To Be Argued By:
PAUL D. CLEMENT
Time Requested: 30 Minutes

APL-2014-00156
New York County Clerk's Index No. 650980/2012

Court of Appeals

STATE OF NEW YORK

ACE SECURITIES CORP., HOME EQUITY LOAN TRUST, SERIES 2006-SL2, by HSBC BANK USA, NATIONAL ASSOCIATION, solely in its capacity as Trustee pursuant to a Pooling and Servicing Agreement, dated as of March 1, 2006,

Plaintiff-Appellant,

—against—

DB STRUCTURED PRODUCTS, INC.,

Defendant-Respondent.

BRIEF FOR PLAINTIFF-APPELLANT

MARC E. KASOWITZ, ESQ.
MICHAEL M. FAY, ESQ.
ZACHARY W. MAZIN, ESQ.
KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
1633 Broadway
New York, New York 10019
Telephone: (212) 506-1700
Facsimile: (212) 506-1800

PAUL D. CLEMENT, ESQ.
ERIN E. MURPHY, ESQ.
STEPHEN V. POTENZA, ESQ.
BANCROFT PLLC
1919 M Street NW, Suite 470
Washington, DC 20036
Telephone: (202) 234-0090
Facsimile: (202) 234-2806

Attorneys for Plaintiff-Appellant

August 26, 2014

CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rules 500.1(f) and 500.22(b)(5), Plaintiff-Appellant HSBC Bank USA, National Association hereby states that it is a wholly-owned subsidiary of HSBC USA, Inc., which in turn, is a subsidiary of HSBC North America, Inc., which is indirectly owned by HSBC Holdings plc., HSBC Bank USA, National Association's primary subsidiaries are HSBC Retail Credit (USA) Inc. and HSBC Mortgage Corporation (USA).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

This case involves the ongoing refusal by DB Structured Products, Inc. ("DBSP"), the sponsor of a residential mortgage-backed securitization (RMBS), to live up to its express promise to cure or repurchase defective mortgage loans whenever they might be discovered. The RMBS agreements at issue here are governed by the same basic terms as a typical RMBS agreement: DBSP made dozens of representations and warranties concerning the quality and characteristics of the nearly 9,000 loans that it securitized. DBSP also promised the Trust and investors that, in the event that DBSP discovered or was notified that any of the loans did not materially comply with those representations and warranties, it would cure or, if cure proved impossible, repurchase the defective loan(s) within a specified time period.

This standard agreement reflected the basic risk-shifting bargain between the parties: Because investors were poorly positioned—both financially and practically—to investigate the quality of each of the thousands of loans underlying the agreements, they would invest *only* upon assurance that the sponsor accepted the risk that it would have to cure or repurchase any defective loan discovered at any time during the life of the agreements. Without that assurance, investors simply could not have taken on the risk of purchasing bonds backed by mortgages that they had no effective or efficient ability to "reunderwrite." And that assurance was all the more critical because DBSP readily acknowledged that it might rely largely on representations and warranties made in the first instance by third-party originators rather than expend its own time and money reunderwriting all 9,000 loans. That being the case, it is unthinkable that investors would have agreed to invest if DBSP's promise to cure or repurchase any defective loans did not last for the life of the agreements.

The decision below undoes that basic bargain. According to the Appellate Division, First Department, the Trust's claim for breach of the obligation to cure or repurchase accrued not when DBSP failed to cure or repurchase a defective loan within the specified period, but rather when DBSP made the materially false representation or warranty—*i.e.*, when the parties first entered into the agreements. In other words, even though the agreements themselves placed no time limit on the distinct obligation to cure or repurchase, according to the Appellate Division (and DBSP), that obligation in fact expired six years after the agreements closed. Indeed, it is even worse than that, as the court concluded that the Trust's claim accrued when the agreements closed, yet nonetheless could not be brought until DBSP failed to cure or repurchase within the contractually specified 60- or 90-day period—even if that period did not expire until more than six years *after* the Agreements closed. Accordingly, the court's decision effectively imposes a *five-years-and-nine-months* expiration date on DBSP's obligation to cure or repurchase, as it would seem to be impossible under the court's reasoning to bring a timely suit if, as here, DBSP refused to cure or repurchase a defective loan that it discovered (either on its own or through a third party demand) any later than that.

Unsurprisingly, that anomalous result finds no support whatsoever in the governing agreements. That is because it erroneously conflates the representations and warranties with the distinct—and distinctly enforceable—obligation to cure or repurchase defective loans. Because this lawsuit is about DBSP's breach of the latter, not the former, it accrued only when that breach actually came to pass.

In any event, the Trust's claim is timely even under the Appellate Division's mistaken view that it accrued when the agreements closed rather than when DBSP breached its obligation to cure or repurchase. The investors timely initiated this action on the Trust's behalf within six years of the closing date of the agreements. Under the plain terms of those agreements, the investors clearly had standing to do so, but if they did not, the Trust cured any standing defect by substituting in and filing a complaint before DBSP ever moved to dismiss. In short, no matter when the Trust's claim accrued, this action was timely initiated. Accordingly, the Court should reject DBSP's efforts to escape liability for its unambiguous breach of its clear contractual obligation to cure or repurchase defective loans.

QUESTIONS PRESENTED

1. Where an RMBS contract obligates the sponsor to cure or repurchase loans upon notice or discovery that the loans do not comply with the sponsor's representations or warranties, does a claim for breach of that obligation to cure or repurchase accrue when the sponsor fails to cure or repurchase within the time period specified by the contract, or when the contract was made?

The First Department erred in holding that the claim accrued when the RMBS contract was made instead of when the RMBS sponsor breached its continuing contractual obligation to cure or repurchase defective loans and, accordingly, erred in dismissing Appellant's claims as time-barred.

2. Was this action timely filed even if the claim for breach of the RMBS contract accrued when the contract was made?

The First Department erred in answering this question in the negative and in refusing to hold this action timely on the basis of the summons with notice, which certain of the Trust's investors filed on behalf of the Trust within six years of when the contract was made.

JURISDICTION

The Court has jurisdiction over this appeal pursuant to CPLR § 5602(a)(1)(i) and CPLR § 5611 because the underlying action originated in the Supreme Court, New York County (R.24-27); the decision below is an order of the Appellate

Division, First Department, entered on December 19, 2013 that finally determines the action and is not appealable as a matter of right (R.vii-x); and this Court granted leave to appeal on June 26, 2014 (R.vi).

STATEMENT OF THE CASE

A. The RMBS Market and the Trust.

This case involves contractual interpretation questions arising out of one of the residential mortgage-backed loan securitizations at the heart of the recent financial crisis. A residential mortgage-backed loan securitization, or "RMBS," is a structured finance transaction in which mortgage loans are pooled and deposited into an entity to serve as collateral for the issuance of securities by that entity. The securities pay principal and interest from the cash flow generated by the mortgage loan pool. (R.36 (Cmpl. ¶ 16).) The most common form of RMBS involves the creation of a trust that purchases a portfolio of mortgage loans from originators of the loans or the sponsor of the securitization and issues certificates representing interests in the assets of the trust. (R.36 (Cmpl. ¶ 17).) The trust and trustee hold the mortgage loans, as well as all the rights associated with those loans, for the benefit of the certificateholders (*i.e.*, investors). (R.36-37 (Cmpl. ¶¶ 17, 20).)

The RMBS trust at issue in this case was created using that same basic model. DBSP, which acted as the "sponsor" of the securitization, purchased a pool of 8,815 mortgage loans from various third-party mortgage originators. (R.32-33, 36-37 (Cmpl. ¶¶ 1-3, 18).)[1] DBSP then sold that pool of loans to an affiliate known as ACE Securities Corp., which acted as the "depositor." ACE Securities Corp., in turn, sold the loans to a trust designated ACE Securities Corp. Home Loan Trust, Series 2006-SL2 (the "Trust"). (R.54-348.) All of this was achieved through the execution of the two agreements at the center of this case: the Mortgage Loan Purchase Agreement ("MLPA"), through which DBSP sold the loans to ACE; and the Pooling and Servicing Agreement ("PSA"), which created the Trust (together, the "Agreements"). (R.36-37 (Cmpl. ¶¶ 18-19).) The Agreements closed on March 28, 2006. (R.78 (PSA § 1.01); R.290 (MLPA § 1).)

Plaintiff-Appellant HSBC Bank USA, National Association is Trustee for the holders of $500 million in Asset Backed Pass-Through Certificates, Series 2006-SL2 (the "Certificates") issued by the Trust pursuant to the PSA and MLPA. The individual mortgage loans serve as collateral for the Certificates, and the Trust and the Trustee therefore hold the mortgage loans on behalf of and for the benefit of the certificateholders. (R.36-37 (Cmpl. ¶¶ 17, 19-20).) The Trust and the

[1] Over 90 percent of the loans were originated by just two companies: Long Beach Mortgage Company and Fremont Investment and Loan. (R.32, 49 (Cmpl. ¶¶ 2, 35).) In 2007, a federal regulator issued Fremont a cease and desist order for "operating with inadequate underwriting criteria and excessive risk in relation to the quality of assets held;" "operating with a large volume of poor quality loans;" and "engaging in unsatisfactory lending practices." (R.49-50 (Cmpl. ¶ 37).) In 2008, another federal regulator included both companies in its report on the "Worst Ten" mortgage originators in the "Worst Ten" metropolitan areas. (R.49 (Cmpl. ¶ 36).)

Trustee stand in the shoes of ACE with respect to the enforcement of DBSP's obligations under the Agreements. (R.37 (Cmpl. ¶¶ 19-20).)

B. The Parties' Rights and Obligations Under the Agreements.

The quality and characteristics of each of the individual mortgage loans in an RMBS trust are critical to investors, both because the loans serve as collateral for the issuance of investors' certificates and because they generate the cash flow used to pay principal and interest to certificateholders. (R.36 (Cmpl. ¶ 16).) In addition, the quality and characteristics of the loans allow ratings agencies to assign the certificates credit ratings, which are critical to attracting investors. (R.33-34 (Cmpl. ¶ 6).) Accordingly, as part of the securitization process, the sponsor of an RMBS makes numerous representations and warranties regarding the quality of the loans it is selling. In this instance, DBSP made more than 50 representations and warranties in the MLPA regarding the credit quality and characteristics of the 8,815 loans that it sold to the Trust. Those included, among other things, representations about each borrower's income, assets, and existing debt obligations; appraisal of property value; the borrower's debt-to-income ratio; a comparison of the borrower's total mortgage debt obligations to the value of the mortgaged properties; and occupancy status. (R.38, 40-47 (Cmpl. ¶¶ 23, 29-30); *see also* R.294-99 (MLPA § 6).) Because these and other characteristics affected the likelihood that borrowers would be willing or able to make their mortgage loan payments, the Certificates derived their value in large part from the veracity of the representations and warranties. (R.37-38 (Cmpl. ¶¶ 21-22, 24).)

Of course, it would be highly impractical for each prospective investor to independently verify the quality and characteristics of every single one of those 8,815 loans. At the same time, however, neither DBSP nor the investors were blind to the reality that at least some of the loans might not comply with the representations and warranties made in the Agreements—especially since the MLPA explicitly contemplated that DBSP itself may have made those representations and warranties without having "review[ed] and examine[d]" all of the underlying "loan files," and thus may have "no knowledge" of their veracity as to some loans. (R.300 (MLPA § 7(a)).) In other words, the parties recognized that even DBSP was not interested in reunderwriting every single loan it was selling, but instead was content to rely on representations and warranties made in the first instance by the third-party originators. Indeed, the only due diligence DBSP bothered to conduct was through an independent firm, Clayton Holdings, that used only sampling, not loan-by-loan review, to check for compliance with the representations and warranties that DBSP was adopting. (*See* R.48-49 (Cmpl. ¶ 34).)[2]

[2] A study conducted years later revealed that DBSP proceeded to securitize almost half of the loans that Clayton rejected. *See* The Financial Crisis Inquiry Commission Report: Final

Moreover, even if DBSP had performed adequate due diligence on all 8,815 loans, the Agreements included some representations that by their nature would have been very difficult to confirm before the Agreements closed. (R.40-48 (Cmpl. ¶¶ 29-30).) For instance, although some of the representations related to compliance with the originator's underwriting guidelines, DBSP also represented that "[n]o misrepresentation or fraud has taken place on the part of the Sponsor, the Mortgagor or any third party originator" of the mortgage loans. (R.38 (Cmpl. ¶ 23); *see also* R.294 (MLPA § 6(ii)).) As a consequence of that representation, DBSP was guaranteeing not just the nature of the underwriting process through which various loan characteristics were determined, but the accuracy of the characteristics themselves—even though their accuracy might depend on information that was not readily available at the time of closing.

For example, home occupancy status is an important characteristic because a borrower who uses the home as a primary residence is less likely to experience delinquencies and payment defaults than one who uses it as a second home or does not occupy the property. (R.45-46 (Cmpl. ¶ 29(H)).) While a mortgage loan file would indicate at the time of closing whether the borrower occupied or intended to occupy the home, whether that was true might not be discoverable without further

---

Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States 167-69 (2011), *at* http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf.

information not yet in the file, such as a court filing or property tax bill indicating that the borrower was actually using the home as a rental property. (R.46-47(Cmpl. ¶ 29(I)).) Likewise, although mortgage applicants may have misstated their income when obtaining loans, such misstatements might have been discovered only through subsequently filed tax records. (R.43-44 (Cmpl. ¶ 29(E)).) Nonetheless, DBSP represented that these characteristics were in fact accurate as to each loan.

As all of these complications underscore, both DBSP and investors were well aware that the representations and warranties DBSP was making might prove materially and detrimentally false as to at least some of the loans DBSP was selling. That being the case, investors simply could not agree to purchase certificates without receiving some assurance that DBSP, not the investors, would bear the risk for the life of the Trust of that possibility coming to pass, as neither they nor the Trustee were in any position to take on the exceedingly costly and time-consuming burden of reunderwriting nearly 9,000 loans—a task that even DBSP itself was unwilling to undertake.

The MLPA responds to this concern directly by ensuring that, if DBSP learned of defective loans, it would take prompt action to correct the problem. To that end, after Section 6 of the MLPA sets forth the numerous representations and warranties DBSP made, Section 7 imposes upon DBSP a “Repurchase Obligation” that arises "[u]pon discovery … of a breach of any of the representations and warranties contained in section 6 that materially and adversely affects the value of any Mortgage Loan or the interest therein of the" Trust or its investors. (R.300 (MLPA § 7(a)).) Under this Repurchase Obligation:

> Within sixty (60) days of [DBSP's] discovery or its receipt of notice of ... any such breach of a representation and warranty ... [DBSP] shall ... cure such defect or breach in all material respects, or in the event [DBSP] … cannot cure such defect or breach, [DBSP] shall, within ninety (90) days of its discovery or receipt of notice of … any such breach of a representation and warranty … repurchase the affected Mortgage Loan ....

(R.300 (MLPA § 7(a)).)

In other words, if DBSP became aware, either on its own or through notice from another party, that the representations or warranties were materially false as to any particular loan, that discovery would give rise to an independent "obligation" on DBSP's part to cure or repurchase the defective loan. As was typical of RMBS agreements at the time, the MLPA does not impose any time limit on this obligation; instead, it simply arises any time DBSP discovers or is made aware of a defect.

Of note, the MLPA specifically states that neither the Trust nor the investors were obligated to verify the veracity of DBSP's representations or warranties before executing the Agreements in order to demand cure or repurchase should a defective loan later come to light. To that end, Section 4(e) of the MLPA provides:

> The fact that the Purchaser or any person has conducted or has failed to conduct any partial or complete examination of the Mortgage Files shall not affect the right of the Purchaser or any assignee, transferee or designee of the Purchaser to demand repurchase or other relief as provided herein or under the Pooling and Servicing Agreement.

(R.292 (MLPA § 4(e)).) Likewise, Section 7(a) confirms that "[t]he representations and warranties contained in Section 6 shall not be impaired by … any failure on the part of the Sponsor *or the Purchaser* to review or examine [the loan files or other documents evidencing or relating to the Mortgage Loans]." (R.300 (MLPA § 7(a)) (emphasis added).) As these provisions reflect, neither the Trustee nor the Trust's certificateholders is obligated to attempt to discover defective loans; instead, their only obligation is to "promptly notify" DBSP of defective loans if and when they are discovered. (R.121-22 (PSA § 2.03(a)).)

Although the cure and repurchase obligation is an expressly self-executing obligation on DBSP that arises even if DBSP was the one to discover the defective loans, the PSA also authorizes either the Trustee or certificateholders to initiate litigation to enforce it. The Trustee is authorized to do so by Section 2.03, which provides in relevant part:

> Upon discovery or receipt of notice of any materially defective document in, or that a document is missing from, a Mortgage File or of a breach by the Sponsor of any representation, warranty or covenant under the [MLPA] in respect of any Mortgage Loan that materially and adversely affects the value of such Mortgage Loan or the interest therein of the Certificateholders, the Trustee shall promptly notify the Sponsor and the Servicer of such defect, missing

> document or breach and request that the Sponsor deliver such missing document, cure such defect or breach within sixty (60) days from the date the Sponsor was notified of such missing document, defect or breach, and if the Sponsor does not deliver such missing document or cure such defect or breach in all material respects during such period, the Trustee shall enforce the obligations of the Sponsor under the Mortgage Loan Purchase Agreement to repurchase such Mortgage Loan from REMIC I at the Purchase Price within ninety (90) days after the date on which the Sponsor was notified of such missing document, defect or breach, if and to the extent that the Sponsor is obligated to do so under the [MLPA]. (R.121.)

If the Trustee does not enforce the repurchase obligation, certificateholders are authorized to do so, subject to the requirements of Section 12.03, which provides in relevant part:

> No Certificateholder shall have any right by virtue of any provision of this Agreement to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement, unless such Holder previously shall have given to the Trustee a written notice of default and of the continuance thereof, as hereinbefore provided, and unless also the Holders of Certificates entitled to at least 25% of the Voting Rights shall have made written request upon the Trustee to institute such action, suit or proceeding in its own name as Trustee hereunder and shall have offered such Trustee such reasonable indemnity as it may require, and the Trustee, for 15 days after its receipt of such notice, request and offer of indemnity, shall have neglected or refused to institute any such action or proceeding. (R.214-15.)

C. The Proceedings Below.

1. <u>DBSP's Refusal to Cure or Repurchase Defective Loans.</u>

A few years after the Agreements closed in March 2006, borrower defaults and delinquencies on individual mortgage loans caused some $330 million in losses to the Trust and, in turn, to certificateholders. (R.35, 51 (Cmpl. ¶¶ 11, 40).)

Accordingly, two certificate-holding investment funds hired an independent forensic mortgage loan review firm to undertake the time-consuming and costly task of reviewing more than 1,600 of the loans in the Trust.[3] (R.40 (Cmpl. ¶ 28).) This loan-by-loan investigation revealed that fully 99% of the loans reviewed failed to comply with at least one of the representations and warranties in the MLPA. (R.34, 40 (Cmpl. ¶¶ 8, 28).) Upon learning the results of the forensic review, in accordance with the Agreements, the Trustee promptly sent DBSP a series of letters between February and July 2012 notifying it of the defective loans and demanding that DBSP comply with its cure or repurchase obligation. (R.50 (Cmpl. ¶ 38); R.800-855, 859-904.) To date, DBSP has refused to cure or repurchase a single loan in response to those notices. (R.50-51 (Cmpl. ¶ 39).)

2. Supreme Court Proceedings.

In the view of both the Trust and its investors, any claim for breach of the obligation to cure or repurchase does not arise until DBSP refuses to cure within 60 days or repurchase within 90 days of learning of a defective loan, at which point the Trust or its investors have six years to bring suit. *See* CPLR § 213. Numerous

---

[3] When the reunderwriting began, the certificate holding investment funds, RMBS Recovery Holdings 4, LLC and VP Structured Products, LLC, together held 25% of the voting certificates. (R.25.) Thus, fully 75% of the certificates were held by other investors, most if not all presumably of whom lacked the resources to undertake such an arduous process themselves. Of course, all certificateholders, not just the two investment funds who undertook the monumental task of a loan-by-loan investigation, stand to benefit from enforcement of DBSP's cure or repurchase obligation.

RMBS sponsors likewise have represented in their SEC filings that repurchase obligations in materially analogous RMBS agreements continue for the life of the agreement.[4] Nonetheless, a few RMBS sponsors had taken the position in litigation that a claim arising out of the failure to cure or repurchase accrues when the agreements were executed, not when the sponsor actually refuses to cure or repurchase after its obligation to do so is triggered. Accordingly, out of an abundance of caution, on March 28, 2012, the sixth anniversary of the execution of the Agreements, the certificateholders who had undertaken the loan-level review commenced this action against DBSP by filing a summons with notice derivatively on behalf of the Trust to enforce the repurchase obligation. (R.24-27.) The certificateholders invoked their authorization under PSA Section 12.03 to sue on behalf of the Trust, and made clear that they were seeking "relief on behalf of the Trust and all of the Certificateholders," in the form of specific performance of the repurchase obligation, damages, and other relief. (R.26.)

[4] *See, e.g.*, Citigroup Inc., Annual Report for fiscal year ended Dec. 31, 2010 (Form 10-K), at 90, 145 (filed Feb. 25, 2011) ("Citi's representations and warranties are generally not subject to stated limits in amount or time of coverage"); Bank of America Corp., Annual Report for fiscal year ended Dec. 31, 2009 (Form 10-K), at 144 (filed Feb. 26, 2010) ("[Bank of America's] representations and warranties are generally not subject to stated limits and extend over the life of the loan"); Wells Fargo & Co., Quarterly Report for the period ended Sept. 30, 2010 (Form 10-Q), at 38 (filed Nov. 5, 2010) ("Investors may demand repurchase at any time …") (*available at* sec.gov). *See also* Reuters, *Private RMBS Take First Steps to U.S. Comeback* (Mar. 22, 2013) (*available at* http://www.reuters.com/article/2013/03/22/abs-rmbs-us-idUSL1N0CE9HS20130322) ("While older R&W provisions and repurchase obligations were for the life of the loan, some recent RMBS proposals contain 'sunset provisions' that free lenders from repurchase obligations after less than 36 months").

On August 24, 2012, DBSP demanded service of a complaint, and on September 13, 2012, the Trustee substituted for the two investment fund certificateholders and filed a complaint. (R.30-348.) The complaint asserts a single count for breach of contract and specific performance based on DBSP's failure to comply with its contractual obligation to cure or repurchase within the specified time period after notice or discovery of any loan that did not comply with DBSP's representations and warranties. (R.51-52 (Cmpl. ¶¶ 41-48).)

DBSP moved to dismiss, arguing that the Trust's claim was untimely because it had accrued when the Agreements closed on March 28, 2006, not when DBSP breached its contractual repurchase obligation in 2012, and therefore had to be initiated within six years of the former date. Although this suit in fact *was* initiated within six years of March 28, 2006, DBSP further argued that the initial summons with notice filed by the investors on behalf of the Trust was a nullity because the investors lacked standing under the PSA to enforce DBSP's repurchase obligation, and that the Trustee's substitution could not relate back to the March 28, 2012 summons with notice. At the same time that DBSP argued that the suit was initiated *too late*, DBSP also argued that the Trust's suit had been filed *too early* because 90 days had yet to pass from when the Trust informed DBSP of the defective loans. Thus, in DBSP's view, it was impossible for the Trust to timely initiate a lawsuit based on DBSP's failure to take any action after being informed of defective loans—even though the Trust began receiving notice of those loans *before* March 28, 2012.

In an order entered on May 14, 2013, the Supreme Court, New York County (Shirley Werner Kornreich, J.), denied DBSP's motion and held the Trustee's claim timely. (R.7-20.) Specifically, the Supreme Court concluded that DBSP "does not breach the PSA and the claim for breach does not accrue until DBSP fails to timely cure or repurchase a loan." (R.15.) As the court explained, "[t]he whole point of how the MLPA and PSA were structured was to shift the risk of non-complying loans onto DBSP," and the Agreements were "likely priced accordingly." (*Id.*) Thus, the argument "that the Trustee's claims accrued in 2006 … utterly belies the parties' relationship and turns the PSA on its head." (R.15-16.) Indeed, DBSP's position, the court observed, would have required the Trustee "to conduct constant due diligence on the veracity of the Representations," which is "squarely at odds with Section 7(a) of MLPA." (R.16.) The court therefore concluded that DBSP's cure or repurchase obligation is a "recurring obligation" and that DBSP "commits an independent breach of the PSA each time it fails to abide and fulfill its obligations" to cure or repurchase. (*Id.*) Accordingly, the Supreme Court held that "[t]he statute of limitations began to run when DBSP improperly rejected the Trustee's repurchase demand." (R.17.)

3. The Appellate Division Decision.

On December 19, 2013, the Appellate Division, First Department, issued a brief opinion reversing. The court acknowledged that, under the plain language of the Agreements, the Trustee "was not entitled to sue or to demand that defendant repurchase defective mortgage loans until it discovered or received notice of a breach *and* the cure period lapsed." (R.viii (Slip. Op. 27).) Nevertheless, the court held that the Trust's claims for breach of the cure or repurchase obligation accrued not upon DBSP's failure to cure or repurchase within the specified period, but instead on the March 2006 closing date of the MLPA, "when any breach of the representations and warranties contained therein occurred[.]" (*Id.*) At the same time, the court concluded that the investors' timely summons with notice was "a nullity" because the investors had "fail[ed] to comply with a condition precedent to commencing suit"—namely, waiting until the cure or repurchase period lapsed. (R.ix (Slip. Op. 28).) In other words, the First Department accepted DBSP's view that the Trust's claim simultaneously was filed both too early and too late.

The court also concluded that the investors' derivative March 28, 2012 summons with notice was insufficient to make the Trust's claim timely because the investors lacked standing to initiate this action on the Trust's behalf. (*Id.*) The court based that conclusion on the language in Section 12.03 of the PSA providing that, as a condition precedent to investor-initiated actions on the Trust's behalf, certificateholders must provide the Trustee with "'a written notice of default and of the continuance thereof.'" (*Id.*) Although the court did not dispute that the certificateholders provided the Trustee with written notice of default, it concluded that the defaults "enumerated in the PSA concern failures of performance by the servicer and master servicer only" and do not include defaults "in connection with the sponsor's breaches of the representations." (*Id.* (citation omitted).) Thus, in the court's view, a certificateholder can never initiate a suit based on DBSP's breach of a contractual obligation. The sole authority the court cited for that conclusion is a case interpreting a very different contract that explicitly limited the kinds of defaults that could be noticed—something that the PSA does not do.

The court also concluded that the complaint that the Trustee filed after it substituted in could not relate back to the timely summons with notice. (*Id.*) The court did not explain why this was so; instead, it cited a handful of its own precedents permitting substitution where corporate affiliates are involved. (R.ix-x (Slip. Op. 28-29).)

4. <u>Leave to Appeal.</u>

On January 21, 2014, the Trustee timely moved the First Department for reconsideration or leave to appeal to this Court, explaining that the accrual question at issue in this case also is at issue in dozens more RMBS cases and has divided the state and federal that have addressed it. On March 20, 2014, DBSP served the Trustee with the Notice of Entry of the Appellate Division's order denying reconsideration and leave to appeal. The Trustee timely sought leave to appeal from this Court, and on April 21, 2014, this Court granted the motion. (R.vi.)

ARGUMENT

I. THE CAUSE OF ACTION FOR BREACH OF THE CURE OR REPURCHASE OBLIGATION DID NOT ACCRUE UNTIL DBSP REFUSED TO CURE OR REPURCHASE.

Under well-settled principles of New York law and the plain language of the parties' agreement, the Trust's claim for breach of DBSP's obligation to cure or repurchase defective loans did not accrue until DBSP actually refused to cure or repurchase the loans within the contractually designated period. That conclusion is compelled by the principle that, when a contract imposes a distinct and continuing obligation, a breach claim accrues when that distinct obligation is breached. It also is compelled by the principle that, when a contract conditions a legal right on the occurrence of both a triggering event and some subsequent act (or failure to act), a breach claim arises only after *both* of those things have come to pass. In short, the obligation to cure or repurchase defective loans is a distinct, and distinctly enforceable, one. Because it is the breach of that obligation—not the deficiencies of the initial representations and warranties—that underlies this lawsuit, the Trust's claim accrued only once that obligation was breached.

Any other conclusion would gut the basic bargain underlying the Agreements. The parties understood that the initial representations and warranties could prove deficient, and they provided a specific mechanism for dealing with that eventuality by requiring DBSP to shoulder the burden of curing or repurchasing *whenever* a defective loan was discovered. Without that critical and ongoing obligation, the Agreements would not have come to fruition, as investors simply could not have taken on the highly impractical and exceedingly expensive burden of reunderwriting nearly 9,000 loans. Moreover, the repurchase obligation provided DBSP with a substantial benefit as well, as it assured DBSP a window of time in which to cure or repurchase defective loans rather than face the prospect of a lawsuit every time a defect was discovered. As the Supreme Court therefore correctly understood, DBSP's attempt to conflate its representations and warranties with its distinct obligation to cure or repurchase defective loans "utterly belies the parties' relationship and turns the PSA on its head." (R.15-16.)

A. The Obligation to Cure or Repurchase Is a Distinct Obligation that Is Breached When DBSP Fails to Cure or Repurchase.

The timeliness of the claim at issue here follows directly from the breach alleged. This is a case about DBSP's breach of its contractual obligation to cure or repurchase defective loans within 90 days of learning of the defects. That claim rather obviously cannot accrue until DBSP fails to honor its obligation to cure or repurchase after discovering or being notified of a materially inaccurate representation or warranty. The notion that the claim somehow accrued at the moment the parties' entered into the Agreement and the underlying representations and warranties were made—long before anyone discovered a defective loan, provided the requisite notification, or failed to cure or repurchase—conflates the veracity of the underlying representations and warranties with DBSP's distinct and continuing obligation to cure or repurchase. This is a case about the latter.

It is a well-settled principle of New York law that a contract containing a distinct and continuing obligation that can arise after the contract is executed is breached when that distinct obligation is breached. The seminal case articulating that principle is *Bulova Watch Co., Inc. v. Celotex Corp.*, 46 N.Y.2d 606 (1979), which involved a roofing contract that, in addition to guaranteeing the initial quality of the roof, also included two 20-year guaranty bonds obligating the manufacturer to repair any defects in the roof that should arise. When Bulova's roof leaked like a "sieve," it sued on two theories: breach of an implied warranty of fitness for use, and breach of the express terms of the guarantee bonds. *Id.* at 609. Although the Court concluded that any breach of warranty claim accrued when the contract was made, it went on to conclude that the claim for breach of the bonds was a distinct claim that accrued only when the defendants failed to abide by their obligation to repair a problem after it was brought to their attention.

As the Court explained, that was so because the defendants "did not merely guarantee the condition or performance of the goods, but agreed to perform a service." *Id.* at 612. Moreover, the distinct agreement to perform that service was a critical component of the parties' bargain, as "the defendants expected Bulova to view the bonds as a special, separate and additional incentive to purchase" their product. *Id.* at 611. Accordingly, the Court had little trouble finding it "clear that the separate bond obligations, as agreements contemplating services, were subject to a six-year statute running separately for the damages occasioned each time a breach of the obligation to repair the bonded roof occurred." *Id.* As Appellate Divisions have recognized in a wide variety of commercial contexts, *Bulova* thus confirms that, when "a contract provides for a recurring obligation, a claim for damages accrues each time the contract is allegedly breached." *N.Y. Cent. Mut. Fire Ins. Co. v. Glider Oil Co., Inc.*, 90 A.D.3d 1638, 1642 (4th Dep't 2011).[5]

[5] *See, e.g., id.* at 1641-42 (where defendant "had recurring obligations under its contract with [plaintiffs], i.e., to supply all LP gas required by [plaintiffs] and to maintain the LP gas supply system" and plaintiffs claimed that defendant breached the contract "by defectively servicing and supplying the LP gas system," cause of action accrued each time that obligation was breached); *Airco Alloys Div. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 80 (4th Dep't 1980) (same); *Meadowbrook Farms Homeowners Ass'n, Inc. v. JZG Res., Inc.*, 105 A.D.3d 820, 822 (2d Dep't 2013) *leave to appeal dismissed*, 21 N.Y.3d 1024 (alleged breach "is of the defendant's obligation to pay annual assessments to the plaintiff. Thus, a new breach occurred for statute of limitations purposes each year the defendant failed to make an allegedly required payment to the plaintiff."); *Knobel v. Shaw*, 90 A.D.3d 493, 494 (1st Dep't 2011) (defendant "had a 'recurring obligation' to pay plaintiff his 31% share of the profits generated by the properties at issue; therefore, plaintiff's contract claim 'accrued each time [defendant] allegedly breached' this obligation" (citation omitted)); *Sirico v. F.G.G. Prods., Inc.*, 71 A.D.3d 429, 435 (1st Dep't 2010) (claim for royalties accrued each time defendant allegedly breached its

That is precisely the case here. The governing Agreements impose on DBSP a distinct and continuing obligation to cure or repurchase any loan that it learns fails to comply with the representations or warranties contained in the Agreements. That much is clear from the Agreements themselves, which are "the best evidence of what parties to a written agreement intend." *Slamow v. Delcol*, 79 N.Y.2d 1016, 1018 (1992). By its plain terms, the MLPA imposes upon DBSP a "repurchase obligation"—*i.e.*, an independent obligation, found in a provision distinct from the representations and warranties themselves, with which DBSP must comply if and when it learns of a materially defective loan. (R.299 (MLPA § 7).) The PSA likewise describes this aspect of the MPLA as a distinct "obligation" that DBSP has undertaken. (R.121-22 (PSA § 2.03(a).) And for good reason: An agreement to provide the substantive service of curing or repurchasing a defective loan is plainly a distinct contractual obligation.

The distinct and continuing nature of the obligation to cure or repurchase is reinforced by the fact that it is a self-executing obligation. By its plain terms, the obligation to cure or repurchase arises whenever DBSP learns of a defective loan,

recurring obligation to pay); *Beller v. William Penn Life Ins. Co. of N.Y.*, 8 A.D.3d 310, 314 (2d Dep't 2004) (claim for damages accrued each time defendant breached its continuing obligation under an insurance contract "to consider the factors comprising the cost of insurance before changing rates, and to review the cost of insurance rates at least once every five years to determine if a change should be made"); *Orville v. Newski, Inc.*, 155 A.D.2d 799 (3d Dep't 1989) (contractual obligation to make a minimum annual debt payment was a continuing one and "breach occurred each year in which defendant failed to make the minimum payment").

whether that occurs through notice from the Trust or an investor or through DBSP's own actions. (*See* R.300 (MLPA § 7(a) ("Upon discovery by the Sponsor ….").) In other words, DBSP has a duty to cure or repurchase defective loans even if neither the Trust nor an investor is aware of those defective loans or asks DBSP to do so. That only underscores that the cure or repurchase obligation is triggered not by the mere act of making the representations or warranties, but by the discovery, however made, that those representations or warranties were inaccurate. After all, it would have made little sense for DBSP to undertake a self-executing obligation to cure or repurchase defective loans if that obligation arose the moment the Agreements were executed.

It is no accident that the parties treated this obligation as separate from the representations and warranties made in the Agreements. Just as in *Bulova*, the obligation to cure or repurchase operated as "a special, separate and additional incentive to" the Trust and its investors to invest. *Bulova*, 46 N.Y.2d at 611. Indeed, it operated as far more than that—the obligation to cure or repurchase defective loans was an essential component of the basic risk-shifting bargain at the core of the securitization. The parties were not blind to the reality that at least some of the 8,815 loans might not comply with the representations and warranties made in the Agreements. But both sides also realized that investors would not be willing to invest in the first place if doing so would require them to reunderwrite every single loan—an arduous task that would have involved spending millions of dollars to review and investigate the full documentation of nearly 9,000 mortgages. In fact, even DBSP itself declined to undertake this arduous task; instead, it bargained for the right to investigate defects and decide whether to cure or repurchase rather than face a lawsuit every time a defective loan was discovered.

That is why the cure or repurchase obligation was so critical to the parties' bargain, and also why it is distinct from the accuracy of the underlying representations and warranties themselves. The only way to ensure the accuracy of the initial representations and warranties (and to bring suit directly for their inaccuracy) would have been to reunderwrite all 8,815 loans. The whole point of the cure or repurchase obligation was to obviate the need for that impractical task by taking pressure off the accuracy of the initial representations and warranties. The cure or repurchase obligation did so by ensuring that the risk of defective loans would be borne not by the Trust or its investors, but by DBSP—the party in a vastly superior position not only to verify the quality of the loans it was selling (and thus determine which loans to sell into the Trust in the first place), but also to determine how to deal with defective loans whenever they might be discovered, whether that be by curing the defect or by repurchasing if cure was not a viable option.

As the Supreme Court thus correctly recognized, DBSP's position that its cure or repurchase obligation had a shelf life of only six years conflates two distinct legal obligations, "utterly belies the parties' relationship[,] and turns the PSA on its head." (R.15-16.)[6] Without the crucial guarantee that DBSP, not the Trust or its investors, would bear responsibility for the life of the Agreements should any loans prove defective, there would have been no investors. The notion that the Trust would have entered into an agreement that implicitly relieved DBSP of this obligation after six years therefore blinks reality. It also destroys the whole function of the cure or repurchase obligation, which exists to obviate the need for investors to investigate the accuracy of representations and warranties for nearly 9,000 loans and either bring suit within six years or forever forfeit their rights.

[6] The Supreme Court is not alone in recognizing that the obligation to cure or repurchase in an RMBS contract typically is a distinct continuing obligation that lasts for the life of the contract. Numerous courts applying New York law have reached that conclusion. *See, e.g.*, *FHFA v. WMC Mortg., LLC*, No. 13-cv-584, 2013 WL 7144159, at *1 (S.D.N.Y. Dec. 17, 2013) (applying New York law to conclude that claim for breach of cure or repurchase obligation under materially analogous contract accrued when defendant failed to repurchase within contractually designated time period); *Lehman Bros. Holdings, Inc. v. Nat'l Bank of Arkansas*, 875 F. Supp. 2d 911, 917 (E.D. Ark. 2012) (same); *LaSalle Bank Nat. Ass'n v. Lehman Bros. Holdings, Inc.*, 237 F. Supp. 2d 618, 638 (D. Md. 2002) (defendant's "failure to repurchase non-conforming loans upon demand as required by a contract is an independent breach of the contract entitling the plaintiff to pursue general contract remedies for breach of contract"); *F.D.I.C. v. Key Fin. Servs., Inc.*, No. 89-cv-2366, 1999 WL 34866812, at *12 (D. Mass. Dec. 23, 1999) ("breach of the agreement by Key occurred when it refused to repurchase the Key Loans upon Home Owners demand as required in the Agreement"), *aff'd sub nom. Resolution Trust Corp. v. Key Fin. Servs., Inc.*, 280 F.3d 12 (1st Cir. 2002). Likewise, numerous RMBS sponsors have acknowledged that their repurchase obligations under materially analogous agreements covered the entire lifespan of those agreements. *See supra* n.4.

The MLPA itself makes this quite clear. Section 4(e) expressly states that the Trust had no obligation to independently investigate whether the loans complied with the representations and warranties made at the time of purchase:

> The fact that the Purchaser or any person has conducted *or has failed to conduct* any partial or complete examination of the Mortgage Files *shall not affect the right of the Purchaser* or any assignee, transferee or designee of the Purchaser *to demand repurchase* or other relief as provided herein or under the Pooling and Servicing Agreement.

(R.292 (MLPA § 4(e)) (emphasis added).) Likewise, Section 7(a) of the MLPA provides:

> With respect to the representations and warranties contained herein as to which the Sponsor *has no knowledge*, if it is discovered that the substance of any such representation and warranty was inaccurate and such inaccuracy materially and adversely affects the value of the related Mortgage Loan, … then *notwithstanding the lack of knowledge by the Sponsor with respect to the substance of such representation and warranty being inaccurate at the time the representation and warranty was made*, the Sponsor shall [cure or repurchase].

(R.300 (MLPA § 7(a)) (emphasis added).)

As the Supreme Court correctly understood, these provisions confirm that DBSP's duty to cure or repurchase was independent both from the underlying representations and warranties themselves and from anyone's knowledge of any inaccuracies in those representations and warranties when they were made. Indeed, DBSP was very careful to disclaim any "duty to ensure that the Representations are true" (R.15), as even DBSP was unwilling to obligate itself to undertake the onerous task of verifying thousands of representations and warranties that came from the third-party originators in the first instance. Rather than attract investors with the thoroughness of its own due diligence, DBSP was more than happy to attract them by promising them that it would cure or repurchase a defective loan within 90 days of discovering the defect, regardless of when that discovery might occur.

DBSP's position would fundamentally rewrite that bargain. DBSP would get the benefit of attracting hundreds of millions of investment dollars without performing its own exhaustive due diligence on the underlying loans, yet would not give investors any meaningful protection in exchange for that benefit. That only underscores why DBSP's reading of the Agreements cannot be correct: If DBSP was unwilling *either* to verify the accuracy of representations or warranties in the first place, *or* to cure or repurchase defective loans once five years and nine months passed, then the Trust really would have been obligating *itself* to reunderwrite 8,815 mortgage loans on day one, in direct contradiction to the express terms of the MLPA. *See Metro. Life Ins. Co. v. Noble Lowndes Int'l, Inc.*, 84 N.Y.2d 430, 437 (1994) ("A cardinal principle governing the construction of contracts is that the entire contract must be considered and, as between possible interpretations of an ambiguous term, that will be chosen which best accords with the sense of the remainder of the contract.").

In fact, DBSP's actual position is even more troubling than that, as DBSP would convert a provision designed to obviate the need for investors to investigate the veracity of the initial representations and warranties and file suit within six years into a requirement that they conduct constant due diligence and file suit *even sooner* than six years. According to DBSP, the Trust could not bring any suit based on the failure to cure or repurchase a defective loan until 90 days after notifying DBSP of the defect because DBSP is contractually entitled to 90 days in which to investigate and decide how to respond. That makes sense if the cure and repurchase obligation is a distinct one, triggered not by the veracity of the initial representations and warranties *vel non* but by discovery or notification of a defective loan. But DBSP would read the 90-day requirement as imposing distinct disabilities on suits *for breach of a representation or warranty*, such that the Trust could not bring any such suit until the 90-day period expires—even if the defective loan is not discovered until less than 90 days before the six-year statute of limitations would run on a suit based on breach of the representations or warranties themselves (which this suit is not).

In other words, in DBSP's view, if (as here) it learned of a defective loan less than 90 days before the six-year statute of limitations on the initial representations or warranties was set to run, it did not need to do anything at all, as the Trust could enforce neither the obligation to cure or repurchase the loan *nor* the representations and warranties themselves at that point. In effect, then, DBSP really contends that the Agreements implicitly impose a distinctively unfavorable statute of limitations on breach of representation or warranty claims (five years and nine months) rather than a distinct obligation to cure or repurchase. Unsurprisingly, that utterly arbitrary time frame is found nowhere in the Agreements or any provision of New York law.

At bottom, any question of contract interpretation must be guided by "[t]he fundamental, neutral precept … that agreements are construed in accord with the parties' intent." *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002). Here, the parties' intent could not be clearer: The obligation to cure or repurchase is a distinct obligation that is triggered by the discovery of a defective loan and continues for the life of the securitization. Indeed, other sponsors of materially analogous RMBS agreements candidly have acknowledged as much. *See supra* n.4. Just as in *Bulova*, that distinct contractual obligation was "a special, separate and additional incentive to" the Trust and investors to spend hundreds of millions of dollars purchasing the loans that DBSP was selling. *Bulova*, 46 N.Y.2d at 611. To confine that obligation to the first six years—or, worse yet, five years and nine months—of the Agreements would both conflate the initial representations and warranties with the distinct and ongoing obligation to cure or repurchase and utterly belie the parties' clear intent.

B. This Court's Condition Precedent Jurisprudence Underscores That the Trust's Cause of Action Did Not Accrue Until DBSP Refused to Cure or Repurchase the Defective Loans.

The conclusion that the Trust's case of action did not accrue until DBSP refused to cure or repurchase the defective loans within 90 days is reinforced by the condition precedent doctrine. It is another well-settled principle of New York law that a breach of contract claim accrues only once "all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court[.]" *Aetna Life & Cas. Co. v. Nelson*, 67 N.Y.2d 169, 175 (1986). Accordingly, when a contractual right is subject to a condition, a claim to enforce that right accrues "only when the condition has been fulfilled." *John J. Kassner & Co. v. City of N.Y.*, 46 N.Y.2d 544, 550 (1979). Likewise, where a contract with a notice or demand provision "allow[s for] time to investigate" and decide how to respond, the statute of limitations does not begin to run until the other party refuses to take action. *Hahn Auto. Warehouse, Inc. v. Am. Zurich Ins. Co.*, 18 N.Y.3d 765, 772 n.5 (2012); *see also Cont'l Cas. Co. v. Stronghold Ins. Co.*, 77 F.3d 16, 21 (2d Cir. 1996). Much like the continuing obligation cases, these cases underscore that, when a breach of contract claim turns on the failure to abide by distinct contractual requirements or conditions once they are triggered, the claim does not accrue until those requirements or conditions have come to pass.

Continental Casualty is a case in point. That case involved the question of when a breach of contract claim for failure to pay losses under a reinsurance policy accrues: when the underlying event giving rise to a claim under the policy occurs, or when the reinsurer is notified of a claim under the policy and then fails to timely pay. Applying New York law, the Second Circuit concluded that it is the latter because the reinsurers "were not in 'breach' of their contract to indemnify until they rejected the demand (or a reasonable time for paying the losses elapsed)." *Cont'l Cas.*, 77 F.3d at 21. As the Court explained, the primary insurer "was entitled—indeed, probably obligated—to wait a reasonable time for the reinsurers to decide whether they would pay or not." *Id.* at 20. Accordingly, it would make no sense at all to treat the contract as requiring the primary insurer to sue for payment before the reinsurer even decided whether to pay.

Once again, the situation here is precisely analogous. By the plain terms of the Agreements, whether it was the Trust or DBSP that discovered a defective loan, the Trust was not only entitled, but obligated, to give DBSP 90 days in which to investigate and decide whether to cure the defect or repurchase the loan.[7] Only after DBSP decided to do neither of those things could the Trust sue to enforce the

[7] Although the summons with notice was filed before that 90-day period ran, the 90-day period had expired without any action by DBSP by the time the complaint was filed. Accordingly, the fact that the summons with notice was filed early in an attempt to protect the Trust against the accrual argument that DBSP ultimately raised does not affect the timeliness of this action. *See infra* Section II.

cure or repurchase obligation. Section 2.03 of the PSA thus states quite specifically:

> *[I]f* the Sponsor does not … cure such defect or breach in all material respects during such period, *the Trustee shall enforce* the obligation of the Sponsor under the Mortgage Loan Purchase Agreement to repurchase such Mortgage Loan from REMIC I at the Purchase Price within ninety (90) days after the date on which the Sponsor was notified of such missing document, defect, or breach, if and to the extent that the Sponsor is obligated to do so under the Mortgage Loan Purchase Agreement.

(R.121 (PSA § 2.03) (emphasis added).) Likewise, DBSP's own self-executing obligation to cure or repurchase was explicitly conditioned on notice or discovery of a defective loan:

> *[I]f* it is discovered that the substance of any such representation or warranty was inaccurate as of the date of such representation or warranty was made or deemed to be made, and such inaccuracy materially adversely affects the value of the related Mortgage Loan or the interest therein of the Purchaser or the Purchaser's assignee, transferee or designee *then* notwithstanding the lack of knowledge by the Sponsor with respect to the substance of the representation or warranty being inaccurate at the time the representation and warranty was made, the Sponsor shall take such action described in the following paragraph in respect of such Mortgage Loan.

(R.300 (MLPA § 7(a)) (emphasis added).) That kind of if/then language is the "unmistakable language of condition." *MHR Capital Partners LP v. Presstek, Inc.*, 12 N.Y.3d 640, 645 (2009).

Indeed, even the Appellate Division readily acknowledged (as DBSP itself argued in the Supreme Court) that expiration of the "60- and 90- day periods for cure and repurchase" was "a condition precedent to commencing suit." (R.ix (Slip. Op. 28).) Yet the Court then inexplicably failed to follow that conclusion to its logical end—namely, that the Trust's claim for failure to cure or repurchase did not accrue until that condition precedent occurred. Instead, the Court reached the incoherent conclusion that the Trust's claim accrued back when the Agreements were initially executed, yet could not be brought until notice and the 90-day cure or repurchase period passed—even if the latter came to pass more than six years after the Agreements were executed. Thus, according to the Appellate Division, the Trust managed to file its claim both too early *and* too late.

Although the Appellate Division did not even try to explain that glaring inconsistency, DBSP has attempted to do so by arguing that the condition precedent here is akin to the kind of "pre-suit demand" that need not be made for a claim to accrue. *See* CPLR § 206(a) ("where a demand is necessary to entitle a person to commence an action, the time within which the action must be commenced shall be computed from the time when the right to make the demand is complete"). That argument fails at the outset because DBSP focuses on the wrong condition. As the Appellate Division itself recognized, the condition that triggered the Trust's right to initiate this lawsuit was DBSP's failure to cure or repurchase the defective loans within 90 days, not the Trust's letters notifying DBSP of their existence. That much is clear from the fact that the obligation to cure or repurchase is a self-executing one that arises even if it is DBSP, not the Trust, that discovers the defect. In other words, the Trust need not even make a demand in order for the obligation to arise. Accordingly, the Trust's notice was only part of the equation; the real trigger was DBSP's failure *to respond* to that notice by curing or repurchasing, as the Agreements obligated it to do.

That readily distinguishes the Agreements from the kinds of contracts to which DBSP alludes—*i.e.*, contracts under which "'a right exists, but demand is necessary to entitle a person to maintain an action.'" *Cont'l Cas.*, 77 F.3d at 21 (quoting 1 Weinstein *et al.*, New York Civil Practice ¶ 206.01 (1995)). Here, the Trust had no right at law until DBSP refused to cure or repurchase the loans within the requisite period; only then did the Agreements permit the Trust to bring suit to enforce that distinct contractual obligation. (*See* R.121 (PSA § 2.03 ("*if* the Sponsor does not … cure such defect or breach in all material respects during such period, *the Trustee shall enforce* the obligation of the Sponsor … to repurchase")) (emphasis added).) Once again, that was a critical component of the parties' bargain, as DBSP wanted to ensure that, before facing the prospect of a lawsuit, it would have time to investigate and determine whether a defect could be cured or whether repurchase was the appropriate course. That is exactly the type of *substantive* condition precedent that must occur before a claim can accrue.

This Court's decision in *Kassner* perfectly illustrates the distinction between that kind of substantive condition precedent of time in which to investigate and determine how to respond to a demand, and the procedural demand provisions to which DBSP attempts to analogize. *Kassner* involved a municipal contract under which an engineering corporation seeking payment for its work was required to submit itemized statements that then were "subject to audit and revision by the Comptroller." *Kassner*, 46 N.Y.2d at 547. After learning that the Comptroller had completed its audit and disallowed the bulk of its claim, the corporation basically did nothing until it submitted a requisition for final payment more than six years later for the small portion that the Comptroller had allowed. Only after receiving a "final certificate of payment" for that amount did the corporation sue the city for the portion that the Comptroller had disallowed more than six years earlier.

In holding the action untimely, the Court concluded that the final certificate was not a substantive condition precedent to suit because "the contract does not state that the plaintiff's right to final payment is conditioned upon the filing of a certificate of final payment." *Id.* at 550. Conversely, the Court explained that the Comptroller's audit *was* a substantive condition precedent because both "the plaintiff's right to final payment and the city's obligation to pay were conditioned upon completion of the audit." *Id.* In other words, because the itemized statements, unlike the final certificates, triggered the city's obligation to perform an additional action (the audit), the claim could not accrue until the city both was informed of a claim and completed the requisite audit.

That same basic distinction is apparent in a century's worth of precedent from both this Court and other courts applying New York law. For example, when a contract obligated a bank to both keep notes and deliver them upon demand, this Court readily concluded that "there could be no complete breach of this contract until a demand and an offer to deliver the receipt *and a refusal to surrender the notes*" both occurred. *Ganley v. Troy City Nat. Bank*, 98 N.Y. 487, 495 (1885) (emphasis added). Likewise, when a contract obligated joint owners of a company to make certain of their contributions within 60 days of receiving notice from the co-owner, the claim did not accrue "until 60 days after the plaintiff's written demand for payment" had passed without the defendant making the requisite contribution. *Russack v. Weinstein*, 291 A.D.2d 439, 441 (2d Dep't 2002). And in *Continental Casualty*, the primary insurer "had no right to indemnity under the policies until it satisfied [the notice requirement,] [*a*]*nd*, the reinsurers … rejected the demand (or a reasonable time for paying the losses elapsed)." *Cont'l Cas.*, 77 F.3d at 21 (emphasis added).[8]

---

[8] *See also, e.g.*, *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 318 (1991) (where a stolen object is in the hands of a "good-faith purchaser," replevin claim does not accrue until demand is made and refused, because until that time, "possession of the stolen property by the good-faith purchaser for value is not considered wrongful"); *Fisher v. City of N.Y.*, 67 N.Y.

As all of these decisions reflect, "New York courts do not instinctively apply CLPR 206(a) in every case where a demand is a predicate to suit." *Cont'l. Cas.*, 77 F.3d at 21; *see also Dickinson v. Mayor of N.Y.*, 92 N.Y. 584, 591 (1893) (construing predecessor to CPLR § 206(a)). To the contrary, they closely examine the contract at issue to determine whether it makes the occurrence of an additional condition "an essential element of the plaintiff's cause of action." *Cont'l. Cas.*, 77 F.3d at 21. To be sure, "where the claim is for payment of a sum of money allegedly owed pursuant to a contract," it typically will be "triggered when the party that was owed money had the right to demand payment, not when it actually made the demand." *Hahn*, 18 N.Y.3d at 771 (rejecting argument that demand was a substantive condition precedent where contract contained no language "unambiguously conditioning [the] right to payment on [the plaintiff's demand"). But when, as here, the claim relates to the failure to perform a distinct action that the demand merely serves to *trigger*, then the claim does not and cannot occur until both the demand *and* that distinct act have come to pass.[9]

73, 75-76 (1876) (where statute required land owner to demand compensation from city for land taken and give city a reasonable time to decide whether to pay, claim did not accrue until demand was made and reasonable time period passed without payment); *Rossi v. Oristian*, 50 A.D.2d 44, 46 (4th Dep't 1975) (where stock option agreement "provide[d] that plaintiff might exercise the option at any time," "the statute of limitations did not commence to run until plaintiff made a demand under the option agreement which defendants were obliged to honor").

[9] Of course, even if DBSP were correct that the running of the repurchase period was merely a procedural condition precedent (and it is not), that still would not explain the Appellate Division's illogical conclusion that the Trust's suit was filed both too late *and too early*, as a

That result accords both with the express terms of the Agreements and with the clear intent of the parties embodied in those terms. DBSP specifically bargained for the 90-day period precisely because it did not want to face the prospect of being dragged into court for breach of contract every time a defective loan was discovered. Instead, DBSP wanted to ensure that it would have sufficient time to investigate an alleged misrepresentation and decide what (if any) action to take. If it decided to cure the defect or repurchase the loan, then no breach would occur. Only if it wrongfully decided to do nothing at all would a breach of contract claim ever arise.

C. The Conclusion that this Claim Accrued When DBSP Failed to Cure or Repurchase Is Entirely Consistent with Public Policy.

The conclusion that the Trust's claim accrued only after DBSP breached its obligation to cure or repurchase within 90 days is entirely consistent with the public policy interests that New York contract law reflects. DBSP's contrary argument rests largely on the notion that giving the Agreements their intended meaning would empower plaintiffs to sleep on their rights. In fact, that is yet another concern that the parties themselves already specifically addressed in the contracting process. There is therefore no need for courts to read into the contract

---

procedural condition precedent does not affect the accrual date. *See Hahn*, 18 N.Y.3d at 770-71. DBSP cannot have it both ways—the Trust's claim accrued either when the repurchase obligation was breached or when the Agreements were executed. In any event, the Trust's claim was timely filed either way. *See infra* Section II.

additional time constraints that the parties did not intend. *Cf. Petrella v. Metro-Goldwyn-Mayer, Inc.*, 143 S. Ct. 1962 (2014) (holding that court erred by reading a laches defense into a statute that already "itself takes account of delay").

Like most RMBS contracts, the Agreements expressly obligate the Trustee to "promptly notify" DBSP of any defective loan it should discover. (R.121 (PSA § 2.03(a) ("Trustee shall promptly notify the Sponsor and the Servicer").) That provision ensures that the Trust could not simply sit around and do nothing (like the corporation in *Kassner*) after learning of a defective loan, but rather was obligated to inform DBSP of the defect within a reasonable time frame—an obligation with which the Trustee clearly complied by notifying DBSP of the defective loans mere weeks after learning of their existence. *See, e.g.*, *LaSalle Bank Nat'l Ass'n. ex rel Lennar Partners, Inc. v. Capco Am. Securitization Corp.*, No. 02-cv-9916, 2005 WL 3046292, at *4 (S.D.N.Y. Nov. 14, 2005) (providing notice within two months of learning that filing was defective was reasonable, as Trustee "spen[t] time investigating whether the defect would cause them injury, and whether [it] was a breach of the PSA"); *LaSalle Bank Nat'l. Ass'n v. Lehman Bros. Holdings, Inc.*, 237 F. Supp. 2d 618, 637 (D. Md. 2002) (providing notice within two months of discovery of breaches constituted prompt notice under PSA).[10]

To be sure, this "prompt notice" requirement did not obligate the Trustee to *investigate* the accuracy of DBSP's representations or warranties on any specific time frame. But that is because the Agreements made crystal clear that "[t]he fact that the Purchaser … has failed to conduct any partial or complete examination of the Mortgage Files *shall not affect the right of the Purchaser … to demand repurchase*." (R.292 (MLPA § 4(e)) (emphasis added).) Indeed, if the Trust's right to enforce the cure or repurchase obligation were already conditioned on *discovering* all defective loans within six years, then there would have been little need for a "prompt notice" of discovery requirement in the first place. That the parties included one thus only underscores their understanding that the cure or repurchase obligation was a distinct obligation that would be triggered only by the notice or discovery of a defective loan.

[10] Prompt notice is not a concept unique to the RMBS context; in fact, it is a common contractual backstop against parties sleeping on their rights in many commercial contexts, including insurance contracts and contracts governed by the Uniform Commercial Code. *See, e.g., Am. Home Assur. Co. v. Int'l Ins. Co.,* 90 N.Y.2d 433, 440 (1997) ("most liability insurance contracts contain clauses requiring the insured to provide prompt notice of an occurrence implicating coverage"); UCC § 2-602 ("Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller."); *see also* 70A N.Y. Jur. 2d Insurance § 1970 (prompt notice requires "notice to be given within a reasonable time in view of all the facts and circumstances of each particular case").

DBSP alternatively raises the specter of never-ending RMBS litigation should contracts like this one be read as containing distinct cure or repurchase obligations that may be enforced when they are breached, rather than when agreements are executed. But all sorts of contractual obligations last for the life of the contract—including, for instance, borrower obligations under a 30-year mortgage loan. Indeed, it is common sense for such obligations to last for the lifetime of the contract when, as here, an investor invests only on the expectation the investment will continue to pay off long beyond the first six years. Anyhow, if DBSP wanted to confine all suits relating to its representations or warranties to the first six years of the Agreements, it had ready options for doing so. For instance, it could have bargained for a sunset provision on the cure or repurchase obligation, as some sponsors have done in more recent RMBS agreements, *supra* note 4, or declined to undertake that obligation at all. DBSP did not pursue those options for an obvious reason—because doing so would have substantially hindered its efforts to attract investors legitimately concerned that the representations and warranties would become unenforceable long before the end of the term of the RMBS.

Moreover, DBSP is hardly in a position to complain about the equities when it agreed to accept this continuing obligation precisely because it obviated the need for DBSP itself to conduct expensive and time-consuming loan-by-loan due diligence, rather than largely relying on the assurances of third-party originators.

(*See* R.300 (MLPA § 7(a) (repurchase obligation triggered by notice from Trustee or "[u]pon discovery by the Sponsor").) Of course, nothing precluded DBSP from performing that due diligence anyway and curing or rejecting defective loans at the outset. DBSP instead chose to take a calculated risk that the combination of assurances from third-party originators and a patently incomplete review by an independent due diligence firm was sufficient security against any substantial number of the loans it was selling providing defective. (R.48 (Cmpl. ¶¶ 31-34).) The fact that DBSP's calculated risk has not paid off is hardly a reason to leave the Trust and its investors with no remedy for massive losses attributable to DBSP's actions—particularly when the certificateholders are the ones who expended significant sums conducting the due diligence that revealed the extensive defects that DBSP made little or no effort to discover.

In any event, DBSP's "floodgates of litigation" arguments are largely beside the point as a practical matter. Litigation is already underway as to the vast majority of the RMBS agreements at the height of the financial crisis, and many RMBS sponsors—including some that have acknowledged the continuing nature of their repurchase obligations, *see supra* note 4—already have agreed to large settlements for investor losses attributable to the inclusion of massive numbers of defective loans in the securitizations that they sponsored.[11] Accordingly, the real issue is not the volume of RMBS litigation, but whether a subset of the banks should avoid all liability for not only securitizing thousands of defective loans in the first place, but then refusing to abide by their contractual obligations to fix that problem after investors expended vast amounts of time and resources discovering those defects.

Indeed, to the extent there is any threat to be concerned about here, it is the threat that *DBSP*'s convenient position today poses to the future of the RMBS industry. There has long been and remains today a need to attract private capital to mortgage finance, and enforcing the allocation of risk in the contracts as written is critically important to attracting that capital. If sponsors want to revise these agreements to limit their risk going forward, they certainly can try to bargain to do so. But it would upend housing finance if investors must constantly worry that

[11] *See, e.g.*, JP Morgan Reaches Proposed $4.5 Billion Mortgage Securities Deal for Most Trusts, Wall Street Journal (Aug. 2, 2014), at http://www.reuters.com/article/2014/08/02/us-jpmorgan-mbs-deals-idUSKBN0G14RY20140802; Press Release, "18 Institutional Investors in RMBS Issued by Citigroup Announce Binding Offer by Citigroup to Four RMBS Trustees to Settle Mortgage Repurchase Claims for 68 RMBS Trusts," Gibbs & Bruns (Apr. 7, 2014) (announcing Citi's agreement to pay $1.125 billion to 68 RMBS trusts to settle mortgage repurchase claims). As has been widely reported, large U.S. banks have also entered into massive settlements to resolve other civil claims based on mortgage loan-related conduct. *See, e.g.*, Tom Schoenberg, Hugh Son & David McLaughlin, BofA to Pay $16.65 Billion to End U.S. Mortgage Probes, Bloomberg (Aug. 21, 2014) (discussing settlements), at http://www.bloomberg.com/news/2014-08-21/bofa-agrees-to-pay-16-65-billion-to-end-u-s-mortgage-probes.html; Karen Freifield, Aruna Viswanatha & David Henry, JPMorgan agrees $13 billion settlement with U.S. over bad mortgages, Reuters (Nov. 19, 2013), at http://www.reuters.com/article/2013/11/20/us-jpmorgan-settlement-idUSBRE9AI0OA20131120.

sponsors will seek to nullify the terms of contracts as written years after the fact, simply because they decide that they no longer like the deal that they initially struck. This Court should not introduce such uncertainty into the RMBS market—let alone into New York contract law as a whole.

II. THIS ACTION WAS TIMELY EVEN IF THE CLAIM ACCRUED AT THE TIME OF CONTRACTING.

The Appellate Division not only incorrectly determined *when* the Trust's claim for breach of the obligation to repurchase accrued, but also imposed an unwarranted restriction on *how* claims for breach of the obligation to cure or repurchase may be brought—specifically, on whether they may be initiated by certificateholders on the Trust's behalf. In refusing to accept that the certificateholders had standing to file the notice with summons initiating this suit, the Appellate Division once again failed to abide by the clear terms of the Agreements. The Appellate Division then compounded the problem by inexplicably failing to abide by settled New York law compelling the conclusion that any purported defect in standing of investors suing derivatively on behalf of the Trust was cured once the Trustee substituted in and filed the complaint on behalf of the same Trust.

A. The PSA Clearly Authorizes Certificateholders to Commence an Action on Behalf of the Trust to Enforce the Repurchase Obligation.

The Appellate Division's decision that the certificateholders lacked "standing" to initiate this action is contrary to the plain terms of the PSA. According to Section 12.03 of the PSA, investors may initiate an action on behalf of the Trust when they, among other things, have provided "a written notice of default and of the continuance thereof" to the Trustee. (R.214-15 (PSA § 12.03).) The PSA does not define the term "default," let alone confine it to particular types of defaults by distinct parties. Instead, it simply states that certificateholders must provide the Trust with "written notice of default" before commencing suit.

The Appellate Division nevertheless concluded that the investors' "written notice of default" to the Trustee of the defective loans did not suffice under Section 12.03 because those notices asserted the wrong kind of "default." (R.ix (Slip op. 28).) In the court's view, because the PSA explicitly defines two particular types of default—a "Servicer Event of Default" and a "Master Servicer Event of Default"—those are the only types of "defaults" that a certificateholder may sue to enforce. In other words, in the Appellate Division's view (and, conveniently, DBSP's), a certificateholder cannot under any circumstances bring suit on the Trust's behalf to enforce a contractual obligation on which *DBSP* defaults, but instead may bring suit to enforce only those contractual obligations on which the "servicer" or "master servicer" defaults.

The basic flaw in that argument is obvious at the outset: Section 12.03 does not say that a certificateholder must provide written notice of a "Servicer Event of Default" or a "Master Servicer Event of Default." It says that a certificateholder must provide "written notice of a default." (R.214-15 (PSA § 12.03).) Nowhere in the PSA is the generic term "default" defined—let alone defined to include only servicer or master servicer defaults. Instead, that term is understood as conveying its ordinary and common meaning of any "omission or failure to perform a legal or contractual duty." Black's Law Dictionary (9th ed. 2009). The fact that other provisions of the PSA use the defined and limited terms "Servicer Event of Default" and "Master Servicer Event of Default" provides no basis for importing those distinct terms into the no-action clause, where the parties chose not to use them.

In fact, the PSA conclusively refutes the notion that the parties considered the undefined term "default" synonymous with the defined terms "Servicer Event of Default" and "Master Servicer Event of Default," as the parties used *all three terms in the disjunctive in the same sentence* of some of the PSA's provisions.[12]

[12] *See* R.202 (PSA § 9.02(a)(viii) ("Except as otherwise provided in Section 9.01 of this Agreement: … The Trustee shall not be deemed to have notice of any default, Master Servicer

The parties' use of the restrictively defined "event of default" terms in some provisions but not in the no-action clause demonstrates their clear intent that the term "default" have a different and broader meaning than the distinct terms defined and used exclusively in other provision of the PSA.

That readily distinguishes this case from *Walnut Place LLC* v. *Countrywide Home Loans, Inc.*, 96 A.D.3d 684 (1st Dep't 2012), the only purported support that the Appellate Division supplied for its counter-textual conclusion. There, the governing contract required the certificateholder to notice an "Event of Default," a term that the contract *expressly* defined to include *only* breaches by a servicer of the loans. *Id.* In other words, the no-action clause in *Walnut Place* contained precisely the kind of specificity that the no-action clause in the PSA did not. That the parties to a *different* contract decided to explicitly limit their no-action clause to servicer defaults in no way supports, let alone compels, the conclusion that the parties to *this* contract did the same. The Appellate Division's wooden reliance on *Walnut Place* for some sort of blanket rule about which defaults count thus flies in the face of the bedrock principle "that agreements are construed *in accord with the*

Event of Default or Servicer Event of Default unless a Responsible Officer of the Trustee has actual knowledge thereof or unless written notice of any event which is in fact such a default is received by a Responsible Officer of the Trustee …")); R.200 (PSA § 8.04 ("The Holders representing at least 66% of the Voting Rights evidenced by all Classes of Certificates affected by any default, Servicer Event of Default or Master Servicer Event of Default hereunder may waive such default …")).

parties' intent," the "best evidence of" which "is what they say in their writing." *Greenfield*, 98 N.Y.2d at 569 (emphasis added).

More fundamentally, the Appellate Division's conclusion is at odds with the basic purpose of the no-action clause, which is to define the rights between *the Trust and the certificateholders* when it comes to bringing law suits to enforce contractual obligations, not to protect *DBSP* from having its own contractual obligations enforced. Indeed, "[t]he major purpose of [a no-action clause] is to deter individual debentureholders from bringing independent law suits for unworthy or unjustifiable reasons." *Feldbaum v. McCrory Corp.,* 18 Del. J. Corp. L. 630, 642 (Del. Ch. 1992). Those concerns plainly do not arise when, as here, the Trust subsequently substitutes in for the certificateholders and adopts the lawsuit as its own, thus acknowledging that the suit is both worthy and justified.

Once again, that readily distinguishes this case from *Walnut Place*, as that is the exact opposite of what happened there. In that case, the trustee not only refused to substitute for the investors who had initiated the suit on the trust's behalf, but affirmatively sought court approval to settle those very claims as part of a broader settlement between the trust and the defendant sponsor. *See Walnut Place LLC v. Countrywide Home Loans, Inc.*, 35 Misc. 3d 1207(A) (Sup. Ct. N.Y. Cty. Mar. 28 2012) *aff'd*, 96 A.D.3d 684 (2012). In other words, unlike this case, *Walnut Place* actually did involve the kinds of concerns at the heart of a no action clause—namely, concerns that the certificateholders were *not* acting with the permission or in the interests of the trust.

In short, the PSA clearly gives certificateholders standing to sue on behalf of the Trust where DBSP defaults, so long as they, among other things, provide the Trust with written notice of that default before doing so. That is exactly what the investors did here. After undertaking a massive review of thousands of loans and identifying rampant defects among nearly all of them, the investors informed the Trust, which in turn informed DBSP (which in turn did nothing). Because the investors sufficiently alleged compliance with the no-action clause before bringing suit, they had standing to file a summons with notice on the Trust's behalf to recover the more than $300 million in losses it suffered. And because that summons with notice was filed within six years of the execution of the Agreements, this action is timely even under DBSP's preferred accrual date.

B. The Trustee's Filing of the Complaint Cures Any Defect With Respect to the Certificateholders' Standing.

In all events, even if the certificateholders lacked standing to file the summons with notice (and they did not), any defect with respect to their standing would have been cured when the Trustee filed the complaint—something that occurred *before* DBSP moved to dismiss the claim. "An action is commenced by filing a summons and complaint or summons with notice[,]" CPLR § 304(a); *see Jones v. Bill,* 10 N.Y.3d 550, 554, (2008), and the "filing of the summons with notice or summons and complaint fixe[s] the point at which an action was commenced for statute of limitations purposes," *Bumpus v. N.Y. City Transit Auth.*, 66 A.D.3d 26, 30-31 (2d Dep't 2009). The certificateholders commenced this action on behalf of the Trust by filing a summons with notice on March 28, 2006, the sixth anniversary of the PSA. That claim is now and has always been a claim on behalf of the Trust, first by the certificateholders under PSA Section 12.03 and then by the Trustee under PSA Section 2.03. Either way, it is a claim brought under the PSA on behalf of the Trust for the benefit of all certificateholders.

In concluding that the substitution of the Trustee as plaintiff in the complaint does not allow the court to "deem timely filed the trustee's complaint," (R.ix (Slip op. 28)), the Appellate Division apparently adopted DBSP's argument that substitution and relation back are permissible only where the parties are "closely related" and the substitution corrects an error or technical defect. But that argument fails at the outset because the Trustee and the Trust's certificateholders *are* "closely related" parties seeking to enforce the same claim on behalf of the Trust. To be sure, they do not have the parent-subsidiary relationship present in the case on which the Appellate Division relied that has often been present in relation back cases.[13] But nothing in those cases or anything else in New York law limits substitution and relation back principles to parents and subsidiaries.

To the contrary, where, as here, the plaintiffs are seeking to enforce the same rights against the same defendants and obtain the same relief, it is well-settled that any purported lack of capacity by the first plaintiff to initiate an action to enforce those rights by notice with summons can be and is cured by the interposition of a complaint by another plaintiff with capacity, so long as the defendant does not move to dismiss before that happens. *See, e.g.*, *Snay v. Cohoes Mem'l Hosp.*, 110 A.D.2d 1021, 1022 (3rd Dep't 1985) (action that "was defective when commenced by service the summons and notice due to plaintiff's lack of capacity to sue as administratrix" was no longer defective when substitution of a plaintiff with capacity occurred before defendant moved to dismiss the action); *cf. Burwell v. Yonkers Gen. Hosp.*, 6 A.D.3d 478, 480 (2nd Dep't 2004) (action filed within the statute of limitations by plaintiff lacking capacity to sue as administratrix "cannot be considered a nullity" and should not have been dismissed where defect in capacity was cured by issuance of letters of administration and administratrix's

[13] *See, e.g.*, *HSBC Guyerzeller Bank AG v. Chascona N.V.*, 42 A.D.3d 381, 382 (1st Dep't 2007) (plaintiffs were "affiliates in the HSBC family"); *Am. Home Assur. Co. v. Scanlon*, 164 A.D.2d 751, 752 (1st Dep't 1990) ("National Union and American Home Assurance Company are interrelated companies in that they are both part of the American International Group of insurance companies"); *Frankart Furniture Staten Is. v Forest Mall Assoc.*, 159 A.D.2d 322 (1st Dep't 1990) (plaintiffs were a "business of retail furniture sales on a consignment basis" and the "actual owner of the furniture which is sold by [the business] in a store leased from the defendant").

filing of an amended complaint before defendants moved to dismiss). Here, DBSP did not move to dismiss until *after* the Trust had substituted in and filed a complaint. Accordingly, any purported defect could be and was cured.[14]

That conclusion is entirely in keeping with the "policy considerations underlying Statutes of Limitations." *Duffy v. Horton Mem'l Hosp.*, 66 N.Y.2d 473, 476 (1985). To be sure, statutes of limitation "embody an important policy of giving repose to human affairs" by "afford[ing] protection to defendants against defending stale claims after a reasonable period of time ha[s] elapsed," *Flanagan v. Mount Eden Gen. Hosp.*, 24 N.Y.2d 427, 429 (1969), and protection to "judicial system from the burden of adjudicating stale and groundless claims." *Duffy*, 66 N.Y.2d at 476-77; *see also Gaines v. City of N.Y.*, 215 N.Y. 533, 539 (1915) (Cardozo, J.) ("The important consideration is that by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts."). But that policy clearly was served in this case when the summons with notice put DBSP on notice that the Trust was seeking to enforce DBSP's cure or repurchase obligation—notice that DBSP received even within the

[14] CPLR § 203(f) provides no support for DBSP's contrary argument, as that provision applies only to relation-back of *pleadings*, and a summons with notice is not a "pleading" under the CPLR. *See* CPLR 305 ("Summons"); CPLR § 3011 ("Kinds of Pleadings"); *see also Hutchison v. Hutchison*, 87 Misc. 2d 1071, 1074 (Sup. Ct. Allegany Cty. 1976) ("a summons with notice is not a pleading."), *aff'd* 55 A.D.2d 817 (4th Dep't 1976).

six-year period that it seeks to impose. DBSP cannot seriously contend that it suffered any prejudice from the fact that the summons was filed by certificateholders on behalf of the Trust instead of the Trustee. Accordingly, it would be manifestly *contrary* to public policy to allow DBSP to escape liability for breaching its clear contractual obligation simply because it objects to the identity of the party that provided the notice.

In fact, New York's "savings statute" exists to protect plaintiffs with meritorious claims from arguments based on such technicalities. CPLR § 205(a) "allows a plaintiff to refile claims within six months of a timely prior action's termination for reasons other than the merits or a plaintiff's unwillingness to prosecute the claims in a diligent manner."[15] The basic point of this provision is to serve "the broad and liberal purpose of remedying what might otherwise be the harsh consequence of applying a limitations period where the defending party has had timely notice of the action." *Goldstein v. N.Y. State Urban Dev. Corp.*, 13

[15] CPLR § 205(a) provides in relevant part:

> 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 … 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[.]"

N.Y.3d 511, 521 (2009) (internal quotation marks omitted); *see also Norex Petroleum Ltd. v. Blavatnik*, No. 121, 2014 WL 2883898 (June 26, 2014).

CPLR § 205(a) applies with particular force when, as here, the party purportedly lacking capacity to enforce a particular entity's rights is replaced by another plaintiff with capacity to do so. *See Reliance Ins. Co. v. PolyVision Corp.*, 9 N.Y.3d 52, 57 (2007) (agreeing that "'[t]he common thread running through cases applying CPLR 205 in cases where the error in the dismissed action lies only in the 'identity' of the plaintiff, is the fact that it is the same person or entity whose rights are sought to be vindicated in both actions'").[16] Accordingly, to the extent there was any defect in the summons with notice, CPLR § 205(a) at a minimum would permit the Trustee, whose standing under the PSA is not and cannot be contested, to file a new action and get the benefit of the summons with notice date.[17] That only underscores that the Appellate Division's refusal to recognize the

[16] *See also Carrick v. Cent. Gen. Hosp.*, 51 N.Y.2d 242, 253 (1980) (concluding that 205(a) applies to save action where spouse timely filed an action for wrongful death of spouse but the action was dismissed for lack of appointed administrator and a new action was filed after administrator appointed and statute of limitations had run); *Genova v. Madani*, 283 A.D.2d 860, (3d Dep't 2001) ("CPLR 205(a) applies to the situation where, as in this case, a trustee in bankruptcy commences an action that was previously dismissed based upon a plaintiff's failure to include the underlying claim on a bankruptcy petition"; "the 'broad and liberal purpose of CPLR 205(a) is furthered by permitting the trustee in bankruptcy to pursue the action that was originally erroneously commenced in the name of the bankrupts") (citations omitted).

[17] Indeed, although there was no need to do so since this case was timely brought, in another abundance of caution, on June 18, 2014, the Trustee filed a separate action pursuant to CPLR § 205(a) in the Supreme Court. *See ACE Secs. Corp. v. DB Structured Prods., Inc.*, Index No. 651854/2014 (Sup. Ct. N.Y. Cty.). After this Court granted the Trustee's motion for leave to

Trustee's substitution in and relation back is manifestly contrary to the policies embodied in New York law.

* * *

At bottom, whether the certificateholders had standing to initiate this action on March 28, 2012, is largely beside the point, as the action did not accrue until DBSP breached is repurchase obligation anyway, meaning the lawsuit was timely when the Trust substituted in and filed its complaint. Even were that not the case, however, this action still would be timely, as the certificateholders initiated the action on the Trust's behalf by filing a summons with notice on March 28, 2012, before the six-year statute of limitations that DBSP is pressing had run. To the extent there is any doubt as to whether they had standing to do so (and there is not), the Trust cured any standing problem by substituting in. Accordingly, none of the various theories DBSP has advanced provides any basis for allowing DBSP to escape liability for its clear breach of its obligation to cure or repurchase any and all defective loans.

---

appeal, the parties filed a stipulation that all proceedings in the new action shall be stayed until after the Court decides this appeal. *Id.* (Doc. 40) (July 1, 2014).

CONCLUSION

For the foregoing reasons, the judgment of the Appellate Division, First Department, should be reversed.

Dated: New York, New York
August 26, 2014

Respectfully submitted,

KASOWITZ, BENSON, TORRES
& FRIEDMAN LLP

By: ______________________
Marc E. Kasowitz (mkasowitz@kasowitz.com)
Michael M. Fay (mfay@kasowitz.com)
Zachary W. Mazin (zmazin@kasowitz.com)

1633 Broadway
New York, New York 10019
(212) 506-1700

BANCROFT PLLC

Paul D. Clement (pclement@bancroftpllc.com)
(*pro hac vice*)
Erin E. Murphy (emurphy@bancroftpllc.com)
(*pro hac vice*)
Stephen V. Potenza (spotenza@bancroftpllc.com)

1919 M Street, NW - Suite 470
Washington, DC 20036
(202) 234-0090

Attorneys for Plaintiff-Appellant