436

New York County Clerk's Index No. 650980/2012

Court of Appeals

STATE OF NEW YORK

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

Plaintiff-Appellant,

—against—

DB STRUCTURED PRODUCTS, INC.,

Defendant-Respondent.

MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

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April 21, 2014

CORPORATE DISCLOSURE STATEMENT

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

STATE OF NEW YORK
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PLAINTIFF-APPELLANT'S NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE that upon the annexed Affirmation of Zachary W. Mazin, dated April 21, 2014, the Decision and Order of the Appellate Division, First Department, dated December 19, 2013 (the "Decision"), attached as Exhibit A thereto, the additional exhibits attached thereto, the accompanying Memorandum of Law in Support of Plaintiff-Appellant's Motion for Leave to Appeal to the Court of Appeals filed herewith, and upon all of the pleadings, papers and proceedings heretofore in this action, Plaintiff-Appellant 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, which closed on March 28, 2006, will move this Court, at

the Courthouse located at 20 Eagle Street, Albany, New York 12207, on Monday, May 5, 2014, at 10:00AM, or as soon thereafter as counsel may be heard, for an Order:

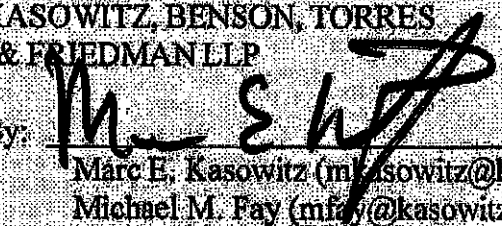
a. Pursuant to CPLR 5602(a)(1)(i) and 22 NYCRR § 500.22 granting Plaintiff leave to appeal to the Court of Appeals from the Decision, entered in the Office of the Clerk on December 19, 2013, on the grounds that the questions presented are of great public importance, present a conflict with the Court of Appeals' prior decisions, and permission to appeal should be granted in the interests of substantial justice; and

b. Granting such other and further relief as the Court deems just and proper.

Dated: New York, New York
April 21, 2014

Respectfully submitted,

KASOWITZ, BENSON, TORRES
& FRIEDMAN LLP

By: 

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STATE OF NEW YORK
COURT OF APPEALS

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-against-

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New York County Clerk's Index No.: 650980/2012

AFFIRMATION OF ZACHARY W. MAZIN IN SUPPORT OF PLAINTIFF-APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

ZACHARY W. MAZIN, an attorney duly admitted to practice before the courts of the State of New York, hereby affirms under penalty of perjury as follows:

1. I am a member of Kasowitz, Benson, Torres & Friedman LLP, together with Bancroft PLLC, attorneys for Plaintiff-Appellant 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, which closed on March 28, 2006.

2. I submit this affirmation in support of Plaintiff-Appellant's Motion for Leave to Appeal to the Court of Appeals pursuant to CPLR § 5602(a)(1)(i) and 22 NYCRR § 500.22.

3. Plaintiff-Appellant seeks permission to appeal from the Decision and Order of the Appellate Division, First Department, dated December 19, 2013 (the "Decision"), which finally determined this action. A true and correct copy of the Decision is attached hereto as Exhibit A.

4. Plaintiff-Appellant was served the Notice of Entry of the Decision by Defendant-Respondent on December 23, 2013, a true and correct copy of which is attached hereto as Exhibit B.

5. On January 21, 2014, Plaintiff-Appellant served its motion for reargument or, in the alternative, leave of the First Department to appeal the Decision to the Court of Appeals (the "Motion to Reargue") upon Defendant-Respondent.

6. The First Department issued a decision denying Plaintiff-Appellant's Motion to Reargue on March 20, 2014, a true and correct of which is attached hereto as Exhibit C.

7. Plaintiff-Appellant was served the Notice of Entry of the First Department's Motion to Reargue decision by Defendant-Respondent on March 20, 2014, a true and correct of which is attached hereto as Exhibit D.

8. Attached hereto as Exhibit E is a true and correct copy of the unreported Order denying Motion for Reconsideration, entered on January 7, 2014, in *Fed. Hous. Agency v. WMC Mortg. LLC*, No. 13 Civ. 0584 (AKH), slip op. (S.D.N.Y. Jan. 7, 2014).

9. Attached hereto as Exhibit F is a true and correct copy of the unreported Order denying Motion for Certification of Interlocutory Appeal, entered on April 14, 2014, in *Fed. Hous. Fin. Agency v. WMC Mortg. LLC*, No. 13 Civ. 0584 (AKH), slip op. (S.D.N.Y. Apr. 14, 2014).

Dated: New York, New York
April 21, 2014

STATE OF NEW YORK
COURT OF APPEALS

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,

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-against-

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF-APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

Plaintiff-Appellant, ACE Securities Corp., Home Equity Loan Trust, Series 2006-SL2 (the "Trust"), by HSBC Bank USA, National Association, solely in its capacity as trustee (the "Trustee") for the holders of Asset Backed Pass-Through Certificates, Series 2006-SL2 (the "Certificates"), issued by the Trust pursuant to a Pooling and Servicing Agreement (the "PSA") and a Mortgage Loan Purchase Agreement (the "MLPA," and together with the PSA, the "Agreements"), both of which closed on March 28, 2006, respectfully submits this memorandum of law in support of its motion, pursuant to CPLR § 5602(a)(1)(i) and 22 NYCRR § 500.22, for leave to appeal to this Court from the December 19, 2013 Decision and Order of the Appellate Division, First Department.[1]

INTRODUCTION

This case presents an exceptionally important question of New York contract law that is central to countless residential mortgage-backed securitization (RMBS) claims involving tens of billions of dollars in investor losses in the wake of the recent financial crisis. That accrual question has squarely divided the courts, producing an untenable situation in which materially analogous claims may proceed in some cases but not others, depending solely on the happenstance of where they were filed. That is not a situation this Court should tolerate,

[1] Submitted herewith in support of the motion is the Affirmation of Zachary W. Mazin, made on April 21, 2014 ("Mazin Aff." or "Mazin Affirmation").

particularly when the stakes are this high. The Court should grant leave to appeal and definitively resolve this critical and recurring question of New York law.

At the height of the RMBS market, RMBS sponsors and their investors routinely entered into agreements governed by the same basic terms: The sponsor made certain representations concerning the quality and characteristics of the typically thousands of loans it securitized. And in the event the sponsor discovered or was notified that any of the loans did not materially comply with these representations and warranties, it agreed to cure or, if cure proved impossible, repurchase the defective loan(s) within a specified time period. This standard agreement reflected the basic risk-shifting bargain between the parties: Because investors were poorly positioned—both financially and practically—to investigate the quality of each of the thousands of loans underlying these agreements, they would invest *only* upon assurance that the sponsor, with its superior knowledge of and position to investigate the loans, accepted for the life of the agreement the risk that its representations and warranties might prove materially false. Without that guarantee, investors simply could not have taken on the risk of purchasing bonds backed by mortgages that they had no effective or efficient ability to "reunderwrite."

The decision below undoes that basic bargain, both here and in a multitude of other pending RMBS cases. According to the Appellate Division, First Department, a claim for breach of the obligation to cure or repurchase a defective

loan accrues not when the sponsor fails to cure or repurchase within the specified period, but rather when the sponsor makes the materially false representation or warranty—in other words, when the parties first enter into the agreement creating the obligation to cure or repurchase. Combining that logic with New York's standard six-year statute of limitations, the court concluded that even though the RMBS Agreements at issue here (like most RMBS agreements) placed no time limit whatsoever on the obligation to cure or repurchase, that obligation in fact expired six years after the Agreements closed. Indeed, it is even worse than that, as the court concluded that failure to cure or repurchase within the contractually specified 60- or 90-day period *is* a condition precedent for purposes of determining when a suit may be initiated, yet *is not* a condition precedent for purposes of determining when a claim accrues. Accordingly, the court's decision effectively imposes a *five-years-and-nine-months* time limit on the obligation to cure or repurchase, as it would seem to be impossible under the court's reasoning to bring a timely suit if the obligation is breached any later than that.

That decision stands in stark contrast to decisions of other courts considering the same question in analogous cases also governed by New York law. For all the reasons explained in the Supreme Court decision overturned by the First Department, other courts have concluded that this Court's precedents compel the commonsense conclusion that a claim for breach of the obligation to cure or

repurchase cannot accrue until that obligation is breached. And one federal court has expressly reaffirmed that conclusion even *after* the First Department issued its contrary decision here. Accordingly, absent this Court's intervention, although RMBS sponsors sued in certain federal courts will be held accountable for flagrantly breaching their cure or repurchase obligations, those who had the good fortune of being sued in state court will escape all liability for doing the same. Certainly, it makes no sense to punish plaintiffs for choosing a state-court forum, but that will be the net effect of leaving this decision unreviewed.

The enormous financial stakes only underscore the inequity of that result. The same accrual question governs hundreds of the claims for recovery of massive losses arising out of instruments at the center of one of the worst financial crises since the Great Depression. This case alone involves more than ***$330 million*** in losses, and that is just the tip of the iceberg—*billions* more are at stake in pending cases brought on behalf of trusts representing a diverse array of investors, including numerous public and private pension funds. Clearly, whether RMBS sponsors may evade all liability for blatantly breaching their obligation to cure or repurchase defective loans is a question of the utmost public importance. Moreover, the answer to the accrual question is of immense future importance as well, as it will determine whether, as a matter of New York law, RMBS contracts can be structured and enforced as parties intend—with conditions precedent and

continuing obligations that allocate risk in a commercially sensible manner—or whether one side may unravel the parties' basic bargain years after the fact.

In short, the need for this Court to resolve the accrual question is acute. Indeed, the Second Circuit may well reach the same conclusion and certify the question to this Court in the appeal that is currently pending before it, or one of the many others that are sure to follow. That is all the more reason to resolve this question now, lest the investors in this case and the countless cases that will be dismissed as a result of the First Division's erroneous decision be denied the opportunity to benefit from this Court's all-but-inevitable resolution of this recurring and exceedingly consequential question of New York law. The Court should grant leave to appeal.[2]

PROCEDURAL HISTORY & TIMELINESS

A. Supreme Court Proceedings.

On March 28, 2006, an RMBS trust, ACE Securities Corp. Home Loan Trust, Series 2006-SL2, was created through a process that included the execution of the two Agreements that are the focus of this case: the PSA and MLPA. On March 28, 2012, the sixth anniversary of the execution of those Agreements, this

[2] This motion also presents a second question that, if resolved in the Trust's favor, would make the complaint timely under the First Department's analysis of the accrual question: whether investors had standing to file a summons with notice on behalf of the Trust. In light of the limitation the First Department's decision places on *when* these claims may be brought, questions regarding *how* they may be initiated take on heighted importance.

action was commenced when two investors, or "certificate holders," who held the Certificates issued by the Trust filed a summons with notice derivatively on behalf of the Trust against DB Structured Products, Inc. ("DBSP"), the sponsor of the Agreements. (R.24-27) On August 24, 2012, DBSP demanded service of a complaint, and on September 13, 2012, appellant HSBC Bank USA, N.A., in its capacity as Trustee for the Trust, substituted for the investors and filed a complaint. (R.30-348) The complaint asserts a single count for breach of contract and specific performance based on DBSP's failure to comply with its contractual obligation to cure or repurchase within a specified time period after notice or discovery of any loan that did not comply with DBSP's representations and warranties. (R.51-52 (Cmpl. ¶¶ 41-48))

DBSP moved to dismiss, arguing that the Trust's claims were untimely under CPLR § 213's six-year statute of limitation because they had accrued when the Agreements closed on March 28, 2006, not when DBSP later breached its repurchase obligation. DBSP further argued, among other things, that the initial summons with notice filed on March 28, 2012, by the investors on behalf of the Trust did not make the Trust's claims timely because the investors lacked standing to enforce DBSP's repurchase obligation, and that the Trustee's substitution could not relate back to the March 28, 2012 summons with notice for the same reason.

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

B. The Appellate Division Decision.

On December 19, 2013, the Appellate Division, First Department, reversed. The court acknowledged that, under the plain language of the Agreements, the Trustee "was not entitled to sue or to demand that defendant repurchase defective mortgage loans until it discovered or received notice of a breach *and* the cure period lapsed." (Mazin Aff. Ex. A (Slip. Op. 27)) Nevertheless, the court held that

the Trust's claims for breach of the cure or repurchase obligation accrued not upon DBSP's failure to cure or repurchase within the specified period, but instead on the March 2006 closing date of the MLPA, "when any breach of the representations and warranties contained therein occurred[.]" (*Id.*) At the same time, the court concluded that the investors' timely summons with notice was "a nullity" because the investors "fail[ed] to comply with a condition precedent to commencing suit"—namely, waiting until the cure or repurchase period lapsed. (*Id.* at 28)

The court also concluded that the investors' derivative March 28, 2012 summons with notice was insufficient to make the Trust's claims timely because the investors lacked standing to initiate this action on the Trust's behalf. (*Id.*) The court based that conclusion on the PSA's "no-action" clause, which provides that, as a condition precedent to investor-initiated actions on the Trust's behalf, certificate holders must provide the Trustee with "'a written notice of default and of the continuance thereof.'" (*Id.*) Although the court did not dispute that the certificate holders provided the Trustee with written notice of default, it concluded that the defaults "enumerated in the PSA concern failures of performance by the servicer and master servicer only" and do not include defaults "in connection with the sponsor's breaches of the representations." (*Id.* (citation omitted)). The court also concluded that the complaint that the Trustee filed after it substituted in could not relate back to the timely summons with notice. (*Id.*)

C. Timeliness of This Motion.

On January 21, 2014, the Trustee, on behalf of the Trust, timely moved the First Department for reconsideration or leave to appeal to this Court. On March 20, 2014, DBSP served the Trustee with the Notice of Entry of the Appellate Division's order denying reconsideration and leave to appeal. (Mazin Aff. Ex. D) The 30-day period during which the Trustee may seek leave to appeal from this Court pursuant to CPLR § 5513(b) therefore expires on Monday, April 21, 2014. Accordingly, the Trustee's motion for leave to appeal is timely.

JURISDICTION

The Court has jurisdiction over this motion and the proposed appeal pursuant to CPLR § 5602(a)(1)(i) and CPLR § 5611 because the underlying action originated in the Supreme Court, New York County; the Appellate Division, First Department, has refused permission to appeal; and the decision below is an order of the Appellate Division, First Department, that finally determines the action and is not appealable as a matter of right.

QUESTIONS PRESENTED

1. Where an RMBS contract obligates the sponsor to cure or repurchase loans upon notice or discovery that the loans do not comply with the sponsor's representations or warranties, does a claim for breach of that obligation to cure or

repurchase accrue when the sponsor fails to cure or repurchase within the time period specified by the contract, or when the contract was made?

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

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

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

STATEMENT OF FACTS

A mortgage loan securitization is a structured finance transaction in which mortgage loans are pooled and deposited into an entity and serve as collateral for the issuance of securities by that entity. The securities pay principal and interest from the cash flow generated by the mortgage loan pool. (R.36 (Cmpl. ¶ 16)) The most common form of residential mortgage loan securitization involves the creation of a trust that purchases a portfolio of mortgage loans from originators of the loans or the sponsor of the securitization and issues certificates representing

interests in the assets of the trust. (R.36 (Cmpl. ¶ 17)) The trust and trustee hold the mortgage loans, as well as all of the rights associated with those loans, for the benefit of the certificate holders (*i.e.*, investors). (R.36-37 (Cmpl. ¶¶ 17, 20))

For decades, mortgage loan securitization has played a critical role in housing finance in the United States.[3] The securitization at issue in this case is just one of many residential mortgage-backed securitizations that were structured during the housing boom of the last decade and that ultimately were at the heart of the recent financial crisis. This securitization comprises a pool of 8,815 mortgage loans sold by DBSP, which served as the sponsor and purchased the loans from various third-party mortgage originators. (R.32-33, 36 (Cmpl. ¶¶ 1-3, 18))

The Trust, and DBSP's duties to the Trust, are governed principally by two contracts: the MLPA, in which DBSP sold the loans to ACE Securities Corp., a DBSP affiliate called the "depositor"; and the PSA, in which ACE Securities Corp. in turn conveyed the loans to the Trust. (R.54-348) Both the MLPA and PSA (collectively, the "Agreements") closed on March 28, 2006. (R.78, 290) Pursuant to the Agreements, the Trust and Trustee hold the mortgage loans on behalf of and for the benefit of the certificate holders. (R.36-37 (Cmpl. ¶¶ 17, 20))

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[3] *See, e.g.*, Gordon H. Sellon, Jr. & Deana VanNahmen, "The Securitization of Housing Finance," Economic Rev. 3-20 (Federal Reserve Bank of Kansas City, July/Aug. 1988) (discussing how the development of mortgage-backed securities "has revolutionized housing finance").

The quality of each of the 8,815 individual mortgage loans held by the Trust is critical to investors, both because the loans serve as collateral for the issuance of their certificates and because they generate the cash flow used to pay principal and interest to certificate holders. (R.36 (Cmpl. ¶ 16)) It would be highly impractical, however, for each prospective investor to conduct independent due diligence on all of the thousands of loans underlying this or any similar RMBS to ensure that the quality of the loans is as represented. Accordingly, these agreements typically were structured to relieve investors of that burden by shifting the risk of defective loans onto the sponsor. The Agreements in this case are illustrative: In the MLPA, although DBSP made specific representations and warranties regarding the credit quality and characteristics of the loans it sold, it imposed no obligation on the Trustee or the investors to verify those representations or warranties. (R.37-39 (Cmpl. ¶¶ 21-25); R.292-300 (MLPA §§ 4(e), 6, 7(a))) Instead, DBSP obligated itself to cure any material violation of the representations and warranties or repurchase any defective loan of which it should become aware. (R.39-40 (Cmpl. ¶¶ 26-27))

To that end, the MPLA provides:

> Within sixty (60) days of [DBSP's] discovery or its receipt of notice of ... any such breach of a representation and warranty [that materially and adversely affects the value of any Mortgage Loan or the interest therein of the [Certificate holders]] ... [DBSP] shall ... cure such defect or breach in all material respects, or in the event [DBSP] ... cannot cure such defect or breach, [DBSP] shall, within ninety (90)

> days of its discovery or receipt of notice of ... any such breach of a representation and warranty ... repurchase the affected Mortgage Loan ....

(R.300 (MLPA § 7(a))) This continuing obligation to cure or repurchase, which was commonplace in RMBS agreements at the time, was a critical component of the agreement to invest. Because DBSP was in a far superior position to investigate the quality of the loans, the parties agreed that DBSP would bear the risk for the life of the agreement that its representations or warranties proved materially false, thus relieving investors of the cost-prohibitive need to "reunderwrite" thousands of loans before investing. In short, the parties were not blind to the reality that some of the nearly 9,000 loans might not comply with DBSP's representations or warranties; rather, they built that risk into the contract and priced it accordingly. (R.38 (Cmpl. ¶ 22))

After the transaction closed in March 2006, borrower defaults and delinquencies on individual mortgage loans caused some $330 million in losses to the Trust and, in turn, to certificate holders. (R.35, 51 (Cmpl. ¶¶ 11, 40)) Given the magnitude of these losses, two certificate holders undertook an independent investigation of more than 1,600 of the loans in the Trust and discovered that 99% failed to comply with at least one of DBSP's representations and warranties. (R.40 (Cmpl. ¶ 28)) In accordance with the Agreements, the Trustee promptly sent DBSP a series of letters between February and July 2012 notifying it of the

defective loans and demanding that DBSP comply with its cure or repurchase obligation. (R.50 (Cmpl. ¶ 38); R.800-855, 859-904) To date, DBSP has refused to cure or repurchase a single loan in response to those notices. (R.50-51 (Cmpl. ¶ 39))

REASONS FOR GRANTING LEAVE TO APPEAL

I. THE COURT SHOULD GRANT LEAVE TO APPEAL TO RESOLVE AN IMMENSELY IMPORTANT ACCRUAL QUESTION THAT HAS SQUARELY DIVIDED STATE AND FEDERAL COURTS.

This case presents an exceptionally important question of New York law that has squarely divided state and federal courts. The Agreements at issue in this case are structured around the same basic bargain as countless RMBS contracts at the heart of the recent financial crisis: Investors agreed to invest in RMBS certificates only on the explicit contractual condition that the sponsor would take on for the life of the agreements the obligation to cure or repurchase any defective loan if and when the sponsor should learn of it. Without this basic risk-shifting bargain, these agreements never would have come to fruition, as they were priced to relieve investors of the highly impractical burden of independently "reunderwriting" each of the several thousand underlying loans.

Some courts, like the Supreme Court in this case and federal district courts both inside and outside the Second Circuit, have recognized as much, and thus correctly concluded that a claim for breach of the obligation to cure or repurchase a

defective loan does not accrue until that obligation is in fact breached. Others, however, have ignored the parties' basic bargain and effectively imposed an unwritten six-year (or, in this case, five-years-and-nine-months) expiration date on the obligation to cure or repurchase. As a result of this conflict, materially analogous claims are now being permitted to proceed in some courts but not others, with some plaintiffs effectively punished for choosing a state-law forum for their state-law claims. That situation is wholly untenable, particularly with *billions* of dollars at stake. This Court should grant leave to appeal and definitively resolve this recurring and exceedingly important question of New York law.

A. Courts Are Squarely Divided on When a Claim for Breach of the Obligation to Cure or Repurchase a Defective Loan Accrues.

As this case arrived at the First Department, state courts applying New York law to construe materially analogous RMBS contracts had reached squarely conflicting conclusions as to when a claim for breach of the obligation to cure or repurchase a defective loan accrues. In this case, the Supreme Court decided that this Court's settled precedents compel the commonsense conclusion that such a claim does not accrue until the sponsor actually breaches the obligation to cure or repurchase. As the Supreme Court explained, any other result would "utterly belie[] the parties' relationship and turn[] the PSA on its head," as "[t]he whole point of how the MPLA and PSA were structured was to shift the risk of non-

complying loans onto DBSP" by requiring DBSP to cure or repurchase defective loans for the life of the Agreements. (R.15-16)

In addition, precisely because the obligation to cure or repurchase defective loans is an ongoing one, the court concluded that DBSP "commits an independent breach of the PSA each time it fails to abide and fulfill" it. (R.16) Accordingly, the court held that "[t]he statute of limitations began to run when DBSP improperly rejected the Trustee's repurchase demand," not when the Agreements closed six years earlier. (R.17) In stark contrast, another court within the First Department concluded the exact opposite, treating such a claim as accruing once and for all when the underlying contract closed. *See Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2005-S4 v. Nomura Credit & Capital, Inc.*, Index No. 653541/2011, 2013 WL 2072817 (Sup. Ct. N.Y. Cnty. May 10, 2013).

That same division is reflected in decisions by federal courts facing the same accrual question in analogous RMBS cases governed by New York law. *Compare Fed. Hous. Fin. Agency v. WMC Mortgage, LLC*, No. 13 Civ. 584 (AKH), 2013 WL 7144159 (S.D.N.Y. Dec. 17, 2013) (concluding that claim for breach of cure or repurchase obligation cannot accrue until that obligation is breached), *with Ace Securities Corp. Home Equity Loan Trust, Series 2007-HE3 v. DB Structured Prods., Inc.* ("*ACE 2007-HE3*"), Nos. 13 Civ. 1869 (AJN), 13 Civ. 2053 (AJN), 13 Civ. 2828 (AJN), 13 Civ. 3687 (AJN), 2014 WL 1116758, at *6-7 (S.D.N.Y. Mar.

20, 2014) (concluding that defendant's failure to cure or repurchase "does not affect when the plaintiff's claim accrues" or constitute an independent breach); *Lehman XS Trust, Series 2006-4N v. GreenPoint Mortg. Funding, Inc.*, No. 13 Civ. 4707 (SAS), 2014 WL 108523, at *3-4 (S.D.N.Y. Jan. 10, 2014) (same).

Still other federal cases, while not specifically addressing the statute of limitations, have reached conflicting results under New York law on whether a claim for breach of a cure or repurchase obligation is distinct from a claim for breach of the representations or warranties made at closing. *See, e.g., LaSalle Bank Nat'l Ass'n. v. Lehman Bros. Holdings, Inc.*, 237 F. Supp. 2d 618, 638 (D. Md. 2002); *Morgan Guar. Trust Co. of N.Y. v. Bay View Franchise Mortg. Acceptance Co.*, No. 00 Civ. 8613 (SAS), 2002 WL 818082, at *14 (S.D.N.Y. Apr. 30, 2002); *F.D.I.C. v. Key Fin. Servs., Inc.*, No. 89 Civ. 2366 (DPW), 1999 WL 34866812, at *12 (D. Mass. Dec. 23, 1999) *aff'd sub nom. Resolution Trust Corp. v. Key Fin. Servs., Inc.*, 280 F.3d 12 (1st Cir. 2002). As these decisions reflect, there is deep-seated disagreement and uncertainty about the nature of a claim for failure to cure or repurchase a defective loan under New York law—particularly in the context of the numerous analogous RMBS agreements at the heart of the recent financial crisis.

Far from alleviating that uncertainty, the First Department's terse decision in this case exacerbates it. According to the First Department, the Trust's claims for

DBSP's breach of its cure or repurchase obligation accrued not when DBSP breached that obligation, but when the transacting parties entered into the agreement that created it. (Mazin Aff. Ex. A (Slip Op. 27)) Yet, at the same time, the First Department concluded that breach of the cure or repurchase obligation was a "condition precedent" to bringing these claims, and thus that the investors' summons with notice (filed on the six-year anniversary of the Agreements) was filed *too early* because the cure or repurchase period had yet to lapse. (*Id.* at 28) Of course, had the investors waited for that period to lapse, then they would have filed *too late* under the First Department's reasoning. In other words, by the First Department's logic, a breach claim filed six years and one day after the Agreements closed, but only 89 days after giving notice of a defective loan, would simultaneously be both too late and too early. In effect, then, under its decision, the notice and cure obligation is wholly unenforceable after five years and nine months—a limitation found nowhere in the contract or New York law.

Predictably, this internally inconsistent and meagerly explained reasoning, under which breach of the cure or repurchase obligation both is and is not a condition precedent, has generated only more confusion. Although the First Department was not the first court to conclude that a claim for failure to comply with the cure or repurchase obligation is not an independent contractual breach, it was the first to conclude that such a claim nonetheless cannot be brought until the

cure or repurchase period has lapsed (and thus the only court that has failed to grasp the practical and theoretical inconsistency between the two holdings). While courts not bound by the decision below have at least endeavored to construe similar contracts to avoid the utterly incoherent result of treating the statute of limitations as having expired before a condition precedent to bringing suit has occurred, *see, e.g.*, *ACE 2007-HE3*, 2014 WL 1116758, at *29 ("the Trustee's duty to provide notice of breaches is simply a promise, not an express condition that must be literally performed"), they have done so only at the expense of destroying their basic risk-shifting bargain. In all events, that even courts that agree with the First Department on the bottom line have been unwilling to adopt its faulty logic only underscores that the decision below has created more questions than answers.[4]

To be sure, there is no conflicting decision from another Appellate Division on these questions. But that is simply a product of the practical reality that (at least to the best of appellants' knowledge) all state-court RMBS cases are pending in Manhattan-area courts governed by the First Department. Accordingly, no conflict among the divisions is ever likely to occur, and nearly *all* state court claims will be dismissed as a result of the decision below. *See, e.g., Fed. Hous. Fin. Agency v.*

[4] Of note, the First Department's decision has been invoked repeatedly by defendants seeking to foreclose comparable claims even when no statute of limitations issue exists. *See, e.g., Lehman XS Trust, Series 2006-GP2 v. GreenPoint Mortgage Funding, Inc.*, No. 12 Civ. 7935 (ALC-HBP), 2014 WL 1301944 (S.D.N.Y. Mar. 31, 2014); *Homeward Residential, Inc. v. Sand Canyon Corp.*, No. 12 Civ. 7319 (AT), 2014 WL 572722 (S.D.N.Y. Feb. 14, 2014).

DB Structured Prod., Inc., Index No. 652978/2012, 2014 WL 1384489, at *2 (Sup. Ct. N.Y. Cnty. Mar. 17, 2014) (relying on decision below to dismiss all claims arising out of $1.4 billion RMBS).

By contrast, the conflict with federal court cases remains very much alive, as one judge explicitly refused to reconsider his conclusion that the Supreme Court in this case had the better reading of New York law, noting that the First Department's decision "does not change my views that the contract was breached not at the time of closing but at the time of failure to cure." *Fed. Hous. Fin. Agency v. WMC Mortg. LLC*, No. 13 Civ. 584 (AKH), slip op., at *1 (S.D.N.Y. Jan. 7, 2014) (Mazin Aff. Ex. E); *cf. Ballow Brasted O'Brien & Rusin P.C. v. Logan,* 435 F.3d 235, 242 n.7 (2d Cir. 2006) (federal courts are not bound by an intermediate state court's misapplication of state law). The same judge declined to certify an interlocutory appeal of the denial of the sponsor's motion to dismiss, concluding that an appeal would not materially advance the litigation because the law on the accrual question "is in flux" and the outcome of litigation on that question in both this Court and the Second Circuit is "uncertain." *Fed. Hous. Fin. Agency v. WMC Mortg. LLC*, No. 13 Civ. 584 (AKH), slip op., at *1 (S.D.N.Y. Apr. 14, 2014) (Mazin Aff. Ex. F).

Accordingly, absent this Court's resolution of this conflict, parties will be left with an arbitrary and unfair situation in which RMBS investors whose claims

were filed in certain federal courts may recover all of their losses, while those who filed claims in state court may recover none of theirs. In effect, plaintiffs will be penalized for pursuing their state-law claims in state court. To make matters worse, claims to enforce similar RMBS obligations are settling for billions of dollars, which makes it all the more untenable for some—but not all—similarly situated sponsors to avoid liability altogether for what are widely acknowledged to be serial violations of their contractual obligations. *See, e.g.*, Federal Housing Finance Agency News Release, "FHFA Announces $5.1 Billion in Settlements with J.P. Morgan Chase & Co." (Oct. 25, 2013) (announcing $1.1 billion in payments to Fannie Mae and Freddie Mac to resolve RMBS contract claims); Press Release, "18 Institutional Investors in RMBS Issued by Citigroup Announce Binding Offer by Citigroup to Four RMBS Trustees to Settle Mortgage Repurchase Claims for 68 RMBS Trusts," Gibbs & Bruns (Apr. 7, 2014) (announcing Citi's agreement to pay $1.125 billion to 68 RMBS Trusts to settle mortgage repurchase claims).

Moreover, precisely because conflict on the accrual issue persists in the federal courts, this state-law question is likely to find its way to this Court through certification even if no conflict among the Appellate Divisions ever materializes. *See* Rules of Ct. of Appeals 22 NYCRR § 500.27(a) (authorizing certification to the Court of Appeals "[w]henever it appears to … any United States Court of

Appeals ... that determinative questions of New York law are involved in a case pending before that court for which no controlling precedent of the Court of Appeals exists"). Indeed, briefing is already underway on an expedited appeal to the Second Circuit from one federal case.[5] Given the high likelihood that this Court will be called upon to resolve this important and recurring question of New York law in the very near future, it would be particularly inequitable to deny this motion and deprive the Trustee and other plaintiffs who pursued their claims in state court of the opportunity to obtain the benefit of the Court's resolution now. Accordingly, the Court should grant leave to appeal and definitively resolve this recurring question that has continued to divide the courts.

B. The First Department's Decision Is Irreconcilable with this Court's Precedents.

The First Department's decision is irreconcilable not only with decisions of other courts considering the same issue, but also with binding decisions of this Court. It is well-established that a breach of contract claim accrues only once "all facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court[.]" *Aetna Life & Cas. Co. v. Nelson*, 67 N.Y.2d 169, 175 (1986). Accordingly, when a contractual right is subject to a condition, any claim to enforce that right accrues "only when the condition has been

[5] *See Lehman XS Trust, Series 2006-4N v. GreenPoint Mortg. Funding, Inc.*, No. 14 Civ. 399 (Doc. No. 36), Br. for Plaintiff-Appellant (2d Cir. Apr. 1, 2014).

fulfilled." *John J. Kassner & Co. v. City of N.Y.*, 46 N.Y. 2d 544, 550 (1979). Likewise, where a notice or demand provision "allow[s for] time to investigate and pay [a] claim[,]" the statute of limitations does not begin to run until that time passes. *Hahn Auto. Warehouse, Inc. v. Am. Zurich Ins. Co.*, 18 N.Y.3d 765, 772 n.5 (2012); *see also Continental Cas. Co. v. Stronghold Ins. Co.*, 77 F.3d 16, 21 (2d Cir. 1996) (concluding that under New York law, plaintiff's breach of contract claim against reinsurers accrued when reinsurers rejected plaintiff's demand for reimbursement, not when loss insured against occurred).

It is equally well-established that each sequential breach of a continuing obligation gives rise to a new and independent breach claim. *Bulova Watch Co. Inc. v. Celotex Corp.*, 46 N.Y.2d 606, 611 (1979); *see also, e.g., New York Cent. Mut. Fire Ins. Co. v. Glider Oil Co., Inc.*, 90 A.D.3d 1638, 1642 (4th Dep't 2011) ("Where, as here, a contract provides for a recurring obligation, a claim for damages accrues each time the contract is allegedly breached."); *Beller v. William Penn Life Ins. Co. of New York*, 8 A.D.3d 310, 314 (2d Dep't 2004) (same); *Airco Alloys Div. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 80 (4th Dep't 1980) (same). Accordingly, when a contract incorporates both an initial warranty and an ongoing obligation to cure any breach of that warranty, each failure to cure is an independent breach that gives rise to an independent cause of action. *See Bulova*, 46 N.Y.2d at 611 (where roofing contract both made representations about quality

of roof and obligated manufacturer to repair any defects that should arise, each failure to repair constituted an independent breach of an ongoing obligation).

The First Department's decision cannot be squared with these settled principles. Under the plain terms of the RMBS agreements, DBSP has a continuing obligation for the life of the Agreements to cure or repurchase any defective loan within 90 days of learning of the defect. The very nature of that continuing obligation is inconsistent with the First Department's one-and-done analysis, where a breach occurs at closing or not at all. The Trustee has sued DBSP for breaching that distinct obligation, not for breaching the initial representations and warranties themselves. (R.51 (Cmpl. ¶¶ 46-47) ("DBSP has failed to repurchase or cure any Defective Loans" and "should be compelled to comply with its contractual obligation to repurchase all Defective Loans")) Thus, under a straightforward application of this Court's settled precedents, the Trust's cause of action accrued only *after* DBSP failed to cure or repurchase within 90 days of learning of the defective loans. That is so both because DBSP's failure to take the requisite action within this contractually specified period is a condition precedent to bringing suit, and also because each failure to do so is an independent breach that gives rise to an independent claim.

Indeed, even the First Department readily acknowledged that expiration of the "60- and 90- day periods for cure and repurchase" was "a condition precedent

to commencing suit" against DBSP. (Mazin Aff. Ex. A (Slip. Op. 28)) Yet it then inexplicably failed to follow that conclusion to its logical end, namely, that the Trust's claim for *breach* of the obligation to repurchase or cure could not accrue until that condition precedent occurred—in other words, until DBSP actually breached the obligation. Instead, it concluded that the Trust's claims accrued when the Agreements closed in March of 2006, yet nonetheless still could not be brought *six years later* because the notice and cure period had yet to lapse. In effect, then, the First Department read into the Agreements a five-years-and-nine-months expiration date on DBSP's obligation to repurchase or cure—even when a defective loan is discovered by DBSP itself—as it would be impossible to bring a timely suit for failure to comply with that obligation when the defective loan is discovered in the final 90 days.

Not only does the decision below read into the Agreements a truncated limitations period found nowhere in New York law (let alone the Agreements themselves); it also reads out of the Agreements a critical component of the bargain underlying this and other RMBS contracts. Of course there was a real risk that not all 9,000 loans would materially comply with DBSP's representations and warranties, but DBSP agreed to bear that risk by assuming a contractual obligation to cure or repurchase defective loans. Nothing in the Agreements provides even the slightest basis for imposing *any* time limit on that core obligation—let alone

imposing a time limit that is 90 days shorter even than the six-year statute of limitations for breach of contract claims. Surely if the parties had intended such an anomalous result, the Agreements would have said so explicitly.

Rather than grapple with the Supreme Court's finding that DBSP's argument "utterly belies the parties' relationship and turns the PSA on its head," (R.15-16) the First Department largely ignored the question of what the parties to *these* Agreements intended. That one-size-fits-all approach cannot be reconciled with this Court's precedents, which demand careful consideration of the intent of the parties as embodied in the contract at hand. *Hahn* is illustrative. There, an insurer (Zurich) billed the insured for amounts for which it concededly had the right to demand payment years earlier but failed to do so through inadvertence. 18 N.Y.3d at 771. This Court concluded that Zurich's claims were time-barred because they accrued when Zurich could have demanded payment. *Id.* In doing so, however, the Court specifically distinguished *Kassner*—a case in which the Court found that a contract imposed a condition precedent to suit—on the ground that, unlike in *Kassner*, Zurich could not "point to any contract language unambiguously conditioning its right to payment on its own demand." *Id.* at 771-72 (internal citations omitted). In other words, the Court emphasized that the accrual analysis turns on the terms of the contract, not rote application of legal principles divorced from fact.

Here, the terms of the contract could not be clearer: The PSA expressly provides that the Trustee may not enforce the repurchase obligation until DBSP fails to cure or repurchase within the contractually specified period. (R.121-22 (PSA § 2.03) ("[I]f the Sponsor does not ... cure such defect or breach in all material respects during such [60 day] period ... the Trustee shall enforce the obligations of the Sponsor under the Mortgage Loan Purchase Agreement to repurchase such Mortgage Loan.")) Accordingly, DBSP's failure to comply with its cure or repurchase obligation plainly was a condition precedent to suit. Indeed, DBSP itself argued as much—and the First Department agreed. It therefore makes no sense at all to conclude, as the First Department did, that the Trust's claim accrued years before that condition occurred. Indeed, there was no claim to bring until that condition occurred, as the failure to comply with the cure or repurchase obligation *is* the relevant breach. Because the decision below cannot be reconciled with this Court's clear precedents articulating these principles, this Court should grant leave to appeal before state courts dismiss countless claims involving literally billions of dollars in investor losses, all based on a manifest misapplication of New York law.

C. The Accrual Question Affects Countless Cases Involving Billions of Dollars in Investor Losses.

The accrual question at the center of this case is of immense importance. By any measure, the financial stakes are enormous, as the same question is outcome

determinative in a multitude of RMBS cases. This case alone involves at least $330 million in losses, and there is more than *$29 billion* at stake in just a few dozen more cases involving the same issue.[6] And that does not even include the

[6] *Law Debenture Trust Co. of N.Y. v. DLJ Mortg. Capital, Inc.*, Index No. 651958/2013 (Sup. Ct. N.Y. Cnty.); *Deutsche Bank Nat'l Trust Co. v. EquiFirst Corp.*, Index No. 651957/2013 (Sup. Ct. N.Y. Cnty.); *U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc.*, Index No. 651954/2013 (Sup. Ct. N.Y. Cnty.); *Deutsche Bank Nat'l Trust Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, Index No. 651959/2013; *Deutsche Bank Nat'l Trust Co. v. Barclays Bank PLC*, Index No. 651789/2013 (Sup. Ct. N.Y. Cnty.); *Natixis Real Estate Capital Trust 2007-HE2 v. Natixis Real Estate Holdings, LLC*, Index No. 153945/2013 (Sup. Ct. N.Y. Cnty.); *Seagull Point, LLC v. WMC Mortg. Corp.*, Index No. 651519/2013 (Sup. Ct. N.Y. Cnty.); *Deutsche Bank Nat'l Trust Co. v. Barclays Bank PLC*, Index No. 651338/2013 (Sup. Ct. N.Y. Cnty.); *ACE Sec.Corp. Home Equity Loan Trust, Series 2007-ASAP1 v. DB Structured Prods., Inc.*, Index No. 650949/2013 (Sup. Ct. N.Y. Cnty.); *Deutsche Bank Nat'l Trust Co. v. Novation Cos., Inc.*, Index No. 650693/2013 (Sup. Ct. N.Y. Cnty.); *U.S. Bank Nat'l Ass'n v. Equifirst Corp.*, Index No. 650692/2013 (Sup. Ct. N.Y. Cnty.); *Deutsche Bank Nat'l Trust Co. v. Morgan Stanley ABS Capital I Inc.*, Index No. 650291/2013 (Sup. Ct. N.Y. Cnty.); *U.S. Bank Nat'l Ass'n v. Merrill Lynch Mortg. Lending, Inc.*, Index No. 654403/2012 (Sup. Ct. N.Y. Cnty.); *Home Equity Mortg. Trust Series 2006-5 v. DLJ Mortg. Capital, Inc.*, Index No. 653787/2012 (Sup. Ct. N.Y. Cnty.); *Home Equity Asset Trust 2006-7 (HEAT 2006-7) v. DLJ Mortg. Capital, Inc.*, Index No. 653467/2012 (Sup. Ct. N.Y. Cnty.); *Home Equity Asset Trust 2006-5 (HEAT 2006-5) v. DLJ Mortg. Capital, Inc.*, Index No. 652344/2012 (Sup. Ct. N.Y. Cnty.) *Home Equity Mortg. Trust Series 2006-1 v. DLJ Mortg. Capital, Inc.*, Index No. 156016/2012 (Sup. Ct. N.Y. Cnty.); *ACE Sec. Corp. Home Equity Loan Trust, Series 2006-FM1 v. DB Structured Prods., Inc.*, Index No. 652978/2012 (Sup. Ct. N.Y. Cnty.); *ACE Sec. Corp. Home Equity Loan Trust, Series 2006-FM1 v. DB Structured Prods., Inc.*, Index No. 652985/2012 (Sup. Ct. N.Y. Cnty.); *Home Equity Asset Trust 2006-6 (HEAT 2006-6) v. DLJ Mortg. Capital, Inc.*, Index No. 652644/2012 (Sup. Ct. N.Y. Cnty.); *Nomura Asset Acceptance Corp., Mortg. Pass-Through Certificates, Series 2006-AF2 Trust v. Nomura Credit & Capital, Inc.*, Index No. 652614/2012 (Sup. Ct. N.Y. Cnty.); *Nomura Asset Acceptance Corp. Alt. Loan Trust, Series 2006-S2 v. Nomura Credit & Capital, Inc.*, Index No. 651827/2012 (Sup. Ct. N.Y. Cnty.); *ACE Sec. Corp. Home Equity Loan Trust, Series 2006-HE3 v. DB Structured Prods., Inc.*, Index No. 652231/2012 (Sup. Ct. N.Y. Cnty.); *SACO I Trust 2006-5 v. EMC Mortg. LLC*, Index No. 651820/2012 (Sup. Ct. N.Y. Cnty.); *ACE Sec. Corp. Home Equity Loan Trust, Series 2006-HE2 v. DB Structured Prods., Inc.*, Index No. 651414/2012 (Sup. Ct. N.Y. Cnty.); *U.S. Bank Nat'l Ass'n v. UBS Real Estate Sec. Inc.*, Index No. 651282/2012 (Sup. Ct. N.Y. Cnty.); *Nomura Asset Acceptance Corp. Alt. Loan Trust, Series 2005-S4 v. Nomura Credit & Capital, Inc.*, Index No. 653541/2011 (Sup. Ct. N.Y. Cnty.); *U.S. Bank Nat'l Ass'n v. Citigroup Global Mkts Realty Corp.*, No. 13 Civ. 6989 (S.D.N.Y.); *Lehman XS Trust, Series 2006-4N v. Greenpoint Mortg. Funding, Inc.*, No. 13 Civ. 4707 (S.D.N.Y.); *Deutsche Bank Nat'l Trust Co. v. WMC Mortg., LLC*, 13 Civ. 1347 (D. Conn.); *Nomura Asset*

many cases in which there is no statute of limitations issue but the answer to the accrual question has been deemed "inextricably intertwined" with the question whether RMBS trustees "may bring separate contract claims based on [the sponsor's] failure to repurchase breached loans." *ACE 2007-HE3*, 2014 WL 1116758, at *6; *see supra* n.4.

This Court's definitive resolution of the accrual question is critical not just to the parties to these pending cases—parties that include trustees acting on behalf of numerous public and private pension fund investors—but also to the future of complex securitizations in general, and residential mortgage-backed securitizations in particular. Securitization of mortgage loans continues to be a critical part of housing finance in the United States, and most of those securitizations continue to be governed by New York law. Accordingly, how RMBS agreements can be structured under New York law will have effects that extend well beyond these cases and, indeed, well beyond New York's borders.

Acceptance Corp., Alt. Loan Trust, Series 2007-1 v. Nomura Credit & Capital, Inc., No. 13 Civ. 3138 (S.D.N.Y.); *Deutsche Bank Nat'l Trust Co. v. Quicken Loans, Inc.*, No. 13 Civ. 6482 (S.D.N.Y.); *Citigroup Mortg. Loan Trust 2007-AMC3 v. Citigroup Global Mkts. Realty Corp.*, No. 13 Civ. 2843 (S.D.N.Y.); *Fed. Hous. Fin. Agency v. WMC Mortg., LLC*, No. 13 Civ. 584 (S.D.N.Y.); *Lehman XS Trust, Series 2006-GP2 v. Greenpoint Mortg. Funding, Inc.*, No. 12 Civ. 7935 (S.D.N.Y.); *Lehman XS Trust, Series 2006-G3 v. Greenpoint Mortg. Funding, Inc.*, No. 12 Civ. 7942 (S.D.N.Y.); *Lehman XS Trust, Series 2006-GP4 v. Greenpoint Mortg. Funding, Inc.*, No. 12 Civ. 7943 (S.D.N.Y.); *The Bank of New York Mellon v. WMC Mortg., LLC*, No. 12 Civ. 7096 (S.D.N.Y.); *Deutsche Bank Nat'l Trust Co. v. WMC Mortg., LLC*, 12 Civ. 0933 (D. Conn.); *Homeward Residential, Inc. v. Sand Canyon Corp.*, No. 12 Civ. 5067 (S.D.N.Y.)

To be sure, this Court has made clear that statutes of limitation "embody an important policy of giving repose to human affairs" by "afford[ing] protection to defendants against defending stale claims after a reasonable period of time ha[s] elapsed." *Flanagan v. Mount Eden Gen. Hosp.*, 24 N.Y.2d 427, 429 (1969). But this Court also has made clear that contracts may be structured to create conditions precedent to accrual of a claim and unequivocally continuing obligations. As the nation's housing markets continue to move beyond the immediate fallout from the financial crisis, it is essential that parties be able to enter into RMBS agreements secure in the knowledge that the basic terms of the bargains they strike will be enforced. If New York law really does permit parties to undo these bargains years after the fact, then this Court should be the one to say so.

II. THIS COURT SHOULD GRANT LEAVE TO APPEAL ON THE QUESTION OF WHETHER THIS ACTION WAS TIMELY EVEN UNDER THE FIRST DEPARTMENT'S ANALYSIS.

It is bad enough that the First Department imposed an unwarranted restriction on *when* claims for breach of an obligation to cure or repurchase may be brought. But the court then compounded the problem by imposing an equally unwarranted restriction on *how* such claims may be brought—specifically, on whether they may be initiated by investors on the trust's behalf. The court did so by failing to give effect to the plain language and clear intent of the PSA's no-action clause. "The fundamental, neutral precept of contract interpretation is that

agreements are construed in accord with the parties' intent[,]" and the "'best evidence of what parties to a written agreement intend is what they say in their writing.'" *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002) (citations omitted). Here, the investors sufficiently alleged compliance with the no-action clause in their summons with notice, giving them standing to sue on behalf of the Trust, which they did in a timely manner. (R.26) And any alleged defects in the summons with notice were in any event cured when the Trustee substituted in and filed the complaint.

The PSA's no-action clause states that investors may proceed on behalf of the Trust when they have provided "a written notice of default and of the continuance thereof" to the Trustee. (R.214 (PSA § 12.03)) Thus, the basic purpose of the PSA's no-action clause, as reflected in the terms of the PSA, is to ensure that actions proceed only with the support of the Trust—and for the benefit of all certificate holders. Clearly, that purpose was served in this case: The investors who commenced this action on behalf of the Trust identified the defective loans to the Trustee before bringing suit, and the Trustee substituted into the case and agreed to pursue claims for breach of DBSP's obligation to cure or repurchase those loans. Nonetheless, the First Department concluded that the investors' written notice did not suffice because they are asserting a claim based upon the wrong kind of "default." (Mazin Aff. Ex. A (Slip op. 28)) In the Court's

view, because the PSA formally defines only two types of default—a "Servicer Event of Default" and a "Master Servicer Event of Default"—the no-action clause's reference to a "default" must necessarily reference those—and only those—two specific types of default, meaning investors may notice breaches of the PSA not by DBSP, but rather only by the Servicer or the Master Servicer. (*Id.*)

The First Department's sole authority for that contra-textual conclusion was its own earlier decision in *Walnut Place LLC* v. *Countrywide Home Loans, Inc.*, 96 A.D.3d 684, 684 (1st Dep't 2012), a loan repurchase case brought derivatively by an RMBS investor. The First Department's reliance on that case was entirely misplaced. *Walnut Place* dismissed the investor's suit because the no-action clause at issue there specifically required the certificate holder to notice an "Event of Default," a term that was expressly defined elsewhere in the contract to include only breaches by a servicer of the loans. *Id.* In other words, the no-action clause in *Walnut Place* contained precisely the kind of specificity that the no-action clause in the PSA did not.

Here, the no-action clause does not use a specifically defined term, but rather uses only the generic term "default." (R.214-15 (PSA § 12.03)) The fact that other provisions of the PSA use the defined terms "Servicer Event of Default" and "Master Servicer Event of Default" provides no basis for importing those distinct terms into the no-action clause, where the parties chose not to use them. In

fact, the PSA conclusively refutes the notion that the parties considered the undefined term "default" synonymous with the defined terms "Servicer Event of Default" and "Master Servicer Event of Default," as the parties used *all three terms in the disjunctive in the same sentence* of some of the PSA's provisions.[7] The parties' use of restrictively defined event-of-default terms in some provisions but not in the no-action clause demonstrates their intent that the term "default" have a *broad* meaning in the no-action clause, and not the narrower meaning of distinct terms defined and used exclusively elsewhere. *Cf. Greenfield*, 98 N.Y.2d at 569.

Because the investors sufficiently alleged compliance with the no-action clause's requirement to provide "notice of default" to the Trustee before bringing suit, they had standing to file a summons with notice on the Trust's behalf for the $300 million in losses it suffered. And because that summons with notice was filed within six years even of the First Department's chosen accrual date (March 28, 2006), this action is timely. In any event, any defect with respect to investor standing or the timing of the summons with notice was cured by the complaint,

[7] *See* PSA § 9.02(a)(viii) ("Except as otherwise provided in Section 9.01 of this Agreement: ... The Trustee shall not be deemed to have notice of any default, Master Servicer Event of Default or Servicer Event of Default unless a Responsible Officer of the Trustee has actual knowledge thereof or unless written notice of any event which is in fact such a default is received by a Responsible Officer of the Trustee ..."); § 8.04 ("The Holders representing at least 66% of the Voting Rights evidenced by all Classes of Certificates affected by any default, Servicer Event of Default or Master Servicer Event of Default hereunder may waive such default ...") (R.200-202).

which DBSP affirmatively demanded without challenging the summons with notice. In filing the complaint, the Trustee made clear that, in its view, the investors were within their rights to bring this suit on the Trust's behalf.

The First Department's contrary conclusion is wholly inconsistent with the text and purpose of the no-action clause, which is to prevent lawsuits that do *not* have the support of the Trustee. Moreover, by precluding investors from aiding the trust in bringing suit within the artificial time constraint that the court's decision imposes, the First Department's no-action clause analysis exacerbates the problems that its accrual analysis creates. Accordingly, leave to appeal is warranted on this issue as well.

CONCLUSION

For the foregoing reasons, the Trust's motion for leave to appeal should be granted.

Dated: New York, New York
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Respectfully submitted,

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