SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, WESTERN-SOUTHERN LIFE ASSURANCE COMPANY, COLUMBUS LIFE INSURANCE COMPANY, INTEGRITY LIFE INSURANCE COMPANY, NATIONAL INTEGRITY LIFE INSURANCE COMPANY

Plaintiffs,

- v -

U.S. BANK NATIONAL ASSOCIATION,

Defendant.

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INDEX NO. 650259/2019

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 78, 79, 80, 81, 82, 83, 84, 94, 96, 97, 112, 113
were read on this motion to DISMISS.

This is another in the long line of Residential Mortgage Backed Securities (RMBS) cases that have occupied state and federal courts for more than a decade. The first wave of cases involved, among other things, breach of contract claims asserted by RMBS trustees, on behalf of trust certificateholders, against sponsors of RMBS trusts for violating their contractual obligations with respect to underwriting. In the second wave of cases, including this one, certificateholders have set their sights on the trustees themselves (here, U.S. Bank National Association, "US Bank") for failing to detect or ameliorate alleged breaches of contract by the sponsors.

US Bank's motion to dismiss the Complaint raises four main issues: (1) whether Plaintiffs' claims must be dismissed for failing to comply with "no-action" provisions that limit

their ability to bring claims to enforce the applicable Pooling and Servicing Agreements ("PSAs"); (2) whether US Bank breached contractual obligations to identify and take action *before* an event of default arose ("pre-EOD claims"); (3) whether US Bank breached contractual obligations to take action as a "prudent" trustee *after* an event of default arose ("post-EOD claims"); and (4) whether some of Plaintiffs' claims are barred by the applicable statute of limitations.

These issues have been the subject of substantial judicial dissection, including in a recent decision from this Court assessing factual allegations nearly identical to those involved in this case (*MLRN LLC v U.S. Bank N.A.*, 2019 NY Slip Op 33379[U] [Sup Ct, NY County 2019] [Borrok, J.] [hereinafter, "*MLRN*"]). For the reasons set forth below, Defendant's motion to dismiss is granted in part and denied in part.

FACTUAL BACKGROUND

RMBS Securitizations and the Trustee's Role

Plaintiffs in this action are five insurance companies that were certificateholders of RMBS issued by nine trusts (NYSCEF 1 ¶¶ 2-3, 10-15 [Compl.]). US Bank served as the trustee for all nine trusts (*id.* ¶¶ 6-8). Plaintiffs assert that US Bank served as a "faithless, do-nothing agent" that failed to carry out its contractual duties both before and after contractually-defined EODs (NYSCEF 56 at 1), and that such failures caused certificateholders to suffer substantial damages (Compl. ¶¶ 116-118).

For context, an RMBS securitization involves bundling mortgage loans together and selling interests in the resulting revenue streams to investors (*id.* ¶¶ 18–20). In each securitization, a "sponsor" or "seller" forms a loan pool of mortgages acquired from "originators" (*id.* ¶¶ 18–19). The sponsor or seller transfers the loan pool to a "depositor," which

segments the loans in the pool according to their levels of risk (*id.* ¶¶ 19–20, 23). The segmented loan pool is conveyed to a trust, which issues securities ("certificates") (*id.* ¶ 20). After an underwriter sells the securities to investors, a "servicer," appointed by the sponsor (and sometimes overseen by a "master servicer"), collects payments on the underlying mortgage loans and sends the funds to a trustee, which passes on the payments to investors (*id.* ¶¶ 20–22). When an RMBS transaction closes, the originators, sponsors, and sellers make representations and warranties ("R&W") concerning certain characteristics of the mortgage loans sold to the trust (*id.* ¶ 45).

RMBS investors' returns depend on the performance of the underlying mortgage loans, and because the investors themselves do not receive the underlying loan or mortgage files, they are "dependent upon their trustee representative, US Bank, to protect their contractual and other legal rights" (*id.* ¶ 5).

The RMBS trustee's duties are set forth in the relevant trust agreements and are different before and after an EOD (*MLRN*, 2019 NY Slip Op 33379[U], 4, citing *Phoenix Light SF Ltd. v Bank of NY Mellon*, 2015 WL 57110645 [SD NY 2015]). Prior to an EOD, the trustee's duties are "largely ministerial," and include tasks such as "taking physical possession of complete mortgage files; preparing certifications of the status of mortgage loan files; and providing notice to all parties whenever there is a breach of representations or warranties by the servicer, sponsors, or originators with respect to a loan, or of any breach by the servicers" (*id*). By contrast, after an EOD, the trustee must act as a "prudent person would exercise or use under the circumstances in the conduct of such person's own affairs" (*id*).

Plaintiffs initiated this action by filing a Summons and Complaint on January 14, 2019 (NYSCEF 1). In its Complaint, Plaintiffs assert a cause of action for breach of contract, alleging that US Bank breached its obligations under the PSAs (*id.*).

The Motion to Dismiss

US Bank seeks to dismiss the Complaint on four main grounds.

First, US Bank argues that Plaintiffs have not complied with, and are not excused from, the contractual requirement that certificateholders provide a written notice of an EOD and a written request of legal action to Wells Fargo, the trust/securities administrator and the master servicer of trusts, before suing the trustee (*see* NYSCEF 1 ¶¶ 84-85; *see also* NYSCEF 37 §12.07 [Affirmation of David E. Adler ["Adler Aff."], Ex. S]). *Second*, for the pre-EOD claims, US Bank contends that Plaintiffs have failed to adequately plead claims based on US Bank's purported duties concerning alleged R&W breaches (NYSCEF 47 at 22). *Third*, US Bank argues that some of these pre-EOD claims are untimely (NYSCEF 47 at 3). And *fourth*, for post-EOD claims, US Bank argues that Plaintiffs fail to plead a contractually defined EOD or US Bank's awareness of such an EOD (NYSCEF 47 at 14).

In response, Plaintiffs argue that they are excused from the requirements of the no-action clauses under all of the PSAs, that they have adequately pleaded pre- and post-EOD claims, and that the question whether claims are timely implicates fact-intensive issues warranting further discovery, not dismissal.

DISCUSSION

In assessing a motion to dismiss under CPLR § 3211, the Court must give the complaint a liberal construction, accept its factual allegations as true, and provide the plaintiff with the benefit of every favorable inference (*see, e.g.*, *Nomura Home Equity Loan, Inc. v Nomura Credit*

& Capital, Inc., 30 NY3d 572, 582 [2017]). The pleading need only "give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action" (CPLR § 3013).

Dismissal based on documentary evidence pursuant to CPLR § 3211(a)(1) is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Dismissal for failure to state a claim pursuant to CPLR § 3211(a)(7) is warranted if the factual allegations in the complaint "do not set forth a viable cause of action, or [] consist of bare legal conclusions" (*Delran v Prada USA Corp.*, 23 AD3d 308, 308 [1st Dept 2005]).

The elements of a breach of contract claim are (1) the existence of a contract, (2) the plaintiff's performance thereunder, (3) defendant's breach thereof, and (4) resulting damages (*e.g.*, *Harris v Seward Park Housing Corp.*, 79 AD3D 425, 426 [1st Dept 2010]). "The interpretation of an unambiguous contract is a question of law for the court" (*Taussig v Clipper Group, L.P.*, 13 AD3d 166, 167 [1st Dept 2004]). "[W]hether an ambiguity exists must be ascertained from the face of an agreement without regard to extrinsic evidence" (*Reiss v Fin. Performance Corp.*, 97 NY2d 195, 199 [2001]; *150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1 [1st Dept 2004] [noting "the bedrock principle that it is a court's task to enforce a clear and complete written agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document"]). When the contract language is unambiguous, "the provisions of the contract delineating the rights of the parties prevail over the allegations set forth in the complaint" (*Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]).

A. <u>No-Action Clauses</u>

The no-action clauses in the PSAs do not bar Plaintiffs' claims here. These clauses prohibit an investor from suing unless it first makes a demand on a specified party, assembles the support of a specified percentage of holders, and offers indemnification for the suit (*e.g.*, Adler Ex. S §12.07 [CSAB 2006-1 PSA]). No-action clauses are designed "to protect the securitizations – and in turn other certificateholders – from the expense of litigating an action brought by a small group of certificateholders that most investors would consider not to be in their collective economic interest" (*Ellington Credit Fund, Ltd. v Select Portfolio Servicing, Inc.*, 837 F Supp 2d 162, 184 [SD NY 2011]; Oral Arg. Tr. at 10-12).

The focus here is on the demand prerequisite of the no-action clauses. For three of the trusts, the no-action clauses would require certificateholders to make a demand on US Bank, as trustee, to bring an action against itself (*see* Adler Aff. Ex. B [chart 1] [delineating these trusts as CMALT 2007-A7, HEMT 2005-5, and TBW 2006-5] [NYSCEF 20]). In such circumstances, not surprisingly, compliance with the demand requirement is excused as futile (*Blackrock Balanced Capital Portfolio (FI) v U.S. Bank N.A.*, 165 AD3d 526, 528 [1st Dept 2018]; *MLRN*, 2019 NY Slip Op 33379[U], 17; *see Cruden v Bank of New York*, 957 F2d 961, 968 [2d Cir 1992] [holding that it "obviously is correct" that no-action clause does not bar suit against trustee "as it would be absurd to require the debenture holders to ask the Trustee to sue itself"]).[1] Accordingly, for the CMALT 2007-A7, HEMT 2005-5, and TBW 2006-5 trusts, Plaintiffs are excused from making such demand as a matter of law.

[1] In addition, "[o]nce performance of the demand requirement in the no-action clause is excused, performance of the entire provision is excused, including the requirement that demand be made by 25% of the certificate holders" (*Blackrock*, 165 AD3d at 528).

Application of the no-action clauses to the other six trusts, however, presents a different wrinkle. Those six trusts permit demand to be made on the Trust Administrator (or "Securities Administrator"), rather than on US Bank itself (*see* CSAB 2006-1 §12.07 ["No Certificateholder shall have any right by virtue or by availing itself of any provisions of this Agreement to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement, unless such Holder . . . ha[s] made written request upon the Trust Administrator to institute such action, suit or proceeding in its own name as Trust Administrator hereunder . . . ."] [NYSCEF 23]). The Trust/Securities Administrator here was Wells Fargo, which also served as Master Servicer (Compl. ¶¶ 85-85). That creates a quandary. Plaintiffs' case against US Bank depends, in part, on US Bank's failure to address the Master Servicer's breaches (*id.* ¶¶ 92-93). So, Plaintiffs' case against US Bank necessarily implicates the alleged misdeeds of Wells Fargo. Consequently, Plaintiffs maintain, it would have been futile for them to demand that Wells Fargo bring this action.

Courts are split on whether compliance with demand requirements are excused when demand is to be made on a third party, rather than the defendant itself. On the one hand, cases like *Commerzbank AG v U.S. Bank Natl. Assn.*, 277 Supp 3d 483, 496 [SD NY 2017], decline to excuse compliance with the demand requirement against third parties, wary that expanding the rule to include "parties whose interests are aligned with the Trustees' or whose alleged misconduct would be exposed as a result of suing the Trustee" would "swallow[ ] a no-action clause as a whole" (*id.* at 495-96; *see also Sterling Fed. Bank, F.S.B. v Bank of N.Y. Mellon*, 2012 WL 3101699, at *2 [ND Ill July 30, 2012]). By contrast, in cases such as *MLRN*, courts have found that a requirement to make a demand upon an entity that served as a "securities/trust administrator *and* as one or more of the master servicer, servicer, custodian and originator" was

just as "absurd" as requiring that a demand be made upon the trustee (*MLRN*, 2019 NY Slip Op 33379[U], 17). Such a reading of the no-action provision would require that demand be made upon the recipient to "bring claims that implicate its own alleged misconduct" (*id*. [citing *Bakal v U.S. Bank Natl. Assn.*, 2018 WL 1726053, *6-7 [SD NY 2018], affd 747 F Appx 32 [2d Cir 2019]; *VNB Realty, Inc. v U.S. Bank, Natl. Assn.*, 2014 WL 1628441, *3 [D NJ 2014]).

The Court finds Justice Borrok's analysis in *MLRN* to be compelling. Requiring that demand be made upon Wells Fargo, in this case and on these allegations, is tantamount to requiring that Wells Fargo bring claims implicating its own alleged misconduct. Under the circumstances, the no-action clauses should not bar Plaintiffs from bringing these claims (*see Blackrock*, 165 AD3d at 528; *Natl. Credit Union Admin. Bd. v U.S. Bank N.A.*, 439 F Supp 3d 275, 280 [SD NY 2020] ["Requiring plaintiffs to request that Wells Fargo sue U.S. Bank based on U.S. Bank's failure to monitor and enforce Wells Fargo's servicing duties should not be a barrier to suing U.S. Bank directly for that failure."]).

Therefore, the no-action clauses are not grounds for dismissing any of Plaintiffs' claims.

B. <u>Pre-Event of Default Claims</u>

Prior to an EOD, an RMBS trustees' duties are mostly ministerial, as spelled out in the PSAs. Indeed, pre-EOD, the trustee has only those "express" contractual duties "specifically set forth" in the PSAs (*e.g.*, Ex. S § 9.01 [1] [CSAB 2006-1 PSA] [adding that "[a]ny permissive right of the Trustee set forth in this Agreement shall not be construed as a duty"]; *Phoenix Light SF Ltd. v Bank of New York Mellon*, 14-CV-10104 (VEC), 2017 WL 3973951, at *2 [SD NY Sept. 7, 2017] ["Prior to an Event of Default, the Trustee has only the contractual duties specified in the GA, which include providing notice to all parties to the GA upon certain breaches of a representation or warranty."]). "As U.S. Bank frequently, and correctly, asserts, its

role is not to 'police' their investments or to act as a fiduciary or guarantor" (*Natl. Credit Union Admin. Bd. v U.S. Bank N.A.*, 439 F Supp 3d 275, 280 [SD NY 2020]; *Natl. Credit Union Admin. Bd. v Deutsche Bank Natl. Tr. Co.*, 410 F Supp 3d 662, 684 [SD NY 2019] [noting "there is no duty to investigate" prior to EOD]). The question before the Court is whether Plaintiffs' pre-EOD claims fit within the express, limited pre-EOD duties imposed on US Bank under the PSAs.

Plaintiffs allege that US Bank was required under the PSAs to take action after it discovered material breaches of the seller's R&Ws with respect to loans held in the Trusts and because loans were missing documentation required to be delivered as part of the mortgage file (*see, e.g.*, Compl. ¶¶ 43, 46). US Bank argues that the pre-EOD claims fail for two main reasons: (i) US Bank had no duty to provide notice of R&W breaches or enforce the Seller's obligation to repurchase loans with breaches; and (ii) some of the claims are untimely.

1. US Bank's Pre-EOD Duties Concerning Notices of R&W Breaches and Enforcement of Sellers' Obligation to Repurchase Breaching Loans

First, Plaintiffs allege that US Bank had an obligation to provide notice to all parties of the sponsors' or originators' breaches of the R&Ws (Compl. ¶ 35). US Bank does not dispute that it had such a duty for seven of the nine trusts, but disputes the scope of its obligations as to GSR 2006-1F and GSR 2007-1F (the "Goldman Trusts").

Section 2.03 of the Standard Terms incorporated into the Goldman Trusts' "Master Servicing and Trust Agreements" states:

> Upon discovery by a Responsible Officer of . . . the Trustee . . . of any breach by any Seller of any representation, warranty or covenant . . . the parties discovering or receiving notice of such defect or breach shall notify the Trustee. Upon discovering or receipt of notice of such breach, the Trustee shall promptly request that such Seller cure such breach and, if such Seller does not [the Trustee] shall enforce such Seller's obligation under such Sale Agreement to purchase such Mortgage Loan . . . .

(NYSCEF 41 §2.03 [b]; NYSCEF 43 §2.03 [b]). Although (as noted below) these provisions impose obligations upon US Bank when it *receives* notice of an R&W breach, including to "request that such seller cure such breach," it does not impose an obligation upon US Bank to notify certificateholders or others. The only express notice duties for these trusts were owed by other parties *to* the trustee, not by the trustee to other parties. Therefore, the Court finds that US Bank had no duty under these provisions to give notice to other deal parties of R&W breaches for the Goldman Trusts.

Second, Plaintiffs allege that for five trusts (the Goldman Trusts, HEMT 2005-5, CMALT 2007-A7, and TBW 2006-5), US Bank also had a duty to enforce the Sellers' obligation to repurchase loans in breach of either R&W provisions or covenants relating to the completeness of mortgage files (Compl. ¶ 36). These repurchase provisions were meant to ensure that loans not in compliance with the Sellers' representations were removed from the trusts, thus protecting the investors. The parties disagree about US Bank's duty to enforce the repurchase obligations for two of the five trusts noted above – HEMT 2005-5 and CMALT 2007-A7.

Under Section 2.06 of the HEMT 2005-5 PSA, US Bank "agree[d] to hold the Trust Fund and exercise the rights referred to above for the benefit of all present and future" certificateholders (Fitzgerald Aff. Ex. 9 [NYSCEF 66]). Undisputedly, the "rights referred to above" include the right to enforce the repurchase protocol in Section 2.03. And in "agree[ing] to . . . exercise the rights referred to above," US Bank assumed an affirmative duty to enforce the repurchase obligation (*see Royal Park Invs. SA/NV v Deutsche Bank Nat'l Tr. Co.*, 2016 WL 439020, at *4 [SD NY Feb. 3, 2016] [analyzing substantively identical provision and holding that it imposed obligation upon RMBS trustee to enforce the repurchase obligations]). While the

PSA forbids "implied covenants or obligations" to be "read into [the PSA] against the Trustee" (HEMT 2005-5 PSA, §8.01 [i] [NYSCEF 83]), Section 2.06 evinces an *express* obligation on US Bank's part to exercise certain rights (*see id.* ["[T]he duties and obligations of the Trustee shall be determined solely by the express provisions of this Agreement . . . ."]).

Separately, for the CMALT 2007-A7 trust, US Bank argues that the PSA did not contain an R&W about the completeness of the mortgage file. But Plaintiffs allege that the Seller in CMALT 2007-A7 "violat[ed] PSA *covenants*," (Compl. ¶ 70 [emphasis added]), by "fail[ing] to ensure that key documents were safeguarded in the mortgage file for each loan" (*id.*; *see* Compl. Ex. C at 4 ["The Trustee . . . declares that the Trustee will hold such documents and other property, including property yet to be received in the Trust Fund, in trust, upon the trusts herein set forth, for the benefit of all present and future certificate holders and any Insurer."]). US Bank suggests that pre-EOD duties cannot be premised on covenants (NYSCEF 78 at 18), but does not cite authority for that proposition or otherwise address its alleged failure to enforce such covenants. At this stage, therefore, Plaintiffs' pre-EOD claims regarding CMALT 2007-A7 survive.

2. Statute of Limitations and Tolling of the Claims

a. "Completeness" R&W Claims

In its motion to dismiss, US Bank's statute of limitations arguments focus on Plaintiffs' R&W claims based on incomplete mortgage files. These claims stem from allegations that "documents that were required to be delivered to the custodian and included in the mortgage file had not been delivered" (Compl. ¶¶ 50, 58), which "breached representations and warranties" regarding "the completeness of the mortgage file delivered to U.S. Bank" (*id.* ¶ 58). The "completeness claims" allege two different types of inaction on US Bank's part relating to the

inadequate mortgage files. For four trusts (CSAB 2006-1, CSAB 2006-3, CSAB 2006-4, and CSMC 2007-1), Plaintiffs assert that US Bank failed to provide *notice* of the R&W breaches (Compl. ¶¶ 51-52). For the other five Trusts (HEMT 2005-5, the Goldman Trusts, CMALT 2007-A7, and TBW 2006-5), Plaintiffs assert that US Bank failed to *enforce* claims for the repurchase of breaching loans (*i.e.*, removing loans with shoddy documentation from the trusts) (*id.* ¶¶ 58, 65, 70, 77). US Bank insists that all of the completeness claims, whether based on an alleged failure of notice or of enforcement, are time-barred.

"On a motion to dismiss a cause of action . . . on the ground that it is barred by the statute of limitations . . . the defendant must establish, inter alia, when the plaintiff's cause of action accrued" (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016] [internal quotations and citations omitted]). Contract claims accruing in New York must be commenced within six years of when they accrued (CPLR §213 [2]). Contract claims accruing outside of New York must be commenced timely under both New York's limitations period and that of the jurisdiction where the claim accrued (*see* CPLR §202).

Plaintiffs filed this action on January 14, 2019, but allege their claims against US Bank were subject to tolling based on a previously filed class action on November 24, 2014, and further were tolled as of December 13, 2017, pursuant to an agreement between the parties (*see* Compl. ¶¶ 119-124). US Bank maintains that the completeness claims were already untimely prior to any tolling taking effect. Specifically, US Bank argues that these claims accrued in February 2008 at the latest, when US Bank is alleged to have discovered the R&W breaches, meaning the statute of limitations on these claims expired by February 2014 (nine months before the class-action tolling allegedly occurred).

US Bank's statute of limitations defense implicates fact questions that cannot be resolved on this motion to dismiss (*MLRN*, 2019 NY Slip Op 33379[U], 7-8 ["[A]ny statute of limitations defense cannot be resolved at the motion to dismiss stage because it involves factual questions as to when and against whom the claims accrued, whether violations were continuing and whether tolling applies"], quoting *Pac. Life Ins. Co. v Bank of N.Y. Mellon*, 2018 WL 1382105, at *7 [SD NY 2019]). Accepting the factual allegations in the Complaint as true, as the Court must do on this motion, US Bank learned about the completeness R&W breaches in 2011 when US Bank assumed the role of "custodian" (Compl. ¶¶ 51-52), and were subject to class action tolling since November 2014 (*id.* ¶¶ 120-123). US Bank's counterargument – that the claims actually accrued in 2008 because the documents it received then were substantively the same as the custodial records it received in 2011 – raises a fact issue warranting discovery, not dismissal.

The completeness claims based on US Bank's alleged failure to enforce repurchase obligations present additional fact issues further precluding dismissal at this stage. The PSAs that allegedly require US Bank to enforce the repurchase obligations do not specify a time to do so. Typically, when the contract does not specify the time of performance, "the parties have a reasonable time to perform" and "the cause of action accrues and the statute begins to run as soon as such reasonable time has expired" (*Lituchy v Guinan Lithographic Co.*, 60 AD2d 622, 622 [2d Dept 1977]). What constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case (*Zev v Merman*, 73 NY2d 781, 783 [1988]). Here, the question whether Plaintiffs' claims accrued when US Bank first allegedly discovered a breach in 2008 (as US Bank contends) or when US Bank allegedly permitted its repurchase rights under the PSA to "lapse" six years after the breach (as Plaintiffs contend), or sometime in between, is not one that can be decided on the pleadings.

Plaintiffs have alleged that US Bank filed lawsuits relating to similar trusts, not in the case, seeking repurchase of loans just prior to the expiration of the limitations period and should have done the same for the trusts here (Compl. ¶¶ 53-58, 61-65, 67-70, 77). Even crediting US Bank's argument that the enforcement-related completeness claims should be tied to the same accrual date as the notice-related completeness claims, the latter remains subject to dispute for the reasons noted above. "Simply put, [a]t this stage, Plaintiffs are not required to specify precisely when, and precisely on what basis, [US Bank] breached each of its contractual obligations" (*Pac. Life Ins. Co.*, 17 CIV. 1388 (KPF), 2018 WL 1382105, at *7, citing *BlackRock Allocation Target Shares: Series S. Portfolio v Wells Fargo Bank, National Assn.*, 247 F Supp 3d 377 [SD NY 2017], cited by *MLRN*, 2019 NY Slip Op 33379[U], 7).

Taking Plaintiffs' allegations as true for purposes of this motion, the outer boundary of the limitations period is 12 years from the date of the underlying R&W breach (*i.e.*, six years for US Bank to assert its repurchase rights plus six years for Plaintiffs to sue US Bank for permitting those rights to lapse) (*see MLRN*, 2019 NY Slip Op 33379[U], 7 [dismissing claims that exceeded the "six plus six" year period]). The earliest trust in this case closed less than 12 years before the parties entered into a tolling agreement (*see* Fitzgerald Aff. Ex. 9 [HEMT 2005-5 PSA Section 1.01: "Closing Date: December 29, 2005"]). Accordingly, unlike in *MLRN*, none of Plaintiffs' claims can be dismissed as untimely on their face.

b. Remaining R&W Claims for the HEMT 2005-5 Trust

For the HEMT 2005-5 trust, US Bank also contends that Plaintiffs' claims arising from R&W breaches relating to underwriting and other representations are untimely. In US Bank's view, the Complaint alleges that US Bank knew "by December 2011" that DLJ, the obligated party for HEMT 2005-5, "had systematically abandoned underwriting guidelines" (Compl. ¶ 57).

Plaintiffs do not allege any class-action tolling for HEMT 2005-5, so Plaintiffs' claims would have expired on December 7, 2017, a week before the tolling agreement went into effect.

These claims relate to US Bank's failure to enforce the Seller's obligation to repurchase loans in HEMT 2005-5, so the analysis regarding enforcement claims noted above also applies here. As with the other trusts, US Bank's obligation to "exercise the right[ ]" to enforce repurchase obligations in HEMT 2005-5 does not include a time for performance. HEMT 2005-5 closed on December 29, 2005. Applying the "six-plus-six" framework for pleading purposes, Plaintiffs allege that US Bank should have sought to enforce repurchase obligations in HEMT 2005-5 by December 29, 2011, which means that Plaintiffs' claims against US Bank stemming from that alleged failure expired no earlier than December 29, 2017. By then, Plaintiffs' claims relating to HEMT 2005-5 were tolled by agreement (*id.* ¶¶ 119-124). Therefore, Plaintiffs' remaining R&W claims for HEMT 2005-5 cannot be dismissed as untimely at the pleading stage.

C. Post-Event of Default Claims

Plaintiffs assert that after Events of Default occurred, US Bank failed to fulfill its duty to act as a prudent person overseeing the trusts (Compl. ¶¶ 79-81). To succeed on its post-EOD claims, Plaintiffs must allege (i) the existence of an EOD, (ii) US Bank's awareness or knowledge of the EOD, and (iii) US Bank's failure to act prudently under the circumstances following the EOD (*MLRN*, 2019 NY Slip Op 33379[U], 9; *Commerce Bank v Bank of N.Y. Mellon*, 141 AD3d 413, 416 [1st Dept 2016]); Adler Aff. Ex. M [NYSCEF 31]). At this stage of the proceedings, the third prong (which plainly raises factual disputes) is not at issue. Rather, US Bank argues that Plaintiffs fail to allege either the existence of an EOD (the first prong) or US Bank's awareness or knowledge thereof (the second prong).

Both of these preconditions require some explanation. Under the PSAs, an EOD occurs when the servicer or master-servicer (depending on the agreement) (i) commits a breach, (ii) receives written notice of the breach, and (iii) fails to cure the breach (*see, e.g.*, Compl. ¶ 82; Adler Aff. Ex. S §8.01 [b] [CSAB 2006-1 PSA] [NYSCEF 37]). Even if all those things occur, however, US Bank only assumes post-EOD duties if it also knows about the EOD. The requisite form of knowledge depends on the trust. For eight of the trusts here, it is enough that US Bank becomes aware of an EOD. But for HEMT 2005-5, the PSA states "the Trustee shall not be deemed to have knowledge of an Event of Default until a Responsible Officer of the Trustee shall have received written notice thereof" (NYSCEF 83).

Plaintiffs allege several different EODs, triggered when (i) the Servicers failed to employ prudent loss mitigation practices, (ii) the Servicers failed to disclose their breaches in annual certifications, and (iii) there was a servicing downgrade pertaining to two of the trusts. In response, US Bank contends that all of Plaintiffs' post-EOD claims fail because (i) Plaintiffs have not adequately alleged the written notice to the Servicer that is required to trigger an EOD, and (ii) even if the EODs themselves were adequately alleged, Plaintiffs fail to plead that US Bank received written notice or had actual knowledge of the EODs.

1. Failure to Employ Prudent Loss Mitigation Practices

Each PSA provides that a Servicer's (or Master Servicer's) failure to adhere to prudent servicing standards ripens into an EOD if left uncured for a specified period after notice of such breach (*see* Compl. ¶ 82; Compl. Ex. C §IX). Among other things, Servicers and Master Servicers were required to engage in prudent loss mitigation practices and protect the certificateholders' interests in the loans as if the Servicer held the loan for its own account (Compl. ¶ 83). Plaintiffs allege that EODs occurred when the Servicers and Master Servicers

failed to employ such loss mitigation practices. For example, the Complaint cites to a Congressional report, issued in the aftermath of the 2008 financial crisis, that found servicers "subcontracting out much of their duties to so-called 'foreclosure mills'" and identified other misconduct leading to prolonged foreclosure timelines (*id.* ¶ 86).

a. Notice to Servicers

Plaintiffs allege two types of written notice for these post-EOD claims: (i) statements from the Servicers admitting to non-compliance; and (ii) letters from US Bank to the Servicers pointing out non-compliance. US Bank challenges the sufficiency of both types of alleged notice.

i. Servicers' Statements

The Servicers' own statements in annual assessments are sufficient to satisfy, for pleading purposes, the written notice requirements. The Servicers were required to provide annual assessments of compliance with applicable servicing criteria, including servicing obligations referenced in the PSAs (Compl. ¶¶ 88-93, 109). The Complaint describes annual assessments that were provided by Wells Fargo, Bank of America, and CitiMortgage – Servicers for eight of the nine Trusts – in which these Servicers admitted they failed to adhere to prudent foreclosure practices and applicable foreclosure timelines (*id.* ¶¶ 88-93).

For instance, Wells Fargo's "2010 Certification Regarding Compliance with Applicable Servicing Criteria," dated February 18, 2011, disclosed material non-compliance with industry criteria across its servicing platform (*id.* ¶ 88). To be sure, the Servicer is not one of the parties identified in the PSA as giving notice of a material breach *by the Servicer*. But that is not grounds for dismissal. "[H]airline distinctions will not be drawn nor circuitous reasoning indulged nor technicalities relied on to bar recovery" where the purpose of the notice

requirement is to alert the Servicer of a breach and the Servicer itself allegedly admitted to a breach (*see M. O'Neil Supply Co. v Petroleum Heat & Power Co.*, 280 NY 50, 53, 56 [1939]). Requiring additional notice from other parties *to* the Servicer of information disclosed *by* the Servicer would be pointless. At a minimum, the Court does not read the PSAs unambiguously to impose such an incongruous condition.

ii. <u>US Bank's Letters to the Servicers</u>

Letters from US Bank to servicers about "imprudent servicing" (Compl. ¶ 93) also constitute written notice to a servicer for pleading purposes. These communications raise fact issues about both the letters' substance and their senders. The contents of the letters allegedly "put [servicers] on notice of their material breaches," by alerting servicers, for example, that they "ha[d] engaged in conduct that did not meet emerging industry standards" (*id.*). While the letters did not contain references to individual loans or trusts, the PSAs do not prescribe any particular form for the written notices, and Plaintiffs need not allege trust- or loan-specific information at this stage (*Phoenix Light SF Ltd. v Deutsche Bank Nat'l Tr. Co.*, 172 F Supp 3d 700, 716 [SD NY 2016] ["formal written notices are not required unless the indenture explicitly sets out the format of the notice"] [citation omitted]; *cf. U.S. Bank Nat'l Ass'n v DLJ Mortg. Capital, Inc.*, 176 AD3d 466 [1st Dept 2019] [notice sufficient under PSA if it "informed defendant that a substantial number of identified loans were in breach, and that the pool of loans remained under scrutiny, with the possibility that additional nonconforming loans might be identified"]). The Court therefore declines to rule, as a matter of law, that US Bank's letters were insufficiently specific to qualify as written notice.

Then there is the question whether the letters from US Bank can qualify as written notice under the PSAs. For six trusts, US Bank as trustee is not one of the parties designated to give

notice (*see* CSAB 2006-1, §8.01 [b]; CSAB 2006-3, §8.01 [b]; CSAB 2006-4, §8.01 [b]; CSMC 2007-1, §8.01 [b]; GSR 2006-1F, §8.04 [b]; GSR 2007-1F, §8.04 [b]; *see also* NYSCEF 27 [chart]). The PSAs for those trusts require "written notice" of a servicer- or master-servicer failure to be "given to the Master Servicer or the Servicer **by the Trust Administrator or the Depositor**, or to the Master Servicer or the Servicer and the Trust Administrator **by the Holders of Certificates evidencing not less than 25% of the Voting Rights evidenced by the Certificates**; . . ." (CSAB 2006-1, §8.01 [b] [emphasis added]).

For four of the six trusts, Plaintiffs get around this obstacle by alleging that US Bank took on the rights of the "Depositor", which is one of the parties authorized to provide notice (*see* CSAB 2006-1, §8.01 [b]; CSAB 2006-3, §8.01 [b]; CSAB 2006-4, §8.01 [b]; CSMC 2007-1, §8.01 [b]).[2] Under the PSAs, the Depositor assigned its "right, title and interest in and to (a) the Mortgage Loans" (Compl. ¶ 27; Ex. C § I). And since the Depositors had the right to give notice regarding the loans, US Bank also had that right. US Bank counters that "the trustee never received the depositor's right under the PSAs . . . but instead its 'right, title and interest in and to . . . the Mortgage Loans' under different agreements" (Reply Mem. of Law at 4, citing Ex. DD §2.01 [a]). While US Bank's argument may ultimately have merit, the cited language does not conclusively refute Plaintiffs' argument that US Bank received the Depositor's notice rights in the PSA.

For the other two trusts in which US Bank is not designated as a party who can provide notice, the Court finds that, at this stage, Plaintiffs have alleged enough to survive dismissal.

[2] The Depositor is an intermediary in getting the mortgage loans from the sponsors to the trusts. Each PSA sets forth a process for conveying the loans to the trusts, but typically the sponsors first conveyed the loans to the Depositors, who then conveyed them to US Bank in its capacity as trustee to hold for the benefit of certificateholders (Compl. ¶ 27).

The practical ramifications of US Bank's argument as to these trusts give the Court pause. Under US Bank's reading, no matter how detailed its letters to the Servicers were, the letters cannot provide written notice as a matter of law if US Bank is not designated to provide such notice under the PSAs. In that scenario, the Servicer could have actual notice of the breach and US Bank could have actual knowledge of the notice, yet no EOD would arise. Whether this incongruous result is supported by the PSAs requires further scrutiny. Plaintiffs' allegations, therefore, do not fail as a matter of law.

In sum, the Court will not dismiss any of Plaintiffs' post-EOD claims for failure to allege written notice. But that is not the end of the matter. In addition to pleading the existence of an EOD, Plaintiffs must also allege US Bank's awareness or knowledge of the EOD.

b. US Bank's Knowledge of the EODs

For eight of the trusts (all but HEMT 2005-5), US Bank is charged with post-EOD duties if it is aware of an EOD, and Plaintiffs adequately allege US Bank's awareness. The Complaint describes documents, produced by US Bank in another litigation, in which the servicers admitted to failing to comply with prudent servicing practices, and allege that US Bank was aware that these breaches remained uncured over a multi-year period (Compl. ¶¶ 88-92; *MLRN*, 2019 NY Slip Op 33379[U], 10 ["[K]nowledge to the trustee may be imputed based on 'its involvement with other RMBS trusts in various capacities, including serving as one of the largest RMBS servicers, being named in RMBS litigation involving similar allegations to those made here, and receiving notice of breaches with respect to other trusts for which it served as trustee' as well as 'other high profile litigation and settlements regarding the same originators and sponsors as those involved with the Trusts'"], citing *Fixed Income Shares: Series S v Citibank NA.*, 130 F Supp 3d 842, 854 [SD NY 2015]). "Although none of the allegations in the Complaint may demonstrate

US Bank's knowledge of deficiencies with respect to any particular loan, they are sufficient to meet Plaintiffs' burden at the motion-to-dismiss stage" (*MLRN*, 2019 NY Slip Op 33379[U], 13-14).

Further evidence of actual knowledge, especially as to individual loans and trusts, may be "uniquely in the possession of" US Bank (*id.* at 13-14 ["[A]t the pleading stage, information concerning breach on a 'loan-by-loan and trust-by-trust basis' is 'uniquely in the possession of defendants'"], citing *BlackRock Allocation Target Shares: Series S. Portfolio v Wells Fargo Bank, National Assn.*, 247 F Supp 3d 377, 390, 389 [SD NY 2017] [noting that courts have, "repeatedly rejected similar arguments by reminding litigants of the difference between sufficient pleading and successful claims"]). "In short, allegations of 'specific or systemic concerns' with RMBS trusts 'creates a reasonable expectation that Defendant's Responsible Officers had received written notice of Events of Default,' and while 'they do not prove that Responsible Officers had received written notice, such proof is not required' on a motion to dismiss (*id.* at 14, citing *Pac. Life Ins. Co. v Bank of New York Mellon*, 17 CIV. 1388 (KPF), 2018 WL 1382105, at *10 [SD NY Mar. 16, 2018], reconsideration denied, 17 CIV. 1388 (KPF), 2018 WL 1871174 [SD NY Apr. 17, 2018]).

For one trust, HEMT 2005-5, the parties disagree over whether Plaintiffs need to allege written notice to US Bank in order to trigger the trustee's post-EOD duties. Section 8.02(viii) of the HEMT 2005-5 PSA states "the Trustee shall not be deemed to have knowledge of an Event of Default until a Responsible Officer of the Trustee shall have received written notice thereof" (NYSCEF 83). Plaintiffs read the "written notice" requirement in this provision to apply only to *constructive* knowledge of an EOD, not to actual knowledge. If US Bank had actual knowledge of an EOD, Plaintiffs argue, US Bank had a duty to act regardless of whether it also received

"written notice thereof." US Bank disagrees. The trustee points out that §8.02(viii) refers broadly to "knowledge," not to constructive or actual knowledge, and therefore that written notice is a precondition to any post-EOD claim stemming from the HEMT 2005-5 PSA.

US Bank's interpretation of Section 8.02(viii) is the better one. Analyzing an identical provision, albeit at the summary judgment stage, the court in *Phoenix Light* "conclude[d] that Section 8.02(viii) means what it says": "[if] the Trustee's prudent person duty were to arise upon the Trustee's actual knowledge, or if Section 8.02(viii) intended to include 'actual knowledge,' then the PSA could have used the phrase 'actual knowledge' in Section 8.02(viii), as it did elsewhere" (*Phoenix Light*, 14-CV-10104 (VEC), 2017 WL 3973951, at *17 [SD NY Sept. 7, 2017]). In the same vein, while Plaintiffs contend that "'deemed knowledge' and 'actual knowledge' are different things," they cite no contractual language describing that difference here (Pls.' Opp. at 18). And the prospect "that discovery will show" the existence of a contractually-prescribed written notice simply underscores that, at this point, Plaintiffs have failed to allege such notice (*see Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 451 [1st Dept 2009] ["[T]he mere hope that discovery might provide some factual support for a cause of action is insufficient to avoid dismissal of a patently defective cause of action."], aff'd, 16 NY3d 173 [2011]).

Therefore, Plaintiffs fail to adequately plead US Bank's knowledge of an EOD for HEMT 2005-5.

c. "Automatic" EODs

Plaintiffs also allege post-EOD claims based on two kinds of EODs that can be triggered *without* notice to the servicers, based on (i) servicers' false compliance statements and (ii) servicer ratings downgrades. These post-EOD claims survive the motion to dismiss.

i. Servicers' False Compliance Statements

Starting with the compliance statements, each PSA requires the servicers to certify annually that they have materially complied with their obligations thereunder (Compl. ¶ 109; *id.* Ex. C §XII; *see, e.g.*, DLJ PSA §14.06 [requiring servicer to certify, inter alia, that "such party has fulfilled all its obligations under this Agreement"]). For four trusts (CSAB 2006-1, CSAB 2006-3, CSAB 2006-4, CSMC 2007-1), Section 8.01 of the PSAs provide that EODs occur automatically if there is "[a]ny failure by the Master Servicer or a Servicer to comply with the [certification] provisions" (Fitzgerald Aff. Exs. 2-5 §8.01 [l] [NYSCEF 59-62]).

Plaintiffs allege that in many cases the servicers failed to disclose their breaches, including by failing to provide notice of R&W violations and liquidation of loans that should have been repurchased by the sellers (Compl. ¶¶ 95-108, 112). And as noted above, Plaintiffs allege that US Bank was aware of these breaches. US Bank's position – that even a false certification satisfies the certification requirement under the PSAs (NYSCEF 78 at 13) – conflicts with language in the PSAs permitting the trustee to rely only on certifications "conforming to the requirements of this Agreement which it reasonably believed in good faith to be genuine" (*see* Fitzgerald Aff. Exs. 2-5 §9.01 [1]). Plaintiffs' allegations are sufficient to state post-EOD claims with respect to the compliance statements.

ii. Servicer Ratings Downgrades

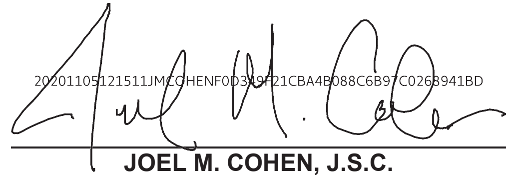
In addition, Plaintiffs adequately allege post-EOD claims for two trusts (HEMT 2005-5 and CSMC 2007-1) based on servicer downgrades (*see* Fitzgerald Aff. Ex. 5 §8.01 [j]-[k]; Fitzgerald Aff. Ex. 9 §7.01 [ix]). Nearly identical allegations were sustained in *MLRN* (2019 NY Slip Op 33379[U], 13). For these automatic EODs of particular trusts, Plaintiffs need not plead notice or other conditions precedent for the EODs to occur except the triggering defaults.

*   *   *   *

Therefore, it is:

ORDERED that US Bank's motion to dismiss is granted in part and denied in part. US Bank's motion is **Granted** with respect to: (i) Plaintiffs' post-EOD claims as to HEMT 2005-5 for failure to allege written notice of the EOD to US Bank (Mot. to Dismiss at 13); and (ii) Plaintiffs' pre-EOD claims as to US Bank's duty to give notice of R&W breaches for the Goldman Trusts (*id.* at 18). The motion is otherwise **Denied**.

This constitutes the Decision and Order of the Court.



11/5/2020	JOEL M. COHEN, J.S.C.
DATE	

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE