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

Court of Appeals

STATE OF NEW YORK

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

Plaintiff-Appellant,

—against—

DB STRUCTURED PRODUCTS, INC.,

Defendant-Respondent.

BRIEF FOR *AMICUS CURIAE* THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF DEFENDANT-RESPONDENT

THEODORE N. MIRVIS
GEORGE T. CONWAY III
CHARLES D. CORDING
VLADISLAV S. VAINBERG
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1000

Attorneys for Amicus Curiae *the Securities Industry and Financial Markets Association*

March 13, 2015

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") brings together the shared interests of hundreds of securities firms, banks and asset managers. Its membership encompasses both sides of the securities industry—those who sell securities (issuers and sponsors) and those who purchase them (institutional investors and asset managers). SIFMA champions policies and practices that foster a strong financial industry, investor opportunity, capital formation, job creation and economic growth, and that build trust and confidence in the financial markets.

One of SIFMA's important functions is the representation of its members' interests in cases addressing issues of widespread concern in the securities and financial markets. In this regard, although it is judicious in its case selection, SIFMA frequently appears as *amicus curiae* in cases that raise important policy issues that impact the markets represented by SIFMA or otherwise affect common practices in the financial services industry. The fundamental issues of import to the securities and financial markets raised in this appeal make it a paradigmatic case in which SIFMA believes its members should be heard.

This case presents for review the application of New York's six-year statute of limitations to claims for breaches of contractual representations and warranties in issuances of residential mortgage-backed securities, or RMBS. This appeal will determine whether key contractual terms agreed to by sophisticated parties and crafted to limit remedies available for breaches of representations and warranties will be enforced as written, or instead judicially rewritten to permit litigation potentially in perpetuity, thereby depriving the industry of certainty and finality. This Court's resolution of this issue will likely have far-reaching, multibillion-dollar implications for the securities and financial industries and SIFMA's members, and more generally, will affect the enforcement (and drafting) of all manner of complex business contracts under New York law. SIFMA accordingly files this *amicus curiae* brief to present its position on this issue, and to provide the Court with information about the RMBS marketplace and the practical consequences of affirmance or reversal of the Appellate Division's important decision below.

PRELIMINARY STATEMENT

As one would expect, the financial crisis that began in 2007 has produced a flood of litigation of various kinds. One species of financial-crisis litigation, exemplified here, involved RMBS. When the crisis peaked in 2008, the prices of those securities had declined precipitously, as mortgage delinquencies rose and ratings agencies downgraded the RMBS. And so hedge funds specializing in distressed debt opportunistically bought the RMBS at deeply discounted prices.

Some of these so-called "vulture" funds resorted to another strategy to boost their returns. They invested in RMBS put-back litigation. They handpicked RMBS that had been issued in 2006 and 2007, and, in 2011 or so, began to agitate for trustees to bring repurchase actions like the one now before this Court. At the same time, though, they realized that time was running out under the six-year New

York statute of limitations governing contracts, CPLR § 213(2). As the sixth anniversary of the securitization contracts at issue here approached, for example, the vulture funds behind *this* lawsuit warned the Trustee about the "Urgent Need for a Tolling Agreement," and about how "it is imperative that the Trustee act expeditiously" because of "potential expiring statute of limitations deadlines." R. 359.

The issue in this case is whether the vulture funds' initial view was right—or whether, as the Trustee they caused to sue asserts now, there is effectively *no* statute of limitations on RMBS repurchase actions at all. The Trustee here asserts that the period during which claims can be brought extends beyond the sixth anniversary of a securitization—indeed, that it lasts "for the life of the agreements." Br. 2. Because RMBS trusts contain thirty-year mortgages, that would mean that RMBS repurchase claims could be brought up to *thirty-six years* after the securitization transaction was consummated. Here, for example, where the securitization contracts were executed—and the contracts' representations and warranties were allegedly breached—in 2006, the Trustee's position would mean that repurchase claims could be brought *as late as 2042*.

If the idea of litigating the financial crisis of the last decade for another quarter-century seems absurd, that is because it is. For the Trustee's argument that the statute of limitations has not run relies upon distortions of the contracts and the governing New York law.

The contractual breaches at issue here are breaches of representations and warranties—representations and warranties that were either true or false in 2006, when they were made. That should mean, of course, that the statute of limitations began running in 2006, because "[i]n New York, a breach of contract cause of action accrues at the time of breach." *Ely-Cruikshank Co.* v. *Bank of Montreal*, 81 N.Y.2d 399, 402 (1993). It runs from the time of breach "'even though the injured party may be ignorant of the existence of the wrong or injury.'" *Id.* at 403 (citation omitted). So any breach happens when the representation or warranty was made, and once the sixth anniversary of that time passes, any claims for such a breach are barred.

To get around this elemental rule of law, the Trustee relies on a provision in the securitization agreements establishing the *remedy* available in the event any of the loans in the trust breached the representations and warranties made in 2006. That remedy—the "*sole* remedy," according to the agreements—provides for repurchase of the breaching loan. If the RMBS sponsor becomes aware of a breaching loan, it has a set period of time in which it must cure the breach, and if it cannot do that, it must buy the specific loan back. According to the Trustee, any failure to do *that* is what starts the limitations period running. The "breach" at issue is not the breach of a representation or warranty, claims the Trustee; it is the "breach" of the *repurchase* remedy. So if a repurchase demand is not made until 2036, then the right to sue extends to 2042. That makes sense, declares the Trustee without citation, because the "basic bargain" among the parties was that it was "unthinkable that investors would have agreed to invest if DBSP's promise to cure or repurchase any defective loans did not last for the life of the agreements." Br. 2.

That stands the contracts on their head. The Trustee deliberately conflates and confuses the repurchase *remedy* with the representation and warranty *breach*. The agreements at issue here specify what the breach really is: they *expressly state* that a breach of a representation or warranty under the mortgage loan purchase agreement is the "breach." Over and over and over again, the contracts use the word "breach" to describe what happens if a representation or warranty is untrue at closing; and they clearly say that the representations and warranties are made "*as of the Closing Date*." As for the cure-or-repurchase protocol, the contracts make clear that it is *not* an independent covenant, as the Trustee claims, but rather constitutes the "*sole remedy*" for the "breach." The cure-or-repurchase "sole remedy" procedure, in fact, *limits* the sponsor's liability—and does *not* provide an independent, limitations-triggering right to sue, as the Trustee imagines here.

That, in fact, is the basic RMBS bargain: investors get the benefit of expansive representations and warranties, but, in exchange, they accept a limitation on liability—the "sole *remedy*" of cure or repurchase. By recharacterizing that sole remedy as an "independent obligation" and thus an "independent contractual breach" (Br. 24; Reply Br. 10-11, 9 n.2), the Trustee inverts this bargain, and distorts the plain words and design of the contracts beyond recognition. In the Trustee's world, a provision manifestly designed to *reduce* litigation actually *multiplies* it. In the Trustee's world, a provision clearly meant to *limit* liability instead greatly *expands* it.

The Trustee's theory thus defies the express terms of the contracts and settled principles of New York law. As shown below, the sophisticated commercial parties to these agreements would not and did not contract for an indefinite limitations period. And New York law does not permit the alchemization of what a contract repeatedly calls a "breach"—untrue representations and warranties—into something *other* than a breach, and to treat a failure to carry out a *remedy* as an independent breach. To hold otherwise, indeed, would mean that virtually *any* complex business agreement, not just the RMBS agreements at issue here, could breed litigation in perpetuity merely by specifying a remedy for a breach. On the Trustee's theory, for example, a liquidated damages clause would indefinitely extend the statute of limitations: the limitations period would not begin until the defendant refuses to pay the liquidated amount.

To accept the Trustee's views, moreover, would vitiate what this Court has found to be the Legislature's "primary purpose" in enacting "a limitations period": to provide "fairness to a defendant" by ensuring that a defendant is "'secure in his reasonable expectation that the slate has been wiped clean of ancient obligations.'" *Duffy* v. *Horton Mem'l Hosp.*, 66 N.Y.2d 473, 476 (1985) (citations omitted). It would also subvert another critical legislative purpose: "the need to protect the judicial system from the burden of adjudicating stale and groundless claims." *Id.* at 476-77. The courts of this State already teem with RMBS repurchase claims.

Given that the financial crisis is now pushing eight years on, that litigation cascade should be subsiding—*if* the limitations period is properly applied to the contracts as they were written.

Acceptance of the Trustee's position, however, could revive a multitude of time-barred suits that have already been dismissed by dozens of judges faithfully applying the fundamental principles of New York law that produced the correct decision below. And it would lead to new suits as far as the eye can see. If the Trustee has its way, and the contracts are distorted and the statute is not applied, New York judges—not to mention their successors—would thus bear the burden of stale RMBS put-back cases for many years to come.

ARGUMENT

POINT I

THE TRUSTEE DISTORTS THE "BASIC BARGAIN" OF RMBS SECURITIZATIONS, AND WRONGLY TREATS THE CONTRACTS' SOLE REMEDY AS AN INDEPENDENT COVENANT OF PERFORMANCE.

In contending that its breach of warranty claim accrued "when DBSP failed to cure or repurchase a defective loan within the specified period," the Trustee distorts the securitization contracts. According to the Trustee, the Appellate Division's decision "undoes" the parties' "basic risk-shifting bargain." That bargain, imagines the Trustee, is that investors "would invest *only* upon assurance that the sponsor accepted the risk that it would have to cure or repurchase any defective loan discovered at any time during the life of the agreements." Citing nothing but its own words, the Trustee declares it "*unthinkable* that investors would have agreed to invest if DBSP's promise to cure or repurchase any defective loans did not last for the life of the agreements." Br. 1, 2 (emphasis added in part).

Relying on this ipse dixit, the Trustee proceeds to disregard the plain language of the contracts: the agreements' repeated references to "*breach*" as meaning a breach of a representation or warranty, and their repeated references to the cure or repurchase provision as being the "*remedy*"—indeed, the "*sole* remedy"—for such a breach. According to the Trustee, because it is so "unthinkable" that the repurchase provision does not operate forever, that provision *must* be "a distinct contractual obligation," "an independent obligation … distinct from the representations and warranties themselves." Br. 24. And so in the Trustee's view, the breach at issue here is *not* what the *contract* calls the breach; instead, it is the failure to carry out what the contract calls the "sole remedy," the repurchase remedy, a remedy the Trustee claims can be invoked for "the life of the agreements," *id.* at 1, 2—which could be three decades. The claim doesn't accrue until then, the Trustee believes, and thus, as a practical matter, the statute of limitations can *never* really run.

But by ignoring what the contracts define as the "breach" and what they define as the "remedy," the Trustee stands the true "basic bargain" among the parties on its head. Under the contracts as written, the RMBS sponsor *does* stand by an extensive set of representations and warranties that it represents to be true as of the time that they were made. But in exchange for giving those broad protections, the sponsor gets something in return: what the contract calls the "sole remedy," the cure and repurchase provision that *narrows* the available remedy, and *limits* liability, for any breach. No open-ended damages claims are permitted; only cure or repurchase is allowed. Far from being a distinct, independent covenant of performance, the sole repurchase remedy is thus just what the contracts say it is—a limited and exclusive *remedy*, a remedy for a breach that previously occurred at the time of securitization, when the representations and warranties were made. It makes no sense to construe that remedy—which seeks to *reduce* litigation and *limit* liability—as a covenant that instead *multiplies* and *expands* both, as the Trustee urges here.

A. The repurchase remedy and sole-remedy provisions limit sponsor liability in exchange for extensive representations and warranties.

RMBS are a creature of private contract among highly sophisticated parties. A financial institution, typically called the "sponsor," sells thousands of residential mortgage loans to a trust, usually through an intermediary. The trust next issues securities—"certificates"—that entitle their holders to cash flows generated by the loans in the trust.[1] These residential mortgage-backed securities are then sold to

[1] *See* THOMAS P. LEMKE *ET AL.*, MORTGAGE-BACKED SECURITIES § 1.1 (2014); *see also, e.g.*, Joint Task Force, Dep't of the Treasury, Office of Federal Housing Enterprise Oversight, and the Securities and Exchange Commission, *Staff Report: Enhancing Disclosure in the Mortgage-Backed Securities Markets*, at 5, 7 (Jan. 2003) ("Joint Task Force Report"), *available at* http://www.sec.gov/news/studies/mortgagebacked.htm. RMBS referred to in this brief are so-called "private-label" or "non-agency," that is, RMBS issued by private financial institutions rather than by the government-sponsored enterprises ("GSEs")—the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie

investors. The investors who originally bought the securities were also highly sophisticated: they were "predominantly institutional and include banks, insurance companies, hedge funds, mutual funds, foreign central banks, and sovereign wealth funds, as well as Fannie Mae and Freddie Mac."[2] And when the financial crisis broke out and RMBS prices precipitously dropped, "vulture" funds—specialized hedge funds that speculate in distressed debt—scooped the RMBS right up. *See* Point III, below.

These sophisticated investors could freely buy and sell RMBS certificates because the terms of the contracts defining the rights of those certificates were fully disclosed, well-known and often standardized. The contractual rights travel with the certificates. Those contracts typically included pooling and servicing agreements ("PSAs") and/or mortgage loan purchase agreements ("MLPAs"). These detailed agreements set forth the rights of various parties, including the investors who purchase the RMBS. For public securitizations, they are filed, as they were in this case, with the SEC.[3] And there is no doubt that the sophisticated investors who purchased RMBS—including the vulture funds that purchased in the secondary market—could easily have reviewed the agreements before they invested.

Mac")—or the Government National Mortgage Association ("Ginnie Mae"). *See* Joint Task Force Report at 5-6.

2 Office of Fed. Hous. Enter. Oversight, *A Primer on the Secondary Mortgage Market*, Mortgage Market Note 08-3 at 8 (July 21, 2008), *available at* http://1.usa.gov/18vinWn.

3 *See, e.g.*, ACE Securities Corp., Form 8-K, EX-4.1 (Mar. 1, 2006) (Pooling and Servicing Agreement, ACE Securities Corp. Home Equity Loan Trust, Series 2006-SL2), *available at* http://1.usa.gov/188FBuZ.

Among the important features of these contracts are the representations and warranties made by the sponsors. Typically, an RMBS sponsor "makes an extensive set of representations and warranties … about the loans being sold and the underwriting process that produced them."[4] Those representations and warranties do *not* guarantee the loans' future performance; indeed, "there is seldom an entity that is guaranteeing the payment of the securities."[5] Instead, the representations and warranties only address specific characteristics and qualities of the individual loans and real estate *at the time the representations and warranties were made*. The representations and warranties are either true or false as to each loan at that time. If there is a breach of any representation or warranty, it occurs right then and there. The contractual language itself makes that unmistakably clear. For here, as did countless other sponsors, DBSP represented and warranted loan characteristics "*as of the Closing Date*," R. 294 (MLPA § 6; emphasis added), defined as "March 28, 2006," R. 290 (MLPA § 1). For example, DBSP represented and warranted that the loans were "underwritten in accordance with the related originator's underwriting guidelines," that "[n]o misrepresentation or fraud ha[d] taken place" in the mortgage origination, that each loan file contained an appraisal by a qualified appraiser, and that various financial representations about the loans, set forth in a "[c]losing [s]chedule," were true, R. 294, 296, 297, 299 (MLPA §§ 6(ii), (xxiii), (xxiv), (xxx), (lix)).

---

4 Robert T. Miller, *RMBS Put-Back Litigations and the Efficient Allocation of Endogenous Risk Over Time* 9 (Univ. of Iowa Legal Studies Research Paper No. 14-31, Dec. 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504798.

5 *See, e.g.*, Joint Task Force Report at 12.

The representations and warranties are extensive, but there is a trade-off—one built into the design of the RMBS offering: a limited and exclusive remedy. Breach of a representation or warranty does not entitle an RMBS investor to rescind an investment purchase. That would be a drastic, nonsensical result for breaches as to individual loans in a pool consisting of thousands; it would "involve unwinding the entire securitization transaction," and would impose "obviously prohibitive" costs on everyone involved.[6] Likewise, a breach does not entitle an investor to damages; "expectation damages … would be extremely difficult to determine, and if [a] court actually undertook such an inquiry, the results would be highly unpredictable."[7]

To deal with the problem of how to remedy breaches of representations and warranties as to particular loans, "parties to securitization transactions have developed an elegant contractual mechanism" that avoids these costs and difficulties—"the Repurchase Provision."[8] That provision requires the repurchase of the *specific mortgage loan* as to which there is a breach—the "affected Mortgage Loan," the provision says—and even then only if the breach "materially and adversely affects the value of any Mortgage Loan or the interest therein" of the Trust. R. 300 (MLPA § 7(a)); *see also* R. 121-22 (PSA § 2.03(a)). Thus, breaches can only occur "loan-by-loan," as to "*particular* loans." *Ret. Bd. of the*

6 Miller, *RMBS Put-Back Litigations* 23.
7 *Id.* at 22.
8 *Id.* at 23.

Policemen's Annuity & Benefit Fund of the City of Chicago v. *Bank of New York Mellon*, 775 F.3d 154, 156, 162 (2d Cir. 2014) (emphasis added).

Equally importantly, the repurchase provision is accompanied by "a Sole Remedy Provision, which contractually bars the Purchaser from seeking other remedies normally available for breach of contract."[9] Here, the contracts provided that "the obligations of [DBSP] set forth in [the repurchase provision] to cure or repurchase a defective Mortgage Loan … constitute the sole remedies of the Purchaser against the Sponsor respecting … a breach of the representations and warranties …." R. 300 (MLPA § 7(c)); *see also* R. 121-22 (PSA § 2.03(a)).[10] As a result, courts in New York and elsewhere have consistently recognized that, no matter what, "the only remedy available to Plaintiff remains the cure or repurchase of defective loans"—and that "the clear contractual limitations on Plaintiff's remedies do not dissolve simply because it must bring suit to enforce those remedies." *ACE Sec. Corp. Home Equity Loan Trust, Series 2007-HE3* v. *DB Structured Prods., Inc.*, 5 F. Supp. 3d 543, 553 (S.D.N.Y. 2014).[11]

---

[9] Miller, *RMBS Put-Back Litigations* 24.

[10] The governing agreements also typically provide that, as an alternative to repurchase, the sponsor may substitute a replacement loan, but this alternative remedy is only available in the first two years because of federal tax law requirements. *E.g.*, R. 122-23 (PSA § 2.03(b)); *see* 26 U.S.C. § 860G(a)(4)(B)(ii).

[11] *Accord*, *e.g.*, *U.S. Bank Nat'l Ass'n* v. *DLJ Mortg. Capital, Inc.*, No. 650369/2013, 2013 WL 6997183, at *3 (Sup. Ct. N.Y. Cnty. Jan. 15, 2014), *aff'd*, 121 A.D.3d 535 (1st Dep't 2014); *MASTR Adjustable Rate Mortgs. Trust 2006-OA2* v. *UBS Real Estate Sec., Inc.*, No. 12 Civ. 7322 (HB), 2013 WL 4399210, at *4 (S.D.N.Y. Aug. 15, 2013); *Deutsche Alt-A Sec. Mortg. Loan Trust, Series 2006-OA1* v. *DB Structured Prods., Inc.*, 958 F. Supp. 2d 488, 497-500 (S.D.N.Y. 2013).

These provisions carefully limit the sponsor's exposure. Regardless of the magnitude or number of any breaches, the contracts' "sole remedy" provision ensures that sponsors do not bear open-ended liability for investors' damages or losses on the portfolio. The remedy for breach is simply and solely to cure the breach or to remove individual loans from the trust through repurchase. If a loan breached the representations and warranties when they were made, and if the breach materially and adversely affected the "value of such Mortgage Loan or the interest therein of the Certificateholders," R. 121 (PSA § 2.03(a)), then *that loan* must be repurchased and thereby removed.

The sole remedy is thus an elegant, carefully crafted solution to any problem caused by a breach of a representation and warranty: if there was a breach of a representation or warranty as to a particular loan when it was put into the trust, the contractual repurchase protocol solves the problem, once and for all, without disturbing the rest of the portfolio or the RMBS issue as a whole. The repurchase protocol limits and defines the sponsors' risk, while providing a clear remedy for investors. That is consistent with a fundamental structure of "[t]he mortgage securitization process," which is "designed to distribute risk."[12]

And the representations, warranties, and sole-remedy provision do not, as Supreme Court erroneously (and inexplicably) held below, "function[] as insurance for the Trustee." R. 15. Under the governing contracts as written, an RMBS sponsor does not represent, let alone insure, that homeowners will repay their

[12] *See, e.g.*, LEMKE, MORTGAGE-BACKED SECURITIES § 1.1 (emphasis omitted); *see generally* Miller, *RMBS Put-Back Litigations*.

loans, without fail, for thirty years (or whatever the term of the loan). An RMBS sponsor does not promise to stand guard against the risks of a recession, a decline in housing prices, or an upturn in unemployment. Those risks are borne by investors. Investors who wanted insurance against such risks could have—and did—purchase insurance-"wrapped" RMBS certificates. For those certificates, financial guaranty or "monoline" insurers unconditionally guaranteed the payment of principal and interest. The very existence of such insurance, indeed, confirms that the repurchase protocol does not "function as insurance." [13]

But the Trustee's theory would not only transform the representations and warranties into insurance, it would also give trustees and the vulture funds behind them decades to decide when and how to collect on that insurance. They could lie in wait for years or decades, collecting principal and interest on loans that may have breached representations and warranties but that nonetheless perform. And when an economic downturn comes, as one did here and no doubt will again, and the loans later default, the funds could pounce, hunt through the loan files for breaches, and then sue to have the loans repurchased—up to thirty years after origination. Nothing in the contracts provides for such a windfall.

---

[13] The repurchase mechanism also forecloses the possibility of duplicative recovery to insurers. In securitizations insured by a "monoline" insurer, often both the monoline and the trustee are able to give notice of breaches of representations and warranties to the sponsor. If any of the representations and warranties are breached in such a securitization, a remedy other than repurchase could leave the sponsor exposed to double damages to the monoline insurer and trustee based on the same breach on the same loan.

B. In agreeing to a sole and limited repurchase remedy, the parties did not contract for an indefinite limitations period.

Given that the parties thus contracted to restrict liability through the repurchase and sole-remedy provisions, and given the clear language of the contracts, it makes no sense to recast those provisions as expanding liability by establishing a virtually permanent extension of the statute of limitations.

In particular, the Trustee is wrong to suggest that investors would never have agreed to invest if the repurchase provision "did not last for the life of the agreements." Br. 2. To the contrary, it made perfect economic sense for the parties to have understood that the repurchase remedy would only be available for the standard, generally applicable limitations term of six years, and that this term would commence at the time the representations and warranties were breached. That is how all contracts with representations have always been understood to work. The party receiving the representation has six years to claim breach—not forever.

Although the Trustee observes that the sponsor is in a "superior position … to verify the quality of the loans it was selling" (Br. 26), that is true, if at all, only until the time it sells the loans to the trust. It thus hardly follows that the limitations period should be "extended for utterly fantastic lengths of time"[14]—the result that the Trustee urges here. For with the passage of time, it makes less and less economic and practical sense to allow the trust to assert claims of breach, and

[14] Miller, *RMBS Put-Back Litigations* 34.

to permit a remedy for, or litigation over, those claims. As events at origination recede into the past, the costs of providing a remedy go up. On the other side of the equation, the benefits of providing a remedy decline: the rate of error in deciding whether a breach occurred years before obviously increases over time. The reasons for both tendencies are plain: "with the passage of time, determining disputed issues becomes much more difficult (that is, more costly) because documents are lost, memories fade, and witnesses become unavailable. This means that the error rate in such cases will rise, and the costs of investigating and disputing issues will rise as well."[15]

Some concrete examples drive the point home. Consider, for example, an alleged breach of a representation of the valuation of a mortgaged property as of the securitization's closing date: "valuing a property as of a date even a few years in the past is very difficult; valuing a property as of a date thirty or more years in the past is virtually impossible. Market conditions will have changed so much as to make any contemporary information useless, and sufficiently detailed information from such a distant time in the past will be very difficult and costly to obtain."[16] Or take the representation that there was no fraud by the borrower in the origination of a loan: in the typical case, is that really provable, or worth proving, ten, fifteen, twenty, or thirty years down the line? Or figuring out, a decade or a score or more years later, whether underwriting guidelines in use at origination were followed?

---

15 *Id.* at 27-28.
16 *Id.* at 35.

At some point the game is no longer worth the candle—and simply cannot be fairly played at all. That is why, for all contracts, big or small, complex or simple, there is a statute of limitations. Parties to contracts under New York law, of course, are presumed to know what New York law provides, and are equally "presumed [to have] had such law in contemplation when the contract was made." *Dolman* v. *U.S. Trust Co. of N.Y.*, 2 N.Y.2d 110, 116 (1956). And here, the extraordinarily sophisticated, well-advised parties who drafted these complex RMBS securitizations surely must have known not only that the New York statute of limitations for contracts is six years, but also that New York views limitations periods as "embody[ing] an important policy of giving repose to human affairs," *Flanagan* v. *Mount Eden Gen. Hosp.*, 24 N.Y.2d 427, 429 (1969), a policy "'designed 'to spare the courts from litigation of stale claims,''" *Nussenzweig* v. *diCorcia*, 9 N.Y.3d 184, 188 (2007) (citation omitted), claims for which the "'evidence has been lost, memories have faded, and witnesses have disappeared,'" *Duffy* v. *Horton Mem'l Hosp.*, 66 N.Y.2d 473, 476 (1985) (quoting *Flanagan*, 24 N.Y.2d at 429 (citation and internal quotation marks omitted)); *see also Lyles* v. *State*, 3 N.Y.3d 396, 400 (2004).

The parties knew all this, and they could have tried to contract around it. To be sure, a pre-accrual contractual "promise to waive, to extend, or not to plead the statute of limitation has no effect … ," GEN. OBLIG. LAW § 17-103(3), and is void as against "a societal interest or public policy 'of giving repose to human affairs,'" *John J. Kassner & Co.* v. *City of New York*, 46 N.Y.2d 544, 550 (1979) (citation omitted). Still, the parties could have actually tried to structure the contracts to accomplish what the Trustee says they do—but in fact don't. These sophisticated firms could have dispensed with the language of representation, warranty, breach, and remedy—and instead could have crafted a pure promise of continuing performance, a provision that would have required certain loan characteristics to remain true for the life of the loans. Like a roofer who bonds himself to fix a roof whenever it springs a leak in the future, *cf. Bulova Watch Co.* v. *Celotex Corp.*, 46 N.Y.2d 606, 608, 611-12 (1979), sponsors could have—independently of any representations, warranties, breaches or remedies—covenanted that, for as long as any of the RMBS remain outstanding, they are flatly obliged to repurchase any defaulting mortgage loan.

But RMBS securitization contracts, including those at issue here, "do *not* contain such provisions."[17] They do not contain such provisions because their signatories did not, in fact, bargain for a repurchase mechanism that operates "for the life of the agreement." Trustee Br. 15. To the contrary, the parties defined the breach of a representation or warranty as being the contractual "breach" for which a limited remedy could be had. As a result, their agreements must be understood to have accepted and assumed, quite sensibly, that New York's six-year statute of limitations would begin to run when that breach occurred—at the time the representations and warranties were made.

---

[17] Miller, *RMBS Put-Back Litigations* 26 (emphasis added).

POINT II

OVERWHELMING AND VIRTUALLY UNCONTRADICTED AUTHORITY SUPPORTS THE APPELLATE DIVISION'S DECISION.

A. Under settled New York law, claims for breaches of representations and warranties accrue when the representations and warranties are made.

The undeniable fact that, under the plain terms of the securitization contracts, the breach of representations and warranties is the contractual breach, and the repurchase protocol is simply the remedy, resolves this case. For this Court has consistently made clear that, "[g]enerally, any Statute of Limitations begins to run when a cause of action accrues," and that, "[i]n New York, a breach of contract cause of action accrues at the time of the breach." *Ely-Cruikshank Co.* v. *Bank of Montreal*, 81 N.Y.2d 399, 402 (1993). Indeed, the limitations period begins to run even if the plaintiff does not know about the breach, and even if she has yet to suffer harm from the breach. Thus, "[k]nowledge 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]." *Id.* at 403 (quoting *Varga* v. *Credit-Suisse*, 5 A.D.2d 289, 292 (1st Dep't 1958)). The statute "'runs from the time of the breach though no damage occurs until later,'" *id.* at 402 (quoting 6 SAMUEL WILLISTON, CONTRACTS § 2004, at 5641 (rev. ed. 1938)), "'even though the injured party may be ignorant of the existence of the wrong or injury,'" *id.* at 403 (quoting *Schmidt* v. *Merchs. Despatch Transp. Co.*, 270 N.Y. 287, 300 (1936)).

And it is black-letter New York law that if the breach at issue is the breach of a false representation or warranty made at the time of contracting, then the limitations clock starts running right then and there. If a "representation … was false when made" in the contract, then "the breach occurred at the time of the execution of the contract," and so that is the time that "'the cause of action accrues and the Statute of Limitations begins to run.'" *W. 90th Owners Corp.* v. *Schlechter*, 137 A.D.2d 456, 458 (1st Dep't 1988) (citation omitted); *accord*, *e.g.*, *Varo, Inc.* v. *Alvis PLC*, 261 A.D.2d 262, 265, 268 (1st Dep't 1999).

This Court's holding on the breach-of-warranty claim in *Bulova Watch Co.* v. *Celotex Corp*., 46 N.Y.2d 606 (1979), illustrates the point nicely. The defendant there had sold some roofing materials to the plaintiff. The plaintiff alleged that the defendant had breached an implied warranty of fitness because the materials were not fit for their intended use. *Id.* at 608-09. The warranty claim "does not hold water," this Court found, because "the claim [is] barred by the Statute of Limitations." *Id.* at 609-10. And the reason why the claim was barred was that "the cause of action arose at the time of the sale." *Id.* at 610 (citations omitted). The roofing supplies in *Bulova* either were or were not as warranted at the time they were sold. Accordingly, if there was a breach at all, it happened at the time of sale, and the limitations period began to run then. If the roof starts to leak in year ten, the statute of limitations bars the claim—even if the leak resulted from roofing materials that were unfit when sold.

Even the part of *Bulova* on which the Trustee relies (Br. 22-23), the discussion of the "20-Year Guaranty Bond[s]," 46 N.Y.2d at 608, defeats the Trustee's position here. Those bonds *did exactly what DBSP did not do* in the RMBS representations and warranties here: through the bonds, the *Bulova* defendants warranted the item being sold *not* just at the time of sale, but continually *after* that. And "the defendants did not merely guarantee the condition or performance of the goods" over the twenty-year period; they also "*agreed to perform a service—to repair the roof*" over those two decades—*regardless* of whether the repair was necessitated by a defect that existed when the roof was installed. *Id.* at 611-12. *That* was why the "bond obligations, as agreements contemplating services, were subject to a six-year statute … running separately for the damages occasioned each time a breach of the obligation to repair the bonded roof occurred." *Id.* at 611 (citations omitted). It was the failure to live up to *that* separate covenant, a covenant to perform a continuing service, that gave rise to a separate limitations period; and *that* service did *not* depend upon any representation about the roof at the time of sale.

Thus, the repurchase *remedy* in the securitization contracts cannot be likened to the independent repair-the-roof obligation created by the *Bulova* guaranty bonds. To hold otherwise here would vitiate the animating principle of New York contract law—"that, when parties set down their agreement in a clear, complete document, their writing should … be enforced according to its terms." *Vermont Teddy Bear Co.* v. *538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004). Indeed, as an express "limitation on liability ... in a contract," the repurchase remedy constitutes exactly the sort of private "[a]greement on the allocation of the risk of economic loss" that this Court has said New York "courts should honor." *Met. Life Ins. Co.* v. *Noble Lowndes Int'l, Inc.*, 84 N.Y.2d 430, 436 (1994).

Here, as explained above, the terms in the contracts provided that the repurchase protocol was a *remedy* for an earlier breach, and not an independent covenant that could be separately breached. As the First Department recognized in an earlier case, the repurchase mechanism in an RMBS transaction "merely provides for a remedy in the event of a breach." *Walnut Place LLC* v. *Countrywide Home Loans, Inc.*, 96 A.D.3d 684, 684-85 (1st Dep't 2012). And that is why it correctly held below 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." R. viii.

That holding—that the six-year limitations period begins to run from the time of breach, and not when a remedy is later invoked and refused—is reinforced by this Court's decision in *Hahn Automotive Warehouse, Inc.* v. *American Zurich Insurance Co.*, 18 N.Y.3d 765 (2012). Sometime in the 1990s, Zurich acquired the contractual right to bill Hahn for deductibles and various expenses for two insurance policies. It didn't recognize that fact, however—and didn't bill Hahn—until 2005 and 2006, well more than six years later. *Id.* at 768-69. "The deductible policies specified that Hahn 'shall pay … [Zurich] within twenty (20) days of [Zurich's] demand,'" *id.* at 768, and "Zurich argue[d] that [its] invoices [were] timely because the six-year statute of limitations did not begin to run until 2005 and 2006, when Zurich demanded payment and Hahn refused to pay," *id.* at 770.

Not so, held this Court. The six-year limitations period had run years before: "the statute of limitations … was triggered when the party that was owed money had the right to demand payment, not when it actually made the demand." *Id.* at 771. "To hold otherwise," this Court held, "would allow [the plaintiff] to extend the statute of limitations indefinitely 'by simply failing to make a demand.'" *Id.* (citations omitted).

So too here. To hold that the limitations period here began to run only when repurchase was demanded and refused would extend that period indefinitely—as one commentator aptly put it, "for utterly fantastic lengths of time."[18] Given that RMBS trusts contain thirty-year mortgages, a trustee could bring suit up to *thirty-six years* after securitization if the Trustee's argument here is accepted. Here, where the securitization agreements were executed in 2006, that would mean that suit could be brought as late as the year 2042.

B. Courts have rejected the Trustee's RMBS accrual theory virtually unanimously.

Dozens of cases have been brought in the courts of this State and elsewhere raising precisely the same limitations issue presented here. It is quite telling that the Trustee cites almost none of them. Applying settled New York law, recognizing the RMBS contracts' clear delineation of what the breach is and what the remedy is, and perceiving the utter fantasticality of litigating the last decade's

[18] Miller, *RMBS Put-Back Litigations* 34.

mortgage crisis in cases two or three decades hence, courts have virtually unanimously rejected the RMBS limitations accrual theory pressed by the Trustee here. These courts have recognized that settled law precludes the fancy footwork through which Trustee tries to dodge the plain contractual language here.

A mountain of authority thus contradicts the Trustee. Many of these decisions come from courts of this State applying the decision below[19]—cases that would have to be reopened if that decision is reversed. But those cases do not

[19] *See, e.g.*, *U.S. Bank Nat'l Ass'n* v. *DLJ Mortg. Capital, Inc.*, 121 A.D.3d 535, 536 (1st Dep't 2014); *U.S. Bank Nat'l Ass'n* v. *GreenPoint Mortg. Funding, Inc.*, No. 651954/2013, 2015 WL 915444, at *4-*6 (Sup. Ct. N.Y. Cnty. Mar. 3, 2015); *U.S. Bank Nat'l Ass'n* v. *DLJ Mortg. Capital, Inc.*, No. 652699/2013, 2015 WL 298642, at *2 (Sup. Ct. N.Y. Cnty. Jan. 16, 2015); *Morgan Stanley Mortg. Loan Trust 2007-2AX* v. *Morgan Stanley Mortg. Capital Holdings LLC*, No. 650339/2013, 2014 WL 6669698, at *2 (Sup. Ct. N.Y. Cnty. Nov. 24, 2014); *Deutsche Bank Nat'l Trust Co.* v. *HSBC Bank USA, Nat'l Ass'n*, No. 652001/2013, 2014 WL 5419939, at *1 (Sup. Ct. N.Y. Cnty. Oct. 22, 2014); *Home Equity Asset Trust 2006-8* v. *DLJ Mortg. Capital, Inc.*, No. 654157/2012, 2014 WL 4966133, at *1 (Sup. Ct. N.Y. Cnty. Oct. 1, 2014); *Home Equity Asset Trust 2007-2* v. *DLJ Mortg. Capital, Inc.*, No. 651174/2013, 2014 WL 4966127, at *1 (Sup. Ct. N.Y. Cnty. Oct. 1, 2014); *Morgan Stanley Mortg. Loan Trust 2006-13ARX* v. *Morgan Stanley Mortg. Capital Holdings LLC*, No. 653429/2012, 2014 WL 4829638, at *2 (Sup. Ct. N.Y. Cnty. Sept. 25, 2014); *ACE Sec. Corp. Home Equity Loan Trust, Series 2007-WM1* v. *DB Structured Prods., Inc.*, No. 650312/2013, 2014 WL 5243511, at *1-*2 (Sup. Ct. N.Y. Cnty. Sept. 25, 2014); *ACE Sec. Corp. Home Equity Loan Trust, Series 2007-ASAP2* v. *DB Structured Prods., Inc.*, No. 651936/2013, 2014 WL 4785503, at *2 (Sup. Ct. N.Y. Cnty. Aug. 28, 2014); *Nomura Asset Acceptance Corp. Alt. Loan Trust, Series 2006-S4* v. *Nomura Credit & Capital, Inc.*, No. 653390/2012, 2014 WL 2890341, at *5 (Sup. Ct. N.Y. Cnty. June 26, 2014); *SACO I Trust 2006-5* v. *EMC Mortg. LLC*, No. 651820/2012, 2014 WL 2451356, at *8 (Sup. Ct. N.Y. Cnty. May 29, 2014); *ACE Sec. Corp. Home Equity Loan Trust, Series 2006-HE4* v. *DB Structured Prods., Inc.*, No. 653394/2012, 2014 WL 1384490, at *4 (Sup. Ct. N.Y. Cnty. Apr. 4, 2014); *FHFA* v. *DB Structured Prods., Inc.*, No. 652978/2012, 2014 WL 1384489, at *2 (Sup. Ct. N.Y. Cnty. Mar. 17, 2014); *U.S. Bank Nat'l Ass'n* v. *DLJ Mortg. Capital, Inc.*, No. 650369/2013, 2013 WL 6997183, at *2-*3 (Sup. Ct. N.Y. Cnty. Jan. 15, 2014), *aff'd*, 121 A.D.3d 535 (1st Dep't 2014); *Home Equity Asset Trust 2006-5* v. *DLJ Mortg. Capital, Inc.*, No. 652344/2012, 2014 WL 27961, at *2-*3 (Sup. Ct. N.Y. Cnty. Jan. 3, 2014); *Nomura Asset Acceptance Corp. Alt. Loan Trust, Series 2006-S2* v. *Nomura Credit & Capital, Inc.*, No. 651827/2012, 2013 WL 6840128, at *1 (Sup. Ct. N.Y. Cnty. Dec. 23, 2013); *see also Nomura Asset Acceptance Corp. Alt. Loan Trust, Series 2005-S4* v. *Nomura Credit & Capital, Inc.*, No. 653541/2011, 2013 WL 2072817, *5-*9 (Sup. Ct. N.Y. Cnty. May 10, 2013) (arriving at the same conclusion prior to the decision below).

stand alone. A slew of decisions from other courts—courts *not* bound by the intermediate appellate decision below—agree. They hold that RMBS claims for breaches of representations and warranties accrue at the time the securitization transactions close; that a sponsor's failure to repurchase loans does not constitute an independent contractual breach, because the repurchase protocol is just a remedy; and that, accordingly, the running of the statute of limitations cannot be deferred for decades in the manner that the Trustee imagines here.

The decisions go on, and on:

- "Under New York law, a claim for breach of the representations and warranties would have accrued at the time that the transaction closed, and not at the discovery of the breach." *MASTR Adjustable Rate Mortgs. Trust 2006-OA2* v. *UBS Real Estate Sec. Inc.*, 12 Civ. 7322 (PKC), 2015 WL 764665, at *8 (S.D.N.Y. Jan. 9, 2015) (Castel, J.).
- "Here, … abrogat[ing] the rule stated in *ACE I* and the well-reasoned cases following it in this District ... 'would allow [a plaintiff] to extend the statute of limitations indefinitely by simply failing to make a demand.'" *Deutsche Bank Nat'l Trust Co.* v. *Quicken Loans Inc.*, No. 13 Civ. 6482 (PAC), 2014 WL 3819356, at *4 (S.D.N.Y. Aug. 4, 2014) (Crotty, J.; quoting *Hahn*, 18 N.Y.3d at 771).
- "A claim stemming from breach of a contract's R[epresentations] & W[arrantie]s accrues when any breach of the representations and warranties contained therein occurred." *Citigroup Mortg. Loan Trust 2007-AMC3* v. *Citigroup Global Mkts. Realty Corp.*, No. 13 Civ. 2843 (GBD), 2014 WL 1329165, at *2 (S.D.N.Y. Mar. 31, 2014) (Daniels, J.; quotations and citations omitted).
- "[F]ailure to repurchase the loans does not constitute an independent breach of the MLPAs because repurchase is nothing more than a pre-suit remedial provision. … This Court holds that the closing date [of the MLPA] is the relevant date of accrual." *Lehman XS Trust, Series 2006-GP2* v. *Greenpoint Mortg. Funding, Inc.*, No. 12 Civ. 7935 (ALC), 2014 WL 1301944, at *3-*4 (S.D.N.Y. Mar. 31, 2014) (Carter, J.).

- “The cause of action—misrepresentations in the MLPA—existed and the defendant’s conduct giving rise to the claim was complete before the demand was made. … Wells Fargo could have demanded repurchase as early as the 2002 closing date of the MLPA, so that is the date that controls for statute of limitations purposes.” *Wells Fargo Bank, N.A.* v. *JPMorgan Chase Bank, N.A.*, No. 12 Civ. 6168 (MGC), 2014 WL 1259630, at *3-*4 (S.D.N.Y. Mar. 27, 2014) (Cedarbaum, J.) (quotations and citations omitted).

- “Numerous courts have held that a defendant’s failure to repurchase a breached loan does not affect when the plaintiff’s claim accrues, and therefore does not constitute a separate breach of contract. … Accordingly, the Court rejects Plaintiff’s argument that the sole remedy provisions are inapplicable simply because it has pleaded ‘independent’ failure-to-repurchase claims. … [S]uch claims are not independently actionable.” *ACE Sec. Corp. Home Equity Loan Trust, Series 2007-HE3* v. *DB Structured Prods., Inc.*, 5 F. Supp. 3d 543, 552 (S.D.N.Y. Mar. 20, 2014) (Nathan, J.; citations omitted).

- “In New York, a breach of contract cause of action accrues at the time of the breach. ... [T]he Court finds that Defendant’s alleged failure to repurchase the Subject Loans did not constitute a new breach triggering a new statute of limitations period.” *Aurora Commercial Corp.* v. *Standard Pac. Mortg., Inc.*, No. 12 Civ. 3138 (WJM), 2014 WL 1056383, at *4-*5 (D. Colo. Mar. 19, 2014) (Martinez, J.; quotations and citations omitted).

- “[Plaintiff’s] claim of breach of the duty to cure or repurchase ... fails as a matter of law because the repurchase provision is merely a remedy for the breach of a ... representation, not a separate promise that can give rise to an independent cause of action.” *Homeward Residential Inc.* v. *Sand Canyon Corp.*, 298 F.R.D. 116, 131 (S.D.N.Y. 2014) (Torres, J.) (citations omitted).

- “‘[U]nder New York law, claims which are subject to pre-suit cure or demand requirements accrue when the underlying breach occurs, not when the demand is subsequently made or refused.’ ... ‘[T]he [breach of contract] claims accrued on the closing date of the [Mortgage Loan Purchase Agreement], when any breach of the representations and warranties contained therein occurred’ not when ‘defendant either failed to timely cure or repurchase a defective mortgage loan.’” *Lehman XS Trust, Series 2006-4N* v. *GreenPoint Mortg. Funding, Inc.*, 991 F. Supp. 2d 472, 477-78 (S.D.N.Y. 2014) (Scheindlin, J.; footnotes and citations omitted).

- "[T]he failure to provide a contractual repurchase remedy [does not] constitute[] a separate breach, independent of the underlying breach of representations and warranties. ... [T]he parties could have expressly provided in their contract that failure to repurchase is a different breach and that a remedy exists for that failure—but did not." *MASTR Asset Backed Sec. Trust 2006-HE3* v. *WMC Mortg., LLC*, 983 F. Supp. 2d 1104, 1112-13 (D. Minn. 2013) (Tunheim, J.).

- "[U]nder New York law, claims which are subject to pre-suit cure or demand requirements accrue when the underlying breach occurs, not when the demand is subsequently made or refused." *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) (Sweet, J.).

- "LBHI may not extend the accrual date of the statute of limitations simply by delaying its demand for payment [for breach of mortgage loan representations and warranties]. ... To find otherwise would allow LBHI to essentially circumvent the statute of limitations by indefinitely deferring its demand for payment." *Lehman Bros. Holdings, Inc.* v. *Evergreen Moneysource Mortg. Co.*, 793 F. Supp. 2d 1189, 1194 (W.D. Wash. 2011) (Robart, J.) (citation omitted).

- "[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, i.e., in March 2000, which was prior to the commencement of this litigation in April 2002." *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) (Stein, J.).

- "'Because representations and warranties about facts pre-existing, or contemporaneous with, a contract's closing are to be true and accurate when made,' a breach of such representations and warranties 'occurs on the date of the contract's closing and hence the cause of action accrues on that date.'" *Cent. Mortg. Co.* v. *Morgan Stanley Mortg. Capital Holdings LLC*, Civ. A. No. 5140-CS, 2012 WL 3201139, at *17 (Del. Ch. Aug. 7, 2012) (Strine, C., citation and footnote omitted; applying Delaware law), *reargument denied*, 2012 WL 4503731 (Del Ch. Oct. 1, 2012).

About this overwhelming authority, the Trustee says nothing. And against it, the Trustee proffers just four cases in a footnote. Br. 27. n.6. But even those cases do the Trustee little good.

The first decision cited by the Trustee is now being *reconsidered* by the judge who wrote it. *FHFA* v. *WMC Mortg., LLC*, No. 13 Civ. 584 (AKH), 2013 WL 7144159, at *1 (S.D.N.Y. Dec. 17, 2013), was a cursory, one-page order that merely cited Supreme Court's decision in *ACE*—with no analysis at all. The judge has since decided to "re-examine the views I expressed on the statute of limitations," and now recognizes that "[f]alse warranties and representations breach the contract at the time they were made." Order, *FHFA* v. *WMC Mortg., LLC*, No. 13 Civ. 584 (AKH), at 3 (S.D.N.Y. Jan. 15, 2015) (docket entry no. 87). Noting that the case would be "untimely and must be dismissed" "[i]f the six-year statute of limitations began to run from the execution of the PSA when the representations and warranties were made and the mortgages were transferred," the court has ordered further briefing from the parties on the limitations issue. *Id.* at 4.

The Trustee's remaining three authorities fare no better. For next it cites a stray remark in *FDIC* v. *Key Fin. Servs., Inc.*, No. 89 Civ. 2366 (DPW), 1999 WL 34866812 (D. Mass. Dec. 23, 1999), *aff'd sub nom. Resolution Trust Corp.* v. *Key Fin. Servs. Inc.*, 280 F.3d 12 (1st Cir. 2002)—a decision that *did not involve any limitations question at all*, much less the New York law on accrual. The case didn't even involve an RMBS securitization. Instead, it involved the quantum of damages a defendant had to pay for breaching a generic loan purchase agreement.

Id. at *1. The court offhandedly observed that, "[i]n this case, the breach of the agreement by Key occurred when it refused to repurchase the Key Loans upon Home Owners' demand as required in the Agreement." *Id.* at *12. The court cited no authority at all. *See id.* at *12-*17. And when the United States Court of Appeals for the First Circuit affirmed the damages calculation, it *expressly declined* to endorse the lower court's statement that the contract was breached at the time that Key refused a repurchase demand—because the question was irrelevant to the case. *See Resolution Trust Corp.* v. *Key Fin. Servs. Inc.*, 280 F.3d 12, 18 (1st Cir. 2002) (holding that affirmance was required "[w]hether or not Key committed an independent breach by failing to repurchase on demand").

That disposes of the last two cases cited by the Trustee as well, as those cases mistakenly rely on *Key*. *See LaSalle Bank Nat'l Ass'n* v. *Lehman Bros. Holdings, Inc.*, 237 F. Supp. 2d 618, 638 (D. Md. 2002); *Lehman Bros. Holdings, Inc.* v. *Nat'l Bank of Ark.*, 875 F. Supp. 2d 911, 917 (E.D. Ark. 2012). The first, *LaSalle*, did not even address limitations. And both *LaSalle* and *Lehman* misread the First Circuit's ruling in *Key* as having held that a refusal to repurchase constitutes an independent breach. As a result, "those decisions misapply [*Key*] and are unpersuasive," because the "First Circuit case had nothing to do with the statute of limitations and does not hold that a failure to repurchase on demand constitutes an independent breach of contract." *Nomura Asset Acceptance Corp. Alt. Loan Trust, Series 2005-S4* v. *Nomura Credit & Capital, Inc.*, No. 653541/2011, 2013 WL 2072817, at *8 (Sup. Ct. N.Y. Cnty. May 10, 2013). Indeed, the First Circuit had "pointedly declined to decide whether the district court's view of the law was correct because that question was not dispositive," *ACE Sec. Corp. Home Equity Loan Trust, Series 2007-HE3*, 5 F. Supp. 3d at 552-53 (rejecting *LaSalle*)—and thus "expressly disclaimed reliance on th[e] 'independent breach' theory," *Deutsche Alt-A Sec. Mortg. Loan Trust, Series 2006-OA1*, 958 F. Supp. 2d at 499, upon which the Trustee grounds its appeal here.

In short, against the overwhelming authority rejecting its accrual theory, the Trustee cites *nothing* that substantially supports it. Because there is nothing.

POINT III

THE APPELLATE DIVISION'S HOLDING IS FAIR AND SERVES THE INTERESTS OF JUSTICE.

The decision below is not only compelled by the securitization contracts and New York law, it also achieves an eminently just result. It hardly amounts to "a dramatic restriction on the contractual rights [of] investors," let alone "effectively shorten[s] the applicable statute of limitations," and it certainly does not "impose[] on investors ... an extraordinary due diligence obligation on nearly 9,000 underlying loans." Trustee Reply Br. 1.

That is because six years is a long time. It is a rather "generous … limitations period"—as this Court has observed. *In re R.M. Kliment & Frances Halsband, Architects*, 3 N.Y.3d 538, 539 (2004). It is plenty of time in which to find out about provable breaches of representations and warranties that actually made a difference to investors.

And that is confirmed by all that has happened since 2007 and 2008, when the financial crisis hit. When the financial and housing crisis set in, RMBS lost much of their value. And as rating agencies (Moody's and S&P) began downgrading RMBS, "[i]nvestors like banks, pension funds, and insurance companies, who are by rule barred from owning low rated securities, were forced to sell off their downgraded RMBS."[20] Ultimately, "investors fled the multi-trillion dollar market for mortgage-backed securities ... dropping MBS values ... to fractions of their former prices."[21] At that point, hedge funds that speculate in distressed assets and debt stepped in to take advantage of this drastically dislocated market. Seeing an opportunity to buy RMBS at deep discounts, they began launching and raising money for investment vehicles that would, as one of the vulture funds behind this case put it, "provide dedicated exposure to opportunities resulting from the collapse of the housing and related structured products markets."[22] To their credit, they have been wildly successful.[23]

---

[20] U.S. Senate Permanent Subcommittee on Investigations, Wall Street and The Financial Crisis: Anatomy of a Financial Collapse, at 6 (Apr. 13, 2011) (Majority and Minority Staff Report).

[21] Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report (Jan. 2011) ("FCIC Report"), at 444-45 (Dissenting Statement of Peter J. Wallison), *available at* http://1.usa.gov/1b6KWFG.

[22] Press Release, Fir Tree Inc., Fir Tree Closes Mortgage Opportunity Fund (July 9, 2009), *available at* http://prn.to/1boO8ix.

[23] *See* Eric Uhlfelder, *Best 100 Hedge Funds*, BARRON'S (May 18, 2013) ("Top-performing MBS shops occupied four of *Barron's* first 15 spots in our Hedge Fund 100."), *available at* http://on.barrons.com/15A44Lq; Katya Wachtel, *Hedge Fund Scorecard 2012: Mortgage Masters Win, Paulson on Bottom Again*, Reuters Blogs: Unstructured Finance (Jan. 28, 2013) ("Mortgage funds roared home with returns of almost 19 percent last year, trouncing all other hedge fund strategies and beating the S&P 500 stock index."), *available at* http://reut.rs/16gPULK.

At the same time, many of these sophisticated hedge funds began speculating not just in low-priced RMBS, but in RMBS *litigation*. They bought RMBS to add to their profits by hiring lawyers and pursuing repurchase litigation against RMBS sellers and sponsors. "A growing number of [these] hedge funds [have been] scouring the files of securitized home loans, in hopes of reaping rich profits by forcing mortgage-bond issuers to buy back faulty credits."[24] As one industry report described one of the funds behind this case:

> Fir Tree also sees great potential in pursuing putbacks. ... Last year, the New York firm returned 25%, largely by selling bonds whose values had risen. But it now sees higher returns flowing from efforts to build a team capable of picking apart securitized mortgage pools in search of fraud or other covenant violations before negotiating payouts.[25]

As part of their speculation-on-litigation strategy, these funds have been bringing, and directing trustees to bring, untimely claims, such as the claims in this case. But the vulture funds knew their rights, and New York law, when they invested. And they knew in particular that the statute of limitations on breaches of representations and warranties in connection with a securitization would run on the sixth anniversary of the date the representations and warranties were made. The six-year clock was ticking down quickly, in fact, when counsel for the funds behind this lawsuit wrote the Trustee about the "Urgent Need for a Tolling Agreement": on January 12, 2012, they beseeched that "it is imperative that the Trustee act expeditiously" because of "potential expiring statute of limitations

---

[24] Asset-Backed Alert, *MBS 'Putback' Investors Target Big Issuers* (Feb. 24, 2012), *available at* http://bit.ly/1b7CcEh.

[25] *Id.*

deadlines." R. 359. The Trustee here, however, chose not to seek a tolling agreement or to sue before the limitations period expired.

But in many other cases, the trustees did timely assert, toll or settle similar claims. And as if to demonstrate how ample six years really is, some of those claims have yielded some of the largest settlements in our Nation's history. The week before this brief was completed, the Appellate Division approved an *$8.5 billion* settlement between Bank of America and Countrywide, an RMBS sponsor, and Bank of New York Mellon, a securitization trustee, to resolve mortgage repurchase and servicing claims involving 530 RMBS trusts. *See In re Bank of New York Mellon*, No. 651786/11, 2015 WL 921625, at *1-*4 (1st Dep't Mar. 5, 2015). Likewise, JPMorgan and a group of 21 institutional investors have agreed to a similar $4.5 billion settlement covering 330 trusts, subject to approval by the trustees.[26] And Citigroup and a coalition of 18 institutional investors have agreed to a $1.125 billion settlement for 68 RMBS trusts, also subject to approval by trustees.[27]

In short, the application of New York's generous six-year limitations period has left plenty of time for investors to assert representation and warranty claims. There is no need, and no warrant, to extend that period by as much as a factor of six, as the Trustee effectively seeks to do here.

---

[26] *See* Petition, *In re U.S. Bank Nat'l Ass'n*, 652382/2014 (Sup. Ct. N.Y. Cnty. Aug. 3, 2014) (docket entry no. 1).

[27] *See* Petition, *In re U.S. Bank Nat'l Ass'n*, 653902/2014 (Sup. Ct. N.Y. Cnty. Dec. 21, 2014) (docket entry no. 1).

Not only is there no need to give investors up to 36 years to file suit, but doing so would contravene important public policies of this State. The statute of limitations "giv[es] repose to human affairs," *Flanagan*, 24 N.Y.2d at 429, promises "fairness to a defendant," *Duffy*, 66 N.Y.2d at 476, and serves to wipe "the slate ... clean of ancient obligations," *id.* (quoting *Flanagan*, 24 N.Y.2d at 429). And, most significantly, it also "protect[s] the judicial system from the burden of adjudicating stale and groundless claims." *Id.* at 476-77.

That last policy, in particular, is very much at stake here. The scope of the litigation that resulted from the financial crisis is breathtaking. According to one estimate, there were 1,120 financial crisis-related lawsuits filed between January 2007 and the end of November 2014, consisting of lawsuits against RMBS sponsors and trustees, mortgage lenders and servicers, and other parties involved in the creation and administration of RMBS, taking the form of, among other things, investor actions, shareholder class actions and derivative actions, government and regulatory actions, and monoline and other insurer actions.[28]

New York courts, like other courts around the nation, have been grappling with what to do about all these cases and the administrative burdens and expenses they create. On May 23, 2013, the Administrative Judge for Civil Matters issued an administrative order directing that all actions brought in that court "alleging misrepresentation or other wrong in connection with or arising out of the creation

[28] *See* Faten Sabry, Sungi Lee, Joseph Mani & Linh Nguyen, NERA Economic Consulting, *Credit Crisis Litigation Update: Significant Settlement Activity in 2014 and New Cases against RMBS Trustees and Mortgage Lenders* 4 (Feb. 19, 2015), *available at* http://bit.ly/1ButXL9.

or sale of [RMBS]" be assigned to the Honorable Marcy S. Friedman.[29] This is the sort of administrative consolidation usually reserved for mass torts, natural disasters, and industrial accidents. If the six-year statute of limitations is not applied here, the need for such extraordinary administrative action would continue for decades to come, and the never-ending flood of litigation may overwhelm any administrative solution.

Not only that, a holding in favor of the Trustee here would have ramifications that go well beyond RMBS litigation. In virtually any complex business contract negotiated in New York today, there are representations and warranties. And there are frequently carefully-crafted provisions specifying and limiting the remedies available for breaches of those representations and warranties. The reasoning advanced by the Trustee, if upheld by this Court, would threaten to gut the statute of limitations for claims on countless such contracts. Breaches of representations and warranties would no longer be thought to occur as of the time they are made; instead, limitations periods would start running only when, perhaps years or decades after a breach, a plaintiff unsuccessfully invokes a contractual remedy, whether that remedy is an RMBS cure-or-repurchase protocol, or a simple, garden-variety liquidated damages clause. That is the equivalent of no statute of limitations at all.

Beyond even that, accepting the Trustee's position would undermine settled expectations in the law of contracts in a dramatic and most prominent way. That is

---

[29] Administrative Order for the First Judicial District Supreme Court, Civil Branch (May 23, 2013) (Heitler, A.J.).

no small matter to the State of New York. As the Chief Judge's Task Force on Commercial Litigation in the 21st Century recently observed, "[t]he rule of law [is a] key element[]" in "help[ing] our State retain its role as the preeminent financial and commercial center of the world," and "in keeping us competitive in today's global economy."[30] New York is a preeminent commercial center in substantial part because parties can rely on dependability and the predictability of its respected law of contracts. And the longstanding, essential principle underlying that dependability and predictability is a straightforward one, a corollary of the rule of law: New York "courts 'may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.'" *Bailey* v. *Fish & Neave*, 8 N.Y.3d 523, 528 (2007) (citations omitted). If this Court is to uphold that venerable principle here, it should affirm the decision below.

---

[30] THE CHIEF JUDGE'S TASK FORCE ON COMMERCIAL LITIGATION IN THE 21ST CENTURY, REPORT AND RECOMMENDATIONS TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1 (June 2012), *available at* http://bit.ly/16gNUTG.

CONCLUSION

It is respectfully submitted that the decision of the Appellate Division, First Department should be affirmed.

Dated: New York, New York
March 13, 2015

WACHTELL, LIPTON, ROSEN & KATZ

By: George T. Conway III
George T. Conway III

Theodore N. Mirvis
Charles D. Cording
Vladislav S. Vainberg
51 West 52nd Street
New York, New York 10019
(212) 403-1000

Attorneys for Amicus Curiae *the Securities Industry and Financial Markets Association*