Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Capital, Inc.
2019 NY Slip Op 31954(U)
July 8, 2019
Supreme Court, New York County
Docket Number: 153945/2013
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

IN RE: PART 60 RMBS PUT-BACK LITIGATION — Index No. 777000/2015

NATIXIS REAL ESTATE CAPITAL TRUST 2007-HE2, by COMPUTERSHARE TRUST COMPANY, NATIONAL ASSOCIATION, solely in its capacity as Separate Securities Administrator, — Index No. 153945/2013

Seq. Nos. 14, 15, 2

Plaintiff-Counterclaim Defendant,

– against –

NATIXIS REAL ESTATE CAPITAL, INC.,

Defendant-Counterclaim Plaintiff.

NATIXIS REAL ESTATE HOLDINGS LLC, successor-in-interest to Natixis Real Estate Capital Inc. *f/k/a* IXIS Real Estate Capital Inc., — Index No. 595610/2015

Third-Party Plaintiff,

– against –

WELLS FARGO BANK, N.A.,

Third-Party Defendant.

In this residential mortgage-backed securities (RMBS) breach of contract action, plaintiff Computershare Trust Company, National Association (Computershare), in its capacity as Separate Securities Administrator, sues defendant Natixis Real Estate Holdings LLC, successor to Natixis Real Estate Capital Inc. (together, Natixis), the Seller of the loans that were securitized. The complaint pleads breach of contract causes of action on three grounds: that

upon the loan originators' failure to repurchase loans affected by material breaches of the originators' representations and warranties, Natixis was contractually obligated to repurchase but failed to do so (First and Second Causes of Action); that Natixis was also contractually obligated but failed to repurchase loans affected by material breaches of its own representations and warranties (id.); and that Natixis was contractually obligated but failed to notify other parties to governing agreements of its discovery of breaches of representations and warranties (id., Third and Fourth Causes of Action).

On or about September 17, 2018, Natixis served an amended third-party complaint against Wells Fargo Bank, N.A. (Wells Fargo), the Securities Administrator and Master Servicer for the Trust, as well as an amended answer alleging amended counterclaims against Computershare and Wells Fargo. The causes of action against Wells Fargo in the amended third-party complaint and the amended counterclaims are identical. The first cause of action ("Count I") alleges that Wells Fargo breached its contractual duty, in its capacity as Securities Administrator, to provide Natixis prompt written notice of Wells Fargo's discovery of material breaches of representations and warranties. (Amended Third-Party Complaint, ¶¶ 88, 89 [Am. TPC].) This cause of action is also pleaded as the sole amended counterclaim against Computershare. This cause of action alleges that Computershare is liable as Wells Fargo's "representative and designee" for Wells Fargo's breaches. (Amended Answer, ¶¶ 80-85 [Am. Ans.].) The second cause of action in the amended third-party complaint and the second counterclaim in the amended answer ("Count II") allege that Wells Fargo breached its contractual duty, in its capacity as Master Servicer, to perform its duty to oversee and monitor the Servicer. In particular, this cause of action and counterclaim allege that Wells Fargo failed to cause the Servicer to give Natixis prompt written notice of material breaches, and that Wells

Fargo also failed to conduct "Default Oversight, thereby failing to cause the Servicer to maximize the timely and complete recovery of principal and interest on defaulted Mortgage Loans and REO Properties." (Am. TPC, ¶¶ 93, 94; Am. Ans., ¶¶ 88, 89.) The third cause of action in the amended third-party complaint and third counterclaim in the amended answer ("Count III") allege that Wells Fargo, in its capacity as Master Servicer, was obligated to monitor the Servicer and cause the Servicer to perform its duties under the Pooling and Servicing Agreement (PSA), and that Wells Fargo is contractually obligated to indemnify Natixis "[i]n the event Wells Fargo negligently performed its master servicing duties or recklessly disregarded such duties, causing Natixis harm. . . ." (Am. TPC, ¶¶ 99, 100; Am. Ans., ¶¶ 94, 95.)

Wells Fargo moves to dismiss the amended third-party complaint and amended counterclaims, pursuant to CPLR 3211 (a) (1), (5), and (7). This action is one of a very small number of cases in the Part 60 coordinated RMBS Litigation and, to the best of this court's knowledge, RMBS litigation generally, which asserts claims concerning the duties of securities administrators, master servicers, or servicers. In Nomura Asset Acceptance Corp. Alternative Loan Trust Series 2006-S4 v Nomura Credit & Capital, Inc., 2018 NY Slip Op 30928 [U], 2018 WL 2197830 [Sup Ct, NY County May 14, 2018] [Nomura]), the trustee sued the sponsor (a Nomura entity) for breaches of representations and warranties, and the sponsor brought a third-party action, which alleged a number of claims that are substantially similar to those at issue here, against Wells Fargo, as master servicer and securities administrator, and against a servicer. To the extent applicable, this court will rely, without extended discussion, on the reasoning of and authorities cited in Nomura.

Computershare separately moves to dismiss the third affirmative defense in Natixis' amended answer, which asserts that the claims against Natixis are time-barred. Prior to the

amendment, this defense asserted that the claims were time barred by the statute of limitations, pursuant to CPLR 213. The amendment asserts the bar under "all applicable statutes of limitations, including, without limitation, CPLR 213 and/or any other statutes of limitations made applicable by the borrowing statute in CPLR 202 or any other statute."

By prior motion, Computershare sought dismissal of numerous affirmative defenses raised in Natixis' original answer and of a counterclaim against it alleging that Computershare, as Wells Fargo's representative, breached the PSA by failing to provide Natixis with prompt written notice of breaches of representations and warranties. (Ans., "Count I".)[1] The prior motion will also be addressed in this decision.

Discussion

It is well settled that on a motion to dismiss pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) When documentary evidence under CPLR 3211(a) (1) is considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Leon v Martinez, 84 NY2d at 88.)

Wells Fargo's Motion to Dismiss

Indemnification

As a threshold matter, the court holds that the third cause of action fails as a matter of law

[1] This motion raised issues in common with other cases in the Part 60 coordinated RMBS litigation regarding failure to notify claims, which have now been decided on a coordinated basis.

to state a claim for indemnification in favor of Natixis against Wells Fargo. The PSA indemnification clause, section 9.12, contains two provisions that govern indemnification as between Natixis and Wells Fargo. The first, set forth in the first paragraph of this section, states in pertinent part: The Master Servicer (Wells Fargo) agrees to indemnify Natixis (among others) for "any and all claims, losses, penalties, fines, forfeitures, legal fees and related costs, judgments, and any other costs, liability, fees and expenses that . . . [Natixis] may sustain as a result of the Master Servicer's willful malfeasance, bad faith or negligence in the performance of its duties hereunder or by reason of its reckless disregard for its obligations and duties under this Agreement, including, without limitation, its obligations under Sections 3.02(e), 3.22, 3.23 or 8.12 . . . ," sections that concern regulatory and reporting obligations. This provision further states that enumerated parties, including Natixis as Seller of the loans, "shall immediately notify the Master Servicer if a claim is made by a third party with respect to this Agreement or the Mortgage Loans which would entitle [Natixis, among others] to indemnification under this Section 9.12, whereupon the Master Servicer shall assume the defense of any such claim and pay all expenses in connection therewith. . . ."

Natixis relies on this paragraph in claiming a right to indemnification. (See Natixis Memo. In Opp., at 4.)[2] By its terms, the paragraph unambiguously provides for indemnification of Natixis by Wells Fargo only for third-party claims or losses[3] related to Wells Fargo's conduct as Master Servicer. As discussed above, however, the main action by Computershare does not plead any claims or losses based on Wells Fargo's conduct. In Nomura (2018 WL 2197830, at *

[2] The parties filed separate memoranda of law on each of the three motions addressed by this decision. The memoranda referred to in connection with a given motion are the memoranda filed on that motion.

[3] As used in this decision, losses means any of the enumerated items in section 9.12, including but not limited to judgments (for damages), attorney's fees, and expenses.

16-17), this court considered an indemnification claim by the seller of the loans against a servicer and against Wells Fargo as master servicer, under substantively similar PSA indemnification provisions, which required a relationship between the claim or action being indemnified and the indemnitors' wrongful conduct. In Nomura, the main action alleged wrongful conduct on the part of the seller of loans—in particular, the seller's breaches of representations and warranties and of its separate notification obligation. The decision held that the main action did not meet the contractual requirements for indemnification because it did not allege any "claim . . . relating to" the servicer's or master servicer's wrongful conduct—there, gross negligence and material breaches of their contractual servicing or master servicing obligations, respectively. Here, similarly, the main action alleges wrongful conduct on the part of Natixis as Seller but does not allege any wrongdoing by the servicer or master servicer.[4] On the reasoning of and the authorities cited in Nomura, to which the parties are referred, the court holds that Natixis is not entitled to indemnification from Wells Fargo for any claims or losses for which it may ultimately be held liable in the main action. The third cause of action in the amended third-party complaint and the third amended counterclaim will accordingly be dismissed.

The court reaches a different result as to the viability of the first and second causes of action in the amended third-party complaint and the first and second amended counterclaims. Wells Fargo argues that, although denominated causes of action for breach of contract, they are in substance claims for indemnification, and that they fail because "Natixis has no right to indemnification under the PSA or otherwise." (Wells Fargo Memo. In Supp., at 4.) Wells Fargo correctly argues that a party's characterization of a cause of action does not control a court's

[4] The allegations of wrongful conduct in the main action include not only Natixis' breaches of its own representations and warranties and its failure to notify plaintiff of such breaches, but also its failure to repurchase loans affected by the originators' breaches of representations and warranties. The difference in the wrongful conduct alleged in Nomura and that at issue here is not material to this court's holding.

determination as to its nature. Contrary to Wells Fargo's contention, however, the first and second causes of action do not seek indemnification.

As stated above, the first cause of action pleads a failure to notify claim for breach of contract based on Wells Fargo's failure, in its capacity as Securities Administrator, to satisfy its duty to notify Natixis of its discovery of breaches of representations and warranties that materially affected the value of the loans. (Am. TPC, ¶¶ 88-89.) To hold that this cause of action effectively states a claim for indemnification would be to ignore the First Department's repeated holdings in the RMBS context that a claim against a party for breach of a contractual obligation to notify other parties of its discovery of breaches of representations and warranties is independent of a claim for breach of representations and warranties. As explained by the First Department, claims against both sellers and servicers of loans for failure to notify are separate claims for separate damages. (See Bank of New York Mellon v WMC Mtge., LLC, 151 AD3d 72, 81 [1st Dept 2017]; Federal Housing Finance Agency v Morgan Stanley ABS Capital I Inc., 59 Misc 3d 754 [Sup Ct, NY County Mar. 6, 2018] [FHFA] [this court's prior decision discussing failure to notify cases].)

The second cause of action pleads breach of contract based on Wells Fargo's failure, in its capacity as Master Servicer, to monitor the Servicer and to cause the Servicer to perform its duties, including the duty to notify Natixis of the Servicer's discovery of breaches of representations and warranties. (Am. TPC, ¶ 93.) This cause action also alleges that Wells Fargo, as Master Servicer, breached the PSA "by failing to conduct Default Oversight, thereby failing to cause the Servicer to maximize the timely and complete recovery of principal and interest on defaulted Mortgage Loans and REO Properties." (Id., ¶ 94.) This cause of action, like the first, thus pleads Wells Fargo's breach of contractual obligations that are independent of

Natixis' contractual representations and warranties.

In so holding, the court rejects Wells Fargo's contention that the amended complaint seeks to recover from Wells Fargo for Natixis' "own potential repurchase liability" in the main action, and that Natixis "alleges no independent damages other than the liability it may owe in the First-Party [main] Action." (Wells Fargo Memo. In Supp., at 9.) The first and second causes of action seek damages only "to the extent Natixis is liable [in the main action] for any damages resulting from the Alleged Material Breaches. . . ." (Am. TPC, ¶¶ 90, 95.) Natixis' claim is not, however, one for indemnification in which "a party held legally liable to plaintiff shifts the entire loss to another." (See Mas v Two Bridges Assocs., 75 NY2d 680, 690 [1990].) While Natixis' damages are dependent on an ultimate finding of its liability in the main action, the amended third-party complaint pleads numerous allegations seeking not to pass through its repurchase liability to Wells Fargo, but to hold Wells Fargo liable to the extent that Wells Fargo's breaches of its contractual obligations "exacerbate[ed]" damages for which Natixis may be held liable—e.g., by increasing the repurchase price (Am. TPC, ¶ 37), or failing "to preserve Mortgage Loan value and mitigate damages and losses to the Trust and certificateholders" (id., ¶ 42), or failing to cause the servicer "to maximize the timely and complete recovery of principal and interest on defaulted mortgage loans and REO properties." (Id., Heading at 16 [capital letters omitted].)[5]

In sum, the first and second causes of action plead breaches of contract by Wells Fargo that are independent of Natixis' alleged breaches, and damages that are distinct from the damages for which Natixis may be held liable as a result of its own breaches. The causes of action are for breach of contract, not indemnification. (See Nomura, 2018 WL 2197830, at * 5-6

[5] At the pleading stage, the parties to this action, and to the Part 60 RMBS litigation generally, have provided scant detail as to the repurchase damages or failure to notify damages that may be available upon a finding of liability. As this court has previously noted, the assessment of such damages will require determination of novel issues that must be made on a fully developed factual record. (See FHFA, 59 Misc 3d at 788.)

[upholding impleader of substantively similar third-party breach of contract claims, described above, against Wells Fargo as Securities Administrator and Master Servicer and against Servicer, and distinguishing the breach of contract claims from the contractual indemnification claim]; cf. Lehman XS Trust, Series 2006-GP2 v Greenpoint Mtge. Funding, Inc., 916 F3d 116, 126-127 [2d Cir 2019] [holding that RMBS Trustee's claim against originator for breaches of representations and warranties was one for breach of contract and not indemnification—a determination there relevant to the timeliness of the claim].)

Finally, the court is unpersuaded by Wells Fargo's contention that Natixis' maintenance of the second cause of action is barred by the indemnification provision in Wells Fargo's favor set forth in the last paragraph of section 9.12 of the PSA, which provides:

> "The Unaffiliated Seller [Natixis] agrees to indemnify the Master Servicer [Wells Fargo] and hold it harmless against any and all claims, losses, penalties, fines, forfeitures, legal fees and related costs, judgments, and any other costs, liabilities, fees and expenses that the Master Servicer may incur or sustain in connection with, arising out of or related to a material breach of the Unaffiliated Seller's repurchase obligations under Section 2.03(d)."

Even assuming for purposes of this motion that this provision applies to intra-party claims,[6] the court holds that the provision does not require indemnification of the claims at issue. The provision expressly requires Natixis to indemnify Wells Fargo for claims that arise out of Natixis' repurchase obligations rather than Wells Fargo's own breaches. As held above, however, the second cause of action alleges independent breaches by Wells Fargo and damages dependent upon, but distinct from, those for which Natixis may be liable in the main action in connection with its repurchase obligations.

[6] This indemnification provision appears in PSA § 9.12, which bears the heading "Indemnification; Third Party Claims." Under settled principles of contract interpretation, the language of the heading is properly considered along with the language of the contract in construing its meaning. (See e.g. Universal Amer. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa., 25 NY3d 675, 680-682 [2015]; Anonymous v Anonymous, 137 AD3d 583, 585-586 [1st Dept 2016].)

Significantly, also, a holding that the indemnification provision bars the breach of contract cause of action would leave Natixis without a remedy for Wells Fargo's breaches (if any) of its contractual oversight servicing obligation. This obligation requires Wells Fargo, as Master Servicer, to cause the Servicer to perform its duties and obligations. (PSA § 9.01.) The duties and obligations of the Servicer in turn include the duty to notify specified parties of the Servicer's discovery of breaches of representations and warranties. It is undisputed that, under the PSA, Natixis, as Unaffiliated Seller, among others, is entitled to notice of the Servicer's discovery of such breaches. (Id., § 2.03 [d].) As explained in Nomura, a Servicer's breach of its notification obligations may affect not only the interest of the Trustee or of the certificateholders but also of the loan Seller, as improper servicing practices may affect the timeliness of breach notices and may, for example, increase the repurchase price the Seller is required to pay for defective loans. (Nomura, 2018 WL 2197830, at * 13.) In Nomura, in considering a similar PSA provision imposing a notification obligation on the Servicer, this court held that the Servicer failed to show that Nomura, as loan Seller, lacked standing to enforce the obligation. (Id., at * 13-14.) Here, similarly, Wells Fargo fails to show on this motion that Natixis, as Seller, lacks standing to enforce the master servicing obligation insofar as it relates to the Servicer's notification obligation.

Remaining Bases for Dismissal

The court turns to the remaining bases on which Wells Fargo seeks dismissal of the amended third-party complaint and counterclaims. First, Wells Fargo claims that the pleading of the first and second causes of action is inadequate on several grounds (see Wells Fargo Memo. In Supp., at 14-18), all of which this court rejects.

Natixis is not precluded by its denial that it breached its own contractual obligations from

pleading, in the alternative, that in the event that it is found liable for such breaches, it is entitled to recovery for the exacerbation of its damages as a result of Wells Fargo's own alleged breaches of its contractual duties. Nor do the first and second causes of action fail to plead sufficient detail as to any of the elements of the alleged breaches of contract.

The first cause of action adequately pleads Wells Fargo's discovery of breaches of representations and warranties—discovery that is relevant to Wells Fargo's alleged breach of its duty, in its capacity as Securities Administrator, to provide Natixis with prompt written notice of such discovery. (See generally Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC, 149 AD3d 127, 139-140 [1st Dept 2017] [Natixis I], affg 2015 NY Slip Op 32360 [U], 2015 WL 4038760 [Sup Ct, NY County 2015] [appeal of a prior motion by Natixis to dismiss the complaint in the instant action, discussing, among other issues, the sufficiency of pleading of discovery—there, by Natixis—of breaches of representations and warranties]; Nomura, 2018 WL 2197830, at * 11-13 [collecting RMBS authorities holding the pleading of discovery sufficient absent loan level detail].) The pleading is also sufficiently detailed as to causation, or exacerbation of, Natixis damages. (See id., at * 6.)[7]

The second cause of action also sufficiently pleads Wells Fargo's breach, in its capacity as Master Servicer, of its obligations to supervise the Servicer. Wells Fargo claims that these obligations did not include an obligation to ensure that the Servicer performed its duty to notify Natixis of the Servicer's discovery of Natixis' or an originator's breaches of representations and warranties, and that the pleading of such an obligation impermissibly reads an additional term into the PSA. (See Wells Fargo Reply Memo., at 9.) It is undisputed that Wells Fargo had an

[7] The first cause of action in the original and amended complaints ("Count I") pleads the identical counterclaim against both Wells Fargo and Computershare. In the prior motion to dismiss the complaint, Computershare raised additional objections to the pleading of the counterclaim. Those objections will be addressed in the section of this decision that determines Computershare's prior motion.

obligation, in its capacity as Securities Administrator but not as Master Servicer, to provide prompt written notice to Natixis of Wells Fargo's discovery of breaches of representations and warranties. (PSA § 2.03 [d].) It is also undisputed that the Servicer had an obligation to provide notice to Natixis of the Servicer's discovery of such breaches. (Id.) Contrary to Wells Fargo's apparent contention, however, the fact that Wells Fargo did not have a direct obligation as Master Servicer to notify Natixis of discovery of breaches does not compel the conclusion that Wells Fargo did not have the obligation as supervisor of the Servicer to ensure that the Servicer performed its notification obligation. Moreover, as in Nomura, the scope of and standards for performance of the obligations of Wells Fargo as Master Servicer and of the Servicer have not been discussed in any substantive respect by the parties and cannot be decided at the pleading juncture. (Nomura, 2018 WL 2197830, at * 9-10.)

Wells Fargo also argues that the Appellate Division has incorrectly held that failure to notify claims are separate from claims for breaches of representations and warranties, and that such holdings cannot be reconciled with ACE Secs. Corp. v DB Structured Prods., Inc. (25 NY3d 581 [2015].) Perhaps recognizing that the Appellate Division has adhered to this holding after ACE, Wells Fargo argues, in the alternative, that the Appellate Division has not "recognized" a failure to notify claim by a sponsor (i.e., seller) in particular, and that a sponsor "has an incentive to keep quiet about R&W breaches" and should not be permitted to assert a failure to notify claim against other deal parties. (Wells Fargo Reply Memo., at 12-13.) In fact, Wells Fargo does not cite, and this court is unaware of, any case in which the Appellate Division has considered the viability of a failure to notify claim asserted by a sponsor. Moreover, Wells Fargo's assertion ignores that the PSA here, as is typical in RMBS securitizations, imposes an obligation on other parties to the transaction to give notice to the seller, among others, of

discovery of breaches by the seller of its representations and warranties, and that it is such notice, or the seller's own discovery of breaches, that triggers the seller's repurchase obligation. (See PSA § 2.03 [d].) As similarly held in Nomura (2018 WL 2197830, * 6), the failure to notify claim plausibly pleads that each of the parties on whom the notice obligation is imposed, including the Servicer, has the ability to either frustrate or facilitate the seller's performance of its repurchase obligation and to affect the damages for which the seller may be liable to the trust. Wells Fargo's contention that a seller should not be permitted to maintain a failure to notify claim is thus unpersuasive and unsupported by any legal authority.

Finally, Wells Fargo contends that portions of the first and second causes of action against it for breach of contract in Natixis' amended third-party complaint, and the identical counterclaims against it in Natixis' amended answer, are time-barred.[8] As to the failure to notify claims pleaded against Wells Fargo in its capacity as Securities Administrator, Wells Fargo contends that the claims are barred to the extent based on breaches discovered by Wells Fargo more than six years before Natixis' assertion of the failure to notify claims. (Wells Fargo Memo. In Supp., at 19.) As to Natixis' claims based on Wells Fargo's alleged master servicing defaults, Wells Fargo cites general allegations in the amended third-party complaint that Wells Fargo, as Master Servicer, "did not conduct Default Oversight. . . ," and contends that because Natixis asserts that Wells Fargo "never performed its default oversight responsibilities," Natixis' claims

[8] This action was commenced by filing of a summons with notice on April 30, 2013 by Wells Fargo, solely in its capacity as Securities Administrator. A complaint was filed by Computershare, solely in its capacity as Separate Securities Administrator, on October 4, 2013. By stipulation dated March 4, 2014, so-ordered on April 8, 2014, Natixis consented to the amendment of the caption to name Computershare as plaintiff, while preserving all objections to standing of Wells Fargo to commence and prosecute the action, the right and/or standing of Computershare to file the complaint and prosecute the action, and the appointment of Computershare as Separate Securities Administrator. Natixis filed an answer asserting counterclaims against both Computershare and Wells Fargo on August 5, 2015. Natixis filed its third-party complaint on August 21, 2015. As noted above, on September 17, 2018, it amended its answer and its third-party complaint to assert the counterclaims and causes of action, respectively, at issue on this motion.

for breach of such responsibilities must have accrued at or shortly after the time of closing—more than six years before the assertion of Natixis' claims. (Wells Fargo Memo. In Supp., at 19-20, citing Am. TPC, ¶¶ 72, 73.)

Natixis counters that its claims in the third-party action, like its counterclaims, relate back to the claims in the main action. Although Natixis apparently recognizes that the relation-back doctrine, as codified in CPLR 203, does not technically apply to the third-party action, Natixis argues that the court has broad discretion to apply the doctrine. Natixis contends that compelling reasons exist for the exercise of such discretion, given that Wells Fargo originally commenced the main action and that it would be unfair to permit it to avoid the application of the doctrine by "unilaterally exit[ing] the [main] action." (Natixis Memo. In Opp., at 19-20.)

Wells Fargo advances two further arguments in support of the branch of its motion to dismiss the counterclaims: first, that the counterclaims are identical to the claims in the amended third-party complaint and should be dismissed for the same reasons; and, second, that Computershare was duly appointed as Separate Securities Administrator, and that Computershare, not Wells Fargo, filed the complaint in the main action. (Wells Fargo Memo. In Supp., at 22.)

Natixis responds that its counterclaims against Wells Fargo are proper because Wells Fargo filed the summons commencing the main action and "never initiated a proper substitution" of Computershare. (Natixis Memo. In Opp., at 21.) Natixis further argues that to allow Wells Fargo to unilaterally withdraw from the case would permit it "to insulate itself from liability through the assertion of a statute of limitations defense. . . ." (Id.) In the alternative, Natixis argues that even if Wells Fargo is no longer a party to the main action, Natixis has filed a counterclaim against Computershare and may file similar claims against Wells Fargo as an

"other person[] alleged to be liable," pursuant to CPLR 3019 (a). (Id., at 21-22.) In reply, Wells Fargo argues that formal substitution of Computershare was not required; that "[s]ubstitution or not, Wells Fargo is no longer pursuing first-party claims against Natixis . . ."; and that CPLR 3019 (a) is inapplicable because it requires a counterclaim to be asserted against both a named plaintiff and a third party, but that only Wells Fargo is named in the second counterclaim and the "substance of the [first counterclaim] is directed solely at the non-party, Wells Fargo." (Wells Fargo Reply Memo., at 13.)

As the above discussion of the parties' arguments shows, the timeliness of Natixis' claims may depend, under the relation-back doctrine, on whether the claims are maintainable as counterclaims or as causes of action in the third-party complaint. Although it is abundantly clear that Natixis may not simultaneously maintain duplicative counterclaims and third-party claims, the parties fail to address, in any but the most cursory fashion, whether, given the unusual procedural posture of the case, the counterclaims or the third-party action should be held to be maintainable. Neither party submits comprehensive legal authority on that issue—that is, authority on the scope of CPLR 3019 and the propriety of interposition of the counterclaims against Wells Fargo, as well as the application of the relation-back doctrine to third-party claims as opposed to counterclaims. Wells Fargo has the burden on its motion of showing both that the counterclaims, rather than the third-party claims, should be dismissed and that the relation-back doctrine does not save the third-party claims. On this briefing, Wells Fargo fails to meet this burden.

In declining to dismiss Natixis' claims as untimely, the court also emphasizes that, as discussed above, Natixis' pleading of Wells Fargo's breaches (i.e., Wells Fargo's alleged discovery of breaches and failure, in its capacity as Securities Administrator, to provide notice of

such discovery, and Wells Fargo's alleged failure to perform its supervisory duties as Master Servicer), is sufficient notwithstanding the absence of loan level detail as to the particular loans affected by breaches, the specific breaches, or the dates of discovery. The date of accrual of the claims based on these breaches—the starting point for any statute of limitations analysis—will require a fully developed factual record. As discussed in this court's prior RMBS decisions, it suffices for pleading purposes at the motion to dismiss stage that the pleading supports a reasonable inference that there are some timely claims. (See generally FHFA, 59 Misc 3d at 781-782; HSBC Bank USA, N.A., Series 2007 OAR5 v Merrill Lynch Mtge. Lending, Inc., 2019 NY Slip Op 30358 [U], 2019 WL 646413, * 3 [Sup Ct, NY County Feb. 15, 2019].)[9]

Wells Fargo's motion to dismiss will accordingly be denied except as to Natixis' third-counterclaim for contractual indemnification which, together with the identical third cause of action in the amended third-party complaint, will be dismissed for the reasons stated above.

Computershare's Motion to Dismiss the Statute of Limitations Defense

Computershare moves to dismiss the statute of limitations defense asserted as the third affirmative defense in Natixis' amended answer. The motion advances three grounds for dismissal: first, that Natixis was required to seek leave of court prior to service of the amended answer and failed to do so; second, that the defense is barred by the law of the case doctrine; and

[9] In the section of its brief on the asserted untimeliness of Natixis' breach of contract claims, Wells Fargo also seeks dismissal of certain of Natixis' claims that Wells Fargo's failure to provide prompt notice increased Natixis' damages. It argues that Natixis cannot claim that Wells Fargo's delay increased its damages because its right to substitute mortgage loans under the PSA ended more than six years before the assertion of the third-party claims and counterclaims; that Natixis cannot claim increased damages because loans were liquidated, to the extent the liquidation occurred more than six years before the assertion of the third-party claims and counterclaims; and that Natixis cannot claim increased damages due to its inability to recoup its losses from originators, to the extent that the originators were "defunct or insolvent" more than six years before the assertion of the claims and counterclaims. (Wells Fargo Memo. In Supp., at 20.) As held above, the failure to notify claims are adequately pleaded absent loan level detail as to the dates of Wells Fargo's breaches. Wells Fargo's claims as to the available damages for breaches must therefore await a fully factually developed record as to the accrual date of the particular breaches.

third, that Natixis waived the right to assert the applicability of a foreign state's limitations period. As noted above, the original answer pleaded that the claims against Natixis were time-barred under New York law pursuant to CPLR 213, while the amended answer asserts the bar under "CPLR 213 and/or any other statutes of limitations made applicable by the borrowing statute in CPLR 202 or any other statute." (Am. Ans., Third Aff. Defense.) The court assumes for the purposes of this motion that the amendment did not require leave of court. The court nevertheless holds that the statute of limitations defense is barred by the law of the case doctrine.

Natixis brought a prior motion to dismiss on the ground, among others, that the complaint was barred by the six-year New York statute of limitations for a breach of contract claim, as set forth in CPLR 213. This court denied the motion, rejecting Natixis' contention that the claims accrued on the "as of" date of the contract, rather than on its execution date. The Appellate Division affirmed this holding, reasoning that "[a] claim for breach of warranty accrues at the time the contract is executed, not on its 'as of' date," and that, in this case, "the PSA was executed on April 30, 2007. The trust at issue closed on April 30, 2007. . . . Thus, April 30, 2013 (the date plaintiff commenced the action) was the last day on which plaintiff could sue, and the action is therefore timely." (Natixis I, 149 AD3d at 134-135.)

It is well settled that "[a]n appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court . . . [and] operates to foreclose re-examination of [the] question absent a showing of subsequent evidence or change of law. Under the doctrine, parties or their privies are preclude[d from] relitigating an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue." (Carmona v Mathisson, 92 AD3d 492, 492-93 [1st Dept 2012] [internal citations and quotation marks omitted]; accord Delgado v City of New York, 144

AD3d 46, 50-51 [1st Dept 2016].) A party may not raise "new arguments" where it had a "full and fair opportunity to raise them" on a prior appeal, absent a showing of "subsequent evidence or change of law." (See Matter of Citigroup Global Mkts., Inc. v Fiorilla, 151 AD3d 665, 666 [1st Dept 2017], lv dismissed 151 NY3d 986; Matter of Brodsky v New York City Campaign Fin. Bd., 107 AD3d 544, 545-546 [1st Dept 2013].)

Natixis claims that the amendment of the statute of limitations defense was "precipitated" by Deutsche Bank National Trust Co. v Barclays Bank PLC (156 AD3d 401 [1st Dept 2017] [DBNT/Barclays], lv granted 32 NY3d 904 [2018].) (Natixis Memo. In Opp., at 2.) As this court has previously explained, that decision did not effect a change in the law that supports the amendment. In DBNT/Barclays, the Appellate Division "applied existing tests in determining where a nonresident RMBS trustee's cause of action accrues," and "did not articulate a new test, or create a new statute of limitations defense for RMBS trustees. . . ." (Nomura Asset Acceptance Corp., Series 2006-AF2 v Nomura Credit & Capital, Inc., 2018 WL 5099045 at * 3 [Sup Ct, New York County Oct. 18, 2018] [this court's decision, following DBNT/Barclays, of a coordinated motion in the RMBS litigation for leave to amend to assert a statute of limitations defense based on the borrowing statute].)

Natixis also unpersuasively argues that it did not have a full and fair opportunity to assert the applicability of the borrowing statute. As Natixis points out, in pleading the statute of limitations defense, it was not required to allege a specific statute or even the correct applicable statute. (Natixis Memo. In Opp., at 9; Immediate v St. John's Queens Hosp., 48 NY2d 671, 673 [1979], rearg denied 48 NY2d 975; DeSanctis v Laudeman, 169 AD2d 1026 [3d Dept 1991] [holding that the defendant did not waive the statute of limitations defense where the defendant incorrectly cited the CPLR instead of the EPTL].) On the facts of this case, however, Natixis

effectively consented to the law to be applied. It did not merely plead that CPLR 213 barred the claims, but litigated a motion to dismiss based on this statute through its appeal to the First Department, which explicitly rejected the defense and held the claims timely. (Natixis I, 149 AD3d at 134-135.) Moreover, Natixis cannot plausibly claim that it was not aware of the potential applicability of the borrowing statute, as the borrowing statute was asserted as early as 2014 in the coordinated Part 60 RMBS litigation. (See Nomura [borrowing statute decision], 2018 WL 5099045 at * 3.) Natixis also makes no showing that its claim under the borrowing statute is based on newly acquired evidence or, put another way, that it did not have evidence, at the time of the prior motion, to support its borrowing statute defense. (See Lee v Chun Ka Luk, 127 AD3d 612, 613 [1st Dept 2015].) Having litigated the statute of limitations solely under the New York statute, Natixis cannot be permitted to re-litigate the defense under the borrowing statute.[10]

The Appellate Division's decision on the application of the law of the case doctrine in connection with a capacity/standing issue previously raised by Natixis in this action is not to the contrary. On the appeal of Natixis' motion to dismiss, the Appellate Division affirmed this court's holding that the Securities Administrator had standing to prosecute this action. (Natixis I,

[10] In light of this holding, the court need not consider whether Natixis satisfies the merits element of the standard for grant of leave to amend, which requires that the proffered amendment not be "palpably insufficient or clearly devoid of merit." (See e.g. MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499, 500 [1st Dept 2010].) Under the borrowing statute, CPLR 202, where a nonresident brings an action based upon a cause of action "accruing without the state," the action must be timely under the laws of this state and of the place without the state where the cause of action accrued. As previously explained by this court, in DBNT/Barclays, a case brought by a nonresident RMBS trustee, the Appellate Division held that the cause of action was untimely, whether the place where the cause of action accrued was held to be the place of the plaintiff's residence or was determined by applying a multi-factor test. (Nomura [borrowing statute], 2018 WL 5099045, at * 3.) Here, in arguing that the borrowing statute applies, Natixis cites the California residence of the trustee, although the trustee is not the plaintiff. Moreover, if the plaintiff is considered to be Wells Fargo, which initially commenced the action in its capacity as the Securities Administrator, the state statute of limitations that may apply under the residence test is not the California 4 year statute of limitations, but the statute of limitations of Wells Fargo's residence. Natixis does not, however, discuss the impact of either Wells Fargo's or Computershare's residence on the application of the borrowing statute under either the plaintiff residence or the multi-factor test.

149 AD3d at 132.) In a subsequent decision, the Appellate Division held that this court erred in denying a motion, based on law of the case, for discovery bearing on Computershare's appointment as Separate Securities Administrator and therefore on its authority to maintain this action. (Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Capital, Inc., 155 AD3d 482, 483 [1st Dept 2017] [Natixis II], modifying 2016 WL 6686140 [Sup Ct, NY County Nov. 9, 2016].) The Appellate Division held that the prior decision did not bar Natixis' argument that Computershare lacked capacity to sue because its appointment did not satisfy the requirements of the PSA, and that this issue was not actually litigated on defendant's motion to dismiss. (155 AD3d at 483.) The Court arguably distinguished between Natixis' claim regarding Computershare's lack of capacity to sue and Natixis' claim, on the prior motion, regarding Wells Fargo's lack of standing. In any event, the Court found that on the prior motion, the allegations of the complaint that Computershare had been duly appointed were assumed to be true, and that "it was only after discovery commenced that defendant could determine whether the requirements of section 10.10 [of the PSA governing Computershare's appointment] had been satisfied." (Id., at 483.) Here, in contrast, as held above, Natixis does not claim that any information about the plaintiff's residence or the accrual of the claims in the main action was not available to it at the time of the prior motion. Nor does Natixis make any showing that it did not have a full and fair opportunity at that time to raise the claim under the borrowing statute. Computershare's motion to dismiss the statute of limitations defense in Natixis' amended answer will accordingly be granted.

Computershare's Prior Motion to Dismiss

In its prior motion, Computershare moved to dismiss the single counterclaim brought against it in Natixis' original answer, as well as numerous affirmative defenses also asserted by

Natixis in the original answer. Without conceding that Natixis amended its answer as of right, Computershare seeks dismissal of the claims asserted in the amended answer on the grounds asserted in the prior motion. It is noted that the pleading of the counterclaim against Computershare in the original and amended answers ("Count I") is materially similar. The pleading of the affirmative defenses in the original and amended answers also does not differ in any material respect, with the exception that the statute of limitations (third affirmative) defense in the original answer was based on CPLR 213 and the amended answer also asserts the borrowing statute. The statute of limitations defense in the amended answer will be dismissed, on Computershare's separate motion, for the reasons stated above.

Counterclaim

Natixis' first counterclaim against both Computershare and Wells Fargo is based on the "duty to notify" and alleges that "Wells Fargo, in its capacity as Securities Administrator, and . . . Computershare, as Wells Fargo's representative and designee, breached the express provisions of the PSA by failing to provide Natixis prompt written notice . . ." of breaches of representations and warranties. (Am. Ans. ¶ 84, Ans. ¶ 51; "Nature of the Counterclaims," Am. Ans. ¶¶ 1-10, Ans. ¶¶ 1-7.)[11]

The main action was commenced by the filing of a summons with notice by "Natixis Real Estate Capital Trust 2007-HE2, by Wells Fargo Bank, National Association, solely in its capacity as Securities Administrator." Pursuant to an Instrument of Appointment and Acceptance (IAA) between Wells Fargo and Computershare, dated June 5, 2013, Wells Fargo appointed Computershare as Separate Securities Administrator, and Computershare assumed the "Securities Administrator Repurchase Duties," which included litigation of the claims in the

[11] The allegations of the counterclaim are substantially the same as the allegations of the third-party and amended third-party complaint.

main action. The complaint was subsequently filed by "Natixis Real Estate Capital Trust 2007-HE2, by Computershare Trust Company, National Association, solely in its capacity as Separate Securities Administrator." The complaint pleads that Computershare was duly appointed pursuant to PSA § 10.10, and is authorized by its appointment "to take actions on behalf of the Trust for purposes of enforcing repurchase obligations, including, but not limited to commencing and prosecuting litigation." (Compl. ¶ 13.) The complaint further pleads that Computershare "assumes and undertakes the conduct of this action, originally filed by Wells Fargo on April 30, 2013, on behalf of the Trust and for the benefit of the Certificateholders." (Id.)

In moving to dismiss the counterclaim, Computershare contends that it is not a party to, and has no obligations under, the PSA, and that it is not alleged to have violated any duties imposed by the PSA. (Computershare Memo. In Supp., at 1, 6.) Computershare also contends that the IAA provides that Computershare does not assume the liabilities of Wells Fargo. (Id., at 1.) In opposition, Natixis acknowledges that it "does not assert any claims against Computershare based Computershare's conduct," and that the counterclaim is based solely on Wells Fargo's alleged failure to give prompt written notice of breaches. (Natixis Memo. In Opp., at 3-4.) Natixis contends, instead, that its counterclaim against Computershare is procedurally proper pursuant to CPLR 3019 (c) because "(i) Computershare is purporting to act as nominee for Wells Fargo, (ii) Wells Fargo is a beneficially interested party and (iii) had Wells Fargo remained the named plaintiff in the Action, Natixis would have been able to assert its counterclaim against Wells Fargo." (Id., at 5.)[12] In response, Computershare disputes Natixis' contention that it is the nominee of Wells Fargo, stating that consistent with its authority under the IAA and, as alleged in the complaint, its claims are brought on behalf of the Trust, not on

[12] Natixis acknowledges that the claim against Computershare, pursuant to CPLR 3019 (c), is "capped at Natixis's alleged liability" in the main action. (Natixis Memo. In Opp., at 8 n 2.)

behalf of Wells Fargo. (Computershare Reply Memo., at 3; Compl., ¶ 13.) Computershare further contends that the counterclaim is contingent on the outcome of the main action and is therefore improper under New York law. (Computershare Reply Memo., at 2-3.)

Natixis' argument that the claim is brought on behalf of Wells Fargo, and that Wells Fargo is the beneficially interested party, is unpersuasive. Computershare, in filing its complaint in its capacity as Separate Securities Administrator, and Wells Fargo, in filing the original Summons with Notice, both appear to have acted as nominal plaintiffs on behalf of the Trust. The court finds, however, that Computershare has not shown as a matter of law that the counterclaim is not maintainable pursuant to CPLR 3019.

CPLR 3019 (c), which governs counterclaims against a trustee or nominal plaintiff, provides:

> "In an action brought by a trustee or in the name of a plaintiff who has no actual interest in the contract upon which it is founded, a claim against the plaintiff shall not be allowed as a counterclaim, but a claim existing against the person beneficially interested shall be allowed as a counterclaim to the extent of the plaintiff's claim, if it might have been so allowed in an action brought by the person beneficially interested."

Notwithstanding that the statute on its face authorizes a counterclaim solely against the party beneficially interested—a requirement that does not appear to be met here—there is substantial authority that a counterclaim may be brought alleging any claim against a Trustee, in its capacity as a Trustee. (Siegel, NY Prac § 225 [6th ed 2018] ["If a party has several capacities, a counterclaim involving that party may be used only in respect of the capacity in which she appears in the action. Where T is a trustee, for example, and brings an action in behalf of the trust, the defendant can interpose as a counterclaim any claim existing against T in T's trustee capacity, or against the whole body of beneficiaries of the trust, but can't interpose a claim existing against T personally and having no relationship to the trust"]; see Siegel, Practice

Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3019:16; 2 Robert L. Haig, New York Practice, Commercial Litigation in New York State Courts § 8:139 [4th ed 2018].) Thus, a counterclaim against Wells Fargo in its capacity as Securities Administrator, at least if it had continued as plaintiff, would appear to fall within this doctrine.

There is also authority that where the plaintiff sues as the assignee of a claim against the defendant, a claim accrued in the defendant's favor against the assignor may be asserted by the defendant as a counterclaim against the plaintiff-assignee to the extent of a set-off against the plaintiff-assignee's claim. (See Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3019:5; Matter of Estate of Pokrass, 105 AD2d 659, 661 [1st Dept 1984] ["On the record here, [petitioner] is simply an assignee of a claim, asserting that claim, who is subject to defenses or setoffs existing against either the assignee or assignor, subject to the applicable rules of law"].) As the Commentaries have explained, CPLR 3019 originally had provisions governing assertion of counterclaims against assignees, but is now subject to General Obligations Law § 13-105, which provides:

> "Where a claim or demand can be transferred, the transfer thereof passes an interest, which the transferee may enforce by an action or special proceeding, or interpose as a defense or counter-claim, in his own name, as the transferrer might have done; subject to any defense or counter-claim, existing against the transferrer, before notice of the transfer, or against the transferee."

Here, the PSA contained a provision setting forth the terms on which Wells Fargo as Securities Administrator could assign or delegate a "qualified Person" to perform its duties. (PSA, § 10.10.) Pursuant to the IAA, Wells Fargo appointed Computershare to assume its "Securities Administrator Repurchase Duties." (IAA, §1.2 [NYSCEF Doc No 162].) By letter dated June 11, 2013, Wells Fargo requested that, as required by PSA § 10.10, the Depositor "consent to the assignment" by Wells Fargo, as Securities Administrator, to Computershare, as Separate

Securities Administrator, of any duties Wells Fargo "may have to enforce repurchase obligations. . . ." (Letter Annexed to IAA.)

Despite Wells Fargo's apparent transfer or assignment to Computershare of the authority to prosecute the claims in the main action against Natixis, the parties have not discussed the legal authority, under CPLR 3019 and General Obligations Law §13-105, governing the application of the doctrine permitting the assertion of counterclaims against an assignee.[13] The court accordingly will not finally determine on this record whether Computershare qualifies as an assignee or transferee within the meaning of GOL 13-105.

In declining to dismiss at the pleading stage, the court rejects Computershare's claim that the counterclaim is not maintainable because it is contingent on the outcome of the main action. (Computershare Reply Memo., at 2.) As discussed above in connection with Wells Fargo's motion, the first counterclaim against Wells Fargo and Computershare pleads breaches of contract by Wells Fargo (i.e., failure of Wells Fargo to notify Natixis of its discovery of breaches of representations and warranties) that are independent of the breaches alleged in the main action against Natixis (i.e., breaches by Natixis of representations and warranties and failure to repurchase loans when obligated to do so). The counterclaim also pleads damages that are distinct from the damages for which Natixis may be held liable as a result of its own breaches. The counterclaim is therefore not contingent but predicated on an existing cause of action, and is maintainable under long-standing authority. (See Atlantic Gulf & West Indies S.S. Lines v City of New York, 271 AD 1008, 1008 [1st Dept 1947], lv denied 272 AD 793.)

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[13] Computershare appears to argue that a counterclaim may not be asserted against it because the IAA contains a provision that "the Separate Securities Administrator shall have no liability or responsibility under the Underlying Agreement [the PSA] . . . for any period prior to the Effective Date or for any act or omission of the Securities Administrator [Wells Fargo] under or in connection with the Underlying Agreement. . . ." (IAA, § 1.5.; Computershare Memo. In Supp., at 9.) Computershare does not analyze this provision in light of CPLR 3019 (c) and General Obligations Law § 13-105.

Affirmative Defenses

Computershare moves to dismiss the majority of the affirmative defenses asserted by Natixis. The pleading of these defenses is substantially the same in Natixis' answer and amended answer.

First, Computershare argues that the first four affirmative defenses are barred by the law of the case doctrine. As to the first affirmative defense, for failure to state a cause of action, Computershare fails to identify any specific prior holdings of this court as to pleading defects. In addition, even assuming that failure to state a cause of action is properly pleaded as an affirmative defense, given that such a failure may be asserted at any time (CPLR 3211 [e]), inclusion of the defense in the answer is non-prejudicial "surplusage" and may stand. (See Riland v Frederick S. Todman & Co., 56 AD2d 350, 352 [1st Dept 1977]; accord San-Dar Assocs. v Fried, 151 AD3d 545, 545-546 [1st Dept 2017].) The second affirmative defense, for lack of standing, is maintainable based on the Appellate Division's decision that the defense encompasses the claim that Computershare lacks capacity—an issue that cannot be determined on the pleadings. (Natixis II, 155 AD3d 482, supra.) The third affirmative defense, based on the statute of limitations, will be dismissed for the reasons set forth above on Computershare's motion to dismiss this defense. The fourth affirmative defense, for "failure to meet the requisite condition precedent prior to filing [the] Action," will stand. As held by this court on Natixis' prior motion to dismiss, and affirmed by the Appellate Division, this action is maintainable based on allegations as to Natixis' discovery of breaches of representations and warranties, as discovery and written notice to a securitizer of breaches are independent "triggers" of a securitizer's repurchase obligation. (Natixis I, 149 AD3d at 138-139, affg 2015 WL 4038760, at * 4-5].) Having held that this action was maintainable based on the allegations as to discovery,

this court did not determine whether, if Computershare were unable to prove discovery, it could also maintain the action based on notice to Natixis (and the originators) of breaches. Rather, the court held that factual issues existed as to the sufficiency and timeliness of any repurchase demands. (Id., 2015 WL 4038760, at * 5 n 3].)

The fifth affirmative defense alleges failure to mitigate damages. The eighth and ninth affirmative defenses allege equitable defenses including estoppel, waiver, laches, in pari delicto, and unclean hands. Computershare argues that Natixis fails to allege any facts in support of these defenses. (Computershare Memo. In Supp., at 13, 15-16.) Natixis responds that its mitigation defense is based on Wells Fargo's failure to provide Natixis with prompt notice of Wells Fargo's discovery of material breaches. (Natixis Memo. In Opp., at 14.) Natixis also argues that its equitable defenses are grounded in Wells Fargo's failure to provide such notice, and that it requires disclosure (i.e., discovery) on the extent and timing of Wells Fargo's discovery of such breaches. (Id. at 16.) Computershare replies that these defenses are not maintainable based on Wells Fargo's conduct because Wells Fargo is a non-party. (Computershare Reply, at 7-8.)

It is well settled that "[i]n moving to dismiss an affirmative defense pursuant to CPLR 3211 (b), the plaintiff bears the heavy burden of showing that the defense is without merit as a matter of law. The allegations set forth in the answer must be viewed in the light most favorable to the defendant, and the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed." (Granite State Ins. Co. v Transatlantic Reins. Co., 132 AD3d 479, 481 [1st Dept 2015] [citing 534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick, 90 AD3d 541, 541-542 [1st Dept 2011] [other internal citations and quotation marks omitted]; Pugh v New York City Hous. Auth., 159 AD3d 643, 643 [1st Dept 2018].) Moreover,

an affirmative defense should not be dismissed on a pre-discovery motion "where there remain questions of fact requiring a trial." (Granite State Ins. Co., 132 AD3d at 481; compare Reversible Destiny Found., Inc. v Post, 2019 NY Slip Op 05225, 2019 WL 2619848 [1st Dept June 27, 2019].)

Here, although the pleading of the affirmative defenses lacks factual detail, the answer also pleads counterclaims based on Wells Fargo's alleged wrongful failure to notify Natixis of Wells Fargo's discovery of breaches. As discussed above, the court cannot determine on the record as briefed whether these counterclaims are maintainable against Computershare, pursuant to General Obligations Law § 13-105, as a possible transferee of claims from Wells Fargo. To the extent that the affirmative defenses are related to the counterclaims they will therefore also stand at this juncture. The waiver defense will, however, be dismissed as the allegations of the answer, even if viewed in the light most favorable to Natixis, do not support a claim that Computershare or Wells Fargo intentionally relinquished a known right.

The sixth affirmative defense pleads that the claims are barred "because any alleged breaches of representations and warranties are not the proximate cause of any loss in value of any mortgage loan or damages to the Trust or the certificateholders." The seventh affirmative defense pleads that the claims are barred because, "to the extent that any injury or damages were incurred as alleged in the Complaint, which are denied, any such injury or damages were caused and brought about by the acts, conduct or omissions of individuals and/or entities other than Natixis." Computershare claims that, contrary to the governing agreements and developing law in the RMBS context, the defenses require proof of "loss causation." (Computershare Memo. In Supp., at 13-15.) Natixis argues that the defenses do not plead that loss causation is required, and that the defenses are maintainable because Computershare must ultimately prove that the

value of loans has been materially and adversely affected, thus triggering Natixis' repurchase obligation under the PSA. Natixis also argues that the burden of proof of proximate cause of loss remains with plaintiff, notwithstanding the assertion of the affirmative defenses. (Natixis Memo. In Opp., at 14-16.) On this motion, the court need not and will not determine the standard of proof which must be met in order to establish a "material and adverse effect" on the value of loans allegedly subject to repurchase. Like the defense of failure to state a cause of action, the defenses regarding causation appear to be non-prejudicial surplusage, and may be maintained at the pleading stage.

The eleventh affirmative defense pleads that "Natixis is entitled to receive indemnification or contribution from others if it were to incur liability as a result of the Action." Computershare argues that a claim for common law indemnification or contribution is not maintainable in this breach of contract action. (Computershare Memo. In Supp., at 17.) In response, Natixis does not assert that the defense seeks recovery under the common law. Rather, it asserts that Natixis' allegations in its answer demonstrate that Natixis is entitled to indemnification from Wells Fargo pursuant to PSA section 9.12. On Wells Fargo's motion, the court dismissed a claim by Natixis for contractual indemnification under this section. The affirmative defense will therefore also be dismissed.

Finally, the twelfth affirmative defense pleads that the claims are barred "to the extent the certificateholder or certificateholders participating in directing this litigation or directing plaintiff's counsel purchased the certificates believing that breaches of representations or warranties had (or possibly had) occurred." Computershare seeks dismissal of this defense on the ground that the beliefs and motivations of the certificateholders are irrelevant to whether the trust is entitled to specific performance or damages due to Natixis' failure to repurchase loans.

(Computershare Memo. In Supp., at 18.) Computershare also claims that the sole purpose of the defense is to permit Natixis to seek impermissible discovery from Computershare. (Id.) In opposition, Natixis characterizes the defense as asserting "that the certificateholders improperly (i.e., in ways not permitted under the transaction documents or applicable law) directed Wells Fargo and/or Computershare to commence this Action." (Natixis Memo. In Opp., at 17.) At the oral argument of the motion, Natixis also appeared to argue that the defense supports discovery as to Computershare's standing in this action. (Oral Arg. Tr. at 30 [NYSCEF Doc No 202].)

Natixis submits no authority that the pleaded allegation—i.e., the allegation that directing certificateholders believed that breaches of representations and warranties had occurred when they purchased the certificates—would support a legally viable defense to Computershare's claims against it for failure to perform its repurchase obligations under the PSA. Natixis does not assert, let alone cite legal authority, that the beliefs of the certificateholders at the time of purchase of the certificates support a claim of champerty. (Cf. Deutsche Bank Natl. Trust Co. v WMC Mtge., LLC, 2015 WL 1650835, * 41-42 [D Conn Apr. 14, 2015, Civ Nos 3:12-CV-933, 3:12-CV-969, 3:12-CV-1699, 3:12-CV-1347 [CSH]] [reasoning that the champerty doctrine had no application to the cases at bar where the PSA did not authorize certificateholders to provide notices of default in connection with the sponsor's breaches of representations, and where the PSA required the trustee to file the actions on behalf of the certificateholders], reconsidered on other grounds 2015 WL 11237310 [2015].)

To the extent that Natixis re-characterizes its defense as one based on the allegation that certificateholders impermissibly directed commencement of the action, this allegation is not in fact pleaded in support of the defense. Moreover, this allegation arguably overlaps with the capacity or standing defense which is maintainable under the Appellate Division decision in

Natixis II (155 AD3d 482, supra.) The twelfth affirmative defense will accordingly be dismissed. This dismissal shall not be construed as precluding appropriate discovery from certificateholders. The scope of such discovery must, however, be addressed in connection with specific discovery requests.

ORDER

It is hereby ORDERED that the motion of Wells Fargo Bank, N.A. (Wells Fargo) to dismiss the amended third-party complaint and amended counterclaims (Motion Seq. No. 14) is granted solely to the extent of dismissing the third cause of action ("Count III") in the amended third-party complaint of Natixis Real Estate Holdings LLC (Natixis) and the third counterclaim ("Count III") in Natixis' amended answer; and it is further

ORDERED that the motion of Computershare Trust Company, National Association (Computershare) to dismiss the third affirmative (statute of limitations) defense in Natixis' amended answer (Motion Seq. No. 15) is granted to the extent of dismissing such defense; and it is further

ORDERED that the motion of Computershare to dismiss the first counterclaim in Natixis' answer and amended answer ("Count I") and to dismiss various affirmative defenses therein (Motion Seq. No. 2) is granted solely to the extent of dismissing the following affirmative defenses: the third; the eighth to the extent that it asserts waiver; the eleventh; and the twelfth.

This constitutes the decision and order of the court.

Dated: New York, New York
July 8, 2019

MARCY FRIEDMAN, J.S.C.