SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 53EFM

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MLRN LLC

Plaintiff,

- v -

U.S. BANK NATIONAL ASSOCIATION,

Defendant.

INDEX NO. 652712/2018

MOTION DATE 12/21/2018

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 101
were read on this motion to/for DISMISS.

Upon the foregoing documents and for the reasons set forth on the record (9/19/19), the defendant's motion to dismiss the amended complaint (the **Complaint**) pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7) is granted solely to the extent set forth below and is otherwise denied.

RELEVANT BACKGROUND

US Bank National Association (**US Bank**) is the current trustee for 62 residential-mortgage-backed-securities (**RMBS**) trusts (Compl., ¶ 4). Sixty of those RMBS trusts are governed by Pooling and Servicing Agreements (**PSAs**). Two of the RMBS trusts (Home Equity Mortgage Trust 2006-2 and TMTS 2005-11) are indenture trusts. The Complaint asserts a single cause of action against US Bank for breach of contract.

The court assumes a general familiarity with RMBS cases. Briefly, however, an RMBS securitization involves bundling mortgage loans together and selling interests in the resulting revenue streams to investors (the **Certificate Holders**) (*id*., ¶¶ 18-25). In each securitization, a "sponsor" or a "seller" forms a loan pool from the mortgage loans and then transfers that loan pool to a "depositor," which segments the loans in the pool according to their level of risk (*id.*, ¶¶ 19-20, 23). The segmented loan pool is then conveyed to a trust which issues securities (the **Certificates**) (*id.*, ¶ 20). After an underwriter sells the Certificates to investors, the sponsor or seller appoints a servicer or master servicer, who then collects payments on the underlying mortgage loans and directs the funds to a trustee – here, US Bank – which passes the payments on to the Certificate Holders (*id*., ¶ 21).

Following the 2008 financial crisis and the collapse of so many mortgage-backed securities, a flood of litigation ensued in respect of the RMBS seeking redress for the defaulted Certificates. Much of the litigation was brought by trustees of the RMBS trusts against their sellers or servicers. As many of these contracts were made in the early 2000s, the statute of limitations was often an issue in these early RMBS cases (e.g., *ACE Sec. Corp. v DB Structured Prods., Inc.*, 25 NY3d 581 [2015]).

More recently, as the original cases have settled or been litigated to conclusion, the RMBS cases that are being brought have begun to take on a different form and the instant case is one of a "growing number of cases" in which the Certificate Holders of RMBS trusts now assert claims against their common trustee (*e.g.*, *Pacific Life Ins. Co. v Bank of NY Mellon*, 2018 WL 1382105

*1 [SD NY March 16, 2018]; *Blackrock Balanced Capital Portfolio (FI) v US Bank N.A.*, 165 AD3d 526 [1st Dept 2018]; *Royal Park Invs. SA/NV v Bank of NY Mellon*, 2016 WL 89930 [SD NY March 2, 2016] [**RMBS Trustee Case(s)**]). These RMBS Trustee Cases represent the "latest wave" of RMBS litigation wherein Certificate Holders allege that a trustee "failed to discharge its duty as Trustee" by disregarding "its contractual obligations to protect Plaintiffs" from "pervasive documentation errors, breaches of seller representations and warranties ('R&Ws') and systemic loan-servicing violations" because "doing so would have exposed Defendant to liability for its own RMBS-related misconduct" (*BlackRock Allocation Target Shares: Series S. Portfolio v Wells Fargo Bank, Nat. Assn.,* 247 F Supp 3d 377 [SD NY 2017]).

In the instant action, the Complaint alleges that US Bank and other parties to the PSAs, including the servicers and master servicers, were required to provide notice of any breach of the representations and warranties (**R&W**s) made by the sponsors or the other parties that originated the mortgage loans (sponsors and others, collectively, the **Originators**) underlying the trusts (Compl., ¶¶ 9, 32-34). These R&Ws "concerned key attributes of the mortgage loans" held by the trusts, including the Originators' "adherence to the origination guidelines applicable to those loans and to state laws regarding predatory lending" (*id.*, ¶ 9). The Complaint alleges that, as the trustee, US Bank had "an express duty to provide notice of breaching loans to trigger repurchase protocols and/or enforce the obligations of the responsible parties to repurchase loans that breached [R&W] provisions in a material manner or were missing required documentation" (*id.*). In addition, "US Bank was also required to: (i) provide notice of, and remedy, breaches of the Servicers' duties, such as the duties to service the mortgage loans prudently, mitigate losses, and give notice of breaches of [R&Ws] or other loan defects, and (ii) provide notice of, and remedy,

breaches by the Master Servicer, which was required to supervise and monitor the Servicers." (*id.*).

MLRN LLC (**MLRN**) acquired Certificates issued by the trusts with an original face value of approximately $596.6 million in 2018, with an express assignment of all litigation claims (*id.*, ¶ 6). The Complaint alleges that:

> US Bank breached its contractual duties under the PSAs in multiple ways, including by failing to: (i) provide notice of representation and warranty violations by the Originators and Sponsors; (ii) provide notice of the Servicers' breaches, including, for example, the Servicers' failures to service the mortgage loans prudently and to give notice to, or cause the responsible parties to repurchase loans subject to a breach of representation or warranty or missing contractually-required documentation; (iii) cause the responsible parties to repurchase loans subject to a breach of representation or warranty or missing documentation required to be delivered under the PSAs; and (iv) exercise prudently all the rights and remedies available to the Trustee under the PSAs upon an Event of Default

(*id.*, ¶ 12).

The RMBS trustee's duties are expressly set forth in the relevant trust agreement and are different prior to an Event of Default (**EOD**) and post EOD (*Phoenix Light SF Ltd. v Bank of NY Mellon*, 2015 WL 57110645 [SD NY Sept. 29, 2015]). Prior to an EOD, an RMBS trustee's duties are "largely ministerial," and include such tasks as "taking physical possession of complete mortgage files; preparing certifications of the status of the mortgage loan files; and providing notice to all parties whenever there is a breach of a representation or warranty by the Servicers, sponsors, or loan originators, with respect to a loan, or of any breach by the Servicers" (*id.* [internal citations omitted]). Post-EOD, however, an RMBS trustee assumes the same duties

as a common law trustee and must act as a "prudent person" would act under the circumstances in the conduct of its own affairs (*id.*).

MLRN alleges that US Bank breached both its pre-EOD and post-EOD duties when it learned, among other things, that the trusts contained a substantial number of loans as to which the seller or servicer had failed to comply with its contractual obligations and failed to take appropriate action. The 90-page Complaint sets forth in substantial detail a number of specific EODs and additional breaches that, but for US Bank's failure to provide notice, would have ripened into EODs if left unremedied. MLRN contends that this post-EOD duty continues while any EOD remains uncured (*e.g.*, Compl., ¶ 109).

DISCUSSION

US Bank moves for partial dismissal of the action pursuant to CPLR 3211 (a)(1), (a)(5) and (a)(7). On a motion to dismiss, the pleadings are afforded a liberal construction and the plaintiff accorded the benefit of every possible favorable inference (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). This is particularly so with respect to RMBS cases, where this standard has been described as a "low bar" (*Phoenix Light SF Ltd v Bank of NY Mellon*, 2015 WL 5710645 *4 [SD NY September 29, 2015]) and where the plaintiff may satisfy its pleading burden with allegations that simply "raise a reasonable expectation that discovery will reveal evidence proving [the plaintiff's] claim" (*Phoenix Light SF Ltd v Deutsche Bank National Trust Co.*, 172 F Supp 3d 700 [SD NY 2016] [citation omitted]).

Dismissal based on documentary evidence pursuant to CPLR 3211 (a)(1) is warranted only if the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law (*150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004] [citing *Leon v Martinez*, 84 NY2d 83, 88 (1994)]). Dismissal based on statute of limitations pursuant to CPLR 3211 (a)(5) is warranted if the defendant can establish *prima facie* that the time in which to sue has expired and the plaintiff cannot aver evidentiary facts establishing that the action is timely or falls within an exception to the statute. Finally, dismissal for failure to state a claim pursuant to CPLR 3211 (a)(7) is warranted if the factual allegations in the complaint "do not set forth a viable cause of action, or [] consist of bare legal conclusions" (*Delran v Prada USA Corp.*, 23 AD3d 308, 308 [1st Dept 2005]).

The well-settled elements of a breach of contract claim that MLRN must allege are (1) the existence of a contract, (2) US Bank's breach and (3) damages as a result of the breach (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). There is no heightened pleading requirement for a claim sounding in breach of contract as there is with claims sounding in fraud or defamation (*see* CPLR 3016). MLRN's pleading must only "give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action" (CPLR 3013).

US Bank argues that MLRN has failed to adequately plead "the bulk" of its breach of contract claims because it claims that the complaint: (1) fails to state post-EOD claims, (2) fails to state a pre-EOD claims, and (3) is barred by the statute of limitations with respect to, at least, the pre-EOD claims (Def. Supp. Brief, p. 1; *9/19/2019 Tr.*, p. 59).

I. The Pre-EOD Claims

US Bank argues that the pre-EOD claims are untimely because this action was filed eleven years after the last of the trusts closed in 2007 and thus almost more than double New York's six-year statute of limitations period for contract claims (CPLR § 213[2]).

In opposition, MLRN asserts that US Bank breached its duty to enforce the repurchase of defective loans and, in addition, that US Bank breached its duties by allowing these repurchase claims to lapse (Compl., ¶¶ 69-97). MLRN claims that US Bank had six years from the closing of each securitization to enforce the repurchase obligations and that, where US Bank breached its obligations by allowing these claims to lapse, MLRN then has an additional six years to bring any claims against US Bank for breach of such contractual obligations. Thus, MLRN argues that its claims are timely and that, in any event, the question of timeliness cannot be resolved on a motion to dismiss citing *Pacific Life, supra*. In that case, addressing a substantially similar issue in another RMBS Trustee Case, Judge Failla wrote:

> ***any statute of limitations defense cannot be resolved at the motion to dismiss stage*** because it involves factual questions as to when and against whom the claims accrued, whether violations were continuing and whether tolling applies … ***each of Defendant's arguments implicating the statute of limitations is premature***; the court cannot resolve this issue from the face of the Complaints… [and] because Plaintiffs have raised the specter of ongoing breaches, the Court is unable to determine as a matter of law that Plaintiffs have alleged discovery of breaches that occurred during the limitations period. Simply put, at this stage, Plaintiffs are not required to specify precisely when, and precisely on what basis Defendant breached each of its contractual obligations.

(2018 WL 1382105, *7 [internal quotations omitted, citing *BlackRock Allocation Target Shares: Series S. Portfolio v Wells Fargo Bank, National Assn.*, 247 F Supp 3d 377 [SD NY 2017] [emphasis added]).

The rationale articulated by this decision is compelling. As is commonly the case with RMBS cases, the statute of limitations inquiry is complicated by the fact that MLRN's pre-EOD claims are subject to class action tolling as most of the RMBS trusts at issue here either are or were involved in class action litigation and, thus, subject to tolling under the class-action tolling doctrine articulated in *American Pipe & Constr. Co. v Utah* (414 US 538, 554 [1977]). *American Pipe* held that under the federal class action rule, "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action" (*id.*). New York courts have adopted this rule (*Desrosiers v Perry Ellis Menswear, LLC*, 139 AD3d 473, 474 [1st Dept 2016]). Here, 36 of the RMBS trusts at issue in this action were involved in *Blackrock Balanced Capital Portfolio (FI) v US Bank N.A.*, Index No. 651864/2014 (Sup Ct NY Cnty, filed June 19, 2014). Three RMBS trusts were added in *Blackrock Balanced Capital Portfolio (FI) v US Bank N.A.,* Index No. 652204/2015 (Sup Ct NY Cnty, filed June 19, 2015). Four of the RMBS trusts were also at issue in *Royal Park Invs. SA/NV v US Bank N.A.*, No. 14-cv-2590 (SD NY, filed April 11, 2014). For the avoidance of doubt, US Bank does not dispute that class-action tolling may be applicable to at least some of the RMBS trusts here (Def. Reply Memo., p. 9).

However, not all of MLRN's claims necessarily survive even at this pleading stage. As is clear from the complaint, at least one of the RMBS trusts closed as far back as 2004 (e.g., PPSI 2004-WWF1) and another several trusts as far back as 2005 (e.g., TTTS 2005-8HE and TMTS 2005-11). Put another way, taking all of the allegations set forth in the complaint as true and assuming

that US Bank breached its duty to enforce the repurchase of defective loans contained in the RMBS trusts, which time would have run by 2010 and 2011, respectively, and then breached its duties by allowing these repurchase claims to lapse, which claim would have become untimely by 2016 and 2017, and this action having not commenced until 2018, the court holds that to the extent that any such RMBS trusts were not involved in a class action lawsuit such that the statute of limitations would be tolled pursuant to class-action tolling as articulated in *American Pipe*, *supra*, any claims relating to such RMBS trusts are dismissed as untimely.

II. The Post-EOD claims

As an initial matter, US Bank does not concede the timeliness of the post-EOD claims, but rather, as it explained at oral argument:

> we haven't moved on [] the statute of limitations post-EOD claims because … [w]e don't think it's a motion to dismiss type [of] issue.

(*9/19/2019 Tr.*, p. 59).

Putting aside issues of timeliness, to succeed on its post-EOD claims, MLRN must allege: (1) the existence of an EOD, (2) US Bank's awareness of the EOD, and (3) US Bank's failure to act prudently under the circumstances post-EOD. US Bank does not challenge the allegation that it failed to act prudently on this motion, but only takes issue with the existence of EODs and its knowledge thereof. To survive a motion to dismiss, a RMBS plaintiff is "not required to allege that defendant had actual knowledge of a loan-specific breach" nor to "allege loan-specific breaches" (*Fixed Income Shares: Series S v Citibank, N.A.*, 157 AD3d 541 [1st Dept 2018]). Rather, it is sufficient at the pleading stage to allege "pervasive breaches of representations and

warranties" as are alleged by MLRN here (*Fixed Income Shares: Series S v Citibank, N.A.*, 130 F Supp 3d 842, 854 [SD NY 2015]). Moreover, knowledge to the trustee may be imputed based on "its involvement with other RMBS trusts in various capacities, including serving as one of the largest RMBS servicers, being named in RMBS litigation involving similar allegations to those made here, and receiving notice of breaches with respect to other trusts for which it served as trustee" as well as "other high profile litigation and settlements regarding the same originators and sponsors as those involved with the Trusts" (*id.*).

Turning first to the existence of EODs, MLRN alleges the following uncured Servicer or Master Servicer breaches ripened into EODs with respect to all 62 RMBS trusts at issue:

- Failing to provide notice of breaches of representations and warranties (Compl., ¶¶ 98-99).
- Fabricating documents on a widespread basis when the missing documents were needed to foreclose on properties (*id*., ¶¶ 103 and 107; Ex. G).
- Failing to notify transaction parties that loans in foreclosure were eligible for repurchase due to incomplete documentation or otherwise ensure that the Certificate Holders' interests in the loans were adequately protected (*id*., ¶¶ 103 and 108).
- Falsifying or failing to deliver Servicer certifications regarding compliance with servicing requirements (*id.*, ¶¶ 112-115).
- Imprudent servicing of Trust assets, e.g., overcharging borrowers in default and charging excessive fees (*id.*, ¶¶ 116-120, Ex. H).

MLRN also alleges certain additional, trust-specific EODs as follows:

- With respect to HEAT 2006-2 and TMTS 2005-11 trusts, the issuer's failure to protect trust collateral by permitting the mortgage files to remain incomplete (*id.*, ¶¶ 121-124)
- With respect to GSAMP 2005-AHL2, when there was a servicer downgrade EOD following a June 2015 S&P 500 rating drop to "below average" (*id.*, ¶¶ 129-130).
- With respect to GSAMP 2005-AHL2, GSAMP 2006-HE3, GSAMP 2006-HE7, GSAMP 2007-HE1 and GSAMP 2007-HE2, when certain cumulative losses exceeded contractually-defined thresholds (*id.*, ¶¶ 125-128, 131).

Additionally, the Complaint alleges master servicer breaches as each PSA contains a provision requiring the Master Servicer to:

> supervise, monitor and oversee the obligations of the Servicers to service and administer their respective Mortgage Loans in accordance with the terms of the applicable Servicing Agreement and … shall cause each Servicer to perform and observe the covenants, obligations and conditions to be performed or observed by such Servicer under the applicable Servicing Agreement

(e.g., BAFC 2006-H PSA, § 3.01).

MLRN alleges that permitting the servicers to breach their duties without consequence was a breach of the master servicers' duty to monitor the servicers (Compl., ¶¶ 47, 55-56, 105, 107). MLRN also argues that discovery is likely to reveal additional EODs.

With respect to notice, MLRN alleges that written notice of these servicer and master servicer breaches was provided as, e.g., the servicers/master servicers received document certification and exception reports from US Bank showing deficient mortgage loan files (*id.*, ¶¶101-109, Ex. G). MLRN further alleges that, in addition:

> on July 21, 2011, the Association of Mortgage Investors ("AMI") notified all major RMBS trustees (including U.S. Bank) that "substantial evidence [] has emerged of abuses in the servicing and monitoring of" RMBS. The letter set forth in detail the publicly available information demonstrating that there was widespread evidence, including some of the evidence referenced in this Complaint, that loan Originators had systematically breached representations and warranties provided to securitization trusts, and that the parties servicing loans underlying securitization trusts had systematically breached their obligations under applicable servicing agreements. The letter cautioned: "You cannot be negligent ascertaining the pertinent facts regarding the underlying collateral"; "[u]pon discovery of representation or warranty breaches, you have to notify the appropriate parties"; and "you must comply with your obligations … to take action to remedy the servicer Events of Default in the best interests of the certificateholders."

(*id.*, ¶ 110).

The Complaint also alleges that "investors in a number of other Covered Trusts provided U.S. Bank notice of numerous defaults by the Servicers, Sponsors and Originators," and that "U.S. Bank also received notices of other Events of Default specifically referencing the Covered Trusts" (*id.*, ¶ 111).

Additionally, for 21 of the RMBS trusts, an EOD only requires servicer or master servicer knowledge of its breaches, i.e., no written notice is required because a servicer or master servicer's knowledge of its failure to perform its contractual duties is enough to establish an

EOD (*see id.*, ¶ 106; Veliky Aff., Ex. 1). By way of example, the ABSHE 2006—HE3 PSA defines an EOD as:

> any failure on the part of the Servicer duly to observe or perform in any material respect any of the covenants or agreements on the part of the Servicer … which continues unremedied for a period of 45 days after the earlier of (x) … written notice of such failure … and (y) actual knowledge of such failure

(ABSHE 2006-HE3 PSA s. 7.01[a][ii]).

For 26 of the RMBS trusts, certain EODs also occur automatically, i.e., no written notice or actual notice of the servicer or master servicer is required. Here, MLRN alleges that EODs occurred in five of the RMBS trusts due to cumulative losses exceeding certain contractually-defined thresholds (Compl., ¶¶ 125-128, 131). For another 21 of the RMBS trusts, MLRN alleges that EODs occurred automatically due to the servicer or master servicer's failure to deliver conforming certifications of compliance (*id.*, ¶ 113). MLRN maintains that these EODs occur automatically regardless of written notice or actual knowledge because a false certification cannot be conforming. Here, too, MLRN argues that discovery is likely to reveal the existence of additional EODs.

Although none of the allegations in the Complaint may demonstrate US Bank's "knowledge of deficiencies with respect to any particular loan, they are sufficient to meet Plaintiffs' burden at the motion-to-dismiss stage" (*id.*, citing *Royal Park Invest.*, 109 F Supp 3d at 602-603). This is because at the pleading stage, information concerning breach on a "loan-by-loan and trust-by-trust basis" is "uniquely in the possession of defendants" (*BlackRock Allocation Target Shares: Series S. Portfolio v Wells Fargo Bank, National Assn.*, 247 F Supp 3d 377, 390, 389 [SD NY

2017] [noting that courts have, "repeatedly rejected similar arguments by reminding litigants of the difference between sufficient pleading and successful claims"]). In short, allegations of "specific or systemic concerns" with RMBS trusts "creates a reasonable expectation that Defendant's Responsible Officers had received written notice of Events of Default," and while "they do not prove that Responsible Officers had received written notice, such proof is not required" on a motion to dismiss (*Pacific Life Ins. Co.*, *supra*, 2018 WL 1382105, *10). Here, MLRN pleads such knowledge (*see*, e.g., Compl., ¶¶ 107, 116, 188, Ex. G).

US Bank also contends that MLRN failed to plead the requisite written notice to the servicer with respect to certain of the RMBS trusts and argues that MLRN cannot rely on the prevention doctrine, as further discussed below, to salvage this defect. Specifically, with respect to certain of the RMBS trusts US Bank claims that it either had no duty to send out any notices to cure or that, to the extent that it had a duty to give notice, the Certificate Holders entitled to at least 25% of the Voting Rights could have sent notice of the servicers' failures as well and that thus MLRN cannot allege that US Bank "caused" the servicers or master servicers not to receive the requisite notice (Def. Supp. Memo, pp. 7-8). Here, US Bank relies on two First Department's decisions in *BlackRock Balanced Capital Portfolio (FI) v US Bank Natl. Assn. (*(165 AD3d 526 [1st Dept 2018]) and *Fixed Income Shares: Series M v Citibank, N.A.* (157 AD3d 541 [1st Dept 2018]), which limited the application of the "prevention doctrine" in cases such as the one here.

The prevention doctrine stands for the proposition that a party cannot argue that its contractual obligations have not been triggered by a condition precedent when it is, itself, the one who prevented the triggering of such condition precedent (*id.*). Prior to these *Fixed Income Shares*,

courts applied the prevention doctrine to situations where the defendant trustee claimed that no EOD occurred because the servicers never received notice to cure from the trustee (e.g., *Phoenix Light SF Ltd. v Deutsche Bank Natl. Tr. Co.*, 172 F Supp 3d 700 [SD NY 2016]; *Oklahoma Police Pension & Retirement Sys. v US Bank, N.A.*, 291 FRD 47, 70 [SD NY 2013]; compare with, *BlackRock, supra*).

In *Fixed Income Shares,* the first of the two cases decided by the Appellate Division, Certificate Holders sued their RMBS trustee for breach of the implied covenant of good faith and fair dealing and for breach of contract alleging a breach of certain R&Ws and based on "robosigning" (157 AD3d at 541-42). The First Department dismissed the breach of good faith and fair dealing cause of action because the relevant PSA expressly stated that, "no implied covenants or obligations shall be read into this Agreement against the Trustee" (*id.* at 542). As to the breach of contract cause of action, the First Department held that the relevant PSA did not require the defendant trustee to give notice to cure and again found that the "failure to send a notice to cure to the servicers is not 'active conduct' … [where] under the PSA, 'the Holders of Certificates entitled to at least 25% of the Voting Rights could have sent notice of the servicers' failure" (157 AD3d at 542-43).

In *BlackRock*, the Certificate Holders similarly sued their RMBS trustee for breach of fiduciary duty, breach of contract, breach of the implied covenant of good faith and fair dealing and for negligence (165 AD3d 526; 2018 NY Slip Op 31388[U] [January 17, 2018]). The trial court dismissed all claims except for the breach of contract claim, which it sustained in part (*id.*). On appeal, the First Department further limited the Certificate Holders' breach of contract claim by

finding that the RMBS trustee's failure to send out a notice to cure to servicers with respect to certain RMBS trusts was "not 'active conduct' within the meaning of the prevention doctrine" and dismissed all claims relating to such trusts (165 AD3d at 527).

At oral argument MLRN expressly disclaimed reliance on the prevention doctrine to sustain ***any*** of its claims, but nevertheless claimed in its motion papers that the doctrine applies to preclude US Bank from "shirking" its responsibility for giving notice of the EODs (*9/19/2019 Tr.*, p. 27:14-18; Ptf. Opp. Memo, pp. 5-6). Despite MLRN's best efforts to disclaim reliance on the prevention doctrine, it clearly does rely on the doctrine with respect to certain RMBS trusts in order to allege an EOD and the court is bound to follow the Appellate Division decisions in *BlackRock* and *Fixed Income Shares,* and not the federal court authority cited by MLRN for the proposition that these cases were incorrectly decided, which is not binding on this court (*see National Credit Union Admin. Bd. v Deutsche Bank Natl Trust Co.*, -- F Supp 3d ---, 2019 WL 5190889, *15-16 [SD NY October 15, 2019]). Inasmuch as both *BlackRock* and *Fixed Income* stand for the proposition that a failure to send a notice to cure to the servicer is not active conduct, all claims based on the failure to give such notice must be dismissed (*see* Def. Chart 1(a), NYSCEF Doc. No. 34).

Finally, US Bank argues that to the extent that any of MLRN's claims survive, the claims against it are also barred by no-action clauses, which require the Certificate Holders to take certain steps before pursuing legal action, including, as relevant here, to make a demand that a specified deal party initiate the suit (e.g., Danilow Aff., Ex. D, § 11.03). For 58 of the trusts at issue, US Bank concedes that the Appellate Division has already ruled on this issue, i.e., that when the no-action

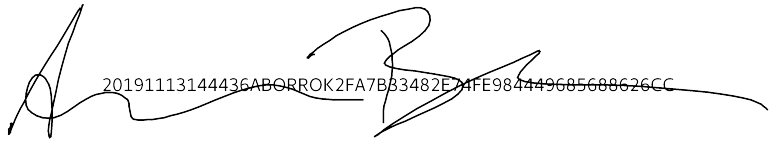
clause requires certificate holders to demand that the trustee commence an action against itself, compliance with the no-action clause is excused (*Blackrock, supra,* 165 AD3d at 528). However, for four of the RMBS trusts, a demand may also be made on the securities administrator or the trust administrator and, here, US Bank argues that there is nothing absurd about asking one of these parties to sue the trustee, and therefore the claims as to these four trusts must be dismissed (Def. Supp. Memo., p. 21). As MLRN points out, however, the other party empowered to sue regarding these four trusts here is Wells Fargo, which serves as both the securities/trust administrator ***and*** as one or more of the master servicer, servicer, custodian and originator (e.g., BAFC 2006-H, CMLTI 2007-AHL, BAFC 2006-H, BAFC 2006-H). Thus, to make a demand on Wells Fargo, MLRN would essentially be asking Wells Fargo to bring claims that implicate its own alleged misconduct. That would be as "absurd an application of the no-action clause" as demanding that US Bank sue itself and, indeed, other courts considering this argument have concluded as much (e.g., *Bakal v US Bank Natl. Assn.*, 2018 l 1726053, *6-7 [SD NY April 2, 2018], affd 747 F appx 32 [2d Cir 2019]; *VNB Realty, Inc. v US Bank, N.A.*, 2014 WL 1628441, *3 [D NJ April 23, 2014]). To the extent that the federal court in *CommerzBank AG v US Bank Natl. Assn.* held otherwise, that decision is not binding on this court, and, in any event, the position articulated therein appears to be against the weight of authority in both the Second Circuit and more broadly (277 F Supp 3d 483 [SD NY 2017]). This court is not persuaded by its rationale.

Accordingly, it is

ORDERED that the motion to dismiss is granted solely to the extent indicated above and is otherwise denied; and it is further

ORDERED that the defendant is to serve an answer to the amended complaint within 20 days; and it is further

ORDERED that the parties are directed to appear for a status conference in Part 53 on December 12, 2019 at 11:30.



11/14/2019
DATE

ANDREW BORROK, 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**