SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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MARK A. ZITTMAN, IRA FBO MARK ZITTMAN AND MARK A. ZITTMAN AS BENEFICIARY OF IRA FBO MARK ZITTMAN, MARK A. ZITTMAN, MARK A. ZITTMAN REVOCABLE TRUST,

Plaintiffs,

- v -

U.S. BANK, NATIONAL ASSOCIATION, AS TRUSTEE (AND ANY PREDECESSORS OR SUCCESSORS THERETO).,

Defendant.

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INDEX NO. 656964/2021

MOTION DATE 11/04/2024

MOTION SEQ. NO. 016

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 016) 2, 184, 188, 358, 378, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 510, 511, 512, 513, 514, 515

were read on this motion to DISMISS.

BACKGROUND

This case involves twenty-seven (27) residential mortgage-backed securities ("RMBS") trusts (the "Trusts"). Defendant ("US Bank") is the Trustee of the Trusts. Each of the Trusts is governed by a Pooling and Servicing Agreement ("PSA") or similar agreement ("Governing Agreements"). The Trusts closed between 2005 and 2007.

Plaintiffs' original Complaint (NYSCEF 2) asserted a single breach of contract claim alleging that US Bank, as Trustee, failed to "enforce the Trusts' right to have … Document Defects cured. . ." by obligated parties to the Governing Agreements. The Complaint specifically stated that Plaintiffs did not seek "damages caused by an Event of Default" or "relief that would

alter the priority of payments" (*id*. ¶ 45). The Complaint also sought a declaratory judgment that US Bank was not entitled to indemnification under the terms of the Governing Agreements. Defendant US Bank moved to dismiss the Complaint.

While Defendant's motion was pending, the Court of Appeals issued its decision in *IKB Intl., S.A. v Wells Fargo Bank, N.A.* (40 NY3d 277 [2023]) ("IKB"). In *IKB*, the Court of Appeals held that there was no "implied contractual duty on the part of the trustee to enforce the repurchase protocol obligations of other parties" in the RMBS agreement at issue in that case (*id.* at 282). In light of the *IKB* decision, the parties stipulated for Plaintiffs to withdraw their breach of contract claims as to certain Trusts, for the Plaintiffs to file an amended complaint, and for Defendant to file a renewed motion to dismiss (NYSCEF 184).

On September 5, 2023, Plaintiffs filed their first Amended Complaint (NYSCEF 188 ["FAC"]) asserting four causes of action: (1) breach of contract for failing to identify document defects or representation and warranty breaches for pre-event-of-default ("EOD") breaches; (2) breach of contract for post-EOD breaches; (3) breach of the covenant of good faith and fair dealing; and (4) declaratory judgment. Defendant moved to dismiss based on documentary evidence, the statute of limitations, and for failure to state a viable cause of action.

In its decision on that motion, the Court dismissed the implied covenant claim and held that the new pre- and post-EOD claims asserted in the FAC did not relate back to the filing date of the original complaint (NYSCEF 358 at 5-6). The Court also found that, absent tolling, under New York law Plaintiffs' claims must have been asserted within 12 years of the closing of the relevant Trusts (NYSCEF 358 at 4-5, citing *Zittman v HSBC Bank USA, N.A.*, 224 AD3d 638, 639 [1st Dept 2024] ["the outer limit for timeliness for plaintiffs' claims that defendant failed to enforce the obligor's repurchase obligation to repurchase a loan that had missing or defective

documents is 12 years after the expiration of the obligor's cure period. That is, six years for the statute of limitations on the underlying repurchase claims to expire, plus six years for the statute of limitations on the repurchase enforcement claims to expire"]).

Plaintiffs were given leave to replead to clarify which of their timeliness arguments applied to which Trusts (NYSCEF 358 at 6), which they did in a second Amended Complaint (NYSCEF 378, "SAC"). Defendant now moves to dismiss certain claims in the SAC under CPLR 3211(a)(1), (5), and (7) on the grounds that those claims are untimely, refuted by documentary evidence, and/or fail to state a claim.

For the reasons discussed below, Defendant's motion is granted in part.

STANDARD

On a motion to dismiss for failure to state a claim under CPLR 3211(a)(7), the Court must accept all factual allegations as true, afford the pleadings a liberal construction, and accord plaintiff the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[H]owever, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration" (*Myers v Schneiderman*, 30 NY3d 1, 11 [2017] [citations and quotations omitted]). As is often stated, "the court must 'determine only whether the facts as alleged fit within any cognizable legal theory'" (*Richards v Sec. Resources*, 187 AD3d 452 [1st Dept 2020], quoting *Leon*, 84 NY2d at 87-88).

Granting a motion to dismiss based on CPLR 3211(a)(1) is appropriate "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

Dismissal based on a statute of limitations defense under CPLR 3211(a)(5) is warranted if the moving defendant establishes that the time to commence an action has expired and the plaintiff cannot raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable (*MLRN LLC v U.S. Bank, N.A.*, 2019 NY Slip Op 33379 [U] at *3 [Sup Ct, New York County 2019], *affd* 190 AD3d 426 [1st Dept 2021]). When considering a motion to dismiss based on the statute of limitations, the Court "must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff" (*Benn v Benn*, 82 AD3d 548 [1st Dept 2011], quoting *Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815, 816 [2008] [citations omitted]). "Further, plaintiff's submissions in response to the motion 'must be given their most favorable intendment'" (*id.*, quoting *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982], *cert denied* 459 US 1146 [1983]). However, Plaintiffs bear the burden of raising an issue of fact as to whether the statute of limitations was tolled or otherwise inapplicable (*Wilson v Southampton Urgent Med.-Care, P.C.*, 112 AD3d 499, 500 [1st Dept 2013]).

DISCUSSION

I. Pre- and Post-EOD repurchase-related claims under 11 Trusts are untimely

Defendants assert that for 21 certificates (in 11 Trusts)[1] held in two collateralized debt obligations ("CDOs") (MKP and West Coast), all pre-EOD and post-EOD repurchase-related claims are untimely under California law and therefore must be dismissed. Under New York's borrowing statute, CPLR 202, a claim must be timely under the limitations period of both New

[1] These trusts are BAFC 2007-C, BAFC 2007-D, BSABS 2006-AC2, **GSAA 2006-1**, **GSAA 2006-3**, **GSR 2006-AR1**, **HEAT 2005-7**, HVMLT 2006-4, MSM 2006-1AR, SURF 2006AB3, and WFMBS 2006-AR1. Defendant argues that all claims relating to the bolded trusts are also untimely under New York law (*see* NYSCEF 396 [Summary of Arguments Chart 1A])

York *and* the State in which the claim accrued. For borrowing-statute purposes, a claim accrues "in the place of the injury" (*Glob. Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 529 [1999]). Where "an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss"—for entities, their "principal place of business" (*Proforma Partners, L.P. v Skadden Arps Slate Meagher & Flom, L.L.P.*, 280 AD2d 303, 303–04 [1st Dept 2001]).

In the prototypical RMBS case—in which the trustee sues the alleged wrongdoer on behalf of the certificate holders—it is the residence of the trustee that determines the "place of injury" for purposes of the borrowing statute (*Deutsche Bank Natl. Tr. Co. v Barclays Bank PLC*, 34 NY3d 327, 339 [2019]). In this case, Plaintiffs assert claims that were initially assigned to JPMorgan Chase Bank, N.A. ("JPMorgan"), the original trustee (for MKP) and collateral agent (for West Coast) (NYSCEF 448 [West Coast Security Agreement] § 2.01 [a]; NYSCEF 451 [MKP Indenture] at BNYM2000083-84).

For borrowing statute purposes, Plaintiffs are "not entitled to stand in a better position than that of [the] assignor," and thus accordingly "[w]e must therefore first ascertain where the cause of action accrued in favor of" the assignor[2] at the time of accrual (*Portfolio Recovery Assoc., LLC v King*, 14 NY3d 410, 416 [2010]). In sum, it is the residence or principal place of business of the trustee/collateral agent of the CDOs six years following the Trusts' closing dates,[3] *i.e.* between 2012 and 2014, that determines the jurisdiction in which the claim accrued

[3] Plaintiffs argue that different types of repurchase-related claims accrue at different times. The Court already decided that the Trustee's repurchase-related claims against the obligors accrued at the Trusts' closing in connection with Defendant's motion to dismiss the FAC, and thus Plaintiffs' claims against the Trustee for permitting those claims to lapse accrued six years thereafter (NYSCEF 358 at 4-5)

for borrowing statute purposes (*id.*; *see* NYSCEF 398 [Trust Closing Dates], NYSCEF 402 [CDO Trusts' Accrual Dates]).

The parties agree that in 2006 JPMorgan sold its corporate trust business to Bank of New York Company ("BNY"), which in turn merged with Mellon Financial Corporation in 2007 to create Bank of New York Mellon, Inc. ("BNYM") (NYSCEF 454, 484). The parties disagree, however, as to which entity was the trustee/collateral agent during the period between 2012 and 2014, and whether the entity that Defendant proposes, Bank of New York Mellon Trust Company ("BNYMT"), is located in California for purposes of the borrowing statute.

Plaintiffs contend that the identity of the original trustee/collateral agent governs and that Defendant is estopped from arguing otherwise based on US Bank's prevailing argument in *NCUA Bd. v U.S. Bank, N.A.* (2023 US Dist LEXIS 54802, at *9 [SD NY, Mar. 30, 2023] [dismissing claims based on US Bank's argument that a trust's claims against an obligor accrue where the original trustee was located]). This argument fails. In *NCUA*, US Bank argued that the location of the original trustee governed because the original trustee was in place *when the claims accrued* (*see* Memorandum of Law in Support of U.S. Bank National Association's Motion for Partial Summary Judgment in *NCUA*, available at 2022 WL 10735342). As discussed above, here the *successor* trustee was in place at the time of accrual, so US Bank's current position is consistent with its position in *NCUA*.

A. Documentary evidence shows that BNYMT was the successor trustee/collateral agent, and Plaintiffs do not plead or provide evidence to the contrary

Defendant asserts that after JPMorgan sold its trust business to BNY, Bank of New York Trust Company succeeded JPMorgan as the trustee/collateral agent (NYSCEF 459 [2007 Notice of Acceleration listing "Bank of New York Trust Company...as successor to JPMorgan" as the

trustee]). Following the BNY-Mellon merger, in 2008 Bank of New York Trust Company changed its name to Bank of New York Mellon Trust Company (NYSCEF 450, 456, 461).

In response, Plaintiffs (who do not plead specific facts about the identity of the CDOs' trustee/collateral agent in the SAC or the exhibits thereto) argue that if the Court does not find that the original trustee/collateral agent is the relevant entity to consider, the correct successor trustee is BNYM (based in New York), not BNYMT (based in California). In support of that contention, Plaintiffs cite a Note Valuation Report from June 2007 listing the trustee for the West Coast CDO as "Bank of New York" (NYSCEF 453). This report, however, predates the relevant timeframe of 2012 to 2014.

By contrast, Defendant relies on a Note Valuation Report defining "Trustee" as BNYMT in 2013 (NYSCEF 464). This document is from the relevant time period and in most instances predates the accrual dates for the relevant trusts.[4] While Plaintiffs note that the same report lists BNY as Trustee in the header, this is not persuasive: the parties agree that BNY had ceased to exist by that time. Defendant provides a variety of other documents from before and after the relevant timeframe listing BNYMT as the trustee/collateral agent for the CDOs (NYSCEF 449, 459, 460).

In sum, the documentary evidence demonstrates that BNYMT is the proper party to consider for borrowing statute purposes. Plaintiffs do not plead facts to the contrary to which the

[4] Claims regarding several of the Trusts in these CDOs are untimely under New York law (*see* Section II, *infra*). The 2013 Note Valuation Report predates accrual for claims concerning five out of the seven remaining Trusts (BAFC 2007-C, BAFC 2007-D, BSABS 2006-AC2, MSM 2006-1AR, and WFMBS 2006-AR1) and postdates accrual by less than a year for the other two (HVMLT 2006-4 and SURF 2006-AB3).

Court must defer, nor do they otherwise meet their burden of raising an issue of fact regarding the identity of the CDOs' trustee/collateral agent.

B. BNYMT is located in California for borrowing statute purposes

Multiple agency filings list Los Angeles as the address of BNYMT (NYSCEF 461 [SEC Form T-1]; NYSCEF 462 [FDIC]; NYSCEF 463 [OCC]). The First Department has also concluded in another RMBS action that BNYMT is a California resident for borrowing statute purposes (*see MLRN LLC v U.S. Bank, N.A.*, 217 AD3d 576, 578 [1st Dept 2023]). Plaintiffs' references to documents containing mailing addresses in other states are unavailing.

C. California's tolling doctrines do not apply

Plaintiffs cannot rely on California's discovery rule for breach of contract claims given the allegations in the SAC that servicer misconduct was obvious based on publicly available information (SAC ¶¶ 126, 130, 168).

Neither is California's equitable tolling doctrine of help to Plaintiffs. California courts may employ equitable tolling "to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits" (*Bollinger v Natl. Fire Ins. Co.*, 25 Cal 2d 399, 410, 154 P2d 399, 405 [1944]). Contrary to Plaintiffs' assertion, California law does not "only" require timely notice, lack of prejudice, and good faith, reasonable conduct on behalf of the Plaintiff—these are necessary, but not sufficient, showings (*see Addison v State*, 21 Cal 3d 313, 319, 578 P2d 941, 944 [1978] [applying equitable tolling after finding those three things were shown *and* examining whether application of equitable tolling "satisfies the policy underlying the statute of limitations without ignoring the competing policy of avoiding technical and unjust forfeitures"]). The facts here are not analogous to the "technical forfeitures" discussed in the California cases, e.g. timely filing in the wrong forum.

California's COVID tolling is inapplicable because the limitations period for all certificates expired before 2019. Further, California does not apply class action tolling for out-of-state class actions (*MLRN LLC v U.S. Bank, N.A.*, 217 AD3d 576, 578 [1st Dept 2023]).

Accordingly, all repurchase-related claims in connection with trusts BAFC 2007-C, BAFC 2007-D, BSABS 2006-AC2, GSAA 2006-1, GSAA 2006-3, GSR 2006-AR1, HEAT 2005-7, HVMLT 2006-4, MSM 2006-1AR, SURF 2006AB3, and WFMBS 2006-AR1 are dismissed as untimely.

II. Certain other claims are untimely under New York Law

A. Post-EOD repurchase-related claims in 19 trusts are untimely under New York law

As the Court decided in connection with Defendant's prior motion to dismiss, Plaintiffs' new pre- and post-EOD claims asserted in the first amended complaint (NYSCEF 188) do not relate back to the original filing date (NYSCEF 358 at 5-6). This includes all post-EOD repurchase-related claims, such that their effective filing date is September 5, 2023.

Absent tolling, under New York Law Plaintiffs' claims must have been asserted within 12 years of the closing of the relevant Trusts (NYSCEF 358 at 4-5, citing *Zittman v HSBC Bank USA, N.A.*, 224 AD3d 638, 639 [1st Dept 2024], citing CPLR 213 [2] ["the outer limit for timeliness for plaintiffs' claims that defendant failed to enforce the obligor's repurchase obligation to repurchase a loan that had missing or defective documents is 12 years after the expiration of the obligor's cure period. That is, six years for the statute of limitations on the underlying repurchase claims to expire, plus six years for the statute of limitations on the repurchase enforcement claims to expire"]). As the relevant trusts closed in 2007 at the latest,

generally the claims must have been filed no later than 2019, meaning that COVID-related tolling is inapplicable.

Defendant maintains that it has produced all relevant tolling agreements for the trusts, and that none of the post-EOD repurchase-related claims are timely even factoring in tolling agreements and COVID tolling for many trusts (NYSCEF 398 [Tolling Agreement Chart]).[5] Plaintiffs' only arguments for the timeliness of these claims are that they should relate back to the original filing date, and that it cannot be said conclusively at this time that US Bank has produced all of its tolling agreements. The Court previously rejected the first argument, as described above. Given US Bank's extensive production of relevant tolling agreements over the past four years (*see* NYSCEF 268, e.g.), Plaintiffs have not met their burden to demonstrate issues of fact regarding further tolling. Plaintiffs cannot proceed with facially untimely claims based on the mere hope that more tolling agreements will surface from unknown sources.

Accordingly, all post-EOD repurchase-related claims regarding trusts ABFC 2007-WMC1, BAFC 2007-D, BSABS 2006-AC2, CSAB 2006-3, GSAA 2006-1, GSAA 2006-3, GSAMP 2006-HE4, GSR 2006-AR1, HEAT 2005-6, HEAT 2005-7, HEAT 2006-3, HEAT 2006-4, HVMLT 2005-3, LXS 2005-5N, LXS 2005-9N, LXS 2007-15N, MSM 2006-1AR, TMST 2007-3, and WFMBS 2006-AR1 are dismissed as untimely under New York law.

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[5] These trusts are ABFC 2007-WMC1, BAFC 2007-D, BSABS 2006-AC2, CSAB 2006-3, GSAA 2006-1, GSAA 2006-3, GSAMP 2006-HE4, GSR 2006-AR1, HEAT 2005-6, HEAT 2005-7, HEAT 2006-3, HEAT 2006-4, HVMLT 2005-3, LXS 2005-5N, LXS 2005-9N, LXS 2007-15N, MSM 2006-1AR, TMST 2007-3, and WFMBS 2006-AR1 (*see* NYSCEF 396). Post-EOD repurchase-related claims for several of these trusts have already been dismissed as untimely under California Law (*see* Section I, *supra*).

B. Pre-EOD loan characteristic R&W claims in 16 trusts are untimely under New York law

The Court previously held that these representation and warranty ("R&W") claims do not relate back, such that their filing date is September 5, 2023, and that the limitations period for these claims is 12 years from the closing of each trust (NYSCEF 358). While Plaintiffs argue that the accrual date for these types of claims is later than that, the Court previously considered and rejected those arguments. These claims are untimely for the same reasons described above.

Accordingly, all pre-EOD loan characteristic R&W claims are dismissed as untimely for the following trusts: ABFC 2007-WMC1, BSABS 2006-AC2, GSAA 2006-1, GSAA 2006-3, GSAMP 2006-HE4, GSR 2006-AR1, HEAT 2005-6, HEAT 2005-7, HEAT 2006-3, HEAT 2006-4, HVMLT 2005-3, LXS 2005-5N, LXS 2005-9N, MSM 2006-1AR, TMST 2007-3, and WFMBS 2006-AR1.

C. Pre-EOD document defect / completeness R&W claims in several trusts are untimely under New York law

Plaintiffs likewise claim that the accrual date for these claims[6] is different, but this argument was raised and disposed of in the last motion to dismiss: the same 12-year limitations period applies (NYSCEF 358). The pre-EOD document defect and completeness R&W claims were first filed on October 18, 2021 (for two trusts) and December 14, 2021 (for five trusts) and are thus presumptively untimely.

However, as discussed below (*see* Section II [D] [3], *infra*), class action tolling renders the document defect (but not the completeness R&W) claims timely for the following three

[6] These claims relate to GSAA 2006-1, GSAA 2006-3, GSR 2006-AR1, HEAT 2005-7, HVMLT 2005-3, LXS 2005-5N, and LXS 2005-9N (see NYSCEF 396).

trusts: HVMLT 2005-3, LXS 2005-5N, and LXS 2005-9N. Thus, pre-EOD document defect claims are dismissed as untimely for the reasons stated above for the following trusts: GSAA 2006-1, GSAA 2006-3, GSR 2006-AR1, and HEAT 2005-7. Completeness R&W claims are dismissed as untimely for the following trusts: GSAA 2006-1, GSAA 2006-3, GSR 2006-AR1, HEAT 2005-7, HVMLT 2005-3, LXS 2005-5N, and LXS 2005-9N.

D. Application of class action tolling

Plaintiffs argue that many otherwise untimely claims are saved by tolling based on three class actions, the *Royal Park* action, and the federal and state *Blackrock* actions. Class action tolling begins on the filing date of each relevant class action and ends "when it is no longer objectively reasonable for absent class members to rely upon the putative class action to vindicate their rights" (*Chavez v Occidental Chem. Corp.*, 35 NY3d 492, 506 [2020]). This occurs when the claims at issue were no longer part of the class action, whether because the claims had been dismissed or abandoned, or because the court denied class certification (*id.*).

The *Royal Park* class action was filed on April 11, 2014, and certification was denied on July 10, 2018 (*Royal Park Invs. SA/NV v US Bank, N.A.*, 2018 WL 3551641, at *1 [SD NY, July 10, 2018]). While this toll would apply to the BSABS 2006-AC2 trust, claims related to this trust must be timely under both New York and California law. Because California does not recognize cross jurisdictional class action tolling, *Royal Park* tolling is irrelevant and these claims are untimely. Likewise, tolling from the *Blackrock* class actions is irrelevant for the following trusts, as the claims related them are untimely under California law: BAFC 2007-C, BAFC 2007-D, GSAA 2006-1, GSAA 2006-3, GSR 2006-AR1, HEAT 2005-7, HVMLT 2006-4, MSM 2006-1AR, SURF 2006AB3, and WFMBS 2006-AR1.

The impact of *Blackrock* thus need only be examined for the following trusts: ABFC 2007-WMC1, CSAB 2006-3, GSAMP 2006-HE4, HEAT 2005-6, HEAT 2006-3, HEAT 2006-4, HVMLT 2005-3, LXS 2005-5N, LXS 2005-9N, LXS 2007-15N, and TMST 2007-3 (see NYSCEF 401 [Class Action Tolling Chart 5]). The federal *Blackrock* action was filed on November 24, 2014. All but one of these trusts[7] were dismissed from the federal Blackrock action on May 18, 2015 (*Blackrock Allocation Target Shares: Series S Portfolio v U.S. Bank, N.A.*, 2015 WL 2359319, at *6 [SD NY, May 18, 2015]). Claims regarding those trusts were immediately refiled in state court on June 19, 2015. Assuming that Plaintiffs get the benefit of the savings statute (CPLR 205 [a]) such that the state class action relates back to the federal filing date, the tolling end-date varies for different types of claims.

1) Post-EOD claims

Blackrock tolling applies to post-EOD claims for the following trusts: ABFC 2007-WMC1, CSAB 2006-3, GSAMP 2006-HE4, HEAT 2005-6, HEAT 2006-3, HEAT 2006-4, HVMLT 2005-3, LXS 2005-5N, LXS 2005-9N, and LXS 2007-15N. Tolling for claims related to all but one of these trusts ended on January 17, 2018, when the post-EOD claims were dismissed for failure to allege an EOD (*Blackrock Balanced Cap. Portfolio (FI) v U.S. Bank, N.A.*, 2018 WL 452001, at *3 [Sup Ct, NY County Jan. 17, 2018]). One of these trusts, ABFC 2007-WMC1, was not included in the federal action. Tolling for that trust began on June 19, 2015, and ended on September 12, 2016, when it was omitted from an amended complaint (NYSCEF 124-25 in Index No. 652204/2015). Thus the post-EOD claims for all of these trusts are untimely.

[7] TMST 2007-3 remained in the federal action until denial of class certification on January 31, 2018.

2) Pre-EOD R&W claims

The parties agree that April 18, 2018 was the end date for tolling of pre-EOD R&W claims for the following trusts: ABFC 2007-WMC1, GSAMP 2006-HE4, HEAT 2005-6, HEAT 2006-3, HEAT 2006-4, HVMLT 2005-3, LXS 2005-5N, LXS 2005-9N. Because Plaintiffs' pre-EOD R&W claims do not relate back to their first complaint, these claims are all untimely.

3) Pre-EOD document defect claims

The Court agrees with Plaintiffs' assessment of the tolling period for pre-EOD document defect claims related to HVMLT 2005-3, LXS 2005-5N, and LXS 2005-9N. These claims were dismissed on April 18, 2019, not January 17, 2018 as Defendant argues (*Blackrock Balanced Capital Portfolio (Fl) v U.S. Bank, N.A.*, 2018 NY Slip Op 31388[U], *6 [Sup Ct, NY County 2018] [discussing document *delivery*, not document *defect* claims]). Thus this group of claims is timely.

III. Merits Issues

In light of the foregoing, only a few remaining issues need to be addressed.

A. The post-EOD claim regarding SURF 2007-BC2 is dismissed

The only remaining post-EOD claim for which Defendant seeks dismissal relates to SURF 2007-BC2. Defendant argues that Plaintiffs must plead that the trustee received written notice of an EOD to trigger its duties under the relevant PSA.

The PSA for SURF 2007-BC2 provides that "[e]xcept as otherwise provided in Section 8.01…the Trustee shall not be deemed to have knowledge of an Event of Default until a Responsible Officer of the Trustee shall have received written notice thereof" (NYSCEF 434 § 8.02 [viii]). The First Department has found that essentially identical provisions preclude post-EOD claims where the plaintiff failed to allege written notice, whether or not the defendant had

actual notice through other means (*see W. & S. Life Ins. Co. v U.S. Bank, N.A.*, 209 AD3d 6, 17 [1st Dept 2022]).

Plaintiffs respond that servicers sent US Bank annual statements of compliance that identified servicing deficiencies, and that US Bank in response sent those servicers written notice of those deficiencies (SAC ¶¶ 375-79). Plaintiffs claim that this constitutes sufficient written notice, relying on *Commerzbank AG v U.S. Bank N.A.* (457 F Supp 3d 233, 252 [SD NY 2020] [finding that for trusts in which an EOD can only occur on written notice, this same behavior by US Bank satisfied the PSAs' written notice requirement]). However, the same argument (namely that US Bank was sending notices of servicing failures to servicers) was considered and rejected in *W & S* (*see W. & S. Life Ins. Co. v U.S. Bank, N.A.*, 69 Misc 3d 1213[A] at *9 [Sup Ct, NY County 2020], *affd in relevant part* 209 AD3d at 16). Moreover, notice of servicing failures is not the same as notice of an EOD (*see Commerce Bank v Bank of N.Y. Mellon*, 141 AD3d 413, 415 [1st Dept 2016] ["notice of events that, with time, might ripen into [EODs]" is not notice of an EOD]). Accordingly, this claim is dismissed for failure to plead written notice of EOD.

B. Pre-EOD R&W claims

The only remaining pre-EOD R&W claims for which Defendant seeks dismissal pertain to BAFC 2006-H and TMST 2007-3. For BAFC 2006-H, Defendant likewise argues that Plaintiffs failed to plead sufficient notice to trigger its pre-EOD enforcement duty. The BAFC 2006-H PSA provides that "[i]f the Trustee receives written notice that the Depositor, the Sponsor or the applicable Servicer…has not delivered such missing document or cured such defect or breach…during such period, the Trustee…shall enforce the…obligation" and cause the loan to be substituted or repurchased (NYSCEF 411 § 2.02). The First Department, construing the same language in a different BAFC trust, held that plaintiff must allege that the Trustee

received written notice of a failure to cure to trigger the Trustee's pre-EOD enforcement duty—alleging that the Trustee prepared its own defect certifications was insufficient (*Finkelstein v U.S. Bank, N.A.*, 219 AD3d 401, 403 [1st Dept 2023]).

Plaintiffs allege that US Bank followed a general practice of tracking *when it was notified* of a cure or failure to cure for R&W and Document Defect claims (SAC ¶ 122). Giving Plaintiffs the benefit of all reasonable favorable inferences, the Court finds that they have sufficiently pleaded that US Bank received written notice such that this claim survives (*see MLRN LLC v US Bank, N.A.*, 2019 NY Slip Op 33379[U], 13-14 [Sup Ct, NY County 2019], *affd* 2021 NY Slip Op 00025 [1st Dept 2021] ["[A]t the pleading stage, information concerning breach on a loan-by-loan and trust-by-trust basis is uniquely in the possession of defendants"] [internal quotations and citation omitted]).

The mortgage file completeness R&W claim related to TMST 2007-3, however, fails. There is some dispute about whether this is a R&W claim, as Plaintiffs insist, versus a document defect claim. But accepting Plaintiffs' contention that this is an R&W claim, it is untimely because it does not relate back, as discussed above. Even if it were timely, the provisions Plaintiffs cite are not R&Ws regarding the completeness of the mortgage file (*see* NYSCEF 63, Schedule III §§ iv, v, ix, x, xi, xxii). Accordingly, this claim is dismissed.

C. Pre-EOD Document Defect Claims

Defendant seeks dismissal of these claims on different grounds for different trusts. Regarding BAFC 2006-H, Defendant argues that Plaintiffs failed to plead the trustee's receipt of written notice. Plaintiffs allege that, after Defendant notified Obligors of [Document Defects] and demanded their cure, it "sat on its hands" "when [it] was notified that the Obligors failed or refused to Cure" (SAC ¶ 123). Plaintiffs also plead that US Bank tracked when it received notice

of a cure or failure to cure for R&W and Document Defect claims (*id.* ¶ 122). As discussed above, these allegations are sufficient to survive a motion to dismiss.

Plaintiffs also adequately plead their document defect claim as it relates to TMST 2007-3 (*see* NYSCEF 435 [TMST 2007-3 PSA] § 2.04 ["Upon discovery…that a document is missing from, a Mortgage File…which materially adversely affects the value of that Mortgage Loan…" the Trustee shall notify the initial seller, and if the initial seller does not cure, the trustee "shall enforce the Initial Seller's obligation…and cause the Initial Seller to repurchase that Mortgage Loan"]). Defendant only discusses dismissal of completeness R&W claims with regard to this trust, not document defect claims.

For LXS 2005-5N, LXS 2005-9N, LXS 2007-15N, and SASC 2007-EQ1, Defendant claims that there was no pre-EOD document defect enforcement duty. Plaintiffs confirm in their opposition that they do not bring document defect claims regarding these trusts (NYSCEF 508 at 18). Accordingly, Defendant's motion is denied as to these claims, as there is nothing to dismiss.

D. The implied covenant claim is dismissed

As this Court previously held (NYSCEF 358), the motion to dismiss the claim for breach of the implied covenant of good faith and fair dealing is granted, as the Court may not disregard the specific provisions of the Governing Agreements that specify US Bank's obligations as trustee (*IKB Intl., S.A. v Wells Fargo Bank, N.A.*, 40 NY3d at 287).

IV. Claims that remain

As Defendant's motion is granted in large part on multiple grounds, it is simpler to list the claims that survive:

(1) Pre-EOD document defect claims for ABFC 2007-WMC1, HVMLT 2006-1, HVMLT 2005-3, LXS 2005-5N, TMST 2007-3, BAFC 2006-H, and LXS 2005-9N;

(2) Pre-EOD R&W claims for HVMLT 2006-1, LXS 2007-15N, SASC 2007-EQ1, and BAFC 2006-H;

(3) Pre-EOD Completeness R&W claims for ABFC 2007-WMC1, HVMLT 2006-1, LXS 2007-15N, and SASC 2007-EQ1;

(4) Post-EOD repurchase-related claims for BAFC 2005-H, HVMLT 2006-1, and SASC 2007-EQ1; and

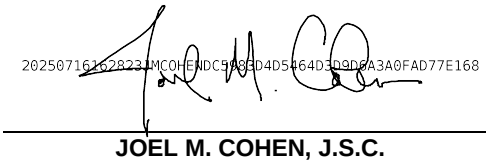
(5) Post-EOD non-repurchase-related claims for ABFC 2007-WMC1, BAFC 2006-H, BAFC 2007-C, BAFC 2007-D, BSABS 2006-AC2, GSAA 2006-1, GSAA 2006-3, HVMLT 2005-3, HVMLT 2006-1, HVMLT 2006-4, LXS 2005-5N, LXS 2005-9N, LXS 2007-15N, MSM 2006-1AR, SASC 2007-EQ1, TMST 2007-3, and WFMBS 2006-AR1.

Accordingly, it is

ORDERED that Defendant's motion to dismiss is **granted in part** consistent with the decision above; it is further

ORDERED that within 14 days of this decision and order the parties file a proposed scheduling order for the completion of discovery, filing of Note of Issue, and filing of summary judgment motions (if any).

This constitutes the decision and order of the Court.



7/16/2025
DATE

JOEL M. COHEN, J.S.C.

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