New York County Clerk's Index No. 650980/12

436

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.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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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 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

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.

TABLE OF CONTENTS

Table of Authorities

Page(s)

Cases

Other Authorities

Statutes and Rules

Defendant-Respondent DB Structured Products, Inc. ("DBSP") respectfully submits this memorandum in opposition to the motion (the "Motion") of Plaintiff-Appellant HSBC Bank USA, N.A. ("Plaintiff" or the "Trustee") for leave to appeal the unanimous Decision and Order of the Appellate Division, First Department (the "Decision"),[1] entered on December 19, 2013.

PRELIMINARY STATEMENT

The unanimous Decision from which Plaintiff seeks leave to appeal involved the straightforward application of well-settled New York statute of limitations principles concerning the accrual of breach of contract claims, principles that this Court has repeatedly reaffirmed. Plaintiff's claims were based on alleged breaches of contractual representations and warranties concerning the characteristics of a pool of mortgages as of March 28, 2006. The Appellate Division held that those claims accrued and the six-year limitations period set forth in CPLR 213(2) began to run on March 28, 2006, the date that the representations and warranties were made. In doing so, the Appellate Division faithfully applied Court of Appeals precedent and rejected Plaintiff's extraordinary contentions that claims for breaches of representations and warranties concerning mortgages originated in 2006 or before do not accrue until Plaintiff chooses to demand a remedy and could still be timely even if first filed decades from now. *See, e.g.*,

[1] (*See* Mazin Aff. Ex. A); also reported at 112 A.D.3d 522 (1st Dep't 2013).

Hahn Automotive Warehouse, Inc. v. Am. Zurich Ins. Co., 18 N.Y.3d 765, 768 (2012) (New York law does not "allow [a plaintiff] to extend the statute of limitations indefinitely by simply failing to make a demand.") (citations, quotations, and alterations omitted); *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 404 (1993) (New York law does not "extend the highly exceptional discovery notion to general breach of contract actions[.]"). There was nothing novel about this clearly correct ruling. Nor does the Decision raise issues of statewide public importance, create a split among the Departments of the Appellate Division or otherwise meet the stringent criteria warranting review by this Court. Indeed, Plaintiff's brief does not even cite the leave to appeal standard, much less satisfy it.

Plaintiff expressly concedes that "there is no conflicting decision from another [Department of the] Appellate Division" and that the Decision only affects cases pending in Manhattan courts bound by the First Department. (Mot. 19.) Nonetheless, Plaintiff contends that leave to appeal should be granted because *federal* courts are "squarely divided." (*Id.* at 3; *see also id.* at 14-15, 20.) This is as wrong as it is irrelevant. First, federal rulings overwhelmingly either comport with or expressly follow the Decision; Plaintiff's contrary argument turns on a solitary two-sentence denial of a motion for reconsideration. Second, the possibility of divergent outcomes in different forums is a basic reality of the United

States federal system. Federal courts are required to minimize such inconsistencies by deferring to New York courts on questions of New York law, not the other way around. *See Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("state courts are the ultimate expositors of state law"); *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 134 (2d Cir. 1999) (federal courts should "apply the law as interpreted by New York's intermediate appellate courts"); *Lehman XS Trust, Series 2006-4N v. Greenpoint Mortg. Funding, Inc.*, -- F. Supp. 2d ---, No. 13-cv-4707(SAS), 2014 WL 108523, at *3 n.46 (S.D.N.Y. Jan. 10, 2014) ("follow[ing] the First Department's decision in *ACE Securities*" because no "contrary law from the New York Court of Appeals or 'persuasive data' that it would rule differently" exists).

Plaintiff also argues that leave to appeal should be granted because the Decision's accrual rule would "inequitabl[y]" cause remedies in this and similar residential mortgage-backed securities ("RMBS") contracts to "expir[e] six years after the Agreements closed" (as it is undisputed that any representation and warranty breaches occured no later than the closing date). (Mot. 2-3, 22.) This, however, is what statutes of limitations always do. By cutting off plaintiffs' rights after a set amount of time, they "represent[ ] a legislative judgment that occasional hardship is outweighed by the advantage of barring stale claims." *Ely-Cruikshank*,

81 N.Y.2d at 404 (citations, quotations, and alterations omitted).[2] Moreover, Plaintiff's appeals to equity ring all the more hollow because this case—like many, if not most, of the cases affected by the Decision—is directed and funded by distressed debt investment funds (here, Fir Tree Partners and Varde Partners) that purchased RMBS bonds at extreme discounts, years after their issuance and after the fallout from the 2007-2008 financial crisis, in order to profit through litigation.[3]

Finally, while Plaintiff hyperbolically claims that the Decision will allow RMBS sponsors to "evade all liability" (Mot. 4), the cases affected by the Decision are simply those in which investors like Fir Tree failed to convince trustees to file timely lawsuits. Cases in which trustees did file suit within New York's ample six-year limitations period are still moving forward—not to mention those cases, wholly unaffected by the Decision, in which RMBS investors other than late-

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[2] *See also 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" and "cannot be deemed arbitrary or unreasonable solely on the basis of a harsh effect.") (citations, quotations, and alterations omitted); *Gregoire v. G.P. Putnam's Sons*, 298 N.Y. 119, 125 (1948) ("The statue [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.") (citations and quotations omitted).

[3] *See, e.g.*, Asset-Backed Alert, *MBS 'Putback' Investors Target Big Issuers* (Feb. 24, 2012) ("Monarch Alternative Capital was among the first to begin carrying out the 'putback' strategy last year. Now, Amherst Advisory & Management, Fir Tree Partners, Glenview Capital and Varde Partners are among other fund managers working either on their own or in teams to follow the same course."), *available at* http://www.abalert.com/headlines.php?hid=156068 (last visited May 1, 2014).

purchasing hedge funds are pursuing their claims under federal and state securities laws, as well as New York tort law. In sum, the Decision's holding that representations and warranties accrue at breach is completely in accord with settled New York law, and is not a matter of State-wide public importance. Plaintiff's motion should be denied.

COUNTER-STATEMENT OF THE CASE

The RMBS trust at issue in this case was created on March 28, 2006, when DBSP transferred loans it had purchased from third-party mortgage originators to a securitization conduit, ACE Securities Corp., pursuant to a March 28, 2006 Mortgage Loan Purchase Agreement (the "MLPA"). The MLPA contained representations and warranties made by DBSP concerning the mortgage loans, which DBSP stated were true and correct "as of the closing date," *i.e.*, March 28, 2006. Also on the closing date, ACE transferred the loans, and its rights under the MLPA, to the Trustee on behalf of the trust, pursuant to a Pooling and Servicing Agreement (the "PSA"). The PSA limits the remedy for breaches of these representations and warranties to cure or repurchase of materially and adversely breaching loans, and provides that, upon notice, DBSP will cure breaches within 60 days or repurchase breaching loans within 90 days. (R. 121-22 (PSA § 2.03(a)).)

The PSA also specifies that "the Trustee shall enforce" this repurchase

remedy, and contains a "no action clause" which bars certificateholders from bringing suit except in certain limited cases in which a specified percentage of certificateholders has tendered to the Trustee a "written notice of default and of the continuance thereof, as hereinbefore provided." (R. 214-15 (PSA § 12.03).) "Defaults" under the PSA concern only failures of performance by the Servicer and Master Servicer, and are enumerated in Article VIII of the PSA, titled "Default," which also contains the only PSA provisions providing for "notices of default." (R. 194-98 (PSA § 8.02).) As such, the no-action clause does not permit prosecution of representation and warranty claims other than by the Trustee.

This suit was commenced by affiliates of Fir Tree and Varde (the "Funds"). The Funds wrote to the Trustee on January 12, 2012, alleging breaches of representations and warranties and asking the Trustee to "act expeditiously" "in light of the potentially expiring statute of limitations deadlines." (R. 355-59, at 359.) The Trustee notified DBSP of the Funds' breach allegations on February 8, 2012. (R. 801-02.) On March 8, 2012—a mere twenty-nine days after the Trustee had first notified DBSP of the Funds' claims—the Funds demanded that the Trustee sue DBSP. (R. 24-27, at 26.) The Trustee declined to do so. Then, on March 28, 2012, only forty-nine days after the notice to DBSP, the Funds filed a Summons with Notice which purported to allege claims for breaches of representations and warranties, and asserted that the Trustee had refused to sue

DBSP. Neither the sixty-day cure period nor the ninety-day repurchase period had run at the time the Funds demanded that the Trustee bring suit, or on the date the Funds filed the Summons.

Subsequently, on September 13, 2012, almost six years and six months after the closing date, the Trustee appeared in the action and filed the operative complaint. (R. 32-53.) DBSP moved to dismiss because the Summons was defective and the Complaint was untimely. The IAS Court denied DBSP's motion in a Decision and Order dated May 13, 2013, which observed that it is "undisputed that [the Funds] lacked standing to maintain this action under the PSA's no-action clause" (R. 11) but denied DBSP's motion on the basis that the claims did not accrue until DBSP "rejected the Trustee's repurchase demand." (R. 11, 17.) In so holding, the IAS Court analogized the PSA's demand requirement to the claim notice obligations of an insurance policyholder, and acknowledged that its holding contradicted previous cases dealing "with this exact situation" in the mortgage-repurchase context. (R. 14.)

DBSP timely appealed, and in a Decision and Order entered on December 19, 2013, the First Department unanimously reversed the IAS Court and held that "the claims accrued on the closing date of the MLPA, March 28, 2006, when any breach of the representations and warranties contained therein occurred." (Decision at 27.) The Decision also held that "the certificate holders' failure to

comply with a condition precedent to commencing suit rendered their summons with notice a nullity," and, regardless, that the "certificate holders lacked standing to commence the action on behalf of the trust" because the "PSA does not authorize certificate holders to provide notices of 'default' in connection with the sponsor's breaches of the representations." (*Id.* at 28.) Finally, the Decision held that the Funds' defective summons could not render timely the Trustee's late-filed complaint. (*Id.*) On January 13, 2014, Plaintiff moved for reargument of the Decision or, in the alternative, for leave to appeal to this Court. On March 20, 2014, the First Department reaffirmed its Decision by summarily denying both parts of Plaintiff's motion. The instant motion followed.

ARGUMENT

I. THE MOTION IDENTIFIES NO BASIS FOR LEAVE TO APPEAL

This Court has long held that appeals should be permitted only in "exceptional cases." *Sciolina v. Erie Preserving Co.*, 45 N.E. 371, 372 (1896). The First Department's application of New York's rule that "a breach of contract cause of action accrues at the time of breach" (*Ely-Cruikshank*, 81 N.Y.2d 404) in no way meets this high standard. Leave to appeal to the Court of Appeals is granted for issues that are novel or of State-wide public importance, present a conflict between the Appellate Division's decision and prior decisions of this Court, or involve a conflict among the departments of the Appellate Division. 22

N.Y.C.R.R. § 500.22(b)(4). On a motion for leave to appeal, "[a]rguing error below is not enough. The certiorari factors listed in Rule 500.22(b)(4) must be addressed. The primary function of the Court of Appeals is to decide legal issues of State-wide significance, not to correct error made in the Appellate Division."[4] Plaintiff's briefing does not even recite, much less analyze, the Rule 500.22(b)(4) factors. Stripped of its irrelevant and inaccurate arguments concerning federal case law, the Motion amounts to nothing more than claims of error by the Appellate Division, which would fail to merit review by this Court even if they were well-founded (which they are not).

A. No Conflicts With Court Of Appeals Or Appellate Division Cases

Plaintiff does not even attempt to demonstrate any conflict with decisions of the other departments of the Appellate Division. To the contrary, Plaintiff readily acknowledges not only that "there is no conflicting decision from another [department of the] Appellate Division" but that "*no conflict among the [departments] is ever likely to occur.*" (Mot. 19 (emphasis added).)

Plaintiff's attempt to conjure conflicts with this Court's decisions (Mot. 23-24) misapprehends the relevant inquiry. The Decision announced no new rule of law that could possibly conflict with this Court's precedents; it simply found

[4] New York Court of Appeals Civil Jurisdiction and Practice Outline § II(E)(5) (Feb. 2011), available at http://www.courts.state.ny.us/CTAPPS/forms/civiloutline.pdf (last visited May 1, 2014).

that claims under the relevant contracts were subject to New York's general accrual rule—accrual upon breach—and not to one of the limited exceptions to that rule. Indeed, the only Court of Appeals authorities that appear in the Motion (discussed in greater detail in Section II below) are cited for highly general principles of contract law which Plaintiff (wrongly) contends the Appellate Division misapplied. A party that loses in the Appellate Division cannot, however, obtain leave to appeal simply by arguing that the Appellate Division misapplied general legal principles to the specific facts of its case.

B. Invented Conflicts With Federal Case Law Are Irrelevant

Plaintiff's central argument, on which most of its Motion is focused, is that the Decision "conflict[s] with federal court cases" resulting in "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," thus "penaliz[ing] [plaintiffs] for pursuing their state-law claims in state court." (Mot. 20-21.) This argument is wrong on its own terms, and, in any event, a conflict with federal decisions is simply not a basis for granting leave to appeal. *See* 22 N.Y.C.R.R. § 500.22(b)(4) (leave to appeal may be granted in cases that "present a conflict with prior decision of [the Court of Appeals], or involve a conflict among the departments of the Appellate Division").

It makes sense that potential conflict with federal cases is not grounds for

leave to appeal, as New York courts "are the ultimate expositors" of New York law, *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), to which federal courts must defer on matters of New York law even in the absence of controlling Court of Appeals authority:

> [A] federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule . . .

West v. Am. Tel. & Tel. Co., 311 U.S. 223, 236-37 (1940). Therefore, federal courts "are bound to apply the law as interpreted by New York's intermediate appellate courts" in the absence of "persuasive evidence that the New York Court of Appeals, which has not ruled on th[e] issue, would reach a different conclusion." *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 134 (2d Cir. 1999).

Unsurprisingly, in light of this clear mandate, federal district courts have already applied the Decision and dismissed similar RMBS repurchase cases as time-barred. These courts have found neither "contrary law from the New York Court of Appeals [n]or 'persuasive data' that it would rule differently" and therefore have "follow[ed] the First Department's decision." *Lehman XS*, 2014 WL 108523, at *3 n.46; *see also, e.g.*, *Wells Fargo Bank, N.A. v. JPMorgan Chase Bank, N.A.* ("*Wells Fargo*"), No. 12-cv-6168(MGC), 2014 WL 1259630, at *3

(S.D.N.Y. Mar. 27, 2014) (relying on the Decision in dismissing repurchase case as time-barred). Indeed, federal courts came to the same conclusion *before* the Decision, holding that under New York law, repurchase claims accrued when representations and warranties were breached and were not delayed by contractual demand requirements. *See Structured Mortg. Trust 1997-2 v. Daiwa Fin. Corp.*, No. 02 Civ. 3232(SHS), 2003 WL 548868, at *2-3 (S.D.N.Y. Feb. 25, 2003); *Lehman Bros. Holdings, Inc. v. Evergreen Moneysource Mortg. Co.*, 793 F. Supp. 2d 1189, 1193-1194 (W.D. Wash. 2011).

Plaintiff's statement that the courts "are squarely divided" on the accrual issue is manifestly inaccurate. It turns on a *single case* in which a Southern District judge, in a two-sentence endorsement of a motion for reconsideration of a ruling rendered before the Decision, stated that "I've read the Appellate Division's Decision in *ACE II* and it 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-cv-0584 (S.D.N.Y. Jan. 1, 2014) (Mazin Aff. Ex. E).[5] This *ipse dixit* pronouncement, devoid of any analysis, is fundamentally inconsistent with the majority of federal precedents on the issue and, more basically, with federal courts' obligation to defer to New York state courts on

[5] This court then denied a motion for a stay or interlocutory appeal of its decision in a similarly terse endorsement. (*See* Mazin Aff. Ex. F.)

matters of New York law. Correcting this single federal district court's error is the responsibility of the Second Circuit, not the New York Court of Appeals.

Plaintiff also argues that "other federal cases," which "[do] not specifically address[ ] 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," citing three cases decided between 1999 and 2003. (Mot. 17.)[6] Obviously, three isolated federal rulings which were rendered years before the Decision and which do not even address accrual do not demonstrate the existence of a "deep-seated" conflict, and provide no basis for granting leave to appeal.

Moreover, Plaintiff's authorities are even weaker than this suggests. Plaintiff cites *F.D.I.C. v. Key Financial Services, Inc.*, which stated, in the context of calculating damages and without citation to any supporting authority, that "the breach . . . occurred when [defendant] refused to repurchase[.]" No. 89-cv-2366(DPW), 1999 WL 34866812, at *12 (D. Mass. Dec. 23, 1999). The First

[6] Throughout the Motion, Plaintiff attempts to characterize Plaintiff's claims as claims for breach of this supposed "distinct obligation." *See, e.g.*, Mot. 24 ("The Trustee has sued DBSP for breaching that distinct obligation, not for breaching the initial representations and warranties themselves.").) This is inconsistent with Plaintiff's prior briefing and argument. *See, e.g.*, R. 1174 (Hr'g Tr. 31:25) ("MR. KASOWITZ: There are really two kinds of breaches here.");(Pl.'s Mem. Of Law In Opp'n to Def.'s Mot. To Dismiss 32-33 (arguing that Plaintiff sought both "specific performance" of the repurchase remedy and other measures of damages for "DBSP['s] fail[ure] to comply with its express cure or repurchase obligations"). The ease with which Plaintiff can recharacterize its claims as either or both claims for "breach of representations and warranties" or claims for "failure to remedy breaches of representations and warranties" demonstrates how specious Plaintiff's "independent breach" argument really is.

Circuit then affirmed the damages calculation while expressly disclaiming reliance on this aspect of the District Court's reasoning. *See Resolution Trust Corp. v. Key Fin. Servs., Inc.*, 280 F.3d 12, 18 (1st Cir. 2002) (affirming "[w]hether or not Key committed an independent breach by failing to repurchase on demand"). Next, Plaintiff cites *LaSalle Bank, N.A. v. Lehman Bros. Holdings, Inc.*, which, also in the damages context, erroneously cited *Resolution Trust* as adopting the "independent breach" theory. 237 F. Supp. 2d 618, 638 (D. Md. 2002).[7]

Directly refuting Plaintiff's claim that these cases "reflect deep seated disagreement and uncertainty" about the viability of independent breach claims, such claims—and repurchase plaintiffs' reliance on these very cases as support—have recently been resoundingly rejected by both state and federal courts. *See, e.g., Nomura Asset Acceptance Corp. Alt. Loan Trust, Series 2005-S4 v. Nomura Credit & Capital, Inc.*, 39 Misc.3d 1226(A), at *10 (Sup. Ct. N.Y. Cty. 2013) ("*Nomura 2005-S4*") (*LaSalle* and its progeny "misapply . . . *Resolution Trust* [ ], and are unpersuasive. The First Circuit case had nothing to do with the statute of limitations and does not hold that a failure to repurchase constitutes an independent breach of contract."); *ACE Securities Corp. Home Equity Loan Trust, Series 2007-*

[7] Plaintiff also cites *Morgan Guaranty Trust Co. of New York v. Bay View Franchise Mortgage Acceptance Co.*, No. 00-cv-8613(SHS), 2002 WL 818082 (S.D.N.Y. Apr. 30, 2002), but *Bay View* also does not discuss accrual or statute of limitations issues, and Plaintiff's attempt to imply tension between *dicta* in *Bay View* and the Decision's accrual holding is belied by the fact that Judge Stein, who decided *Bay View*, less than a year later also decided the *Daiwa* case relied upon in the Decision.

HE3 v. DB Structured Prods., Nos. 13-cv-1869(AJN), 13-cv-2053(AJN), 13-cv-2828(AJN), 13-cv-3687(AJN), 2014 WL 1116758, at *7 (S.D.N.Y. Mar. 20, 2014) ("*ACE 2007-HE3*") ("the *LaSalle* court misread [*Resolution Trust*]: 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"); *Deutsche Alt-A Sec. Mortg. Loan Trust, Series 2006-OA1 v. DB Structured Prods., Inc.*, 958 F. Supp. 2d 488, 499 (S.D.N.Y. 2013) (expressly rejecting *LaSalle* and finding 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. Rather, 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.").[8]

Finally, Plaintiff argues that leave to appeal should be granted based on speculation that the Second Circuit might certify a question regarding the same

[8] Other recent federal court decisions further demonstrate that the "independent breach" theory, far from being a hotly-contested issue, is a dead letter. *Citigroup Mortg. Loan Trust 2007-AMC3 v. Citigroup Global Markets Realty Corp.*, No. 13-cv-2843(GBD), 2014 WL 1329165, at *5 (S.D.N.Y. Mar. 31, 2014) ("the failure to cure or repurchase does not constitute an independent breach of contract under New York law"); *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) ("The demand at issue here is not a substantive element of the underlying claim for breach but merely a procedural prerequisite to suit."); *Homeward Residential, Inc. v. Sand Canyon Corp.*, No. 12-cv-7319(AT), 2014 WL 572722, at *15 (S.D.N.Y. Feb. 14, 2014) (First Department precedent refutes the "independent breach" theory); *Lehman XS*, 2014 WL 108523, at *4 (defendant's "alleged failure to comply with its cure or repurchase obligations does not give rise to a separate breach of contract").

accrual issue to this Court in an appeal which presents similar RMBS repurchase statute of limitations issues (but involves different contract language). Initially, and most obviously, the bare existence of the possibility of certification in one case is not a basis to obtain leave to appeal *in a different case*. Moreover, Plaintiff's backwards argument grossly overstates the likelihood of certification, and ignores the fact that certification has not even been requested by the plaintiff in that appeal.

The Second Circuit has noted that "certification is an exceptional procedure, to which we resort only in appropriate circumstances," *McGrath v. Toys "R" Us, Inc.*, 356 F.3d 246, 250 (2d Cir. 2004), and that it will "decline to certify any questions of law to New York's highest court" where "sufficient precedents [from lower New York courts] exist for us to make [a] determination." *McCarthy v. Olin Corp.*, 119 F.3d 148, 153-54 (2d Cir. 1997). Certification is not a process that allows federal litigants to circumvent Appellate Division precedents; instead, it is only to be used in those rare cases where "there is a split of authority on the issue, where [a] statute's plain language does not indicate the answer, or when presented with a complex question of New York common law for which *no New York authority can be found*." *Id.* (citations, quotations, and alterations omitted). The straightforward accrual question presented by this case is clearly not complex, and regardless, it is certainly not a question "for which no New York authority can

be found."[9]

C. No Novel Issues Or Issues Of State-Wide Public Importance

Finally, Plaintiff rather cursorily contends that the accrual question is of "the utmost public importance" because the First Department's holding would permit "RMBS sponsors [to] evade all liability" on "claims for recovery of massive losses." (Mot. 4.) This argument is both exaggerated and inaccurate.

First, the centerpiece of the Motion's cursory three-page discussion of this point is a bloated footnote which attempts to demonstrate the importance of the accrual question by string-citing cases ostensibly "involving the same issue." (Mot. 28.)[10] In fact, this footnote commingles citations to cases actually affected

[9] Plaintiff is also mistaken that the Decision has caused "only more confusion" and has "created more questions than answers." (Mot. 18-19.) Plaintiff supports this by citing cases in which the Decision "has been invoked . . . where no statute of limitations issue exists" (*id.* 19 n.4) but all this means is that courts have properly relied on the Decision in rejecting "independent breach" arguments. *See* note 8, *supra.* Plaintiff also cites *ACE 2007-HE3*, a case in which the trustee provided pre-suit notice and sued within the six-year period, but then sought to bring claims for other loans not specified in its pre-suit notices based on allegations that the defendant had already discovered those breaches. 2014 WL 1116758, at *15. The court—which in the same ruling relied on the Decision to reject Plaintiff's "independent breach" theory—treated the plaintiff's "discovery" allegations as raising fact issues, and determined that whether pre-suit notice was required as to each of the loans at issue in the case could not be resolved on a motion to dismiss. *Id.* While DBSP disagrees with this aspect of this ruling, the fact that the suits at issue in *ACE 2007-HE3* were unquestionably commenced by the trustee within the six year statute of limitations and after the pre-suit cure and repurchase periods had expired as to many of the loans at issue fundamentally distinguishes *ACE 2007-HE3* from this case.

[10] Plaintiff also makes an unsupported reference to "more than $29 billion at stake" in these cases, a figure which appears to reflect the aggregate balances of all the RMBS trusts at issue, rather than some estimate of losses possibly attributable to breaches. (*See* Mot. 28.)

by the Decision with cases not involving statute of limitations issues at all,[11] and other irrelevant citations, such as cases voluntarily dismissed by the parties before any decision, and the pre-consolidation docket numbers of since-consolidated cases.[12]

Second, as noted above (and despite Plaintiff's wolf-in-sheep's-clothing references to "public and private pension fund investors" (*e.g.*, Mot. 29), the cases plaintiff cites—each of which concerns a single RMBS trust[13]—were, like this case, largely instigated by a small group of distressed debt investors against a similarly small group of banks and mortgage companies.[14] These distressed debt investors are not seeking to recoup "losses," but to reap high returns on speculative

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[11] *See, e.g.*, *U.S. Bank Nat'l Ass'n (Merrill Lynch Mortgage Investors Trust, Series 2006-RM5) v. Merrill Lynch Mortg. Lending, Inc.*, No. 654403/2012, 2013 N.Y. Slip Op. 32189(U) (Trial Order) (Sup. Ct. N.Y. Cnty. Sept. 10, 2013) (motion to dismiss denied on grounds unrelated to statute of limitations); *Homeward Residential, Inc. v. Sand Canyon Corp.*, No. 12 Civ. 5067, 2014 WL 572722 (S.D.N.Y. Feb. 14, 2014) (same); *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.) (motion to dismiss pending on issues unrelated to statute of limitations); *Nomura Asset Acceptance Corp., Alt. Loan Trust, Series 2007-1 v. Nomura Credit & Capital, Inc.*, No. 13 Civ. 3138 (S.D.N.Y.) (same); *SACO I Trust 2006-5 v. EMC Mortg. LLC*, Index No. 651820/2012 (Sup. Ct. N.Y. Cnty.) (same).

[12] *See, e.g.*, *Seagull Point, LLC v. WMC Mortg. Corp.*, No. 651519/2013 (Sup. Ct. N.Y. Cnty.) (voluntarily dismissed); *Home Equity Asset Trust 2006-7 (HEAT 2006-7) v. DLJ Mortg. Capital, Inc.*, No. 653467/2012 (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.).

[13] By way of contrast, FHFA's $4 billion settlement with JPMorgan Chase, cited by Plaintiff (Mot. 21), resolved a single case which brought securities claims concerning *103* RMBS trusts.

[14] For instance, of the approximately three dozen cases string-cited by Plaintiff, six are against Credit Suisse affiliate DLJ Mortgage Capital, five against GreenPoint Mortgage, five against WMC Mortgage, five against DBSP, and four against Nomura.

investments. Indeed, while Plaintiff complains that parties have been able to negotiate substantial global settlements concerning RMBS breach of representation and warranty claims, (Mot. 3, 21), the hedge funds who instigated this litigation have sought to *disrupt* these same settlements in the hopes of higher profits from litigation. *See, e.g.*, N.Y. TIMES, *Hedge Funds Sniff for Even Bigger Payouts From Banks* (Jan. 28, 2014) ("[O]ne hedge fund has gone one step further — it is trying to coax other investors out of participating in the JPMorgan settlement. . . . Fir Tree Partners last week proposed to buy several JPMorgan bond deals from other investors. . . . On five of the deals, Fir Tree, either alone or with others, has directed the bonds' trustees to start litigation against JPMorgan.").[15]

As such, the suits affected by the Decision are just one small piece of the substantial corpus of litigation commenced in the wake of the financial crisis. Investors who purchased RMBS at or near issuance as investments in their own right—rather than as distressed assets with potential litigation upside—have been able to pursue numerous other avenues to recovery, including claims under federal and state securities statutes and common law tort claims, contrary to Plaintiff's suggestion that investors have no recourse other than to the contract claims at issue

[15] *Available at* http://dealbook.nytimes.com/2014/01/28/hedge-funds-sniff-for-even-bigger-payouts-from-banks (last visited May 1, 2014). Tellingly, rather than cite this JPMorgan settlement, the Motion cites an inapposite settlement with the Federal Housing Finance Agency concerning claims on "single family, whole loan[s]" (*i.e.*, non-securitized loans sold to Fannie Mae or Freddie Mac). *See* Federal Housing Finance Agency News Release, "FHFA Announces $5.1 Billion in Settlements with J.P. Morgan Chase & Co." (Oct. 25, 2013) (Mot. 21).

here. *Cf. City of Ann Arbor Emps.' Ret. Sys. v. Citigroup Mortg. Loan Trust Inc.*, No. 08-cv-1418, 2010 WL 6617866, at *7 (E.D.N.Y. Dec. 23, 2010) (RMBS investors may pursue claims for "securities laws disclosure violations" and, as a matter of public policy, cannot be limited to contractual repurchase remedies). The fact that Fir Tree's investment strategy involves attempting to turn a profit through financial crisis litigation does not make its profits a matter of public importance.

Third, while Plaintiff vaguely contends that the accrual issue is "critical . . . to the future" of "mortgage loan securitization," which "[f]or decades . . . has played a critical role in housing finance" (Mot. 11, 29), there is only *one* pre-2013 decision from a New York state or federal court addressing contract claim accrual in the securitization context. Like the First Department's Decision, this case holds that the statute of limitations runs from the date the representations and warranties are breached and is not deferred by a contractual demand requirement. *See Structured Mortg. Trust 1997-2 v. Daiwa Fin. Corp.*, No. 02 Civ. 3232(SHS), 2003 WL 548868, at *2 (S.D.N.Y. Feb. 25, 2003) ("[S]ince the facts warranted in the March 1994 Pooling Agreement were not true when made, the statute of limitations began to run at that time, and expired six years later[.]"). The paucity of litigation over this issue in the securitization context, and the fact that the First Department's accrual holding did not actually

break new ground, should put to rest any concerns over the Decision's consequences for housing finance.

Ultimately, Plaintiff's argument amounts to nothing more than a general objection to the basic operation of the statute of limitations by a litigant that claims its untimely suit has merit. Statutes of limitations, however, were "enacted to afford protection to defendants against defending stale claims after a reasonable period of time had elapsed during which a person of ordinary diligence would bring an action," thus "embody[ing] an important policy of giving repose to human affairs." *Flanagan v. Mount Eden Gen. Hosp.*, 24 N.Y.2d 427, 429 (1969). By setting the statute of limitations for contract claims at six years (*see* CPLR 213(2)), the Legislature has already weighed the policy considerations, and the balance it struck must stand. *See 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.") (citations and quotations omitted).

II. PLAINTIFF FAILS TO IDENTIFY ANY ERROR BY THE APPELLATE DIVISION

As discussed above, merely arguing error by the Appellate Division is

not a basis for granting leave to appeal. The First Department's accrual ruling simply applied well-established principles of New York contract law to the unambiguous text of the contracts. *See* Decision at 27 ("The 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.") (citations omitted).

First, it is black-letter law that contracts containing representations and warranties are breached if the representations and warranties are false, and that contract claims based on such breaches accrue on the date of the breach. *See Bulova Watch Co. v. Celotex Corp.*, 46 N.Y.2d 606, 610 (1979) (breach of warranty claim concerning condition of roof accrued on date of contract); *Varo, Inc. v. Alvis PLC*, 261 A.D.2d 262, 265, 268 (1st Dep't 1999) (same).

Second, where, as here, representations and warranties are made "as of" the date of an agreement and concern existing or historical facts, they are false (if at all), and the plaintiff's breach claim accrues, on the day the agreement is entered into, not the date of the plaintiff's subsequent discovery or injury. *See, e.g., Ely-Cruikshank Co., Inc. v. Bank of Montreal*, 81 N.Y.2d 399 (1993) ("Knowledge of the occurrence of the wrong on the part of the plaintiff is not necessary to start the Statute of Limitations running in a contract action.") (citations, quotations, and

alterations omitted); *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."); *ABB Indus. Sys. v. Prime Tech., Inc.*, 120 F.3d 351, 360 (2d Cir. 1997) (under CPLR 213(2), warranty that site complied 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").

Plaintiff does not, and cannot, dispute these two bedrock principles of New York contract law. Instead, Plaintiff argues that this case falls under an exception to these rules which was triggered because the contracts provided that "[u]pon discovery or receipt of notice" of a breach, "the Trustee shall promptly notify" DBSP and request that DBSP cure the breach "within [60] days" or "repurchase such Mortgage Loan . . . within [90] days," a procedure which the parties specifically "understood and agreed" to constitute "the sole remedy respecting such . . . breach." (R. 121-22 (PSA § 2.03(a)).) As the myriad cases cited in Section IB, *supra*, demonstrate, this provision merely specifies the remedy in the event of a breach. Nothing in New York law supports the untenable argument that a contract specifying a particular remedy for a breach is not breached until the allegedly breaching party fails to voluntarily provide the specified remedy upon demand. New York law is clear that a contract claim

subject to a pre-suit demand requirement accrues when the plaintiff could have made the demand—*i.e.*, when the contract was breached—and is not deferred until the date the demand is actually made.

In addition to simply reiterating its categorically-rejected "independent breach" theory, Plaintiff argues that this Court's decisions in *Hahn*, *Bulova*, and *Kassner* support its position. Plaintiff is wrong.

A. This Court's Ruling In *Hahn* Supports The Decision

This Court's decision in *Hahn Automotive Warehouse, Inc. v. American Zurich Insurance Co.*, 18 N.Y.3d 765, 768 (2012), squarely supports the Appellate Division's ruling. *Hahn* involved contracts that required an insured to reimburse its insurer for certain deductible payments within a specified time from the insurer's demand. *Id.* The insurer neglected to make such demands for over six years, but argued that its claims were timely because the statute of limitations had not started to run until it demanded payment and the insured refused to pay. Rejecting this argument, this 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). This Court found that the rule proposed by the plaintiff 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).[16]

Plaintiff ignores *Hahn*'s holding, and instead cites it for the supposed proposition that "where a notice or demand provision 'allows for time to investigate and pay a claim,' the statute of limitations does not begin to run until that time passes." (Mot. 23 (quoting *Hahn*, 18 N.Y.3d at 772 n.5) (alterations omitted).) The quoted language is actually from *Continental Casualty Co. v. Stronghold Ins. Co.*, 77 F.3d 16 (2d Cir. 1996), which *Hahn* was *distinguishing* in the footnote cited by Plaintiff. *Continental* held that claims under insurance policies did not accrue until the insured gave notice of the covered loss, because the insurer could not have breached the contract until it refused to pay after receiving notice; its discussion of "investigat[ion] and pay[ment of] a *claim*" concerns *insurance* claims, not contract claims generally. *Id.* at 20. Neither *Continental* nor *Hahn* 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.

In fact, *Continental* simply holds, consistent with settled New York law,

[16] *See also Elie Int'l, Inc. v. Macy's W. Inc.*, 106 A.D.3d 442, 443 (1st Dep't 2013) ("The contract provision that makes receipt of an invoice a condition for requiring payment from the vendor does not affect the accrual date of the breach of contract claim."); *Town of Brookhaven v. MIC Prop. & Cas. Ins. Corp.*, 245 A.D.2d 365, 365 (2d Dep't 1997) ("When the defendant . . . [breached the contract], the Town possessed the legal right to demand payment . . . and the Town may not extend the Statute of Limitations by simply failing to make a demand.").

that a demand requirement will delay accrual only where there is *no legal wrong* until demand is made and refused—in other words, where demand is a substantive element of a claim rather than a procedural condition to suit, "as in bailment cases and replevin cases involving good-faith purchasers of stolen art." *Id.* at 21 (citation omitted); *see also Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 147 (1st Dep't 1990) (distinguishing between demands that are "substantive element[s] of the cause of action" and those that are "procedural condition[s] precedent to suit," and holding that accrual is delayed until demand and refusal only when the demand is "substantive"), *aff'd* 77 N.Y.2d 311, 319 (1991). In this case, the demand requirement is part of a "remedy" for an underlying "breach," *i.e.*, the falsity of a representation or warranty which DBSP promised to be true, making it, straightforwardly, a "procedural" condition precedent *to suit*, not a "substantive" condition precedent constituting an element of the *claim*. *See, e.g.*, *Wells Fargo Bank, N.A. v. JPMorgan Chase Bank, N.A.*, 2014 WL 1259630, at *3 (S.D.N.Y. Mar. 27, 2014) (distinguishing *Continental* in similar repurchase case since "[t]he demand at issue here is not a substantive element of the underlying claim for breach but merely a procedural prerequisite to suit"). This is exactly what the First Department held in finding that "the certificate holders fail[ed] to comply with a condition precedent *to commencing suit*."[17] Decision at 28 (citing

[17] This, of course, is why the First Department concluded that the pre-suit notice and cure

So. Wine & Spirits of Am., Inc. v. Impact Envt'l Eng'g, PLLC, 80 A.D.3d 505 (1st Dep't 2011)).

B. This Court's Ruling In *Kassner* Supports The Decision

Plaintiff's reliance on *John J. Kassner & Co. v. City of N.Y.*, 46 N.Y.2d 544 (1979) is similarly misplaced. In *Kassner*, a city contract provided that payments were "subject to audit and revision by the Comptroller." *Id.* at 547-48. This Court held that the plaintiff's claim accrued when the audit was completed, because there was no possible contractual wrong by the city before this point. *Id.* at 550. The pre-suit demand requirement at issue in this case is nothing like the audit in *Kassner*, which was not (contrary to Plaintiff's suggestion) a "condition precedent to suit" on a pre-existing *breach* (Mot. 26), but a condition precedent to the city's *performance* (*i.e.*, payment for services) in the first place. Also, in *Kassner* the *defendant* controlled the timing of the audit, while in this case (as in *Hahn*) the *plaintiff* controlled the timing of its demand—an important distinction given New York's rule against permitting plaintiffs to unilaterally postpone the running of the statute of limitations. *See, e.g.*, *State of N.Y. v. City of Binghamton*, 72 A.D.2d 870, 871 (3d Dep't 1979) ("The Statute of Limitations begins to run

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provisions at issue in this case were "a condition precedent for purposes of determining when a suit may be initiated, yet [ ] not a condition precedent for purposes of determining when a claim accrues." (Mot. 3.) Plaintiff's ostensible "confusion" (Mot. 18-19) on this point is simply a function of its erroneous insistence that procedural prerequisites to a plaintiff commencing a suit are necessarily also substantive elements of the plaintiff's underlying claim.

when the right to make the demand for payment is complete, and the plaintiff will not be permitted to prolong the Statute of Limitations simply by refusing to make a demand. *City of New York v. State of New York*, 40 N.Y.2d 659 (1976), relied upon by the appellant, affords it no relief for the reason that in the case at hand the plaintiff controlled the timing of the demand.") (citation omitted).[18]

C. This Court's Ruling In *Bulova* Supports The Decision

Plaintiff argues that "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," citing *Bulova Watch Co. v. Celotex Corp.*, 46 N.Y.2d 606, 611 (1979). (Mot. 23.) This provides Plaintiff no support. *Bulova* involved both a sales contract for roofing materials and *separate agreements* to provide repairs within a specified 20-year period which were offered "as a special, separate and additional incentive to purchase" the roofing materials. *Bulova*, 46 N.Y.2d at 610-11.

The contracts at issue here, by contrast, involve nothing more than a warranty and a provision specifying the sole remedy for its breach. Obviously,

[18] Indeed, *Kassner* also held that a contract provision stating that no suit could be brought "unless . . . commenced within six (6) months after the date of filing . . . of the certificate for the final payment hereunder" *did not defer accrual* where the plaintiff delayed its demand for payment (and therefore the filing of the certificate) for six years after the alleged breach (the Comptroller's disallowance) occurred. 46 N.Y.2d at 548, 551-52. Plaintiff's delay in making repurchase demands until years after the alleged breaches of representations and warranties in this case is much more analogous to the *Kassner* plaintiff's delay in perfecting its right to suit than it is to the *Kassner* defendant's audit.

simply specifying a remedy in a contract does not create a separate contract, as the cases cited above rejecting Plaintiff's "independent breach" theory demonstrate. *See, e.g.*, *Deutsche Alt-A*, 958 F. Supp. 2d at 499 ("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."). Plaintiff is conflating contracts specifying "repair or replacement" as *remedies* for breaches of warranties with contracts involving (as in *Bulova*) additional "repair or replacement" *warranties* separate and apart from their underlying product warranty. Courts routinely distinguish between these concepts. *See, e.g.*, *Jackson v. Eddy's LI RV Center, 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).

D. Plaintiff's Cursory Arguments Concerning The Decision's Other Holdings Do Not Warrant Leave To Appeal

Plaintiff does not attempt to argue that the other issues it cursorily raises in the final few pages of the Motion raise issues of public or state-wide importance, or conflict with other New York case law, and instead simply reargues the merits of points it already lost. Indeed, whether the hedge fund entities that filed the initial summons had standing to bring claims under the particular language of this PSA's "no-action clause" is precisely the sort of issue that does *not* warrant leave to appeal; Plaintiff does not contend this issue has any sort of wide-ranging application, only that it disagrees with how the First Department interpreted the PSA's terms. Indeed, the only authorities Plaintiff cites in its argument are *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002)—for the general principle that contracts are "construed in accord with the parties' intent" as evidenced by "what they say in their writing"—and *Walnut Place LLC v. Countrywide Home Loans, Inc.*, 96 A.D.3d 684 (1st Dep't 2012), a materially similar no-action clause case cited in the Decision, which Plaintiff attempts to distinguish textually.

The no-action clause prohibits suits other than by the Trustee unless preceded by (among other things) a "notice of default and of the continuance thereof, as hereinbefore provided." (R. 214 (PSA § 12.03).) The PSA contains an

article (Article VIII) titled "Default," which specifically addresses failures of performance by the servicer (the party that collects mortgage payments from borrowers) and the master servicer (the party that oversees the servicer and administers the bonds). Only this article authorizes certificateholders to provide "notices of default and the continuance thereof" to the Trustee, and these notices are thus the only possible "notices of default" that could be "hereinbefore provided" as required by the no-action clause (Plaintiff, tellingly, excises the latter phrase from its Motion).

Plaintiff argues, without textual support, that "default" also means breaches of DBSP's representations and warranties, but these are always described as "breaches," in accord with standard legal usage (breaches of representations and warranties concerning present or historical conditions are rarely if ever described as "defaults," a term which generally refers, as here, to failures of ongoing performance obligations), and are discussed in Section 2.03, not Article VIII. Notably, this argument—that breaches of representations and warranties are "defaults" under the PSA—is irreconcilable with Plaintiff's central theme that such breaches are not even contractual wrongs until the expiration of the cure and repurchase periods, neither of which had run when the hedge funds filed the summons. Plaintiff's untenable interpretation of the no-action clause was rejected both by the First Department *and* the IAS Court, which specifically noted that

"these certificateholders lacked standing to maintain this action under the PSA's no-action clause." (R. 11.) It certainly does not now justify leave to appeal.

Plaintiff cites no authorities whatsoever to support its barely-articulated argument that the Trustee's untimely complaint could be deemed timely by virtue of the hedge funds' defective summons, regardless of the hedge funds' lack of standing. New York law is to the contrary. *See, e.g.*, *Goldberg v. Camp Mikan-Recro*, 42 N.Y.2d 1029, 1029 (1977) (the untimely appearance of a party with standing cannot be deemed timely by virtue of an earlier summons filed by a party that lacks "the capacity to sue"); *Nomura 2005-S4*, 39 Misc.3d 1226(A), at *7-8 (same; extensively analyzing this issue in materially identical repurchase case); *cf. So. Wine & Spirits*, 80 A.D.3d at 506 ("the original complaint was brought by plaintiffs in violation of the condition precedent, and plaintiffs cannot rely upon [relation-back] to cure such failure to comply").

CONCLUSION

For the foregoing reasons, the motion of Appellant for leave to appeal the Decision and Order of the Appellate Division, First Department, entered on December 19, 2013, which (i) reversed the Order of the Supreme Court, New York County, entered on May 13, 2013, denying Respondent's motion to dismiss Appellant's Complaint, and (ii) ordered the trial court to enter judgment in favor of Respondent, should be denied.

Dated: May 5, 2014

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