Freedom Trust 2011-2 v DB Structured Prods., Inc.
2022 NY Slip Op 32096(U)
July 2, 2022
Supreme Court, New York County
Docket Number: Index No. 656245/2019
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREA MASLEY** **PART** **48**

Justice

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INDEX NO. 656245/2019

FREEDOM TRUST 2011-2, ON BEHALF OF ACE SECURITIES CORP. HOME EQUITY LOAN TRUST, SERIES 2006-FM1,

MOTION DATE

MOTION SEQ. NO. 001

Plaintiff,

- v -

DB STRUCTURED PRODUCTS, INC.,

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 34

were read on this motion to/for DISMISS .

In this action for breach of contract related to a residential mortgage-backed securities (RMBS) trust, defendant DB Structured Products, Inc. (DBSP) moves, pursuant to CPLR 3211 (a) (1), (3), (5) and (7), to dismiss the complaint brought by plaintiff Freedom Trust 2011-2 (Freedom), on behalf of Ace Securities Corp., Home Equity Loan Trust, Series 2006-FM1 (Trust).

BACKGROUND

According to the complaint, the process of securitizing the residential mortgage loans in this action is typical of RMBS structured finance transactions. (NYSCEF Doc. No. [NYSCEF] 18, Compl. ¶ 49.) The Trust was created pursuant to a Pooling and Servicing Agreement dated August 1, 2006 (PSA). (*Id.* ¶ 31.) DBSP, as the Trust's sponsor, acquired 6,493 residential mortgage loans from loan originator Fremont Investment and Loan pursuant to a Mortgage Loan and Purchase Agreement dated August 25, 2006 (MLPA) for the purpose of selling them to a depositor, here, Ace

Securities Corp. (Depositor), a special purpose vehicle affiliated with DBSP. (*Id.* ¶¶ 32, 35, 48.) Depositor transferred the mortgage loans, which had an aggregate principal balance of $1,451,859,623 as of August 1, 2006, to the Trust, at which the Trust issued certificates with an aggregate face value of $1,412,660,000 to Depositor, who then sold the certificates to nonparty Deutsche Bank Securities, Inc. (*Id.* ¶ 49; *see generally* NYSCEF 20, Prospectus Supplement.) Deutsche Bank Securities, Inc. then sold the certificates to investors. (NYSCEF 18, Compl. ¶ 49.) Under the PSA, the Trust holds the mortgage loans for the benefit of the investors in the certificates. (*Id.* ¶ 50.) Nonparty HSBC Bank USA, National Association (Trustee) serves as the Trustee for the Trust. (*Id.* at 1[1].) Freedom owns certificates corresponding to approximately 29% of the total outstanding certificate balance (*id.* ¶ 112), and claims it owns a beneficial interest in and equitable title to the Trust. (*Id.* ¶ 30).

An RMBS trust typically derives revenue from payments made on the underlying mortgage loans, and thus, the value of an RMBS trust is contingent upon the characteristics and quality of those loans, including the underwriting process, the borrowers' creditworthiness, and the information supplied by the borrowers on the loan applications. (*Id.* ¶ 39.) Here, DBSP made a series of representations and warranties in the MLPA and PSA about the quality, characteristics and risk profile of each loan in the Trust. (*Id.* ¶¶ 60-63.) DBSP had selected the mortgage loans it wished to securitize and had exclusive access to the documentation associated with those loans. (*Id.* ¶¶ 17-18.) By doing so, Freedom alleges that DBSP assumed the risk that the loans it had selected for securitization carried the represented characteristics and risk profile. (*Id.* ¶

[1] Pages cited refer to NYSCEF generated pagination.

14.) Freedom further alleges the representations and warranties DBSP made were "essential contract terms, without which the [c]ertificates would not have been marketable" because "[a] core feature – if not the core feature – of that bargain was that DBSP, not the Trust or investors, should bear the risk of defective Mortgage Loans." (*Id.* ¶ 16.)

Early in the life of the Trust, DBSP allegedly discovered that many of the mortgage loans breached DBSP's representations and warranties in the documents. (*Id.* ¶ 3.) DBSP undertook an extensive review of the loans it had securitized, engaged firms to reunderwrite the affected loans and sought reimbursement from the loan originators for "breached out" loans. (*Id.* ¶¶ 3, 6, 21, 77.) DBSP, though, never told the Trustee or the certificateholders of what it had learned (*id.* ¶ 76), and failed to cure a single material breach it had discovered in its review. (*Id.* ¶ 8.) Freedom subsequently performed its own forensic and data reviews of numerous mortgage loans in the Trust to determine whether they conformed with DBSP's representations and warranties. (*Id.* ¶¶ 54-58.) These reviews revealed that 1,992 mortgage loans placed in the Trust did not conform to DBSP's representations and warranties. (*See id.* ¶¶ 2, 54-58, 64-70.)

Freedom caused notices of breach to be sent to the Trustee, and the Trustee then sent DBSP four notices between April 23, 2012 and January 16, 2013 identifying the defective loans and explaining the nature of the breaches. (*Id.* ¶¶ 82-85, 87-90.) DBSP, pursuant to Section 7(a) of the MLPA, has repurchased only five of the 1,992 breaching mortgage loans identified in the breach notices. (*Id.* ¶ 20, 93.)

On August 24, 2012, Freedom commenced an action, purportedly on behalf of the Trust, alleging that DBSP had breached its representations and warranties about

the quality and characteristics of the securitized mortgage loans (Original Action). (*See Freedom Trust 2011-2 v DB Structured Products, Inc.*, Sup Ct, NY County, index No. 652985/2012 [Original Action]; NYSCEF 18, Compl. ¶ 9.) The Trustee, apparently acting at Freedom's direction, subsequently filed a complaint, an amended complaint and moved for leave of court to file a proposed second amended complaint in the Original Action. (*Id.* ¶ 9.) Significantly, the caption on the complaint no longer matched the caption on the summons with notice; the Trustee had substituted Freedom as plaintiff and removed HSBC as a nominal defendant. (NYSCEF 9, Compl. [in the Original Action].)

In a decision and order dated March 26, 2018, the court (Friedman, J.) dismissed the Trustee's cause of action for breach of contract as time-barred because the Trustee had filed the complaint more than six years after the closing date on the MLPA.[2] (*Freedom Trust 2011-2 v DB Structured Prods., Inc.*, 2018 NY Slip Op 30506[U], *4-5 [Sup Ct, NY County 2018], *affd as mod sub nom. LDIR, LLC v DB Structured Prods., Inc.*, 172 AD3d 1 [1st Dept 2019].) Relying on *ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.* (25 NY3d 581, 589 [2015], *affg* 112 AD3d 522 [1st Dept 2013]), the court also found that, although Freedom, as certificateholders, had filed a timely summons with notice, it lacked standing to bring a breach of contract cause of action on behalf of the Trust. (*Freedom Trust 2011-2*, 2018

[2] The decision and order of the court (Friedman, J.) consolidated for disposition a separate, but related RMBS breach of contract action brought by a certificateholder against DBSP regarding the quality and characteristics of the mortgage loans underlying the securitizations. (*See LDIR, LLC, on behalf of ACE Secs. Corp. Home Equity Loan Trust, Series 2007-ASAP1, et al., v DB Structured Products, Inc.*, Sup Ct, NY County, index No. 650949/2013.)

NY Slip Op 30506[U], *5). There, dealing with the same PSA as that in this action, the "no action" clause in the PSA allowed a certificateholder to pursue litigation only upon written notice of a servicer or master servicer default and did not authorize a certificateholder to serve notices of default relating to the sponsor's breaches of representations and warranties.[3] (*Id.*) Similarly, the court rejected the argument that Freedom could have sued derivatively on the Trust's behalf. (*Id.* at *6, *citing Federal Hous. Fin. Agency v Morgan Stanley ABS Capital I Inc.*, 2016 NY Slip Op 32867[U], *8 [Sup Ct, NY County 2016] [finding that the certificateholder could not escape the no action clause by "mere inclusion of the words 'on behalf of the Trustee' in the caption of a summons with notice"], *affd sub nom. Matter of Part 60 Put-Back Litig.*, 146 AD3d 566 [1st Dept 2017].)

On April 25, 2019, the Appellate Division, First Department affirmed the dismissal of the cause of action for breach of contract for breaches of representations and warranties but granted the Trustee's motion for leave to serve a second amended complaint to plead a cause of action for breach of contract based on DBSP's failure to notify the Trustee of the breaches of representations and warranties DBSP had discovered. (*LDIR, LLC*, 172 AD3d at 4-6). The Trustee filed a second amended complaint five days later. (NYSCEF 184, Second Am. Compl. [in the Original Action].) The Original Action is still pending. (NYSCEF 201, Order [Dec. 5, 2019] [in the Original Action].)

[3] The PSA partially defines a "Certificateholder" or "Holder" as "[t]he Person in whose name a Certificate is Registered in the Certificate Register." (NYSCEF 19, PSA at 24.)

On October 23, 2019, Freedom and the Trustee, at Freedom's direction, executed an Authorization and Agency Agreement (Authorization).[4] (NYSCEF 18, Compl. ¶ 11.) The Trustee purportedly exercised its authority under Section 2.03(a) of the PSA to enforce DBSP's contractual obligations by authorizing Freedom to pursue any remedies Freedom may have available to it arising out of DBSP's breaches of the representations and warranties in the MLPA and PSA, including commencing this action in its own name on behalf of the Trust for the benefit of all certificateholders. (*Id.*) The Trustee, acting in accordance with Section 9.02(a) of the PSA, also appointed Freedom as its agent for the purpose of enforcing DBSP's contractual obligations. (*Id.*) Accordingly, Freedom commenced this action on October 24, 2019, by filing a summons and complaint asserting a single cause of action for breach of contract stemming from DBSP's alleged breaches of representations and warranties in the MLPA and PSA. It seeks specific performance of DBSP's repurchase obligations or monetary damages, if specific performance is impossible or impractical, and its costs and attorneys' fees.

DBSP now moves pre-answer to dismiss the complaint under CPLR 3211 (a) (1), (3), (5) and (7). It contends the no action clause prohibits Freedom, a certificateholder, from maintaining this action, the specific language in the no action clause trumps the general language in Sections 2.03(a) and 9.02(a), and the Trustee cannot waive noncompliance with the no action clause. DBSP asserts that Freedom lacks standing to sue in its own name, even as the Trustee's agent, because of the real party in interest

[4] The Trustee indicates that it will furnish a copy of the Authorization upon entry of a protective order. (NYSCEF 25, Opp Brief at 11, n 1.)

doctrine. In addition, DBSCP claims the Trustee cannot assign a time-barred claim. DBSP also submits that CPLR 205 (a) is inapplicable because Freedom voluntarily discontinued the Original Action, North Carolina's three-year statute of limitations in contract actions applies, and CPLR 205 (a) is not meant to allow the Trustee to revive a time-barred claim.

DISCUSSION

A. Legal Standards

Dismissal under CPLR 3211 (a) (1) is appropriate where the documentary evidence utterly refutes the plaintiff's claims and conclusively establishes a defense as a matter of law. (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 175 [2021], *rearg denied* 37 NY3d 1020 [2021].) CPLR 3211 (a) (3) allows the court to grant dismissal where the plaintiff lacks the legal capacity to sue. The defendant bears the burden of demonstrating that the plaintiff lacks the capacity to sue. (*Brunner v Estate of Lax*, 137 AD3d 553, 553 [1st Dept 2016].) On a motion brought under CPLR 3211 (a) (5), the defendant must show the action was not commenced within the applicable statute of limitations. (*Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman, LLP*, 188 AD3d 530, 531 [1st Dept 2020].) On a CPLR 3211 (a) (7) motion, the court may grant dismissal where "the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017].)

B. Legal Capacity and the No Action Clause

Freedom correctly points out that the concept of legal capacity is distinct from the concept of standing. Legal capacity is a threshold matter and concerns a party's power to appear and bring its grievance before the court whereas standing concerns "whether 'the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast[ ] the dispute in a form traditionally capable of judicial resolution.'" (*Matter of Graziano v County of Albany*, 3 NY3d 475, 478-479 [2004] [citation omitted].) The two concepts are not interchangeable (*Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 154 [1994]), even though the terms legal capacity and standing have been used interchangeably (*see Matter of Part 60 RMBS Put-Back Litig.*, 155 AD3d 482, 484 [1st Dept 2017]). "Legal capacity to sue, or lack thereof, often depends purely on the litigant's status," thus application of the no action clause impacts Freedom's capacity to sue on the PSA. (*Security Pacific Nat. Bank v Evans*, 31 AD3d 278, 279-280 [1st Dept 2006] [applying legal capacity rules as the primary determination in the case turned on whether the plaintiff was a proper party to sue].)

The no action clause in Section 12.03 of the PSA, titled Limitation on Rights of Certificateholders, reads, in relevant part:

> "No Certificateholder shall have any right by virtue of any provision of this Agreement to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement, unless such Holder previously shall have given to the Trustee a written notice of default and of the continuance thereof, as hereinbefore provided, and unless also the Holders of Certificates entitled to at least 25% of the Voting Rights shall have made written request upon the Trustee to institute such action, suit or proceeding in its own name as Trustee hereunder and shall have offered to the Trustee such reasonable indemnity as it may require against the costs, expenses and liabilities to be incurred therein or

> thereby, and the Trustee, for 15 days after its receipt of such notice, request and offer of indemnity, shall have neglected or refused to institute any such action, suit or proceeding. It is understood and intended, and expressly covenanted by each Certificateholder with every other Certificateholder. and the Trustee, that no one or more Holders of Certificates shall have any right in any manner whatsoever by virtue of any provision of this Agreement to affect, disturb or prejudice the rights of the Holders of any other of such Certificates, or to obtain or seek to obtain priority over or preference to any other such Holder, or to enforce any right under this Agreement, except in the manner herein provided and for the equal, ratable and common benefit of all Certificateholders. For the protection and enforcement of the provisions of this Section, each and every Certificateholder and the Trustee shall be entitled to such relief as can be given either at law or in equity”

(NYSCEF 19, PAS at 234.)

Generally, “[n]o-action clauses protect potential defendants from ‘defending [individual] lawsuits’ by ‘delegating the right to bring a suit ... to the trustee.’” (*Federal Hous. Fin. Agency v WMC Mortgage, LLC*, No. 13 Civ. 584, 2015 WL 9450833, *5 [SD NY, July 10, 2015], *quoting Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 566 [2014].) No action clauses allow a trustee, acting as a stakeholder, to pursue litigation on behalf of all noteholders and ensure the proceeds are shared ratably among them. (*Cortlandt St. Recovery Corp. v Bonderman,* 31 NY3d 30, 39, 44 [2018].) Such clauses must be strictly construed in accordance with general principles of contract interpretation. (*Quadrant Structured Prods. Co., Ltd*, 23 NY3d at 560, *citing Cruden v Bank of N.Y.*, 957 F2d 961, 968 [2d Cir 1992].) Thus, “when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms.” (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990].)

Applying these precepts, the no action clause in Section 12.03 clearly and unambiguously states that, unless certain conditions are met, no certificateholder shall

have "any right by virtue of any provision of this Agreement to institute any suit, action, or proceeding … with respect to [the PSA]" and that no certificateholder shall have "any right in any manner whatsoever by virtue of any provision of this Agreement … to enforce any right under this Agreement." As discussed above, the no action clause prohibited Freedom from maintaining the Original Action because it did not permit certificateholders to sue upon a notice of breaches of representations and warranties, and thus, Freedom lacked standing to assert the claim. (*Freedom Trust 2011-2*, 2018 NY Slip Op 30506[U], *4-5.) Freedom, a certificateholder, commenced this breach of contract action arising from DBSP's alleged breaches of representations and warranties. Thus, the no action clause bars Freedom from maintaining this action.

Freedom, in opposition, attempts to circumvent the effect of the no action clause by claiming it is suing not as a certificateholder but as a representative on behalf of the Trust, and grounds its authority on Sections 2.03(a) and 9.02(a). Section 2.03(a), titled Repurchase or Substitution of Mortgage Loans, provides, in part, that "the Trustee shall enforce the obligations of the Sponsor under the [MLPA] to repurchase such Mortgage Loan from REMIC I at the Purchase Price within ninety (90) days after the date on which the Sponsor was notified of such missing document, defect or breach." (NYSCEF 19, PAS at 107.) Section 9.02(a), titled Certain Matters Affecting Trustee and Securities Administrator, states, in relevant part, that "Except as otherwise provided in Section 9.01 of this Agreement … (vi) The Trustee may execute any of the trusts or powers hereunder or perform any duties hereunder either directly or by or through agents or attorneys." (*Id.* at 217-218.) Freedom contends the Authorization cures its previous

lack of capacity, or contractual standing, because it is now suing as the Trustee's authorized appointee or agent.

However, "courts should read a contract 'as a harmonious and integrated whole' to determine and give effect to its purpose and intent" and ensure that no provision is rendered meaningless. (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 581 [2017] [citation omitted].) The plain language of the no action clause broadly prohibits a certificateholder from pursuing any action under the PSA except under limited circumstances not applicable here, and from invoking any other provision of the PSA in order to sue with respect to that agreement. Construing the PSA to allow Freedom, a certificateholder, to invoke Sections 2.03 and 9.02 to sue would leave the no action clause without effect, and is contrary to recognized principles of contract interpretation. (*See HTRF Ventures, LLC v Permasteelisa N. Am. Corp.*, 190 AD3d 603, 609 [1st Dept 2021] [refusing to enforce a disclaimer provision to preclude a warranty period because it would render another provision meaningless]; *Eaglehill Genpar LLC v FPCG, LLC*, 188 AD3d 527, 529 [1st Dept 2020] [declining to following the defendant's interpretation of the contract which would have rendered another clause meaningless].) Furthermore, the Trustee may not waive noncompliance with the no action clause. (*See Federal Hous. Fin. Agency v HSBC Fin. Corp.*, 2017 NY Slip Op 30846[U], *8 [Sup Ct, NY County 2017] [reasoning that the Trustee cannot ratify a certificateholder's past acts to retroactively cure the certificateholder's "standing" defect under a no action clause].)

Additionally, there is no conflict between the no action clause and Sections 2.03(a) and 9.02(a). "[W]here two seemingly conflicting contract provisions reasonably

can be reconciled, a court is required to do so and to give both effect." (*U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.*, 157 AD3d 93, 100 [1st Dept 2017] [internal quotation marks and citation omitted].) In the event of an inconsistency between a general and a specific contract provision, the specific contract provision controls. (*Bank of Tokyo-Mitsubishi, Ltd., N.Y. Branch v Kvaerner a.s.*, 243 AD2d 1, 8 [1st Dept 1998].) Here, the no action clause restricts a certificateholder from pursuing any action by virtue of any provision of the PSA whatsoever whereas Section 9.02(a)(vi) generally authorizes the Trustee to appoint an agent or attorney to perform its duties. Section 2.03(a) states only that "[t]he Trustee shall enforce" DBSP's obligations.

Moreover, Sections 2.03(a) and 9.02(a) do not contain any language indicating that their application trumps the no action clause. "When a preposition such as 'notwithstanding any other provision' is included in a contractual provision, that provision overrides any conflicting provisions in the contract." (*See CNH Diversified Opportunities Master Account, L.P. v Cleveland Unlimited, Inc*., 36 NY3d 1, 16 [2020], *rearg denied* 36 NY3d 1043 [2021] [citations omitted].) Neither Sections 2.03(a) nor 9.02(a) contain language indicating they supersede or limit the no action clause.

Freedom also argues that construing the no action clause to prohibit a certificateholder from pursuing this action renders it inconsistent with Section 9.04 of the PSA, which reads, "[e]ach of the Trustee and the Securities Administrator in its individual capacity or any other capacity may become the owner or pledgee of Certificates and may transact business with other interested parties and their Affiliates with the same rights it would have if it were not Trustee or the Securities Administrator." (NYSCEF 19, PAS at 220.) In the event the Trustee owns a certificate, Freedom

contends that the no action clause divests the Trustee of the authority to sue. Reading the no action clause with Section 9.04 in the manner Freedom suggests, though, would be nonsensical and contrary to other provisions expressly authorizing the Trustee to initiate litigation with or without owning a certificate. (*See e.g.,* Section 9.02[b] ["All rights of action under this Agreement or under any of the Certificates, enforceable by the Trustee, may be enforced by it without the possession of any of the Certificates, … and any such suit, action or proceeding instituted by the Trustee shall be brought in its name for the benefit of all the Holders of such Certificates, subject to the provisions of this Agreement"].)

Freedom cites numerous cases where the plaintiffs, as beneficial owners of notes or securities, obtained authority to sue from the entity authorized in the indenture agreements to sue, but those cases are readily distinguishable. Critically, it does not appear that the agreements in those actions contained an expansive no action clause broadly restricting the plaintiff from pursuing any litigation whatsoever under any provision of the agreement.

For instance, in *Springwell Nav. Corp. v Sanluis Corporacion, S.A*. (81 AD3d 557, 557 [1st Dept 2011], *affg* 2009 NY Slip Op 33395[U] [Sup Ct, NY County 2009]), a prior action brought by Springwell, the beneficial holder of a $1 million interest in an unrestricted global note, to recover unpaid principal and interest was dismissed because the right to sue was specifically reserved in the indenture agreement to the registered holder of the note. (*Springwell Nav. Corp. v Sanluis Corporación, S.A.*, 46 AD3d 377, 377 [1st Dept 2007].) A clause in the agreement granted each holder the right to institute litigation to enforce payment, and a separate clause provided that "the

registered Holder may grant proxies and otherwise authorize any Person [such as Springwell] ... to take any action that a Holder is entitled to take under this Indenture or the Notes." (*Springwell Nav. Corp.*, 2009 NY Slip Op 33395[U], *2.) *Springwell* later cured the defect with its lack of capacity when the registered holder assigned its right to sue to Springwell as its proxy. (*Springwell Nav. Corp.*, 81 AD3d at 557.) The PSA does not contain a similar provision allowing the Trustee to appoint a proxy.

In *Diverse Partners, LP v AgriBank, FCB* (No. 16-CV-9526, 2017 WL 4119649 [SD NY, Sept. 14, 2017]), the court found an agreement was ambiguous as to whether a beneficial owner of global securities had standing to enforce it. A provision in the agreement stated that each "holder" of the securities may enforce the agreement or the securities, but a separate provision discussed an "owner" of the securities commencing a judicial proceeding to enforce its rights. (2017 WL 4119649, *2-3.) The court concluded that this second provision "clearly anticipates that beneficial owners ... have the right under the contract to enforce its provisions." (2017 WL 4119649, *3.) In light of this ambiguity, and an authorization to sue the plaintiff had obtained from the holder, the court denied the defendant's motion to dismiss. Freedom has not identified similar ambiguous provisions in this action.

In *Allan Applestein TTEE FBO D.C.A. v Province of Buenos Aires* (415 F3d 242, 245-246 [2d Cir 2005]), the defendant waived the argument that the indenture agreement did not give the plaintiff standing to sue and conceded that the plaintiff had obtained permission to sue. And in *Royal Park Investments SA/NV v Deutsche Bank Natl. Trust Co.*, No. 14-CV-4394, 2016 WL 439020, *3 [SD NY, Feb. 3, 2016]), the registered holder conferred standing upon the plaintiff, a beneficial owner, to sue the

RMBS trustee. That determination, however, was made in the context of a negating clause. A negating clause typically forecloses enforcement by third-party beneficiaries. (2016 WL 439020, *2; *see India.com, Inc. v Dalal*, 412 F3d 315, 321 [2d Cir 2005] [negating clause generally precludes third-party beneficiary status].) Freedom has not alleged that the PSA contains a similar negating clause. Moreover, the plaintiff in that action, who owned certificates in 10 RMBS trusts, had sued the trustee for breach of contract, breach of trust, and for a violation of the Trust Indenture Act of 1939 (15 USC § 77aaa *et seq.*), which was permissible because the no action clause did not apply to debenture suits against the Trustee (*id.*). (2016 WL 439020, *3.) Freedom is not suing the Trustee.

Furthermore, none of the cases cited above dealt with the assignment of a time-barred claim. It has already been determined that the Trustee's claim for breach of representation and warranties against DBSP is time-barred. (*LDIR, LLC*, 172 AD3d at 6.) Freedom now sues on behalf of the Trust, but Freedom has not adequately addressed how the Trustee can assign a time-barred claim. (*See Craft EM CLO 2006-1, Ltd. v Deutsche Bank AG*, 178 AD3d 552, 553 [1st Dept 2019] [granting dismissal where the "plaintiff, who originally timely sued as the 'issuer' under the swap agreements, could not rely on CPLR 205 (a) when it refiled the suit as assignee of the trustee's claims, which were time-barred when assigned"].) In sum, the court finds that, contrary to Freedom's contention, the no action clause does not permit Freedom to invoke Sections 2.03(a) or 9.02(a) and sue in its own name.

Plaintiff's letter to the court, dated June 21, 2022, referring the court to three recent decisions of the Commercial Division, New York County and the Southern

District of New York is equally unavailing to support plaintiff's position. (NYSCEF 36, Letter [June 21, 2022].) None of the cited cases show how the Trustee can assign a time-barred claim and remedy the ineffectiveness of Sections 2.03(a) and 9.02(a) to invoke standing in light of the no-action clause found in Section 12.03. For example, plaintiff cites to *Park Royal I LLC v HSBC Bank USA, N.A.* for the proposition that a plaintiff's initial lack of standing is readily cured by subsequently obtaining authorization to sue from a registered holder. (2022 WL 1689873, index nos. 650933/2019, 657392/2017 *3-4 [Sup Ct, NY County, May 25, 2022] [applying the relation-back doctrine].) *Park Royal* is inapplicable to this action because here the Trustee's breach of contract claim was determined to be time-barred whereas in *Park Royal*, there is no indication that the claims were time-barred even had the registered certificateholder had brought the action. The court in *Park Royal* distinguishes the facts in that action to the facts in *Phoenix Light SF Ltd. v Deutsche Bank Natl. Trust Co.*, which is also cited by plaintiff in its June 2022 letter. (No. 14-cv-10103, 2022 WL 384748, *15-16 [SD NY, Feb. 8, 2022].)

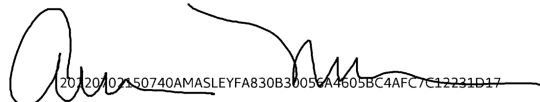
The court in *Phoenix Light* held that the relation-back doctrine did not apply in this case as plaintiffs did not have standing when they initially asserted their claims as they failed to satisfy the condition precedent to obtain consent from the relevant entity. *Phoenix Light* actually highlights plaintiff's standing deficiencies; Section 12.03 expressly requires that certificateholders fulfill certain condition precedents prior to bringing suit. Without satisfying the condition precedents laid out in Section 12.03, plaintiff cannot invoke the relation-back doctrine to ground its standing argument and it cannot now raise these arguments.

Lastly, plaintiff cites *In re AXA Equitable Life Ins. Co. COI Litig*. for the proposition that beneficial owners (as is plaintiff here) may receive authorization from the registered owner to sue even if the contract does not specifically provide for such authorization. (No. 16-cv-740, 2022 WL 976266, *7-9 [SD NY, Mar. 31, 2022].) *In re AXA Equitable Life Ins.* is wholly inapplicable because the PSA is not silent on whether a beneficial owner can sue. (NYSCEF 19, PAS at 234 [Section 12.03].)

In view of the foregoing, the court need not address the other arguments advanced by the parties in support of or in opposition to dismissal.

Accordingly, it is

ORDERED, that the motion brought by defendant DB Structured Products, Inc. to dismiss the complaint (motion sequence number 001) is granted, and the complaint is dismissed in its entirety as against the defendant, with costs and disbursements to the defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the defendant.



7/2/2022		ANDREA MASLEY, J.S.C.
DATE		

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