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May 7, 2021

VIA FEDEX & DIGITAL PORTAL
Clerk of the Court
New York Court of Appeals
20 Eagle Street
Albany, New York 12207

RE: *U.S. Bank National Association v. Robert L. Gordons LLC, et al.*
APL-2021-00064
New York County Index No.: 850238/2018
Appellate Division, First Department Docket No.: 2020-00091

Clerk of the Court:

We are in receipt of your letter, dated April 23, 2021 (attached hereto as **Exhibit A**), within which the Court has directed that Defendant-Appellant Robert L. Gordons LLC ("Appellant" or "Defendant") comment on the Court of Appeal's subject matter jurisdiction to hear the requested appeal. Specifically, the Court has requested comment as to whether the order appealed from (attached hereto as **Exhibit B**) "grants a new trial or hearing within the meaning of CPLR 5601(c)" and "whether the stipulation for judgment absolute is illusory."

As the Court is aware, Appellant has taken this appeal, as of right, pursuant to CPLR §5601(c). Under the aforementioned section, "An appeal may be taken to the court of appeals as of right in an action originating in the supreme court . . . an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him." *See* CPLR §5601(c). The New York Constitution similarly provides that "Appeals to the court of appeals may be taken…[a]s of right, from an order of the appellate division granting a new trial in an action or a new hearing in a special proceeding where the appellant stipulates that, upon affirmance, judgment absolute or final order shall be rendered against him or her." *See* N.Y. Cons., Art. VI, Sec. 3(b)(3).

I. RELEVANT FACTS

At *nisi prius,* Plaintiff-Respondent U.S. Bank National Association, Successor Trustee to Bank of America, National Association as Successor by Merger to LaSalle Bank NA as Trustee for Washington Mutual Mortgage Pass-Through Certificates WaMu Series 2007-OA4 Trust ("Respondent" or "Plaintiff") and Defendant each made separate motions for summary judgment. Supreme Court disposed of both motions in a single order, dated November 15, 2019, wherein Defendant's motion for summary judgment was granted, and Plaintiff's motion for summary judgment was denied (the "Dismissal Order"). Attached as **Exhibit C** is a true and correct copy of the Supreme Court's November 15, 2019 Order. The action was, thereupon, dismissed.

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Plaintiff appealed the Dismissal Order to the Appellate Division, First Department. In its March 25, 2021, decision and order (the "Order Appealed" or the "First Department Order"), the First Department reversed so much of the Dismissal Order as had granted Defendant's motion for summary judgment and, additionally, directed that the matter be remanded back to the Supreme Court for reconsideration of Plaintiff's previously denied motion for summary judgment. *See* **Ex. B**.

II. SUMMARY JUDGMENT IS EQUIVALENT TO A TRIAL; THUS, THE APPELLANT'S DIRECTIVE TO REMAND A PREVIOUSLY DECIDED SUMMARY JUDGMENT MOTION FOR RECONSIDERATION CONSTITUTES A 'NEW TRIAL'

As it relates to the question now posed by the Court of Appeals — *i.e.*, whether the First Department Order "grants a new trial or hearing within the meaning of CPLR 5601(c)" — it is likely that Respondent will argue that no appeal (as of right) lies in the case at bar because: (i) the relevant Order Appealed, on its face, does not direct that a trial and/or hearing be held; and/or (ii) no literal trial was held in Supreme Court, where the case was disposed purely on the basis of the parties' competing motions for summary judgment. *See* **Ex. B**. Established law of the Court of Appeals and the various Appellate Departments, however, make clear that the First Department Order herein meets the criteria mandated by CPLR §5601(c).

First, this Court has repeatedly recognized that the grant of summary judgment is the equivalent of a trial.[1] Accordingly, the Supreme Court's original grant of summary judgment to Defendant satisfies the first predicate to CPLR §5601(c) — *i.e.*, that there must have been an initial trial at *nisi prius.*

Second, Appellate Courts have long recognized that a <u>motion</u> for summary judgment — wherein the movant submits his or her evidence in an attempt to obtain judgment and dispose of the factual issues of a case — is the equivalent of a trial,[2] both "functional[ly]"[3] and

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[1] *See Collins v. Bertram Yacht Corp.,* 42 N.Y.2d 1033, 1034 (1977) ("The grant of summary judgment, the procedural equivalent of a trial, results in a final judgment on the merits") (citations omitted); *Nesbit v. Nimmich,* 34 A.D.2d 958, 959 (2d Dept 1970) *aff'd on opinion of A.D.,* 30 N.Y.2d 622 (1972) ("Summary judgment is a drastic remedy, the procedural equivalent of a trial.").

[2] *Maas v. Cornell Univ.*, 253 A.D.2d 1, 5 (3d Dep't 1999), *aff'd* 94 N.Y.2d 87 (1999) ("[D]efendant having moved for summary judgment…plaintiff has now elected to assert…a theory of recovery…While such election was permissible at this juncture — summary judgment being the equivalent of a trial.") (citations omitted); *Ostrov v. Rozbruch,* 91 A.D.3d 147, 152 (1st Dept 2012) ("Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.").

[3] *City of New York v. Schmitt,* 11 Misc.3d 145(A), at *9 (App. Term 2d Dep't 2006) ("<u>A motion</u> for summary judgment lays bare the parties' proof and is the <u>functional equivalent</u> of a trial.") (emphasis supplied); *Hendrickson v. Philbor Motors, Inc.*, 102 A.D.3d 251, 256 (2d Dep't 2012) ("[W]e agree with the Hendricksons that if Ford's cross motion were treated by the parties and the Supreme Court as one for summary judgment, then the functional equivalent of a trial has been held.").

"procedural[ly.]"[4] Indeed, the same rules that govern the burdens a litigant must meet at trial also govern the burdens a movant, or opponent, must meet in seeking or opposing summary judgment.[5]

In light of this established principle, it is submitted that in the case at bar, the First Department Order (*see* **Ex. B**) — reversing the Supreme Court's grant of summary judgment to Defendant, and ordering that the Supreme Court reconsider the previously denied summary judgment motion of Plaintiff — is the equivalent of granting a "new trial" sufficient to satisfy the requirements of CPLR §5601(c).

Specifically, as alluded to above, on or about June 3, 2019, Plaintiff moved for summary judgment in the trial court. In response, on or about August 5, 2019, Defendant filed its own motion for summary judgment, seeking dismissal on statute of limitations grounds. Ultimately, after the parties proffered all of their evidence (in a manner equivalent to trial), the Supreme Court, by the November 15, 2019 Order, denied Plaintiff's motion for summary judgment and, instead, granted Defendant's summary judgment motion. *See* **Ex. C**. As detailed above, in the Order Appealed, the First Department reversed the determinations of the Supreme Court regarding the respective motions for summary judgment, and directed reconsideration of Plaintiff's previously denied motion for summary judgment. *Se* **Ex. B**. This holding revived Plaintiff's motion anew, and ordered the Supreme Court to, once again, consider the arguments and evidence submitted in connection therewith. In other words, the First Department granted a "new trial." This is plainly sufficient to comply with the "new trial" requirement of CPLR §5601(c) and, thereby, imbue the Court of Appeals with subject matter jurisdiction to hear the instant appeal.

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[4] *See, e.g.*, *Mendoza v. Highpoint Assoc., IX, LLC,* 83 A.D.3d 1, 8 (1st Dep't 2011) ("It is also beyond cavil that a motion for summary judgment is the procedural equivalent of a trial. In fact, CPLR 3212(b) implicitly draws an analogy between a motion for summary judgment and the motion for a directed verdict made at trial.") (citations omitted) (emphasis supplied); *Werner v. Katal Country Club*, 234 A.D.2d 659, 661 (3d Dep't 1996) ("[S]ince a summary judgment motion is the procedural equivalent of a trial, Supreme Court was free to invoke the provisions of CPLR 3025(c).") (emphasis supplied); *Vine v. John Manville Sales Corp.*, 175 A.D.2d 380, 381 (3d Dep't 1991) ("Among the purposes of a bill of particulars is to limit the proof and prevent surprise at trial . . . and a party may not rely upon evidence which conflicts with its allegations . . . . We perceive no reason why the rule should be any different in connection with evidence submitted on a motion for summary judgment, the procedural equivalent of a trial.").

[5] *See Lo Breglio v. Marks*, 105 A.D.2d 621, 622 (1st Dep't 1984), *aff'd for reasons stated by A.D.*, 65 N.Y.2d 620 (1985) ("It has been said that summary judgment is the procedural equivalent of trial, with both parties required to lay bare their proof .") (citations omitted); *Raineri v. Lalani*, 191 A.D.3d 814, 816 (2d Dep't 2021) ("As summary judgment is the 'functional equivalent' of a trial, the court should have precluded Huppert and Manvar from presenting [certain] evidence at trial . . . ."); *Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & MacRae*, 243 A.D.2d 168, 177 (1st Dep't 1998) ("[S]ummary judgment being the procedural equivalent of a trial, a litigant must elect among inconsistent positions upon seeking expedited disposition.") (citations omitted); *Marano v. Mercy Hosp.*, 241 A.D.2d 48, 51 (2d Dep't 1998) ("[T]he moving party is seeking summary judgment by ruling out any questions of fact…inasmuch as summary judgment is the procedural equivalent of trial, and the credibility of expert witnesses often presents a significant issue for the trier of fact, it would be inappropriate to permit a moving party to obtain summary judgment without requiring that party to submit his or her witnesses' credibility to scrutiny.") (citations omitted); *Christopher P. v. Kathleen M.B.,* 174 A.D.3d 1460, 1461 (4th Dep't 2019) ("Inasmuch as summary judgment is the procedural equivalent of a trial, the moving party must sufficiently demonstrate entitlement to judgment, as a matter of law, by tender of evidentiary proof in admissible form."); *Access Capital v. DeCicco*, 302 A.D.2d 48, 54 (1st Dep't 2002) ("It is well settled that summary judgment is the procedural equivalent of a trial requiring the parties to submit in opposition 'evidentiary facts or materials, by affidavit or otherwise . . . demonstrating the existence of a triable issue of ultimate fact.") (emphasis supplied.).

III. APPELLANT'S STIPULATION FOR JUDGMENT ABSOLUTE MIRRORS THE STIPULATION UTILIZED IN THE MOST RECENT APPEAL PRESENTED TO THIS COURT UNDER CPLR §5601(c)

As it relates to the Court of Appeals' second inquiry regarding the propriety of the stipulation for judgment absolute (the "Stipulation"), a copy of which is attached hereto as **Exhibit D**, Appellant respectfully submits that the same is in no way illusory. The form of the submitted Stipulation was modeled on the stipulation for judgment absolute submitted to the Court in *Hackshaw v. ABB, Inc. (In re New York City Asbestos Litig.)*, 29 N.Y.3d 1068 (2017), the most recent appeal adjudicated by this Court under CPLR §5601(c). A true and correct copy of the stipulation for judgment absolute submitted in *Matter of New York City Asbestos Litig.* is attached hereto as **Exhibit E**. The language of the proffered Stipulation submitted herein is identical to the language of the stipulation for judgment absolute that appears to have been deemed acceptable in *Hackshaw*. However, to the extent that Appellant's proffered "Stipulation for Judgment Absolute" is in an improper form and/or is, in some other way, deemed deficient, Appellant is more than willing to submit an Amended version of its "Stipulation for Judgment Absolute" that complies with the wishes and/or directives of the Court.

IV. APPLICABILITY OF CPLR §1018 TO THIS APPEAL

It is worth noting that in its own "Jurisdictional Response," Respondent will likely assert that Appellant no longer enjoys standing to take the instant appeal because it transferred ownership of the subject parcel of real property (at issued in the underlying action) to a non-party. Such an assertion by Respondent herein, however, would be thoroughly misguided.

As a threshold issue, the conveyance of the realty is not part of the record on appeal. It would be inappropriate for Respondent to rely on evidence not in the record as a basis for defeating Appellant's right to appeal.

Moreover, CPLR §1018, and the well-established jurisprudence from this Court (and the Departments of the Appellate Division) which interpret said provision, clearly protect this appeal from dismissal on the grounds of transfer of an interest. CPLR §1018 states, in relevant part, that "[u]pon any transfer of interest, <u>the action may be continued by or against the original parties</u> unless the court directs the person to whom the interest is transferred to be substituted or joined in the action." *See* CPLR §1018 (emphasis added). In this vein, it has long been recognized that where, <u>as here</u>, the court has not ordered substitution by, or joinder of, the transferee, the original litigant — *i.e.*, the transferor — may continue to either prosecute or defend the relevant action, notwithstanding the transfer of his or her interest. The statute has explicitly been applied to protect the right of an original party to appeal an adverse determination — even after the litigant has conveyed the real property that is the subject of the adverse determination — when such a conveyance occurs after the action was commenced.[6]

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[6] *See, e.g.*, *Udell v. Haas*, 20 N.Y.2d 862, 863 (1967) (denying, pursuant to CPLR §1018, a motion to dismiss an appeal, where appellant sold his property to a third-party during the pendency of the appeal); *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 136 (1981), *rev'd on other grounds*, 458 U.S. 419 (1982) (*citing Udell*, 20 N.Y.2d at 863) (holding that pursuant to CPLR §1018, appellant's transfer of the subject premises subsequent to the commencement of the action did not require abatement of the action or preclude appellant from litigating the appeal); *Prand Corp. v. Gardiner*, 176 A.D.3d 1127, 1129 (2d Dep't 2019) (holding that plaintiff could maintain its action to discharge a mortgage under RPAPL §1501(4), despite selling the property during the pendency of the action, because

Accordingly, it is exceedingly clear that Appellant's transfer of the subject property presents no barrier, whatsoever, to its continued prosecution of this appeal.

V. <u>THIS COURT SHOULD DETERMINE WHETHER THE FIRST DEPARTMENT WAS CORRECT IN DETERMINING THAT PRIOR DECISIONS OF THIS COURT ARE OBSOLETE</u>

It is also respectfully submitted that this appeal will have broad impact on a huge array of civil litigation in New York State, rendering it particularly appropriate for the Court to consider and resolve it. This appeal provides this Court with an opportunity to provide guidance as to the appropriate construction and application of a 2008 amendment to CPLR §205(a) and its impact on orders/judgments dismissing actions for "neglect to prosecute" — an issue that has been (and continues to be) the subject of innumerable decisions by the lower courts, but which, thus far, have escaped this Court's direct consideration. An ever-increasing anthology of decisions handed down by the various Departments of the Appellate Division have interpreted and applied the 2008 amendment in a manner that renders prior precedent from this Court superseded, obsolete, and void. It is submitted that it is essential that this Court weigh in before many of its seminal decisions continue to be relegated (by the lower courts) to the dustbin of "bad law."

(a) *The First Department Order Interprets the 2008 Amendment to CPLR §205 in a Manner that Overrides this Court's Directive that the Record of a Plaintiff's Conduct is Dispositive in Determining whether the Action was Dismissed for Failure to Prosecute*

It should be noted, at the outset, that there is no dispute that the instant action would be time-barred unless the same is saved by the tolling provision of CPLR §205(a). In that vein, CPLR §205(a) provides that where a case is dismissed for non-merits based reasons, the plaintiff is afforded a six-month extension of time to recommence, even if the statute of limitations has expired. *See* CPLR 205(a). An exception to the rule arises if, *inter alia,* the initial case was dismissed for "neglect to prosecute."

In several pre-2008 decisions analyzing this rule, this Court has held that it is the <u>record</u> of a plaintiff's conduct, rather than the verbiage used in the court's order of dismissal, that determines

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CPLR §1018 "expressly allows the action to be continued by the original party even after a transfer of interest . . . [when] it [was] otherwise undisputed that the plaintiff owned the subject property at the time the action was commenced"); *Red House Farm, Inc. v. LAD Enterprises, LLC*, 122 A.D.3d 972, 973 n.1 (3d Dep't 2014) ("Although defendant claims that the appeal should be dismissed because plaintiff sold its property during the pendency of the appeal, we cannot agree…plaintiff may continue the action," pursuant to CPLR 1018); *Matter of Nelson v. City of New York,* 117 A.D.3d 1221, 1223 n.3 (3d Dept 2014) ("Although petitioner sold the subject farm while this appeal was pending, such action does not necessarily render moot her [appeal]"); *Equicredit Corp. of Am. v. Campbell*, 73 A.D.3d 1119, 1120 (2d Dep't 2010) (holding that defendants, who held title to the subject property at the time a foreclosure action was commenced, but who had conveyed that title during the pendency of the action, were "properly permitted to defend the action" even after the conveyance, pursuant to CPLR 1018); *see also J.C. Tarr, Q.P.R.T. v. Delsener,* 70 A.D.3d 774, 779 (2d Dep't 2010) ("[I]t was improper for the Supreme Court, sua sponte, to direct the dismissal, as academic, of the complaint insofar as against Bowen based solely upon the fact that he sold his property…Bowen remains a proper party" *citing* CPLR 1018).

whether a plaintiff has neglected to prosecute its action — and thus, whether the plaintiff would be precluded from availing itself of CPLR §205(a)'s savings provision.[7]

However, in a number of post-2008 decisions — including the case at bar — the lower courts have held, in a manner explicitly contrary to this Court's holding in *Andrea*, that the record of a plaintiff's conduct in a prior dismissed action should not be analyzed in determining whether the plaintiff neglected to prosecute said action. Instead, it is the extent of factual recitation memorialized in a dismissal order that determines whether a case has been dismissed for 'neglect to prosecute.' In other words, even where a case has been dismissed *precisely because* the plaintiff has neglected to prosecute its action, if the dismissing court fails to recite the neglectful conduct in its order, the case will not be deemed to have been dismissed for neglect to prosecute (for CPLR §205(a) purposes).

The basis for these lower court decisions is the 2008 amendment to CPLR §205(a). The amendment imposed — on courts dismissing an action for neglect to prosecute — a duty to "set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation." *See* CPLR §205(a). According to the lower courts that have analyzed this language, an error in <u>form</u> (*i.e.*, the dismissing court's omission of the factual recitation requirement), modifies the <u>substance</u> of the dismissal, in essence, changing it from a 'neglect to prosecute' dismissal to a *non*-'neglect to prosecute' dismissal. This, in turn, gives those fortune plaintiffs (whose neglect was egregious enough to result in dismissal) license to avail themselves of the six-month extension anyway — and due, solely, to the fortuitous circumstance that their neglectful conduct was not recited by the dismissing judge. In the view of the lower courts, the 2008 amendment to CPLR 205(a) has imbued trial court judges with the power to relieve those plaintiffs from the consequence of said neglect, simply by neglecting to recite facts. This Court's central holding in *Andrea* and prior cases — that it is the conduct of the plaintiff, and not the dismissing court's recitation thereof, that determines the application of CPLR 205§(a)'s savings provision — has been abandoned.

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[7] *See, e.g., Andrea v. Arnone, Hedin, Casker, Kennedy & Drake Architects & Landscape Architects, P.C. (Habiterra Assoc.)*, 5 N.Y.3d 514, 520-521 (2005) ("[The] neglect to prosecute exception in CPLR 205(a) applies…whenever neglect to prosecute <u>is in fact</u> the basis for dismissal…[W]here, as here, the record does make clear the basis for the prior dismissal, the question of whether it was a dismissal for neglect to prosecute is a question of law on which we need not defer to Supreme Court's judgment…The plain purpose of excluding actions dismissed for neglect to prosecute from those that can be, in substance, revived by a new filing under CPLR 205(a) was to assure that a dismissal for neglect to prosecute would be a serious sanction, not just a bump in the road.") (emphasis supplied); *Keel v. Parke, Davis & Co.,* 72 A.D.2d 546 (2d Dept 1979) *aff'd for reasons stated by A.D.* 50 N.Y.2d 833 (1980) ("[T]he Trial judge failed to expressly state that his dismissal was for neglect to prosecute. The only question on this appeal is whether the dismissal by the Trial Judge of the original action constituted a dismissal for 'neglect to prosecute.' We hold that it was…In the true and practical sense the plaintiff *failed by reason of his neglect to prosecute his action*" notwithstanding the absence of such verbiage in the dismissal order) (emphasis in original); *Flans v. Federal Ins. Co.,* 43 N.Y.2d 881 (1978) (concluding "<u>inferentially</u>" from the <u>record</u> that "dismissal of the original, timely action was…for 'neglect to prosecute' within the meaning of CPLR 205 (subd [a]) [and thus] [t]he statutory six-month extension [is] not…available" despite the absence of 'neglect to prosecute' verbiage in the dismissal order) (citations omitted) (emphasis supplied).

(b) *The First Department Order Interprets the 2008 Amendment to CPLR 205 in a Manner that Overrides this Court's Directive that Only 'Diligent Suitors' be Allowed the Benefits of the Savings Provision*

Also rendered obsolete by the lower courts' interpretation of the 2008 amendment is this Court's consistently held view that CPLR §205(a) "is intended to protect only those plaintiffs who have been nonsuited despite their continued opposition to that fate." *George v. Mt. Sinai Hospital,* 42 N.Y.2d 170, 180 (1979) (emphasis added); *see also Norex Petroleum Ltd. v. Blavatnik,* 23 N.Y.3d 665, 678 (2014) ("[S]ection 205(a) allows a plaintiff to refile claims within six months of a timely prior action's termination for reasons other than…a plaintiff's unwillingness to prosecute the claims in a diligent manner...[the] statute is designed to insure *to the diligent suitor* the right to a hearing in court till he reaches a judgment on the merits") (underline supplied; italics in original); *Doyle v. Am. Home Prods. Corp.,* 583 F.3d 167, 172 (2d Cir. 2009) ("in order to receive the benefits of [CPLR] 205(a) tolling, the litigant must have prosecuted his original claim diligently…the purpose of 205(a) is to save cases otherwise dismissed on curable technicalities—but only when the litigant has *diligently* prosecuted the claim…New York has well-developed case law on the purpose and application of CPLR 205(a) and its precursor statutes; that case law is unambiguous.") (underline supplied; italics in original). Under the lower courts' understanding of the 2008 amendment, as long as the dismissing court fails to satisfy its statutory duty to "record the specific conduct constituting the neglect," even the most neglectful, non-diligent, suitor is entitled to the benefits of CPLR §205(a)'s tolling provision. Indeed, in the case *sub judice*, the prior action was dismissed because the plaintiff in the prior action allowed the same to lie fallow for nearly *four (4) years.* However, because the dismissing court did not, in the First Department's view, adequately recount the neglect in its dismissal order, Plaintiff, herein, was allowed to avail itself of the benefits of the statute. That neither it, nor its predecessor, was a diligent suitor, was deemed irrelevant. Thus, *George, Norex,* and other decisions of this Court — holding that CPLR §205(a)'s benefits are available only to plaintiffs who have *in fact* been diligent in prosecuting their claims — have been cast aside and replaced by a rule holding that it is a court's recitation of a party's conduct, rather than the party's conduct itself, that is dispositive.

(c) The First Department Order, and its Interpretation of the 2008 Amendment, Fails to Recognize Decades of Caselaw Which Hold that Dismissals Made Pursuant to CPLR §3215(c) are, By Definition, 'Neglect to Prosecute' Dismissals

The recent proclivity of the Appellate Departments to misapply CPLR §205(a) is particularly pervasive in cases such as this, wherein the courts must navigate the interplay between CPLR §205(a)'s 'fact recitation' requirement and prior dismissals rendered under CPLR §3215(c). The New York Legislature amended CPLR §205(a) in 2008 and added the aforementioned 'fact recitation' requirement, explicitly, to address a lack of clarity as "what specifically constitutes a neglect to prosecute." However, the law has never been unclear about whether a CPLR §3215(c) dismissal constitutes 'neglect to prosecute.' Prior to 2008, a dismissal under that statute (and its predecessor) had *always, without exception,* been understood to be a 'neglect to prosecute' dismissal.[8] Yet, recent decisions of the Appellate Departments — such as the one at issue here (*see* **Ex. B**) — have increasingly endorsed the notion that decades of caselaw can be undone and the

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[8] *See, e.g.*, *Wright v. Venugopal,* 58 A.D.2d 680, 681 (3d Dept 1977); *Shepard v. St. Agnes Hospital,* 86 A.D.2d 628, 630 (2d Dept 1982); *see also Sports Legends, Inc. v. Carberry*, 38 A.D.3d 470, 470 (1st Dep't 2007); *EMC Mtge. Corp. v. Smith*, 18 A.D.3d 602, 603 (2d Dept 2005).

neglect of dilatory plaintiffs can be wiped away based simply on the loquaciousness of the dismissing jurist. The question, then, that should be answered by the Court (through this appeal) is whether it is permissible to imbue a judge dismissing for neglect to prosecute (*i.e.*, under CPLR 3215(c)) with the power to relieve plaintiffs of the consequence of this sanction through the expedience of tersely-worded dismissal orders — particular when such an outcome is clearly incongruous with this very Court's prior pronouncements that the tolling benefits of CPLR §205(a) are available only to plaintiffs who have diligently prosecuted the original (dismissed) action. *See supra* Section V(b).

(d) The First Department Order Fails to Adhere to this Court's Mandate that Tolling Under CPLR §205(a) is Unavailable When the Commencing Party Had a Previous Opportunity to Avoid Dismissal Through a Demonstration of 'Good Cause' But Failed to Do So

Relatedly, it is respectfully submitted that the recent decisions of the Appellate Departments — such as the First Department Order at issue here (*see* **Ex. B**) — which permit a dilatory plaintiff to take advantage of CPLR §205(a) despite a prior CPLR §3215(c) dismissal, require the review and guidance of this Court because the same represent a blatant departure from (and/or failure to adhere to) the Court of Appeals' holding in *Matter of Westchester Joint Water Works v. Assessor of City of Rye*, 27 N.Y.3d 566 (2016). In *Matter of Westchester*, this Court made clear that where a plaintiff has the opportunity to avoid the mandatory dismissal of a prior action via a showing of "good cause" but fails to do so, subsequent relief under CPLR §205(a) is unavailable. *See id.* at 575. When, *as here*, a prior action is dismissed, pursuant to CPLR §3215(c), following a motion on notice (as opposed to *sua sponte*) the considerations of *Matter of Westchester* clearly apply in that the relevant defendant (such as Respondent herein) had an opportunity to avoid dismissal via the demonstration of "sufficient cause" but failed to do so. Such failure — pursuant to this Court's binding precedent — would foreclose any attempt to invoke the savings provision of CPLR §205(a), regardless of the factual contents of the dismissal order. Yet, in countless decisions addressing the relationship between CPLR §3215(c) and CPLR §205(a)'s neglect to prosecute exception, the Appellate Departments (including the First Department here — *see* **Ex. B**) have consistently failed to adhere to this Court's holding in *Matter of Westchester* and, instead, have improperly put all of the focus, again, on the words chosen by the dismissing judge. This dichotomy demonstrates exactly why it is necessary for the Court of Appeals to take an appeal such as this one and provide guidance. Namely, it is essential for the Court to clarify whether its holding in *Matter of Westchester* both remains good law and applies to CPLR §3215(c) dismissals such that they preclude a subsequent invocation of CPLR §205(a)'s savings provision.

(e) The First Department Order Disregards Prior Pronouncements of this Court Which Make Clear that Only the 'Same Plaintiff' Who Commenced a Prior Action May Take Advantage of CPLR §205(a)'a Tolling Provision

Lastly, it is respectfully submitted that the Court of Appeals should take the instant appeal and opine upon the same because the First Department Order (*see* **Ex. B**) fails to recognize and/or adhere to this Court's holding in *Reliance Ins. Co. v. PolyVision Corp.*, 9 N.Y.3d 52 (2007) — wherein the Court of Appeals made clear that the term "plaintiff," as used in CPLR §205(a), did not "include an individual or entity other than the original plaintiff." *Id.* at 57.

Specifically, the First Department Order implicates an increasingly popular trend amongst the Appellate Departments wherein they improperly distinguish this Court's clear holding in *Reliance* and allow different plaintiffs to invoke the savings provision of CPLR §205(a) based on the incorrect rationale that the same is permissible so long as the subsequent plaintiff is an "assignee" and/or is asserting the same "cause of action." *See, e.g.*, *Wells Fargo Bank, N.A. v. Eitani,* 148 A.D.3d 193 (2d Dep't 2017).[9] However, as established by this Court, what matters, for the purposes of invoking CPLR §205(a), is that the *identity* of the *commencing* plaintiffs are *the same*, not whether the underlying *causes of action* are the same.[10] Such "identity of plaintiffs" is lacking in the case at bar as Respondent (herein) is not same entity that commenced the previously dismissed action. The First Department's failure (in its Order) to recognize and/or adhere to the *Reliance* principle — *i.e.*, that Respondent (as a "different plaintiff") was barred from invoking CPLR §205(a)'a tolling provision — demonstrates precisely why it is essential that the Court of Appeals provide guidance in a case such as this. Namely, it must provide insight into whether the Appellate Departments' recent interpretation of the "same plaintiff" rule announced in *Reliance* — *i.e.*, that a different plaintiff can invoke the savings provision of CPLR §205(a) so long as there is "identity of claims" — is permissible under the statute.

CONCLUSION

Even putting aside the question of why the Court of Appeals should take the instant appeal, the plain and simple fact (as noted above) is this: the First Department's Order (*see* **Ex. B**) — which revived Respondent's prior motion for summary and directed the Supreme Court to, once again, consider the arguments and evidence submitted in connection therewith — has, under established principles of New York law, gifted Respondent with a "new trial" to procure judgment and dispose of the factual issues in the case at bar. Accordingly, since the instant appeal presented to the Court of Appeals centers on an Order which granted Respondent a "new trial" and which, additionally, includes a valid stipulation of judgment absolute, this Court should correctly determine that it possesses subject matter jurisdiction over this appeal pursuant to CPLR §5601(c).

Thank you for your time and attention to this matter and feel free to contact me with any questions and/or concerns.

Regards,

Christopher Villanti, Esq.
VILLANTI LAW GROUP PLLC

[9] In fact, this very issue is the subject of an appeal currently pending before the Court of Appeals. *See U.S. Bank, N.A. v. UBS Real Estate Sec., Inc.*, 177 A.D.3d 493 (1st Dep't 2019) *lv granted* 35 N.Y.3d 911 (2020).

[10] *See Reliance*, 9 N.Y.3d at 57; *see also U.S. Bank N.A. v. DLJ Mortgage Capital, Inc.*, 141 A.D.3d 431 (1st Dep't 2016)*, aff'd* 33 N.Y.3d 84 (2019); *UBS Real Estate,* 177 A.D.3d at 493-94; *Craft EM CLO 2006-1, Ltd. v. Deutsche Bank AG*, 178 A.D.3d 552, 553 (1st Dep't 2019).

Exhibit A

State of New York
Court of Appeals

John P. Asiello
Chief Clerk and
Legal Counsel to the Court

Clerk's Office
20 Eagle Street
Albany, New York 12207-1095

April 23, 2021

Villanti Law Group PLLC
Attn: Christopher A. Villanti, Esq.
147 Prince Street, Suite 1-14
Brooklyn, NY 11201-3022

Re: US Bank National Assoc. v Robert L. Gordons LLC
APL-2021-00064

Dear Mr. Villanti:

The Court has received your preliminary appeal statement and will examine its subject matter jurisdiction with respect to (1) whether the Appellate Division order grants a new trial or hearing within the meaning of CPLR 5601(c) and (2) whether the stipulation for judgment absolute is illusory. This examination of jurisdiction shall not preclude the Court from addressing any jurisdictional concerns in the future.

You should file within ten days after this letter's date your comments in letter format justifying the retention of subject matter jurisdiction ("Jurisdictional Response"). By copy of this letter, your adversary is likewise afforded the opportunity to submit a Jurisdictional Response within the same ten-day period after this letter's date. All letters shall be filed with proof of service of one copy of the letter on each party.

If applicable, the disclosure statement required to be filed by corporations and other business entities pursuant to section 500.1(f) of the Court of Appeals Rules of Practice shall be filed with the written submissions discussed above.

The times within which briefs on the merits must be filed are held in abeyance during the pendency of this jurisdictional inquiry. If this inquiry is terminated by the Court, the Clerk will notify counsel in writing and set a schedule for the perfecting of the appeal. This communication is without prejudice to any motion any party may wish to make.

Digital Filing Requirement

Parties also are required to submit digital versions of each paper filing (see sections 500.2, 500.10 of the Rules) by uploading them to the Court of Appeals Companion Filing Upload Portal for Civil Motions and Rule 500.10 Jurisdictional Responses (the Portal) accessed through the Court's web site (www.courts.state.ny.us/ctapps). Appellant also shall upload a digital version of each brief filed by each party in the Appellate Division and a copy of the record or appendix filed in that court. A document containing the Technical Specifications and Instructions for Companion Filing Upload of Rule 500.10 Jurisdictional Responses (including Naming Conventions) is enclosed and available on the Court's web site.

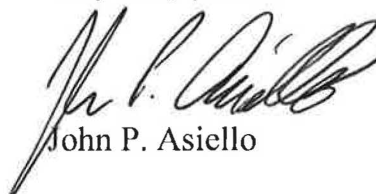
For the Portal, parties to this appeal will use **93104** as the pin number and **APL-2021-00064** as the appeal number for uploading purposes. This pin number should not be shared with others who are not parties to this appeal. All companion digital filings must be submitted no later than the due date for the jurisdictional response letter.

For uploading purposes, appellant's digital Jurisdictional Response shall have the following file name: **USBankNationalvRobertLGordons-app-RobertLGordons-JurRsp.pdf**. Appellant also shall follow the PDF file naming conventions with respect to the digital submission of additional materials, including Appellate Division records and briefs. All digital materials shall be submitted in separate files. Respondent's digital Jurisdictional Response shall have the following file name: **USBankNationalvRobertLGordons-res-USBankdNational-JurRsp.pdf**.

The contents of the digital submissions must be identical to those filed in hard copy, with the exception that the digital version need not contain an original signature (see section 7 of the enclosed Technical Specifications and Instructions).

If you have any questions regarding this letter, you may contact either Margaret N. Wood at 518-455-7702 or Edward J. Ohanian at 518-455-7701.

Very truly yours,



John P. Asiello

JPA/ejo/ai
Enclosure

cc: Kyle B. Stefanczyk, Esq.

Exhibit B

FILED: APPELLATE DIVISION - 1ST DEPT 03/25/2021 09:30 AM 2020-00091
NYSCEF DOC. NO. 31 RECEIVED NYSCEF: 03/25/2021

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Renwick, J.P., Mazzarelli, Singh, González, JJ.

13426 U.S. BANK NATIONAL ASSOCIATION, Successor Trustee to BANK OF AMERICA, NATIONAL ASSOCIATION as Successor by Merger to LASALLE BANK NA as Trustee for WASHINGTON MUTUAL Mortgage Pass-Through Certificates WAMU Series 2007-OA4 Trust,
Plaintiff-Appellant,

Index No. 850238/18
Case No. 2020-00091

-against-

SHERRY KIM et al.,
Defendants,

ROBERT L. GORDONS LLC,
Defendant-Respondent.

Parker Ibrahim & Berg LLP, New York (Robert N. Pollock of counsel), for appellant.

Villanti Law Group PLLC, Brooklyn (Christopher Villanti of counsel), for respondent.

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered November 18, 2019, which, inter alia, granted the motion of defendant Robert L. Gordons LLC for summary judgment dismissing the complaint, unanimously reversed, on the law, with costs, the motion denied, the complaint reinstated, and the matter remanded for consideration of plaintiff's motion for summary judgment and an order of reference on its claim seeking to foreclose on a mortgage.

In 2018, Supreme Court granted defendant's motion pursuant to CPLR 3215(c) to dismiss the complaint in the prior, 2010 foreclosure action for plaintiff's failure to seek a default judgment within one year of defendant's default. The dismissal order did not

include any findings of specific conduct demonstrating a general pattern of delay in proceeding with the litigation, as required to preclude the application of CPLR 205(a) for failure to prosecute (*U.S. Trust, N.A. v Moomey-Stevens*, 168 AD3d 1169 [3d Dept 2019]; *Wells Fargo Bank, N.A. v Eitani*, 148 AD3d 193 [2d Dept 2017], *appeal dismissed* 29 NY3d 1023 [2017]). Under the circumstances, the court should not have granted defendant's motion to dismiss the complaint in the present action as time-barred, as this action was timely brought within six months after the motion court dismissed plaintiff's first foreclosure action (*see* CPLR 205[a]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: March 25, 2021

Susanna Molina Rojas
Clerk of the Court

Exhibit C

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** *Justice* **PART** **IAS MOTION 32**

---X

INDEX NO. 850238/2018

MOTION DATE ____________

MOTION SEQ. NO. 001, 002

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, NATIONAL ASSOCIATION AS SUCCESSOR BY MERGER TO LASALLE BANK NA AS TRUSTEE FOR WASHINGTON MUTUAL MORTGAGE PASS-THROUGH CERTIFICATES WAMU SERIES 2007-OA4 TRUST,

Plaintiff,

- v -

SHERRY KIM, THOMAS KIM, ROBERT L. GORDONS LLC,NATIONAL CITY BANK, BOARD OF MANAGERS OF THE DOWNTOWN CLUB CONDOMINIUM, COLLINS FINANCIAL SERVICES INC.,NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK CITY PARKING VIOLATIONS BUREAU, JOHN DOES AND JANE DOES

Defendant.

---X

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 97, 109, 110, 111, 112, 113, 114, 115, 116

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 117

were read on this motion to/for JUDGMENT - SUMMARY.

Motion Sequence Numbers 001 and 002 are consolidated for disposition. The motion (MS001) by plaintiff for summary judgment and to appoint a referee is denied. The motion by defendant Robert L. Gordons LLC ("Gordons LLC") for summary judgment dismissing this case is granted.

Background

In this foreclosure action, plaintiff moves for summary judgment and to appoint a referee to compute the amount it is due. Gordons LLC moves for summary judgment dismissing this case based on the statute of limitations.

It is undisputed that plaintiff brought a previous foreclosure action on May 21, 2010 against *inter alia* defendants Sherry and Thomas Kim (the borrowers). In that action, plaintiff did not file an RJI until December 2013 and failed to move for a default judgment until June 2014. While plaintiff failed to move its case, the condo successfully prosecuted its own foreclosure action against the borrowers and sold the property at a foreclosure auction to Gordons LLC. When plaintiff finally moved for a judgment of foreclosure and sale, Gordons LLC cross-moved to dismiss on the ground that plaintiff failed to timely move for a default judgment pursuant to CPLR 3215(c). The judge assigned to the case agreed with Gordons LLC and dismissed the case on March 27, 2018 (NYSCEF Doc. No. 91). Plaintiff then commenced this action on August 20, 2018.

Discussion

The central issue on this motion is whether plaintiff may utilize CPLR 205(a) to commence the instant action despite the fact that it began more than six years after the statute of limitations began to run in May 2010 (when plaintiff brought the first foreclosure action).

CPLR 205(a) provides that:

> "If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that

> service upon defendant is effected within such six-month period. Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation."

The purpose of CPLR 205(a) "is to provide a second opportunity to the claimant who has failed the first time around because of some error pertaining neither to the claimant's willingness to prosecute in a timely fashion nor to the merits of the underlying claim" (*George v Mt. Sinai Hospital*, 47 NY2d 170, 178-9, 417 NYS2d 231 [1979]). "Indeed, the statute will normally involve situations in which a suit has been started but, due to an excusable mistake or a procedural defect or ineptitude of counsel or inability to obtain needed evidence, or some other cause that should not be fatal to the claim, the start has been a false one" (*id.* at 179 [internal quotations and citation omitted).

The Court grants the motion by Gordons LLC to dismiss this case. The fact is that the previous action was dismissed because plaintiff failed to prosecute its case; plaintiff waited more than four years to bring a motion for a default judgment. This is not a case where the previous action was dismissed because plaintiff was unable to obtained necessary evidence or some other excusable mistake. In fact, there is no dispute that the borrowers failed to make their mortgage payments and, for some reason, plaintiff did not seek to recoup its loan by obtaining a judgment and selling the property. Instead, plaintiff let the case linger.

The Court rejects Plaintiff's characterization of the dismissal of the 2010 foreclosure action as a "procedural defect." Rather, plaintiff's handling of that case was a complete and utter abandonment of its rights. It could be that plaintiff was not paying attention or that plaintiff was hoping it could recover a substantial amount of interest while the foreclosure case remained

pending for nearly a decade. Either circumstance does not support the application of CPLR 205(a).

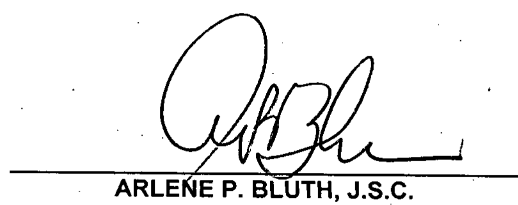
If CPLR 205(a) were found to be applicable in the instant situation, it would completely eviscerate the statute of limitations. It would allow plaintiff to pursue a case more than eight years after the limitations period began to run and it would render CPLR 3215(c) meaningless. A lender who fails to timely seek a default judgment and has its case dismissed could simply bring a new case and cite CPLR 205(a), thereby avoiding both CPLR 3215(c) and the limitations period. This Court cannot sanction this type of "end-run" around the statute of limitations.

Accordingly, it is hereby

ORDERED that the motion by plaintiff (MS001) for summary judgment is denied; and it is further

ORDERED that the motion by defendant Robert L. Gordons LLC for summary judgment dismissing this action is granted, with costs, and the Clerk is directed to enter judgment accordingly and to cancel the Notice of Pendency filed in relation to the subject premises in this matter (NYSCEF Doc. No. 8).

11/15/19
DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:	[X] CASE DISPOSED			[ ] NON-FINAL DISPOSITION		
	[ ] GRANTED	[ ] DENIED		[ ] GRANTED IN PART	[X] OTHER	
APPLICATION:	[ ] SETTLE ORDER			[ ] SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN			[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE	

Exhibit D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, NATIONAL ASSOCIATION AS SUCCESSOR BY MERGER TO LASALLE BANK NA AS TRUSTEE FOR WASHINGTON MUTUAL MORTGAGE PASS-THROUGH CERTIFICATES WAMU SERIES 2007-OA4 TRUST,

Plaintiff,

-against-

SHERRY KIM, THOMAS D. KIM, ROBERT L. GORDONS LLC, NATIONAL CITY BANK, BOARD OF MANAGERS OF THE DOWNTOWN CLUB CONDOMINIUM, COLLINS FINANCIAL SERVICES INC., NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK CITY PARKING VIOLATIONS BUREAU, "JOHN DOES" and "JANE DOES", said names being fictitious, it being the intention of plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein,

Defendants.

Index No.:
850238/2018

Appellate Case No.:
2020-00091

DEFENDANT'S STIPULATION FOR JUDGMENT ABSOLUTE

Defendant ROBERT L. GORDONS LLC ("Defendant") in the above-captioned matter, by its undersigned counsel, hereby stipulates, pursuant to CPLR §5601(c), that judgment absolute shall be entered against it in the event that the Court of Appeals affirms the Order of the Appellate Division, First Department appealed from, entered on March 25, 2021.

Date: Brooklyn, New York
April 7, 2021

/s/ Christopher Villanti
Christopher Villanti, Esq.
VILLANTI LAW GROUP PLLC
Attorney for Defendant
Robert L. Gordons LLC
147 Prince Street, Suite 1-14
Brooklyn, New York 11201
(917) 750-3475

Exhibit E

SUPREME COURT OF THE STATE OF NEW YORK
COUNT OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

---x

IN RE: NEW YORK CITY ASBESTOS LITIGATION — NYCAL

---X

DORCAS C. HACKSHAW, As Executrix of the Estate of SELWYN A. HACKSHAW, and DORCAS C. HACKSHAW, Individually,

Plaintiff-Respondent,

-against-

ABB, INC., *et al.*,

Defendants,

– and –

CRANE CO.,

Defendant-Appellant.

---X

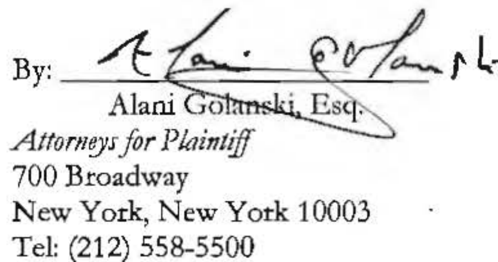
Index № 190022/13

PLAINTIFF'S STIPULATION FOR JUDGMENT ABSOLUTE

The plaintiff in the above-captioned case, by their undersigned counsel, hereby stipulates, pursuant to CPLR 5601(c), that judgment absolute shall be entered against her in the event that the Court of Appeals affirms the Order of the Appellate Division, First Department appealed from, entered October 6, 2016.

Dated: January 24, 2017

WEITZ & LUXENBERG, P.C.



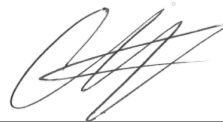
By: ______________________
Alani Golanski, Esq.
Attorneys for Plaintiff
700 Broadway
New York, New York 10003
Tel: (212) 558-5500

STATE OF NEW YORK
COURT OF APPEALS

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, NATIONAL ASSOCIATION AS SUCCESSOR BY MERGER TO LASALLE BANK NA AS TRUSTEE FOR WASHINGTON MUTUAL MORTGAGE PASS-THROUGH CERTIFICATES WAMU SERIES 2007-OA4 TRUST, Plaintiff-Respondent, -against- SHERRY KIM, THOMAS D. KIM, NATIONAL CITY BANK, BOARD OF MANAGERS OF THE DOWNTOWN CLUB CONDOMINIUM, COLLINS FINANCIAL SERVICES INC., NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK CITY PARKING VIOLATIONS BUREAU, "JOHN DOES" and "JANE DOES", said names being fictitious, it being the intention of plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein, Defendants, -and- ROBERT L. GORDONS LLC, Defendant-Appellant.	Case No.: APL-2021-00064 Appellate Docket No.: 2020-00091 **CORPORATE DISCLOSURE STATEMENT** New York County Index No. 850238/2018

In compliance with 22 NYCRR 500.1(f), Defendant-Appellant ROBERT L. GORDONS LLC ("Appellant") hereby states that it has no parents, affiliates or subsidiaries.

Date: Brooklyn, New York
May 7, 2021



Christopher Villanti, Esq.
VILLANTI LAW GROUP PLLC
Attorney for Defendant-Appellant
Robert L. Gordons LLC
147 Prince Street, Suite 1-14
Brooklyn, New York 11201
(917) 750-3475

STATE OF NEW YORK
COURT OF APPEALS

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, NATIONAL ASSOCIATION AS SUCCESSOR BY MERGER TO LASALLE BANK NA AS TRUSTEE FOR WASHINGTON MUTUAL MORTGAGE PASS-THROUGH CERTIFICATES WAMU SERIES 2007-OA4 TRUST, Plaintiff-Respondent, -against- SHERRY KIM, THOMAS D. KIM, NATIONAL CITY BANK, BOARD OF MANAGERS OF THE DOWNTOWN CLUB CONDOMINIUM, COLLINS FINANCIAL SERVICES INC., NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK CITY PARKING VIOLATIONS BUREAU, "JOHN DOES" and "JANE DOES", said names being fictitious, it being the intention of plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein, Defendants, -and- ROBERT L. GORDONS LLC, Defendant-Appellant.	Case No.: APL-2021-00064 Appellate Docket No.: 2020-00091 **AFFIRMATION OF SERVICE** New York County Index No. 850238/2018

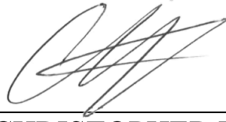
STATE OF NEW YORK
COUNTY OF KINGS

I, Christopher Villanti, the undersigned and an attorney at law, being duly sworn, says:

I am not a party to the action, I reside in Queens County, New York, and I am over 18 years of age.

On May 7, 2021, I served the within **Appellant's Jurisdictional Response, Corporate Disclosure Statement**, and the exhibits attached thereto, by email, and by FedEx Ground Mail, Tracking No. 773668483575, addressed to the following at the last known addresses set forth below:

PARKER IBRAHIM & BERG LLP
Attorneys for Plaintiff-Respondent
5 Penn Plaza, Suite 2371
New York, New York 10001
Kyle.Stefanczyk@piblaw.com



CHRISTOPHER VILLANTI