their contract claims. PB 54-56. But both reflect duties "the parties contemplated … and addressed" in the PSAs. *Dormitory*, 30 N.Y.3d at 712.

Plaintiffs initially posit that a Trustee's discretionary decision not to terminate a servicer *post*-EOD could breach the Trustee's extracontractual post-EOD duty to act as a prudent person. But Plaintiffs allege that the Trustees breached their *contractual* post-EOD duty to "exercise [their] rights and power … *as a prudent person* would." *E.g.*, R.19455 (¶540) (emphasis added). Thus, any claim for breach of a post-EOD prudent-person duty "should proceed under a contract theory," *Dormitory*, 30 N.Y.3d at 711, because it seeks enforcement of the Trustees' post-EOD duties under Section 8.01 of the PSAs.

Plaintiffs also posit that, although the Trustees have no contractual duty to send written notices about *pre*-EOD servicer breaches, they might still breach an extracontractual duty to avoid conflicts of interest by failing to send such notices. But whether and when a Trustee must send pre-EOD notices is a topic "the parties contemplated … and addressed … in the contract terms" (*id.* at 712), as evidenced by the fact that, under certain circumstances, some PSA provisions do require a Trustee to send a pre-EOD notice. Moreover, as demonstrated above, Plaintiffs do not allege that the nature of any injury from breach of the duty to avoid conflicts of interest was different from that underlying their contract claims; they alleged the opposite. So, again, "any action should proceed under a contract theory." *Id.* at 711.

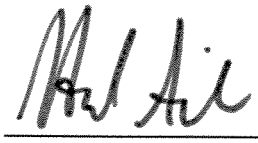
Fourth, Plaintiffs maintain that their tort claims are based on duties that arise independently of the PSAs. PB 53. But this Court has rejected the view that merely identifying a noncontractual duty suffices to support a tort claim. *Dormitory*, 30 N.Y.3d at 712-13. That, as Plaintiffs note (PB 53), *Dormitory* recognized circumstances when tort and contract claims may both proceed does not help them because the Court made clear that those circumstances do not include tort claims like Plaintiffs' that are "merely a restatement, albeit in slightly different language, of the … contractual obligations asserted in the cause of action for breach of contract." *Id.* at 711.

Fifth, and finally, Plaintiffs invoke federal decisions sustaining tort claims. PB 51-52. But *Dormitory*, not those decisions, controls. Regardless, these decisions are unpersuasive. Most preceded *Dormitory* and make the same mistake as the First Department below. Other federal decisions have correctly dismissed analogous tort claims. *E.g.*, *Nat'l Credit Union Admin. Bd. v. Deutsche Bank Nat'l Tr. Co.*, 410 F. Supp. 3d 662, 688 (S.D.N.Y. 2019) (economic loss doctrine barred tort claims because "the basis for plaintiff's damages sound in [the trustee]'s failures to take actions under the PSAs, for which the asserted contractual remedies would be appropriate") (collecting cases).

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 certain of Plaintiffs' tort claims are independent of their contract claims.

Date: March 20, 2023 Respectfully submitted,



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)

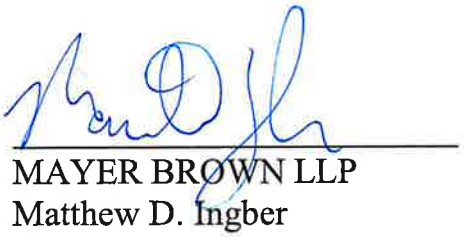
JONES DAY
David F. Adler
Michael T. Marcucci
250 Vesey Street
New York, New York 10281
Telephone: (212) 326-3939
Facsimile: (212) 755-7306
dfadler@jonesday.com
mmarcucci@jonesday.com

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.
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Christopher J. Mikesh

Attorney 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)