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# Court of Appeals

## STATE OF NEW YORK

**Index No. 652344/12**

U.S. BANK NATIONAL ASSOCIATION, solely in its capacity as Trustee of the HOME EQUITY ASSET TRUST 2006-5 (HEAT 2006-5),

*Plaintiff-Appellant,*

*—against—*

DLJ MORTGAGE CAPITAL, INC.,

*Defendant-Respondent.*

*(Caption continued on inside cover)*

**BRIEF FOR *AMICUS CURIAE* THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF DLJ MORTGAGE CAPITAL, INC.**

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**Index No. 652644/12**

U.S. BANK NATIONAL ASSOCIATION, solely in its capacity as Trustee of the HOME EQUITY ASSET TRUST 2006-6 (HEAT 2006-6),

*Plaintiff-Appellant,*

*—against—*

DLJ MORTGAGE CAPITAL, INC.,

*Defendant-Respondent.*

**Index No. 653467/12**

U.S. BANK NATIONAL ASSOCIATION, solely in its capacity as Trustee of the HOME EQUITY ASSET TRUST 2006-7 (HEAT 2006-7),

*Plaintiff-Appellant,*

*—against—*

DLJ MORTGAGE CAPITAL, INC.,

*Defendant-Respondent.*

**Index No. 654147/12**

U.S. BANK NATIONAL ASSOCIATION, solely in its capacity as Trustee of the ASSET BACKED SECURITIES CORPORATION HOME EQUITY LOAN TRUST, SERIES AMQ 2006-HE7 (ABSHE 2006-HE7),

*Plaintiff-Respondent,*

*—against—*

DLJ MORTGAGE CAPITAL, INC.,

*Defendant-Appellant.*

## CORPORATE DISCLOSURE STATEMENT

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.1(f), *amicus curiae* the Securities Industry and Financial Markets Association states that it has no parents, subsidiaries, or affiliates.

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## 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 these appeals—docketed at APL-2017-00115 (the "HEAT Action") and APL-2017-00116 (the "ABSHE Action")—make them paradigmatic cases in which SIFMA believes its members should be heard.

These cases present for review the question of whether New York's savings statute, CPLR 205(a), permits the refiling of claims for the breach of representations and warranties in residential mortgage-backed securities (RMBS) contracts where the initial actions were dismissed because, *inter alia*, U.S. Bank National Association (the "Trustee") failed to comply with its obligations under the contracts' repurchase protocol before commencing the actions, or the actions were initially brought by a different party that lacked the right to bring the claims. These appeals 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 subverted through novel applications of CPLR 205(a) that run counter to this Court's precedent. The Court's resolution of these issues 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 these issues, and to provide the Court with information about the RMBS marketplace and the practical consequences of affirming or reversing the First Department's important decisions below.

## PRELIMINARY STATEMENT

The RMBS contracts at issue in these appeals specify a carefully crafted repurchase protocol as the sole avenue to address breaches of representations and warranties. That protocol requires a trustee alleging such a breach to provide the sponsor with notice and an opportunity to cure or repurchase allegedly breaching loans before the trustee can file a lawsuit to enforce the claims. Such notice-and-cure provisions have been widely adopted in the RMBS market because they encourage parties to address breaching loans without resort to litigation, thus performing the important function of sparing the parties (including investors in the trusts) expense and delay.

In *ACE Securities Corp.* v. *DB Structured Products*, 25 N.Y.3d 581 (2015), this Court recognized that for the repurchase protocol to function as intended, notice-and-cure obligations must be satisfied *before* the trustee files suit. But exactly the opposite happened in the underlying actions. The Trustee here commenced the litigations by filing summonses with notice mere days before the running of the limitations period. It then sent notice-and-cure requests as an afterthought—weeks or months after the limitations period had already run. Under *ACE*, the Trustee's failure to comply with its notice-and-cure obligations renders its repurchase claims untimely and forecloses it from relief under CPLR 205(a).

The Trustee does not contest that it failed to satisfy its notice-and-cure obligations. Instead, it advances a novel construction of CPLR 205(a) that would excuse its own lack of diligence and circumvent *ACE*. But as this Court has repeatedly stated, CPLR 205(a) was intended to "insure to the *diligent* suitor the right to a hearing in court till he reaches a judgment on the merits." *Gaines* v. *City of New York*, 215 N.Y. 533, 539 (1915) (Cardozo, J.) (emphasis added). CPLR 205(a) does not apply, as the Court recognized in *Yonkers Contracting Co.* v. *Port Authority Trans-Hudson Corp.*, 93 N.Y.2d 375, 380 (1999), to save sophisticated parties from a lack of diligence and the consequences of their unexcused failure to comply with contractual remedial provisions.

Indeed, adopting the Trustee's theory of CPLR 205(a) would not only contravene *ACE* and other precedent of the Court, but would also eviscerate the notice-and-cure provisions of the heavily negotiated repurchase protocol, thereby encouraging unnecessary litigation and driving up the costs to parties to RMBS transactions. This Court should decline the Trustee's invitation to disregard precedent and to thwart the well-settled expectations of RMBS parties. Instead, the Court should hold the Trustee to the bargain it struck. That bargain was expressed in the repurchase protocol, which required the Trustee to provide notice and an opportunity to cure *before* filing suit. And, as the Court plainly recognized in *ACE*, the Trustee had to do so within six years. Because the Trustee failed to

timely comply with the repurchase protocol in both the ABSHE and HEAT Actions, its repurchase claims were untimely and CPLR 205(a) cannot be invoked to save them.[1]

The Trustee's claims in the HEAT Action also fail on the independent ground that the initial actions were filed not by the Trustee, but by a certificateholder in the trusts at issue. Because the Court's precedent is clear that the only party that may benefit from CPLR 205(a) is "the plaintiff" that brought the initial action, the Trustee was not entitled to the benefit of the savings statute.

## ARGUMENT

### POINT I

### THE TRUSTEE'S FAILURE TO COMPLY WITH THE BARGAINED-FOR REPURCHASE PROTOCOL FORECLOSES RELIEF UNDER CPLR 205(A)

It is undisputed that the Trustee failed to comply with the notice-and-cure provisions of the repurchase protocol in each of the underlying actions at issue in these appeals. That failure renders CPLR 205(a) unavailable to the Trustee for at least three reasons. *First*, under *ACE*, the Trustee's failure to comply with its notice-and-cure obligations before bringing suit renders its repurchase claims

[1] Specifically, the First Department's decision in the HEAT Action that the Trustee could not invoke CPLR 205(a) should be affirmed, and the First Department's decision in the ABSHE Action should be reversed to the extent it held that the Trustee's breach claims were properly dismissed without prejudice, and remanded with instructions to dismiss the Trustee's claims with prejudice.

untimely, foreclosing recourse to CPLR 205(a). *Second*, this Court has held CPLR 205(a) to be unavailable in circumstances analogous to those here—where a sophisticated party "ignor[es]" bargained-for pre-suit remedial provisions and proceeds directly to litigation, in violation of its contractual duties. *Yonkers*, 93 N.Y.2d at 380. A party is not entitled to receive the benefit of "tolling under CPLR 205(a)" under such circumstances. *Id.* at 381. *Third*, more generally, CPLR 205(a) applies only to "diligent suitor[s]" whose cases have been dismissed on the basis of some excusable defect. *Gaines*, 215 N.Y. at 539. CPLR 205(a) was never intended to save the claims of sophisticated parties who sleep on their rights or disregard their contractual remedial obligations, as the Trustee did here in each of the underlying actions.

### A. The Trustee's repurchase claims are untimely under *ACE* and thus cannot be refiled under CPLR 205(a).

In *ACE*, this Court recognized that a failure to comply with the notice-and cure obligations of an RMBS contract within the six-year limitations period applicable to repurchase claims renders such claims untimely. As the Court stated, notice-and-cure provisions reflect an agreement between the parties to an RMBS contract that "if . . . warranties and representations are materially false, [the sponsor] will cure or repurchase the non-conforming loans *within the same statutory period* in which remedies for breach of contract . . . could have been sought." *ACE*, 25 N.Y.3d at 596 (emphasis added). In other words, a party

seeking to bring breach claims must first provide notice and the opportunity to cure or repurchase the allegedly non-conforming loans *during* the applicable six-year limitations period. Applying these principles, this Court affirmed the First Department's dismissal of ACE's claims as untimely, reasoning that the trustee had failed to comply with the pre-suit notice-and-cure requirement and had "failed to pursue its contractual remedy within six years of the alleged breach." *Id.* at 598; *see also Deutsche Bank Nat'l Tr. Co.* v. *Flagstar Capital Mkts. Corp.*, No. 96, 2018 WL 4976777, at *2-3 (N.Y. Oct. 16, 2018) (reaffirming *ACE*).

The *ACE* rule controls the analysis in this case. The repurchase claims at issue in these appeals accrued in 2006, when the representations and warranties were made and the Trustee's right to seek repurchase first arose. Here, as in *ACE*, the Trustee waited too long to comply with its notice-and-cure obligations and therefore lost its right to bring the repurchase claims. It is undisputed that, in all four of the cases on appeal, the Trustee sent breach notices after the six-year anniversary of the trusts' closing dates. As in *ACE*, the Trustee here "simply failed to pursue its contractual remedy within six years of the alleged breach," 25 N.Y.3d at 598, and its claims were therefore untimely.

Those untimely claims cannot be revived under CPLR 205(a) for two independent reasons. First, "CPLR 205(a) allows recommencement only where the prior action was 'timely commenced.'" *Dreger* v. *N.Y. State Thruway Auth.*,

81 N.Y.2d 721, 723 (1992). Second, dismissal of an action on statute of limitations grounds "is considered to be 'on the merits,'" *Meegan S.* v. *Donald T.*, 64 N.Y.2d 751, 752 (1984), rendering CPLR 205(a) inapplicable, *see In re Oriskany Cent. Sch. Dist. (Booth Architects)*, 85 N.Y.2d 995, 997 (1995); CPLR 205(a) (barring refiling where "an action . . . is terminated . . . [by] a final judgment on the merits"). The Trustee is thus barred from invoking CPLR 205(a) to revive its claims.

**B. A party that disregards a pre-suit remedial provision that it has bargained for is not entitled to the benefit of CPLR 205(a).**

Authorizing use of CPLR 205(a) to save the Trustee's claims would also be inconsistent with this Court's prior jurisprudence denying relief under CPLR 205(a) to a sophisticated party who "ignor[ed]" a contractual remedial provision prior to bringing suit. *Yonkers*, 93 N.Y.2d at 380. In *Yonkers*, the plaintiff, a general contractor, failed to comply with a contractual provision requiring it to plead that it had submitted the dispute to an alternative dispute resolution process overseen by the project's chief engineer prior to filing suit. *Id.* at 377-78. The pleading failure was strategic, not accidental: if the plaintiff had complied with the requirement, it would have pleaded that it *had* submitted the dispute to the chief engineer but that the engineer had denied its claim. *See id.* at 380. Instead, the plaintiff simply "ignor[ed]" the contractual pleading requirement. *Id.* After the plaintiff's first action was dismissed for failure to comply with the contractual

requirement, and long after the limitations period had expired, the plaintiff filed a second action that complied with the contractual requirements. *Id.* at 378. The Court rejected the plaintiff's argument that the second action was timely under CPLR 205(a), holding that CPLR 205(a) did not save claims that were lost because the plaintiff chose to "adopt[] a calculated and tactical stance to escape [a] bargained-for" remedial provision in the parties' contract. *Id.* at 380 (ellipses and internal quotation marks omitted). The plaintiff could have brought timely claims if it had chosen to do so. But it did not, nor did it honor the negotiated remedial scheme. Thus, there was nothing unfair about "preventing tolling under CPLR 205(a)" in that circumstance. *Id.* at 381.

This Court's ruling in *Yonkers* reflects the principles governing application of CPLR 205(a), including the statute's "remedial" purpose of avoiding the "capricious, unfair deprivation of a valuable claim," *Hakala* v. *Deutsche Bank AG*, 343 F.3d 111, 115 (2d Cir. 2003), and its concomitant restriction to plaintiffs who have diligently pursued their claims. *See infra* Point I.C. And the same principle the Court applied to deny the plaintiff's claim in *Yonkers* also applies here, where a sophisticated party, well aware of its pre-suit contractual obligations and able to timely discharge them, fails to do so to the detriment of another party. Under such circumstances, the Trustee should not be saved from its contractual non-performance and lack of diligence by CPLR 205(a), where such an application of

CPLR 205(a) would have the effect of unwinding essential terms of the parties' agreement. Fairness requires instead that such parties—particularly sophisticated RMBS market participants like the Trustee here—be held to the terms of their bargains. *See Breed v. Ins. Co. of N. Am.*, 46 N.Y.2d 351, 355 (1978) ("[A] contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed." (internal quotation marks omitted)).[2]

[2] The Trustee cites a series of decisions where this Court applied CPLR 205(a) to save expired claims, but all of these cases are distinguishable. *See* Resp't's Br. (ABSHE Action) 21-24. All concerned statutory conditions precedent unilaterally imposed by the New York legislature—not a pre-suit requirement agreed to by sophisticated parties to complex commercial contracts. *See Carrick v. Cent. Gen. Hosp.*, 51 N.Y.2d 242, 246 (1980) (statutory requirement to obtain letters of administration before filing suit); *Fleming v. Long Island R.R.*, 72 N.Y.2d 998, 999 (1988) (statutory requirement to make a pre-suit demand on defendant state authority); *Morris Inv'rs v. Comm'r of Fin. of the City of N.Y.*, 69 N.Y.2d 933, 935 (1987) (statutory requirement to deposit disputed tax amount and post a bond). All involved a statute of limitations that was much shorter, and thus much harsher, than the six-year limitations period applicable to breach of contract claims. *See Carrick*, 51 N.Y.2d at 246 (two years); *Fleming* v. *Long Island R.R.*, 518 N.Y.S.2d 144, 147 (2d Dep't 1987) (one year and thirty days), *aff'd*, 72 N.Y.2d 998 (1988); *Morris*, 69 N.Y.2d at 934 (four months). And in each case, when the action was commenced, it was theoretically possible for the plaintiff to comply with the condition precedent before commencing the action. *See Carrick*, 51 N.Y.2d at 246 (plaintiff requested the letter of administration before the limitations period expired but did not obtain it from the Surrogates Court until after the period had run); *Fleming*, 72 N.Y.2d at 999 (plaintiff failed to give defendant pre-suit demand and thirty days to respond but commenced the action with nine months remaining in the thirteen-month limitations period); *Morris*, 69 N.Y.2d at 934 (plaintiffs could have deposited the tax and posted the bond). Here, by contrast, the Trustee failed to comply with a contractual requirement that it expressly agreed to; it failed to do so within the "generous" six-year period applicable to contract claims, *see In re R.M. Kliment & Frances Halsband, Architects*, 3 N.Y.3d 538, 539 (2004); and when it commenced the actions, it was not possible to comply with the requirement because there was less time remaining in the limitations period than the time required to satisfy the requirement.

### C. CPLR 205(a) is not available to save the claims of sophisticated parties who sleep on their rights.

CPLR 205(a) has long been recognized as a "remedial" statute, *George* v. *Mt. Sinai Hosp.*, 47 N.Y.2d 170, 177 (1979), that is "designed to insure to the *diligent* suitor the right to a hearing in court," *Gaines*, 215 N.Y. at 539 (emphasis added).[3] A primary purpose of the statute is thus to avoid the "*capricious, unfair* deprivation of a valuable claim." *Hakala*, 343 F.3d at 115 (emphasis added). Such unfairness may exist where, *inter alia*, an action is subject to dismissal based on a "mistaken belief that the court has jurisdiction," *Gaines*, 215 N.Y. at 539, where a plaintiff "omi[ts] . . . an allegation necessary to the pleading," *Hakala*, 343 F.3d at 115, or where there is an "inability to obtain needed evidence," *George*, 47 N.Y.2d at 179. In contexts like those, where there has been some kind of "excusable mistake," *id.*, courts may apply CPLR 205(a) to save the claim from "what might otherwise be the harsh consequence of applying a limitations period." *Goldstein* v. *N.Y. State Urban Dev. Corp.*, 13 N.Y.3d 511, 521 (2009). But CPLR 205(a) does

[3] The courts have repeatedly emphasized that CPLR 205(a) saves the claims of a "diligent" litigant. *See, e.g.*, *Malay* v. *City of Syracuse*, 25 N.Y.3d 323, 327 (2015) ("The statute and its predecessors were 'designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits.'" (quoting *Gaines*, 215 N.Y. at 539)); *Norex Petroleum Ltd.* v. *Blavatnik*, 23 N.Y.3d 665, 678 (2014) (same); *Wells Fargo Bank, N.A.* v. *Eitani*, 47 N.Y.S.3d 80, 85 (2d Dep't 2017) (same); *Doyle* v. *Am. Home Prods. Corp.*, 583 F.3d 167, 171 (2d Cir. 2009) (same); *Graziano* v. *Pennell*, 371 F.2d 761, 763 (2d Cir. 1967) (Friendly, J.) (same); *Winston* v. *Freshwater Wetlands Appeals Bd.*, 646 N.Y.S.2d 565, 568 (2d Dep't 1996) ("The restorative provisions of CPLR 205(a) . . . reflect[] the idea that a diligent litigant who commenced a timely action but who failed on some generally technical ground, deserves an adjudication on the merits.").

not save claims from every kind of defect, particularly where the defect "pertain[s] . . . to the claimant's willingness to prosecute [the claim] in a timely fashion." *George*, 47 N.Y.2d at 178. CPLR 205(a) therefore may be available to "save cases otherwise dismissed on curable technicalities—but only when the litigant has *diligently* prosecuted the claim." *Doyle* v. *Am. Home Prods. Corp.*, 583 F.3d 167, 171 (2d Cir. 2009) (emphasis in original).

The Trustee here was far from diligent in pursuing its claims. In each case, the Trustee had the right to seek repurchase of allegedly breaching loans beginning in 2006, when the securitizations closed. *See ACE*, 25 N.Y.3d at 599. At any time thereafter until early-to-mid 2012, the Trustee could have reviewed the loans, identified alleged representation and warranty breaches, and requested cure or repurchase for any loans so identified. Instead, the Trustee slept on its rights and took no action with respect to the claims until just before the six-year limitations period was set to expire. At that point, the Trustee was unable to fulfill its notice-and-cure obligations—including letting the cure period run—before the limitations period ran out. Therefore, instead of complying with its notice-and-cure obligations, it simply "ignor[ed]" them, *Yonkers*, 93 N.Y.2d at 380, commencing placeholder litigations before it sent a single breach notice, *see* R. 26, 30, 38-39;

J.R. 38-39.[4] Only *after* the limitations period had expired did the Trustee set about fulfilling the obligations it was required to fulfill pre-suit: sending breach notices and seeking repurchase of specific loans.

Consider what happened with the HEAT 2006-7 trust. As of October 3, 2006 (the closing date), *see* R. 812, the trust had received "the documents and instruments with respect to each Mortgage Loan" and "all the right, title and interest" in and to the loans, *id.* at 848. The Trustee therefore had access to the loan files at closing and the ability to comply with the notice-and-cure requirement and commence a repurchase lawsuit at any point on or before October 3, 2012. *See ACE*, 25 N.Y.3d at 597-98. On June 19, 2012, the Federal Housing Finance Agency ("FHFA"), a certificateholder in the trust, gave the Trustee notice of alleged events of default related to representation and warranty breaches. *See* R. 1544-45. There was still time, at that point, for the Trustee to give DLJ notice of breaches, wait 90 days for DLJ to cure or repurchase, and, if necessary, timely commence a lawsuit. Instead, the Trustee waited until October 19, 2012—*after the limitations period had expired*—to give DLJ notice and start the clock on the 90-

[4] "R." refers to the "Record on Appeal" submitted in connection with the HEAT Action. "J.R." refers to the "Joint Record on Appeal" submitted in connection with the ABSHE Action.

day cure period. *See* R. 78, ¶ 7. The claims therefore could not have been brought until January 17, 2013, by which point it was far too late to bring them.[5]

Or consider the ABSHE 2006-HE7 trust. The Trustee had until November 30, 2012 to comply with the notice-and-cure requirement, and, if necessary, commence a lawsuit to enforce the repurchase remedy. *See* J.R. 215, 265. And if—but only if—Ameriquest was "unable to cure the applicable breach or repurchase a related Mortgage Loan" after the Trustee took these steps, then the governing agreements provided that DLJ "shall do so." *Id.* at 265. The Trustee prematurely sent breach notices to DLJ on March 28, 2012 and June 28, 2012, *see id.* at 823, 833, but it sent nothing to Ameriquest. In fact, it took no action with respect to Ameriquest until November 29, 2012—the day before the limitations period expired—when it filed a bare-bones summons with notice seeking repurchase of "[o]ne or more loans." *Id.* at 39. The Trustee then purportedly gave Ameriquest notice of 1,124 breaches on December 20, 2012, *id.* at 43, ¶ 9, even though, by that point, Ameriquest no longer had any obligation to cure or repurchase the loans. After Ameriquest did not cure or repurchase the loans within

[5] The course of events with respect to the HEAT 2006-5 and HEAT 2006-6 trusts is similar: FHFA sent notice of representation and warranty breaches on June 19, 2012, *see* R. 1544-46; the Trustee sent breach notices on October 19, 2012, *see id.* at 78, ¶ 7; and the claims therefore could have been brought, at the earliest, on January 17, 2013, months after the limitations periods had expired on July 5, 2012, *see id.* at 177 (HEAT 2006-5), and August 1, 2012, *see id.* at 499 (HEAT 2006-6).

90 days, the Trustee then served the summons with notice on March 28, 2013, *see* Affidavit of Service at 1, *U.S. Bank Nat'l Ass'n* v. *DLJ Mortg. Capital, Inc.*, No. 654147/2012 (N.Y. Sup. Ct. Apr. 1, 2013), Dkt. No. 2, seeking to enforce its untimely claims.

In these circumstances, CPLR 205(a) cannot save the Trustee's claims. The Trustee is a sophisticated financial institution lacking neither resources nor expertise. It entered into the governing agreements with full knowledge of its rights and obligations, including its obligation to give pre-suit notice of breaches and an opportunity to cure—obligations that are standard in RMBS contracts.[6] There is nothing "excusable" about its failure to comply with those obligations. *See George*, 47 N.Y.2d at 179. The Trustee was dilatory in exercising its contractual rights and obligations and should not receive the benefit of "tolling under CPLR 205(a)." *Yonkers*, 93 N.Y.2d at 381. There is nothing "capricious" or

[6] Indeed, the Trustee's actions in other litigations against DLJ illustrate this point. In a litigation involving the HEAT 2006-8 trust, which closed on December 1, 2006, the Trustee sent a breach notice on April 27, 2012 seeking cure or repurchase for 347 allegedly breaching loans, and after the cure period lapsed, it "timely commenced" an action "within six years of the closing date" seeking repurchase of those loans. *See Home Equity Asset Trust 2006-8* v. *DLJ Mortg. Capital, Inc.*, 2014 WL 4966133, at *1 (N.Y. Sup. Ct. Oct. 1, 2014), *rev'd in part sub nom. U.S. Bank Nat'l Ass'n* v. *DLJ Mortg. Capital, Inc.*, 34 N.Y.S.3d 428 (1st Dep't 2016). Similarly, in an action involving the HEAT 2007-2 trust, the Trustee "served four timely repurchase demands on DLJ, identifying a total of 1,166 loans as defective," and after the cure periods lapsed, it "timely commenced" an action "within six years of the closing date." *See Home Equity Asset Trust 2007-2* v. *DLJ Mortg. Capital, Inc.*, 2014 WL 4966127, at *1 (N.Y. Sup. Ct. Oct. 1, 2014), *rev'd in part sub nom. U.S. Bank Nat'l Ass'n* v. *DLJ Mortg. Capital, Inc.*, 34 N.Y.S.3d 428 (1st Dep't 2016). The Trustee knows how to bring timely claims. It just failed to do so in these actions.

"unfair" about denying a sophisticated commercial party like the Trustee the right to pursue its claims in these circumstances. *Hakala*, 343 F.3d at 115.

By contrast, saving the Trustee's claims would be unfair to other RMBS parties and would be contrary to the purposes underlying CPLR 205(a) and the statute of limitations. As this Court recognized in *ACE*, New York's statutes of limitations serve the "objectives of finality, certainty and predictability." 25 N.Y.3d at 593. They "not only save litigants from defending stale claims, but also 'express a societal interest or public policy of giving repose to human affairs.'" *Id.* (alterations omitted) (quoting *John J. Kassner & Co.* v. *City of New York*, 46 N.Y.2d 544, 550 (1979)); *see also Flagstar*, 2018 WL 4976777, at *6 (same). The Court has held that CPLR 205(a) serves the same "broader interests served by the statute of limitations," and it has accordingly been clear that CPLR 205(a) should not be used to "breathe life into otherwise stale claims." *Reliance Ins. Co.* v. *PolyVision Corp.*, 9 N.Y.3d 52, 58 (2007).

But that is exactly what the Trustee asks the Court to do here: allow trustees to sleep on their contractual rights, disregard bargained-for contractual pre-suit notice-and-cure requirements, file placeholder litigations on the eve of the six-year anniversary of the closing date, and, only then, comply in an untimely fashion with the repurchase protocol. Using CPLR 205(a) to excuse such a lack of diligence would be flatly inconsistent with the "objectives of finality, certainty and

predictability" that statutes of limitations serve.[7] *ACE*, 25 N.Y.3d at 593; *see also* *Flagstar*, 2018 WL 4976777, at *2, *7 (noting that this Court has "repeatedly rejected accrual dates which cannot be ascertained with any degree of certainty" and that such an approach to accrual would "effectively eviscerate the Statute of Limitations in this commercial dispute arena" (internal quotation marks omitted)). Moreover, by leaving sponsors and originators exposed to unknown, open-ended liability beyond the six-year anniversary of the closing date, this expansive use of CPLR 205(a) would directly undermine "the primary purpose of a limitations period"—"fairness to a defendant," *Duffy* v. *Horton Mem. Hosp.*, 66 N.Y.2d 473, 476 (1985) (reasoning that "a defendant should be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations" (internal quotation marks omitted)).[8]

[7] Permitting litigants to file placeholder litigations that they cannot possibly believe are meritorious—in this case because the notice/cure process had yet to run its course—would encourage "frivolous conduct" subject to sanctions under Part 130 of Chief Administrative Judge's Rules, 22 N.Y.C.R.R. 130-1.1, and would also result in a "waste [of] judicial resources"—one that the Trustee could have easily avoided if it had fulfilled its contractual obligations prior to filing suit, *A.G. Ship Maint. Corp.* v. *Lezak*, 69 N.Y.2d 1, 4 (1986).

[8] Other states likewise require that plaintiffs seeking to benefit from savings statutes like CPLR 205(a) be diligent in pursuing their claims and not sleep on their rights. The New Hampshire Supreme Court, for example, has held that the state's saving statute is "designed to insure a diligent suitor the right to a hearing in court until he reaches a judgment on the merits," and that "the 'diligent suitor' whom the saving statute seeks to protect is the plaintiff who has not slept on his rights." *Roberts* v. *Gen. Motors Corp.*, 673 A.2d 779, 781 (N.H. 1996) (citation and internal quotation marks omitted); *see also, e.g.*, *Furnald* v. *Hughes*, 804 N.W.2d 273, 276 (Iowa 2011); *Kulinski* v. *Medtronic Bio-Medicus, Inc.*, 577 N.W.2d 499, 502 (Minn. 1998); *Banks* v. *Dement Constr. Co.*, 817 S.W.2d 16, 19 (Tenn. 1991); *Isaac* v. *Mount Sinai Hosp.*, 557 A.2d 116, 122 (Conn. 1989); *Hatley* v. *Truck Ins. Exch.*, 494 P.2d 426, 430 (Or. 1972); *Giles* v. *Rodolico*, 140

This is not how the RMBS contracts at issue here were designed to work, and it is not how CPLR 205(a) was intended to be applied. The Trustee here "simply failed to pursue its contractual remedy within six years of the alleged breach[es]." *ACE*, 25 N.Y.3d at 598. Its appeal to CPLR 205(a) to excuse its own lack of diligence should thus be rejected.

## POINT II

## PERMITTING THE TRUSTEE TO REFILE ITS CLAIMS UNDER CPLR 205(A) WOULD THWART THE PURPOSE OF THE REPURCHASE PROTOCOL AND ITS NOTICE-AND-CURE PROVISIONS

The Trustee's arguments must be rejected not only because they are contrary to New York law, but also because they would result in an application of CPLR 205(a) that would thwart the purpose of notice-and-cure provisions and upend the well-settled expectations of participants in the RMBS market.

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A.2d 263, 267 (Del. 1958); *Wasyk* v. *Trent*, 191 N.E.2d 58, 61 (Ohio 1963); *Bollinger* v. *Nat'l Fire Ins. Co. of Hartford, Conn.*, 154 P.2d 399, 404-05 (Cal. 1944).

That emphasis on diligence springs from the same policy considerations that have led this Court to restrict the benefit of CPLR 205(a) to "diligent suitor[s]." *Gaines*, 215 N.Y. at 539. As the Iowa Supreme Court has noted, "[t]he purpose of a savings statute is to prevent minor or technical mistakes from precluding a plaintiff from obtaining his day in court and having his claim decided on the merits." *Furnald*, 804 N.W.2d at 276. That "remedy . . . is narrow and sharp, not broad and blunt," and "is designed to protect plaintiffs only from getting ensnared in fatal technical procedural problems that cannot be avoided through due diligence in the underlying litigation." *Id.* at 283-84. To expand the exception would "swallow entirely the ordinary restrictions of a statute of limitation" which "embrace weighty policies of certainty" and "provid[e] a defendant with . . . certainty and stability." *Id.* at 276.

The pre-suit notice-and-cure requirement is a critical part of the bargain embodied in RMBS securitizations, as the Court recognized in *ACE*. *See* 25 N.Y.3d at 589. That requirement, like similar requirements in other commercial contracts,[9] gives parties the "opportunity to cure the defects . . . while a cure is possible" and to "avoid similar defects" in future transactions. 18 Williston on Contracts § 52:42 (4th ed. 2017). It can also serve functions similar to a statute of limitations, giving parties "closure," 1 White, Summers & Hillman, Uniform Commercial Code § 12:19 (6th ed. 2017), and "protect[ing] [them] from stale claims," 18 Williston on Contracts § 52:42.

The pre-suit notice-and-cure requirement also serves the critically important function of affording parties an opportunity to address breaches before litigation is filed "so [that] litigation can be avoided." *U.S. Bank Nat'l Ass'n* v. *Greenpoint Mortg. Funding, Inc.*, 45 N.Y.S. 3d 11, 15 (1st Dep't 2016). This is especially important given the substantial costs inherent in litigating repurchase claims. These costs flow from the nature of repurchase claims themselves, which must be proved for "each loan" and "each alleged breach." *U.S. Bank, Nat'l Ass'n* v. *UBS Real Estate Sec. Inc.*, 205 F. Supp. 3d 386, 412 (S.D.N.Y. 2016). Repurchase litigation "almost always" involves retention of expensive "re-underwriting"

[9] *See, e.g.*, U.C.C. § 2-607(3)(a) ("Where a tender has been accepted . . . the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . . .").

experts, who are charged with conducting costly and time-consuming reviews of hundreds or possibly thousands of loans in a single trust. 4C N.Y. Prac., Comm. Litig. in N.Y. State Courts § 91:10 (4th ed. 2017). These costs are, of course, in addition to the substantial costs inherent in prosecuting or defending any large, complex commercial litigation. The costs are borne at least in the first instance not only by the sponsors and originators who must defend the claims, but by the trust, and all of its certificateholders, as well. *See, e.g.*, J.R. 264 (section 2.02 of the pooling and servicing agreement governing the ABSHE 2006-HE7 trust, permitting the Trustee to "seek reimbursement" for the "costs of . . . enforcement" of repurchase obligations "from the Trust Fund").

The pre-suit notice-and-cure requirement was designed to protect RMBS securitization parties from these avoidable costs where possible. And, where litigation is unavoidable, the requirement is part of a remedial framework designed to ensure that the litigable claims ripen, and are pursued, "within the same statutory period in which remedies for breach of contract . . . could have been sought." *ACE*, 25 N.Y.3d at 596. In this way, the requirement plays an integral role in the design and implementation of these heavily negotiated contracts and the fine-tuned allocation of rights embodied therein.

But the Trustee's position, if adopted by this Court, would incapacitate the notice-and-cure requirement and turn the contractual framework on its head. If, as

the Trustee contends here, trustees are allowed to commence litigations without first affording defendants notice and a pre-suit opportunity to cure, and if they are allowed to use these fatally flawed litigations, in combination with CPLR 205(a), to extend the six-year limitations period by months or even years, then the pre-suit notice-and-cure requirement would be rendered meaningless. This would upset the careful balance of rights and obligations embodied in the trusts' remedial framework and would alter key terms of the bargain the parties struck.

The Court has recognized that, particularly in cases "involving interpretation of documents drafted by sophisticated, counseled parties," "[i]t is the role of the courts to enforce the agreement" the parties made. *NML Capital* v. *Republic of Argentina*, 17 N.Y.3d 250, 259-60 (2011). The Court has consistently done this in the RMBS context, enforcing the express terms of these complex securitization contracts even where the consequence is that the trustee loses its claims. *See, e.g.*, *Ambac Assurance Corp.* v. *Countrywide Home Loans, Inc.*, 31 N.Y.3d 569, 581-84 (2018) (enforcing "sole remedy" provision in contract between monoline insurer and RMBS sponsor); *Nomura Home Equity Loan, Inc.* v. *Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 584 (2017) (enforcing contractual "sole remedy" limitation); *ACE*, 25 N.Y.3d at 594, 596 (2015) (enforcing contractual notice-and-cure requirement and refusing to create a new claim from contractual repurchase protocol). It should do so again here and reject the Trustee's invitation to apply

CPLR 205(a) in a way that would nullify the pre-suit notice-and-cure requirement and undermine the essential purposes it serves.

## POINT III

## THE TRUSTEE CANNOT BENEFIT FROM CPLR 205(A) IN THE HEAT ACTION BECAUSE IT WAS NOT "THE PLAINTIFF" THAT BROUGHT THE INITIAL ACTION

As the Court reaffirmed in *Reliance*, "the benefit provided by [CPLR 205(a)] is explicitly, and exclusively, bestowed on 'the plaintiff' who prosecuted the initial action." 9 N.Y.3d at 57 (quoting CPLR 205(a)). The Trustee is thus foreclosed from invoking CPLR 205(a) in the HEAT Action, since "the plaintiff" that filed the initial action—FHFA, a certificateholder in the HEAT trusts at issue—was an entirely different entity from the Trustee.[10] Accordingly, the First Department correctly ruled below that the Trustee "is not entitled to refile the claims under CPLR 205(a), because it is not a 'plaintiff' under that statute." *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital*, 35 N.Y.S.3d 82, 84 (1st Dep't 2016).

Attempting to dodge the plain text of CPLR 205(a) and this Court's ruling in *Reliance*, the Trustee argues that a trustee and the certificateholders in an RMBS transaction are functionally equivalent for the purposes of CPLR 205(a) because

[10] The Trustee is also foreclosed from refiling its claims under CPLR 205(a) in the HEAT Action for all the reasons discussed in Points I and II, *supra*. The argument in this Point is an independent basis on which the Court may conclude that the Trustee in the HEAT Action was foreclosed from relief under CPLR 205(a).

the Trustee "assert[s] the same claims on behalf of the same beneficiaries . . . and seek[s] the identical relief" in the refiled action as did FHFA in the original action. Appellant's Br. (HEAT Action) 3; *see also id.* 19 (dubbing this the "[s]ame [r]ights" standard). But even assuming *arguendo* that such a "same rights" standard should apply in the context of CPLR 205(a) (and for the reasons discussed in Defendant's briefing, it should not), the Trustee's position ignores both the practical reality of RMBS transactions and the contractual provisions that define the respective rights and obligations of the Trustee and the certificateholders in these actions. The trustee and certificateholders in an RMBS transaction occupy markedly different roles under the governing agreements. Those roles are defined in large part by the governing agreement's no-action clause, which provides that the only entity with the right to bring claims on behalf of the trust for breaches of representations and warranties (absent a narrow exception not applicable here) is the Trustee. Construing such provisions, New York courts have consistently recognized that no-action clauses bar certificateholders from bringing such claims, and that the trustee is the only entity with the "right to sue" over alleged breaches of representations and warranties. *See, e.g.*, *Walnut Place LLC* v. *Countrywide Home Loans, Inc.*, 948 N.Y.S.2d 580, 581 (1st Dep't 2012); *STS Partners Fund, LP* v. *Deutsche Bank Sec., Inc.*, 53 N.Y.S.3d 632, 633 (1st Dep't 2017); *Deutsche Bank Nat'l Tr. Co.* v. *Quicken Loans Inc.*, 810 F.3d 861, 868 n.8 (2d Cir. 2015);

*ACE Sec. Corp.* v. *DB Structured Prods., Inc.*, 977 N.Y.S.2d 229, 231 (1st Dep't 2013); *Asset Securitization Corp.* v. *Orix Capital Mkts., LLC*, 784 N.Y.S.2d 513, 514 (1st Dep't 2004).

This raft of authority belies the Trustee's contention that it would assert the same rights that were asserted by FHFA, a certificateholder, in the initial action. Pursuant to the no-action clause, certificateholders *do not possess* a right to sue for breaches of representations and warranties; that right is vested solely in the Trustee, absent certain exceptions not applicable here. Thus, even assuming *arguendo* that CPLR 205(a) were available to different parties so long as they asserted the "same rights," it would be impossible for the Trustee here to assert the "same rights" as a certificateholder because the certificateholders *never* had any right to bring this suit to begin with. In other words, CPLR 205(a) is unavailable to the Trustee because it "is seeking to enforce its own, separate rights, rather than the rights of the plaintiff in the original action." *Reliance*, 9 N.Y.3d at 57.

The Trustee claims that this conclusion takes an unduly restrictive view of CPLR 205(a) and elevates form over substance. But the reservation to trustees of the right to bring breach claims is integral to the design of RMBS contracts. As this Court has long recognized, no-action clauses "prevent[] individual bondholders from pursuing an individual course of action and thus harassing their common debtor and jeopardizing the fund provided for the common benefit."

*Batchelder* v. *Council Grove Water Co.*, 131 N.Y. 42, 46 (1892); *see also Cortlandt Street Recovery Corp.* v. *Bonderman*, 31 N.Y.3d 30, 43-44 (2018). By "confin[ing] the bondholder to the remedies expressly authorized," they advance "the best interest of the bondholders as a class." *Batchelder*, 131 N.Y. at 46. Permitting a no-action clause to be circumvented via CPLR 205(a) would "encourage and embolden other certificateholders to . . . advance their individual and conflicting pecuniary interests," *In re Innkeepers USA Trust*, 448 B.R. 131, 144 (Bankr. S.D.N.Y. 2001); *see also Cortlandt Street*, 31 N.Y.3d at 43-44, expose the trust to strike suits that "are either frivolous or otherwise not in the economic interest" of the trust, *Cortlandt Street*, 31 N.Y.3d at 43 (internal quotation marks omitted), and drain the resources of the bondholders as a class, *Feldbaum v. McCrory Corp.*, C.A. No. 11866, 1992 WL 119095, at *5-6 (Del. Ch. June 1, 1992). The First Department's refusal to allow refiling in the HEAT Action thus not only comports with the plain text of CPLR 205(a), but also respects the parties' bargain and promotes the salutary purposes of no-action clauses.

Moreover, as the Court noted in *Reliance*, relaxing the strict construction of CPLR 205(a) that New York courts have long adhered to risks "open[ing] a new tributary in the law . . . and breath[ing] life into otherwise stale claims." 9 N.Y.3d at 58. The Trustee here, a sophisticated financial institution, should be held to the standard of care expected of a "diligent corporate suitor, represented by counsel,"

and required "to operate with the minimal care necessary to determine" which party possesses the right to sue "before bringing suit" itself or allowing others to do so. *Id.* In this action, the Trustee was the only party with the right to sue, and despite being urged by FHFA to do so, *see* R. 1548, it failed to bring suit within the six-year limitations period applicable to breach of contract claims. The Court need not wrest CPLR 205(a) from its textual moorings to reward the Trustee for its unexcused failure to timely pursue its remedies.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Appellate Division, First Department in the HEAT Action should be affirmed, and the First Department's decision in the ABSHE Action should be reversed to the extent it held that the Trustee's breach of contract claims were properly dismissed without prejudice, and remanded with instructions to dismiss the Trustee's claims with prejudice.

Dated: New York, New York
November 20, 2018

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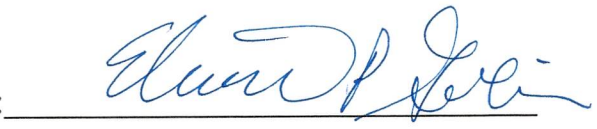
## CERTIFICATE OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), I hereby certify that the total word count for all printed text in the body of the brief is 6924 words, excluding parts identified as common requirements by § 500.13(c)(3).

Dated: New York, New York
November 20, 2018

By: 

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