SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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MLRN LLC

Plaintiff,

- v -

U.S. BANK NATIONAL ASSOCIATION,

Defendant.

**INDEX NO.** 652712/2018

**MOTION DATE**

**MOTION SEQ. NO.** 012 013

**DECISION + ORDER ON MOTION**

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 012) 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 636, 637, 638, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 845, 846, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 879, 883, 889

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 013) 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 639, 640, 651, 652, 653, 654, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683,

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were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER.

The critical issues raised by MRLN LLC (**MLRN**) and U.S. Bank National Association (**US Bank**) is whether the injury is to the Certificateholders or the Trusts and what law governs. Because the injury is to the Trusts and not the Certificateholders whose claims are derivative of the Trusts, New York law governs these New York trusts and MLRN has standing to bring these claims.

US Bank's motion for partial summary judgment (Mtn. Seq. No. 012) is granted solely to the extent that (i) the document defect claims brought for 50 of the Trusts are dismissed as untimely, (ii) the document defect claims and the representations and warranties (**R&W**) claims are dismissed as untimely for an additional six Trusts, and (iii) the repurchase-related claims for loans that were liquidated outside of the six-year statute of limitations period are dismissed as untimely.

MLRN's motion for summary judgment (Mtn. Seq. No. 013) for summary judgment is granted to the extent that that (i) MLRN has standing to sue for all Certificates at issue in the Trusts and US Bank's second, third, fortieth, forty-first, and fiftieth affirmative defenses are dismissed, (ii) an Event of Default (**EOD**) occurred in Trusts TMTS 2005-11 and GSAMP 2006-HE6, and (iii) EODs occurred in Trusts FFMER 2007-2, GSAMP 2006-HE6, HEAT 2005-9, JPMAC 2006-CW2, and MLMI 2006-AHLI as determined by the court (Pauley, J.) in *Commerzbank AG v US Bank Nat'l Ass'n*, 457 F Supp 3d 233 (SD NY 2020).

**The Relevant Facts and Circumstances**

Reference is made to a certain Decision and Order of this Court (the **Prior Decision**), dated November 14, 2019, (2019 WL 5963202; NYSCEF Doc. No. 142). The relevant facts are set forth in the Prior Decision. Familiarity is presumed.

**Discussion**

The proponent of summary judgment must make a *prima facie* showing of its entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish the existence of a material issue of fact that requires trial (*id.*).

I. **The claims accrued to the Trusts in New York**

Relying primarily on *Proforma Partners, L.P. v Skadden Arps Slate Meagher & Flom, LLP*, 280 AD3d 303 [1st Dept 2001], US Bank argues that the claims accrued to original certificate holders at the original certificate holders' principal place of business, and that under the laws of Texas, California or, in the alternative the Cayman Islands, claims related to 61 certificates are untimely. To wit, as to the 55 certificates originally held by HBK Master Fund (**HBKMF**), an entity organized under the laws of the Cayman Islands, US Bank argues that because HBKMF had its principal place of business in Texas, Texas law applies,[1] and as to the six certificates

[1] US Bank argues that HBKMF's principal place of business is in Texas (i) based on an SEC filing (NYSCEF Doc. No. 298), (ii) its website identifies Dallas as its primary office, (iii) four of the five individuals who control

previously held by Bank of New York Mellon Trust (**BNYMT**), a California entity (which received six certificates from the CDO Issuer, a Cayman Islands entity), US Bank argues California law applies.[2]

US Bank argues that, because Texas and California law apply, MLRN is not entitled to a six-plus-six year statute of limitations period. Applying the four-year statute of limitations applicable in Texas and California, US Bank argues the claims are untimely. US Bank also argues that because Texas and California do not recognize cross-jurisdictional class action tolling, the statute of limitations cannot be tolled by class actions that were brought in New York. In the alternative, US Bank argues that even if Cayman Islands law were to apply to these certificates and a six-year statute of limitations were to apply, because Cayman Islands law does not recognize class action tolling, many of the claims are still untimely and must be dismissed. US Bank's arguments fail.

The injury at issue is to the Trusts. The Certificateholders are holders of derivative interests that tie back to the Trusts. This is especially true where, as here, the issues raised are the duties of the Trustee and the Trustee's performance of those duties. The Trustee's role was to administer the

HBKMF's general partner reside in Texas, and (iv) most employees that process trades and cash flows are located in Texas. For its part, MLRN primarily argues that the injury was to the Trusts (which are New York Trusts) and New York law applies. In the alternative, as relevant to this point, MLRN argues that HBKMF holds itself out as a foreign entity and that it is its investment advisor, HBK Services, LLC that is located in Texas. Because HBKMF does not have a principal place of business, the state of formation is determinative (*Interventure 77 Hudson LLC v Falcon Real Estate Inv. Co. LP*, 172 AD3d 481 [1st Dept 2019]), and HBKMF's state of formation is the Cayman Islands. Because the injury is to the Trust and not the certificate holders, this dispute is without consequence.

[2] US Bank argues that the CDO Issuer's principal place of business, Cayman Islands, should be disregarded, and this Court should look to BNYMT's principal place of business (*Phoenix Light SF Ltd. v US Bank Nat'l Ass'n*, 2020 WL 1285783 [SD NY 2020]). As relevant to this point, MLRN argues that the CDO Issuer retained certain rights even after delivering the Certificates to the Indenture Trustee (*Hildene Capital Mgmt., LLC v Bank of NY Mellon*, 105 AD3d 436 [1st Dept 2013]) and that the location of the CDO Issuer should therefore control. Because the injury is to the Trust and New York law applies, the issue is moot.

Trusts in the ways set forth in the PSAs (both pre- and post-EOD), the mechanics of the Trusts, and the attendant waterfalls. The Trusts are the linchpin of the deal structure. The Certificateholders were only harmed by the waterfall distributions from the Trusts ***after*** the Trust experienced the harm (*Maiden v Biehl*, 582 F Supp 1209 [SD NY 1984]; *2002 Lawrence R Buchalter Alaska Tr v Phila. Fin. Life Assur. Co.*, 96 F Supp 3d 182 [SD NY 2015]).

The Trusts are established as New York common law trusts. New York has a significant interest in ensuring that the rights and interests of New York trusts are interpreted consistently under New York law. The idea that the transfers of certificates among beneficiaries of New York trusts could subvert New York's interest in those trusts is illogical. To so hold would undermine the business purpose of the deals at issue because it would subject the parties to unforeseeable and seemingly random shifts in choice of law and applicable statute of limitations periods. This would run counter to the goals of both contract and conflicts of law. New York law should therefore apply, including for the statute of limitations period. Because the harm accrued to the Trusts in New York, a six-year statute of limitations period applies to the claims and certain of the Trusts are entitled to class action tolling based on *Blackrock Balanced Capital Portfolio (FI) v US Bank Nat'l Ass'n*, Index No. 652204/2015 (Sup Ct, NY County 2015) and *Royal Park Investments SA/NV v US Bank Nat'l Ass'n*, Index No. 14-cv-2590 (SD NY 2015).[3]

[3]The Trusts which were involved in the *Blackrock* class action lawsuit are: BAFC 2006-H, CRMSI 2006-1, CSMC 2006-CF3, FFMER 2007-2, FFML 2007-FF1, GSAA 2006-20, GSAA 2006-5, GSAA 2006-9, GSAMP 2005-AHL2, GSAMP 2006-HE3, GSAMP 2006-HE6, GSAMP 2006-HE7, GSAMP 2007-H1, GSAMP 2007-HE1, GSAMP 2007-HE2, GSAMP 2007-NC1, HEAT 2005-9, HEAT 2006-2, HEAT 2006-3, HEAT 2006-7, MABS 2006-FRE1, MABS 2006-HE1, MABS 2006-HE5, MABS 2006- NC1, MLMI 2006-AHL1, MLMI 2006-FM1, MLMI 2006-MLN1, MSM 2007-5AX, MSM 2007-7AX, PPSI 2004-WWF1, SAIL 2005-8, SAIL 2005-HE3, SASC 2005-WF4, SASC 2006-BC1, SGMS 2006-FRE2, SURF 2006-AB1, SURF 2006-BC2, SURF 2006- BC3, and SURF 2006-BC5. The Trusts which were involved in the *Royal Park* class action lawsuit are: HEAT 2006-5, MABS 2006-HE2, MLMI 2006-WMC2, and SASC 2007-EQ1. The Trusts for which class action tolling is not available are: ABSHE 2006-HE3, ABSHE 2006-HE4, ABSHE 2007-HE1, CMLTI 2006-AR6, CMLTI 2006-NC1, CMLTI WMC1, CMLTI 2007-AHL1, CMLTI 2007-AHL3, CMLTI 2007-WFHE3, JPALT 2006-S3, JPMAC 2006-

## II. **MLRN has standing**

Notwithstanding that US Bank previously argued in *Commerzbank AG v US Bank Nat'l Ass'n*, 457 F Supp 3d 233 [SD NY 2020]) that the center of gravity pointed to New York and not Texas, US Bank now argues to this Court that the center of gravity points to Texas and under Texas law, the right to sue for accrued claims does not transfer with the sale of the certificates (*Royal Park v HSBC Bank*, 2018 WL 679495 [SD NY 2018]; *Zurich Ins. Co. v Shearson Lehman Hutton, Inc.*, 84 NY2d 309 [1994]). Therefore, US Bank argues, MLRN lacks standing to bring claims for the certificates held by HBKMF. US Bank is wrong.

Standing is a procedural matter and therefore governed by the law of the forum state (*Royal Park v Morgan Stanley*, 165 AD3d 460, 461 [1st Dept 2018]). Under New York law, a bondholder's claims automatically transfer with sale unless expressly reserved in writing (NY Gen. Oblig. Law § 13-107). In addition, US Bank is judicially estopped from arguing that the center of gravity is Texas. It is of no moment that the court in *Commerzbank AG* was applying Ohio's choice of law analysis. Having previously argued that New York was the center of gravity, they now can not argue otherwise. Even if this were not the case, which it is, under the center-of-gravity test, New York law would still apply. As discussed above, the Trusts are New York trusts and the injury was to the Trusts. The place of contracting, the place of negotiation, the place of performance[4], and the location of the subject matter of the contract was New York.

CW2, MLMI 2006-AR1, MLMI 2006-HE4, MLMI 2007-HE1, SABR 2006-NC2, SACO 2005-6, SURF 2006-AB2, TMTS 2005-11, AND TMTS 2005-8HE.

[4]US Bank also argues that MLRN has failed to demonstrate that all of the transactions at issue were effectuated through the Depository Trust Company (**DTC**) and thus fails to establish that New York was the place of performance for the transactions at issue. The parties do not dispute, however, that they agreed that, pursuant to the

Most of the parties to the PSAs are domiciled in New York. The PSAs provide that New York law applies in construing and interpreting the PSAs (*see, e.g.,* ABSHE 2006-HE3 PSA, § 11.04 [NYSCEF Doc. No. 745]) and many indicate that New York law applies without regard to conflict of laws principles (*see, e.g.,* MSM 2007-5AX PSA, § 11.06 [NYSCEF Doc. No. 790]). There is simply no logical basis for any other state law to apply. Thus, without question, MLRN has standing to bring the claims in this case with respect to all of the certificates at issue.

## III. The document defect claims for 50 Trusts and the document defect claims and the R&W claims for six Trusts are untimely

### *A. The Claims accrued on the first date US Bank was obligated to act, unless the obligations were ongoing*

US Bank argues that claims accrued and the statute of limitations began to run on the first date on which US Bank was obligated to act or 90 days thereafter because the Sellers had a 90-day cure period. In its opposition papers, MLRN argues that the statute of limitations began to run from the time when US Bank could no longer enforce repurchase rights under the Governing Documents. MLRN is not correct.

In the Prior Decision, this Court held that the time from which the statute of limitations ran was not properly resolved at that stage of the litigation (*MLRN*, 2019 WL 5963202, ** 3-4, *citing Pacific Life Ins. Co. v Bank of NY Mellon*, 2018 WL 1382105 [SD NY 2018]). It is axiomatic that the claim accrued at the time of the alleged breach. This occurred when US Bank first breached its obligation under the PSA:

PSAs, all transactions would be effectuated through the DTC in accordance with DTC rules. This is *prima facie* evidence that the transactions were effectuated through the DTC, and US Bank has failed to provide any evidence to the contrary or raise any triable issue of fact that MLRN is not a Certificateholder of the certificates at issue in this action.

> [T]he court rejects plaintiffs' contention that the limitations period only began to run upon the expiration of the Trust's right to enforce its remedies for the mortgage loan file defects…The alleged breaches occurred on the dates on which the Trustees were first required, in connection with the closing of the Trusts, to perform the mortgage loan file obligations, including not only the review and certification of the mortgage loan files but also any obligation to seek repurchase based on loan file defects. The limitations period began at the time of those breaches, not at the time the Trustees were precluded from curing the breaches because they could no longer initiate timely repurchase actions. The court's holding is consistent with other courts that have addressed this issue. (See Royal Park v HSBC, 109 F Supp 3d at 608; Fixed Income, 2017 WL 2870052, at *2; but see Western, 2020 WL 6534496, at *6-7.)
>
> The court does not, however, hold that the mortgage loan file claims are time-barred as a matter of law to the extent that the claims are based upon allegations that the Governing Agreements for certain Trusts impose continuing obligations on the Trustees with respect to the mortgage loan files—e.g., obligations to review files for substitute or replacement loans…At the pleading stage, the mortgage loan file claims regarding such Trusts are maintainable. (See Royal Park v HSBC, 109 F Supp 3d at 608.)

(*IKB Intern., S.A. v LaSalle Bank N.A.*, 2021 WL 358318, * 6 [Sup Ct, NY County 2021, Friedman, J.]).

For clarity, where US Bank was obligated to give notice to the Seller of document defects and failed to do so, it was obligated to act when it knew or should have known of document defects and the claims accrued on that date. Where US Bank did give notice of document defects to the Seller and the Seller failed to cure such defects within the cure period, US Bank was obligated to act at the end of the cure period and claims accrued on that date. With respect to liquidated loans, the claims accrued when the loans were liquidated and where US Bank would be obligated to either cause replacement or pursue damages against the Seller on behalf of the Trust.

***B. Document defect claims are untimely for 50 Trusts***

The PSAs provide the Seller a cure period upon notice of document defects, after which US Bank was obligated to enforce the Seller's obligation to repurchase. With respect to the claims brought on behalf of nine Trusts,[5] it is undisputed that US Bank gave notice to the Seller that it was obligated to repurchase. In the corresponding nine PSAs, this is not expressed as a continuing obligation. Therefore, the claims brought on behalf of these nine Trusts accrued on the day following the Seller's cure period.[6]

[5] ABSHE 2006-HE3, ABSHE 2007-HE1, GSAMP 2006-HE6, HEAT 2005-9, HEAT 2006-2, HEAT 2006-3, HEAT 2006-5, HEAT 2006-7, and TMTS 2005-11. 7 of these Trusts provided the Seller a 90-day cure period (*see* ABSHE 2006-HE3 PSA, § 2.03[a]; ABSHE 2007-HE1 PSA, § 2.03[a]; HEAT 2005-9 PSA, § 2.02; HEAT 2006-2 PSA, § 2.02; HEAT 2006-3 PSA, § 2.02; HEAT 2006-5 PSA, § 2.02; and HEAT 2006-7 PSA, § 2.02). GSAMP 2006-HE6 provided the Seller a 120-day cure period (GSAMP 2006-HE6 PSA, § 2.03[a]) and TMTS 2005-11 provided the Seller a 180-day cure period (TMTS 2005-11 SSA, § 2.02[d]).

[6] For ABSHE 2006-HE3, the Seller received an exception report on July 16, 2006 (Statement of Undisputed Facts, ¶ 182, Mtn. Seq. No. 012 [NYSCEF Doc. No. 637]). The Seller's cure period expired on October 14, 2006, and the document defect claims for ABSHE 2006-HE3 therefore began to accrue on October 15, 2006. For ABSHE 2007-HE1, the Seller received an exception report on January 30, 2008 (*id.*, ¶ 184). The Seller's cure period expired on April 30, 2008, and the document defect claims for ABSHE 2007-HE1 therefore began to accrue on May 1, 2008. For GSAMP 2006-HE6, the Seller received notice of document defects on November 13, 2006 (*id.*, 163). The Seller's cure period expired on March 13, 2007, and the document defect claims for GSAMP 2006-HE6 therefore began to accrue on March 14, 2007. For HEAT 2005-9, the Seller received three exception reports detailing document defects on February 24, 2006, May 24, 2006, and July 11, 2006, and a letter detailing document defects on March 10, 2006 (*id.*, ¶¶ 164-167). Using the date of the latest exception report, July 11, 2006, the Seller's cure period expired on October 9, 2006, and document defect claims for HEAT 2005-9 therefore began to accrue on October 10, 2006. For HEAT 2006-2, the Seller received three exception reports on April 26, 2006, July 11, 2006, and July 21, 2006, and a letter detailing document defects on May 10, 2006 (*id.*, ¶¶ 168-171). Using the date of the latest exception report, July 21, 2006, the Seller's cure period expired on October 19, 2006, and document defect claims for HEAT 2006-2 therefore began to accrue on October 20, 2006. For HEAT 2006-3, the Seller received three exception reports, two on June 28, 2006, and one on July 11, 2006, and a letter detailing document defects on July 11, 2006 (*id.*, ¶¶ 172-175). Using the date of the latest exception report and letter, July 11, 2006, the Seller's cure period expired on October 9, 2006, and document defect claims for HEAT 2006-3 therefore began to accrue on October 10, 2006. For HEAT 2006-5, the Seller received three exception reports on September 27, 2006, October 3, 2006, and October 26, 2006, and a letter detailing document defects on October 10, 2006 (*id.*, ¶¶ 176-178). Using the date of the last exception report, October 26, 2006, the Seller's cure period expired on January 24, 2007, and document defect claims for HEAT 2006-5 therefore began to accrue on January 25, 2007. For HEAT 2006-7, the Seller received four exception reports on December 27, 2006, December 28, 2006, January 26, 2007, and February 27, 2007 (*id.*, ¶¶ 179-180). Using the date of the last exception report, February 27, 2007, the Seller's cure period expired on May 28, 2007, and document defect claims for HEAT 2006-7 therefore began to accrue on May 29, 2007. For TMTS 2005-11, the Seller received an exception report on June 2, 2006. The Seller's cure period expired on November 29, 2006, and document defect claims for TMTS 2005-11 therefore began to accrue on November 30, 2006.

With respect to the claims brought on behalf of 41 Trusts,[7] US Bank did not give notice to the Seller of its obligation to repurchase. This obligation is also not expressed as a continuing obligation and therefore, the claims with respect to these 41 Trusts accrued on the date that US Bank knew or should have known of the document defects. The latest this occurred was when the final exception report was delivered.[8] Therefore, unless class action tolling were to save the claims, the document defect claims for these 50 Trusts must be dismissed as untimely.

### C. Class Action Tolling Does Not Save the Claims for these 50 Trusts

As discussed above, certain of the Trusts are entitled to class action tolling based on their involvement in *Blackrock Balanced Capital Portfolio (FI) v US Bank Nat'l Ass'n*, Index No. 652204/2015 (Sup Ct, NY County 2015) and *Royal Park Investments SA/NV v US Bank Nat'l*

[7] ABSHE 2006-HE4, BAFC 2006-H, CMLTI 2006-AR6, CMLTI 2006-NC1, CMLTI 2006-WMC1, CMLTI 2007-AHL1, CMLTI 2007-AHL3, CSMC 2006-CF3, FFMER 2007-2, FFML 2007-FF1, GSAA 2006-5, GSAA 2006-9, GSAA 2006-20, HEAT 2006-3[7], HEAT 2006-7, JPALT 2006-S3, JPMAC 2006-CW2, MABS 2006-FRE1, MABS 2006-HE1, MABS 2006-HE2, MABS 2006-HE5, MABS 2006-NC1, MLMI 2006-AHL1, MLMI 2006-AR1, MLMI 2006-FM1, MLMI 2006-HE4, MLMI 2006-MLN1, MLMI 2007-HE1, MSM 2007-7AX, SACO 2005-6, SAIL 2005-8, SAIL 2005-HE3, SASC 2005-WF4, SASC 2006-BC1, SASC 2007-EQ1, SGMS 2006-FRE2, SURF 2006-AB1, SURF 2006-AB2, SURF 2006-BC2, SURF 2006-BC3, and SURF 2006-BC5.

[8] For ABSHE 2006-HE4, April 5, 2007 (Statement of Undisputed Facts, ¶ 183, Mtn. Seq. No. 012), for BAFC 2006-H, January 18, 2007 (*id.*, ¶ 185), for CMLTI 2006-AR6, October 4, 2007 (*id.*, ¶ 186), for CMLTI 2006-NC1, July 14, 2007 (*id.*, ¶ 187), for CMLTI 2006-WMC1, July 14, 2007 (*id.*, ¶ 188), for CMLTI 2007-AHL1, May 15, 2008 (*id.*, ¶ 189), for CMLTI 2007-AHL3, October 2, 2007 (*id.*, ¶ 190), for CSMC 2006-CF3, February 6, 2007 (*id.*, ¶ 191), for FFMER 2007-2, March 31, 2009 (*id.*, ¶ 233), for FFML 2007-FF1, March 31, 2009 (*id.*), for GSAA 2006-5, April 10, 2007 (*id.*, ¶¶ 196-198), for GSAA 2006-9, September 29, 2006 (*id.*, ¶¶ 199-200), for GSAA 2006-20, March 27, 2007 (*id.*, ¶¶ 193-195), for HEAT 2006-3, July 27, 2006 (*id.*, ¶ 201), for HEAT 2006-7, February 27, 2007 (*id.*, ¶ 202), for JPALT 2006-S3, April 25, 2007 (*id.*, ¶ 203), for JPMAC 2006-CW2, November 8, 2006 (*id.*, ¶ 204), for MABS 2006-FRE1, February 23, 2007 (*id.*, ¶ 205), for MABS 2006-HE1, February 5, 2007 (*id.*, ¶ 206), for MABS 2006-HE2, June 26, 2007 (*id.*, ¶¶ 207-209), for MABS 2006-HE5, December 18, 2007 (*id.*, ¶¶ 210-211), for MABS 2006-NC1, February 21, 2007 (*id.*, ¶ 212), for MLMI 2006-AHL1, March 31, 2009 (*id.*, ¶ 233), for MLMI 2006-AR1, March 31, 2009 (*id.*), for MLMI 2006-FM1, March 31, 2009 (*id.*), for MLMI 2006-HE4, March 31, 2009, (*id.*), for MLMI 2006-MLN1, March 31, 2009 (*id.*), for MLMI 2007-HE1, March 31, 2009 (*id.*), for MSM 2007-7AX, October 31, 2008 (*id.*, ¶ 231), for SACO 2005-6, January 20, 2011 (*id.*, ¶ 234), for SAIL 2005-8, April 26, 2006 (*id.*, ¶¶ 213-215), for SAIL 2005-HE3, April 21, 2008 (*id.*, ¶¶ 216-218), for SASC 2005-WF4, May 22, 2006 (*id.*, ¶ 219), for SASC 2006-BC1, October 27, 2006 (*id.*, ¶¶ 220-222), for SASC 2007-EQ1, October 25, 2007 (*id.*, ¶ 223), for SGMS 2006-FRE2, June 27, 2007 (*id.*, ¶ 224), for SURF 2006-AB1, April 21, 2006 (*id.*, ¶ 225), for SURF 2006-AB2, November 13, 2006 (*id.*, ¶¶ 226-227), for SURF 2006-BC2, June 1, 2006 (*id.*, ¶ 228), for SURF 2006-BC3, October 31, 2006 (*id.*, ¶ 229), and for SURF 2006-BC5, February 13, 2007 (*id.*, ¶ 230).

*Ass'n*, Index No. 14-cv-2590 (SD NY 2015). Claims on behalf of 29 of these Trusts[9] were brought in *Blackrock* and claims on behalf of three of these Trusts[10] were brought in *Royal Park*.

The complaint in the *Blackrock* class action was filed on June 19, 2015 (Statement of Undisputed Facts, ¶ 159, Mtn. Seq. No. 012). An amended complaint was filed on September 12, 2016 (*id.*, ¶ 161). The amended complaint did not assert causes of action for HEAT 2006-7 and MABS 2006-HE1. These two Trusts are therefore entitled to class action tolling of just under 15 months. On January 15, 2018, the court dismissed the claims for breach of contract based on the alleged pre-EOD breaches concerning loan documentation (*Blackrock Balanced Capital Portfolio (FI) v US Bank Nat. Ass'n*, 2018 WL 452001 [Sup Ct, NY County 2018, Scarpulla, J.], *aff'd in part, modified in part*, 165 AD3d 526 [1st Dept 2018]). The Trusts at issue in the *Blackrock* class action are therefore entitled to tolling of just over two and a half years. The document defect claims for these Trusts accrued between April 21, 2006 (SURF 2006-AB1) and March 31, 2009 (FFMER 2007-2, FFML 2007-FF1, MLMI 2006-AHL1, MLMI 2006-FM1, MLMI 2006-MLN1). The class action tolling of two and a half years is therefore insufficient to save document defects with respect to these Trusts, and those claims must be dismissed.

The complaint in the *Royal Park* class action was filed on April 11, 2014 (Statement of Undisputed Facts, ¶ 156, Mtn. Seq. No. 012) and class certification was denied on July 10, 2018

[9] The Trusts for which accrual dates for document defect claims have been specified herein that were at issue in the *Blackrock* class action are BAFC 2006-H, CSMC 2006-CF3, FFMER 2007-2, FFML 2007-FF1, GSAA 2006-5, GSAA 2006-9, GSAA 2006-20, GSAMP 2006-HE6, HEAT 2005-9, HEAT 2006-2, HEAT 2006-3, HEAT 2006-7, MABS 2006-FRE1, MABS 2006-HE1, MABS 2006-HE5, MABS 2006-NC1, MLMI 2006-AHL1, MLMI 2006-FM1, MLMI 2006-MLN1, MSM 2007-7AX, SAIL 2005-8, SAIL 2005-HE3, SASC 2005-WF4, SASC 2006-BC1, SGMS 2006-FRE2, SURF 2006-AB1, SURF 2006-BC2, SURF 2006-BC3, and SURF 2006-BC5.

[10] The Trusts for which accrual dates for document defects have been specified herein that were at issue in the *Royal Park* class action are HEAT 2006-5, MABS 2006-HE2 and SASC 2007-EQ1.

(*id.*, ¶ 158, *see Royal Park Invs. SA/NV v US Bank Nat Ass'n*, 2018 WL 3551641 [SD NY 2018]). The Trusts at issue in the *Royal Park* class action are therefore entitled to tolling of just over four years. The document defect claims for these Trusts began to accrue between January 25, 2007 (HEAT 2006-5) and October 25, 2007 (SASC 2007-EQ1). The four-year class action tolling is insufficient to save document defect claims with respect to these Trusts, and those claims must also be dismissed.

## IV. ***Document defect claims and R&W claims for six Trusts are barred by the statute of limitations***

Document defect claims and R&W claims must be dismissed for an additional six Trusts[11]. On the record before the Court, these claims are untimely even if the claim accrued on the last day that US Bank could enforce repurchase rights for the Trusts. As discussed above, the claims accrued prior to that date. For these Trusts, US Bank could no longer have enforced repurchase rights between June 15, 2011 and April 28, 2012. Thus, the statute of limitations would have therefore run on these claims between June 15, 2017, and April 28, 2018. Dismissal of these claims is therefore required.

For completeness, the Court notes that MLRN argues that these claims should not be dismissed because they are subject to equitable tolling. Under New York law, a defendant is estopped from pleading a statute of limitations defense if the plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action (*Ross v Louise Wise Services, Inc.*, 8 NY3d

[11] The six Trusts are ABSHE 2006-HE3, ABSHE 2006-HE4, CMLTI 2006-WMC1, SACO 2005-6, TMTS 2005-8HE, and TMTS 2005-11. TMTS 2005-8HE closed on June 15, 2005, SACO 2005-6 closed on August 30, 2005, TMTS 2005-11 closed on October 31, 2005, CMLTI 2006-WMC1 closed on January 31, 2006, ABSHE 2006-HE3 closed on April 17, 2006, and ABSHE 2006-HE4 closed on April 28, 2006.

478, 491 [2007]). However, a plaintiff cannot rely on the same act that forms the basis for the claim and must demonstrate a later fraudulent misrepresentation for the purpose of concealing the former act (*id.*). Simply put, nothing prevented MLRN from bringing this lawsuit years earlier. The fact that the documentation was within the possession of US Bank does not change this analysis. MLRN was aware of lawsuits (including the *Blackrock* and the *Royal Park* actions) brought against US Bank asserting substantially similar claims to those raised in this case and, in fact, asserting claims on behalf of some of the very same Trusts involved in this lawsuit more than three years before this lawsuit was brought. Therefore, MLRN is not entitled to equitable tolling to save these claims.

## V. ***MLRN is entitled to summary judgment on US Bank's second, third, fortieth, forty-first, and fiftieth affirmative defenses***

US Bank's second affirmative defense is that MLRN lacks standing because the negating clauses of certain of the PSAs bar enforcement by anyone other than a listed party, and MLRN is not a Certificateholder. US Bank's third affirmative defense is that MLRN lacks standing, including because MLRN is not a Certificateholder, has assigned its claims in whole or in part, or is attempting to pursue claims not assigned to it. US Bank's fiftieth affirmative defense is that MLRN lacks contractual standing to sue. In support of these affirmative defenses, US Bank largely relies primarily on the same arguments discussed above. For the reasons set forth above, these arguments fail. New York law applies. Under New York law, the accrued claims transferred to MLRN with the sale of the Certificates (NY Gen. Oblig. Law § 13-107). MLRN is a Certificateholder and, as a Certificateholder, MLRN has contractual standing to bring this lawsuit. Thus, the second, third and fiftieth affirmative defenses must be dismissed.

US Bank's fortieth affirmative defense is that these claims are barred by the no-action clauses in the PSAs. This Court rejected this argument previously (2019 WL 5963202, * 8 [Sup Ct, NY County 2019, Borrok, J.], *affd* 190 AD3d 426, 426 [1st Dept 2021]). Thus, US Bank's fortieth affirmative defense is therefore dismissed.

US Bank's forty-first affirmative defense is for champerty. Champerty requires acquisition of a claim with the primary intent to sue (*Bluebird Partners v First Fid. Bank*, 94 NY2d 726, 736 [2000]). MLRN argues that it is entitled to summary judgment and dismissal of this defense because it has adduced sufficient evidence to demonstrate that it purchased the certificates based on its expectation for cash flows either without legal action or through legal action by parties other than MLRN, including the Trustee, other investors, and the SEC (*see, e.g.*, Tr of Dimitri Mirovitski, at 219-220, lines 14-2 [NYSCEF Doc. No. 487]; Tr of Jason Lowry, at 22-23, lines 10-10 [NYSCEF Doc. No. 489]). In its opposition papers, US Bank asserts that because MLRN purchased some of these Certificates after the Court of Appeals held that the Trustee could not recover in putback litigation or even after this suit was filed, the purchases were primarily for purposes of litigation. The argument fails and does not present an issue of fact. MLRN has offered a sufficient alternative purpose such that it can not be said its primary purpose in acquiring the certificates was to sue. Thus, US Bank's forty-first affirmative defense must be dismissed.

## VI. ***MLRN is entitled to a declaration that an EOD occurred in Trusts TMTS 2005-11 and GSAMP 2006-HE6***

MLRN argues that it is entitled to a declaration that an EOD occurred in Trusts TMTS 2005-11 and GSAMP 2006-HE6 and that they have not been cured. In its opposition papers, US Bank

does not dispute that an EOD occurred in Trusts TMTS 2005-11 or GSAMP 2006-HE6 (Statement of Undisputed Facts, ¶¶ 43, 59, Mtn. Seq. No. 013) or that it was subject to heightened prudent person duties while the EODs were continuing and remained uncured. However, according to US Bank, the EOD in TMTS 2005-11 was cured.

In TMTS 2005-11, US Bank argues that the EOD was caused by GMAC, the Master Servicer, filing a voluntary notice of bankruptcy. This EOD was cured when a new Master Servicer was appointed (NYSCEF Doc. No. 808 §§ 6.01-6.02). MLRN acknowledges that a new Master Servicer was appointed, but disputes that this cures the EOD and argues that this is an issue of fact for trial. The argument fails. Thus, while an EOD did occur in TMTS 2005-11, it has been cured.

In GSAMP 2006-HE6, the EOD was triggered by a Cumulative Loss Event. MLRN argues, and US Bank does not dispute, that this EOD is ongoing and remains uncured. MLRN is therefore entitled to a declaration that an EOD occurred in GSAMP 2006-HE6 and remains uncured.

## VII. *MLRN is entitled to summary judgment that EODs occurred in 5 Trusts based on Commerzbank*

MLRN argues based on *Commerzbank v US Bank*, 457 F Supp 3d 233 (SD NY 2020) that it is entitled to summary judgment on the claims brought with respect to five Trusts[12] because, it argues, the *Commerzbank* court found EODs based on (i) Servicer or Master Servicer disclosure of material noncompliance in all five trusts, and (ii) untimely and/or missing compliance documents in GSAMP 2006-HE6. In its opposition papers, US Bank argues the unremarkable

[12] FFMER 2007-2, GSAMP 2006-HE6, HEAT 2005-9, JPMAC 2006-CW2, and MLMI 2006-AHLI.

position that the *Commerzbank* court merely denied US Bank's motion for summary judgment that no EODs occurred and that therefore summary judgment is not appropriate. The argument fails. The court did not hold that there were material issues of fact as to whether an EOD occurred in these five trusts. Rather, the *Commerzbank* court held that EODs had occurred such that US Bank's motion for summary judgment motion that no EODs occurred had to be denied. Therefore, MLRN is entitled to summary judgment that EODs occurred in these five Trusts (*Commerzbank*, 457 F Supp 3d at 254 n 21, 22).

VIII. ***RegAB filings are not admissible without a proper affidavit to prove an EOD***

US Bank argues that the RegAB filings are inadmissible hearsay because they are not properly established for business records treatment under CPLR 4518 in that no appropriate affidavit is adduced authenticating the documents and laying a proper foundation for their admission. To wit, although they were audited by KPMG, and they are a statement against the interest of the Servicer, the Servicer for this purpose is not the agent of US Bank (*i.e.*, because if a default occurred then US Bank would be subject to heightened duties and may well replace the Servicer) such that this can be considered an admission of US Bank. Thus, they argue an affidavit establishing that this is a business record is necessary.

In addition, relying on the affidavit of Mary St. George, the COO of Sand Canyon Corporation, formerly Option One Mortgage Corporation (**Option One**), the Servicer for ABSHE 2006-HE3 (St. George Aff. [NYSCEF Doc. No. 704]), US Bank argues that the definition of materiality for RegAB may be different than under the PSA. In her affidavit, Ms. St. George states that Option One did not evaluate whether it failed to perform in a material respect under the PSAs and that it

did not express any conclusion regarding an EOD (*id.*, ¶¶ 5-6). She also states that a RegAB 1122 filing is a platform-level assessment and that "not every disclosed instance of non-compliance with applicable servicing criteria occurred in every trust in the platform" (*id.*, ¶ 8). Stated differently, the universe of trusts that the RegAB statement covers is different and larger than the Trusts at issue in this case.

For its part, MLRN argues that the definition of materiality under the PSAs and RegAB is the same because RegAB is tied to the PSAs, the Servicers determine the materiality, and the RegAB filings demonstrate that the Servicers breached their obligations under the PSAs in a material way. MLRN also argues that the definition of materiality under the PSAs is "of such a nature that knowledge of the item would affect a person's decision-making; significant; essential" (*Assured Guar. Mun. Corp. v Flagstar Bank, FSB*, 892 F Supp 2d 596, 602 [SD NY 2012], *quoting* Black's Law Dictionary [7th ed. 1999]) and that the purpose of disclosures under RegAB is to "provide[] material information to investors in monitoring transactions and thus their investments" (NYSCEF Doc. No. 899, at 1571). Thus, MLRN argues that it is entitled to summary judgment that EODs occurred.

Both parties are partially correct.

Pursuant to CPLR 4518, a record is admissible as a business record if it was made in the regular course of business at the time of the occurrence or within a reasonable time thereafter. The parties do not dispute that RegAB filings are required to be made by the Servicer in the regular course of its business and are made annually. Although not made at the time of the occurrence,

RegAB statements appear to have been made within a reasonable time thereafter. However, an attorney affirmation is insufficient to establish that these are admissible pursuant to CPLR 4518 (*JPMorgan Chase Bank, N.A. v Clancy*, 117 AD3d 472, 472 [1st Dept 2014]). This is not however the end of the analysis.

The court (Cohen, J.) in *Western and Southern Life Insurance Company v US Bank Nat'l Ass'n*, 69 Misc.3d 1213[A], * 7 (Sup Ct, NY County 2020, Cohen, J.) held that letters from US Bank to servicers about imprudent servicing put the servicers on notice of their material breaches for the purpose of surviving a CPLR 3211 motion. The same is true at the summary judgment stage. RegAB filings from the Servicer indicating material non-compliance put the Trustee on notice to suspect that an EOD may have occurred and that the Trustee may be subject to heightened post-EOD duties. Offered for this purpose, it does not matter that the Servicer was not looking at whether an EOD had occurred in filing its RegAB statement. Put another way, if the RegAB statement is not being offered to prove an EOD occurred under the PSA and is merely offered for its independent legal significance that the Trustee was on notice of a ***potential*** EOD (and that it was on notice that it may be subject to post-EOD heightened duties such that the Trustee had an obligation to make the determination as to whether an EOD occurred), admission as a business record would not be necessary. However, inasmuch as the RegAB statements are being offered to prove that because the Servicer indicated material non-compliance in the RegAB statement, it necessarily means that an EOD occurred and that therefore MLRN is entitled to summary judgment, compliance with CPLR 4518 is mandated. To be clear, this distinction is important. However, it does not suggest a difference in materiality, but rather why an appropriate affidavit supporting its admission is necessary if offered to prove that an EOD occurred. EODs must be

analyzed on a trust specific basis (*Phoenix Light SF Limited v Bank of New York Mellon*, 2017 WL 3973951, * 8 [SD NY 2017]).

The Court has considered the parties remaining arguments and finds them unavailing.

It is hereby ORDERED that US Bank's motion for summary judgment (Mtn. Seq. No. 012) is granted to the extent that (i) document defect claims for 50 Trusts are dismissed as untimely, (ii) document defect claims and R&W claims for six Trusts are dismissed as untimely, and (iii) repurchase claims for loans liquidated outside the statute of limitations period and not otherwise saved by class action tolling are dismissed as untimely; and it is further

ORDERED that MLRN's motion for summary judgment (Mtn. Seq. No. 013) is granted to the extent that (i) US Bank's second, third, fortieth, forty-first, and fiftieth affirmative defenses are dismissed, (ii) an Event of Default occurred in Trusts TMTS 2005-11 and GSAMP 2006-HE6, and (iii) an Event of Default occurred in Trusts FFMER 2007-2, GSAMP 2006-HE6, HEAT 2005-9, JPMAC 2006-CW2, and MLMI 2006-AHLI as determined by the *Commerzbank* court.

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**7/12/2022**
**DATE**

**ANDREW BORROK, JSC**

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| **CHECK ONE:** | | **CASE DISPOSED** | | | X | **NON-FINAL DISPOSITION** | |
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| **APPLICATION:** | | **SETTLE ORDER** | | | | **SUBMIT ORDER** | |
| **CHECK IF APPROPRIATE:** | | **INCLUDES TRANSFER/REASSIGN** | | | | **FIDUCIARY APPOINTMENT** | **REFERENCE** |