To be Argued by:
DAVID J. WOLL
(Time Requested: 30 Minutes)

APL-2014-00156
New York County Clerk's Index No. 650980/12

Court of Appeals

of the

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 DEFENDANT-RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule § 500.1(f) of the Rules of Practice of the Court of Appeals, Defendant-Respondent DB Structured Products, Inc. states that the publicly held indirect corporate parent of DB Structured Products, Inc. is Deutsche Bank Aktiengesellschaft.

The affiliates of DB Structured Products, Inc. are set forth in an addendum hereto. *See infra* page 90, *et seq.*

STATEMENT REGARDING RELATED ACTIONS

Pursuant to Rule § 500.13(a) of the Rules of Practice of the Court of Appeals, Defendant-Respondent DB Structured Products, Inc. states that on June 18, 2014, Appellant commenced an action purporting to "revive" pursuant to CPLR 205(a) the dismissed action that is the subject of this appeal. *See* Compl. ¶ 1, *ACE Securities Corp. Home Equity Loan Trust, Series 2006-SL2 v. DB Structured Products, Inc.*, Index No. 651854/2014 (Sup. Ct. N.Y. Cty.).

Prior to Defendant's response to the complaint, Justice Friedman of the IAS Court entered an order, on the parties' stipulation, which provides that "all proceedings [in such action] shall be stayed until five business days following the issuance of an order by the Court of Appeals determining or otherwise terminating the [instant appeal]." Stipulation and Order, Index No. 651854/2014, NYSCEF Doc. No. 15 (Sup. Ct. N.Y. Cty. Aug. 27, 2014).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

In a unanimous Decision and Order entered on December 19, 2013 (the "Decision"), the Appellate Division, First Department (Tom, J.P., Andrias, Degrasse, and Richter, JJ.) reversed the decision and order of the Supreme Court, New York County (Shirley W. Kornreich, J.) dated May 13, 2013, denying the motion of Defendant-Respondent DB Structured Products, Inc. ("DBSP" or "Respondent") to dismiss with prejudice the complaint of Plaintiff-Appellant HSBC Bank USA, N.A. ("Appellant" or the "Trustee"), and directed entry of judgment in favor of Respondent. In response to the brief of Appellant in support of its appeal from the Decision, Respondent submits this answering brief and respectfully asks this Court to affirm the order and judgment below.

QUESTIONS PRESENTED

1. Whether claims for breach of contractual representations and warranties concerning existing facts accrue when the representations and warranties are made or subsequently, whenever plaintiff demands that defendant remedy the alleged breach and defendant declines to do so.

The First Department correctly held that claims for breach of contractual representations and warranties accrue when the representations and warranties are made.

2. Whether an untimely complaint may be deemed timely by virtue of the earlier filing of a defective summons with notice by parties lacking standing to

assert the claims at issue.

The First Department correctly answered this question in the negative.

INTRODUCTION

The Appellate Division's unanimous ruling was a straightforward application of well-settled principles of New York statute of limitations law governing contract claims. Appellant's claims are based on breaches of contractual representations and warranties made by DBSP that concerned the characteristics of a pool of mortgage loans on March 28, 2006, the relevant closing date for the transaction, and the date of the relevant contract. The representations and warranties, made as of March 28, 2006, were either true or not true as of that date and, thus, any alleged breach occurred on that date as well. The Appellate Division correctly concluded that Appellant's "claims accrued on the closing date of the [contract], March 28, 2006, when any breach of the representations and warranties contained therein occurred," R. viii, and that the six-year limitations period set forth in CPLR 213(2) began to run on that date and expired on March 28, 2012, nearly six months before Appellant asserted its claims, R. ix. In so holding, the Appellate Division declined to adopt the recipe for commercial uncertainty advocated by Appellant, *i.e.*, that the accrual of claims for breaches of representations and warranties be deferred indefinitely until such time in the future that the plaintiff elects to request a remedy for an alleged breach. Appellant's

highly elastic view of the statute is tantamount to there being no limitations period at all and was rightly rejected by the Appellate Division. Instead, the decision appealed from applied a clear, bright-line test for determining the accrual date for claims alleging breaches of representations and warranties that is fully consistent with this Court's precedent and provides the continued certainty and predictability to contracting parties that the statute of limitations is designed to promote. That decision should be affirmed.

The Appellate Division's holding that claims for breaches of representations and warranties accrue as of the date they are allegedly breached—and not on some later date dependent on the vagaries of a plaintiff's unbridled discretion to allege a breach and seek a remedy, no matter how much time has elapsed—is in accord with the vast majority of decisions construing similar loan purchase agreements. *See, e.g.*, *ACE Sec. Corp. Home Equity Loan Trust, Series 2007-HE3 v. DB Structured Prods., Inc.*, --- F. Supp. 2d ----, 2014 WL 1116758, at *6 (S.D.N.Y. Mar. 20, 2014) ("*ACE 2007-HE3*") ("Numerous courts have held that a defendant's failure to repurchase a breached loan does not affect when the plaintiff's claim accrues, and therefore does not constitute a separate breach of contract."); *see generally infra* Section I.D. As those courts have recognized, "[t]his rule prevents a plaintiff from indefinitely extending the statute of limitations by waiting to make a demand." *Wells Fargo Bank, N.A. v. JPMorgan Chase Bank,*

N.A., No. 12-cv-6168(MGC), 2014 WL 1259630, at *3 (S.D.N.Y. Mar. 27, 2014) (citing *Hahn Auto. Warehouse, Inc. v. Am. Zurich Ins. Co.*, 18 N.Y.3d 765, 771 (2012)). Indeed, the Appellate Division's holding is the only result consistent with this Court's foundational statute of limitations jurisprudence. Appellant's proposed approach, on the other hand, contravenes several bedrock principles of New York law as announced by this Court.

Appellant would defer accrual—for years or even decades—based on vague assertions as to when it supposedly could have or should have discovered the breaches alleged, even though the contract was breached, if at all, at its inception. As this Court has made clear, however, "[i]n New York, a breach of contract cause of action accrues at the time of the breach," even where "no damage occurs until later." *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 402 (1993) (quotation omitted). Moreover, New York law does not "extend the highly exceptional discovery notion to general breach of contract actions," as doing so would "effectively eviscerate the Statute of Limitations in this commercial dispute arena." *Id.* at 403-04.

Similarly, Appellant's open-ended, indeterminate approach, which would allow a plaintiff to decide unilaterally when the limitations period begins to run, flies in the face of the rule that statutes of limitations should not be construed so as to allow plaintiffs "to put off the running of the Statute of Limitations

indefinitely." *Snyder v. Town Insulation, Inc.*, 81 N.Y.2d 429, 435 (1993). Where, as here, a contract contains a pre-suit demand requirement, a breach claim accrues when the plaintiff "had the right to demand payment, not when it actually made the demand." *Hahn*, 18 N.Y.3d at 771.

Appellant tries to evade these fundamental rules and formulate an unlimited deferral theory based on the "sole remedy" provisions in the operative agreements. Through those provisions, the parties agreed to limit the remedy available for breach of a representation or warranty to DBSP's repurchase of the breaching loan. Appellant, however, argues that the mere presence of the "sole remedy" provisions postpones accrual of its breach claims indefinitely, until such time as Appellant demands a remedy and DBSP declines to provide it. It is nonsensical to suggest that the contracting parties, by including in their agreement this provision limiting liability, intended to extend the limitations period in perpetuity. Moreover, New York's public policy prohibits parties, at the inception of their contract, from agreeing "in form or effect . . . to extend the period as provided by statute *or to postpone the time from which the period of limitation is to be computed*." *John J. Kassner & Co. v. City of N.Y.*, 46 N.Y.2d 544, 551 (1979) (emphasis in original; internal quotation omitted).

Finally, Appellant argues that its untimely complaint can be deemed timely by virtue of a summons with notice filed by two distressed-debt investment

funds that had no standing to sue and that tried and failed to convince Appellant to bring suit against DBSP within the limitations period. As the Appellate Division correctly found, those distressed debt funds lacked standing to bring suit under the governing agreements, which preclude suits by investors under all but narrowly-defined circumstances which are not present here, and confer the sole authority to bring suit on Appellant, the Trustee. The Appellate Division also correctly rejected Appellant's argument that it should benefit from the filing date of the summons filed by the funds. Where, as here, the only plaintiff with standing makes a conscious decision not to bring suit within the limitations period, the pendency of a defective action filed by parties who lack standing does not create an option for Appellant to change its mind, commence a time-barred action, and yet avoid the consequences of the running of the statute of limitations.

For all these reasons, and as discussed in detail herein, the Appellate Division's ruling dismissing Appellant's claims as time-barred must be affirmed.

COUNTER-STATEMENT OF THE CASE

A. The Agreements

This is one of a number of pending (or recently dismissed) cases that concern loan repurchase (or "put-back") claims arising from alleged breaches of representations and warranties made about the characteristics of the mortgage loans that collateralized a residential mortgage backed securities ("RMBS")

offering (or "securitization"). RMBS are securities issued by a trust that holds a pool of residential mortgage loans. The securities represent interests in the monthly payments made by the borrowers on the mortgage loans, and are structured to provide different levels of risk and return to investors. Most RMBS offerings, including the offering at issue in this case, are publicly offered pursuant to offering documents filed with the Securities and Exchange Commission (the "SEC"), which disclose salient features and risks to potential investors.

To create the RMBS offering at issue, DBSP, its sponsor, purchased loans from non-party originators and sold those loans to ACE Securities Corp. ("ACE"), a securitization conduit known as a "depositor," pursuant to a Mortgage Loan Purchase Agreement dated March 28, 2006 (the "MLPA"). The MLPA contains representations and warranties made by DBSP to ACE concerning the characteristics of the loans, which were expressly made "as of the Closing Date," March 28, 2006.[1] On this same date, ACE transferred the loans and its rights under the MLPA to the trust, ACE Securities Corp. Home Equity Loan Trust, Series 2006-SL2 (the "Trust"), pursuant to a Pooling and Servicing Agreement dated March 1, 2006 (the "PSA"). *See* R. 120-21 (PSA § 2.01). The MLPA and PSA were publicly filed on SEC Form 8K. R. 310-22 (PSA Ex. G).

[1] *See* R. 294 (MLPA § 6) ("The Sponsor hereby represents and warrants to the Purchaser that as to each Mortgage Loan as of the Closing Date . . . ."); R. 290 (MLPA § 1) ("The Sponsor hereby sells, and the Purchaser hereby purchases, on March 28, 2006 (the 'Closing Date'), certain conventional, one- to four-family, fixed-rate, second lien, residential mortgage loans . . .").

The parties to the PSA are ACE (the depositor), Ocwen Loan Servicing LLC (the servicer), Wells Fargo Bank, N.A. (the master servicer and securities administrator), and Appellant (the Trustee). R. 55. ACE's role in the transaction is largely limited to conveying the loans to the Trust, but the servicer, master servicer, and trustee have ongoing responsibilities that are set forth in the PSA. The servicer collects mortgage payments from borrowers and contributes these to the Trust's accounts. R. 128-30 (PSA § 3.01). The master servicer and securities administrator oversees the servicer and is responsible for aggregating and distributing monthly payments and performance reports to investors. R. 154-55 (PSA § 4.01); R. 200-01 (PSA § 9.01). The Trustee has overall responsibility for the Trust and is authorized to bring suit on its behalf. R. 201-02 (PSA § 9.02). DBSP does not have an ongoing role in the securitization; its role was effectively complete at closing, when it transferred (via ACE) its "rights, title and interest in, to and under the Mortgage Loans" and the "contents of the related Mortgage File" to the Trustee and its agents. R. 290 (MLPA § 4(a)); R. 129 (PSA § 2.01).

1. The Representations And Warranties And The Cure-Or-Repurchase Remedy

DBSP's loan-level representations and warranties, made in Section 6 of the MLPA, concern existing characteristics of the mortgage loans, and are all made "as of" March 28, 2006. R. 294 (MLPA § 6). Section 7(a) of the MLPA specifies the remedy for their breach, providing, in relevant part:

> Upon 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 Purchaser or the Purchaser's assignee, transferee or designee, the party discovering such breach shall give prompt written notice to the Sponsor. Within sixty (60) days of its discovery or its receipt of notice of . . . any [ ] breach of representation and warranty, the Sponsor promptly shall . . . cure such . . . breach in all material respects, or in the event the Sponsor cannot . . . cure such . . . breach, the Sponsor 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 . . .[2]

R. 300. Section 7(c) of the MLPA expressly provides that the above constitutes the "sole remedy" for breaches of DBSP's representations and warranties:

> It is understood and agreed that the obligations of the Sponsor set forth in this Section 7 to cure or repurchase a defective Mortgage Loan . . . constitute the sole remedies of the Purchaser against the Sponsor respecting . . . a breach of the representations and warranties contained in Section 5(xii) or Section 6.

Id. Tellingly, Appellant's brief scrupulously avoids using the word "remedy," or describing a breach of representations and warranties with the word "breach." Indeed, the phrase "sole remedy" is found *nowhere* in Appellant's brief.

As noted, the rights of ACE under the MLPA, including DBSP's

[2] The agreements also enabled DBSP to "substitute" a "Qualified Substitute Mortgage Loan" for a breaching loan within the first two years after the closing date. *See* R. 300 (MLPA § 7(a)); R. 121-23 (PSA § 2.03(a) & (b)). The two-year limitation on this alternate remedy is mandated by federal tax law. *See* 26 U.S.C. § 860G(a)(4)(B)(ii) (permitting inclusion of a "qualified replacement mortgage" in a RMBS trust if the mortgage "is received [by the trust] within the 2-year period beginning on the startup day"). Since the repurchase demands at issue here were not made until nearly six years after the closing date, the substitution remedy is not relevant.

representations and warranties, were assigned through the PSA to the Trustee, on behalf of the Trust, on March 28, 2006. Section 2.03(a) of the PSA specifies the manner in which the Trustee may exercise these rights.[3] It provides that "[u]pon discovery or receipt of notice" of a breach, the Trustee is to provide prompt notice to DBSP, "request that [DBSP] cure such . . . breach within sixty (60) days," and, if DBSP does not cure the breach, "the Trustee shall enforce the obligations of [DBSP] under the [MLPA] to repurchase such Mortgage Loan." R. 121-22. The PSA also reiterates that "[i]t is understood and agreed" that this "constitute[s] the sole remedy" for such breaches. *Id.*

2. The No-Action Clause

The PSA also contains a "no action clause" that authorizes investors to bring suit "under or with respect to" the PSA only in strictly limited circumstances:

> 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 to the Trustee such reasonable indemnity as it may require against the costs, expenses and liabilities to be incurred therein or thereby, and the Trustee, for 15 days after its

[3] MLPA § 7(a) also expressly incorporates certain provisions of the PSA, providing that any repurchase will be made "at the Purchase Price (as such term is defined in the [PSA])" and "in a manner consistent with Section 2.03 of the [PSA]." R. 300.

> receipt of such notice, request and offer of indemnity, shall have neglected or refused to institute any such action, suit or proceeding.

R. 214-15 (PSA § 12.03). Such no-action clauses are "standard provisions that are present in many trust agreements," including both pooling agreements such as the PSA, and the indentures that govern most corporate debt issuances. *SC Note Acquisitions, LLC v. Wells Fargo Bank, N.A.*, 934 F. Supp. 2d 516, 531 (E.D.N.Y. 2013) (citation omitted). As discussed further in Section IV.A, *infra*, while the PSA provides for certificateholder notices of default in the case of certain failures of performance by the servicer and master servicer, it neither provides for such notices of "default" with respect to breaches of representations and warranties nor authorizes suit by certificateholders for such breaches.

B. The Proceedings Below

Almost six years after the representations and warranties were made, and well after the crash of the housing market, RMBS Recovery Holdings 4, LLC and VP Structured Products, LLC, affiliates of two distressed debt investment funds, Fir Tree Partners and Värde Partners (the "Funds"), acquired certificates issued by the Trust for the specific purpose of pursuing repurchase claims. *See* R. 355.[4] The

[4] *See also* Asset-Backed Alert, "MBS 'Putback' Investors Target Big Issuers" (Feb. 24, 2012), *available at* http://www.abalert.com/headlines.php?hid=l56068 ("A growing number of hedge funds are scouring the files of securitized home loans, in hopes of reaping rich profits by forcing mortgage-bond issuers to buy back faulty credits. . . . Now, *Fir Tree Partners* . . . and *Värde Partners* are among other fund managers working either on their own or in teams to follow the same course.") (emphases added); Peter Eavis, *Hedge Funds Sniff for Even Bigger Payouts From*

Funds first contacted the Trustee on January 12, 2012. *Id.* Understanding that any contract claims would be time-barred if not filed by the sixth anniversary of the representations and warranties, the Funds requested, among other things, that the Trustee "act expeditiously to request a [tolling] agreement" with DBSP, "*in light of potential expiring statute of limitations deadlines*." R. 359 (emphasis added).

The Funds alleged that 322 loans breached representations and warranties based on the output of a computerized property valuation program known as a "retroactive automated valuation model," run years after the mortgages at issue had been originated, showing property values lower than the original appraised values of the properties as determined by certified appraisers. R. 356. Nearly one month later, on February 8, 2012, the Trustee forwarded the Funds' allegations to DBSP. R. 801. The Trustee, however, did not vouch for their accuracy. To the contrary, the Trustee expressly stated that it had "not conducted any independent review of the facts asserted [by the Funds] and makes no representations as to the accuracy of information contained [in their letter]." R. 801.[5]

On March 8, 2012—well before the expiration of the 60- and 90-day pre-suit cure and repurchase periods—the Funds asked the Trustee to commence

Banks, N.Y. TIMES (Jan. 28, 2014) (discussing Fir Tree's repurchase strategy, and noting that if it succeeds, "the hedge funds stand to make a windfall").

[5] The Trustee forwarded similar allegations from the Funds concerning a further 624 alleged breaches on March 23, 2012, subject to an identical disclaimer. R. 813-14.

litigation against DBSP. R. 26. The Trustee declined to do so, despite the fast-approaching sixth anniversary of the representations and warranties and the Funds' stated concern that the limitations period would soon expire. The Funds took it upon themselves to file a summons with notice on March 28, 2012, the day the limitations period expired, naming DBSP as defendant and the Trustee as "nominal defendant." R. 24. On September 13, 2012—almost six months after the limitations period expired—a complaint was filed under the same index number and by the same lawyers who had represented the Funds, purporting to "substitut[e]" the Trustee as plaintiff. R. 32, 35.[6]

DBSP moved to dismiss the complaint on several grounds, only some of which are at issue in this appeal. As relevant here, DBSP argued that (1) the claims asserted in the complaint accrued as of March 28, 2006, the effective date of the representations and warranties, and therefore became time-barred six years later; (2) the Funds' March 28, 2012 summons was defective because the Funds lacked standing under the no-action clause, and was independently defective because neither the 60-day cure period nor the 90-day repurchase period had lapsed as of the date of its filing; and (3) Appellant's time-barred September 13,

[6] At Appellant's request, DBSP agreed to stipulate to amend the caption of the action "to reflect that the Trustee has sought to substitute as Plaintiff in this action in place of [the Funds]." *See* Stipulation and Order, Index No. 650980/2012, NYSCEF Doc. No. 15, at 2 (Sup. Ct. N.Y. Cty.). The stipulation expressly provided that "this amendment will not in any way prejudice [DBSP's] right to challenge the Trustee's substitution." *Id.* The IAS Court approved the stipulation on November 27, 2012. *See id.* at 1.

2012 complaint could not be deemed timely by virtue of the summons' filing date.

1. The IAS Court's Order

The IAS Court heard argument on DBSP's motion to dismiss on April 30, 2013. Ten days later, on May 10, 2013, Justice O. Peter Sherwood issued a ruling dismissing a materially similar repurchase case. Like the instant action, that case had been initially commenced by affiliates of Fir Tree Partners, and Appellant, in its capacity as securitization trustee, had "substituted" itself as plaintiff more than six years after the effective date of the representations and warranties at issue. *See Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2005-S4 v. Nomura Credit & Capital, Inc.*, 39 Misc.3d 1226(A), 2013 WL 2072817, at *6 (Sup. Ct. N.Y. Cty. May 10, 2013) ("*Nomura 2005-S4*"). *Nomura 2005-S4* held that "the repurchase obligation . . . is merely a remedy," not "a duty independent of the Mortgage Representation breach of contract claims," and therefore that "[t]he statute of limitations beg[an] to run from the date of the first alleged breach, not from the time plaintiff chooses to seek a remedy." *Id.* at *9-10 (internal citation omitted). *Nomura 2005-S4* also held that the Fir Tree affiliate lacked standing to sue under the relevant no-action clause, and rejected Appellant's relation-back argument, finding that substitution and relation-back were only proper for "closely related" parties, and that no such relationship existed between the Fir Tree affiliate and Appellant. *Id.* at *8.

The IAS Court issued its ruling in this case three days later. The IAS Court found that it was "undisputed that [the Funds] lacked standing to maintain this action under the PSA's no-action clause." R. 11. The IAS Court, however, concluded that Appellant's claims did not accrue "until DBSP fail[ed] to timely cure or repurchase a loan," so the statute of limitations did not begin to run until 2012—rendering Appellant's complaint timely regardless of its relation-back to the Funds' summons. R. 15-17. The IAS Court did not reference Justice Sherwood's contrary ruling, but recognized that two federal courts had also "dealt with this exact situation" and reached the opposite conclusion. The IAS Court stated it believed those decisions had "misappli[ed] New York law." R. 14.

The IAS Court's accrual holding arose, in part, from a misinterpretation of the relationship between the MLPA and PSA. The IAS Court reasoned that the "mere fact that a Representation is false does not mean that DBSP 'breached' the PSA," because "[u]nder the PSA, DBSP has no duty to ensure that the Representations are true." R. 15. As a result, the IAS Court concluded that "the *only* contractual wrong that DBSP could commit is failure to abide by Section 2.03 [of the PSA]." *Id.* In so holding, the IAS Court failed to understand that DBSP's representation and warranty liability arises under the MLPA, and the "fact that a Representation is false" is unquestionably a breach of that agreement. Conversely, DBSP cannot "breach" Section 2.03 of the PSA, which does not itself create any

potential liability for DBSP, but instead simply authorizes the Trustee to "enforce the obligations of [DBSP] under the [MLPA]." R. 121-22 (PSA § 2.03(a)).[7]

The IAS Court also hypothesized, without citing any authority or the record, that "[t]he Representations and the Repurchase Protocol functioned as insurance for the Trustee and was likely priced accordingly," and therefore relied on the inapposite insurance law principle that "a reinsurer does not breach its obligations to the insurance company until the reinsurer rejects the insurance company's demand." R. 15-16. As discussed *infra* Section II.A, the insurance analogy has no basis.

Finally, the IAS Court reasoned that if the Trustee's claims accrued when the representations and warranties were breached, this would create an "implied duty to conduct constant due diligence . . . to ensure that lies are ferreted out" before the statute of limitations expires. R. 16. This "constant due diligence"

[7] The IAS Court also construed the PSA as imposing a multi-step demand process under which Appellant is "not *entitled* to . . . make a repurchase demand until . . . the cure period lapses," and thus reasoned that the Trustee's claims could not accrue until it became so entitled. R. 15. Neither Appellant nor any other court has adopted this interpretation; the record demonstrates that Appellant never sent DBSP separate "cure demands" and "repurchase demands," R. 800-904, and the MLPA is absolutely clear that no such separate demands are required. *See* R. 300 (MLPA § 7(a)) ("[T]he Sponsor promptly shall . . . cure such . . . breach in all material respects, or in the event the Sponsor cannot . . . cure such . . . breach, the Sponsor shall . . . repurchase the affected Mortgage Loan"). The IAS Court's reasoning in this regard seems to have derived from a misreading of the language in PSA § 2.03 providing that, "if the Sponsor does not . . . cure such . . .breach [in 60 days], the Trustee shall enforce the obligations of the Sponsor under the [MLPA] to repurchase such Mortgage Loan." R. 121-22. This statement, however, simply reflects that Appellant cannot prematurely "enforce the obligation[ ] . . . to repurchase" while the cure period is still running. It does not create a separate demand requirement.

concern misapprehended the fact that the representations and warranties concerned static characteristics of the loans, as they existed when the representations and warranties were made. Nonetheless, the IAS Court decided that having the breach claims accrue when the representations and warranties were allegedly breached would be "squarely at odds with Section 7(a) of the MLPA" (R. 16), which states that DBSP's "representations and warranties . . . shall not be impaired by any review or examination of loan files . . . or any failure on the part of the Sponsor or the Purchaser to review or examine such documents." R. 300. As discussed further *infra* Section I.C.4, this is a standard term in sales contracts, which ensures that claims for breaches of representations and warranties will not be subject to defenses based on knowledge, reasonableness of reliance, or due diligence. It has nothing whatsoever to do with accrual, and does not (and could not as a matter of public policy) relieve its beneficiary of the obligation, imposed on all litigants, to bring any suit within the time prescribed by the statute of limitations.

2. The Appellate Division's Decision

In a Decision and Order issued on December 19, 2013, a unanimous panel of the Appellate Division, First Department, reversed the IAS Court, granted DBSP's motion, and dismissed the action in its entirety. The Appellate Division ruled that "[t]he motion court erred in finding that plaintiff's claims did not accrue until defendant either failed to timely cure or repurchase a defective mortgage

loan. . . . To the contrary, the claims accrued on the closing date of the MLPA, March 28, 2006, when any breach of the representations and warranties contained therein occurred." R. viii. In so holding, the Appellate Division relied on this Court's decision in *Ely-Cruikshank* for the basic premise that contract claims accrue at the time of breach, 81 N.Y.2d at 402, and its own decision in *Varo, Inc. v. Alvis PLC*, which applied this rule in a case concerning breaches of representations and warranties. 261 A.D.2d 262, 267-68 (1st Dep't 1999). The Appellate Division also relied on the Southern District ruling in *Structured Mortgage Trust 1997-2 v. Daiwa Finance Corp.* (which the IAS Court declined to follow). *Daiwa* held that loan repurchase claims accrued when the underlying representations and warranties were breached, and rejected the argument that a pre-suit demand requirement deferred accrual, noting that such a construction of the contract would effectively "impose[ ] the otherwise rejected accrual-at-injury rule." No. 02-cv-3232(SHS), 2003 WL 548868, at *3 (S.D.N.Y. Feb. 25, 2003).

Having found that Appellant's claims accrued when the representations and warranties were breached, the Appellate Division considered whether Appellant's complaint, which was filed approximately six months after the limitations period expired, was rendered timely by the Funds' summons with notice. The Appellate Division found that it was not, for two independent reasons.

First, the Appellate Division found that because "the 60– and 90–day

periods for cure and repurchase had not yet elapsed" as of the date the summons was filed, the Funds had "fail[ed] to comply with a condition precedent to commencing suit," and this "rendered their summons a nullity." R. ix. The Appellate Division relied on its decision in *Southern Wine & Spirits of America, Inc. v. Impact Environmental Engineering, PLLC*, which held that a suit brought in violation of an "express, bargained-for condition precedent to [plaintiff's] right to bring an action" could not be cured by subsequent compliance and the filing of an amended complaint. 80 A.D.3d 505, 505-06 (1st Dep't 2011). The *Southern Wine* court reasoned that "[r]elation back . . . is dependent upon the existence of a valid preexisting action," and an action brought in contravention of an express contractual prerequisite to suit could not be considered a "valid" action. *Id.*

Second, the Appellate Division held that, "[i]n any event, the [Funds] lacked standing to commence the action" under the no-action clause, because a prerequisite to such an action is provision of a notice of default, but "the PSA does not authorize certificate holders to provide notices of 'default' in connection with the sponsor's breaches of the representations." R. ix.[8] The Appellate Division cited its prior ruling in *Walnut Place LLC v. Countrywide Home Loans, Inc.*, where it had reached the same conclusion in another certificateholder-initiated repurchase

[8] As noted above, the IAS Court had itself found it "undisputed" that the Funds lacked standing. Indeed, DBSP is not aware of any case in which a court has affirmatively found that a certificateholder had standing to pursue repurchase claims. *See infra* Section IV.A.

case. 96 A.D.3d 684, 684-85 (1st Dep't 2012). The Appellate Division also rejected Appellant's contention that "the substitution of the trustee as plaintiff [could] permit [the court] to deem timely filed the trustee's complaint," distinguishing prior First Department cases that had permitted substitution where the wrong corporate affiliate had been mistakenly named as plaintiff. R. ix.

ARGUMENT

I. APPELLANT'S CLAIMS ACCRUED UPON THE ALLEGED BREACH OF THE REPRESENTATIONS AND WARRANTIES

A. Contract Claims Are Subject To A Six-Year Statute Of Limitations That Runs From The Date Of Breach

In New York, breach of contract claims are subject to a "generous six-year [ ] limitations period." *In re R.M. Kliment & Frances Halsband, Architects*, 3 N.Y.3d 538, 539 (2004); CPLR 213(2). The limitations period begins to run when the contract is breached, not when the plaintiff discovers the breach. *See, e.g., Ely-Cruikshank*, 81 N.Y.2d at 403 ("[E]xcept in cases of fraud where the statute expressly provides otherwise, the statutory period of limitations begins to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury.") (quotation omitted).

This Court has expressly declined to impose a discovery rule on contract claims, explaining that doing so would "effectively eviscerate the Statute of Limitations" by replacing the "objective, reliable, predictable and relatively

definitive rules that have long governed" the limitations period for contract claims with rules "entirely dependent on the subjective equitable variations of different Judges and courts." *Id.* at 403-04.

This Court has also repeatedly stated that statutes of limitations reflect a legislative balancing of competing interests, and should therefore be applied in a straightforward and predictable manner. *See, e.g.*, *Zumpano v. Quinn*, 6 N.Y.3d 666, 673 (2006) ("Although sometimes imposing hardship on a plaintiff with a meritorious claim, statutes of limitations reflect the legislative judgment that individuals should be protected from stale claims. They cannot be deemed arbitrary or unreasonable solely on the basis of a harsh effect.").[9]

This Court has also recognized that while "the Statute of Limitations is generally viewed as a personal defense 'to afford protection to defendants against defending stale claims,' it also expresses a societal interest or public policy 'of giving repose to human affairs.'" *Kassner*, 46 N.Y.2d at 550 (quoting *Flanagan v. Mt. Eden Gen. Hosp.*, 24 N.Y.2d 427, 429 (1969), *and Schwartz v. Hayden*

[9] *See also Snyder*, 81 N.Y.2d at 435-36 ("Because of [the] competing policy considerations, we have been reluctant to modify the law governing limitations, even when a party's case seems particularly compelling and we have consistently stated that the responsibility for balancing the equities and altering Statutes of Limitations lies with the Legislature."); *Gregoire v. G.P. Putnam's Sons*, 298 N.Y. 119, 125 (1948) ("The statute [of limitations] . . . is a declaration of public policy governing the right to litigate; it came into our law by way of the Legislature, not through the judicial process. At times, it may bar the assertion of a just claim. Then its application causes hardship. The Legislature has found that such occasional hardship is outweighed by the advantage of outlawing stale claims.").

Newport Chem. Co., 12 N.Y.2d 212 (1963)). Therefore, "parties are not entirely free to waive or modify the statutory defense." *Id.* While agreements to shorten the statute of limitations are generally enforceable, parties do not have the same freedom to agree "in form or effect . . . to extend the period as provided by statute *or to postpone the time from which the period of limitation is to be computed*." *Id.* at 551 (emphasis added). Such agreements are unenforceable as a matter of public policy if they are "adopted at the inception of the contract," and are only permissible if they are entered into separately, "after the cause of action has accrued." *Id.* at 551-52 (citing GEN. OBLIG. L. § 17-103(1)).

These rules apply regardless of whether they have effects that seem harsh or inequitable in a particular circumstance. Moreover, as discussed below, no such circumstance is presented in this case, where the party seeking to avoid the statute of limitations is acting at the behest of late-buying distressed debt investors, had both the means and ability to discover its claims (such as they are) as administrator of the Trust and its assets, and in fact, was advised of its claims' existence before the limitations period expired and made a conscious decision not to sue.

In summary, under settled New York law, the statute of limitations for contract claims is six years, running from the date of breach, not the date of discovery, which reflects a legislative determination concerning a matter of public policy which neither the courts nor private parties are free to revise or undo.

B. Claims For Breaches Of Representations And Warranties Accrue No Differently Than Other Contract Claims

Like other contract claims, claims for breaches of representations and warranties are subject to CPLR 213(2)'s six-year statute of limitations. *See, e.g.*, *Varo*, 261 A.D.2d at 265, 268 ("The complaint seeks relief based on representations made in the stock purchase agreement. . . . Thus, the action sounds in contract and, under CPLR 213(2), the applicable Statute of Limitations is six years."). Where, as here, representations and warranties concern the characteristics of their subject as of the date they are made, they are breached, if at all, on that date. *See, e.g.*, *ABB Indus. Sys. v. Prime Tech., Inc.*, 120 F.3d 351, 360 (2d Cir. 1997) (under CPLR 213(2), a warranty of compliance with environmental laws "was breached, if at all, on the day [the contract] was executed, and therefore, the district court correctly concluded that the statute began to run on that day"); *W. 90th Owners Corp. v. Schlechter*, 137 A.D.2d 456, 458 (1st Dep't 1988) ("The representation . . . was false when made. Thus, the breach occurred at the time of the execution of the contract.").

The principle that claims for breaches of representations and warranties accrue as of the date they are made is a long-settled, bright-line rule that applies regardless of whether potential defects are latent or difficult to discover, and irrespective of information asymmetries between any seller and buyer. *See, e.g.*, *Liberty Mut. Ins. Co. v. Sheila-Lynn, Inc.*, 185 Misc. 689, 692-93 (1st Dep't App.

Term 1945) ("[A] cause of action for breach of warranty of quality and fitness normally accrues at the time of the sale, notwithstanding the fact that the purchaser may not then be aware of the existence of any cause of action"; the contrary rule of accrual upon discovery "seems untenable in light of the authorities in this State"); *Allen v. Todd*, 6 Lans. 222, 224 (4th Dep't 1872) ("Inability to ascertain the quality or condition of property warranted to be, at the time of the sale, a particular quality or in a certain condition, has never been allowed to change the rule as to the time when a right of action for a breach of the warranty occurs.").

This principle also holds in cases where the subject of the representations and warranties is intended to exist, or to remain in use, for longer than the six-year limitations period. *See, e.g.*, *Rosen v. Spanierman*, 894 F.2d 28, 32 (2d Cir. 1990) ("Plaintiffs' argument that New York law deems a warranty to explicitly extend to the future when the nature of the product implied performance over an extended period of time also is without merit."); *cf. Stumler v. Ferry-Morse Seed Co.*, 644 F.2d 667, 671 (7th Cir. 1981) ("The mere expectation, however reasonable, that due to the type of product involved the statute of limitations on the warranty claims would not begin to run until discovery of the defect rather than on delivery does not fit such a claim into the exception to the general rule [of accrual on delivery, not discovery].") (applying Indiana U.C.C.). Thus, the fact that the representations and warranties at issue here concerned mortgage loans with (nominal) 30-year

terms does not suggest that the statute of limitations would operate any differently.[10] *See, e.g.*, *Citizens Utils. Co. v. Am. Locomotive Co.*, 11 N.Y.2d 409, 417 (1962) (opinion of Desmond, C.J.) ("There is, of course, an element of unfairness in requiring a purchaser to sue within six years after purchase to enforce an agreement that the article which is the subject of the sale will last for 30 years. But this is the same kind of 'unfairness' that may result from almost any Statute of Limitations. Indeed it results from the fundamental New York theory of limitations as expressed in article 2 of the Civil Practice Act which makes all limitations except a particular specified one run from breach and not from discovery.").

C. Cure Or Repurchase Is Appellant's Sole Remedy For Breaches, Not A Separate Promise Of Future Performance By DBSP

1. The Agreements' Repurchase Provisions Are Not Independent Of DBSP's Representations And Warranties

Appellant argues that "[t]he timeliness of the claim at issue here follows directly from the breach alleged," and that the Appellate Division's holding "conflates the veracity of the underlying representations and warranties with DBSP's distinct and continuing obligation to cure or repurchase." (Br. 21-22.) Not so. A breach of express contractual representations and warranties, and the contractually specified sole remedy for that breach, are not "two distinct legal obligations" (Br. 27); they are two parts of the same cause of action, as a claim for

[10] As discussed further in Section III.A, here the parties expected the mortgage loans to exist for significantly shorter periods of time than their stated maximum terms.

breach of contract consists of multiple elements, *i.e.*, "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *E.g.*, *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010). The alleged falsity of the representations and warranties constitutes the element of "breach," and the sole remedy provision defines the "damages" that Appellant can recover for that breach; viewing the elements of "breach" and of "damages" as two parts of one unitary cause of action, as did the Appellate Division, is the only approach that makes any sense.[11]

In other words, Appellant has a single contract claim. To prove it, Appellant must establish a breach of DBSP's representations and warranties. If proven, Appellant will be entitled to the "sole remedy" for such breaches—the reconveyance of the breaching loan to DBSP in exchange for DBSP's payment to Appellant of the contractually specified "Purchase Price" for that loan. Appellant cannot avoid the statute of limitations by pleading its claim in a way that superficially subsumes the "breach" element (the element that triggers accrual) into the "damages" element (which is irrelevant to accrual). Indeed, while the contracts at issue repeatedly state that a "breach" occurs whenever a representation or

[11] Appellant states that "[t]his is a case about the latter," *i.e.*, the supposed "distinct and continuing repurchase obligation" (Br. 22), implying that there could also be cases about the former, *i.e.*, the "veracity of the underlying representations and warranties" (*id.*), but this, of course, is nonsense—Appellant could not bring a case about "the veracity of the underlying representations and warranties" without implicating the sole repurchase remedy, and conversely, cannot invoke the "repurchase obligation" absent a breach of representation or warranty.

warranty is false (*see, e.g.*, R. 300 (MLPA § 7(a)); R. 121-22 (PSA § 2.03(a)) (referring to the "breach of any representation or warranty . . . in respect of any Mortgage Loan")), they do not similarly identify the failure to repurchase as a "breach." Appellant's use of the term "breach" to refer to failures to repurchase is entirely of its own making and is without any basis in the contracts. *See Schram v. Cotton*, 281 N.Y. 499, 507 (1939) (rejecting, as "exalt[ing] form over substance," plaintiff's attempt to re-characterize its claim in order to extend the limitations period); *Brick v. Cohn-Hall-Marx Co.*, 276 N.Y. 259, 264 (1937) ("[I]n applying the Statute of Limitations we look for the reality, and the essence of the action.").[12]

Indeed, if the contracts did not include a "sole remedy" provision, Appellant would have not even the germ of an argument that its claims did not accrue at closing. Its claims would undoubtedly be for breaches of representations and warranties—*not* for the failure to remedy those breaches voluntarily or upon demand. They would accrue the moment they were made and expire six years later. *ABB Indus. Sys.*, 120 F.3d at 360 (limitations period for warranty that "was breached, if at all, on the day [the contract] was executed, . . . began to run on that

[12] *See also Rutzinger v. Lewis*, 302 A.D.2d 653, 654 (3d Dep't 2003) ("In classifying a cause of action for statute of limitations purposes, the controlling consideration is not the form in which the cause of action is stated, but its substance."); *Green Bus Lines, Inc. v. Gen. Motors Corp.*, 169 A.D.2d 758 (2d Dep't 1991) ("In applying the Statute of Limitations, courts must look to the essence of the claim, and not the form in which it is pleaded."); *accord Hicks v. Armstrong*, 253 F.3d 1072, 1076 (8th Cir. 2001) (rejecting claim that was "simply an attempt at artful pleading to extend the limitations period"); *Venegas v. Wagner*, 704 F.2d 1144, 1146 n.1 (9th Cir. 1983) ("The statute of limitations cannot be avoided merely by artful pleading.").

day"); *W. 90th Owners Corp.*, 137 A.D.2d at 458 (same). As such, Appellant's accrual argument leads to the absurd result that a liability-limiting "sole remedy" provision has the collateral consequence of grossly expanding the defendant's liability by nullifying its statute of limitations defense.[13] This proposition defies both logic and established law since, as has been noted, parties are not entitled, as a matter of policy, to extend the limitations period indefinitely at the inception of their contract. Such a result would also be incompatible with numerous New York precedents permitting contracting parties to limit the relief available in the event of a breach of contract. *See, e.g.*, *Met. Life Ins. Co. v. Noble Lowndes Int'l*, 84 N.Y.2d 430, 436 (1994) ("A limitation on liability provision in a contract represents the parties' agreement on the allocation of the risk of economic loss . . . which the courts should honor."); *Rubinstein v. Rubinstein*, 23 N.Y.2d 293, 298 (1968) (express "sole remedy" provisions are enforceable).

2. *Bulova* Does Not Support Appellant's Argument

Appellant's primary authority for its contention that the repurchase remedy is a "distinct and continuing obligation" is *Bulova Watch Co. v. Celotex Corp.*, 46 N.Y.2d 606 (1979). *Bulova* offers Appellant no support. *Bulova* involved both a sales contract for roofing materials and separate "Guaranty Bonds"

[13] *Cf., e.g.*, *Kassner*, 46 N.Y.2d at 552 (rejecting argument that "standard clause" in parties' contract deferred accrual, noting that "[i]t is doubtful that the parties actually intended to postpone the accrual of the cause of action or anticipated that this provision would ever be employed to extend the expiration of the statutory period").

under which the defendant and a surety (who was not a party to the sales contract) agreed to provide repairs to the roof for any reason within a specified 20-year period. These Guaranty Bonds were offered "as a special, separate and additional incentive to purchase" the roofing materials. *Id.* at 610-11. The buyer sued on the sales contract for breach of the implied warranty of fitness, and separately for breach of the Guaranty Bonds. *Id.* at 609. This Court concluded that any implied warranty claim "arose at the time of sale" and was therefore time-barred. *Id.* at 610. This Court separately concluded, however, that claims under the Guaranty Bonds, which related to the defendants' failure to make repairs were timely (to the extent these failures occurred in the six years prior to suit) because the Guaranty Bonds were contracts to render future performance during the specified 20-year period and were therefore breached when the defendant failed to render the promised service. *Id.* at 611.

Plaintiff seeks to analogize the repurchase provisions at issue in this case to the Guaranty Bonds, but this analogy holds no water. Under the Guaranty Bonds, the *Bulova* defendants simply promised to provide services as needed to repair damage resulting from "ordinary wear and tear by the elements." *Bulova*, 46 N.Y.2d at 609. The obligation to provide repairs was not in any way connected to or dependent on a breach of warranty. *See id.* at 611-12 & 612 n.3. It certainly was not, as here, specified to be the "sole remedy" for breaches of warranties (none

of which were made in the Guaranty Bonds). The repurchase provision at issue here would be analogous to the Guaranty Bonds had DBSP agreed to repurchase any loan that experienced a loss, for whatever reason, for a specified period of time into the future, but that is clearly not what the agreements here provide.

In its attempt to fit this case to the procrustean bed of the Guaranty Bonds, Appellant also argues that "the obligation to cure or repurchase," like the Guaranty Bonds, "operated as a 'special, separate and additional incentive' to the Trust and its investors to invest." (Br. 25, quoting *Bulova*, 46 N.Y.2d at 611.) Appellant provides no support whatsoever for this assertion (counterintuitive for a "sole remedy" provision). Indeed as the *sole* remedy for breaches of representations and warranties, the cure-or-repurchase remedy is "separate" from, and "additional" to, precisely *nothing*—Appellant has *no other rights or remedies* with respect to DBSP's representations and warranties. In any event, *Bulova* cannot stand for the proposition that if a contract term functions as a "special, separate and additional incentive" to one party, that party's contract claims will for that reason have a deferred accrual date, an impossibly vague standard that could be applied to any number of negotiated contractual provisions.[14]

[14] Appellant's argument is also wholly circular: it assumes that the repurchase provisions extend the statute of limitations, thus making them a "special incentive" for Appellant. (Br. 24-25.) It then treats the conclusion that the repurchase provisions are a "special incentive" as evidence that they extend the statute of limitations. (Br. 25.) Without first assuming the ultimate conclusion that the repurchase provisions extend the statute of limitations—on no basis other than Appellant's *ipse dixit*—there is no reason to view these provisions as a "special incentive."

Appellant's reading of *Bulova* is contrary to settled law. Similar to the arrangement at issue here, sales contracts commonly limit purchasers' remedies for breach of warranty to repair or replacement. Under Appellant's argument, such contractually specified remedies for breach of warranty, contemplating some form of specific performance, would constitute "separate agreements" for future performance of services which would not be breached until the seller failed or refused to provide the specified remedy. It is, however, well-established that such "repair or replace" provisions are *not* separate promises of future performance and do not delay or restart the statute of limitations.[15] Instead, they are merely remedies, and "[i]f the promisor does not abide by the promise to repair, then the promisee has a cause of action for the underlying breach of warranty for the defective product"—not for failure to remedy. *Neuhoff v. Marvin Lumber & Cedar Co.*, 370 F.3d 197, 201 (1st Cir. 2004). As one court explained:

> Plaintiff's [ ] argument that the one year repair or replacement provision constitutes a separate contract, that was breached separately from the contract of sale, is without merit. Plaintiff's argument is in essence that by failing to remedy its first breach,

[15] *See generally* 18 WILLISTON ON CONTRACTS § 52:46, Warranty as to future performance (4th ed.) ("To be deemed a warranty as to future performance, the warranty must expressly provide some form of guarantee that the product will perform in the future as promised; thus, *a seller's mere commitment to repair or replace the goods if they fail to perform does not fall within this category*.") (emphasis added); *Schwatka v. Super Millwork, Inc.*, 106 A.D.3d 897, 899 (2d Dep't 2013) ("A warranty of future performance is one that guarantees that the product will work for a specified period of time. However, *warranties to repair or replace a product in the event that it fails to perform, without any promise of performance, do not constitute warranties of future performance*.") (emphasis added; internal alterations, quotation marks and citations omitted).

> the defendant committed a second breach, giving rise to a brand new cause of action and starting anew the limitations period. The fallacy of this approach is apparent. If we adopted plaintiff's position, limitations periods could be extended for virtually infinite time. We doubt that the Legislature intended such a result.

Centennial Ins. Co. v. Gen. Elec. Co., 253 N.W.2d 696, 697 (Mich. Ct. App. 1977); *accord New Eng. Power Co. v. Riley Stoker Corp.*, 477 N.E.2d 1054, 1058 (Mass. App. Ct. 1985) ("[W]hen there are a warranty and a promise to repair, the remedy of first resort is the promise to repair. If that promise is not fulfilled, then the cause of action is the underlying breach of warranty. The reasoning is sound and particularly pertinent here, where [plaintiff's] argument seems structured to avoid the consequences of its failure timely to commence suit.").

Courts applying New York law consistently follow this rule and reject arguments that, like Appellant's, seek to transform repair or replace remedies into future performance warranties in order to delay or restart the statute of limitations. *See, e.g.*, *Jackson v. Eddy's LI RV Ctr., Inc.*, 845 F. Supp. 2d 523, 534 (E.D.N.Y. 2012) ("[T]he written warranties . . . are limited to repair or replacement of warranted parts. Such 'repair or replace' language neither delays accrual nor creates a warranty separate and apart from the product warranty. Instead, such warranties do nothing more than limit Plaintiff's remedy in the event of breach."); *Statler v. Dell, Inc.*, 775 F. Supp. 2d 474, 482 (E.D.N.Y. 2011) ("Plaintiff's warranty claims accrued at the time of delivery" because "[t]he 'repair or replace'

language of the Warranty is simply language that limits Plaintiff's remedy in the event of breach—it does not create a warranty separate and apart from the product warranty"); *Brainard v. Freightliner Corp.*, No. 02-cv-0317E(F), 2002 WL 31207467, at *3 n.12 (W.D.N.Y. Oct. 1, 2002) ("The distinction between 'repair or replace' warranties and warranties extending to future performance is well recognized.") (collecting New York authorities).[16]

3. Appellant's "Continuing Obligation" Cases Are Inapposite

Appellant cites a handful of cases (Br. 23-24 & n.5) for the proposition that if a party agrees to some form of performance to be rendered in the future, it will ordinarily breach that agreement only when it fails to provide the promised performance. That point, while undisputed, is irrelevant. *None* of Appellant's cases involves contracts containing representations and warranties or contractually specified remedies for their breach. Rather, they, like *Bulova*, concern contractual arrangements where a party agrees to provide a periodic service in the future, one that is neither dependent upon a pre-existing representation or warranty, nor specified as a remedy for its breach.[17]

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[16] The cited cases concern the sale of goods and therefore apply Article 2 of the Uniform Commercial Code, which imposes its own four-year statute of limitations. *See generally* N.Y. U.C.C. § 2-725 (Statutes of Limitations in Contracts for Sale). While the UCC altered pre-existing common law in certain respects, the UCC's rules for the accrual of warranty claims "[are] in accord with the New York law." N.Y. U.C.C. § 2-725, *New York Annotations*, at (3).

[17] *New York Central Mutual Fire Insurance Co. v. Glider Oil Co.* (Br. 23), concerned a contract that obligated the defendant to install a gas tank, periodically provide gas, and service the tank as

Appellant also relies on several cases where the promised future performance under the contract at issue was the periodic payment of money. In none of these cases, however, was the payment of money a remedy for a *breach*. Rather, these cases all concern inapposite circumstances where the *performance* due was the periodic payment of money, such as the payment of monthly dues to a homeowners association, *see Meadowbrook Farms Homeowners Ass'n v. JZG Resources, Inc.*, 105 A.D.3d 820 (2d Dep't 2013); the payment of profits generated from income-producing property, *Knobel v. Shaw*, 90 A.D.3d 493 (1st Dep't 2011); the payment of royalties based on record sales, *Sirico v. F.G.G. Productions, Inc.*, 71 A.D.3d 429 (1st Dep't 2010); or the payment of another party's debts on an annual basis, *Orville v. Newski, Inc.*, 155 A.D.2d 799 (3d Dep't 1989). In all of these cases, again, the obligation to pay money on a recurring basis is *not* a remedy for breach but simply the performance due under the contract, so the contract is not breached until the defendant fails to perform.

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requested. 90 A.D.3d 1638 (4th Dep't 2011). The latter obligations were neither triggered by nor dependent upon a breach of warranty (or any other contract term). Unsurprisingly, the plaintiff's claim for breach of the implied warranty of fitness regarding the gas tank accrued the moment the gas tank was installed (and was time-barred), while the claim for breach of the obligation to service the gas tank was not time-barred to the extent the defendant had improperly performed that service within the preceding six years. *Id.* at 1640-42. *Beller v. William Penn Life Insurance Co. of New York* concerned an insurance contract that obligated the insurer "to consider the factors comprising the cost of insurance before changing rates." 8 A.D.3d 310, 314 (2d Dep't 2004). Again, unsurprisingly, the court found that the plaintiff's contract claim did not accrue until the insurer improperly raised rates without considering such factors. *Airco Alloys Division v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68 (4th Dep't 1980) simply notes the general rule that a party to a contract may commit itself to perform a future service, breaches of which will not occur until the party fails to perform as promised.

Ultimately, contracting parties can agree to the payment of money or the provision of a service and can designate either as the performance due under their contract or as the remedy for a breach. This fact says nothing about what, in any particular contract, constitutes a breach and what constitutes a remedy. Here, the repurchase provisions are the specified sole remedy for breaches of representations and warranties. That a different contract could hypothetically have included similar provisions as the performance due rather than a remedy is irrelevant.

4. Sections 4(e) And 7(a) Of The MLPA Have No Relevance To Accrual

Appellant argues that "the MLPA specifically states that neither the Trust nor investors were obligated to verify the veracity of DBSP's representations and warranties in order to demand cure or repurchase," and that this implicitly demonstrates that the parties did not intend the statute of limitations to accrue before discovery. (Br. 11; *see also* Br. 27-28.) The IAS Court similarly reasoned that, if the statute of limitations ran from breach, Appellant would have "'to conduct constant due diligence on the veracity of the Representations, which is 'squarely at odds with Section 7(a) of the MLPA.'" (Br. 17, quoting R. 16.) These hyperbolic arguments fundamentally misconstrue the MLPA provisions on which they rely.

Section 4(e) of the MLPA provides:

(e) Examination of Mortgage Files. Prior to the Closing Date,

> [DBSP] shall either (i) deliver in escrow to [ACE] or to any assignee, transferee or designee of [ACE] for examination the Mortgage File pertaining to each Mortgage Loan, or (ii) make such Mortgage Files available to the Purchaser or to any assignee, transferee or designee of [ACE] for examination. . . . [ACE] may, at its option and without notice to [DBSP], purchase all or part of the Mortgage Loans without conducting any partial or complete examination. The fact that [ACE] or any person has conducted or has failed to conduct any partial or complete examination of the Mortgage Files shall not affect the rights of [ACE] or any assignee, transferee or designee of [ACE] to demand repurchase or other relief as provided herein or under the Pooling and Servicing Agreement.

R. 292. Section 7(a) similarly provides that "[DBSP's] representations and warranties . . . shall not be impaired by any review and examination of loan files or other documents evidencing or relating to the Mortgage Loans or any failure on the part of [DBSP] or [ACE] to review or examine such documents." R. 300. It also confirms that DBSP remains obligated to remedy breaches of representations and warranties "notwithstanding [any] lack of knowledge by [DBSP]" with respect to the breach as of the time the representation or warranty was made. *Id.*

Such provisions are standard in commercial acquisition contracts, and have nothing to do with the statute of limitations or the accrual of claims. Instead, they are intended to prevent the seller from arguing that the buyer's "rights are waived as a result of its closing with knowledge of breaches" or having conducted inadequate due diligence, as it might argue if "the agreement is silent on the topic." L. Kling & E. Nugent, 2 NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES

AND DIVISIONS § 15.02[2] (*Indemnification—Survival of Representations and Warranties*) (2014).[18]

Appellant's argument that, absent a discovery rule, "the Trust really would have been obligating itself to reunderwrite 8,815 mortgage loans on day one," and that this would stand "in direct contradiction to [MLPA §§ 4(e) and 7(a)]" (Br. 29), is thus plainly incorrect. MLPA §§ 4(e) and 7(a) have a clear and well-defined purpose that is at odds with Appellant's description. They were not included as elliptical textual clues to some purported tacit understanding that claims for breaches of representations and warranties would be subject to a discovery rule.[19] *See* Section I.A, *supra*. A holding that these common and well-understood provisions had such an effect would disrupt parties' settled

[18] *See also Bank of N.Y. Mellon Trust Co., Nat'l Ass'n v. Morgan Stanley Mortg. Capital, Inc.*, No. 11-cv-0505(CM), 2013 WL 3146824, at *24 (S.D.N.Y. June 19, 2013) ("[T]he 'no due diligence' clause applies whether the Trustee 'has conducted or has failed to conduct' due diligence on the files. Under New York law, the Trustee expressly preserved its rights under the warranties with respect to any information it actually discovered or it could have discovered in those files."); *Cobalt Operating, LLC v. James Crystal Enters., LLC*, Civ.A. 714-VCS, 2007 WL 2142926, at *28 (Del. Ct. Ch. July 20, 2007), *aff'd*, 945 A.2d 594 (Del. 2008) (rejecting defense based on insufficiency of buyer's due diligence where contract provided that "no inspection or investigation made by or on behalf of [buyer] or [buyer's] failure to make any inspection or investigation shall affect [seller's] representations, warranties, and covenants hereunder or be deemed to constitute a waiver [thereof]"); *cf. CBS, Inc. v. Ziff-Davis Publ'g Co.*, 75 N.Y.2d 496 (1990) (discussing contract containing similar "no due diligence" clause).

[19] In addition, MLPA §§ 4(e) and 7(a) speak to *pre-closing* investigations (or lack thereof) by ACE or its designee, not post-closing investigations by the Trustee or investors. *See, e.g.*, R. 292 (MLPA § 4(e)) ("The Purchaser may, at its option and without notice to the Sponsor, purchase all or part of the Mortgage Loans without conducting any partial or complete examination."). Thus, any investigation conducted "on day one" simply falls outside their purview.

expectations in any number of commercial contracts.[20]

In any event, the fact that a party is not *contractually obligated* to investigate potential breaches of contract does not change the fact that if it—like any party to any contract—wishes to enforce its rights under the contract, it must pursue any such claims within the period set by the statute of limitations. Thus, there is absolutely no tension, much less a "direct contradiction," between a provision disclaiming a duty to investigate and the standard operation of the statute of limitations—and if there were such a contradiction, the public policy that the statute of limitations cannot be extended or waived *ab initio* would render these provisions unenforceable. *Kassner,* 46 N.Y.2d at 551.

Appellant also confusingly suggests that MLPA §§ 4(e) and 7(a) amounted to some sort of disclaimer by DBSP of the accuracy of its representations and warranties, and that the supposed indefinite extension of the statute of limitations was some sort of tradeoff DBSP accepted because it was "unwilling [ ] to verify the accuracy of the representations or warranties in the first place" and "was very careful to disclaim any 'duty to ensure that the Representations are true.'" (Br. 29, 28.) None of this has any basis in the

[20] *Cf., e.g., Wilmington Trust Co. v. Tropicana Entm't LLC*, Civ.A. 3502-VCN, 2008 WL 555914, at *6 (Del. Ct. Ch. Feb. 29, 2008) ("[I]t is important that language routinely and broadly employed in a specific category of agreements be accorded a consistent and uniform construction."); *Morgan Stanley & Co. v. Archer Daniels Midland Co.*, 570 F. Supp. 1529, 1539 (S.D.N.Y. 1983) ("contract language . . . found in numerous debentures and indenture agreements" should be given a "consistent, uniform interpretation . . . as a matter of law").

agreements.[21] The fact that MLPA § 7(a) provides that the representations and warranties are enforceable against DBSP "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" simply means that DBSP cannot use its own lack of knowledge as a defense to a breach claim. R. 300 (MLPA § 7(a)). DBSP made the representations in a binding contract—no other "verification" is necessary. In any event, far from any "disclaimer" of their accuracy, the MLPA in fact provided that DBSP's representations and warranties "shall be true and correct in all material respects as of the date as of which they are made." R. 201 (MLPA § 8(a)).[22]

Finally, Appellant's claim that the representations and warranties last for the "life of the agreements" is irrelevant. (Br. 2.)[23] Provisions stating that representations or warranties survive indefinitely simply mean that they do not

[21] The language Appellant quotes regarding DBSP's purported "disclaim[er]" is not found in the agreements. Instead, it is from the IAS Court's order, which cites no support. R. 15.

[22] Moreover, an accrual rule dependent on the extent of a defendant's diligence or "verification" of its own representations has no support in existing law, and would be entirely unworkable.

[23] In support, Appellant relies on statements made by other banks regarding other, unspecified loan sale agreements that provide that those banks' representations do not have "stated limits" and "extend over the life of the loan." (Br. 15 n.4.) These statements are nothing more than shorthand recitations of the agreements' survival provisions which, as discussed below, do not indefinitely extend the limitations period. To the extent Appellant seeks to use these statements as evidence of some implied industry understanding that is contrary to what the agreements here actually provide, this is both wrong and improper. *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990) ("Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing.").

lapse until the statute of limitations expires. *See, e.g., GRT, Inc. v. Marathon GTF Tech., Ltd.*, Civ.A. 5571-CS, 2011 WL 2682898, at *15 (Del. Ct. Ch. July 11, 2011) ("[A] survival clause that . . . provides that the representations and warranties will survive indefinitely, is treated as if it expressly provided that the representations and warranties would survive for the applicable statute of limitations.").[24] The purpose of such provisions is not to extend the statute of limitations, but to maintain the enforceability of the representations and warranties; in the absence of such survival provisions, courts have held that representations and warranties become unenforceable once the transaction at issue closes.[25]

D. Existing Repurchase Case Law Firmly Supports The Decision

1. The Decision Accords With The Overwhelming Majority Of Loan Repurchase Precedents

The soundness of the Appellate Division's Decision is further bolstered

[24] *See also* 2 NEGOTIATED ACQUISITIONS § 15.02[2] ("[I]f the representations and warranties are said to survive the closing but no time limit is placed upon such survival, the Buyer may well have the ability to sue the Seller for misrepresentation until the expiration of the applicable statute of limitations"). Of course, survival provisions may also provide that the representations will persist for some amount of time or "sunset" after a particular date that is before the expiration of the applicable limitations period. (*See* Br. 15 n.4 (citing *Reuters* article about recent proposed RMBS agreements in which representations would survive for 36 months or less after closing)). This is entirely consistent with New York law that parties may agree to shorten the applicable limitations period, *Kassner*, 46 N.Y.2d at 551, and does not suggest by negative implication that the absence of such provisions renders the statute of limitations inoperative.

[25] *See, e.g., W. 90th Owners Corp.*, 137 A.D.2d at 459 ("[T]he contract claim is conclusively disproven by the contract of sale, which did not provide for a survival after delivery of the deed of the representation as to the restaurant lease. That representation merged into the conveyance."); 2 NEGOTIATED ACQUISITIONS 15.02[2] ("[I]f it is the intention of the parties that the Buyer may recover from the Seller post-closing for a misrepresentation, they should specifically provide that the Seller's representations and warranties survive the closing.").

by the overwhelming support it enjoys in cases construing materially analogous loan purchase agreements under New York law. First, as noted above, the IAS Court recognized that it was contradicting two squarely-applicable rulings by federal courts applying New York law. *See Daiwa*, 2003 WL 548868, at *2 (the "statute of limitations began to run at that time, and expired six years later"; a contractual demand requirement did not defer accrual); *Lehman Bros. Holdings, Inc. v. Evergreen Moneysource Mortg. Co.*, 793 F. Supp. 2d 1189, 1194 (W.D. Wash. 2011) ("LBHI may not extend the accrual date of the statute of limitations simply by delaying its demand for payment. To find otherwise would allow LBHI to essentially circumvent the statute of limitations by indefinitely deferring its demand for payment.") (citing *Hahn*, 897 N.Y.S.2d at 487).

As also noted above, the IAS Court's order was issued three days after a well-reasoned dismissal ruling was issued in *Nomura 2005-S4*, 2013 WL 2072817. *Nomura 2005-S4* rejected the same arguments proffered here by Appellant, holding that "[t]he repurchase obligation . . . is merely a remedy," not "a duty independent of the . . . breach of contract claims," and that accrual of a contract claim cannot be delayed until "the time plaintiff chooses to seek a remedy." *Id.* at *8.

The Appellate Division's holding is also supported by its prior ruling in *Walnut Place*, 96 A.D.3d at 684-85. While *Walnut Place* involved the distinct issue of certificateholders' ability to bring suit, the court rejected the similar

argument that the repurchase provisions at issue authorized suits for failure to repurchase, holding that the repurchase provisions at issue "merely provide[ ] for a remedy in the event of a breach," not the basis for a separate cause of action. *Id.*

Additionally, in the time between the issuance of the IAS Court's ruling and the Appellate Division's reversal, two other courts applying New York law in the RMBS repurchase context rejected Appellant's argument. In *Deutsche Alt-A Securities Mortgage Loan Trust, Series 2006-OA1 v. DB Structured Products, Inc.*, Judge Sweet of the Southern District found that "New York law . . . does not recognize pre-suit remedial provisions as constituting separate promises which can serve as the basis for independent causes of action," but "[r]ather, under New York law, claims which are subject to pre-suit cure or demand requirements accrue when the underlying breach occurs, not when the demand is subsequently made or refused." 958 F. Supp. 2d 488, 499-500 (S.D.N.Y. 2013) ("*Deutsche Alt-A 2006-OA1*") (citing *Hahn*, 18 N.Y.3d at 770-71, *and Cont'l Casualty Co. v. Stronghold Ins. Co.*, 77 F.3d 16, 21 (2d Cir. 1996)). A Minnesota federal district court came to the same conclusion. *MASTR Asset Backed Sec. Trust 2006-HE3 v. WMC Mortg., LLC*, 983 F. Supp. 2d 1104, 1113 (D. Minn. 2013) ("Because New York law applies, this Court must predict if the New York Court of Appeals would find that the failure to provide a contractual repurchase remedy constitutes a separate breach, independent of the underlying breach of representations and warranties.

This Court finds that it would not.").

This same rule was adopted by the Delaware courts. As now-Chief Justice Strine explained in a 2012 opinion that applied Delaware law but relied on many of the same principles underpinning New York's statute of limitations rules, the operative claim in a loan repurchase suit is a claim for breach of representations and warranties, not a claim for failure to repurchase:

> The act of the Agency putting back the loan does not give rise to a claim for breach of contract against Morgan Stanley. Central Mortgage's breach of contract claims under the Master Agreement and transaction-specific documents are for breaches of the representations and warranties with respect to the information about particular loans. Those claims accrued under Delaware law when Central Mortgage bought the servicing rights. The accuracy of the underlying loan information data is independent of whether the Agencies put back the loans, because if that information was not accurate, it was not accurate from the time the contract was entered, regardless of whether the Agency discovered it or not. . . .
>
> Statutes of limitations are enacted "to require plaintiffs to use diligence in bringing suits so that defendants are not prejudiced by undue delay," in recognition of the fact that memories fade and information goes stale. Stale claims pose an obvious threat to doing real justice, as any trial judge knows. It is difficult enough to discern what happened when adverse parties are talking about what happened last year. Here, Central Mortgage seeks to sue on loans originated over five years ago, by parties other than Morgan Stanley. Memories must be dimmed by now, and the economy has changed in a way that may be relevant to whether any breach was in fact material, as it must be to support relief for Central Mortgage, and that may bear on the equity of affording it any relief.

Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC, Civ.A. 5140-

CS, 2012 WL 3201139 (Del. Ct. Ch. Aug. 7, 2012), *reh'g denied*, 2012 WL 4503731 (Del. Ct. Ch. Oct. 1, 2012).

Finally, the overwhelming majority of New York federal courts to have considered the issue since the Appellate Division's Decision have not hesitated to apply it.[26] *See Lehman XS Trust, Series 2006-4N v. GreenPoint Mortg. Funding, Inc.*, 991 F. Supp. 2d 472, 478 (S.D.N.Y. 2014) (Judge Scheindlin) ("[Defendant's] alleged failure to comply with its cure or repurchase obligations does not give rise to a separate breach of contract at the time of refusal. . . ."); *Homeward Residential Corp. v. Sand Canyon Corp.*, 298 F.R.D. 116, 132 (S.D.N.Y. 2014) (Judge Torres) (dismissing claim for "breach of the duty to cure or repurchase"); *ACE 2007-HE3*, 2014 WL 1116758, at *6 (Judge Nathan) ("[A] defendant's failure to repurchase a breached loan does not affect when the plaintiff's claim accrues, and therefore does not constitute a separate breach of contract. . . . To sanction Plaintiff's theory would effectively allow a plaintiff to extend the statute of limitations for breach of warranty claims."); *Wells Fargo*, 2014 WL 1259630, at *3 (Judge Cedarbaum) (rejecting the argument that "the cause of action accrued not upon JPMorgan's

[26] The Appellate Division's ruling has also, of course, been applied by a number of New York state courts. *See, e.g.*, *Fed. Hous. Fin. Agency v. DB Structured Prods., Inc.*, No. 652978/2012, 2014 WL 1384489, at *1-2 (Sup. Ct. N.Y. Cty. Mar. 17, 2014) ("*FHFA*"); *Home Equity Asset Trust 2006-5 v. DLJ Mortg. Capital, Inc.*, 42 Misc.3d 1206(A), 2014 WL 27961, at *4 (Sup. Ct. N.Y. Cty. Jan. 3, 2014) ("*Heat 2006-5*"); *Nomura Asset Acceptance Corp. Alt. Loan Trust, Series 2006-S2 v. Nomura Credit & Capital, Inc.*, No. 651827/2012, 2013 WL 6480128 (Sup. Ct. N.Y. Cty. Dec. 23, 2013) ("*Nomura 2006-S2*").

initial breach but rather upon JPMorgan's refusal in 2010 to honor the repurchase demand"; a plaintiff may not "indefinitely extend[ ] the statute of limitations by waiting to make a demand"); *Lehman XS Trust, Series 2006-GP2 v. GreenPoint Mortg. Funding, Inc.*, No. 12-cv-7935(ALC), 2014 WL 1301944, at *3 (S.D.N.Y. Mar 31, 2014) (Judge Carter) ("[F]ailure to repurchase the loans does not constitute an independent breach of the MLPAs because repurchase is nothing more than a pre-suit remedial provision."); *Citigroup Mortg. Loan Trust 2007-AMC3 v. Citigroup Global Mkts. Realty Corp.*, No. 13-cv-2843(GBD), 2014 WL 1329165, at *5 (S.D.N.Y. Mar. 31, 2014) (Judge Daniels) ("[T]he failure to cure or repurchase does not constitute an independent breach of contract under New York law"); *Deutsche Bank Nat'l Trust Co. v. Quicken Loans Inc.*, No. 13-cv-6482(PAC), 2014 WL 3819356, at *4 (S.D.N.Y. Aug 04, 2014) (Judge Crotty) ("[T]here is no persuasive evidence that the New York Court of Appeals would abrogate the rule stated [by the Appellate Division] and the well-reasoned cases following it in this District. . . . [T]herefore, the Court holds that the period of limitations in this case began to run when the R & Ws were breached.").[27]

[27] The Colorado federal district courts, in a series of loan repurchase cases brought by affiliates of Lehman Brothers, have also reached the same conclusion. *See, e.g.*, *Lehman Bros. Holdings Inc. v. Universal Am. Mortg. Co.*, No. 13-cv-00087(CMA), 2014 WL 1715365, at *4 (D. Colo. Apr 30, 2014) (rejecting, under New York law, the contention that "Defendant's failure to repurchase the loan within thirty days of Plaintiff's agent's demand . . . is an independent breach"); *Aurora Commercial Corp. v. Standard Pac. Mortg., Inc.*, No. 12-cv-3138(WJM), 2014 WL 1056383 (D. Colo. Mar. 19, 2014) (same).

2. Appellant's Four Authorities Do Not Advance Its Position

Despite the overwhelming weight of contrary authority, Appellant weakly contends, in a footnote, that "[n]umerous courts applying New York law" have adopted its position on accrual. (Br. 27 n.6.) Appellant cites only four cases, and its decision to relegate these cases to a footnote speaks volumes.

First in time is *F.D.I.C. v. Key Fin. Servs., Inc.*, No. 89-cv-2366, 1999 WL 34866812 (D. Mass. Dec. 23, 1999) ("*Key I*"). *Key I* is not a statute of limitations case (it also does not involve an "RMBS contract," but rather a simple loan purchase agreement). *Id.* at *1. The cited opinion concerns a damages calculation; in setting the measure of damages, the court states, without any analysis, that "the breach of the agreement by Key occurred when it refused to repurchase the Key Loans upon Home Owners' demand as required in the Agreement." *Id.* at *2. As Appellant notes, *Key I* was subsequently affirmed by the First Circuit. *See Resolution Trust Corp. v. Key Fin. Servs., Inc.*, 280 F.3d 12 (1st Cir. 2002) ("*Key II*"). However, the First Circuit declined to endorse this aspect of the district court's reasoning, instead simply stating that the damages award was appropriate "whether or not Key committed an independent breach by failing to repurchase on demand." *Id.* at 18.

Appellant's second case is *LaSalle Bank Nat'l Ass'n v. Lehman Bros. Holdings, Inc.*, 237 F. Supp. 2d 618 (D. Md. 2002) ("*LaSalle*"). *LaSalle*, again, is

a damages case, not a statute of limitations case. It erroneously relies on *Key II* for the proposition (not endorsed in that ruling and repeatedly discredited by New York courts since) that "[u]nder New York law, a loan seller'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." *Id.* at 638.

Appellant's third case, *Lehman Bros. Holdings, Inc. v. Nat'l Bank of Arkansas*, 875 F. Supp. 2d 911 (E.D. Ark. 2012) ("*National Bank*"), *is* a statute of limitations case, but it simply adopts *LaSalle* without analysis. *Id.* at 916-17. As more recent decisions have noted, *LaSalle* (and by extension *National Bank*), simply misread *Key II*. *See ACE 2007-HE3*, 2014 WL 1116758, at *7 ("[T]he *LaSalle* court misread [*Key II*]: although the First Circuit affirmed a district court opinion relying on an independent breach theory, it pointedly declined to decide whether the district court's view of the law was correct because that question was not dispositive."); *Nomura 2005-S4*, 2013 WL 2072817, at *8 ("[*National Bank* and *LaSalle*] misapply [*Key II*] and are unpersuasive. [*Key II*] had nothing to do with the statute of limitations and does not hold that a failure to repurchase on demand constitutes an independent breach of contract."); *see also Deutsche Alt-A 2006-OA1*, 958 F. Supp. 2d at 498-99 (adopting *Nomura*'s reasoning).

Finally, Appellant cites *Federal Housing Finance Agency v. WMC*

Mortgage LLC, a short-form order in which a district judge, relying solely on the IAS Court's now-reversed holding, found a complaint to be timely because "[t]he causes of action stated in the complaint alleged failures to cure after defendants received notice of the breach, not of the original breaches themselves." No. 13-cv-584(AKH), 2013 WL 7144159, at *1 (S.D.N.Y. Dec. 17, 2013). While this does indicate that a single Southern District judge has agreed with the IAS Court, this sparsely reasoned short-form order adds little of substance to Appellant's position. Indeed, the order indicates that the motion was denied because "the record is insufficient" and "the motion, at this time, is premature." *Id.*

II. APPELLANT'S "CONDITION PRECEDENT" ARGUMENTS FAIL

Appellant contends that its position "is reinforced by the condition precedent doctrine" and that the lapse of the pre-suit cure and repurchase periods is an "essential element" of its claim. (Br. 32.) Appellant is wrong. The lapse of the pre-suit cure-or-repurchase periods at issue here is neither a condition to any party's performance, nor an essential element of Appellant's claim. Instead, it is a procedural prerequisite to bringing suit on an existing claim, and such a requirement does not defer accrual of the underlying cause of action.

A. The Pre-Suit Remedial Provisions Are Procedural, Not Substantive, And Do Not Defer Accrual

In a recent ruling in a similar loan repurchase action, Judge Cedarbaum of the Southern District succinctly explained how contractual pre-suit demand and

remedy provisions interact with the accrual of causes of action:

> In cases involving contractual demand provisions, the general rule in New York is that "the cause of action accrues when the party making the claim possesses a legal right" to make the demand, not when the demand actually occurs. *Hahn* [ ], 18 N.Y.3d [at] 770 [ ] (alterations omitted). This rule prevents a plaintiff from indefinitely extending the statute of limitations by waiting to make a demand. *Id.* The New York statutes essentially codify this rule, providing that "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." N.Y. C.P.L.R. § 206(a).

Wells Fargo, 2014 WL 1259630, at *3.

Relying primarily on the Second Circuit's ruling in *Continental Casualty*, 77 F.3d 16, Appellant contends that the pre-suit demand requirement is an "essential element" of its claim because it "allows [DBSP] time to investigate and decide how to respond," and therefore that it falls within an exception to the general rule and defers the accrual of its claim.[28] (Br. 32 (quotation omitted).) Appellant's reliance on *Continental Casualty* is misplaced. That case concerned the application of "the rule [that] has evolved in insurance cases that a cause of

[28] While most of the cases it cites arise in the "demand" context, Appellant argues that this case fits into a separate category of "claim[s] relat[ing] to the failure to perform a distinct action that the demand merely serves to *trigger*." (Br. 39; *see also id.* at 36 ("[T]he real trigger was DBSP's failure *to respond* to that notice by curing or repurchasing . . ."). This is incoherent. A "demand" always implies a response, whether it is to render performance due under a contract, or to voluntarily cure an alleged breach before litigation is commenced, and the fact that a suit is brought after a demand always means that the defendant has "failed to respond" to the demand in a manner satisfactory to the plaintiff.

action accrues 'when the loss insured against becomes due and payable' under the policy." 77 F.3d at 20. Under the reinsurance agreement at issue, the reinsurers did not become obligated to perform—*i.e.*, to indemnify the cedent insurer—until it provided them with notice of its losses (referred to as a "claim" under the policies). The Second Circuit therefore concluded that since, "[u]nder these policies, [plaintiff's] actual losses were not due and payable until a reasonable period of time elapsed after it gave notice of them," the "causes of action accrued then . . . and not before." *Id.* at 21.

In so holding, the Second Circuit distinguished CPLR 206(a), explaining that the statute applied to "procedural demands"—situations in which "a right exists, but a demand is necessary to entitle a person to maintain an action"—but not to "substantive demands," in which "a demand is an essential element of the plaintiff's cause of action." *Cont'l Cas.*, 77 F.3d at 21. As examples of the latter, the Second Circuit cited "bailment cases" and "replevin cases involving good faith purchasers," situations in which the defendant's only wrongful conduct is the refusal to return property upon demand, not the initial possession. The court reasoned that since "the reinsurers were not in 'breach' of their contract to indemnify until they rejected the demand," the demand requirement in the reinsurance contract was similarly substantive. *Id.*

This substantive/procedural distinction tracks the right/remedy distinction

at the crux of this appeal. While the reinsurers in *Continental Casualty* "were not in 'breach' of their contract" before demand and refusal, DBSP certainly was (assuming the truth of Appellant's allegations); indeed, the repurchase provisions of the MLPA and PSA use the word "breach" *six* and *twelve* times, respectively, when referring to the falsity of DBSP's representations and warranties, making unmistakably clear that such a "breach" constitutes a breach of contract. R. 300 (MLPA § 7(a)); R. 121-22 (PSA § 2.03(a)). Due to these breaches, a "right exist[ed]" against DBSP, but before "maintain[ing] an action" on that right, Appellant was supposed to make a demand on DBSP. *Cont'l Cas.*, 77 F.3d at 21. Such a demand, which seeks a remedy for a breach of contract rather than the performance due under the contract, is paradigmatically procedural, and does not delay accrual. *Id.*; *see also*, *e.g.*, *Wells Fargo*, 2014 WL 1259630, at *3 ("The cause of action—misrepresentations in the MLPA—existed and the defendant's conduct giving rise to the claim was complete before the demand was made," and thus the repurchase demand requirement "is not a substantive element of the underlying claim for breach but merely a procedural prerequisite to suit.") (quotations omitted); *Deutsche Alt-A 2006-OA1*, 958 F. Supp. 2d at 499 ("[U]nder New York law, claims which are subject to pre-suit cure or demand requirements accrue when the underlying breach occurs, not when the demand is subsequently made or refused.").

Appellant also cites this Court's decision in *Hahn* as a case that supposedly recognizes that "substantive" demands are those that "'allow time to investigate' and decide how to respond" to a claim (Br. 32, quoting *Hahn*, 18 N.Y.3d at 772 n.5), but *Hahn* holds nothing of the sort. *Hahn* concerned insurance policies that required the insured to reimburse its insurer for certain deductible payments within a specified period of time from the insurer's demand. Rejecting the argument the insurer's claim did not accrue until after it demanded and the insured refused to pay the deductibles, the Court endorsed "[a] consistent line of Appellate Division precedent hold[ing] that where the claim is for payment of a sum of money allegedly owed pursuant to a contract, the cause of action accrues when the party making the claim possesses a legal right to demand payment." *Id*. at 770 (citations, quotations, and alterations omitted). Adopting the contrary rule proposed by the plaintiff, this Court concluded, would improperly "allow [a plaintiff] to extend the statute of limitations indefinitely by simply failing to make a demand." *Id*. at 771 (citations, quotations, and alterations omitted).

Appellant ignores *Hahn*'s holding, and instead focuses on a footnote in the opinion, where the Court, in "reject[ing] [the plaintiff's] contention . . . that we should adopt an accrual-upon-demand rule," distinguished *Continental Casualty* on the ground that there the demand was a "condition precedent" which afforded "'the insurance company time to investigate and pay the claim.'" *Id*. at 772 n.5.

Appellant apparently takes this to mean that any demand or pre-suit period that provides time to investigate a breach claim is "substantive," but this grossly misreads *Hahn* and *Continental Casualty*: the "claim" discussed in these cases is the *demand for coverage* that gives rise, under insurance law principles, to the insurer's duty to perform under the policies in the first instance—not a "claim" in the sense of a "cause of action." Neither *Hahn* nor *Continental Casualty* suggests that accrual turns on whether a pre-suit demand provision might "allow for time to investigate and pay," a standard which would seemingly always be met.

Appellant gains no more traction on its condition precedent theory in arguing that MLPA § 7(a) and PSA § 2.03(a), "[b]y the[ir] plain terms," both use "if/then" language which, according to Appellant, is the "unmistakable language of [a] condition." (Br. 34 (quotation omitted).) MLPA § 7(a) does not create a condition at all, but simply states that DBSP cannot defend against a breach claim on the ground that it was not aware of the breach at the time the representation was made. R. 300. Further, PSA § 2.03(a) does not place a condition on DBSP's performance under the contract; its clear purpose is to identify and limit Appellant to the "sole remedy" of repurchase in the event any representation is "breach[ed]." R. 121-22. Indeed, the PSA's use of an "if/then" framework merely reflects the fact that the sole repurchase remedy (like any other contractually specified remedy) applies only "if" there is a breach. *Cf. Rubinstein v. Rubinstein*, 23 N.Y.2d 293,

296, 298 (1968) (construing clause providing that "in the event" a party breaches the contract, "then" the non-breaching party shall be entitled to liquidated damages, as a remedial provision); *Deutsche Lufthansa AG v. The Boeing Co.*, No. 06-cv-7667(LBS), 2006 WL 3155273, at *5 (S.D.N.Y. Oct. 30, 2006) (contract providing a "sole and exclusive remedy" "if one party . . . fails in a material way to perform an obligation under this agreement" used "the precise terminology favored by the courts of New York . . . *to limit the remedies available*") (emphasis added).

Appellant also makes much of the fact that the Appellate Division found that the Funds' summons failed to comply with a "condition precedent to commencing suit," yet did not find that "the Trust's claim . . . did not accrue until that condition precedent occurred." (Br. 34-35.) To Appellant, the former necessarily implies the latter. This, however, is clearly not so. If it were, CPLR 206(a) would be rendered meaningless, since a "demand [that] is necessary to entitle a person to maintain an action" is certainly a "condition precedent to commencing suit," but such a demand does not, under that statute, delay accrual.[29] *See, e.g., Robb v. Low*, 99 A.D.3d 614, 614 (1st Dep't 2012) ("[P]laintiff's claim

[29] Appellant accuses the Appellate Division of contradictorily holding that "the Trust [had] managed to file its claim both too early *and* too late" (Br. 35), a statement that is long on rhetorical flourish and short on accuracy. The *Funds*, not Appellant, filed their summons "too early," before the end of the cure and repurchase periods, but the summons, filed on March 28, 2012, was itself timely for statute of limitations purposes. Appellant's complaint, on the other hand, was filed on September 13, 2012, and was thus "too late," being filed more than six years after accrual of the statute of limitations. In any event, there is nothing contradictory about a pleading being both procedurally defective and time-barred.

accrued at the time he could have demanded repayment, *i.e.*, when defendant breached the contract."); *Sutton v. Burdick*, 75 A.D.3d 884, 885 (3d Dep't 2010) ("[Plaintiff's] claim accrued not, as he asserts, at the time he actually demanded and was refused performance, but rather . . . when the failure of the parties to perform could be construed as a breach of the agreement."); *Woodlaurel, Inc. v. Wittman*, 199 A.D.2d 497, 497-98 (2d Dep't 1993) ("[P]laintiff was entitled to make its demand for payment, and its cause of action for nonpayment arose at the end of each calendar year in which taxes were imposed.").

Indeed, since at least *Dickinson v. City of New York*, 92 N.Y. 584 (1883) (cited at Br. 39), New York courts have recognized that the existence of a pre-suit cure period does not delay accrual, or transform a defendant's failure to remedy into a separate, actionable wrong. In *Dickinson*, this Court held that a 30-day statutory period during which the City of New York would be free from litigation while it investigated claims did not affect accrual of a claim against the City. As the Court explained, this 30-day period was enacted:

> mainly to enable the comptroller to settle claims against the city and thereby save unnecessary costs and expenses in the litigation which must ensue. We think that it was not intended to indefinitely extend the time in all cases within which an action might be brought against the city and thus put in the power of the claimant to delay, without any limitation whatever, . . . and thus deprive it of a defense which belongs to and is the inherent right of ordinary litigants . . . .

Id. at 590. As the Court went on to explain, where a legal wrong has occurred, and

the only impediments to its prosecution in court are the defendant's discovery of the wrong (whether by notice or otherwise) and the expiration of a pre-suit cure period, the claim accrues immediately. *Id*. at 590-91. The logic behind this rule is obvious: parties should be able to bargain for preconditions on suits against them without suffering the collateral consequence of effectively eliminating their statute of limitations defense. *See, e.g.*, *Westminster Props., Ltd. v. Kass*, 163 Misc. 2d 773, 775 (1st Dep't 2001) (landlord's claim accrued upon tenant's breach of lease, not when breach persisted after tenant's receipt of 10-day notice to cure); *S. Wine*, 80 A.D.3d at 505 (statute of limitations had run on plaintiffs' claims despite their noncompliance with "condition precedent to their right to bring an action against defendants"); *cf. Kumar v. Dhanda*, 17 A.3d 744, 749 (Md. Ct. Spec. App. 2011), *aff'd*, 43 A.3d 1029 (Md. 2012) (provision requiring parties "to engage in non-binding arbitration as a condition precedent to bringing suit" did not defer accrual).

B. Appellant's "Condition Precedent" Cases Are Inapposite

None of the case law Appellant cites even remotely suggests that the pre-suit requirements at issue here are a substantive element of its contract claim. Appellant primarily relies on this Court's ruling in *Kassner*, 46 N.Y.2d at 551-52. In *Kassner*, a municipal contract required a contractor to submit itemized statements to the Comptroller for "audit and revision" as a condition of payment. *Id.* at 547-48. As such, under this contract, the contractor's performance consisted

of the services it rendered, the city's performance was payment for these services, and the audit by the Comptroller was a condition precedent to the city's performance. Thus, in conducting its audit and then making payment, the city was in no way remedying a pre-existing breach of contract but was instead simply rendering the performance due under the contract.

Appellant contrasts *Kassner*'s audit requirement with another provision of that contract which required any suit under the contract to be "commenced within six (6) months after the date of filing . . . of the certificate for the final payment." *Kassner*, 46 N.Y.2d at 548. Appellant appears to contend that the filing of the certificate is an example of a "procedural demand," and that a repurchase demand should be considered "substantive" because it is more like the *Kassner* plaintiff's submission of invoices (which "triggered the city's obligation to perform an additional action (the audit)") than the filing of the certificate (which triggered nothing, except for the six-month window to bring suit). (Br. 37-38.)

All this, however, simply redefines "substantive demand" to mean "any demand that entails a response," while assigning the label of "procedural demands" to an invented category of "demands" that do not contemplate any sort of response, and as such are not actually demands at all. These ersatz classifications have no legal basis; the operative distinction in *Kassner*, as in the other authorities cited by Appellant, remains the distinction between a demand that is a condition to a party's

performance, and a demand that seeks a remedy for a pre-existing wrong.

Appellant also relies on the "bailment cases . . . and replevin cases involving good faith purchasers of stolen art" cited in *Continental Casualty* as examples of causes of action that entail "substantive demands." 77 F.3d at 21.[30] The fact that this rule applies in bailment and replevin cases, however, does not suggest that it should also apply in this breach of contract case. To the contrary, the same fundamental distinction persists: defendants in those cases "commit[ ] no wrong, as a matter of substantive law," until they fail to respond to the plaintiff's demand. *Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 147 (1st Dep't 1990), *aff'd*, 77 N.Y.2d 311 (1991). Thus "the requirement that a demand be made" in such cases "is a substantive element of the cause of action, not a procedural condition precedent to suit, and for that reason, CPLR 206(a) . . . is inapplicable." *Id.* (citation omitted). In this case, by contrast, the demand is to provide a "*remedy*" for a pre-existing "*breach*" of contract, and therefore plainly

[30] *Ganley v. Troy City National Bank* (Br. 38) involved a contract requiring the defendant to hold the plaintiff's property until the plaintiff demanded its return. 98 N.Y. 487 (1885). This Court, applying bailment law, concluded that the defendant committed no breach, and plaintiff had no claim, until the plaintiff requested return of her property and was refused. *Id.* at 494 ("By the terms of this contract the defendant was bound . . . to deliver [the notes] up to [the plaintiff] upon her demand . . . . [The plaintiff] could not put the defendant in default upon its contract until a demand and an offer to surrender the receipt, and until that time her cause of action did not accrue."). *Solomon R. Guggenheim Foundation v. Lubell* (Br. 38 n.8) was a replevin action, and applied the principle that good faith purchasers of stolen art (like bailees) commit no wrongful act until they refuse to return the property to its true owner upon demand. 77 N.Y.2d at 317-18.

falls on the procedural side of the substantive/procedural divide.[31]

Appellant lastly relies on two Appellate Division decisions, one involving an option contract, *Rossi v. Oristian*, 50 A.D.2d 44 (4th Dep't 1975), and the other concerning a contract that required the defendant to make equalizing capital contributions to a joint enterprise within 60 days of written notice from the other party of its own contributions, *Russack v. Weinstein*, 291 A.D.2d 439 (2d Dep't 2002). In neither case was the demand required to remedy a pre-existing breach or bring suit upon it; rather the demand in those cases served to trigger the party's *performance* under the contract—either to tender the stock upon the optionee's exercise, *see Rossi*, 50 A.D.2d at 46, or to make the capital contribution in the contractually specified time, *see Russack*, 291 A.D.2d at 440.[32]

[31] Instructively, in replevin cases where the stolen property remains in possession of *the thief*, the replevin claim accrues immediately upon the theft, rather than after demand and refusal, since there the underlying wrong is the illegal taking of the property, not the denial of the demand. *Solomon R. Guggenheim Found.*, 77 N.Y.3d at 317.

[32] In a footnote, Appellant cites *Fisher v. New York*, 67 N.Y. 73 (1876), a case concerning New York's condemnation statute. (Br. 38 n.8.) The statute required the City to compensate the party whose property was condemned within four months, and provided that no cause of action would lie unless the City failed to pay within the four month period. The Court held that a cause of action under this statute did not accrue until this period lapsed, because the City's obligation to pay within four months of the board's approval was, again, the performance of its duty under the statute, not a remedy for a pre-existing legal wrong (since the government's exercise of its condemnation power is not itself unlawful). Indeed, in *Dickinson*, this Court distinguished *Fisher* on this exact ground. *Dickinson*, 92 N.Y. at 591 (*Fisher* is "clearly distinguishable" in that "the right of action depended upon the statute, and an adherence to its requirements was essential to maintain it; a demand, therefore, was a part of the cause of action and necessary to be alleged and proven, and without this no cause of action existed").

C. The Appellate Division's Decision Properly Enforced The Contractual Condition Precedent To Suit

The Funds did not wait for the 60- or 90-day cure or repurchase periods to run before filing their March 28, 2012 summons. The Appellate Division found that this "rendered their summons a nullity." R. ix. In so holding, the court relied on its prior decision in *Southern Wine*, which held that since "[r]elation back . . . is dependent upon the existence of a valid preexisting action," an action brought in contravention of an "express, bargained-for condition precedent to suit" could not be considered a "valid" action to which a subsequent amended complaint could relate back. 80 A.D.3d at 505-06.[33] Notably, *Southern Wine* is another instance of a claim accruing before the occurrence of a condition precedent to suit: the plaintiff's attempt at relation-back demonstrates that the statute of limitations had run on its claims before it complied with the condition.[34]

Appellant notes (*e.g.*, Br. 11) that MLPA § 7(a) provides that DBSP shall cure or repurchase breaching loans both upon notice from the Trustee and upon its

[33] The Appellate Division also found, as an alternative holding, that the Funds "lacked standing to commence the action on behalf of the trust." R. ix. This was also the correct result under the governing agreements, as discussed below. *See* Section IV, *infra*.

[34] In a later opinion, the Appellate Division held that a subsequent action commenced by the *Southern Wine* plaintiffs was covered by CPLR 205(a)'s savings provision and was therefore timely. *See S. Wine & Spirits of Am., Inc. v. Impact Envt'l Eng'g, PLLC*, 104 A.D.3d 613, 613 (1st Dep't 2013) (citing *Sabbatini v. Galati*, 43 A.D.3d 1136, 1139 (2d Dep't 2007) ("Dismissal of a complaint for the failure to satisfy a condition precedent to suit is not a 'final judgment on the merits' for the purposes of CPLR 205(a)."). In this case, of course, the distinct issue of the initial and "substituted" plaintiffs not being the same entity dooms Appellant's attempt to rely on CPLR 205(a), an issue that is, in any event, not before the Court. *See* Section IV.B, *infra*.

own discovery of breaches. *See* R. 300. However, Appellant does not contend that DBSP discovered the alleged breaches at issue in this case or that such discovery somehow relieved Appellant of the duty to provide pre-suit notice. Indeed, Appellant does not seek reversal of this aspect of the Decision, presumably because it believes such an argument would be incompatible with its position that the lapse of the cure-or-repurchase period was an "essential element" of its claim. (Br. 39.) On this record, the Appellate Division was entirely correct to hold Appellant to the terms of its contract—and as *Southern Wine*, *Dickinson*, and numerous cases applying CPLR 206(a) demonstrate, enforcing a condition to suit in no way suggests that accrual of the underlying claim should be deferred.

Appellant does suggest, somewhat obliquely, that under its proposed accrual rule, the statute of limitations would run from 90 days after either the date DBSP discovers or receives notice of a defect. (*E.g.*, Br. 11.) DBSP is aware of no circumstance in which accrual of a plaintiff's claim has been found to have been triggered by a *defendant's* discovery of the claim,[35] and the practical and conceptual problems with imposing such a convoluted, subjective, and fact-

[35] Indeed, courts considering such provisions have typically "declined to find that a notice requirement is a condition precedent when the remedy obligation can be triggered by something other than a notice," *i.e.*, "discovery." *Wells Fargo Bank, N.A. v. Sovereign Bank, N.A.*, 13-cv-4313(NRB), 2014 WL 4412397, at *8 (S.D.N.Y. Sept. 8, 2014) (dismissing repurchase claims for failure to comply with notice requirement that did *not* include a discovery provision, and denying leave to amend because subsequent attempt at providing notice did not occur "within the statute of limitations period"). Here, however, Appellant does not argue, even in the alternative, that its failure to comply should not result in dismissal.

intensive discovery rule should be self-evident. *See, e.g., MRI Broadway Rental, Inc. v. U.S. Mineral Prods. Co.*, 92 N.Y.2d 421, 428 (1998) ("In keeping with the important purposes of avoiding stale claims and providing defendants with a degree of certainty and predictability in risk assessment, *our precedents have rejected accrual dates which cannot be ascertained with any degree of certainty in favor of a bright line approach*.") (emphasis added).

III. APPELLANT'S POLICY ARGUMENTS ARE MERITLESS

A. Appellant's Speculation About Incentives Is Baseless

Throughout its brief, Appellant asserts that its position on accrual *must* be correct because investors "would invest *only* upon the assurance that [DBSP] . . . would have to cure or repurchase any defective loan discovered at any time during the life of the agreements." (Br. 1.)[36] Appellant, however, cites no authority whatsoever in support of these sweeping, baseless proclamations, which find no support in the text of the governing agreements, or in New York law (*see* Sections I and II, *supra*). In interpreting a contract, what is relevant are its actual terms, not the parties' one-sided, post-hoc characterizations of their motives and intentions, or self-serving theories as to which interpretation would create the best incentives.[37]

[36] *See also, e.g.*, Br. 2 (a contrary result is "unthinkable"); *id.* at 21 ("the Agreements would not have come to fruition"); *id.* at 27 ("there would have been no investors").

[37] *See, e.g., Greenfield v. Philles Records*, 98 N.Y.2d 562, 570 (2002) ("[A] court is not free to alter the contract to reflect its personal notions of fairness and equity.") (citation omitted); *Zeevi Holdings Ltd. v. Republic of Bulgaria*, No. 09-cv-8856(RJS), 2011 WL 1345155, at *6

Separate and apart from this, however, Appellant's appeals to the equities and to policy considerations are fatally flawed on their own terms.

First, while Appellant argues (again, without citation) that "investors were poorly positioned" to investigate the truth of the representations and warranties (Br. 1), DBSP's counterparty is not "investors," it is Appellant, the Trustee. At closing, the mortgage loans and their associated documentation are transferred to Appellant. *See* R. 120-21 (PSA § 2.01); R. 36 (Compl. ¶ 19). Under Appellant's supervision, the servicer interacts directly with borrowers, and the master servicer compiles and disseminates loan performance data. R. 142-43 (PSA § 3.13(a)(iv)). All of this information, and all of the loan documentation remains, of course, readily available to Appellant—and while Appellant is quick to point out that the agreements did not *obligate* it to perform due diligence or investigate potential breaches (*see, e.g.*, Br. 28), there was certainly nothing preventing it from doing so. The fact that it did not assert claims until pressed by highly litigious distressed debt traders does not absolve it of the running of the limitations period.

Second, while the agreements impose a "sole remedy" for breaches of

(S.D.N.Y. Apr. 5, 2011) (rejecting arguments that "rely almost exclusively on speculation regarding Petitioner's intentions in entering into the Agreement," rather than an interpretation "grounded in the document itself"); *Klos v. Lotnicze*, 133 F.3d 164, 168 (2d Cir. 1997) ("The secret or subjective intent of the parties is irrelevant."); *Reed v. Knollwood Park Cemetery*, 441 F. Supp. 1144, 1148 (E.D.N.Y. 1977) (even if a plaintiff's "self-serving construction might accurately reflect the real intent" of the parties, reliance on such a construction is inappropriate "if to do so would contradict the clearly express language of the contract").

representations and warranties, this contract right is not investors' only recourse. Instead, the RMBS, as publicly-offered securities, are subject to statutory disclosure requirements concerning the same loan characteristics that are the subject of DBSP's representations and warranties.[38] If these are materially misrepresented, investors have extensive rights and remedies under securities laws.

Indeed, unlike the pursuit of securities (and common-law tort) claims, the pursuit of repurchase litigation is a specialized field, dominated by distressed-debt hedge funds and largely devoid of the "investors [who] agreed to invest" at the inception of the securitization.[39] This is a case in point: the Funds, who commenced this action and eventually persuaded Appellant to "substitute" as plaintiff, are not investors who acquired their RMBS certificates in the initial offering, nor did they experience losses in the financial crisis; instead, they purchased their RMBS for cents on the dollar *after* the financial crisis in order to pursue repurchase litigation. (*See supra* note 4.) That the Funds' investment strategy failed to pay off because they could not convince Appellant to file a timely

[38] Among other things, the SEC requires issuers to disclose in public filings the same loan characteristics, on a pool-wide basis, as those that are at issue in actions such as these. *See, e.g.*, SEC Reg. AB Item 1111, 17 CFR § 229.1111 (requiring detailed description of pool assets).

[39] The other major participant in this arena is the Federal Housing Finance Agency ("FHFA"), acting as conservator for Fannie Mae and Freddie Mac, which has pursued an aggressive strategy of bringing both repurchase claims and securities claims concerning the same RMBS offerings. *See, e.g.*, *Quicken Loans*, 2014 WL 3819356, at *5 (noting, in dismissing untimely FHFA-instigated repurchase suit, that "FHFA is already seeking redress in this Court for losses Freddie Mac suffered on its investment in this Trust in a separate matter").

suit is no reason to rewrite settled law regarding the accrual of contract claims.[40]

Third, Appellant provides no basis for its argument that an indefinite statute of limitations is necessary to uncover breaches. The loan-level representations and warranties relate to the characteristics of the loans as of their origination. Evidence of such breaches should surface soon after the securitization, while losses occurring after a loan has paid for years are significantly less likely to relate to a condition existing as of origination, and more likely to result from circumstances that are not subject to any representation or warranty, such as changing macroeconomic conditions or borrower life events.[41] Moreover, while

[40] In a footnote, Appellant cites two pending pre-suit global repurchase settlements by other RMBS sponsors, apparently as proof that its claims are meritorious and that absent a deferred accrual rule DBSP, unlike those sponsors, will inequitably "avoid all liability." (Br. 45 & n.11.) The existence of those settlements, of course, is not indicative of the merits of the claims asserted here, and in any event DBSP is presently defending several repurchase suits in the New York state and federal courts which *were* timely commenced by Appellant. *See, e.g.*, *Deutsche Alt-A 2006-OA1*, 958 F. Supp. 2d at 488; *ACE 2007-HE3*, 2014 WL 1116758; *ACE Sec. Corp. Home Equity Loan Trust, Series 2007-ASAP2 v. DB Structured Prods., Inc*., No. 651936/2013, 2014 WL 4785503 (Sup. Ct. N.Y. Cty. Aug. 28, 2014). There is nothing unfair about applying the statute of limitations straightforwardly, even to bar an allegedly meritorious (but untimely) claim. *See Zumpano*, 6 N.Y.3d at 673. Indeed, before entering into the global settlements Appellant cites, those investors and trustees, unlike Appellant, obtained tolling agreements in early 2012. *See* J.P. Morgan Chase & Co. RMBS Settlement Offer, Tolling Agreements, *available at* http://www.rmbstrusteesettlement.com/doc.php; Citigroup Inc. RMBS Proposed Settlement, Tolling Agreements, *available at* http://citigrouprmbssettlement.com/tolling.php.

[41] Indeed, while Appellant hyperbolically claims that if it had to comply with New York's six-year statute of limitations, it would have to "reunderwrite [all of the] mortgage loans on day one" (Br. 29) and "conduct constant due diligence" (*id.* at 17), the Funds themselves did not even exist before 2011, yet were able to submit hundreds of demands within the space of a single year. As such, the untimeliness of this suit is simply a function of the Funds' late start. Notably, Appellant itself cites to publicly available reports from 2007 and 2008 which alleged widespread deficiencies in the lending practices by the two largest originators of the Trust's loans. (Br. 6. n.1.) Nonetheless, no repurchase demands were made concerning this Trust until 2012. *See* R.

Appellant makes much of the loans' nominal 30-year terms, the offering documents filed with the SEC disclosed that prepayments on these loans would result in much shorter average loan terms.[42]

B. Appellant's Accrual Rule Is Inconsistent With Public Policy

Appellant contends that because the governing agreements require that Appellant provide "prompt notice" of breaches to DBSP upon discovery, "[t]here is therefore no need for courts to read into the contract additional time constraints that the parties did not intend," *i.e.*, CPLR 213(2)'s six-year statute of limitations. (Br. 39-40.) This is completely backwards. The statute of limitations applies to all contracts and there is no basis for inferring that the parties "did not intend" the statute of limitations to apply because it is not expressly referenced—nor would such an inference be at all consistent with New York public policy.

Moreover, as Appellant itself notes, "prompt notice" provisions are not uncommon, and it would truly upend the expectations of contracting parties who had bargained for such rights to learn that they had thereby implicitly agreed to indefinitely defer the running of the statute of limitations. *See, e.g.*, *Kassner*, 46

801. In any event, setting aside whether reunderwriting all 8,815 loans would ever be reasonable, the statute of limitations is six years, not one day, and Appellant would not have to constantly "conduct due diligence" but would only need to review the mortgage loans once.

[42] *See* ACE Securities Corp. Home Equity Loan Trust, Series 2006-SL2, Prospectus Supplement at S-38, S-40-52 (Form 424(b)(5)) (Mar. 24, 2006), *available at* http://www.sec.gov/Archives/edgar/data/1356242/000093041306002368/0000930413-06-002368.txt.

N.Y.2d at 552 (finding it "doubtful" that in adopting a "standard clause" that imposed additional time limits on suit, "the parties actually intended to postpone the accrual of the cause of action or anticipated that this provision would ever be employed to extend the expiration of the statutory period").[43]

Appellant claims that the policy goals of the statute of limitations are served by the prompt notice requirement, which prevents "plaintiffs [from] sleep[ing] on their rights." (Br. 40.) This is not even correct on Appellant's own terms. Appellant's proposed "prompt notice" rule merely requires Appellant to forward to DBSP breach allegations received from certificateholders at some point after it receives them. (Br. 41-42.) It imposes no duty of reasonable diligence on either Appellant or on the non-party certificateholders (Br. 42 ("To be sure, this 'prompt notice' requirement d[oes] not obligate the Trustee to *investigate* the accuracy of DBSP's representations or warranties on any specific time frame.") (emphasis in original)), and, as such, in no way prevents any party from sleeping on its rights. Under Appellant's rule, investors could acquire RMBS years in the future, investigate at their leisure, and have their claims deemed timely so long as the securitization trustee did not wait more than a few months before performing

[43] *Cf.* 2 NEGOTIATED ACQUISITIONS § 1502[2] & n.29 (noting that "the general rule is that a claim for breach of warranty must be asserted promptly," even in the absence of an express prompt notice requirement, and that "a lapse of time after the aggrieved party had reason to know of the breach of warranty claim [may be] sufficient to bar a claim for damages even if the statute of limitations has not expired").

the ministerial task of forwarding the letter to the allegedly breaching party (without investigating the letter's allegations).[44]

Appellant also takes much too narrow a view of the policies served by the statute of limitations, which, in addition to preventing plaintiffs from sleeping on their rights, also "'afford[s] protection to defendants against defending stale claims,'" and "expresses a societal interest or public policy 'of giving repose to human affairs.'" *Kassner*, 46 N.Y.2d at 550 (quoting *Flanagan*, 24 N.Y.2d at 429, *and Schwartz*, 12 N.Y.2d 212). The latter policies are not served in the slightest by a rule that would effectively allow a party to a contract to unilaterally delay the operation of the legislatively-set statute of limitations and be bound solely by some private form of laches.

IV. THE FUNDS' SUMMONS WITH NOTICE DOES NOT RENDER THIS ACTION TIMELY

Appellant argues that even if this Court straightforwardly applies New York law and rules against it on accrual, its claims are still timely because the Funds (not Appellant) commenced this action by filing a summons with notice on

[44] Appellant attempts to assuage the Court that its deferred accrual rule, based on some vague "prompt notice" concept, would not open the floodgates to litigation because "as a practical matter" "[l]itigation is already underway as to the vast majority of the RMBS agreements at the height of the financial crisis." (Br. 44.) Appellant cites no support, and, indeed, there are scores, if not hundreds, of RMBS securitizations issued before the financial crisis on which repurchase claims have not been asserted, all of which would be potentially subject to manifestly stale claims if Appellant's rule were adopted. Moreover, Appellant's proposed rule is not limited to "RMBS agreements," but could be argued to have application to any number of commercial contracts containing limited remedies for breaches of warranty.

the last day of the limitations period. As an even more attenuated alternative, Appellant posits that if its accrual argument is wrong (which it is) and the Funds lacked standing to prosecute this action (which they did), the action should nonetheless be deemed timely based on the filing date of the summons that the Funds lacked standing to file. These theories are irrelevant, however, because Appellant *does not challenge* on this appeal the Appellate Division's independent holding that the summons did not commence a valid action because it did not comply with the PSA's pre-suit notice requirements. Accordingly, this Court need not even reach Appellant's "standing" and "substitution" arguments.

Moreover, Appellant's attempt to latch onto the Funds' defective summons is inconsistent with the plain terms of the agreements, which prohibit certificateholders like the Funds from bringing repurchase claims, and is contrary to settled New York law, under which a party without standing cannot commence a valid action into which a party with standing can later substitute. *See Goldberg v. Camp Mikan-Recro*, 42 N.Y.2d 1029, 1029-30 (1977). As such, the only possible result here is dismissal of Appellant's claims as time-barred.

A. The Funds Lacked Standing To Commence This Action

Certificateholders, including the Funds, do not have the right to sue for breaches of representations and warranties. *See* R. 121-22 (PSA § 2.03(a).) That right belongs exclusively to Appellant, the Trustee, which made a conscious

decision not to file suit within the limitations period, despite being told to do so by the Funds "in light of potential expiring statute of limitations deadlines." R. 359.

Specifically, the PSA provides that "[n]o certificateholder shall have any right to . . . control the operation and management of the Trust Fund, or the obligations of the parties hereto." R. 214 (PSA § 12.03). It further contains a so-called "no-action" clause, which circumscribes the ability of certificateholders "to institute any suit . . . upon or under or with respect to [the PSA]." *Id.* Such clauses are standard features of corporate trust agreements which "prevent[] individual bondholders from pursuing an individual course of action and thus harassing their common debtor and jeopardizing the fund provided for the common benefit." *Batchelder v. Council Grove Water Co.*, 131 N.Y. 42, 46 (1892); *see also Feder v. Union Carbide Corp*., 141 A.D.2d 799, 800 (2d Dep't 1988) (no-action clause exists to "deter individual debenture holders from bringing independent law suits which are more effectively brought by the indenture trustee.") (citation omitted).

The PSA's no-action clause prohibits certificateholder suits in all but one circumstance: when there has been a "default" under the PSA, and four additional conditions are met: (i) certificateholders "shall have given to the Trustee a written notice of default and of the continuance thereof, as hereinbefore provided"; (ii) certificateholders "entitled to at least 25% of the Voting Rights shall have made written request upon the Trustee to institute such action . . . in its own name"; (iii)

such certificateholders shall also "have offered to the Trustee such reasonable indemnity as it may require against the costs, expenses and liabilities to be incurred therein"; and (iv) "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." R. 214-15 (PSA § 12.03).

The "defaults" that can give rise to such certificateholder suits are described in Article VIII of the PSA. R. 194-200. That Article, titled "Default," exclusively concerns non-performance by the servicer and master servicer of their obligations under the PSA, which are referred to as "defaults" throughout the agreement.[45] *See, e.g.*, R. 155 (PSA § 4.03(a) (requiring Master Servicer to take certain action "with respect to the occurrence of an event that, unless cured, would constitute the Servicer Event of Default, or an event of default")); R. 193 (PSA § 7.07 ("The Depositor . . . may, but is not obligated to, perform, or cause a designee to perform, any defaulted obligation of the Master Servicer or any Servicer under this Agreement . . . .")). Article VIII does not address failures of performance by

[45] The PSA also uses the terms "defaulting servicer" and "defaulting master servicer" to describe the servicer and master servicer in instances where they have failed to perform their duties. *See, e.g.*, R. 196-97 (PSA § 8.01) (discussing circumstances where certificateholders or the Trustee may "terminate all of the rights and obligations of the defaulting Servicer"); R. 206 (PSA § 9.10) (describing co-Trustee's obligations, including "as successor to a defaulting Master Servicer hereunder"). No similar adjective is used to describe the other parties to the PSA when they have failed to perform their duties, much less to describe DBSP.

the other parties to the PSA[46] (which are not referred to as "defaults"), or breaches of representations by DBSP—which makes sense, since DBSP's representations are made in the MLPA, not the PSA.[47] Article VIII also contains the only provisions of the PSA that authorize certificateholders to provide "notices of default" to the Trustee as mentioned in the no-action clause, and these provisions specify that such notices may only be provided in the event that the servicer or master servicer fails to perform its duties. R. 195 (PSA § 8.01(a)(i) & (ii) (certificateholders may provide "to . . . the Trustee" "written notice of [ ] failure" by the servicer "to remit . . . for distribution to the Certificateholders any payment . . . required to be made" or "duly to observe or perform in any material respect any . . . of the covenants . . . contained in [the PSA]")); R. 196-97 (PSA § 8.01(b)(i) (describing same with respect to "any failure on the part of the Master

[46] This, of course, makes sense in light of their roles under the PSA. ACE, as depositor, has no obligations except to convey the mortgage loans to the Trust, a task that is completed as soon as the Trust comes into existence. Appellant, as Trustee, is tasked with administering the Trust and bringing claims on its behalf. Identifying the Trustee's non-performance of its duties as a "default" would make no sense since the purpose of having "defaults" under the PSA is to trigger the ability of certificateholders to ask the Trustee to bring suit on their behalf for violations under that agreement. Obviously, the Trustee cannot be asked to sue itself (*cf. Cruden v. Bank of N.Y.*, 957 F.2d 961, 968 (2d Cir. 1992)), and the PSA avoids this absurdity by not including Trustee performance failures in the list of things that constitute "defaults".

[47] DBSP was a signatory to the PSA "for purposes of Section 7.11 and Section 9.05" only. R. 218. The former provision granted DBSP the right to "transfer the servicing responsibilities" of the servicer "at any time without cause." R. 194. Pursuant to the latter provision, DBSP agreed to indemnify the Trustee against any losses arising out of "the last paragraph of [PSA] Section 2.01," which itself stated that no mortgage loan would be a so-called "high cost" mortgage loan as that term is defined under various state laws. R. 203; R. 121.

Servicer")).[48]

In light of these provisions, the Appellate Division correctly held that the "defaults" referenced in the PSA's no-action clause "concern failures of performance by the servicer and master servicer only" and that "the PSA does not authorize certificate holders to provide notices of 'default' in connection with the sponsor's breaches of the representations," thus barring the Funds from bringing this action.[49] R. ix. The Appellate Division's holding in this regard was consistent with its prior precedents, *see Walnut Place*, 96 A.D.3d at 684 (PSA no-action clause "plainly limits certificate holders' right to sue to an 'Event of Default,' which . . . involves only the master servicer"), and with decisions from other courts, *see, e.g., Sterling Fed. Bank, F.S.B. v. DLJ Mortg. Capital, Inc.*, No. 09-cv-6904, 2010 WL 3324705, at *4 (N.D. Ill. Aug. 20, 2010) (dismissing breach of

[48] That the PSA limits the category of things that can constitute a "default" for purposes of the no-action clause to failures of performance by the servicer and master servicer is no surprise since under the PSA those parties have day-to-day responsibilities with respect to the management of the Trust's assets (*i.e.*, the mortgage loans and collections thereon) and payments to certificateholders. *See, e.g.*, R. 128-83 (PSA, Articles III, IV, and V).

[49] Appellant vaguely suggests that the Funds also had standing because they purported to commence this action "derivatively" on behalf of the Trust. (Br. 46.) Under New York law, however, trust beneficiaries attempting to bring a derivative action must demonstrate that either (1) they made a demand on the trustee to bring suit and the trustee's "refusal [was] so unjustifiable as to constitute an abuse of the trustee's discretion," or (2) "because of the trustee['s] conflict of interest, or some other reason, it is futile to make such a demand." *Velez v. Feinstein*, 87 A.D.2d 309, 315 (1st Dep't 1982). The latter circumstance is clearly inapplicable since the Funds did make a demand on Appellant, which it rejected. *Tomczak v. Trepel*, 283 A.D.2d 229, 230 (1st Dep't 2001) (affirming denial of leave to amend complaint to change theory from demand refusal to demand futility). The former circumstance is also inapplicable since neither Appellant nor the Funds purported to allege that Appellant's initial refusal to bring suit was so unjustifiable as to constitute an abuse of Appellant's discretion.

representation claims for failure to comply with no-action clause).[50]

Appellant argues that the Appellate Division's holding "is contrary to the plain terms of the PSA" (Br. 47), but cannot point to any inconsistent PSA provisions. At bottom, Appellant's position is that since the "PSA does not define the term 'default,'" the Appellate Division should have construed that term to mean *any* "'omission or failure to perform a legal or contractual duty'" by *any* person, including DBSP. (Br. 47-48, quoting Black's Law Dictionary (9th ed. 2009).) This argument does not withstand scrutiny.

As discussed above, the PSA clearly confines "defaults" to failures by the servicer and master servicer. Appellant's suggestion that the term should be divorced from its context is plainly contrary to basic rules of contract interpretation, and the Appellate Division was correct to reject this interpretation as an improper attempt to rewrite the PSA by manufacturing new "defaults." *See, e.g., Reiss v. Fin. Performance Corp.*, 97 N.Y.2d 195, 199 (2001) ("[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and

[50] Other New York courts have reached the same conclusion both before and after the Appellate Division's ruling. *See, e.g., Nomura 2005-S4*, 2013 WL 2072817, at *6 ("Although Plaintiff contends that [a certificateholder] had standing to sue, understandably it does not elaborate in its opposition brief given the decision in *Walnut Place*"); *FHFA*, 2014 WL 1384489, at * 2 ("[T]he sponsor's breach of representations and warranties is not a 'default' about which FHFA is entitled to notify the Trustee. Therefore, FHFA lacks standing to sue."); *HEAT 2006-5*, 2014 WL 27961, at *4 ("[The] breaches asserted by the Trustee in its repurchase requests . . . fall outside the servicing-related Event of Default categories enumerated in the PSAs. Accordingly, [the certificateholder's] actions . . . are barred by the PSAs' No Action clauses."). Indeed, the IAS Court itself reached the same conclusion. R. 11 ("It is undisputed that [the Funds] lacked standing to maintain this action under the PSA's no-action clause.").

thereby make a new contract for the parties under the guise of interpreting the writing.") (quotation omitted).[51]

Indeed, it is not even clear what "default" Appellant believes DBSP committed here. Appellant vaguely suggests that the Funds complied with the PSA's no-action clause because they provided notice of "defective loans" and "rampant [mortgage] defects." (Br. 47, 51.) By this logic, the operative "default" is the falsity of DBSP's representations as to those loans (which both the MLPA and PSA describe as a "breach" not a "default"). Appellant does not make this argument, however, because it is patently inconsistent with Appellant's contention that breaches of representations and warranties are *not* breaches, and that the only actionable wrong that DBSP can commit is failure to cure or repurchase.[52]

Appellant contends that "default" must mean something broader than servicer and master servicer failures of performance because the PSA also contains the defined terms "Servicer Event of Default" and "Master Servicer Event of Default." (Br. 48.) These defined terms simply specify *types of defaults* by the servicer or master servicer, which, if they occur, trigger certain rights and

[51] The PSA also uses the term "default" in referring to (i) instances where a particular action taken (or not taken) by the servicer, master servicer, or their successors shall *not* be considered a default, R. 140-41 (PSA § 3.12); R. 198 (PSA §§ 8.01(b), 8.02(a)), which reinforces the point that "defaults" relate solely to those entities' performance; and (ii) mortgage loans on which borrowers have failed to make payment, a usage that is, of course, completely irrelevant here.

[52] Of course, Appellant cannot claim that a "failure to repurchase" is the operative "default" since the Funds filed their summons well before the 60- and 90-day periods expired. *See* R. ix.

obligations under the PSA. Importantly, one such event is the failure of those parties to "duly perform in any material respect" any of their duties (*i.e.*, a lowercase "default") "which continues unremedied for a period of thirty (30) days after the date on which written notice of such failure . . . shall have been given to . . . the Trustee . . . by the Holders of Certificates entitled to at least 25% of the Voting Rights." R. 195 (PSA § 8.01(a)(ii)); R. 196-97 (PSA § 8.01(b)(i)). In other words, where the servicer or master servicer does not perform one of its duties, certificateholders can provide written notice to the Trustee of this continuing default, and will not have to submit a further notice when that lowercase "default" ripens into an "Event of Default" with the passage of time. This is precisely what is contemplated by the no-action clause. *See* R. 214 (PSA § 12.03) (requiring a "written notice of default and of the continuance thereof, *as hereinbefore provided*") (emphasis added). No comparable provision exists with regard to DBSP or breaches of representations and warranties.[53]

[53] Appellant's argument that "default" must mean something broader than servicer or master servicer failures because the PSA uses "default," "Servicer Event of Default," and "Master Servicer Event of Default," in the disjunctive in several provisions (Br. 48) is plainly wrong. As discussed above, the purpose of those latter defined terms is to identify events that trigger subsequent duties and rights under the agreement, not to define the universe of what constitutes a "default" by the servicer or master servicer under the PSA. The provisions Appellant cites do not change this conclusion but, in fact, support DBSP's interpretation. One of those provisions is titled "Waiver of Servicer Events of Default" clearly demonstrating that "defaults" relate to servicer actions or inactions. R. 200 (PSA § 8.04). The other time the PSA uses the terms in the disjunctive is when describing under what circumstances the Trustee will be deemed to have notice of such events. R. 202 (PSA § 9.02(a)(viii)). That provision certainly does not suggest that "defaults" mean failures by DBSP.

Appellant also mischaracterizes the Appellate Division's Decision as relying on *Walnut Place* to create some sort of "blanket rule about which defaults count." (Br. 49.) The Appellate Division cited *Walnut Place* simply as another case in which a similar no-action clause limited permissible certificateholder suits to failures of performance by servicers and master servicers. R. ix. In fact, it is Appellant that advocates an inappropriate "blanket rule" in contending that unless the PSA specifically contains a term that is "expressly defined to include only breaches by a servicer of the loans" (Br. 49), the no-action clause must permit certificateholders to sue on any non-performance by any person. *See Walnut* Place, 96 A.D.3d at 685 (rejecting "interpretation of the 'no-action' clause [that] would . . . distort the plain meaning of the clause").

Finally, Appellant suggests that even if its interpretation of the no-action clause is incorrect, this Court should rule in its favor on the standing issue because the Trustee "substitute[d] in for the certificateholders . . . thus acknowledging that the suit is both worthy and justified." (Br. 50.) Appellant justifies its "ratification" theory on the grounds that no-action clauses exist to "define the rights between *the Trust and certificateholders*," not "to protect DBSP." (*Id.*) It is well-settled, however, that "the primary purpose of a no-action clause [ ] is to protect issuers," *i.e.*, defendants like DBSP. *Quadrant Structured Prods. Co. v. Vertin*, 23 N.Y.3d 549, 565 (2014) (quotation omitted). This purpose would be frustrated if trustees,

as Appellant contends, could unilaterally waive compliance with their terms.

B. The Trustee's Complaint Does Not Benefit From The Summons With Notice Filing Date

As discussed above, the Funds, despite their lack of standing, filed the summons that purported to commence this action. In it, they stated that "[o]n March 8, 2012, [the Funds] directed [Appellant], and offered [Appellant] reasonable indemnity, to enforce DB's repurchase obligations. [Appellant] has not accepted [the Funds'] direction." R. 26. After the Funds served the summons, DBSP filed a notice of appearance and demanded a complaint. R. 30-31. Appellant did not move to intervene or substitute as plaintiff under Article 10 of the CPLR, but instead simply served a complaint in response to DBSP's demand, bearing a caption unilaterally revised to name Appellant as plaintiff.[54] R. 32. Appellant now argues that despite its decision not to bring suit within the limitations period (a decision which it neither explains nor attempts to justify), its untimely complaint should be deemed commenced as of the date of the Funds' summons, even though that summons was doubly defective, both by virtue of the Funds' failure to provide adequate pre-suit notice and because of their lack of standing under the no-action clause.

Preliminarily, despite its own reliance on "relation back principles" (Br.

[54] As discussed *supra* note 6, the parties later stipulated to amend the caption for administrative purposes, but DBSP expressly reserved its rights to challenge the substitution.

53), Appellant suggests, in a footnote, that these principles are inapplicable because CPLR 203(f) "applies only to relation-back of *pleadings*, and a summons with notice is not a 'pleading' under the CPLR." (Br. 54 n.14.) Appellant, however, does not say what alternative principles it believes are applicable. To the extent Appellant contends that this Court has no authority to assess whether a summons filed by a plaintiff without standing commences a viable action into which a plaintiff with standing can substitute, that proposition is clearly wrong. Cases commenced by defective summons with notice are subject to dismissal; such a summons "d[oes] not confer jurisdiction over defendant or constitute the timely commencement of an action." *Parker v. Mack*, 61 N.Y.2d 114, 117 (1984); *see also Roth v. State Univ. of N.Y.*, 61 A.D.3d 476, 476 (1st Dep't 2009) ("In thus failing to comply with the notice requirements of CPLR 305(b), the summons was jurisdictionally defective . . ."). The issues presented here are indistinguishable from the issues presented in the relation-back context, and relation-back authorities therefore provide the appropriate framework for assessing the validity of Appellant's purported substitution even if Appellant is correct that CPLR 203(f) itself does not apply. *Cf. Lutzker v. Novo Nordisk Pharm., Inc.*, No. 07-cv-3272, 2008 WL 905040, at *4 (E.D.N.Y. Apr. 2, 2008) (applying relation-back principles in removed action commenced by summons with notice).[55]

[55] If anything, the Funds' commencement of their invalid action via summons with notice means

New York courts have long held that "relation-back" requires "a valid preexisting action." *George v. Mt. Sinai Hosp.*, 47 N.Y.2d 170, 179 (1979); *see also S. Wine*, 80 A.D.3d at 505-06 ("Relation back . . . is dependent upon the existence of a valid preexisting action."). An action filed by a plaintiff without capacity or standing to sue is not a "valid preexisting action."[56] *Goldberg*, 42 N.Y.2d at 1029-30 ("[T]he original suit was not brought by one with the capacity to sue . . . . Accordingly, when . . . the 'second amended' summons [was] served, both subsequent to the expiration of the Statute of Limitations, there was no pre-existing action to which it could 'relate back.'") (citations omitted); *Truty v. Fed. Bakers Supply Corp.*, 217 A.D.2d 951, 952 (4th Dep't 1995) ("The original action was not brought by parties with standing to sue for breach of contract. When plaintiffs sought to serve an amended complaint in April 1994, the Statute of Limitations had run and there was no valid pre-existing action to which the amended complaint could 'relate-back.'") (citations omitted).

As Appellant notes, substitution and relation-back have been permitted "where the parties are 'closely related' and the substitution corrects an error or technical defect." (Br. 52.) Appellant contends that "the Trustee and the Trust's

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that dismissal should be entered under CPLR 3211(a)(8), for lack of personal jurisdiction. DBSP asserted this as a basis for dismissal in its motion, but neither of the courts below specifically addressed potential distinctions specific to actions commenced via summons with notice.

[56] Neither is an action brought, as here (*see* Section II.C, *supra*) in violation of a procedural prerequisite to suit. *E.g.*, *S. Wine*, 80 A.D.3d at 505-06.

certificateholders *are* 'closely related'" (Br. 52), but the fact that two parties share a common interest does not make them closely related. Indeed, at the time the summons was filed, the Trustee and the Funds were adverse and the Funds named the Trustee as a nominal defendant in the summons. R. 24. While Appellant states that "nothing . . . in New York law limits substitution and relation back principles to parents and subsidiaries," it proffers no supporting authorities, instead merely citing in a footnote substitution cases in which such relationships *were* present. (Br. 53 n.13.) Indeed, it makes sense that "close relationships" should be limited to corporate affiliates. Mistakenly filing suit in the name of the wrong person is only likely to occur in situations where the original and substituted plaintiff are effectively under common control. Appellant's proposed rule—that parties are "closely related" by virtue of their pursuit of the same claim—would seemingly be satisfied in every case in which one party seeks to substitute for the other, and as such is no rule at all.

Appellant also completely ignores the criterion that the substitution be necessary to "correct[ ] an error or technical defect." (Br. 52.) Such substitutions further a "policy of liberality in permitting the correction of a mistake." *Frankart Furniture Staten Island v. Forest Mall Assocs.*, 159 A.D.2d 322, 323 (1st Dep't 1990). No "mistake" is alleged to have been made here; Appellant simply decided not to pursue claims which were brought to its attention within the limitations

period. The same liberality does not, and should not, apply to decisions involving plaintiffs who consciously declined to bring suit within the limitations periods. *See, e.g.*, *15 E. 11th Apt. Corp. v. Elghanayan*, 232 A.D.2d 289, 289 (1st Dep't 1996) (intervention improper where "[t]he initial omission of appellants as plaintiffs . . . was the result of a conscious strategic decision"); *Everhome Mortg. Co. v. Charter Oak Fire Ins. Co.*, No. 07-cv-98(RRM), 2012 WL 868961, at *12 (E.D.N.Y. Mar. 14, 2012) (no basis under CPLR to "allow LaSalle the benefit of EverHome's filing date . . . where [LaSalle] had ample notice and opportunity to bring claims . . . within the statutory period").

Appellant proposes that "any purported lack of capacity by the first plaintiff to initiate an action . . . 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." (Br. 53.) Appellant suggests that this is a "well-settled" rule that applies specifically in actions commenced by summons with notice (*id.*), but it is neither of those things. It is simply an improper generalization from cases that misapply this Court's ruling in *Carrick v. Central General Hospital*, 51 N.Y.2d 242 (1980).

Carrick involved a wrongful death action that had initially been dismissed because it was commenced by an administratrix who had not received her formal letters of administration at the time of commencement, and thus lacked

capacity to sue.[57] 51 N.Y.2d at 246-47. After dismissal, the administratrix, having in the intervening time been duly appointed, filed new actions, relying on CPLR 205(a)'s revival provision, which provides that if a timely action is dismissed other than on the merits, by voluntary discontinuance, or for neglect to prosecute, "the plaintiff . . . may commence a new action upon the same transaction or occurrence" within six months of the dismissal, and such action will be deemed timely by virtue of the original dismissed action's filing date. *Id.* at 246 (quoting CPLR 205(a)). This Court held that the plaintiff was entitled to rely on CPLR 205(a) despite the "fatal" defects in its original suit. *Id.* at 249. This Court distinguished *Goldberg* (which, as noted above, holds that a similar capacity defect cannot be cured by amendment), reasoning that "*Goldberg* involved the application of CPLR 203[f], which contemplates a 'valid pre-existing action to which [an] amendment can relate back,' while *George* [and *Carrick*] involved the application of CPLR 205[a], which specifically contemplates a prior defective action subject to dismissal upon timely motion." *Id.* (quoting *George,* 47 N.Y.2d at 179).

Appellant cites two cases—*Snay v. Cohoes Memorial Hospital*, 110 A.D.2d 1021 (3d Dep't 1985) and *Burwell v. Yonkers General Hospital*, 6 A.D.3d

[57] Technically, the defect in *Carrick* was the nonfulfillment of a statutory requirement "in the nature of a condition precedent to the right to bring the suit and, as such, [ ] an essential element of the claim." *Carrick*, 51 N.Y.2d at 250. As such, *Carrick* provides another example of a "condition precedent to the right to bring the suit" that does not defer accrual of the statute of limitations.

478, 480-81 (2d Dep't 2004)—that allow capacity defects to be cured within the same action, reasoning, in effect, that where CPLR 205(a) would apply, dismissal of the initial action is unnecessary as a practical matter. In so holding, these cases misinterpret *Carrick* as "overrul[ing]" or "severely limit[ing]" *Goldberg*.[58] *Snay*, 110 A.D.2d at 1022. Not so: "*Carrick* neither overruled nor 'severely limited' *Goldberg*"; *Carrick* simply dealt with revival of a dismissed action under CPLR 205(a) while *Goldberg* addressed relation-back. *Nomura 2005-S4*, 2013 WL 2072817, at *6; *see also George*, 47 N.Y.2d at 177 (affirming *Goldberg*'s holding that dismissal of a defective action "is the appropriate response," even if CPLR 205(a) would apply if recommenced). Thus, even if the capacity defect at issue in these executor/administrator cases were analogous to the Funds' lack of standing, which it is not, the proper result would be dismissal.

In any event, *Snay* and *Burwell* are fundamentally inapposite. The Funds do not lack "capacity" to bring suit, as would a minor or decedent. Rather, the Funds have capacity to bring lawsuits generally, but do not have standing under the governing agreement to pursue the suit they purported to commence. A party's inability to sue under a contract is a defect in its "standing." *See, e.g.*, *Aymes v. Gateway Demolition, Inc.*, 30 A.D.3d 196, 196 (1st Dep't 2006) ("Plaintiff, a

[58] Appellant vaguely suggests that its "rule" applies specifically to cases commenced, as here, "by notice with summons," as opposed to by summons and complaint. (Br. 53.) This has no basis; indeed, while *Snay* involved a case commenced by summons with notice, *Burwell* involved a case commenced by summons and complaint. 6 A.D.3d at 479.

nonparty to the contract, lacked standing to bring this action."). Thus, while a plaintiff's lack of capacity can be cured by a subsequent event, *e.g.*, the issuance of letters testamentary, the Funds cannot similarly cure the defect in their standing.

The rules pertaining to the curing of capacity defects are animated by the same basic principle as the decisions permitting substitution of affiliates to correct errors and to avoid forfeitures on technical grounds. *See, e.g.*, *Bernardez v. City of N.Y.*, 100 A.D.2d 798, 800 (1st Dep't 1984) (discussing difficulties posed to litigants by delays in the issuance of letters of administration); *George*, 47 N.Y.2d at 173 (permitting revival action by administratrix following "comedy of errors" in which initial suit was erroneously commenced in the name of decedent); *cf. Gaines v. City of N.Y.*, 215 N.Y. 533, 539 (1915) (where plaintiff had "in good faith . . . mistaken his forum," his "error ought not to bar the prosecution of his action"). Those rules have no application where, as here, a party with standing who chose not to sue during the limitations period later changes its mind and attempts, after the limitations period has expired, to substitute into a suit commenced by a party that lacks standing.

For these same reasons, allowing Appellant to benefit from the Funds' filing date is *not* "in keeping with the policy considerations underlying statutes of limitations." (Br. 54.) An action filed by a party without standing after the party with standing has declined to sue does *not* "give timely notice" to the defendant of

the "present purpose" of the party with standing "to maintain his rights before the courts." *Gaines*, 215 N.Y. at 539. It does exactly the opposite. *See Reliance Ins. Co. v. PolyVision Corp.*, 9 N.Y.3d 52, 58 (2007) (rejecting an attempt to apply CPLR 205(a) to a case dismissed because brought erroneously by the wrong corporate affiliate, and noting that holding "[t]he diligent corporate suitor" to the consequences of its decisions as to when, and how, to commence suit "serves . . . the broader interests served by the statute of limitations").

CPLR 205(a), of course, is not before the Court on this appeal. By its express terms it only applies, as noted above, to "new action[s]" commenced after the dismissal of an initial defective action. Appellant nonetheless attempts to draw support from this statute, and from this Court's decision in *Reliance*. These authorities do not in any way support Appellant's position. To the contrary, in *Reliance*, this Court held:

> [T]he benefit provided by the section is explicitly, and exclusively, bestowed on "the plaintiff" who prosecuted the initial action. Only if "the plaintiff" dies, and his or her cause of action survives, may the executor or administrator of a deceased plaintiff's estate commence a new action based on the same occurrence. Outside of this representative context, we have not read "the plaintiff" to include an individual or entity other than the original plaintiff.

9 N.Y.2d at 57. This Court therefore declined to apply CPLR 205(a) to a suit commenced by a corporate affiliate of the original plaintiff, noting that it was "mindful of the potential ramifications of a rule allowing a 'different, related

corporate entity' the benefit of the statutory grace period." *Id.* at 58. As the Court concluded, the statute, by its terms, only benefits "the plaintiff," and "we prefer to read CPLR 205(a) as it was written by the Legislature and has consistently been applied by this Court." *Id.*; *see also George*, 47 N.Y.2d at 179 ("Usually, of course, the fact that one party commenced an action which is subsequently dismissed, will not serve to justify application of [CPLR 205(a)] so as to support a later action by a different claimant.").

Appellant nonetheless attempts to derive a rule that "CPLR § 205(a) applies with particular force" to the substitution of a plaintiff with standing for a plaintiff without standing. (Br. 56.) This, of course, is the opposite of what *Reliance* actually holds. Appellant quotes the following language: "[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." (*Id.* (quoting *Reliance*, 9 N.Y.3d at 57).) Tellingly, this quote sets off the word "identity" in quotation marks. 9 N.Y.3d at 57 (quoting *Reliance Ins. Co. v. PolyVision Corp.*, 390 F. Supp. 2d 269, 273 (E.D.N.Y. 2005)). As the next sentence of both opinions (which Appellant fails to quote) makes clear, in such cases, the "identity" of the plaintiff does not change, only its *capacity* does. *Id.* ("[T]he plaintiff in the new lawsuit may appear in a different capacity . . ."). Thus,

in *Reliance*, the fact that "RIC is not RNY in a different capacity" precluded application of CPLR 205(a). *Id.* at 57-58. The same is true here: HSBC, as Trustee, is not Fir Tree or Värde in a different capacity.[59]

Finally, the inapplicability of CPLR 205(a) is all the more apparent in this case, where (unlike in *Reliance*) the standing defect is not the result of an error, but rather of a decision by the party with standing not to pursue the claim in a timely fashion. As this Court explained:

> The very function of [CPLR 205(a)] is to provide a second opportunity to the *claimant* who has failed the first time around *because of some error pertaining neither to the claimant's willingness to prosecute in a timely fashion nor to the merits of the underlying claim*. . . . In sum, a distinction must be drawn between a failure to commence an action, be it due to a failure of process or some similar reason, and a defect in that action which mandates dismissal. In the former case, [CPLR 205(a)] will be inapplicable, whereas in the latter case the statute will apply.

George, 47 N.Y.2d at 178-79 (emphases added). Here, there was no mistake. The Trustee's decision to decline to timely file suit precludes its reliance on the Funds' improper summons, no matter when that summons was filed.

[59] *Streeter v. Graham & Norton Co.*, 263 N.Y. 39 (1933), relied on by this Court in *Reliance*, is also instructive, and disposes of Appellant's argument that CPLR 205(a) should apply because the summons was purportedly filed "on behalf of the Trust." (Br. 55.) In *Streeter*, a wrongful death action was improperly commenced by decedent's insurer, rather than by the administrator. 263 N.Y. at 41-42. This Court held that CPLR 205(a)'s predecessor statute did not save a subsequent action by the administrator, since "[t]he present action was not brought by the same plaintiff or representative" as the initial action. *Id.* at 44.

CONCLUSION

For the foregoing reasons, the Decision and Order of the Appellate Division, First Department, entered on December 19, 2013, should be affirmed.

Dated: New York, New York
October 9, 2014

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ADDENDUM

The affiliates of DB Structured Products, Inc. are Abbey Life Assurance Company Limited; Abbey Life Trust Securities Limited; Abbey Life Trustee Services Limited; ABFS I Incorporated; ABS Leasing Services Company; ABS MB Ltd.; Accounting Solutions Holding Company, Inc.; Agripower Buddosò Società Agricola a Responsabilità Limitata; Airport Club für International Executives GmbH; Alex. Brown Financial Services Incorporated; Alex. Brown Investments Incorporated; Alex. Brown Management Services, Inc.; Alfred Herrhausen Gesellschaft – Das internationale Forum der Deutschen Bank – mbH; Americas Trust Servicios de Consultoria, S.A.; Apexel LLC; Argent Incorporated; Autumn Leasing Limited; Avatar Finance; AWM Luxembourg SICAV-SIF; AXOS Beteiligungs- und Verwaltungs-GmbH; B.T. Vordertaunus (Luxembourg), S.à r.l.; B.T.I. Investments; BAG; Baincor Nominees Pty Limited; Bainpro Nominees Pty Ltd; Bainsec Nominees Pty Ltd; Bankers International Corporation; Bankers International Corporation (Brasil) Ltda.; Bankers Trust International Finance (Jersey) Limited; Bankers Trust International Limited; Bankers Trust Investments Limited; Bankers Trust Nominees Limited; Barkly Investments Ltd.; Bayan Delinquent Loan Recovery 1 (SPV-AMC), Inc.; Beachwood Properties Corp.; Bebek Varlik Yönetym A.S.; Betriebs-Center für Banken AG; BfI-Beteiligungsgesellschaft für Industriewerte mbH; BHF Club Deal GmbH; BHF

Grundbesitz-Verwaltungsgesellschaft mbH; BHF Grundbesitz-Verwaltungsgesellschaft mbH & Co. am Kaiserlei OHG; BHF Immobilien-GmbH; BHF Lux Immo S.A.; BHF Private Equity Management GmbH; BHF Private Equity Treuhand- und Beratungsgesellschaft mbH; BHF Trust Management Gesellschaft für Vermögensverwaltung mbH; BHF Zurich Family Office AG; BHF-BANK (Schweiz) AG; BHF-BANK Aktiengesellschaft; BHF-BANK International S.A.; BHF-Betriebsservice GmbH; BHW – Gesellschaft für Wohnungswirtschaft mbH; BHW – Gesellschaft für Wohnungswirtschaft mbH & Co. Immobilienverwaltungs KG; BHW Bausparkasse Aktiengesellschaft; BHW Eurofinance B.V.; BHW Financial Srl; BHW Gesellschaft für Vorsorge mbH; BHW Holding AG; BHW Invest, Société à responsabilité limitée; BHW Kreditservice GmbH; BHW-Immobilien GmbH; Billboard Partners L.P.; Biomass Holdings S.á r.l.; Blue Cork, Inc.; Blue Ridge CLO Holding Company LLC; Bluewater Creek Management Co.; BNA Nominees Pty Limited; Bonsai Investment AG; Borfield S.A.; BRIMCO, S. de R.L. de C.V.; BT Commercial Corporation; BT CTAG Nominees Limited; BT Globenet Nominees Limited; BT International (Nigeria) Limited; BT Maulbronn GmbH; BT Milford (Cayman) Limited; BT Muritz GmbH; BT Nominees (Singapore) Pte Ltd; BT Opera Trading S.A.; BT Sable, L.L.C.; BT Vordertaunus Verwaltungs- und Beteiligungsgesellschaft mbH; BTAS Cayman GP; BTD Nominees Pty Limited;

BTVR Investments No. 1 Limited; Buxtal Pty. Limited; C. J. Lawrence Inc.; CAM Initiator Treuhand GmbH & Co. KG; CAM PE Verwaltungs GmbH & Co. KG; CAM Private Equity Nominee GmbH & Co. KG; CAM Private Equity Verwaltungs-GmbH; 3160343 Canada Inc.; Caneel Bay Holding Corp.; Cape Acquisition Corp.; CapeSuccess Inc.; CapeSuccess LLC; Cardales UK Limited; Career Blazers Consulting Services, Inc.; Career Blazers Contingency Professionals, Inc.; Career Blazers Learning Center of Los Angeles, Inc.; Career Blazers LLC; Career Blazers Management Company, Inc.; Career Blazers New York, Inc.; Career Blazers of Ontario Inc.; Career Blazers Personnel Services of Washington, D.C., Inc.; Career Blazers Personnel Services, Inc.; Career Blazers Service Company, Inc.; Caribbean Resort Holdings, Inc.; Cashforce International Credit Support B.V.; Castlewood Expansion Partners, L.P.; Castor LLC; Cathay Advisory (Beijing) Company Ltd; Cathay Asset Management Company Limited; Cathay Capital Company (No. 2) Limited; CBI NY Training, Inc.; Centennial River 1 Inc.; Centennial River 2 Inc.; Centennial River Acquisition I Corporation; Centennial River Acquisition II Corporation; Centennial River Corporation; Channel Nominees Limited; Cinda – DB NPL Securitization Trust 2003-1; CITAN Beteiligungsgesellschaft mbH; Civic Investments Limited; Consumo Finance S.p.A.; Coronus L.P.; CREDA Objektanlage- und -verwaltungsgesellschaft mbH; CTXL Achtzehnte Vermögensverwaltung GmbH; Cyrus J. Lawrence Capital

Holdings, Inc.; D B Rail Holdings (UK) No. 1 Limited; D F Japan Godo Kaisha; D&M Turnaround Partners Godo Kaisha; D.B. International Delaware, Inc.; DAHOC (UK) Limited; DAHOC Beteiligungsgesellschaft mbH; DB (Gibraltar) Holdings Limited; DB (Malaysia) Nominee (Asing) Sdn. Bhd.; DB (Malaysia) Nominee (Tempatan) Sdn. Bhd.; DB (Pacific) Limited; DB (Pacific) Limited, New York; DB (Tip Top) Limited Partnership; DB Abalone LLC; DB Alex. Brown Holdings Incorporated; DB Alps Corporation; DB Alternative Trading Inc.; DB Aotearoa Investments Limited; DB Beteiligungs-Holding GmbH; DB Bluebell Investments (Cayman) Partnership; DB Boracay LLC; DB Broker GmbH; DB Canada GIPF – I Corp.; DB CAPAM GmbH; DB Capital Management, Inc.; DB Capital Markets (Deutschland) GmbH; DB Capital Markets Asset Management Holding GmbH; DB Capital Partners (Asia), L.P.; DB Capital Partners (Europe) 2000 – A Founder Partner LP; DB Capital Partners (Europe) 2000 – B Founder Partner LP; DB Capital Partners Asia G.P. Limited; DB Capital Partners Europe 2002 Founder Partner LP; DB Capital Partners General Partner Limited; DB Capital Partners Latin America, G.P. Limited; DB Capital Partners, Inc.; DB Capital Partners, Latin America, L.P.; DB Capital, Inc.; DB Cartera de Inmuebles 1, S.A.U.; DB Chestnut Holdings Limited; DB Commodities Canada Ltd.; DB Commodity Services LLC; DB Consortium S. Cons. a r.l.; DB Consorzio S. Cons. a r. l.; DB Corporate Advisory (Malaysia) Sdn. Bhd.; DB Crest Limited; DB

Delaware Holdings (Europe) LLC; DB Delaware Holdings (UK) Limited; DB Depositor Inc.; DB Energy Commodities Limited; DB Energy Trading LLC; DB Enfield Infrastructure Holdings Limited; DB Enfield Infrastructure Investments Limited; DB Enterprise GmbH; DB Enterprise GmbH & Co. Zweite Beteiligungs KG; DB Equipment Leasing, Inc.; DB Equity Limited; DB Equity S.à r.l.; DB Fillmore Lender Corp.; DB Finance (Delaware), LLC; DB Finance International GmbH; DB Finanz-Holding GmbH; DB Fund Services LLC; DB Funding LLC #4; DB Funding LLC #5; DB Funding LLC #6; DB Global Technology SRL; DB Global Technology, Inc.; DB Group Services (UK) Limited; DB Holdings (New York), Inc.; DB Holdings (South America) Limited; DB HR Solutions GmbH; DB iCON Investments Limited; DB Impact Investment Fund I, L.P.; DB Industrial Holdings Beteiligungs GmbH & Co. KG; DB Industrial Holdings GmbH; DB Infrastructure Holdings (UK) No. 3 Limited; DB Intermezzo LLC; DB International (Asia) Limited; DB International Investments Limited; DB International Trust (Singapore) Limited; DB Investment Management, Inc.; DB Investment Managers, Inc.; DB Investment Partners, Inc.; DB Investment Services GmbH; DB Investment Services Holding GmbH; DB Investments (GB) Limited; DB IROC Leasing Corp.; DB Jasmine (Cayman) Limited; DB Kredit Service GmbH; DB Leasing Services GmbH; DB Management Support GmbH; DB Managers, LLC; DB Mortgage Investment Inc.; DB Nexus American Investments

(UK) Limited; DB Nexus Iberian Investments (UK) Limited; DB Nexus Investments (UK) Limited; DB Nominees (Hong Kong) Limited; DB Nominees (Singapore) Pte Ltd; DB Omega Ltd.; DB Omega S.C.S.; DB Operaciones y Servicios Interactivos, A.I.E.; DB Overseas Finance Delaware, Inc.; DB Overseas Holdings Limited; DB Partnership Management II, LLC; DB Partnership Management Ltd.; DB PEP V; DB PEP V GmbH & Co. KG; DB Platinum Advisors; DB Portfolio Southwest, Inc.; DB Print GmbH; DB Private Clients Corp.; DB Private Equity GmbH; DB Private Equity International S.à r.l.; DB Private Equity Treuhand GmbH; DB Private Wealth Mortgage Ltd.; DB PWM Collective Management Limited; DB PWM Private Markets I GP; DB Rail Trading (UK) Limited; DB Re S.A.; DB Real Estate Canadainvest 1 Inc.; DB Risk Center GmbH; DB RMS Leasing (Cayman) L.P.; DB Road (UK) Limited; DB Samay Finance No. 2, Inc.; DB Securities S.A.; DB Securities Services NJ Inc.; DB Service Centre Limited; DB Service Uruguay S.A.; DB Services Americas, Inc.; DB Services New Jersey, Inc.; DB Servicios México, S.A. de C.V.; DB Servizi Amministrativi S.r.l.; DB Strategic Advisors, Inc.; DB Structured Derivative Products, LLC; DB Structured Products, Inc.; DB Trips Investments Limited; DB Trust Company Limited Japan; DB Trustee Services Limited; DB Trustees (Hong Kong) Limited; DB U.K. Nominees Limited; DB U.S. Financial Markets Holding Corporation; DB UK Australia Finance Limited; DB UK

Australia Holdings Limited; DB UK Bank Limited; DB UK Holdings Limited; DB UK PCAM Holdings Limited; DB Valoren S.à r.l.; DB Value S.à r.l.; DB Vanquish (UK) Limited; DB Vantage (UK) Limited; DB Vantage No. 2 (UK) Limited; DB Vita S.A.; db x-trackers Holdings (Proprietary) Limited; DBAB Wall Street, LLC; DBAH Capital, LLC; DBAS Cayman Holdings 2 Limited; DBC Continuance Inc.; DBCCA Investment Partners, Inc.; DBCIBZ1; DBCIBZ2; DBD Pilgrim America Corp.; DBFIC, Inc.; DBG Vermögensverwaltungsgesellschaft mbH; DBIGB Finance (No. 2) Limited; DBNY Brazil Invest Co.; DBNZ Overseas Investments (No. 1) Limited; DBOI Global Services (UK) Limited; DBOI Global Services Private Limited; DBR Investments Co. Limited; DBRE Global Real Estate Management IA, Ltd.; DBRE Global Real Estate Management IB, Ltd.; DBRMSGP1; DBRMSGP2; DBS Technology Ventures, L.L.C.; DBUKH Finance Limited; DBUSBZ1, LLC; DBUSBZ2, LLC; DBVR Investments No. 3 Ltd.; DBX Advisors LLC; DBX Strategic Advisors LLC; dbX-Asian Long/Short Equity 3 Fund; dbX-Commodity 1 Fund; dbX-Convertible Arbitrage 11 Fund; dbX-Convertible Arbitrage 13 Fund; dbX-Credit 2 Fund; dbX-Credit 3 Fund; dbX-CTA 11 Fund; dbX-CTA 14 Fund; dbX-CTA 16 Fund; dbX-CTA 17B_37 Fund; dbX-CTA 18 Fund; dbX-CTA 19 Fund; dbX-CTA 2 Fund; dbX-CTA 7 Fund; dbX-CTA 9 Fund; dbX-European Long/Short Equity 7 Fund; dbX-Event Driven 1 Fund; dbX-Global Long/Short Equity 10 (Sabre); dbX-Global Long/Short Equity 8

(Pyramis); dbX-Global Long/Short Equity 9 Fund; dbX-Global Macro 9 Fund; dbX-High Yield 1 Fund; dbX-Japan Long/Short Equity 4 (AlphaGen Hokuto); dbX-Risk Arbitrage 1 Fund; dbX-Risk Arbitrage 10 Fund; dbX-Risk Arbitrage 6 Fund; dbX-Risk Arbitrage 9 Fund; dbX-US Long/Short Equity 13 Fund; dbX-US Long/Short Equity 9 Fund; DCAPF Pte. Ltd.; De Meng Innovative (Beijing) Consulting Company Limited; DeAM Infrastructure Limited; DeAWM Fixed Maturity; DEBEKO Immobilien GmbH & Co Grundbesitz OHG; DEE Deutsche Erneuerbare Energien GmbH; DEGRU Erste Beteiligungsgesellschaft mbH; Delowrezham de México S. de R.L. de C.V.; DEUFRAN Beteiligungs GmbH; DEUKONA Versicherungs-Vermittlungs-GmbH; Deutsche (Aotearoa) Capital Holdings New Zealand; Deutsche (Aotearoa) Foreign Investments New Zealand; Deutsche (New Munster) Holdings New Zealand Limited; Deutsche Aeolia Power Production S.A.; Deutsche Alt-A Securities, Inc.; Deutsche Alternative Asset Management (Global) Limited; Deutsche Alternative Asset Management (UK) Limited; Deutsche Asia Pacific Finance, Inc.; Deutsche Asia Pacific Holdings Pte Ltd; Deutsche Asset & Wealth Management International GmbH; Deutsche Asset & Wealth Management Investment GmbH; Deutsche Asset Management (Asia) Limited; Deutsche Asset Management (Hong Kong) Limited; Deutsche Asset Management (India) Private Limited; Deutsche Asset Management (Japan) Limited; Deutsche Asset Management (Korea) Company Limited; Deutsche Asset

Management (UK) Limited; Deutsche Asset Management Canada Limited; Deutsche Asset Management Group Limited; Deutsche Asset Management Schweiz; Deutsche Auskunftei Service GmbH; Deutsche Australia Limited; Deutsche Bank (Cayman) Limited; DEUTSCHE BANK (CHILE) S.A.; Deutsche Bank (China) Co., Ltd.; Deutsche Bank (Malaysia) Berhad; Deutsche Bank (Malta) Ltd; Deutsche Bank (Mauritius) Limited; Deutsche Bank (Perú) S.A.; Deutsche Bank (Suisse) SA; Deutsche Bank (Uruguay) Sociedad Anónima Institución Financiera Externa; DEUTSCHE BANK A.S.; Deutsche Bank Americas Finance LLC; Deutsche Bank Americas Holding Corp.; Deutsche Bank Bauspar-Aktiengesellschaft; Deutsche Bank Capital Markets S.r.l.; Deutsche Bank Corretora de Valores S.A.; Deutsche Bank Europe GmbH; Deutsche Bank Financial Inc.; Deutsche Bank Financial LLC; Deutsche Bank Holdings, Inc.; Deutsche Bank Insurance Agency Incorporated; Deutsche Bank Insurance Agency of Delaware; Deutsche Bank International Limited; Deutsche Bank International Trust Co. (Cayman) Limited; Deutsche Bank International Trust Co. Limited; Deutsche Bank Investments (Guernsey) Limited; Deutsche Bank Luxembourg S.A.; Deutsche Bank Mutui S.p.A.; Deutsche Bank México, S.A., Institución de Banca Múltiple; Deutsche Bank National Trust Company; Deutsche Bank Nederland N.V.; Deutsche Bank Nominees (Jersey) Limited; Deutsche Bank PBC Spólka Akcyjna; Deutsche Bank Polska Spólka Akcyjna; Deutsche Bank Privat-

und Geschäftskunden Aktiengesellschaft; Deutsche Bank Real Estate (Japan) Y.K.; Deutsche Bank Realty Advisors, Inc.; Deutsche Bank S.A.; Deutsche Bank S.A. – Banco Alemão; Deutsche Bank Securities Inc.; Deutsche Bank Securities Limited; Deutsche Bank Services (Jersey) Limited; Deutsche Bank Società per Azioni; Deutsche Bank Trust Company Americas; Deutsche Bank Trust Company Delaware; Deutsche Bank Trust Company New Jersey Ltd.; Deutsche Bank Trust Company, National Association; Deutsche Bank Trust Corporation; Deutsche Bank Trustee Services (Guernsey) Limited; Deutsche Bank Österreich AG; Deutsche Bank, Sociedad Anónima Española; Deutsche Capital Finance (2000) Limited; Deutsche Capital Hong Kong Limited; Deutsche Capital Markets Australia Limited; Deutsche Capital Partners China Limited; Deutsche Cayman Ltd.; Deutsche CIB Centre Private Limited; Deutsche Climate Change Fixed Income QP Trust; Deutsche Clubholding GmbH; Deutsche Commodities Trading Co., Ltd.; Deutsche Custody Global B.V.; Deutsche Custody N.V.; Deutsche Custody Nederland B.V.; Deutsche Domus New Zealand Limited; Deutsche Emerging Markets Investments (Netherlands) B.V.; Deutsche Equities India Private Limited; Deutsche Far Eastern Asset Management Company Limited; Deutsche Fiduciary Services (Suisse) SA; Deutsche Finance Co 1 Pty Limited; Deutsche Finance Co 2 Pty Limited; Deutsche Finance Co 3 Pty Limited; Deutsche Finance Co 4 Pty Limited; Deutsche Finance No. 2 (UK) Limited; Deutsche

Finance No. 2 Limited; Deutsche Finance No. 4 (UK) Limited; Deutsche Foras New Zealand Limited; Deutsche Friedland; Deutsche Futures Singapore Pte Ltd; Deutsche Gesellschaft für Immobilien-Leasing mit beschränkter Haftung; Deutsche Global Markets Limited; Deutsche Group Holdings (SA) (Proprietary) Limited; Deutsche Group Services Pty Limited; Deutsche Grundbesitz Beteiligungsgesellschaft mbH; Deutsche Grundbesitz-Anlagegesellschaft mbH & Co Löwenstein Palais; Deutsche Grundbesitz-Anlagegesellschaft mit beschränkter Haftung; Deutsche Haussmann, S.à r.l.; Deutsche Holdings (BTI) Limited; Deutsche Holdings (Luxembourg) S.à r.l.; Deutsche Holdings (Malta) Ltd.; Deutsche Holdings (SA) (Proprietary) Limited; Deutsche Holdings Limited; Deutsche Holdings No. 2 Limited; Deutsche Holdings No. 3 Limited; Deutsche Holdings No. 4 Limited; Deutsche Immobilien Leasing GmbH; Deutsche India Holdings Private Limited; Deutsche International Corporate Services (Delaware) LLC; Deutsche International Corporate Services (Ireland) Limited; Deutsche International Corporate Services Limited; Deutsche International Custodial Services Limited; Deutsche International Finance (Ireland) Limited; Deutsche International Trust Company N.V.; Deutsche International Trust Corporation (Mauritius) Limited; Deutsche Inversiones Dos S.A.; Deutsche Inversiones Limitada; Deutsche Investment Management Americas Inc.; Deutsche Investments (Netherlands) N.V.; Deutsche Investments Australia Limited; Deutsche

Investments India Private Limited; Deutsche Investor Services Private Limited; Deutsche IT License GmbH; Deutsche Knowledge Services Pte. Ltd.; Deutsche Long Duration Government/Credit QP Trust; Deutsche Managed Investments Limited; Deutsche Mandatos S.A.; Deutsche Master Funding Corporation; Deutsche Morgan Grenfell Group Public Limited Company; Deutsche Morgan Grenfell Nominees Pte Ltd; Deutsche Mortgage & Asset Receiving Corporation; Deutsche Mortgage Securities, Inc.; Deutsche New Zealand Limited; Deutsche Nominees Limited; Deutsche Oppenheim Family Office AG; Deutsche Overseas Issuance New Zealand Limited; Deutsche Postbank AG; Deutsche Postbank Finance Center Objekt GmbH; Deutsche Postbank International S.A.; Deutsche Private Asset Management Limited; Deutsche Securities (India) Private Limited; Deutsche Securities (Perú) S.A.; Deutsche Securities (Proprietary) Limited; Deutsche Securities (SA) (Proprietary) Limited; Deutsche Securities Asia Limited; Deutsche Securities Australia Limited; Deutsche Securities Corredores de Bolsa Spa; Deutsche Securities Inc.; Deutsche Securities Israel Ltd.; Deutsche Securities Korea Co.; Deutsche Securities Limited; Deutsche Securities Mauritius Limited; Deutsche Securities Menkul Degerler A.S.; Deutsche Securities New Zealand Limited; Deutsche Securities Saudi Arabia LLC; Deutsche Securities Sociedad de Bolsa S.A.; Deutsche Securities Venezuela S.A.; Deutsche Securities, S.A. de C.V., Casa de Bolsa; Deutsche Securitisation Australia Pty Limited; Deutsche

StiftungsTrust GmbH; Deutsche Transnational Trustee Corporation Inc; Deutsche Trustee Company Limited; Deutsche Trustee Services (India) Private Limited; Deutsche Trustees Malaysia Berhad; Deutsche Ultra Core Fixed Income QP Trust; Deutsches Institut für Altersvorsorge GmbH; DFC Residual Corp.; DI Deutsche Immobilien Baugesellschaft mbH; DI Deutsche Immobilien Treuhandgesellschaft mbH; DIB-Consult Deutsche Immobilien- und Beteiligungs-Beratungsgesellschaft mbH; DIL Financial Services GmbH & Co. KG; DISCA Beteiligungsgesellschaft mbH; DIV Holding GmbH; DMG Technology Management, L.L.C.; DMJV; DNU Nominees Pty Limited; Drolla GmbH; DSL Portfolio GmbH & Co. KG; DSL Portfolio Verwaltungs GmbH; DTS Nominees Pty Limited; DWS Holding & Service GmbH; DWS Investment S.A.; DWS Investments (Spain), S.G.I.I.C., S.A.; DWS Investments Distributors, Inc.; DWS Investments Service Company; DWS RREEF Real Estate Securities Income Fund; DWS Trust Company; easyhyp GmbH; EC EUROPA IMMOBILIEN FONDS NR. 3 GmbH & CO. KG; EDORA Funding GmbH; Elba Finance GmbH; ELBI Funding GmbH; ELDO ACHTE Vermögensverwaltungs GmbH; ELDO ERSTE Vermögensverwaltungs GmbH; Elizabethan Holdings Limited; Elizabethan Management Limited; Equipment Management Services LLC; Estate Holdings, Inc.; Evergreen Amsterdam Holdings B.V.; Evergreen International Holdings B.V.; Evergreen International Investments B.V.; Evergreen International Leasing B.V.; Exinor SA; EXTOREL Private Equity

Advisers GmbH; FARAMIR Beteiligungs- und Verwaltungs GmbH; Farezco I, S. de R.L. de C.V.; Farezco II, S. de R.L. de C.V.; Fenix Administración de Activos S. de R.L. de C.V.; Fenix Mercury 1 S. de R.L. de C.V.; Fiduciaria Sant' Andrea S.r.L.; Filaine, Inc.; Finanza & Futuro Banca SpA; Firstee Investments LLC; Fondo de Inversión Privado NPL Fund Two; FRANKFURT CONSULT GmbH; Frankfurt Family Office GmbH; Frankfurt Finanz-Software GmbH; FRANKFURT-TRUST Invest Luxemburg AG; FRANKFURT-TRUST Investment-Gesellschaft mit beschränkter Haftung; Frankfurter Beteiligungs-Treuhand Gesellschaft mit beschränkter Haftung; Frankfurter Vermögens-Treuhand Gesellschaft mit beschränkter Haftung; Franz Urbig- und Oscar Schlitter-Stiftung Gesellschaft mit beschränkter Haftung; Funds Nominees Limited; Fünfte SAB Treuhand und Verwaltung GmbH & Co. Suhl "Rimbachzentrum" KG; G Finance Holding Corp.; GbR Goethestraße; Gemini Technology Services Inc.; German Access LLP; German American Capital Corporation; Global Commercial Real Estate Special Opportunities Limited; Greenwood Properties Corp.; Grundstücksgesellschaft Frankfurt Bockenheimer Landstraße GbR; Grundstücksgesellschaft Köln-Ossendorf VI mbH; Grundstücksgesellschaft Wiesbaden Luisenstraße/Kirchgasse GbR; Gulara Pty Ltd; GUO Mao International Hotels B.V.; Hac Investments Ltd.; HAC Investments Portugal – Servicos de Consultadoria e Gestao Ltda.; Hakkeijima Godo Kaisha;

Herengracht Financial Services B.V.; HTB Spezial GmbH & Co. KG; Hudson GmbH; Hypotheken-Verwaltungs-Gesellschaft mbH; IC Chicago Associates LLC; IFN Finance N.V.; IKARIA Beteiligungs- und Verwaltungsgesellschaft mbH; Imodan Limited; Industrie-Beteiligungs-Gesellschaft mit beschränkter Haftung; International Operator Limited; IOS Finance EFC, S.A.; ISTRON Beteiligungs- und Verwaltungs-GmbH; IVAF I Manager, S.á r.l.; IVAF II Manager, S.á r.l.; Izumo Capital YK; JADE Residential Property AG; JR Nominees (Proprietary) Limited; Jyogashima Godo Kaisha; KEBA Gesellschaft für interne Services mbH; KHP Knüppe, Huntebrinker & Co. GmbH; Kidson Pte Ltd; Kingfisher (Ontario) LP; Kingfisher Holdings I (Nova Scotia) ULC; Kingfisher Holdings II (Nova Scotia) ULC; Kingfisher Nominees Limited; Klöckner Industriebeteiligungsgesellschaft mbH; Konsul Inkasso GmbH; Kradavimd UK Lease Holdings Limited; Kunshan RREEF Equity Investment Fund Management Co. Ltd.; LA Water Holdings Limited; Lammermuir Leasing Limited; LAWL Pte. Ltd.; Leasing Verwaltungsgesellschaft Waltersdorf mbH; Legacy Reinsurance, LLC; Liegenschaft Hainstraße GbR; Long-Tail Risk Insurers, Ltd.; Luxembourg Family Office S.A.; LWC Nominees Limited; MAC Investments Ltd.; Maher 1210 Corbin LLC; Maher Chassis Management LLC; Maher Terminals Holding Corp.; Maher Terminals LLC; Maher Terminals Logistics Systems LLC; Maher Terminals USA, LLC; Maritime Indemnity Insurance Co. Ltd.; Maxblue Americas

Holdings, S.A.; Mayfair Center, Inc.; MEF I Manager, S.á r.l.; MEFIS Beteiligungsgesellschaft mbH; MHL Reinsurance Ltd.; MIT Holdings, Inc.; "modernes Frankfurt" private Gesellschaft für Stadtentwicklung mbH i. L.; Morgan Grenfell & Co. Limited; Morgan Grenfell Development Capital Holdings Limited; Morgan Nominees Limited; Mortgage Trading (UK) Limited; MortgageIT Securities Corp.; MortgageIT, Inc.; Mountain Recovery Fund I Y.K.; MRF2 Y.K.; MXB U.S.A., Inc.; Navegator – SGFTC, S.A.; NCKR, LLC; NEPTUNO Verwaltungs- und Treuhand-Gesellschaft mit beschränkter Haftung; Nevada Mezz 1 LLC; Nevada Parent 1 LLC; Nevada Property 1 LLC; Nevada Restaurant Venture 1 LLC; Nevada Retail Venture 1 LLC; NIDDA Grundstücks- und Beteiligungs-Gesellschaft mit beschränkter Haftung; Nordwestdeutscher Wohnungsbauträger Gesellschaft mit beschränkter Haftung; norisbank GmbH; North American Income Fund PLC; Novelties Distribution LLC; O.F. Finance, LLC; Office Grundstücksverwaltungsgesellschaft mbH; OOO "Deutsche Bank"; OPB Verwaltungs- und Beteiligungs-GmbH; OPB Verwaltungs- und Treuhand GmbH; OPB-Holding GmbH; OPB-Nona GmbH; OPB-Oktava GmbH; OPB-Quarta GmbH; OPB-Quinta GmbH; OPB-Septima GmbH; Oppenheim Asset Management Services S.á r.l.; OPPENHEIM Beteiligungs-Treuhand GmbH; OPPENHEIM Capital Advisory GmbH; Oppenheim Eunomia GmbH; OPPENHEIM Flottenfonds V GmbH & Co. KG; Oppenheim Fonds Trust GmbH;

OPPENHEIM Internet Fonds Manager GmbH i. L.; Oppenheim Kapitalanlagegesellschaft mbH; OPPENHEIM PRIVATE EQUITY Manager GmbH; OPPENHEIM PRIVATE EQUITY Verwaltungsgesellschaft mbH; OPS Nominees Pty Limited; OVT Trust 1 GmbH; OVV Beteiligungs GmbH; PADUS Grundstücks-Vermietungsgesellschaft mbH; Pan Australian Nominees Pty Ltd; PB (USA) Holdings, Inc.; PB Capital Corporation; PB Factoring GmbH; PB Firmenkunden AG; PB Sechste Beteiligungen GmbH; PB Spezial-Investmentaktiengesellschaft mit Teilgesellschaftsvermögen; PBC Banking Services GmbH; PBC Carnegie, LLC; PBC Services GmbH der Deutschen Bank; PEIF II (Manager) Limited; Pelleport Investors, Inc.; Pembol Nominees Limited; Percy Limited; PHARMA/wHEALTH Management Company S.A.; Phoebus Investments LP; Pilgrim Financial Services LLP; Plantation Bay, Inc.; Pollus L.P.; Polydeuce LLC; Portos N.V.; Postbank Akademie und Service GmbH; Postbank Beteiligungen GmbH; Postbank Direkt GmbH; Postbank Filial GmbH; Postbank Filialvertrieb AG; Postbank Finanzberatung AG; Postbank Immobilien und Baumanagement GmbH; Postbank Immobilien und Baumanagement GmbH & Co. Objekt Leipzig KG; Postbank Leasing GmbH; Postbank P.O.S. Transact GmbH; Postbank Service GmbH; Postbank Systems AG; Postbank Versicherungsvermittlung GmbH; Primelux Insurance S.A.; Private Equity Asia Select Company III S.á r.l.; Private Equity Global Select Company IV S.á r.l.;

Private Equity Global Select Company V S.á r.l.; Private Equity Select Company S.á r.l.; Private Financing Initiatives, S.L.; PS plus Portfolio Software + Consulting GmbH; PT. Deutsche Securities Indonesia; Public joint-stock company "Deutsche Bank DBU"; Pyramid Ventures, Inc.; R.B.M. Nominees Pty Ltd; registrar services GmbH; Regula Limited; REIB Europe Investments Limited; REIB International Holdings Limited; Rimvalley Limited; RMS Investments (Cayman); RoCal, L.L.C.; RoCalwest, Inc.; RoPro U.S. Holding, Inc.; Route 28 Receivables, LLC; Royster Fund Management S.á r.l.; RREEF America L.L.C.; RREEF China REIT Management Limited; RREEF European Value Added I (G.P.) Limited; RREEF India Advisors Private Limited; RREEF Investment GmbH; RREEF Management GmbH; RREEF Management L.L.C.; RREEF Shanghai Investment Consultancy Company; RREEF Spezial Invest GmbH; RTS Nominees Pty Limited; Rüd Blass Vermögensverwaltung AG; SAB Real Estate Verwaltungs GmbH; Sagamore Limited; SAGITA Grundstücks-Vermietungsgesellschaft mbH; Sajima Godo Kaisha; Sal. Oppenheim Alternative Investments GmbH; Sal. Oppenheim Boulevard Konrad Adenauer S.á r.l.; Sal. Oppenheim Corporate Finance North America Holding LLC; Sal. Oppenheim Global Invest GmbH; Sal. Oppenheim jr. & Cie. AG & Co. Kommanditgesellschaft auf Aktien; Sal. Oppenheim jr. & Cie. Beteiligungs GmbH; Sal. Oppenheim jr. & Cie. Komplementär AG; Sal. Oppenheim jr. & Cie. Luxembourg S.A.; Sal. Oppenheim Private Equity Partners

S.A.; SALOMON OPPENHEIM GmbH i. L.; SAPIO Grundstücks-Vermietungsgesellschaft mbH; Schiffsbetriebsgesellschaft Brunswik mit beschränkter Haftung; Service Company Four Limited; Service Company Three Limited; Sharps SP I LLC; Sherwood Properties Corp.; Shopready Limited; Silver Leaf 1 LLC; STC Capital YK; Structured Finance Americas, LLC; Sunbelt Rentals Exchange Inc.; Süddeutsche Vermögensverwaltung Gesellschaft mit beschränkter Haftung; TAF 2 Y.K.; Tapeorder Limited; Taunus Corporation; Telefon-Servicegesellschaft der Deutschen Bank mbH; TELO Beteiligungsgesellschaft mbH; Tempurrite Leasing Limited; Thai Asset Enforcement and Recovery Asset Management Company Limited; The World Markets Company GmbH i. L.; Tilney (Ireland) Limited; Tilney Asset Management International Limited; Tilney Group Limited; Tilney Investment Management; TOKOS GmbH; Treuinvest Service GmbH; Trevona Limited; Triplereason Limited; UDS Capital Y.K.; Urbistar Settlement Services, LLC; US Real Estate Beteiligungs GmbH; VCG Venture Capital Fonds III Verwaltungs GmbH; VCG Venture Capital Gesellschaft mbH; VCG Venture Capital Gesellschaft mbH & Co. Fonds III KG i. L.; VCG Venture Capital Gesellschaft mbH & Co. Fonds III Management KG; VCM MIP III GmbH & Co. KG; VCM MIP IV GmbH & Co. KG; VCM Treuhand Beteiligungsverwaltung GmbH; VCP Treuhand Beteiligungsgesellschaft mbH; VCP Verwaltungsgesellschaft mbH; Vertriebsgesellschaft mbH der Deutschen

Bank Privat- und Geschäftskunden; Vesta Real Estate S.r.l.; VI Resort Holdings, Inc.; VÖB-ZVD Processing GmbH; Wealthspur Investment Company Limited; WEPLA Beteiligungsgesellschaft mbH; WERDA Beteiligungsgesellschaft mbH; Whale Holdings S.à r.l.; Wilmington Trust B6; 5000 Yonge Street Toronto Inc.; and Zürich – Swiss Value AG.