SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

FREEDOM TRUST 2011-2, on behalf of ACE Securities Corp. Home Equity Loan Trust, Series 2006-FM1,

Plaintiff,

- against -

DB STRUCTURED PRODUCTS, INC.,

Defendant

-and-

HSBC BANK USA, NATIONAL ASSOCIATION, in its capacity as Trustee of ACE Securities Corp. Home Equity Loan Trust, Series 2006-FM1

Nominal Defendant.

DECISION/ORDER
Index No. 652985/2012

Mot. Seq. 002, 003

LDIR, LLC, on behalf of ACE SECURITIES CORP. HOME EQUITY LOAN TRUST, SERIES 2007-ASAP1; LDIR, LLC, individually,

Plaintiff,

- against -

DB STRUCTURED PRODUCTS, INC., and HSBC BANK USA, NATIONAL ASSOCIATION, as Trustee,

Defendants,

-and-

ACE SECURITIES CORP. HOME EQUITY LOAN TRUST, SERIES 2007-ASAP1,

Nominal Defendant.

Index No. 650949/2013

Mot. Seq. 002, 003

These separate residential mortgage-backed securities (RMBS) breach of contract actions are based on alleged breaches of representations and warranties by defendant DB Structured Products, Inc. (DBSP), the Sponsor, regarding the quality and characteristics of the mortgage loans underlying the securitizations. HSBC Bank USA, National Association is Trustee of ACE

Securities Corp. Home Equity Loan Trust, Series 2006-FM1, and ACE Securities Corp. Home Equity Loan Trust, Series 2007-ASAP1, the Trusts to which the loans were conveyed. DBSP moves to dismiss the first amended complaint (FAC) in each case pursuant to CPLR 3211 (a) (1), (3), (5), (7), and (8), on the ground, among others, that the actions are time-barred. The Trustee separately moves in each action for leave to file a proposed second amended complaint (PSAC), which would supplement the pleading of its claims for breach of the implied covenant of good faith and fair dealing with allegations of DBSP's purported bad faith conduct after the closing of the securitizations.

The first amended and proposed second amended complaints in the two actions (collectively, the complaints) are substantially similar.[1] Each pleads a first cause of action, for breach of contract, based on DBSP's alleged breaches of representations and warranties and failures to cure or repurchase defective loans, either upon notice or upon its own discovery of breaches. (Freedom Trust FAC, ¶¶ 104-116; Freedom Trust PSAC, ¶¶ 110-119; LDIR FAC, ¶¶ 108-120; LDIR PSAC, ¶¶ 113-122.) The second cause of action in each complaint, for breach of the implied covenant of good faith and fair dealing, is based on DBSP's alleged deliberate and willful failures to cure breaches or to repurchase defective loans, purportedly "as part of a deliberate strategy to deprive the Trustee of its contractual rights" by "stonewall[ing] in an effort to evade liability." (Freedom Trust FAC, ¶¶ 118, 117-131; Freedom Trust PSAC, ¶¶ 120-149; LDIR FAC, ¶¶ 121-135; LDIR PSAC, ¶¶ 123-151.) The implied covenant causes of action in the proposed second amended complaints also plead that DBSP "violated its contractual obligation, express or implied, to notify the other securitization parties, including the Trustee,"

[1] In this decision, the action captioned Freedom Trust 2011-2 v DB Structured Products, Inc. (No. 652985/2012) will be referred to as "Freedom Trust" or the "Freedom Trust Action," and the action captioned LDIR, LLC v DB Structured Products, Inc. (No. 650949/2013) will be referred to as "LDIR" or the "LDIR Action."

upon its discovery of breaches of representation and warranties. (Freedom Trust PSAC, ¶ 139; LDIR PSAC, ¶ 141.)[2]

The relevant facts are undisputed: Each of the above-captioned actions was commenced when a certificateholder filed a summons with notice on, or one day prior to, the six-year anniversary of the securitization closing date. The Trustee did not file the initial complaint or attempt to substitute itself as plaintiff in either action until several months after the six-year anniversary of the closing date.[3]

DISCUSSION

The parties' motions raise many issues that have previously been determined by decisions of the appellate courts and of this court.[4] In determining such issues on these motions, the court will rely on the reasoning of, and the authorities cited in, the prior decisions.

Breaches of Representations and Warranties

It is now settled that the first cause of action in each of the complaints, for breach of contract, accrued on the closing dates of the respective securitizations, when DSBP's representations and warranties were made, and not when DSBP failed to repurchase breaching

[2] The first amended complaint in the LDIR Action pleads that "[u]pon its independent discovery of breaches of its representations and warranties, DBSP was required to notify the Trustee of the breaches," but does not expressly tie that allegation to either of the two causes of action in that pleading. (See LDIR FAC, ¶ 10.)

[3] More specifically, Freedom Trust 2011-2, a certificateholder in ACE Securities Corp. Home Equity Loan Trust, Series 2006-FM1, commenced the Freedom Trust Action by filing a summons with notice naming DBSP as a defendant on August 24, 2012. The Trustee filed the initial complaint on January 28, 2013, more than five months after the six-year anniversary of the securitization closing date of August 25, 2006.

LDIR, LLC, a certificateholder in ACE Securities Corp. Home Equity Loan Trust, Series 2007-ASAP1, commenced the LDIR Action by filing a summons with notice on March 15, 2013. The Trustee filed the initial complaint on August 1, 2013, more than four months after the six-year anniversary of the securitization closing date of March 15, 2007.

[4] By Order of the Administrative Judge, dated May 23, 2013, this court was designated to hear "all actions hereafter brought in this court alleging misrepresentation or other wrong in connection with or arising out of the creation or sale of residential mortgage-backed securities."

loans. (ACE Secs. Corp. v DB Structured Prods., Inc., 25 NY3d 581, 589 [2015], affg 112 AD3d 522 [1st Dept 2013] [ACE].) As also held under substantially similar circumstances, "[t]he summons with notice filed by the certificate holders . . . , while timely, was ineffective, because the certificate holders lacked standing to assert claims against defendant." (See Nomura Asset Acceptance Corp. Alternative Loan Trust v Nomura Credit & Capital, Inc., 139 AD3d 519, 520 [1st Dept 2016] [Nomura].) The original, first amended, and proposed second amended complaints, filed by the Trustee after the passage of the six-year statute of limitations for breach of representation and warranty claims, are untimely and do not relate back to the defective summonses with notice. (Id.; U.S. Bank N.A. v DLJ Mtge. Capital, Inc., 141 AD3d 431, 432-433 [1st Dept 2016], lv granted 29 NY3d 910 [2017]; ACE, 112 AD3d at 523, affd on other grounds 25 NY3d 581; Federal Hous. Fin. Agency v Morgan Stanley ABS Capital I Inc., 2016 WL 1587345, at * 4 [Sup Ct, NY County, Apr. 12, 2016, No. 650291/2013] [FHFA (NC1)], affd 146 AD3d 566 [1st Dept 2017] [FHFA (Morgan Stanley)].)

This court's holding that the certificateholders lacked standing to assert breach of contract claims against DBSP is based on the terms of the "no-action clauses" in the governing Pooling and Servicing Agreements (PSAs). These clauses prohibit any certificateholder from instituting an action with respect to the PSA unless, among other conditions, the certificateholder gives the Trustee "a written notice of default and of the continuance thereof" and the Trustee neglects or refuses to institute such action for 15 days after its receipt of such notice. (Freedom Trust PSA, § 12.03; LDIR PSA, § 12.03.) In ACE, the Appellate Division held that certificateholders lacked standing to commence a breach of contract action on behalf of their trust based on a virtually identical no-action clause. (See 112 AD3d at 523, affd on other

grounds 25 NY3d 581.)[5] In so holding, the Appellate Division expressly rejected an argument by the trustee that the no-action clause "authorize[d] certificate holders to provide notices of 'default' in connection with the sponsor's breaches of the representations." (Id.) The Court reasoned that "the 'defaults' enumerated in the PSA concern[ed] the failures of performance by the servicer and master servicer only." (Id.)

This case is indistinguishable from ACE. Here, as in ACE, the default provisions of the PSAs refer to servicer and master servicer defaults. (Freedom Trust PSA, art. 8; LDIR PSA, art. 8.) Also as in ACE, the no-action clauses permit certificateholders to institute actions upon certain conditions with respect to a "default," an undefined term. On the authority of ACE, the court holds that the no-action clauses authorize certificateholder actions only upon written notice of a servicer or master servicer default. The court accordingly rejects the Trustee's contention that the term "default" authorizes certificateholders to institute actions upon notice of breaches of representations and warranties.[6] (Cf. Nomura, 139 AD3d at 520 [holding that the Trustee's argument "that it alleged compliance with the no-action clause, permitting the certificate holder[] to assert claims on behalf of the trust, is not persuasive, since the pooling and servicing agreement[s] specifically refute[] this basis for the certificate holders' allegations of standing"].)

For the reasons stated, and on the authorities cited in this court's prior opinions, the court further holds that the no-action clauses were not intended solely for the Trustee's benefit, and

[5] In affirming the Appellate Division's decision in ACE, the Court of Appeals assumed, without deciding, that the certificateholders had standing. (25 NY3d at 589, 599.)

[6] Even if this court were to accept the Trustee's argument that a breach of representation or warranty constitutes a "default," as that term is used in the no-action clauses, the certificateholders do not allege that they complied with the requirement to wait 15 days after providing notice of a default to the Trustee before bringing suit. (See Freedom Trust PSA, § 12.03; LDIR PSA, § 12.03.) Each summons with notice was also ineffective for this reason. (See Federal Hous. Fin. Agency v UBS Real Estate Secs., Inc., 2016 WL 4039321, * 3 [Sup Ct, NY County, July 27, 2016, No. 651282/2012] [this court's prior decision, finding certificateholder summons with notice ineffective based on failure to comply with 60-day waiting requirement in no-action clause].)

that DBSP has standing to raise the issue of the certificateholders' non-compliance with the clauses as a defense. (E.g. Federal Hous. Fin. Agency v UBS Real Estate Secs., Inc., 2016 WL 4039321, * 3 [Sup Ct, NY County, July 27, 2016, No. 651282/2012].) The court also rejects, for the reasons stated in its prior decisions, the Trustee's argument that it waived or ratified any standing defect when it filed the initial complaints. (Id.; Federal Hous. Fin. Agency v HSBC Fin. Corp., 2017 WL 1479480, * 4 [Sup Ct, NY County, Apr. 25, 2017, No. 651627/2013].) To the extent the Trustee argues that the no-action clauses do not apply because the certificateholders filed the actions derivatively on behalf of the Trusts, that argument is rejected for the reasons stated by the Appellate Division in FHFA (Morgan Stanley) (146 AD3d at 567-568).

The Trustee argues, in the alternative, that the first causes of action are timely under New York General Obligations Law (GOL) § 17-101, pursuant to which a written acknowledgment of a contractual obligation may restart the six-year limitations period for a breach of contract claim.[7] (See e.g. LDIR Action, Tee.'s Memo. In Opp. To MTD, at 7-10.) In order to constitute an "acknowledgment" under GOL § 17-101, a writing "must recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it." (Lew Morris Demolition Co., Inc. v Board of Educ. of the City of N.Y., 40 NY2d 516, 521 [1976]; accord Hui v East Broadway Mall, Inc., 4 NY3d 790, 791 [2005].)

The letters on which the Trustee relies, sent by a representative of DBSP in response to notices by the Trustee of alleged breaches of representations and warranties, do not contain any

[7] GOL § 17-101 provides, in pertinent part: "An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules other than an action for the recovery of real property."

acknowledgment by DBSP of breaches of representations or warranties. Nor do they contain any acknowledgment by DSBP of any obligation on the part of DBSP to repurchase the loans identified in the Trustee's notices. To the contrary, the letters state that DBSP "cannot make any determination" as to the accuracy of the alleged breaches without access to the full loan origination files, servicing records, and all evidence supporting the breach claims made in the Trustee's breach notices. (Letter from Anthony Aulisa, Vice President of DSBP, dated June 11, 2013 [LDIR Action, Israeli Aff., Exh. A]; Letter from Anthony Aulisa, Vice President of DSBP, dated June 19, 2012 [Freedom Trust Action, Israeli Aff., Exh. B].) Although the letters request such materials from the Trustee, they further explicitly state that "[t]his request is without prejudice and does not waive any rights or defenses that DBSP might have under the [governing agreement(s)] or otherwise might have with respect to the alleged breaches." (Id.) For all of these reasons, the letters plainly do not qualify as "acknowledgments" under GOL § 17-101.[8] (See e.g. Stern v Stern Metals, Inc., 22 AD3d 567, 568 [2d Dept 2005] [letter recognizing "possibility" of liability did not constitute an acknowledgement under GOL § 17-101]; Gazza v United Cal. Bank Intl., 88 AD2d 968, 970 [2d Dept 1982] [execution of mortgage did not constitute an acknowledgment of obligation under guarantee where the parties explicitly reserved "'whatever rights or defenses, as the case may be, under and by virtue of [the] guarantee'" (brackets in original)].)

Failure to Notify

The Trustee argues that, even if its claims for breaches of representations and warranties are untimely, it has independent, timely breach of contract claims based on DBSP's alleged

[8] Moreover, as DSBP correctly argues, the letters were sent at a time when a conflict existed among the Courts regarding the proper application of the statute of limitations to RMBS claims for breach of representations and warranties and for failures to repurchase defective loans. This conflict was first resolved by the Appellate Division in ACE (112 AD3d 522, supra). (LDIR Action, Def.'s Reply Memo., at 10 n 11.)

failure to promptly notify the Trustee of breaches of representations and warranties discovered by DBSP early in the life of the Trusts. (See LDIR Action, Tee.'s Memo. In Opp. To MTD, at 5; Freedom Trust Action, Tee.'s Memo. In Opp. To MTD, at 5.)

In a recent decision, to which the parties are referred, this court discussed a number of issues common to RMBS "failure to notify" claims by trustees against securitizers, including the accrual of such claims for statute of limitations purposes. (See generally Federal Hous. Fin. Agency v Morgan Stanley ABS Capital I Inc., 2018 WL 1187676 [Sup Ct, NY County, Mar. 6, 2018, Nos. 650291/2013, 651959/2013] [the Failure to Notify decision].) Under the Appellate Division decisions in Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc. (133 AD3d 96 [1st Dept 2015], mod on other grounds 30 NY3d 572 [NY, Dec. 12, 2017] [Nomura (FM2)]), Morgan Stanley Mortgage Loan Trust 2006-13ARX v Morgan Stanley Mortgage Capital Holdings LLC (143 AD3d 1 [1st Dept 2016], appeal docketed No. APL-2016-00240 [Morgan Stanley]), and Bank of N.Y. Mellon v WMC Mortgage, LLC (151 AD3d 72, 81 [1st Dept 2017]), a securitizer's alleged breach of its contractual obligation to notify a trustee upon its discovery of breaches of representations and warranties gives rise to an independent, separate claim for breach of contract. In the Failure to Notify decision, this court held that such a claim accrues upon the securitizer's discovery of breaches and failure to provide prompt written notice.

In these cases, even assuming that failure to notify claims are pleaded,[9] the pleadings do not state legally viable causes of action and are refuted by documentary evidence. (See generally

[9] As noted at the outset of this decision, neither the first amended complaints nor the proposed second amended complaints plead a breach of contract cause of action based on DBSP's alleged failure to notify. In the LDIR Action, however, the opening summary of the first amended complaint pleads that DBSP had a duty to notify the Trustee upon its discovery of breaches of representations and warranties. The proposed second amended complaints in both actions also plead, as part of the implied covenant causes of action, that DBSP violated its "express or implied" obligation to notify the Trustee upon its discovery of breaches of representations and warranties. (See supra, at 2-3.)

Simkin v Blank, 19 NY3d 46, 52 [2012]; 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 [2002].) The Trustee fails to identify any provision in the governing agreements that imposes a contractual duty upon DBSP to promptly notify the Trustee of DBSP's discovery of breaches of representations and warranties. Section 7 (a) of the MLPAs, on which the Trustee relies, sets forth a protocol to be followed when DBSP, the Purchaser, or the Trustee discovers qualifying breaches of representations and warranties. That protocol requires only that notice be provided to DBSP—not to the Trustee.[10]

It is well settled that the court "may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." (Reiss v. Financial Performance Corp., 97 NY2d 195, 199 [2001] [internal quotation marks and citation omitted].) These "very sophisticated parties . . . certainly could have included" the Trustee (or "any assignee, transferee or designee of the Purchaser") as a party to be notified upon DBSP's discovery of a breach. (See generally Nomura [FM2], 133 AD3d at 107-108 [internal quotation marks and citations omitted], mod on other grounds 30 NY3d 572; MBIA Ins. Corp. v Countrywide Home Loans, Inc., 105 AD3d 412, 413 [1st Dept 2013].) Indeed, it is common for the governing agreements in RMBS transactions to impose upon a sponsor an express contractual obligation to notify the trustee upon its discovery of a

[10] Section § 7 (a) of the MLPAs provides, in pertinent part:

> "Upon discovery by the Seller [DBSP], the Purchaser [non-party ACE Securities Corp.] or any assignee, transferee or designee of the Purchaser [including the Trustee] of . . . a breach of any of the representations and warranties contained in Section 6 [of the MLPA] that materially and adversely affects the value of any Mortgage Loan or the interest therein of the Purchaser or the Purchaser's assignee, transferee or designee, the party discovering such breach shall give prompt written notice to the Seller [DBSP]."

breach of a representation or warranty that materially affects the value of a loan.[11] The Trustee here did not secure such a provision.

The Trustee argues that, despite the plain language of section 7 (a) of the MLPAs, it would be "absurd" to interpret the provision as omitting a requirement that DBSP promptly notify the Trustee of its discovery of a breach of representation or warranty, because such an interpretation would "turn DBSP into the arbiter of its own repurchase obligations." (LDIR Action, Tee.'s Memo. In Opp. To MTD, at 6.) This argument is unpersuasive. Whether or not DBSP has or had a notification obligation, it remained obligated, by the clear terms of section 7 (a), to repurchase loans materially and adversely affected by breaches of representations and warranties. Moreover, "Court[s] will not imply a term where the circumstances surrounding the formation of the contract indicate that the parties, when the contract was made, must have foreseen the contingency at issue and the agreement can be enforced according to its terms." (Reiss, 97 NY2d at 199.) The possibility that DBSP or other parties would discover breaches of representations or warranties was clearly foreseeable to those sophisticated parties, and they specifically agreed to a protocol that would be followed upon such an occurrence. As noted, that protocol does not include any requirement that DBSP promptly notify the Trustee of breaches. Section 7 (a) is not without meaning, as it requires the Purchaser and the Trustee to notify DBSP of breaches discovered by those parties, and serves as a condition precedent to DBSP's obligation to repurchase defective loans it does not discover independently. There is no question that the provision can be enforced according to its terms.[12]

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[11] For example, section 3.01 of the MLPA at issue in Morgan Stanley (143 AD3d 1, supra) provided that, "[u]pon discovery by the Depositor, the Seller, the Servicer, the Purchaser or any assignee, transferee or designee of the Purchaser of a breach of any of the representations and warranties . . . the party discovering such breach shall give prompt written notice to the others." (Morgan Stanley, MLPA [Exh. 1 to the Am. Compl.], No. 653429/12.)

[12] The court also rejects the Trustee's argument that a duty to notify should be implied because "DBSP cannot perform its obligation to repurchase loans it discovers to be in breach without notifying the other transaction parties

As the first causes of action fail to plead viable breach of contract claims, the branches of the motions to dismiss those causes of action will be granted.

The Implied Covenant of Good Faith and Fair Dealing

The remaining issue is whether the Trustee has stated viable claims for breach of the implied covenant of good faith and fair dealing, as pleaded in either the first amended complaints or the proposed second amended complaints.

For the reasons stated, and on the authorities cited, in this court's prior RMBS decisions, the court holds that the pleaded and proposed implied covenant claims are duplicative of the nonviable breach of contract claims. Similar implied covenant claims have been dismissed as duplicative of breach of representation and warranty and failure to notify claims in decisions of the Appellate Division and the U.S. Court of Appeals for the Second Circuit. (See MBIA Ins. Corp. v Countrywide Home Loans, Inc., 87 AD3d 287, 293, 297 [1st Dept 2011] [dismissing implied covenant claim as duplicative of breach of contract claim where implied covenant claim was based, among other things, on allegation that defendant "deliberately refused to take corrective action on defaulting loans so that it could collect more fees"]; Nomura [FM2], 133 AD3d at 108, mod on other grounds 30 NY3d 572; Deutsche Bank Natl. Trust Co. v Quicken Loans Inc., 810 F3d 861, 869 [2d Cir 2015] [affirming dismissal of implied covenant claims as duplicative of untimely breach of contract claims based on Quicken's sale of defective loans and

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of its intent to do so." (LDIR Action, Tee.'s Memo. In Opp. To MTD, at 6.) First, the Trustee does not address whether there are circumstances under which DBSP might be able to "cure [the] defect or breach in all material respects" without involving the Trustee, in which case repurchase would be unnecessary. (See MLPA § 7 [a].) Furthermore, although it may be true that, as a matter of "logistics" (LDIR Action, Tee.'s Memo. In Opp. To MTD, at 6), DBSP cannot repurchase without the involvement of the Trustee, the Court of Appeals has foreclosed the possibility of an independent breach of contract claim based on a sponsor's failure to comply with its repurchase obligations. (ACE, 25 NY3d at 599.) Here, the Trustee did not bargain for a notification right in the governing agreements. Accordingly, even accepting the Trustee's assertion that notice is one of several procedural steps eventually necessary for DBSP to comply with its repurchase obligations, the failure to provide such notice is not an independent breach of these contracts.

"purported failure to notify the Trustee promptly of material defects"]; Deutsche Bank Natl. Trust Co. v Flagstar Capital Mkts. Corp., 2015 WL 1646683, * 4 [Sup Ct, NY County Apr. 13, 2015, No. 653048/13] [this court's prior decision dismissing an implied covenant cause of action as duplicative of a breach of contract cause of action where both claims were based on allegations as to the defendant's "pervasive breaches of the representations and warranties, its awareness of the breaches, and its failure to notify the Trustee or repurchase the defective loans"], affd on other grounds 143 AD3d 15 [1st Dept 2016] [Flagstar]; Law Debenture Trust Co. of N.Y. v DLJ Mtge. Capital, Inc., 2015 WL 1573381, * 11 [Sup Ct, NY County, Apr. 8, 2015, No. 651958/13] [same]; see generally Phoenix Capital Investments LLC v Ellington Mgt. Group, L.L.C., 51 AD3d 549, 550 [1st Dept 2008] [dismissing implied covenant claim as "an invalid substitute for its nonviable breach of contract claim"].)

More particularly, the breach of contract claims in both the LDIR action and the Freedom Trust action are based on the allegations that "DBSP discovered or at least should have discovered breaches of the representations and warranties on its own" and was provided with breach notices by the Trustee, thereby "triggering DBSP's cure or repurchase obligations." DBSP, however, "failed and refused to cure or repurchase any defective Morgan Loans." (LDIR FAC, ¶¶ 111, 113; Freedom Trust FAC, ¶¶ 106, 108.) The breach of contract claims also allege that DBSP's failure to identify and cure breaches of representations and warranties was "grossly negligent or willful[]." (LDIR FAC, ¶ 116; Freedom Trust FAC, ¶ 111.) The implied covenant claims in both actions are based on allegations that DBSP discovered breaches of representations and warranties and thereafter engaged in a course a conduct, designed to delay or frustrate repurchase efforts until the limitations period expired, by failing to notify the Trustee of defects and responding to breach notices in bad faith. (LDIR FAC, ¶¶ 121-135; Freedom Trust FAC, ¶¶

116-130.) The implied covenant claims thus allege that "DBSP in bad faith has adopted . . . a practice of deliberately and willfully breaching its obligations not only to cure breaches or repurchase breaching loans once it has been put on notice of breaches by the Trustee, but also of deliberately and willfully failing to cure or repurchase based on its obligation arising from its own discovery of breaches." (LDIR FAC, ¶ 122; Freedom Trust FAC, ¶ 117.) The proposed second amended complaints add details as to this alleged practice.[13]

The allegations in the implied covenant claims as to DBSP's discovery of breaches and failure to comply with the repurchase protocol are clearly duplicative of those in the breach of contract claims. The allegations as to DBSP's failure to notify the Trustee of defective loans, similarly, are duplicative of, and fail to save, the Trustee's nonviable failure to notify claims.

Further, it is well settled that, although the implied covenant encompasses "promises which a reasonable person in the position of the promisee would be justified in understanding were included" in a contract, "[t]he duty of good faith and fair dealing . . . is not without limits." (Dalton v Educational Testing Serv., 87 NY2d 384, 389 [1995] [internal quotation marks and citation omitted].) "[N]o obligation can be implied that 'would be inconsistent with other terms of the contractual relationship.'" (Id., at 389, quoting Murphy v American Home Prods. Corp., 58 NY2d 293, 304 [1983].) The implied covenant accordingly "cannot be used to create terms

[13] The proposed second amended complaints allege, among other things, that DBSP recognized after the closing dates that "the mortgage loans it had purchased over the years were rife with defects" (LDIR PSAC, ¶ 129; Freedom Trust PSAC, ¶ 126) and that it "engaged in a massive, systematic, post-closing reunderwriting of mortgage loans" in order to "seek reimbursement from originators for breaching loans." (LDIR PSAC, ¶ 126 [emphasis omitted]; Freedom Trust PSAC ¶, 123.) The purpose of this "breach out program" allegedly was to mitigate losses by identifying defective loans and recovering payments from originators with respect to those loans. (LDIR PSAC, ¶ 128 [internal quotation marks omitted]; Freedom Trust PSAC, ¶ 125.) Yet despite its numerous repurchase requests to originators, DBSP failed to repurchase any defective loans from the Trusts. (See LDIR PSAC, ¶ 135; Freedom Trust PSAC, ¶ 132.) Moreover, DBSP "stonewalled" upon receiving breach notices from the Trustees, declaring that it lacked information that, in fact, it had already acquired as a result of its "breach out" efforts. (LDIR PSAC, ¶ 138; Freedom Trust PSAC, ¶ 135.)

that do not exist in the writing." (Vanlex Stores, Inc. v BFP 300 Madison II LLC, 66 AD3d 580, 581 [1st Dept 2009]; D & L Holdings, LLC v RCG Goldman Co., LLC, 287 AD2d 65, 73 [1st Dept 2001], lv denied 97 NY2d 611 [2002] ["The covenant of good faith and fair dealing cannot be used to add a new term to a contract, especially to a commercial contract between two sophisticated commercial parties represented by counsel"].) Put another way, the implied covenant cannot be used to "effectively create an independent contractual right that was not bargained for by the parties." (Madison Apparel Group Ltd. v Hachette Filipacchi Presse, S.A., 52 AD3d 385, 386 [1st Dept 2008]; National Union Fire Ins. Co. of Pittsburgh, Pa. v Xerox Corp., 25 AD3d 309, 310 [1st Dept 2006], lv dismissed 7 NY3d 886 [same].) Where a contract contains an express covenant governing a subject, Courts will not imply a covenant with respect to the same subject. (Lehman Bros. Intl. (Europe) v AG Fin. Prods., Inc., 2013 WL 1092888, * 2 [Sup Ct, NY County, Mar. 12, 2013, No. 653284/11] [this court's prior decision, collecting authorities].)

As discussed above, the MLPAs explicitly cover the subject of notice and do not require DBSP to promptly notify the Trustee upon its discovery of a qualifying breach. This court may not imply a notification obligation inconsistent with the notification requirements expressly provided for in the MLPAs. Moreover, the Trustee could not reasonably have expected to receive written notice from DBSP upon DBSP's discovery of a breach of representations and warranties under these circumstances in which the MLPAs do not require such notice.[14]

As DBSP correctly argues, absent a contractual provision to the contrary, a party is under no obligation to reveal to its counterparty that it has breached a contract. If the Trustee wanted

[14] The Trustee, although not a party to the MLPAs, must be charged with knowledge of the contents of those agreements, and in particular the rights it stood to acquire from the Purchaser. (E.g. LDIR Action, FAC, ¶¶ 100-106 [detailing the contractual provisions assigning the Purchaser's rights under the MLPA to the Trustee].)

to impose such an obligation on DBSP, it should have made certain the contract was clear and unambiguous. (See Zumpano v Quinn, 6 NY3d 666, 675 [2006] ["A wrongdoer is not legally obligated to make a public confession, or to alert people who may have claims against it, to get the benefit of a statute of limitations"]; Bank of N.Y. Mellon v WMC Mtge. LLC, 53 Misc 3d 967, 971-973 [Sup Ct, NY County, Sept. 7, 2016, No. 653099/14, Kornreich, J.] [same].) Having failed to negotiate for such a notification right, the Trustee cannot now supplement or "nullify" the protocols to which it agreed on the ground that "defendant acted unfairly" or in bad faith in failing to notify it of breaches. (See generally Phoenix Capital Investments LLC, 51 AD3d at 550.) Although the consequences of the Trustee's bargain may be quite severe under the particular circumstances of these cases, the fact that a party suffers harm under a contract does not mean that an express or implied contractual duty was violated.

Finally, implying a requirement that DBSP promptly notify the Trustee upon its discovery of breaches of representations and warranties would create an independently enforceable obligation. (See Morgan Stanley, 143 AD3d at 4.) Recognition of this obligation could give rise to a contract claim accruing later than that for breaches of representations and warranties, and thereby enable the Trustee to recover damages in fact caused by such breaches. In its recent Failure to Notify decision, this court addressed accrual and other issues arising as a result of the Appellate Division's recognition of a breach of contract claim based on the defendant's failure to notify the trustee of its discovery of breaches of representations and warranties, where the governing agreements expressly required such notification. The decision discussed the substantial implications for the RMBS litigation and significant public policy concerns raised by the recognition of an independently enforceable notification obligation. (See Failure to Notify decision, 2018 WL 1187676, at * 8-13, 16-19.) No justification exists for this

court to imply a notification obligation with such serious ramifications where, as here, the extremely sophisticated commercial parties did not see fit to expressly provide for such an obligation.

In sum, both the first amended complaints and the proposed second amended complaints fail to plead viable causes of action for breach of the implied covenant of good faith and fair dealing. As the proposed complaints are "palpably insufficient or clearly devoid of merit," leave to amend to supplement the implied covenant causes of action will accordingly be denied. (See MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499, 500 [1st Dept 2010].) Moreover, the implied covenant claims in the first amended complaints will be dismissed.

Equitable Estoppel

Finally, the Trustee argues that DBSP should be equitably estopped from asserting the statute of limitations as it allegedly kept silent about breaching loans and failed to comply in good faith with its repurchase obligations prior to the expiration of the limitations period for breach of contract claims. (See LDIR Action, Tee.'s Memo. In Opp. To MTD, at 23-24.) This court and others have rejected virtually identical equitable estoppel arguments in RMBS cases, based on the trustees' failure to plead facts sufficient to support their claim that the defendant securitizers' bad faith conduct led the trustees to believe that there were no defective loans or "prevented" them from bringing suit within the limitations period. (See e.g. Flagstar, 2015 WL 1646683, * 3-4 [this court's decision, citing additional authorities], affd on other grounds 143 AD3d 15; Bank of N.Y. Mellon v WMC Mtge. LLC, 53 Misc 3d 967, 971-973 [Sup Ct, NY County Sept. 7, 2016, No. 653099/14, Kornreich, J.] [rejecting equitable estoppel argument where the defendant was "not alleged to have hidden anything or prevented [the trustee] from discovering breaches"]; see also Wells Fargo Bank, N.A. v JPMorgan Chase Bank, N.A., 2014

WL 1259630, * 5 [SD NY Mar. 27, 2014, No. 12 Civ 6168, Cedarbaum, J.], affd on other grounds 643 Fed Appx 44 [2d Cir, Mar. 16, 2016].) The Trustee's invocation of equitable estoppel here is unavailing for the same reasons.[15]

The court has considered the Trustee's remaining contentions and finds them to be without merit.

It is accordingly hereby ORDERED that the motions of defendant DB Structured Products, Inc. to dismiss the first amended complaints in the above-captioned actions are granted, and each action is dismissed in its entirety; and it is further

ORDERED that the motion of HSBC Bank USA, National Association in each action for leave to file a proposed amended complaint is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
March 26, 2018

MARCY S. FRIEDMAN, J.S.C.

[15] In its Failure to Notify decision, the court contrasted the standard for prevention under the equitable estoppel doctrine with the standard for pleading that a securitizer's failure to notify a trustee of breaches of representations and warranties was a proximate cause of the trustee's failure to commence a put-back action within the statute of limitations. (2018 WL 1187676, at * 18 n 18.)