SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 45

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IKB INTERNATIONAL, S.A., IKB DEUTSCHE INDUSTRIEBANK A.G.,

Plaintiffs,

- v -

U.S. BANK, N.A.

Defendant.

INDEX NO. 654442/2015

MOTION DATES 11/14/2024, 12/24/2024

MOTION SEQ. NOS. 016, 017

DECISION + ORDER ON MOTIONS

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HON. ANAR RATHOD PATEL:

The following e-filed documents, listed by NYSCEF document number (Motion 016) 677, 680–838, 1067–1250, 1256, 1259, 1266, 1268, 1291–1292, and 1302–1313 were read on this motion for JUDGMENT – SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 017) 676, 839–1008, 1011–1066, 1251–1255, 1257–1258, 1265, and 1267 were read on this motion for JUDGMENT – SUMMARY.

Relevant Factual and Procedural Background

This case arises from claims asserted by Plaintiffs IKB International S.A. and IKB Deutsche Industriebank AG (collectively, "IKB" or "Plaintiffs") against U.S. Bank National Association, as Trustee ("U.S. Bank" or "Defendant"). *See* NYSCEF Doc. No. 731 (Ex. 47, Compl.). IKB alleges that U.S. Bank, as Trustee for twenty (20) residential mortgage-backed securities ("RMBS") trusts (the "Trusts"),[1] breached its duties as Trustee by failing to perform certain required obligations. *Id.*; *see also* NYSCEF Doc. No. 837 at 6 (Def. Mem. of Law). Defendant filed a Motion for Summary Judgment seeking dismissal of all counts in the Complaint based upon threshold and merit-based arguments. NYSCEF Doc. No. 677 (Mot. Seq. 016). Plaintiffs subsequently filed a Partial Motion for Summary Judgment seeking a finding that certain events of default occurred in the Trusts, and dismissal of Defendant's affirmative defenses of champerty and failure to mitigate damages. NYSCEF Doc. No. 676 (Mot. Seq. 017).

The Court hereby incorporates by reference the Court's Decision and Order placed on the record after oral argument held on June 23, 2025. NYSCEF Doc. No. 1320 at 89:1–110:17 (6/23/25 Tr.). The Court ruled on the following threshold and merit-based issues: standing to

[1] The Complaint identifies 71 Trusts at issue, that number has since declined to 20 at-issue trusts based upon prior rulings in this action. *See* NYSCEF Doc. No. 25 (Ex. 1, Compl.).

assert claims, issue preclusion, statute of limitations, negating clauses, no-action clauses, consequential damages, damages offset, and the dismissal of the affirmative defenses of champerty and failure to mitigate damages. The Court also dismissed all claims related to the JPALT 2006-S4 Trust. *Id*. at 97:18–99:13.

The Court now addresses the claims involving post-Events of Default ("EOD") in the remaining nineteen (19) trusts in this action.[2] The remaining claims involve Trustee duties concerning: (1) untimely delivery of compliance documents by the servicer to the trustee[3]; (2) non-delivery of compliance documents by the servicer to the trustee; (3) receipt of non-conforming compliance documents; (4) maintenance of real estate owned ("REO") properties; (5) servicer rating downgrades; and (6) failure to notify trust certificateholders after a termination test fell below a specified level.

Legal Standard

On a motion for summary judgment, CPLR § 3212 requires the movant to "make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hospital*, 68 N.Y. 2d 320, 324 (1986). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Id.* Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate facts sufficient to require a trial, or summary judgment will be granted. *Id.*

Discussion

I. Trustee Duties Pre- and Post-EOD

In considering whether to grant or deny summary judgment on the post-EOD claims, the Court must look to the Trust Pooling and Servicing Agreement ("PSA") language to determine whether the Trustee's actions, or lack thereof, were consistent with its rights and obligations under the governing agreements. To ascertain "the rights, duties and obligations" of the Trustee, the Court must look "exclusively by the terms of the agreements by which the relationships were formed", here, through the PSAs. *Cece & Co. Ltd. v. U.S. Bank, N.A.*, 153 A.D.3d 275, 279 (1st Dept. 2017). "A trustee is not required to act beyond the powers conferred by the governing agreements[.]" *BlackRock Allocation Target Shares: Series S Portfolio v. Wells Fargo Bank, N.A.*, 247 F.Supp.3d 377, 396 (S.D.N.Y. 2017). Prior to the occurrence of an EOD, the Trustee "does not have a duty to 'nose to the source'" to proactively monitor other parties or attempt to uncover EODs. *Commerce Bank v. Bank of New York Mellon*, 141 A.D.3d 413, 415–16 (1st Dept 2016) (internal citation omitted). However, post-EOD, as defined within the PSA of each Trust, "an indenture trustee's fiduciary duties expand … such that 'fidelity to the terms of an indenture does not immunize [a] … trustee against claims that [it] has acted in a manner inconsistent with his or

[2] NYSCEF Doc. No. 1318 (7/3/25 Letter attaching the parties' agreed-upon chart "Claims Remaining Following Summary-Judgment Decision on Champerty, Mitigation, Standing (Assignments), Issue Preclusion, Negating Clauses, No-Action Clauses, Statute of Limitations, and Damages").

[3] In their respective papers, U.S. Bank refers to the required documents as Regulation AB Item 1122s and Regulation AB Item 1123s (or, collectively, "RegABs"). IKB refers to these same documents as "ASOCs."

her fiduciary duty of undivided loyalty to trust beneficiaries.'" *BlackRock Allocation Target Shares*, 247 F.Supp.3d at 395 (internal citation omitted). Thus, although the pre-EOD analysis of trustee duties is limited to its ministerial obligations under the governing PSA, the post-EOD analysis implicates the duty of loyalty. *See id.* at 395–96.

The at-issue Trust PSAs contain language reflecting this shifting and transformative standard of duties upon the occurrence of an EOD. NYSCEF Doc. No. 1067 at Chart 1-A (Ex. 1, PSA Provision Charts). Each of the Trusts has the same, or substantially similar, language indicating that "[d]uring an Event of Default, the Trustee shall exercise such of the rights and powers vested in it by this Agreement and use the same degree of care and skill in their exercise as a prudent person would exercise or use under the circumstances in the conduct of such person's own affairs." NYSCEF Doc. No 835 at § 8.01 (Ex. 1, MSAC 2006-HE5 PSA).

A. Legal Requirements Regarding Trustee Awareness of an EOD by Written Notice or Actual Knowledge

To establish the existence of an EOD, each PSA indicates whether a responsible party for the Trust requires (1) written notice; (2) actual knowledge; or (3) either written notice or actual knowledge. NYSCEF Doc. No. 839 at 11 (Pl. Mem. of Law). The First Department strictly construes the governing agreement language for trustees and holds that written-notice provisions in PSAs "mean what they say." *W. & S. Life Ins. Co. v. U.S. Bank Nat'l Ass'n*, 209 A.D.3d 6,17 (1st Dept. 2022) (strictly enforcing condition-precedent notice requirements).

Under the operative PSAs, any written notice must: (1) identify the loan or trust alleged to be in breach lest it be insufficiently specific to constitute written notice; (2) include specific notice of a material breach of a particular covenant or agreement governed by the PSA and, for most trusts, require the failure to be remedied; and (3) originate from and be delivered to the parties designated in the PSA. *See, e.g.*, *IKB Int'l, S.A. v. Wells Fargo Bank, N.A.*, 208 A.D.3d 423, 429–30 (1st Dept. 2022) (*Wells Fargo 2022*) (written notice must come from and go to an authorized party); *see also* PSA Provision Charts.

Determining whether a party has actual knowledge involves a fact-intensive inquiry. A party's "actual knowledge" of a material breach of a particular covenant or agreement must be loan- or "trust-specific." *Nat'l. Credit Union Admin. Bd. v. U.S. Bank, N.A.*, 665 F.Supp.3d 483, 494 (S.D.N.Y. 2023) (plaintiff must establish loan- or trust-specific knowledge at summary judgment); *see also, Nat'l Credit Union Admin. Bd. v. U.S. Bank, N.A.*, 439 F.Supp.3d 275, 282 (S.D.N.Y. 2020) ("actual knowledge and written notice of systemic RMBS problems" does not suffice to establish an EOD).

B. Trust-Specific PSA Requirements Regarding Written Notice or Actual Knowledge

The PSA language in each Trust specifies whether written notice or actual knowledge is required for the occurrence of an EOD. The only acceptable notification method to the Trustee in certain Trusts[4] is PSA-compliant written notice to the Trustee. PSA Provision Charts at Chart 1-

[4] HEAT 2005-8, HEAT 2005-9, HEAT 2006-1, HEAT 2006-2, and HEAT 2006-4.

H. The remaining Trusts[5] allow PSA-compliant actual knowledge by the Trustee, in addition to written notice. *Id.* at Chart 1-G; *see also* NYSCEF Doc. No. 1065 at 17 (Def. Mem. of Law in Opp'n).

Accordingly, for the Court to find there was an EOD, Plaintiff must provide evidence of a PSA-compliant written notice in the Trusts that require written notice; or must provide evidence of a PSA-compliant notification of an EOD to a responsible party of the Trustee in the Trusts that allow actual knowledge or written notice.

II. Plaintiffs Raise New Post-EOD Claims Concerning Untimely, Missing, or Non-Compliant ASOCs Documents at Summary Judgment Stage

U.S. Bank argues that claims for all EODs resulting from late, missing, or nonconforming Annual Statements as to Compliance ("ASOCs") in the Complaint should be dismissed because IKB first pleads these claims, and new theories regarding these claims, in briefing at summary judgment. Def. Mem. of Law at 25–26. Plaintiffs do not dispute that the claims were not plead in the Complaint[6], nor do they dispute that, if unpled, these theories are untimely because they cannot relate back. *See Phoenix Light SF Ltd. v. Deutsche Bank Nat'l Tr. Co.*, 585 F. Supp.3d 540, 572 (S.D.N.Y. 2022) ("Under New York law, relation-back applies to the amendment of claims and parties and is dependent upon the existence of a valid preexisting action.") (internal citations omitted).

Rather, in a three-line footnote, IKB cites to *Kennelly v. Mobius Realty Holdings LLC*, 33 A.D.3d 380, 382 (1st Dept. 2006), claiming that the Court has discretion under CPLR § 3025(c) to deem the pleadings amended to conform to the proof presented on summary judgment. NYSCEF Doc. No. 1227 at 22, n.3 (Pl. Mem. of Law in Opp'n.). *Kennelly* held that the court could employ such discretionary action when the opposing party suffers no prejudice. *Kennelly*, 33 A.D.3d at 382. Plaintiffs cite no other legal authority for the proposition that this Court may consider what they concede are new allegations on a motion for summary judgment.

The Court finds the facts in the *Kennelly* case so dissimilar to the facts at issue here, that the case is inapposite. In *Kennelly*, the court, in a special proceeding, deemed the pleadings amended when the petitioner added unpled allegations less than two months after commencement of the proceedings. By contrast, IKB commenced this proceeding ten years ago, fact discovery closed in August 2023, expert discovery closed in June 2024, and Plaintiffs filed the Note of Issue in August 2024. Now, U.S. Bank must defend itself in over 60 individually alleged EODs brought up for the first time at the summary judgment stage. Def. Mem. of Law in Opp'n at 10. U.S. Bank argues that it is "unfairly prejudiced" because it did "not have an opportunity to seek summary judgment on these alleged EODs as part of its just-filed motion" because IKB "failed to assert

[5] BSABS 2007-HE4; BSABS 2007-HE5; BSARM 2005-10; BSARM 2005-12; CMLTI 2006-WFHE4; CMLTI 2007-AHL1; CMLTI 2007-AMC4; CMLTI 2007-WFHE1; CMLTI 2007-WFHE2; CSAB 2006-4; JPALT 2006-S4; JPMAC 2006-CW1; JPMAC 2006-CW2; and ABSHE 2006-HE5.

[6] Plaintiffs argue that their second supplemental interrogatory responses listed "categories" of EODs. 6/23/25 Tr. 80:12–18. However, Defendant identifies their interrogatory requests provided to Plaintiffs calling for specific theories and facts, not general categories. NYSCEF Doc. No. 1024 at 7 (Ex. N, Pl. Second Supplemental Answers to Interrogatories) ("Identify each Event of Default You contend occurred in the Trusts, and the date You contend each Event of Default occurred.").

them in its complaint, its expert reports, or in discovery (despite interrogatories specifically calling for these theories)." *Id.* Notably, IKB has not requested leave to file an amended complaint to include these new claims during the pendency of this litigation. Rather, IKB lays this burden on the Court to deem the Complaint as amended. The Court declines to do so. IKB had ample opportunity to amend the Complaint, and any such amendment at this junction results in undue prejudice against Defendant.

Accordingly, the Court grants Defendant's Motion for Summary Judgment, in part, and dismisses all claims related to the delivery of ASOCs, as well as Trust liability with respect to any non-compliant ASOCs. The Court renders all remaining arguments thereto as academic.

III. Servicer Failure-to-Perform EODs

Plaintiffs allege numerous Trust EODs related to Trustee inaction due to a Servicer's failure to perform their PSA-prescribed duties ("Servicer Failure-to-Perform"). An EOD based on a Servicer's Failure-to-Perform may occur when there is "any failure on the part of the Servicer duly to observe or perform in any material respect any other of the covenants or agreements on the part of the Servicer contained in [the PSA]." PSA Provision Charts at Chart 1-E. Whether such failure-to-perform on the part of the Servicer is material is a question of fact for the jury, unless the materiality is clear and "substantially uncontradicted." *See Cont'l Ins. Co. v. RLI Ins. Co.*, 161 A.D.2d 385, 387 (1st Dept. 1990) ("Ordinarily, the question of the materiality… is a question of fact for the jury"); *see also Deutsche Bank Nat'l Tr. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 289 F.Supp.3d 484, 513 (S.D.N.Y. 2018) ("[T]he materiality of any particular breach is a question of fact under New York law"). Plaintiffs allege (1) the failure of U.S. Bank to oversee maintenance of foreclosed properties; and (2) the failure of U.S. Bank to enforce multiple Servicer Failure-to-Perform breaches in the HEAT 2006-4 Trust.

A. EODs Based on Failure to Maintain Real Estate Owned ("REO") Properties

IKB asserts that an EOD occurred in each of the nineteen Trusts for failing "to [m]aintain REO [p]roperties." NYSCEF Doc. No. 1313 at 27–29 (Pl. Mem. of Law in Opp'n); NYSCEF Doc. No. 1011 (Ex. A, IKB's 190 Asserted EODs). REO properties are foreclosed properties where title transfers to the trust. Servicers are contractually obligated to manage and maintain those properties in accordance with the PSA. *See, e.g.*, NYSCEF Doc. No. 1145 (Ex. 79, U.S. Bank Letter to Am. Home Mortgage Servicing, Inc.). The PSA of each Trust requires the Servicer to "manage, conserve, protect and operate each REO Property for the Certificateholders solely for the purpose of its prompt disposition and sale... ." PSA Provision Charts at Chart 1-K.

IKB alleges an EOD occurred after U.S. Bank sent letters to numerous Servicers in December 2009 and January 2010 highlighting systemic maintenance issues facing foreclosed properties. NYSCEF Doc. Nos. 1145–51 (Exs. 79–84, U.S. Bank Letters). The nearly identical letters, however, are generic and do not include loan- or trust-specific information. *See*, *e.g.*, U.S. Bank Letter to Am. Home Mortgage Servicing, Inc. at 3. ("[T]he ability to proceed with real property transactions has been curtailed due to non-payment of property taxes and other assessments" and "servicers are failing to timely file documents of transfer/registration upon the sale of properties."). The letters requested, *inter alia*, that Servicers "take immediate action to remit funds to the appropriate party in an amount sufficient to remove all existing tax liens and

outstanding tax amounts" and ensure that documents in REO property transactions "undertaken in the name of [U.S. Bank] expressly in its capacity as Trustee" state as much. *Id.* at 4. Each letter is addressed to a Servicer regarding all, or many of, the Trusts they oversee on behalf of U.S. Bank and address platform-level and industry-wide issues. *See* Exs. 79–84, U.S. Bank Letters. Finally, the letters do not set forth any affirmative finding by U.S. Bank that a breach occurred. Rather, U.S. Bank conveys industry best practices and urges the Servicers to adopt them moving forward. *Id.* These generic letters are insufficient to establish that an EOD occurred in any specific loan or Trust because Plaintiff failed to establish that the letters supplied loan- or Trust-specific knowledge to the Servicers. *Nat'l. Credit Union Admin. Bd.*, 665 F.Supp.3d at 494 (plaintiff must establish loan- or trust-specific knowledge at summary judgment).

IKB also claims U.S. Bank had both written notice and actual knowledge of REO issues in particular municipalities because it kept "[a] spreadsheet of properties . . .list[ing] more than 2,000 properties across all Trusts with ... REO problems" ("Spreadsheet"). NYSCEF Doc. No. 1155 (Ex. 89, REO Spreadsheet); *see also* Pl. Mem. of Law at 28. IKB further submits: (1) a letter from the Los Angeles City Attorney's Office to U.S. Bank informing it of "complaints respecting numerous properties apparently owned by various trusts on whose behalf [U.S. Bank] serves as trustee" and requesting a meeting (NYSCEF Doc. No. 1156 (Ex. 90, Letter From L.A. City Attorney)); (2) a complaint filed by the State of California in a legal action against U.S. Bank "for failing to maintain REO properties" (NYSCEF Doc. No. 1157 (Ex. 91, California REO Complaint)); and (3) U.S. Bank's cross-complaint against, and resulting in settlement with, certain Servicers related to said legal action (NYSCEF Doc. No. 1158 (Ex. 92, Trust Petition Notification)).

IKB does not assert, let alone offer evidence, that U.S. Bank provided the Spreadsheet to the Servicers. *See* Pl. Mem. of Law in Opp'n. at 28. The Spreadsheet itself identifies communications between U.S. Bank and Servicers regarding some of the industry-based REO pervasive issues with respect to foreclosed properties, but there is no identification of specific Trusts, or loans within a Trust, where U.S. Bank served as Trustee. *See* REO Spreadsheet. Although the Spreadsheet references two REO property violations in the CMLTI 2007-WFHE2 Trust and six in the CSAB 2006-4 Trust, at best, this could establish actual knowledge of breaches on the Trustee's part because a particular property can be tied to a particular loan. *See id.* However, this alone is irrelevant, because the PSA of each Trust requires, at the very least, both the Servicer and the Trustee to have actual knowledge, and there is no evidence on the record of any Servicer having actual knowledge. *See* PSA Provision Charts at Charts 1-E–1-H.

The letter from the Los Angeles City Attorney's Office to U.S. Bank is inadequate to show written notice to, or actual knowledge on the part of, U.S. Bank because the letter does not identify any specific properties, loans, or Trusts. Letter from L.A. City Attorney. The purpose of the letter is to request various categories of information *from* U.S. Bank with respect to what foreclosed properties in Los Angeles the Trusts own, not to advise U.S. Bank of an EOD in a Trust. *See id.* The complaint filed by the State of California against U.S. Bank does allege violations in REO properties in various Trusts. California REO Complaint. Of these, the State of California alleged just one violation on one property in the BSABS 2005-AC9 Trust, two violations on two properties in the CMLTI 2007-AMC4 Trust, and one violation on one property in the HEAT 2005-9 Trust. *Id.* at 54, 59–60, 63. To the extent that the State of California's complaint references specific violations on specific properties in specific Trusts, it is still insufficient to raise a triable issue of

fact as to whether there was an EOD because this was a public filing, and IKB offers no evidence that a Responsible Officer of either the Trustee or Servicer of the at-issue Trusts received either written notice, or had actual knowledge, as required pursuant to the PSAs. *See* PSA Provision Charts at Charts 1-E, 1-G, and 1-H.

U.S. Bank's cross-complaint against, and resulting settlement with, Servicers resolved claims that the Servicers mismanaged foreclosures and subsequent obligations across a broad number of RMBS trusts, some of which are Trusts in this action. *See generally* Certificateholder Notification of Settlement. Within Appendix I to the Certificateholder Notification of Settlement, "Exhibit 1" lists trusts that were the subject of the original allegations by the State of California (*id.* at 56–79);[7] "Exhibit 2" lists trusts that were added later in the litigation (*id.* at 80–116);[8] and "Exhibit 4" consists of a "Funding and Settlement Agreement" that lists specific property addresses where settlement funds are to be allocated to cover REO violations alleged by the State of California (*id.* at 142–182).[9] "Exhibit 3" consists of a list of trusts that were part of U.S. Bank's settlement with the City of Los Angeles and therefore part of the allocation process in U.S. Bank's settlement with Servicers, regardless of whether they were "original" or "additional" trusts in the California cross-complaint. *Id.* at 41; *see also id.* at 117–141.[10]

While multiple Trusts appear in Exhibits 1, 2, and 3, these lists are simply categories from a litigation pleading and do not constitute written notice because they do not identify any breach of the respective PSAs and reflect no intent to trigger contractual remedies under the PSAs. *See id.* at 37–56; *see also IKB Int'l, S.A. v. Wells Fargo Bank, N.A.*, 40 N.Y.3d 277, 285 (2023) (*Wells Fargo 2023*). Nor do any of these exhibits establish actual knowledge because courts require trust-specific knowledge of a material breach provided to a "Trust Responsible Officer" from an authorized party as a condition precedent to an EOD. *Wells Fargo 2022*, 208 A.D.3d at 429–30 (dismissing claims due to insufficient written notice to authorized party).

The sole exception is Exhibit 4, which contains property-level allegations for the CMLTI 2007-AMC4 Trust, which could plausibly be connected to a loan in the Trust. Certificateholder Notification of Settlement at 171, 178. By contrast, the inclusion of other at-issue Trusts in Exhibits 1, 2, or 3 only reflects that these Trusts were part of U.S. Bank's broad litigation posture and settlement, but do not show that U.S. Bank had the requisite property-, loan-, or trust-specific knowledge required to establish either written notice or actual knowledge.

B. Post-EOD Servicer Failure-to-Perform in the HEAT 2006-4 Trust

Plaintiffs claim that U.S. Bank, as Trustee, and Wells Fargo, as Servicer, both received a letter dated April 13, 2012 from Marc Kasowitz, *Esq.* on behalf of the Federal Housing Financing

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[7] At-issue Trusts in Ex. 1: HEAT 2006-2, CSAB 2006-4, HEAT 2006-4, JPMAC 2006-CW1, JPMAC 2006-CW2, CMLTI 2007-AHL1, CMLTI 2007-WFHE1, CMLTI 2007-WFHE2, HEAT 2005-8, and HEAT 2005-9.

[8] At-issue Trusts in Ex. 2: ABSHE 2006-HE5, CSAB 2006-4, HEAT 2006-4, JPMAC 2006-CW1, JPMAC 2006-CW2, CMLTI 2007-WFHE1, CMLTI 2007-WFHE2, HEAT 2005-8, and HEAT 2005-9.

[9] At issue Trust in Ex. 4: CMLTI 2007-AMC4.

[10] At-issue Trusts in Ex 3: CMLTI 2006-WFHE4, CMLTI 2007-AMC4, ABSHE 2006-HE5, HEAT 2006-4, JPMAC 2006-CW1, JPMAC 2006-CW2, CMLTI 2007-AHL1, CMLTI 2007-WFHE1, CMLTI 2007-WFHE2, HEAT 2005-8, HEAT 2005-9.

Agency ("FHFA"), the largest Certificateholder in the HEAT 2006-4 Trust, informing both service providers of EODs in the Trust attributable to "[t]he Servicers hav[ing] failed to observe and perform, in material respects, the covenants and agreements they are required to perform under the PSA." NYSCEF Doc. No. 780 (Ex. 91, Kasowitz Letter). The Kasowitz Letter requests that, on FHFA's behalf, "the Trustee institute an action, suit, or proceeding in its own name in its capacity as Trustee under the PSA, against [the Servicer] for breaching representations and warranties concerning the Mortgage Loans and for failing to repurchase the Mortgage Loans." *Id.*

The Kasowitz Letter identifies a specific trust and three major relevant breaches thereunder by citing to the HEAT 2006-4 PSA at §§ 2.03(d), 3.01, and 3.12, and directly asserts that these breaches rise to the level of ongoing EODs. NYSCEF Doc. No. 725 (Ex. 41, HEAT 2006-4 PSA). Under § 7.01(ii) of the Trust's PSA, however, an EOD does not materialize solely upon breach or notification of same by an authorized party. HEAT 2006-4 PSA at 10. Rather, it arises only after the Servicer receives written notice of its failure to perform and subsequently fails to cure the breach within the applicable 60-day cure period. *Id*. Therefore, while the Kasowitz Letter states that an EOD had occurred, that conclusion is only legally sound if (1) the Servicer had received prior written notice of the breach(es) and failed to cure them within 60 days, or (2) the Kasowitz Letter itself served as initial written notice, thereby commencing the 60-day cure period, and (3) the time to cure subsequently elapsed without said cure. Because the Kasowitz Letter was issued contemporaneously to both the Trustee and Servicer and does not allege prior written notice or a cure period expiration date, at best, the Kasowitz Letter initiated the cure period pursuant to the PSA provisions. Thus, the Kasowitz Letter's assertion that an EOD "had occurred" is premature.

Following receipt of the Kasowitz Letter, the Servicer, Wells Fargo, denied a material breach. *See* NYSCEF Doc. No. 892 (Ex. 25aa, Wells Fargo Certification of Compliance). Defendant alleges, and Plaintiffs do not dispute, that this denial occurred within the 60-day cure period provided for in § 7.01(ii) of the HEAT 2006-4 PSA. *Id.*; *see also* HEAT 2006-4 PSA at 10. Under the Trust structure, the Trustee's heightened fiduciary obligations are not triggered upon mere receipt of written notice alleging a breach, but only after all conditions precedent to the Trustee declaring an EOD are satisfied. Therefore, U.S. Bank's acceptance of the Servicer's denial during the cure period cannot be taken to imply a dereliction of any post-EOD duties, because those duties had not yet attached pursuant to the HEAT 2006-4 Trust PSA.

> Prior to the occurrence of an Event of Default, and after the curing or waiver of all such Events of Default which may have occurred, . . . in the absence of bad faith on the part of the Trustee, the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon any certificates or opinions furnished to the Trustee and conforming to the requirements of this Agreement.

NYSCEF Doc. No. 706 at Chart 22-H (Ex. 22) (citing HEAT 2006-4 PSA § 8.01(i) at 9).

Here, the Trustee acted within its pre-EOD, and largely ministerial, role unless the Servicer failed to cure the specified breaches within the required period. *See Wells Fargo 2023*, 40 N.Y.3d 277 at 285 (pre-EOD trustee role involves only express duties under governing agreement). Accepting the Servicer's summary denial as accurate falls acceptably within the limited scope of

the Trustee's pre-EOD duties. The Kasowitz Letter does not establish an EOD or show potential liability on the part of U.S. Bank as to alleged breaches in the HEAT 2006-4 Trust.

Accordingly, the Court grants Defendant's Motion for Summary Judgment on the Servicer-Failure-to-Perform claims in part and denies the Motion as to the alleged EOD in CMLTI 2007-AMC4, which presents a question of fact for the jury.

IV. Servicer Rating Downgrade EODs

Plaintiff claims that automatic EODs occurred in the CSAB 2006-4, HEAT 2005-9, HEAT 2006-2, and HEAT 2006-4 Trusts after a servicer rating downgrade. The PSAs of these Trusts require a Trustee to declare an EOD when the Trust Servicer's rating, as measured by major credit ratings agencies, falls below a specified level as defined within the respective PSA. PSA Provision Charts at Chart 1-L. IKB asserts that an EOD occurred in each of these four Trusts because of a rating downgrade. Pl. Mem. of Law at 11.

A. Bank of America Servicer Rating Downgrade in CSAB 2006-4 Trust

Bank of America acted as Servicer for the CSAB 2006-4 Trust when Moody's Investor Service, Inc. ("Moody's") issued updated ratings on May 3, 2011 and April 5, 2012 for Bank of America; these ratings used a new ratings system that added modifiers (a "+" or "-") within each rating level. NYSCEF Doc. Nos. 862–863 (Exs. 22–23, Moody's Svs. Announcements). In each of these ratings updates, Moody's downgraded Bank of America's rating. *Id.* U.S. Bank disputes that the downgrades issued by Moody's were "two or more levels" as required by the PSA to trigger an EOD because the downgrades caused Bank of America's rating to fall from "SQ1" at closing to "SQ2-" after the second rating downgrade *Id.*; *see also* Def. Mem. of Law in Opp'n at 20–21.

A guide issued by Moody's on May 10, 2005 discussed the then-recent addition of "+" and "-" modifiers to their current ratings system and reasoned that modifiers provided additional granularity with respect to where a servicer ranked within the "designated rating category" (*i.e.*, at the higher, mid-point, or lower part of the category). NYSCEF Doc. No. 1036 (Ex. Z, Moody's Servicer Quality Ratings). In response to this guide, IKB argues that a ruling from the Southern District of New York, involving the CSAB 2006-4 Trust, held that each modifier added to Moody's rating system did constitute a new rating level under the PSA, and therefore there was an EOD because the movement from SQ1 to SQ2- constituted a downgrade of two levels. Pl. Mem. of Law at 14–15; *Commerzbank AG v. U.S. Bank National Association*, 457 F. Supp.3d 233, 255 (S.D.N.Y. 2020).

The relevant provision of the PSA governing the CSAB 2006-4 Trusts states:

> (a) [E]ither (i) the servicer rankings or ratings for a Servicer are downgraded two or more levels below the level in effect on the Closing Date by one or more of the Rating Agencies rating the Certificates or (ii) the servicer rankings or ratings for a Servicer are downgraded to "below average" status by one or more of the Rating Agencies rating the Certificates or (b) one or

> more Classes of the Certificates are downgraded or placed on negative watch due in whole or in part to the performance or servicing of a Servicer.

NYSCEF Doc. No. 852 at § 8.01(j) (Ex. 12, CSAB 2006-4 PSA).

Ultimately, it is unclear from the factual record whether a change of a modifier in Moody's ratings system should be considered movement within a single rating category, or a downgrade of a rating category which would trigger an EOD pursuant to the CSAB 2006-4 Trust PSA.

B. Ocwen Servicer Rating Downgrade in the HEAT Trusts

Ocwen Financial Corporation acted as Servicer for the HEAT 2005-9, HEAT 2006-2, and HEAT 2006-4 Trusts and submitted a required quarterly10-Q filing to the Securities and Exchange Commission on July 30, 2015 that included their servicer ratings. Joint Statement of Undisputed Facts at 13; *See also* NYSCEF Doc. No. 864 (Ex. 24, Ocwen Form 10-Q). IKB claims an EOD occurred when Ocwen reported in their 10-Q filing that Standard and Poor's Rating Services, a division of The McGraw-Hill Companies, Inc. ("S&P") "lowered a number of our ratings to below average and revised the outlook for these ratings to stable." *Id.* at 12. U.S. Bank does not dispute the "below average" servicer rating but argues that the overt PSA language excludes any ratings offered by S&P because the ratings agency must maintain "a servicer rating system *and* a Rating on the Certificates" (emphasis added). NYSCEF Doc. No. 854 at § 7.01(vi) (Ex. 14, HEAT 2005-9 PSA). IKB provides no evidence that S&P offered a "Rating on the Certificates." *See* Def. Opp'n. at 20–21. The relevant provision of the PSAs governing the HEAT 2005-9, HEAT 2006-2, and HEAT 2006-4 Trusts state that an EOD means, as relevant here:

> [A]ny reduction or withdrawal of the ratings of a Servicer as a servicer of subprime mortgage loans by one or more of the Rating Agencies that maintains a servicer rating system and a Rating on the Certificates to "below average" or below, except for any downgrade by Fitch to "RPS4" or below.

HEAT 2005-9 PSA at § 7.01(vi).

Given the unambiguous PSA language requiring S&P to maintain a "Rating on the Certificates" in order for their "below average" general servicer rating to cause an EOD in the Trusts, the claims against HEAT 2005-9, HEAT 2006-2, and HEAT 2006-4 Trusts fail for lack of evidence, as required at summary judgment, that S&P ever had a "Rating on the Certificates."

Accordingly, this Court denies, in part, Defendant's Motion for Summary Judgment that the CSAB 2006-4 Trust experienced an EOD due to credit agency ratings downgrades because it is a question for the jury. The Court grants, in part, Defendant's Motion for Summary Judgment with respect to claims that the HEAT 2005-9, HEAT 2006-2, and HEAT 2006-4 Trusts experienced an EOD due to a credit agency ratings downgrade.

V. Trust Performance EOD Related to Termination Test

IKB claims a Trust performance EOD occurred when the HEAT 2005-9 Trust "fail[ed] … the Ocwen Termination Test" and "fail[ed] . . .the SPS Termination Test." Pl. Mem. of Law at 21–22; *see also* HEAT 2005-9 PSA at § 7.01(iv), (xii). In their Joint Statement of Undisputed

Facts, the parties agree that the HEAT 2005-9 PSA states that "[i]f pursuant to clause (A) of the definition of either the Ocwen Termination Test or the SPS Termination Test, the . . . [loan losses are] . . .greater than the percentage set forth in the table in such definition, the Trustee shall report such failure . . . to Certificateholders in its monthly statement . . . ." NYSCEF Doc. No. 680 at ¶ 115 (Joint Statement of Undisputed Facts); *see also* HEAT 2005-9 PSA § 1.01 at 43, 54–55. The Termination Tests fail only if realized losses exceed specific percentages on particular dates, *and* "Holders of the Certificates entitled to 51% or more of the Voting Rights request in writing" that the Trustee terminate the Servicer. *Id.*

IKB asserts, and U.S. Bank does not dispute, that the Ocwen and SPS Termination Test failures exceeded the allowable loss percentages in the HEAT 2005-9 Trust, and that the Trustee did not receive a Trustee termination request from 51% or more of shareholders. Pl. Mem. of Law at 21–22; *see also* Def. Mem. of Law in Opp'n at 21. Parties also do not dispute that although the Ocwen Termination Test exceeded the allowable loss percentages in June 2008, and the SPS Termination Test failed as of September 30, 2008, Certificateholders were not notified of either trigger event until November 2008 in the remittance report that is available to all Certificateholders. Pl. Mem. of Law at 22–23; *see also* Def. Mem. of Law at 27–28; Joint Statement ¶¶ 116–118; NYSCEF Doc. No. 942 (Ex. 75, SPS Failure Notification). The September 2008 investor package sent to Certificateholders stated the Trust had not failed the SPS Termination Test, but did not state whether the Trust exceeded the allowable loan loss percentage. NYSCEF Doc. No. 940 at 5 (Ex. 73, Sept. 2008 HEAT 2005-9 Distribution Package). The September 2008 investor package made no mention of the Ocwen Termination Test. *Id.* However, the November 2008 remittance report states the "realized loss percentage" of both the Ocwen and SPS Termination Tests was "greater than Applicable Los[s] Percentage" and further stated that the Certificateholders did not request the termination of either Servicer. NYSCEF Doc. No. 1019 at 2 (Ex. I, November 25, 2008 HEAT 2005-9 Remittance Report). Neither party argues any PSA-prescribed timeframe by which U.S. Bank is required to provide notice to Certificateholders after either Termination Test exceeds the allowable loan loss percentage.

Here, the record is unclear whether U.S. Bank breached its contractual duties to notify Certificateholders about the loan loss percentage trigger event that occurred in June by waiting until the November 2008 "monthly statements" to disclose the trigger event. This is a question of fact for the jury.

Accordingly, the Court denies, in part, Defendant's Motion for Summary Judgment with respect to claims related to Trust Termination Test failure EODs.

Conclusion

The Court has considered the parties' remaining contentions and finds them to be unavailing.

Upon the foregoing, it is hereby

ORDERED that Defendant U.S Bank, N.A.'s Motion for Summary Judgment (Mot. Seq. 16) is GRANTED, in part, to the extent of dismissing (1) all Pre-Event of Default claims; (2) all claims in the JPALT 2006-S4 Trust pursuant to the negating clause in the Trust's Pooling and

Servicing Agreement; (3) all claims where Defendant's underlying conduct was the subject of a previous settlement by JPMorgan Chase & Co. (Index No. 652382/2014) and/or Citigroup, Inc. (Index No. 653902/2014) with Trust Certificateholders; (4) all claims involving repurchase rights on 5,264 loans that are subject to a six-year statute of limitations; (5) all claims related to the untimely delivery of Annual Statements as to Compliance or Regulation AB Item 1123s by the Servicer to the Trustee, non-delivery of Annual Statements as to Compliance or Regulation AB Item 1123s by the Servicer to the Trustee, and receipt of non-conforming Annual Statements as to Compliance or Regulation AB Item 1123s by the Trustee; (6) all claims related to REO properties with the exception of the REO claims in Trust CMLTI 2007-AMC4; (7) all claims related to Servicer Failure-to-Perform EODs in the HEAT 2006-4 Trust; (8) all claims related to Servicer ratings downgrades in the HEAT 2005-9, HEAT 2006-2, AND HEAT 2006-4 Trusts; Defendant's Motion is otherwise DENIED; and it is further

ORDERED that Plaintiffs' IKB International S.A. and IKB Deutsche Industriebank AG Motion for Partial Summary Judgment (Mot. Seq. 017) is GRANTED, in part, to the extent of dismissing Defendant's affirmative defense of champerty; Plaintiffs' Motion is otherwise DENIED; and it is further

ORDERED that parties shall appear for a Pre-Trial Conference on February 25, 2026 at 11:00 a.m. in Courtroom 428 at 60 Centre Street. Parties shall adhere to Part 45 Practices at Section XI.C. regarding requisite submissions in advance of the Pre-Trial Conference and shall submit a joint chart of outstanding claims to be adjudicated at trial in advance of the Pre-Trial Conference.

The foregoing constitutes the Decision and Order of this Court.

A. R. Patel

October 21, 2025
DATE

ANAR RATHOD PATEL, A.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**