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# [***Phoenix Light Sf v. Wells Fargo Bank, N.A.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:647T-XFY1-FG68-G03M-00000-00&context=1000516)

United States District Court for the Southern District of New York

December 6, 2021, Decided; December 6, 2021, Filed

14-CV-10102 (KPF) (SN); 15-CV-10033 (KPF) (SN)

**Reporter**

2021 U.S. Dist. LEXIS 233418 \*

PHOENIX LIGHT SF LIMITED, et al., Plaintiffs, -against- WELLS FARGO BANK, N.A., Defendant.COMMERZBANK AG, Plaintiff, -against- WELLS FARGO BANK, N.A., Defendant.

**Counsel:**  [\*1] For Phoenix Light SF Limited, Silver Elms CDO II Limited, Blue Heron Funding II Ltd., Kleros Preferred Funding V Plc, Silver Elms CDO plc, Blue Heron Funding V Ltd., C-Bass CBO XVII Ltd., Blue Heron Funding IX Ltd., C-Bass CBO XIV Ltd., Plaintiffs (1:14-cv-10102-KPF-SN): David H Wollmuth, Melissa Ann Finkelstein, Randall R. Rainer, Steven Sanford Fitzgerald, Bridget Elizabeth Croutier, Christopher Jon Lucht, Jay Gerald Safer, John Richard Hein, LEAD ATTORNEYS, Wollmuth Maher & Deutsch LLP, New York, NY; George A. Zelcs, LEAD ATTORNEY, PRO HAC VICE, Korein Tillery, LLC, Chicago, IL; John Anton Libra, LEAD ATTORNEY, Korein Tillery, LLC, Chicago, IL; Matthew Davies, LEAD ATTORNEY, PRO HAC VICE, Korein Tillery, Chicago, IL; Michael Christopher Ledley, LEAD ATTORNEY, Simpson Thacher & Bartlett LLP (NY), New York, NY; Stephen M. Tillery, LEAD ATTORNEY, PRO HAC VICE, Korein Tillery, LLC, St. Louis, MO; Jay Stuart Handlin, Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, Los Angeles, CA; Nicole Marie Clark, Paul DeFilippo, Philip Ransom Schatz, Roselind Franciska Hallinan, Ryan John Keenan, Sean Patrick McGonigle, Wollmuth Maher & Deutsch LLP, New York, NY; Ryan Anthony Kane, Wallmuth [\*2]  Maher & Deutsch LLP, New York, NY; William Andrew Maher, Wollmuth, Maher & Deutsch, LLP, New York, NY.

Royal Park Investments SA/NV, Plaintiffs (1:14-cv-10102-KPF-SN), Pro se.

For Wells Fargo Bank, N.A., Defendant (1:14-cv-10102-KPF-SN): Jayant W. Tambe, LEAD ATTORNEY, Amanda Leigh Dollinger, Jones Day (NYC), New York, NY; Andrew R. Stanton, PRO HAC VICE, K&L Gates LLP, Pittsburg, PA; Courtney Lyons Snyder, Jones Day(PA), One Mellon Center, Pittsburgh, PA; Eric Peter Stephens, Harold Keith Gordon, Howard Fredrick Sidman, Jason Jurgens, Joseph James Boylan, Mahesh Venkatakrishnan, Ryan John Andreoli, Traci Leigh Lovitt, Tracy V. Schaffer, Jones Day (NYC), New York, NY; Kimberly A. Brown, Jones Day(PA), Pittsburgh, PA; Kurt Michael Gosselin, Jones Day, New York, NY; Robert L. Schnell, Faegre Baker Daniels LLP, Minneapolis, MN.

For Dock Street Capital Management, LLC, Interested Party (1:14-cv-10102-KPF-SN): Jeffrey Craig Dannenberg, LEAD ATTORNEY, Kestenbaum, Dannenberg & Klein, LLP, New York, NY.

For Commerzbank AG, Plaintiff (1:15-cv-10033-KPF-SN): Bridget Elizabeth Croutier, John Richard Hein, Michael Christopher Ledley, Nicole Marie Clark, Paul DeFilippo, Philip Ransom Schatz, Roselind [\*3]  Franciska Hallinan, Ryan John Keenan, Sean Patrick McGonigle, Steven Sanford Fitzgerald, David H Wollmuth, Ryan Anthony Kane, Wollmuth Maher & Deutsch LLP, New York, NY; Jay Stuart Handlin, Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, Los Angeles, CA.

Royal Park Investments SA/NV, Consolidated Plaintiff (1:15-cv-10033-KPF-SN), Pro se.

For Wells Fargo Bank N.A., Defendant (1:15-cv-10033-KPF-SN): Howard Fredrick Sidman, LEAD ATTORNEY, Amanda Leigh Dollinger, Cealagh P Fitzpatrick, Eric Peter Stephens, Harold Keith Gordon, Jason Jurgens, Jayant W. Tambe, Joseph James Boylan, Mahesh Venkatakrishnan, Mario Cacciola, Ryan John Andreoli, Traci Leigh Lovitt, Tracy V. Schaffer, Jones Day (NYC), New York, NY; Andy Stanton, Jones Day, Pittsburgh, PA; Danielle Leneck, Rasha G Shields, Jones Day (LA), Los Angeles, CA; Kurt Michael Gosselin, Jones Day, New York, NY.

For Dock Street Capital Management, LLC, Interested Party (1:15-cv-10033-KPF-SN): Jeffrey Craig Dannenberg, LEAD ATTORNEY, Kestenbaum, Dannenberg & Klein, LLP, New York, NY.

**Judges:** SARAH NETBURN, United States Magistrate Judge.

**Opinion by:** SARAH NETBURN

**Opinion**

**REPORT & RECOMMENDATION**

**SARAH NETBURN, United States Magistrate Judge**.

**TO THE HONORABLE KATHERINE** [\*4]  **POLK FAILLA**:

This case is one of many lawsuits brought in this District in the wake of the financial crisis regarding residential mortgage-backed securities ("RMBS") trusts. Commerzbank AG ("Commerzbank") and the Phoenix Light SF Limited Plaintiffs ("Phoenix Light," and collectively "Plaintiffs") filed an action against RMBS trustee Wells Fargo Bank. N.A. ("Wells Fargo"), alleging, in relevant part. Wells Fargo's failiue to discharge its duties as trustee and failiue to abide by its contractual obligations. Wells Fargo moves for summary judgment as to 29 trusts, and Plaintiffs cross-move as to 27. See ECF Nos. 559, 574.[[1]](#footnote-2)1 I recommend GRANTING in PART and DENYING in PART the parties' motions with regards to Plaintiffs' standing, contractual ability to bring the claims, the Minnesota court orders, and the timeliness of Plaintiffs' claims.[[2]](#footnote-3)2 Because these recommendations may resolve one or both actions, or may significantly narrow the scope of remaining claims, I decline to address the remaining issues raised in the parties' briefs. Within 14 days of a final decision by the Court, the parties are ordered to file a joint letter identifying any outstanding claims that require resolution.

**BACKGROUND**

**I. Factual Background**

"Explanations of the typical formation process and structure of RMBS trusts abound in this District, and this Court will not here reinvent the wheel." [*BlackRock Allocation Target Shares: Series S. Portfolio v. Wells Fargo Bank, Nat'l Ass'n ("BlackRock Series S" or "BlackRock II"), 247 F. Supp. 3d 377, 419-20 (S.D.N.Y. 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N6R-PX91-F04F-03CS-00000-00&context=1000516), objections overruled, [*2017 WL 3610511 (S.D.N.Y. Aug. 21, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5P98-VGS1-F04F-0129-00000-00&context=1000516). I provide a brief description for context.

The at-issue trusts were created to facilitate the sale of securitized residential mortgage loans to investors. The trusts are governed by contracts between the loan depositor, trust administrator, trustee, and loan servicer. The contracts are known variously as Pooling and Service Agreements ("PSAs"), indentures, and other ancillary contracts (collectively referred to below as "governing agreements" or "PSAs"). The PSAs include representations and warranties ("R&Ws") made by the loan depositors, sellers, sponsors, and originators regarding characteristics of the mortgage loans underlying the trusts. Wells Fargo had certain duties under the PSAs' terms to enforce loan sellers' obligations in the event of an R&W breach or discovery of material document defects, and to act prudently with regards to Events of Default ("EODs"). Plaintiffs contend that Wells Fargo [\*6]  breached those duties. See [*BlackRock Series S, 247 F. Supp. 3d at 385-87*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N6R-PX91-F04F-03CS-00000-00&context=1000516).

**II. Procedural History**

The Phoenix Light action was filed on December 23, 2014, with an amended complaint filed on March 13, 2015, and a second amended complaint filed on February 24, 2016. See ECF Nos. 1, 25, 80. The Commerzbank action was filed on December 24, 2015. See CB ECF No. 1. After almost half a decade of litigation, the parties cross-moved for summary judgment. See generally ECF Nos. 559, 574. Judge Failla referred those motions to me for a report and recommendation.

**DISCUSSION**

**I. Legal Standard**

Under [*Federal Rule of Civil Procedure 56*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=1000516), the Court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." [*Fed. R. Civ. P. 56(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=1000516). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." [*Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6H80-0039-N37M-00000-00&context=1000516). The moving party bears the initial burden of establishing that no genuine issue of material fact exists. [*Id. at 256-57*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6H80-0039-N37M-00000-00&context=1000516); see [*Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6HC0-0039-N37R-00000-00&context=1000516). "In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim." [\*7]  [*Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-G2S0-001T-D0FS-00000-00&context=1000516) (citing [*Celotex, 477 U.S. at 322-23*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6HC0-0039-N37R-00000-00&context=1000516)).

To defeat summary judgment, the non-moving party must produce more than a "scintilla of evidence," [*Anderson, 477 U.S. at 252*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6H80-0039-N37M-00000-00&context=1000516), and "may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible . . . ." [*Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-G0Y0-003B-P09K-00000-00&context=1000516); [*Flores v. United States, 885 F.3d 119, 122 (2d Cir. 2018)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RW6-SW31-JNY7-X02R-00000-00&context=1000516) ("[C]onclusory statements, conjecture, or speculation by the party resisting the motion will not defeat summary judgment." (quoting [*Kulak v. City of New York, 88 F.3d 63, 71 (2d Cir. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-20F0-006F-M27G-00000-00&context=1000516))). The non-moving party "must set forth specific facts demonstrating that there is a genuine issue for trial." [*Wright v. Goord, 554 F.3d 255, 266 (2d Cir. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4VHT-1P00-TXFX-43D8-00000-00&context=1000516) (internal quotation marks omitted).

In ruling on a motion for summary judgment, the Court must "resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." [*Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc., 391 F.3d 77, 83 (2d Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4DY0-DF80-0038-X133-00000-00&context=1000516). When both sides have moved for summary judgment, the district court is "required to assess each motion on its own merits and to view the evidence in the light most favorable to the party opposing the motion, drawing all reasonable inferences in favor of that party." [*Wachovia Bank, Nat'l Ass'n v. VCG Special Opportunities Master Fund, Ltd., 661 F.3d 164, 171 (2d Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:83HC-G3P1-652R-01XX-00000-00&context=1000516).

In the RMBS context, while plaintiffs may rely on relatively "generalized" allegations to survive a motion to dismiss, at summary judgment, plaintiffs must show evidence of liability on a "trust-by-trust" basis [\*8]  to prevail on their claims. [*Commerzbank AG v. U.S. Bank Nat'l Ass'n ("CB/U.S. Bank"), 457 F. Supp. 3d 233, 241 (S.D.N.Y. 2020)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5YSG-RBX1-JTGH-B32J-00000-00&context=1000516), reconsideration denied, [*2021 WL 603045 (S.D.N.Y. Feb. 16, 2021)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:6216-WBF1-F4GK-M53C-00000-00&context=1000516), and modified sub nom. [*Commerzbank AG v. U.S. Bank N.A., No. 16-cv-4569 (DLC), 2021 WL 4124509 (S.D.N.Y. Sept. 9, 2021)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:63JX-RTC1-F2TK-240V-00000-00&context=1000516) (internal quotation marks omitted); see [*Phoenix Light SF Ltd. v. Bank of N.Y. Mellon, No. 14-cv-10104 (VEC), 2017 WL 3973951, at \*8 (S.D.N.Y. Sept. 7, 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PDY-6151-F04F-02R9-00000-00&context=1000516).

**II. Plaintiffs' Standing**

Wells Fargo contends that the assignments by all [*Phoenix Light*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PDY-6151-F04F-02R9-00000-00&context=1000516) plaintiffs authorizing Phoenix Light to commence this suit are champertous under New York law, negating Phoenix Light's standing. Wells Fargo further argues that Commerzbank lacks standing to bring claims based on the certificates it sold without reserving its claims, and that Phoenix Light cannot demonstrate ownership of several tranches of RMBS on which it now sues. The Court agrees with Wells Fargo on all counts.

**A. Standing Generally**

The doctrine of standing "asks whether a litigant is entitled to have a federal court resolve his grievance," [*Hillside Metro Assocs., LLC v. JPMorgan Chase Bank, Nat'l Ass'n, 747 F.3d 44, 48 (2d Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BFB-P0N1-F04K-J1JB-00000-00&context=1000516) (quoting [*Kowalski v. Tesmer, 543 U.S. 125, 128 (2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4F13-37V0-004C-000K-00000-00&context=1000516)), and involves "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." [*Kowalski, 543 U.S. at 128*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4F13-37V0-004C-000K-00000-00&context=1000516). Courts should resolve questions of standing before turning to the merits of the case. [*All. for Env't Renewal, Inc. v. Pyramid Crossgates Co., 436 F.3d 82, 85 (2d Cir. 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4J3Y-7420-0038-X2FG-00000-00&context=1000516).

Standing's constitutional facet "imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III." [*Warth v. Seldin, 422 U.S. 490, 498 (1975)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BGK0-003B-S1WN-00000-00&context=1000516). To merit federal-court jurisdiction, a plaintiff must establish, [\*9]  at minimum, injury-in-fact, causation, and redressability. [*W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP, 549 F.3d 100, 106-07 (2d Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4V2S-8950-TXFX-41S7-00000-00&context=1000516) (citing [*Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XF70-003B-R3RX-00000-00&context=1000516)). "These requirements ensure that a plaintiff has a sufficiently personal stake in the outcome of the suit so that the parties are adverse." [*Id. at 107*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4V2S-8950-TXFX-41S7-00000-00&context=1000516). The prudential standing rule "bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." [*United States v. Suarez, 791 F.3d 363, 366 (2d Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GB9-M8R1-F04K-J02T-00000-00&context=1000516) (quoting [*Rajamin v. Deutsche Bank Nat'l Tr. Co., 757 F.3d 79, 86 (2d Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CJG-87K1-F04K-J05K-00000-00&context=1000516)). Courts "may consider third-party prudential standing even before Article III standing." [*Hillside Metro Assocs., LLC, 747 F.3d at 48*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BFB-P0N1-F04K-J1JB-00000-00&context=1000516) (internal quotation marks omitted).

**B. Champerty**

Wells Fargo argues that the assignments authorizing Phoenix Light to bring this litigation are void because they are champertous under New York Law. The Court of Appeals recently affirmed a decision by the District Court finding that *these same assignments* "were indeed champertous, as they were made 'with the intent and for the primary purpose of bringing a lawsuit.'" [*Phoenix Light SF DAC v. U.S. Bank Nat'l Ass'n ("PL/U.S. Bank"), No. 20-cv-1312, 2021 WL 4515256 (2d Cir. Oct. 4, 2021)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:63S6-TGG1-JKHB-62KM-00000-00&context=1000516) (quoting [*Justinian Cap. SPC v. WestLB AG, 28 N.Y.3d 160, 163 (2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5M1R-7SN1-F04J-608V-00000-00&context=1000516)). The Court of Appeals has denied Phoenix Light's petition for panel rehearing or rehearing *en banc*. ECF No. 159, PL/U.S. Bank (2d Cir. Nov. 19, 2021).

Wells Fargo raises the same champerty argument that was adopted by the District Court and affirmed by the Court of Appeals. Phoenix Light, however, seeks to distinguish [\*10]  PL/U.S. Bank on the merits and disputes that some or all Phoenix Light Plaintiffs are collaterally estopped from litigating this issue. I recommend that the Court find the litigation assignments to be champertous and void under New York law.

**1. Plaintiffs' Formation, the CDO Indentures, and the Litigation Assignments**

WestLB AG ("WestLB") was a German public limited company that created special purpose entities to issue collateralized debt obligations ("CDO Issuers"). Wells Fargo 56.1 ¶¶ 897-98. Among those issuers are the Phoenix Light CDO Plaintiffs (the "CDO Plaintiffs"). Id. ¶ 898. The CDO notes issued by the CDO Plaintiffs were backed by RMBS certificates and other securities holdings. Pls. 56.1 ¶ 428-29. It is undisputed that the CDO Plaintiffs acquired the RMBS certificates from third parties, including WestLB. Id. ¶ 432. The CDO Plaintiffs then transferred their RMBS certificates to CDO Indenture Trustees pursuant to CDO Indentures. Id. ¶ 433; Wells Fargo 56.1 ¶ 905. Although the parties dispute the scope of certain provisions, the CDO Indentures generally include granting clauses that convey to the CDO Indenture Trustee "all [of the Issuer's] right, title and interest" in the [\*11]  certificates, including the right to bring claims. Wells Fargo 56.1 ¶ 906.

Separately, WestLB created Phoenix Light to hold certain of WestLB's distressed assets. Id. ¶ 899. Among the assets that WestLB transferred to Phoenix Light were certain RMBS certificates at issue in this case, as well as notes issued by the CDO Plaintiffs, which gave Phoenix Light a majority of the controlling class of notes issued by the CDO Plaintiffs. See Pls. 56.1 ¶¶ 447, 450-51. As part of its formation, Phoenix Light entered into a Trust Agreement with Deutsche Bank as Trustee. Wells Fargo 56.1 ¶ 907. Pursuant to the Trust Agreement, Phoenix Light pledged to the Trustee "all its present and future, actual and contingent claims and rights . . . arising from the Collateral Acquisition Agreement." Id. ¶ 908. Later, Phoenix Light entered into an Amended and Restated U.S. Security Agreement with Deutsche Bank, under which Phoenix Light granted to the Trustee "all right, title and interest in and to" the RMBS certificates. Id. ¶ 909.

Following the financial crisis, the German government established Erste Abwicklungsanstalt ("EAA") to "take over and dispose of or wind up assets, liabilities and other risk exposure [\*12]  of WestLB AG." Id. ¶ 900. It is undisputed that all of Phoenix Light's notes were transferred to EAA in 2009 and 2010. Id. ¶ 901.

Although the parties dispute whether it was needed, starting in 2015 (after [*Phoenix Light*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:63S6-TGG1-JKHB-62KM-00000-00&context=1000516) was filed), the CDO Plaintiffs obtained litigation assignments from the CDO Indenture Trustees. These assignment agreements provided generally that the CDO Indenture Trustee "assigns, conveys, transfers and sets over all right, title and interest that the . . . Trustee may have, if any, with respect to the claims asserted by each CDO Issuer . . . ." Id. ¶ 917; see id. ¶ 920. Each agreement explicitly identified this case and PL/U.S. Bank for purposes of the litigation assignment and did not include an assignment beyond the rights to pursue the claims in the identified lawsuits. Id. ¶¶ 917, 919, 920, 922. Similarly, Phoenix Light entered into an assignment agreement with Deutsche Bank, assigning back to Phoenix Light "any and all rights that the Trustee may have to pursue and enforce the claims set forth in the Complaints [in the Lawsuits]. . . ." Id. ¶ 924. The "Lawsuits" in this agreement expressly referred to this case and PL/U.S. Bank. Id. ¶ 926.

It is undisputed that the Plaintiffs [\*13]  did not pay for the assignment of these litigation rights, and that they agreed to fund the litigation themselves. Id. ¶ 936. The agreements provided that the Plaintiffs are not entitled to any proceeds from the litigation beyond reimbursement of costs and expenses. Id. ¶¶ 918, 921, 925, 937. Indeed, Plaintiffs seek only their fees and expenses in this action. Id. ¶ 927.

Plaintiffs' [*Rule 30(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:6182-PKJ3-CH1B-T220-00000-00&context=1000516) corporate representative Peter Collins testified in PL/U.S. Bank that EAA instructed, or asked Phoenix Light to instruct, the CDO Plaintiffs to obtain the assignments from the CDO Indenture Trustees for the purpose of pursuing claims in this lawsuit and PL/U.S. Bank. Id. ¶ 914. Mr. Collins testified that he was not aware of any other purpose for the assignments. Id. He also testified both previously and in this case that the Plaintiffs viewed the CDO Indenture Trustees as "suffering conflicts of interests" and that without the litigation assignment these claims would not have been brought against the RMBS trustees. Id. ¶¶ 915, 928, 929. Mr. Collins's testimony regarding the purpose of the litigation assignments was corroborated in PL/U.S. Bank by the testimony of Alan Geraghty, one of Phoenix Light's directors, [\*14]  among others. Id. ¶¶ 930-31.

**2. New York Champerty Law**

New York's champerty statute, [*Judiciary Law § 489*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-13T1-6RDJ-8463-00000-00&context=1000516), restricts individuals and companies from purchasing or taking an assignment of notes or other securities "with the intent and for the purpose of bringing an action or proceeding thereon." [*N.Y. Jud. Law § 489(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-13T1-6RDJ-8463-00000-00&context=1000516) (2021). The law distinguishes "between 'acquiring a thing in action in order to obtain costs,' which constitutes champerty, 'and acquiring it in order to protect an independent right of the assignee,' which does not." [*Tr. for the Certificate Holders of Merrill Lynch Mortg. Invs., Inc. v. Love Funding Corp., 591 F.3d 116, 120 (2d Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XHP-V6W0-YB0V-D027-00000-00&context=1000516) (quoting [*Tr. for the Certificate Holders of Merrill Lynch Mortg. Invs., Inc. v. Love Funding Corp., 13 N.Y.3d 190, 199 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4XFY-9HV0-TXFV-S2B1-00000-00&context=1000516)). The purpose behind a plaintiff's acquisition of rights is "the critical issue in assessing whether such acquisition is champertous." [*Justinian Cap. SPC, 28 N.Y.3d at 167*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5M1R-7SN1-F04J-608V-00000-00&context=1000516). Where a lawsuit is "not merely an incidental or secondary purpose of [an] assignment, but its very essence," the assignment is void. [*Id. at 168*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5M1R-7SN1-F04J-608V-00000-00&context=1000516). An assignment of rights is not champertous, however, "if its purpose is to collect damages, by means of a lawsuit, for losses on a debt instrument in which [the plaintiff] holds a preexisting proprietary interest." [*Love Funding, 13 N.Y.3d at 195*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4XFY-9HV0-TXFV-S2B1-00000-00&context=1000516).

Champerty is an affirmative defense for which the defendant bears the burden of proof. See [*Love Funding, 591 F.3d at 119*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XHP-V6W0-YB0V-D027-00000-00&context=1000516). The intent and purpose of an assignment is usually a factual question that cannot be decided on summary judgment, but [\*15]  "where a plaintiff fails to rebut evidence that its purpose in seeking an assignment was to commence suit, a court may grant summary judgment in favor of a defendant." [*PL/U.S. Bank, No. 14-cv-10116 (VSB), 2020 WL 1285783, at \*11 (S.D.N.Y. Mar. 18, 2020)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5YFS-4YJ1-JSRM-606W-00000-00&context=1000516) (citing [*Justinian Cap. SPC, 28 N.Y.3d at 167*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5M1R-7SN1-F04J-608V-00000-00&context=1000516); [*Love Funding, 13 N.Y.3d at 201 & n.6*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4XFY-9HV0-TXFV-S2B1-00000-00&context=1000516)).

**3. The Purpose of the Litigation Assignments**

There is no genuine dispute that the sole purpose of the assignments was to authorize Plaintiffs to pursue this litigation (and the litigation in [*PL/U.S. Bank*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5YFS-4YJ1-JSRM-606W-00000-00&context=1000516)). The assignments were all secured in 2015 after the District Court in [*PL/U.S. Bank*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5YFS-4YJ1-JSRM-606W-00000-00&context=1000516) granted the RMBS Trustees' motion to dismiss, finding that the CDO Indentures constituted a "full assignment" of "all . . . right, title and interest in the [RMBS] certificates," as well as the "full power to file actions" regarding rights under the RMBS certificates." [*PL/U.S. Bank, No. 14-cv-10116 (KBF), 2015 WL 2359358, at \*2 (S.D.N.Y. May 18, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G1B-X2R1-F04F-03PK-00000-00&context=1000516) (cleaned up). Accordingly, the Court concluded that the CDO Indentures' granting clauses divested the Phoenix Light Plaintiffs of any rights to pursue litigation. [*Id. at \*2-3*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G1B-X2R1-F04F-03PK-00000-00&context=1000516). The Court permitted the filing of an amended complaint, and the assignments were thereafter secured.

This history and the facts of this case make plain that the "genesis of the assignment agreements was the desire to litigate this case." [*PL/U.S. Bank, 2020 WL 1285783, at \*12*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5YFS-4YJ1-JSRM-606W-00000-00&context=1000516). The Court of Appeals found that factual finding to be "clear." [*PL/U.S. Bank, 2021 WL 4515256, at \*1*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:63S6-TGG1-JKHB-62KM-00000-00&context=1000516). Moreover, the Phoenix [\*16]  Light Plaintiffs are not saved by the preexisting proprietary interest exception. That conclusion has also been affirmed by the Court of Appeals. [*Id. at \*2*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:63S6-TGG1-JKHB-62KM-00000-00&context=1000516).

Under New York law, an assignment of a claim does not violate [*Judiciary Law § 489*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-13T1-6RDJ-8463-00000-00&context=1000516) "if its purpose is to collect damages, by means of a lawsuit, for losses on a debt instrument in which [the Plaintiff] holds a preexisting proprietary interest." [*Love Funding, 13 N.Y.3d at 195*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4XFY-9HV0-TXFV-S2B1-00000-00&context=1000516). Plaintiffs argue that they hold preexisting proprietary interests that are incompatible with a finding of champerty: (1) an obligation to pay principal and interest to the noteholders; (2) a reversionary interest in the collateral; (3) performance obligations; and (4) priority payment provisions that ensure the Plaintiffs have funds to pay their own expenses.

The Court of Appeals rejected any argument that Plaintiffs retained any residual ownership interest in the RMBS certificates. [*PL/U.S. Bank, 2021 WL 4515256, at \*2*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:63S6-TGG1-JKHB-62KM-00000-00&context=1000516). The Court noted that "a grant of 'all . . . right, title, and interest' to an indenture trustee is a 'complete transfer.'" Id. (quoting [*Nat'l Credit Union Admin. Bd. v. U.S. Bank Nat'l Ass'n, 898 F.3d 243, 253 (2d Cir. 2018)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5SY2-PK51-JN6B-S2NJ-00000-00&context=1000516)). "A CDO making such a grant conveys *in toto* all interest that they had in the Underlying Securities." Id. (cleaned up).

The Court of Appeals declined to address Plaintiffs' arguments related to various [\*17]  obligations on waiver grounds. Here, Plaintiffs identify obligations such as a "duty to maintain corporate form; prepare annual compliance statements; retain calculation agent; [and] provide monthly reports," ECF No. 575 (Pls. Cross-Mot. and Opp.) at 84, as establishing "precisely the types of interests" courts have found to create a proprietary interest. But Plaintiffs do not explain why book-keeping obligations would give them a proprietary interest in the RMBS certificates, and the cases Plaintiffs cite do not support their position. See [*House of Eur. Funding I Ltd. v. Wells Fargo Bank, No. 13-cv-519 (RJS), 2015 WL 5190432, at \*7 (S.D.N.Y. Sept. 4, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GW0-BST1-F04F-002M-00000-00&context=1000516) (finding injury sufficient for Article III standing based on actions adversely affecting underlying assets); House of Eur. Funding I, Ltd. v. Wells Fargo Bank, N.A., No. 13-cv-519 (RJS), 2014 WL 1383703, at \*16 (S.D.N.Y. Mar. 31, 2014) (finding that the CDO issuer did lack standing based on assignment even if it also suffered an Article III injury-in-fact); *Hildene Cap. Mgmt., LLC v. Bank of N.Y. Mellon, 105 A.D.3d 436, 438 (N.Y. App. Div. 2013)* (considering an indenture agreement that expressly authorized the issuer to take action "necessary or advisable to . . . preserve and defend title to the Collateral"). None of these cases compels a different outcome.

Additionally, Plaintiffs argue, without citation, that because the [*Love Funding*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4XFY-9HV0-TXFV-S2B1-00000-00&context=1000516) preexisting proprietary interest is broader than Article III injury-in-fact, the existence of an injury-in-fact demonstrates "*conclusively*" a preexisting [\*18]  proprietary interest. Plaintiffs reason that if a party without legal title to the claim suffers injury-in-fact it "*must*" also have a proprietary interest in the claim. The Court of Appeals "reject[ed] that proposition, which is without support in case law." [*PL/U.S. Bank, 2021 WL 4515256, at \*2*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:63S6-TGG1-JKHB-62KM-00000-00&context=1000516). It further found that, "unlike the plaintiff in [*Love Funding*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4XFY-9HV0-TXFV-S2B1-00000-00&context=1000516), who held the underlying loan at issue, here Plaintiffs retain no ownership interest in the RMBS certificates." Id.

Separately, Plaintiffs seek to distinguish Phoenix Light's Trust Agreement. They contend that the Agreement expressly authorizes Phoenix Light to bring claims related to its collateral, and that the Agreement's granting clauses merely "pledge" the collateral as security. This contention was raised to the Court of Appeals, and it was expressly rejected. [*PL/U.S. Bank, 2021 WL4515256, at \*2*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:63S6-TGG1-JKHB-62KM-00000-00&context=1000516). The Court concluded that the Phoenix Light Trust Agreement "*did* grant 'all . . . right, title, and interest'" in the RMBS certificates and found that the "Trust Agreement and U.S. Security Agreement leave no daylight between Phoenix Light and the other CDO plaintiffs for the purposes of the champerty analysis." Id. (emphasis in original).

Finally, Plaintiffs rationalize the assignments from the Indenture Trustees as [\*19]  "the only prudent course of action" because the relevant trustees were also RMBS trustees unwilling to sue themselves or develop "bad law." The trustees' potential conflict of interest does not change the fact that Plaintiffs sought the assignments "to pursue litigation. Plaintiffs understood that 'because of those alleged conflicts of interests, absent [the assignments], these claims would not be brought against the RMBS trustees.' In any case, assigning a claim to avoid a conflict of interest does not mean the assignment is not champertous." [*PL/U.S. Bank, 2020 WL 1285783, at \*12 n.21*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5YFS-4YJ1-JSRM-606W-00000-00&context=1000516) (quoting exhibit) (alternation in original).

Thus, on the merits, I recommend that the Court find, as Judge Broderick did and the Court of Appeals affirmed, that the litigation assignments are champertous and therefore void. In the alternative, the Court could decide this issue on collateral estoppel grounds.

**4. Collateral Estoppel**

Collateral estoppel applies "where (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final [\*20]  judgment on the merits." [*Marvel Characters, Inc. v. Simon, 310 F.3d 280, 288-89 (2d Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:475K-CTS0-0038-X43M-00000-00&context=1000516) (quoting [*Boguslavsky v. Kaplan, 159 F.3d 715, 720 (2d Cir. 1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TWF-2B40-0038-X4JK-00000-00&context=1000516)).

First, Plaintiffs argue that the issues litigated in [*PL/U.S. Bank*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5YFS-4YJ1-JSRM-606W-00000-00&context=1000516) were not identical or necessarily decided because, they contend, the district court based its decision on both Article III and prudential standing. They argue that New York law precludes collateral estoppel when a court relies on alternative grounds because each issue was not "necessarily decided." Under New York law, "[i]f an appeal is taken and the appellate court affirms on one ground and disregards the other, there is no collateral estoppel as to the unreviewed ground." [*Tydings v. Greenfield, Stein & Senior, LLP, 11 N.Y.3d 195, 200 (2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4TPD-KS10-TX4N-G1MG-00000-00&context=1000516) (quoting [*Gelb v. Royal Globe Ins. Co., 798 F.2d 38, 45 (2d Cir. 1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2GG0-0039-P32P-00000-00&context=1000516)). The Court of Appeals has affirmed the district court's finding that the Plaintiffs lacked prudential standing, and Wells Fargo does not seek collateral estoppel on Article III grounds. And the Court is not "required," in Plaintiffs' words, to consider Article III standing before ruling on champerty, which affects Plaintiffs' prudential standing. "Where, as here, a case presents questions of both constitutional and prudential standing, [the Court] may assume Article III standing and address the alternative threshold question of whether a party has prudential standing." [*PL/U.S. Bank, 2021 WL 4515256, at \*1*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:63S6-TGG1-JKHB-62KM-00000-00&context=1000516) (cleaned up).

None of Plaintiffs' other related arguments has merit. The doctrine [\*21]  of *in pari delicto* does not apply because Wells Fargo is not a party to the challenged transactions, and Plaintiffs have not offered evidence that Wells Fargo acted "fraudulently, or . . . by deceit or any unfair means has gained an advantage." [*CBF Indústria de Gusa S/A v. AMCI Holdings, Inc., 850 F.3d 58, 78 (2d Cir. 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N0M-00S1-F04K-J00C-00000-00&context=1000516) (quoting [*PenneCom B.V. v. Merrill Lynch & Co., Inc., 372 F.3d 488, 493 (2d Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CRB-0N90-0038-X4RR-00000-00&context=1000516)). And it is irrelevant that the actual securities at issue in this action are different from those at issue in [*PL/U.S. Bank*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:63S6-TGG1-JKHB-62KM-00000-00&context=1000516). Of course, that case analyzed Phoenix Light's *assignments*, not the collateral underlying those assignments—which are the very same assignments at issue in this case.

Plaintiffs also contend that collateral estoppel applies only to judgments on the merits, and Article III standing dismissals are not on the merits. As affirmed by the Court of Appeals, [*PL/U.S. Bank*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:63S6-TGG1-JKHB-62KM-00000-00&context=1000516) is not based on Article III grounds.[[3]](#footnote-4)3 Moreover, "courts in this District 'have previously applied collateral estoppel to the issue of standing.'" [*Lefkowitz v. McGraw-Hill Glob. Educ. Holdings, LLC, 23 F. Supp. 3d 344, 360 (S.D.N.Y. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CBR-4491-F04F-010G-00000-00&context=1000516) (quoting [*Hollander v. Members of the Bd. of Regents of the Univ. of the State of New York, No. 10-cv-9277 (LTS)(HBP), 2011 WL 5222912, at \*2 (S.D.N.Y. Oct. 31, 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:83J2-9NM1-652J-D2X9-00000-00&context=1000516), aff'd, [*524 F. App'x 727 (2d Cir. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:585C-2WR1-F04K-J0MB-00000-00&context=1000516)).

Plaintiffs' next argument is that [*PL/U.S. Bank*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:63S6-TGG1-JKHB-62KM-00000-00&context=1000516) announced a "rule of law," and that whether the district court construed controlling authority correctly is a pure question of law not subject to collateral estoppel. But the court relied on "facts developed in discovery" and "various materials in the record" to determine that Phoenix Light's assignments [\*22]  were champertous, [*PL/U.S. Bank, 2020 WL 1285783, at \*3, \*5*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5YFS-4YJ1-JSRM-606W-00000-00&context=1000516), and the Court of Appeals affirmed "based on the factual findings of the District Court" and "[f]or substantially the reasons given by Judge Broderick," [*2021 WL 4515256, at \*1*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:63S6-TGG1-JKHB-62KM-00000-00&context=1000516). The Court does not face a "pure question[] of law . . . unmixed with any particular set of facts." [*Env't Def. v. U.S. E.P.A., 369 F.3d 193, 203 (2d Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CDT-58M0-0038-X0N3-00000-00&context=1000516) (quoting [*United States v. Alcan Aluminum Corp., 990 F.2d 711, 719 (2d Cir. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H210-003B-P1J4-00000-00&context=1000516)).

Plaintiffs have long run out of time to ratify under [*Federal Rule of Civil Procedure 17*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2101-FG36-1378-00000-00&context=1000516). Under [*Rule 17*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2101-FG36-1378-00000-00&context=1000516), ratification is permitted for "a reasonable time" "after an objection." [*Fed. R. Civ. P. 17(a)(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2101-FG36-1378-00000-00&context=1000516); see [*Nat'l Credit Union Admin. Bd., 898 F.3d at 259*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5SY2-PK51-JN6B-S2NJ-00000-00&context=1000516) (finding a year-long delay unreasonable under [*Rule 17*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2101-FG36-1378-00000-00&context=1000516)); [*Commonwealth of Pa. Pub. Sch. Employees' Ret. Sys. v. Morgan Stanley & Co., 814 F.3d 641, 643 (2d Cir. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J52-VGR1-F04K-J0N7-00000-00&context=1000516) (eighteen months); Sudarsan v. Seventy Seven Energy Inc., No. 17-cv-2342 (GBD), 2018 WL 1088004, at \*5 (S.D.N.Y. Feb. 6, 2018) (eight months). In 2016, Wells Fargo wrote to the Court that "Plaintiff [Phoenix Light] has not established standing based on the purported re-assignment of the claims to the CDOs." ECF No. 82 at 3. Five years have elapsed, and the time has come and gone for timely ratification.

Finally, Plaintiffs argue that some Phoenix Light plaintiffs did not have a full and fair opportunity to litigate champerty. Those plaintiffs in the current case who were parties in [*PL/U.S. Bank*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5YFS-4YJ1-JSRM-606W-00000-00&context=1000516) have had their arguments about champerty considered and rejected both by Judge Broderick and by the Court of Appeals. They have had their opportunity to litigate this issue. Judge Broderick and the Court of Appeals' logic applies with equal [\*23]  force to those Phoenix Light plaintiffs who were not parties to [*PL/U.S. Bank*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5YFS-4YJ1-JSRM-606W-00000-00&context=1000516) (Blue Heron II, Blue Heron V, and Blue Heron IX) but are "so identified in interest" with the [*PL/U.S. Bank*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5YFS-4YJ1-JSRM-606W-00000-00&context=1000516) plaintiffs that those plaintiffs "could represent the privy's interest." [*Gutierrez v. City of New York, No. 13-cv-3502 (JGK), 2015 WL 5559498, at \*5 (S.D.N.Y. Sept. 21, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5H02-3401-F04F-010X-00000-00&context=1000516). As parties to the same assignments held champertous by Judge Broderick and the Court of Appeals, their ability to bring a breach of contract claim "derived from the identical arrangement" relied upon by the [*PL/U.S. Bank*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5YFS-4YJ1-JSRM-606W-00000-00&context=1000516) plaintiffs. [*Buechel v. Bain, 97 N.Y.2d 295, 305 (2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:44R3-24S0-0039-43HR-00000-00&context=1000516). The non-[*PL/U.S. Bank*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5YFS-4YJ1-JSRM-606W-00000-00&context=1000516) plaintiffs are thus in sufficient "privity with a prior litigant, such that the litigation of [the] issue by that prior litigant . . . estop[s] the non-party from later seeking to re-litigate the same issue." [*Fisher v. Tice, No. 15-cv-00955 (LAK)(DF), 2015 WL 6916624, at \*6 (S.D.N.Y. Oct. 26, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5H96-V731-F04F-0154-00000-00&context=1000516).

Collateral estoppel therefore applies, and Phoenix Light's claims can be dismissed on this alternative ground.

**C. Commerzbank's Sold Certificates**

Wells Fargo argues that Commerzbank lacks standing to bring claims based on 21 at-issue certificates it sold before suing (the "Sold Certificates").[[4]](#footnote-5)4 Commerzbank does not dispute that it sold the certificates, but asserts that when the Sold Certificates were transferred, it retained rights to claims in the certificates.

Plaintiffs first contend that waiver, judicial estoppel, and [\*24]  the law of the case preclude Wells Fargo from raising the issue of Commerzbank's standing. Subject matter jurisdiction, however, cannot be waived. [*Ashcroft v. Iqbal, 556 U.S. 662, 671 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=1000516). And a Court cannot exercise subject matter jurisdiction over claims for which the plaintiff lacks standing. See [*Valdin Invs. Corp. v. Oxbridge Cap. Mgmt., LLC, 651 F. App'x 5, 7 (2d Cir. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JX5-JK41-F04K-J17D-00000-00&context=1000516) (plaintiff's "assignment of its rights extinguished its claims . . . and deprived it of any interest in the litigation"; affirming dismissal for lack of subject matter jurisdiction); see also [*Phoenix Light SF Limited v. Bank of N.Y. Mellon, No. 14-cv-10104 (VEC), 2020 WL 2950799, at \*1 & n.3 (S.D.N.Y. Jun. 3, 2020)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:602B-C6R1-JSXV-G0WP-00000-00&context=1000516) (standing non-waivable); [*Zurich Am. Ins. Co. v. Wausau Bus. Ins. Co., No. 16-cv-3643 (VSB), 2018 WL 4684112, at \*5 (S.D.N.Y. Sept. 28, 2018)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5TC7-XY11-F60C-X02P-00000-00&context=1000516) (assignment of claims deprives assignor of standing). Similarly, the doctrines of judicial estoppel and law of the case do not apply where the court's subject matter jurisdiction is questioned. [*Creaciones Con Idea, S.A. de C.V. v. Mashreqbank PSC, 232 F.3d 79, 82 (2d Cir. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:41M9-S2H0-0038-X1GP-00000-00&context=1000516) (citing [*Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5H60-003B-S53N-00000-00&context=1000516)); see [*Gosain v. Texplas India Priv. Ltd., 393 F. Supp. 3d 368, 374 (S.D.N.Y. 2019)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5WKR-CCV1-DYFH-X1SJ-00000-00&context=1000516) ("Standing is an essential component of subject matter jurisdiction."). Accordingly, Wells Fargo may contest Commerzbank's standing.

On the merits, Wells Fargo argues that Commerzbank did not reserve its claims in the Sold Certificates when they were transferred, and under [*New York's General Obligations Law § 13-107*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0XX1-6RDJ-8543-00000-00&context=1000516), the right to sue travels with the security (unless expressly reserved). Commerzbank does not dispute that it sold the securities without an express reservation of rights, but argues that this is irrelevant under English law. Resolution [\*25]  of the issue depends on which jurisdiction's law applies to the transfer.

Federal courts sitting in diversity or adjudicating state claims through supplemental jurisdiction generally apply the choice-of-law rules of the forum state to decide which state's laws apply. See [*Gerena v. Korb, 617 F.3d 197, 204 (2d Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:8024-NH90-YB0V-D0D7-00000-00&context=1000516); [*Rogers v. Grimaldi, 875 F.2d 994, 1002 (2d Cir. 1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RTS-8T00-003B-508N-00000-00&context=1000516). In New York, forum state law governs procedural matters, while substantive ones are subject to a choice-of-law analysis. [*Davis v. Scot. Re Grp. Ltd., 30 N.Y.3d 247, 252 (2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5R0P-7D71-JFSV-G4DP-00000-00&context=1000516).

**1. Standing as a Procedural or Substantive Question**

Wells Fargo argues that the application of New York's choice-of-law rules was settled in *Royal Park Invs. SA/NV v. Morgan Stanley, 165 A.D.3d 460 (N.Y. App. Div. 2018)* ("*Royal Park*"). There, the Appellate Division, First Department, found that, under New York choice-of-law rules, the "question of whether a plaintiff has standing 'is a procedural matter.'" *Id. at 461* (quoting *O'Neill v. Warburg, Pincus & Co., 39 A.D.3d 281, 281 (N.Y. App. Div. 2007)*, and citing [*Mertz v. Mertz, 271 N.Y. 466, 473 (1936)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-RD70-003F-63PN-00000-00&context=1000516)). *Royal Park* appears to be an outlier and may reflect a co-mingling of issues. It relies primarily on an 85-year-old decision from the New York Court of Appeals, which stated that the "law of the forum determines the jurisdiction of the courts, *the capacity of parties to sue or to be sued*, the remedies which are available to suitors and the procedure of the courts." [*Mertz, 271 N.Y. at 473*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-RD70-003F-63PN-00000-00&context=1000516) (emphasis added to denote language quoted in *Royal Park*). While related, standing and capacity to sue are not [\*26]  the same. See [*Fund Liquidation Holdings LLC v. Bank of Am. Corp., 991 F.3d 370, 382 (2d Cir. 2021)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:627C-NFD1-FC1F-M0FC-00000-00&context=1000516); [*Silver v. Pataki, 96 N.Y.2d 532, 537 (2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:43G4-TC60-0039-41JD-00000-00&context=1000516). Thus, it is at best questionable that *Royal Park*'s conclusion is correct, and Wells Fargo offers no other cases for this proposition.

By comparison, most cases view standing as a substantive question and conduct a choice-of-law analysis. See, e.g., [*Hau Yin To v. HSBC Holdings, PLC, 700 F. App'x 66, 68 (2d Cir. 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PW2-BYM1-F04K-J1CJ-00000-00&context=1000516) (applying choice-of-law analysis to question of standing); [*Pac. Life Ins. Co. v. Bank of N.Y. Mellon ("Pacific Life"), No. 17-cv-1388 (KPF), 2018 WL 1382105, at \*16 (S.D.N.Y. Mar. 16, 2018)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RWF-MJK1-F7G6-61N9-00000-00&context=1000516) (applying New York's "center of gravity" or "grouping of contacts" approach to standing question in claim brought by RMBS certificateholders against Trustee); Royal Park Invs. SA/NV v. Deutsche Bank Nat'l Tr. Co., No. 14-cv-4394 (AJN), 2017 WL 1331288, at \*7 (S.D.N.Y. Apr. 4, 2017) (recognizing that standing requires choice-of-law analysis that could lead to application of multiple state laws); see also [*Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt International B.V. v. Schreiber, 407 F.3d 34, 44-49 (2d Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4G37-1J10-0038-X51M-00000-00&context=1000516) (choice-of-law analysis necessary to determine which state law applied on question of assignment of claims); [*Galef v. Alexander, 615 F.2d 51, 58 (2d Cir. 1980)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KM60-0039-W0DG-00000-00&context=1000516) (recognizing the "substantive question of [a] stockholder's right to sue"); [*Coster v. Coster, 289 N.Y. 438, 442 (1943)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRS-XSD0-003C-C3V8-00000-00&context=1000516) (the "right to bring and to maintain" suit "is a substantive right" and therefore "the *lex loci*, not the law of the forum, controls").

Accordingly, I find that standing is a substantive question and recommend that the Court apply New York's "center of gravity" approach "to establish which State has the most significant relationship to the transaction and the parties." [*Pacific Life, 2018 WL 1382105, at \*16*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RWF-MJK1-F7G6-61N9-00000-00&context=1000516) (quoting [*Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., 84 N.Y.2d 309, 317 (1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S2R-6MH0-003V-B1KT-00000-00&context=1000516)).

**2. New York's Center of Gravity** [\*27]  **Test**

Under New York's center of gravity test, courts consider: (i) the places of contracting, negotiation, and performance; (ii) the location of the subject matter of the contract; and (iii) the domicile or place of business of contracting parties. Id.; [*Zurich Ins. Co., 84 N.Y.2d at 317*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S2R-6MH0-003V-B1KT-00000-00&context=1000516). The place of contracting and the place of performance are given the heaviest weight in this analysis. [*Brink's Ltd. v. S. Afr. Airways, 93 F.3d 1022, 1031 (2d Cir. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RK4-CH00-006F-M2BM-00000-00&context=1000516).

Plaintiffs contend that English law applies because the transactions took place out of Commerzbank's London branch between sellers and purchasers almost all of whom were in London. See ECF No. 587 ("Boelstler Decl.") ¶¶ 3-5. But Commerzbank is "an entity organized under the laws of Germany," CB ECF No. 1 ¶ 16, and "courts in this district have rejected the concept that branches of a bank are separate entities," [*CB/U.S. Bank, 457 F. Supp. 3d at 243*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5YSG-RBX1-JTGH-B32J-00000-00&context=1000516) (citing [*HSH Nordbank AG v. RBS Holdings USA Inc., No. 13-cv-3303 (PGG), 2015 WL 1307189, at \*5 (S.D.N.Y. Mar. 23, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FK7-D031-F04F-037P-00000-00&context=1000516)).

Moreover, the actual transactions did not occur in London but in New York through the Depository Trust Company ("DTC"). The DTC is a securities depository based in New York City that is organized as a limited purpose trust company and provides safekeeping through electronic record-keeping of securities balances. See, e.g., Wells Fargo 56.1 ¶ 146. It also acts as a clearinghouse to process and settle trades. See id [\*28] .; Boelstler Decl. ¶¶ 7-8. *It* - not the London branch office of Commerzbank - held and transferred the Sold Certificates. See Boelstler Decl. ¶¶ 6-8; Wells Fargo 56.1 ¶¶ 110, 114, 118, 122, 138. Commerzbank disputes the significance of these facts and argues that DTC performs purely "ministerial functions."

District Judge Pauley considered these same arguments with respect to Commerzbank and found that New York had the greatest interest: "[t]he fact that DTC actually holds the certificates and effectuates the transactions means that the transactions actually occurred in New York and are governed by New York law." [*CB/U.S. Bank, 457 F. Supp. 3d at 243*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5YSG-RBX1-JTGH-B32J-00000-00&context=1000516); see also [*Bear Stearns Mortg. Funding Tr. 2006-SL1 v. EMC Mortg. LLC, No. 12-cv-7701 (VCL), 2015 WL 139731, at \*10 (Del. Ch. Jan. 12, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F28-M641-F04C-G0B6-00000-00&context=1000516) (applying New York law as result of "most significant relationship" test in part because "the physical location of the Certificates at the Depository Trust Company [was] located in New York").

The cases Plaintiffs cite where New York state courts applied other jurisdictions' law despite DTC clearance do not compel a different outcome. In both Sealink Funding Ltd. v. UBS AG and Sealink Funding Ltd. v. Morgan Stanley, the parties agreed that English law applied. *997 N.Y.S.2d 101 (Sup. Ct. 2014)*; No. 650196/2012, 2014 WL 1511156, at \*3 (Sup. Ct. Apr. 17, 2014). In [*Pacific Life*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RWF-MJK1-F7G6-61N9-00000-00&context=1000516), the Court conducted a center of gravity test and found that all of the factors favored the application [\*29]  of California law (with no discussion of the DTC). [*2018 WL 1382105, at \*16*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RWF-MJK1-F7G6-61N9-00000-00&context=1000516). And, in In re Petrobas Sec. Litig., the Court refused to find that securities purchases that settled through the DTC were "domestic" for purposes of application of Section 10(b) of the Securities Exchange Act, recognizing the sweeping result of such a finding. [*152 F. Supp. 3d 186, 193 (S.D.N.Y. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HSK-8341-F04F-024S-00000-00&context=1000516). Judge Pauley rejected this same "litany of cases," and so does the Court. [*CB/U.S. Bank, 2021 WL 603045, at \*3*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:6216-WBF1-F4GK-M53C-00000-00&context=1000516).

Commerzbank also argues that it is not a "participant" subject to DTC's rules. Boelstler Decl. ¶ 7. "But this ignores the fact that Commerzbank trades through a wholly-owned subsidiary, which is a DTC participant." [*CB/U.S. Bank, 2021 WL 603045, at \*3*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:6216-WBF1-F4GK-M53C-00000-00&context=1000516). And as to the contracting parties' domicile or place of business, Plaintiffs' supporting declaration on this issue lists no fewer than seven buyers for the Sold Certificates. Boelstler Decl. ¶ 10. To the extent these sales occurred in London branch offices, that is insufficient. In any event, the information Commerzbank provides about the buyers' domicile or place of business does not convince the Court that the certificate buyers were located in England for purposes of the "center of gravity" test.

In summary, the actual certificates are located in New York and the transactions occurred in New York; although the London Commerzbank [\*30]  branch conducted the sales, Commerzbank itself is incorporated under German law; and there is insufficient information to conclude that the buyers were domiciled or had their principal place of business in England. With heavy weight accorded to the place of transaction and the latter two considerations in equipoise, the Court finds that New York has the most significant relationship to the transactions at issue, and New York law thus governs the question of whether Commerzbank sold its right to bring claims associated with the Sold Certificates.

[*New York General Obligations Law § 13-107*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0XX1-6RDJ-8543-00000-00&context=1000516) provides that the transfer of Commerzbank's Sold Certificates automatically vested in the transferees all of Commerzbank's claims related to the Sold Certificates. See [*N.Y. Gen. Oblig. Law § 13-107(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0XX1-6RDJ-8543-00000-00&context=1000516). This rule applies to both contract and tort claims. See [*Bluebird Partners, L.P. v. First Fid. Bank, N.A., 97 N.Y.2d 456, 461-62 & n.1 (2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45FK-2GP0-0039-4467-00000-00&context=1000516); [*Okla. Police Pension & Ret. Sys. v. U.S. Bank Nat'l Ass'n, 986 F. Supp. 2d 412, 415-16 (S.D.N.Y. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5B2M-X001-F04F-045P-00000-00&context=1000516); One William St. Capital Mgmt. L.P. v. U.S. Educ. Loan Trust IV, LLC, No. 652274/2012, 2017 WL 2152585, at \*3-5 (N.Y. Sup. Ct. May 17, 2017). Only claims that are "expressly reserved in writing" are exempted. [*N.Y. Gen Oblig. Law § 13-107(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-0XX1-6RDJ-8543-00000-00&context=1000516). Because it is undisputed that Commerzbank did not expressly reserve its litigation rights, it does not have standing to bring claims related to the Sold Certificates.

**D. Phoenix Light's Ownership of Specific Tranches**

The Court recommends that Phoenix Light's claims be dismissed because their assignments are champertous. Should the Court reject that [\*31]  recommendation, Wells Fargo argues that Phoenix Light cannot establish ownership of three tranches within the FFML 2006-FFA Trust (the "Non-Transferred Securities").[[5]](#footnote-6)5 Phoenix Light claims that it acquired its interests in the Non-Transferred Securities through exercise notices executed in 2009 pursuant to the terms of Standby Asset Purchase Agreements ("SAPAs") that it entered into with Kestrel Funding P.L.C. and Harrier Finance Limited.

The Kestrel and Harrier SAPAs through which Plaintiffs allege they acquired the Non-Transferred Securities both state that the seller (Kestrel or Harrier) has the right to offer to sell Purchase Pools to Phoenix Light "by delivery to [Phoenix Light] of an Exercise Notice on any Notice Delivery Date." ECF No. 566 ("Stanton Decl.") Ex. 52 § 2.1; Stanton Decl. Ex. 53 § 2.1. For its part, Phoenix Light "agrees to purchase any and all Purchase Pools for which an Exercise Notice is delivered." Stanton Decl. Ex. 52 § 2.2; Stanton Decl. Ex. 53 § 2.2. According to the executed SAPAs, Phoenix Light could acquire only those securities from Kestrel or Harrier for which Kestrel or Harrier delivered an exercise notice.

The parties' exhibits suggest that Phoenix Light [\*32]  did not acquire the Non-Transferred Securities according to the SAPAs' terms. According to a spreadsheet documenting the means of Phoenix Light's trust acquisition, for each of the Non-Transferred Securities, "due to scriveners [sic] error, parties failed to include the Certificate on Exercise Notice when transferring assets to Phoenix Light." Stanton Decl. Ex. 198 at 2. At deposition, Phoenix Light's corporate representative testified that the SAPAs' "intent" was "to have all assets or anything of value transferred from Harrier or Kestrel into Phoenix Light." Stanton Decl. Ex. 168 at 144:18-21. He also explained that "scrivener's error" alluded to the fact that the Non-Transferred Securities had been "written down to zero" (i.e., had no notional balance) and should have been but were not reflected in the exercise notices. Id. at 144:10-18. But scrivener's error does not explain away the issue: Phoenix Light had used exercise notice amendments to signal that other securities with no notional balance were considered included in the exercise notice, and offers no explanation for why it did not do the same for the Non-Transferred Securities. Id. at 146:9-147:9, 152:11-17. And, as Wells [\*33]  Fargo notes, and Plaintiffs fail to refute, the Non-Transferred Securities were not included in a Certificate of Beneficial Ownership that Phoenix Light's nominee provided in connection with a prior settlement involving the FFML 2006-FFA trust. Stanton Decl. Ex. 192 (executed on June 4, 2018). In other words, none of the Non-Transferred Securities was ever included in an exercise notice or exercise notice amendment, and thus they were not offered for Phoenix Light's purchase under the terms of the SAPAs.

Plaintiffs make two counterarguments: first, that the corporate representative's sworn testimony is enough to establish ownership and standing; and second, that a later 2012 Harrier Assignment transferred two of the Non-Transferred Securities to Phoenix Light. As to the sufficiency of oral testimony, Plaintiffs' cited cases are unpersuasive. [*In re Vivendi Universal, S.A. Sec. Litig., 605 F. Supp. 2d 570, 581 (S.D.N.Y. 2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4WKJ-NY00-TXFR-J2GN-00000-00&context=1000516), considered only a declaration, and [*In re Zierden-Landmesser, 214 B.R. 300, 302 (Bankr. M.D. Pa. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RVB-THG0-0039-017P-00000-00&context=1000516), considered only oral testimony, whereas the Court has been presented with the operative agreements governing the acquisition of the Non-Transferred Securities and other documentary evidence. Moreover, this case has reached the summary judgment stage, whereas *Chuck v. City of Homestead Police Dep't, 888 So. 2d 736, 753-54 (Fla. Dist. Ct. App. 2004)*, concerned a "preliminary adversarial hearing" where [\*34]  no records had yet been produced—in fact, the court noted that documents supporting the ownership claim would be "persuasive at the forfeiture trial." *Id. at 753*. And, notwithstanding the extrinsic evidence of intent available, the SAPAs are governed by New York law. Stanton Decl. Ex. 52 § 9; Stanton Decl. Ex. 53 § 9. In New York, when an agreement is set forth "in a clear, complete document, [the] writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." [*W.W.W. Assocs., Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S2R-8WX0-003V-B2R4-00000-00&context=1000516). Here, there are executed contracts with clauses affirming that the SAPAs, as supplemented by delivery of exercise notices, "contain[] the entire agreement between the parties relating to the subject matter hereof." Stanton Decl. Ex. 52 § 14; Stanton Decl. Ex. 53 § 14. The corporate representative's testimony is insufficient to establish Phoenix Light's ownership of any of the Non-Transferred Securities.

The 2012 Harrier Assignment does not help. The Assignment transfers all of Harrier's remaining legal claims relating to the securities previously "transferred to [Phoenix Light] [\*35]  on the dates specified in the applicable exercise notices created *pursuant to the terms of the SAPA*." ECF No. 588 ("Fitzgerald Decl.") Ex. 28 at 1 (emphasis added). But Phoenix Light did not acquire any of the Non-Transferred Securities according to the SAPA's terms. Thus, an Assignment that lists the Non-Transferred Securities does not establish an underlying transfer of those securities. Because the Non-Transferred Securities were not transferred pursuant to the SAPA's terms, Harrier could not use the Assignment to transfer the legal claims associated with those securities.

Thus, if the Court declines to find that all of Phoenix Light's claims are barred by New York's champerty law, I recommend that the Court finds that Phoenix Light does not own and lacks standing as to the Non-Transferred Securities.

**III. Contractual Bars to Plaintiffs' Claims**

Wells Fargo argues that Plaintiffs are contractually barred from bringing many of their claims due to negating clauses (as to both Phoenix Light and Commerzbank) and no-action clauses (as to Commerzbank). The Court agrees with Wells Fargo as to the negating clauses and with Plaintiffs as to the no-action clauses.

**A. Negating Clauses**

Negating clauses [\*36]  in certain Trust agreements limit the parties who may pursue actions to enforce contractual rights. [*Royal Park Invs. SA/NV v. HSBC Bank USA, Nat'l Ass'n ("Royal Park/HSBC"), 109 F. Supp. 3d 587, 606 (S.D.N.Y. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G45-BF31-F04F-04BS-00000-00&context=1000516). Wells Fargo argues that seven of the Trusts contain such limitations and bar Plaintiffs' claims.[[6]](#footnote-7)6 The negating clauses in these agreements are materially identical. They provide: "Nothing in this Agreement or in the Certificates, expressed or implied, shall give to any Person, other than the Certificateholders, the parties hereto and the NIMS Insurer and their successors hereunder, any benefit or any legal or equitable right, remedy or claim under this Agreement." Stanton Decl. Ex. 1 § 11.10 (ABFC 2005-HE2); see Stanton Decl. Ex. 2 § 11.10 (ABFC 2005-OPT1); Stanton Decl. Ex. 3 § 11.10 (ABFC 2006-OPT1); Stanton Decl. Ex. 5 § 11.10 (ABFC 2006-OPT2); Stanton Decl. Ex. 16 § 11.11 (OOMLT 2006-2); Stanton Decl. Ex. 20 § 11.11 (FFML 2006-FFA); Stanton Decl. Ex. 21 § 10.11 (IMM 2005-6). One agreement also identifies the "Swap Counterparty and its successors and assignees" as beneficiaries. Stanton Decl. Ex. 20 § 11.11. Plaintiffs are not parties to the agreements, the NIMS Insurer, or the Swap Counterparty. Wells Fargo 56.1 ¶¶ 93-106. Each of the seven agreements also differentiates between [\*37]  the "Certificateholder" or "Holder," the "Person in whose name a Certificate is registered in the Certificate Register," and the "Certificate Owner," "[w]ith respect to each Book-Entry Certificate, any beneficial owner thereof." Id. ¶¶ 107-38. Plaintiffs do not provide any proof that they are Certificateholders as contemplated by the terms of the agreements. Id. ¶¶ 107-38.

Plaintiffs raise several arguments to avoid application of the negating clauses: (1) waiver; (2) mootness; and (3) equity. First, Plaintiffs argue that Wells Fargo has waived any defense based on the negating clauses because it failed to assert Plaintiffs' contractual capacity or right to sue in three pleadings since its initial answer. Wells Fargo responded with a list of filings, from 2015 to 2020, in which the issue of Plaintiffs' capacity to sue was raised. ECF No. 606 (Def. Opp. & Reply) at 10. Plaintiffs failed to respond to these facts in their reply brief and so the Court may deem this argument abandoned. In any event, the record supports a finding that this issue was not waived.

Second, Plaintiffs claim that they have obtained authorizations "for almost all" of the challenged certificates, rendering this [\*38]  defense moot. Beneficial owners may "obtain[] . . . permission to sue from the registered holder" even if a negating clause would ordinarily bar such a suit. [*Allan Applestein TTEE FBO D.C.A. v. Province of Buenos Aires, 415 F.3d 242, 245 (2d Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GMS-VTM0-0038-X54Y-00000-00&context=1000516). Courts have consistently dismissed breach of contract claims brought by beneficial owners who could not establish that the registered owner (that is, the certificateholder) had assigned to them the right to sue. See, e.g. [*Commerzbank AG v. Deutsche Bank Nat'l Tr. Co. ("CB/Deutsche"), 234 F. Supp. 3d 462, 475-76 (S.D.N.Y. 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MVB-KVM1-F04F-007F-00000-00&context=1000516); [*Phoenix Light SF Ltd. v. Deutsche Bank Nat'l Tr. Co. ("PL/Deutsche"), 172 F. Supp. 3d 700, 711-12 (S.D.N.Y. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JDH-PWC1-F04F-0456-00000-00&context=1000516).

Commerzbank obtained authorizations in April and May 2020. Nearly all of Commerzbank's asserted contract claims accrued more than six years before the assignment date for those loans. Wells Fargo 56.1 ¶¶ 956, 958; see ECF No. 616 ("Andreoli Opp. Decl.") Exs. S, T (calculating enforcement and authorization dates for 4,526 Commerzbank loans). By the time Plaintiffs received authorization to bring those claims, they were time-barred under New York law. See *N.Y. CPLR § 213*. Plaintiffs do not dispute that "an assignment cannot confer any greater rights than at the time of the assignment the assignor possessed." [*BNP Paribas Mortg. Corp. v. Bank of Am., N.A., No. 09-cv-9783 (RWS), 2013 WL 6484727, at \*4 (S.D.N.Y. Dec. 9, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5B21-YY11-F04F-03WG-00000-00&context=1000516) (citing [*New York & Presbyterian Hosp. v. Country-Wide Ins. Co., 17 N.Y.3d 586, 593 (2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5414-XRM1-F04J-60FF-00000-00&context=1000516) ("[Y]ou cannot assign your right to benefits . . . if you had no right to those benefits in the first place.")). Thus, the authorizations are ineffective for any time-barred claims.

Plaintiffs claim that the [\*39]  authorizations relate back to commencement. [*Rule 17(a)(3)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2101-FG36-1378-00000-00&context=1000516) joinder permits "the real party in interest to ratify, join, or be substituted into the action" so long as such substitute occurs within "a reasonable time" after objection. Wells Fargo raised Plaintiffs' contractual standing in 2015, 2016, and 2017—and Plaintiffs responded, clearly aware of the need to seek authorizations. See ECF No. 606 at 9-10 (collecting parties' filings). Five years passed between Wells Fargo's first objection to Plaintiffs' lack of contractual standing and Plaintiffs' receipt of authorizations. Plaintiffs' authorizations are therefore untimely and ineffective.

Finally, Plaintiffs argue that the equities demand that the Court not enforce the negating clauses against them. They contend that the authorizations should relate back to prevent "unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense." [*Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 19-21 (2d Cir. 1997)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JNR0-00B1-D1WP-00000-00&context=1000516) (quoting 1991 [*Fed. R. Civ. P. 15*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F103-00000-00&context=1000516) advisory committee note). Plaintiffs, however, fail to explain why the equities favor this result. They have known for at least five years that Wells Fargo was challenging their contractual standing and they failed to take action to ensure the "just, speedy, and inexpensive [\*40]  determination" of this case. [*Fed. R. Civ. P. 1*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8JD7-3YB2-8T6X-706W-00000-00&context=1000516). And, with respect to Phoenix Light, which has not obtained any assignments, Plaintiffs argued that "these ambiguous PSAs" must be construed against Wells Fargo, and that "equity will suffer no wrong without a remedy." ECF No. 575 at 10 n.25. Plaintiffs fail to articulate how the PSAs are ambiguous, and they cite no case that would permit the Court to read out the negating clause merely to avoid a "get-out-of-jail-free card." ECF No. 619 (Pls. Reply) at 6 n.15.

Thus, application of the negating clauses is straightforward. "Under New York law, where a provision in a contract expressly negates enforcement by third parties, that provision is controlling." [*Morse/Diesel, Inc. v. Trinity Indus., Inc., 859 F.2d 242, 249 (2d Cir. 1988)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-Y560-001B-K0XY-00000-00&context=1000516). And "even where a contract expressly sets forth obligations to specific individuals or categories of individuals, those individuals do not have standing to enforce those obligations by suing as third-party beneficiaries when the contract contains a negating clause." [*Wilson v. Dantas, 746 F.3d 530, 537 (2d Cir. 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5BNR-TFT1-F04K-J1VS-00000-00&context=1000516) (quoting [*In re Lehman Bros. Holdings Inc., 479 B.R. 268, 275-76 (S.D.N.Y. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:566H-3RH1-F04F-02HX-00000-00&context=1000516)).

Courts in this District consistently enforce the plain language of the negating clauses against beneficial owners who seek to enforce the agreements without proper assignment. See [*Nat'l Credit Union Admin. Bd. v. U.S. Bank Nat'l Ass'n, 439 F. Supp. 3d 275, 278-79 (S.D.N.Y. 2020)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5Y6P-WRN1-F8SS-612H-00000-00&context=1000516) (dismissing breach-of-contract claims on this ground); [\*41]  [*CB/Deutsche, 234 F. Supp. 3d at 475-76*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MVB-KVM1-F04F-007F-00000-00&context=1000516) (same); [*PL/Deutsche, 172 F. Supp. 3d at 711-12*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JDH-PWC1-F04F-0456-00000-00&context=1000516) (same); [*Royal Park/HSBC, 109 F. Supp. 3d at 606-07*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G45-BF31-F04F-04BS-00000-00&context=1000516) (same).

The governing agreements for the other two trusts with Negating Clause Securities use slightly different but similarly effective language. The agreements classify Commerzbank's certificates as "Book-Entry Certificates" and provide that the "Certificateholder" is a "Depository." Stanton Decl. Ex. 6 § 1.01 (ABSHE 2005-HE5); Stanton Decl. Ex. 7 § 1.01 (CMLTI 2005-OPT4); see Wells Fargo 56.1 ¶¶ 139-146, 151-158. As a beneficial owner, Commerzbank is a "Certificate Owner," not "Certificateholder," under the terms of these two agreements. Wells Fargo 56.1 ¶¶ 142-148, 153-160. The certificates' *trustee* "deal[s] with the Depository as the authorized representative of the Certificate Owners with respect to the Book-Entry Certificates for the purposes of exercising the rights of Certificateholders . . . ." Id. ¶¶ 149, 161. In contrast, Certificate Owners' rights with respect to the certificates are "limited to those established by law and agreements between such Certificate Owners and the Depository Participants and brokerage firms representing such Certificate Owners." Id. ¶¶ 149, 161. The governing agreements are neither "law" nor an agreement between the Certificate [\*42]  Owners and Depository Participants. Commerzbank thus has no rights under the agreements themselves. Commerzbank *may* enforce the agreements by acting through DTC, id. ¶¶ 144, 156, but DTC is not involved in this action, and there is no evidence that DTC has authorized Commerzbank to bring suit as to the two trusts governed by these agreements, id. ¶¶ 165-66. Without proper authorization, Commerzbank does not have the right to bring claims related to these two trusts.

Plaintiffs are thus contractually barred from pursuing claims related to the Negating Clause Securities, except for a deferred ruling on the four loans whose claimed enforcement dates were determined by reviewing Dr. Snow's report, see Andreoli Opp. Decl. Exs. S, T. This provides an alternative ground to grant partial summary judgment in Wells Fargo's favor.

**B. No-Action Clauses**

No-action clauses in four at-issue trusts require certificateholders to provide written notice to the trustee and have a certain percentage of certificateholders make a written request of the trustee to act before bringing lawsuits related to the trust (including lawsuits against the trustee itself).[[7]](#footnote-8)7 Wells Fargo argues that, because Commerzbank did [\*43]  not provide notice to Wells Fargo or obtain the approval of the requisite percentage of certificateholders before filing this suit, Wells Fargo 56.1 ¶¶ 170-72, Commerzbank is barred from bringing claims as to those trusts. The Court does not agree.

Courts "read a no-action clause to give effect to the precise words and language used, for the clause must be 'strictly construed'" and "read narrowly." [*Quadrant Structured Prods. Co. v. Vertin, 23 N.Y.3d 549, 560 (2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CD6-SNF1-F04J-607B-00000-00&context=1000516) (quoting [*Cruden v. Bank of N.Y., 957 F.2d 961, 968 (2d Cir. 1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6J80-008H-V0D0-00000-00&context=1000516)). The no-action clauses here apply to "any suit, action or proceeding in equity or at law upon, under or with respect to this Agreement against the Depositor, the Trustee, the Servicer or any successor to any such parties." Wells Fargo 56.1 ¶ 169.

The parties spar over the application of [*Cruden*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6J80-008H-V0D0-00000-00&context=1000516), in which the Court of Appeals held that the no-action clause in that case did not require certificateholders to provide a written demand to the indenture trustee before bringing suit against it, "as it would be absurd to require the debenture holders to ask the Trustee to sue itself." [*957 F.2d at 968*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6J80-008H-V0D0-00000-00&context=1000516). The no-action clause in [*Cruden*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6J80-008H-V0D0-00000-00&context=1000516) applied to "any action or proceedings at law or in equity or in bankruptcy or otherwise, upon or under or with respect to this Indenture, or for the appointment of a receiver or trustee, [\*44]  or for any other remedy hereunder." [*Id. at 967*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6J80-008H-V0D0-00000-00&context=1000516). Wells Fargo argues that the no-action clauses at hand are distinguishable because, unlike the [*Cruden*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6J80-008H-V0D0-00000-00&context=1000516) clause, they specifically refer to suits against the trustee. But the [*Cruden*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6J80-008H-V0D0-00000-00&context=1000516) clause is more expansive than Wells Fargo suggests—it applies to *all* claims and *all* remedies, which would include claims and remedies against the trustee. The no-action clauses are not substantively distinguishable from that in [*Cruden*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6J80-008H-V0D0-00000-00&context=1000516), and "the Second Circuit's holding is clear: a No-Action Clause does not apply to debenture holder suits against the indenture trustee, as it would make little sense to ask the trustee to sue itself." [*Royal Park/HSBC, 109 F. Supp. 3d at 606*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G45-BF31-F04F-04BS-00000-00&context=1000516); see [*Blackrock Core Bond Portfolio v. U.S. Bank Nat'l Ass'n, 165 F. Supp. 3d 80, 99 (S.D.N.Y. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J5P-TK71-F04F-00WH-00000-00&context=1000516) ([*Cruden*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6J80-008H-V0D0-00000-00&context=1000516) leads to conclusion that no-action clause is unenforceable in suits against trustees).

Pointing to provisions in the governing PSAs that permit the appointment of a separate trustee, Wells Fargo argues that it could appoint a separate trustee to assess a claim, but such appointments are permitted only "for the purpose of meeting any legal requirements of any jurisdiction in which any part of the Trust or property constituting the same may at the time be located." E.g. Stanton Decl. Ex. 8 § 9.11(a). Even after a separate trustee is appointed, Wells Fargo remains "jointly" [\*45]  liable in exercising all "rights, powers, duties and obligations" and responsible for directing the separate trustee if Wells Fargo is incompetent or unqualified to perform such acts. Id. The provisions are not enough to render the no-action clauses enforceable.

Wells Fargo is incorrect that the No-Action Clause Trusts' agreements are "alternative structures" sufficient to "lead to a different result." [*Blackrock Core Bond Portfolio, 165 F. Supp. 3d at 99*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J5P-TK71-F04F-00WH-00000-00&context=1000516). The [*Blackrock*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J5P-TK71-F04F-00WH-00000-00&context=1000516) court suggested that possibility in the context of describing the [*Cruden*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6J80-008H-V0D0-00000-00&context=1000516) no-action clause's "sequential building block[]" construction. [*Id. at 98*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J5P-TK71-F04F-00WH-00000-00&context=1000516) (describing how a waiting period "make[s] sense only when one follows the steps that have preceded"). The no-action clauses here also contain a waiting period and are structured no differently.

Last, Wells Fargo suggests that, alternatively, Commerzbank failed to meet the no-action clauses' numerosity requirements. But such a carve-out has been rejected by [*Cruden*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6J80-008H-V0D0-00000-00&context=1000516) and subsequent courts—the ineffective demand provision renders the no-action clause ineffective in full. See [*PL/Deutsche, 172 F. Supp. 3d at 717*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JDH-PWC1-F04F-0456-00000-00&context=1000516); [*Blackrock Core Bond Portfolio, 165 F. Supp. 3d at 99*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5J5P-TK71-F04F-00WH-00000-00&context=1000516) ("[W]hen the demand requirement falls, the entire provision falls.").

Accordingly, should the Court reach this issue, I recommend finding that Commerzbank may bring claims relating to the No-Action Clause [\*46]  Trusts.

**IV. The Minnesota TIP Orders**

Wells Fargo next contends that Minnesota trust instruction proceeding ("TIP") court orders relieve it of repurchase-related obligations for 13 trusts and bar 5,103 of Plaintiffs' repurchase-related claims (the "Separate Trustee Claims"). See ECF No. 564 ("Andreoli Decl.") Exs. C, D. According to Wells Fargo, not only was it entitled to rely on the court orders under the terms of the trusts' PSAs, but three Minnesota rules preclude Plaintiffs from collaterally challenging the TIP orders. In response, Plaintiffs argue that the TIP orders are void for lack of jurisdiction and due process, and thus not subject to any of the rules against collateral challenge. Plaintiffs also maintain that, even if the TIP orders are valid, Plaintiffs' claims against Wells Fargo are outside the orders' scope; that the PSAs do not, by their terms, relieve Wells Fargo of its duties; and that Wells Fargo breached its duties as to certain loans before the separate trustee was appointed. The Court finds that the TIP orders preclude Plaintiffs from bringing claims for most of the Separate Trustee Claims, except for a deferred ruling on the eight loans whose claimed enforcement [\*47]  dates were determined by reviewing Dr. Snow's report, see Andreoli Opp. Decl. Exs. V, W, and the twenty loans with R&W breaches in the OOMLT 2007-3 and GPMF 2005-AR4 trusts.

**A. The Full Faith and Credit Act's Applicability**

Under the [*Full Faith and Credit Act, 28 U.S.C. § 1738*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5HW2-D6RV-H0NS-00000-00&context=1000516), federal courts give preclusive effect to state-court judgments "whenever the courts of the State from which the judgments emerged would do so," [*Allen v. McCurry, 449 U.S. 90, 96 (1980)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6TT0-003B-S3R7-00000-00&context=1000516), and "insofar as doing so is consistent with constitutionally protected due process," [*Johnston v. Arbitrium (Cayman Islands) Handels AG, 198 F.3d 342, 347 (2d Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y3X-HS90-0038-X4M1-00000-00&context=1000516).

Plaintiffs' first argument against the Full Faith and Credit Act's application is that the TIP courts lacked *in rem* jurisdiction. In Minnesota, judgments may be challenged for lack of jurisdiction where "the lack of jurisdiction affirmatively appears on the face of the record," [*Hanson v. Woolston, 701 N.W.2d 257, 265 (Minn. Ct. App. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4GR9-HP00-0039-42MJ-00000-00&context=1000516), and a "mere absence" from the record of facts "essential" to jurisdiction "does not render an order" subject to collateral attack, [*In re Hudson's Guardianship, 226 Minn. 532, 536 (1948)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-4Y00-003G-V3KP-00000-00&context=1000516); see [*Stoll v. Gottlieb, 305 U.S. 165, 171-72 (1938)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8D20-003B-74PW-00000-00&context=1000516) ("Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter.").

Under Minnesota law, the TIP orders are not subject to collateral attack for lack of jurisdiction. The TIP orders provide a statutory basis for state-court *in rem* jurisdiction and [\*48]  note that Wells Fargo had a corporate trust office in located in Minneapolis, Minnesota, which supports a finding that the intangible property at issue (the right to pursue repurchase claims) was also located in Minnesota. See Stanton Decl. Exs. 97, 100, 103, 109, 113, 115, 118, 121, 135, 137; see also [*Matter of HarborView Mortg. Loan Tr. 2005-10, A18-0043, 2018 WL 4201211, at \*5 (Minn. Ct. App. Sept. 4, 2018)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5T63-R8J1-F2MB-S336-00000-00&context=1000516) (situs of intangible property same as that of the debtor and creditor). The TIP orders do not contain an affirmative, challengeable lack of jurisdiction.

Plaintiffs next contend that, as the effective "defendants" in the proceedings, the TIPs violated their due process rights. "[I]n order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising jurisdiction over the interests of persons in a thing," and the standard for determining whether the exercise of jurisdiction over the interests of persons is consistent with due process "is the minimum-contacts standard elucidated in International Shoe." [*Shaffer v. Heitner, 433 U.S. 186, 207 (1977)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9CF0-003B-S1JM-00000-00&context=1000516). But it is not *Plaintiffs'* contacts with Minnesota which justify *in rem* jurisdiction; it is the *trustee's* "decision-making processes, which determine whether the right [to pursue litigation] will be asserted and how it will be asserted." [\*49]  [*Matter of HarborView Mortg. Loan Tr. 2005-10, 2018 WL 4201211, at \*6*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5T63-R8J1-F2MB-S336-00000-00&context=1000516). "Maintaining the instruction proceeding and exercising jurisdiction over the trust in the state where the bank exercises the right to pursue the litigation does not offend traditional notions of fair play and substantial justice." Id. Plaintiffs' cited cases do not compel a different result. See [*Rush v. Savchuk, 444 U.S. 320, 328-29 (1980)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7N80-003B-S3MP-00000-00&context=1000516) (finding no *quasi in rem* jurisdiction where there were no "significant contacts" between the litigation and the forum); [*Shaffer, 433 U.S. at 207-09*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9CF0-003B-S1JM-00000-00&context=1000516) ("unusual for the State where the property is located not to have [*in rem*] jurisdiction" but "presence of the property alone" does not support *quasi in rem* jurisdiction). The TIP orders were jurisdictionally sound and did not violate Plaintiffs' due process rights. The Full Faith and Credit Act therefore applies.

**B. Minnesota Rules of Preclusive Effect**

Three Minnesota rules potentially preclude Plaintiffs from collaterally challenging the TIP orders: the Minnesota statute governing *in rem* TIPs, Minnesota's rule that facially valid judgments are not subject to collateral attack, and Minnesota's rule of collateral estoppel.

The Minnesota statute governing *in rem* TIPs provides that such court orders are "binding in rem upon the trust estate and upon the interests of all beneficiaries, [\*50]  vested or contingent, even though unascertained or not in being." [*Minn. Stat. § 501C.0204(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5HFC-MDX1-DXC8-02XX-00000-00&context=1000516) (2016) (recodified from *Minn. Stat. § 501B.21* (2002)). TIP orders "may not be collaterally attacked but stand[] as a judgment on the matters determined by the order." [*In re Est. & Tr. of Anderson, 654 N.W.2d 682, 686 (Minn. Ct. App. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:47C9-PJ50-0039-44NR-00000-00&context=1000516) (quoting [*In re Warner's Tr., 263 Minn. 449, 455 (1962)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-4810-003G-V09M-00000-00&context=1000516)). The TIP orders are therefore binding on Plaintiffs, the at-issue trusts' beneficiaries.

Minnesota's rule on collateral attack of facially valid judgments is similarly applicable. "An action with an independent purpose and contemplative of another form of relief that depends on the overruling of a prior judgment is a collateral attack," and "[i]t is well-settled in Minnesota that a facially valid judgment is not subject to collateral attack." [*Popp Telcom v. Am. Sharecom, Inc., 210 F.3d 928, 941 (8th Cir. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:403B-YMN0-0038-X4XG-00000-00&context=1000516) (citing [*Elbow Lake Coop. Grain Co. v. Commodity Credit Corp., 144 F. Supp. 54, 61 (D. Minn. 1956)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-R8G0-003B-24S9-00000-00&context=1000516), then [*Fidelity & Deposit Co. v. Riopelle, 298 Minn. 417, 421 (1974)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-3HD0-003G-V1DV-00000-00&context=1000516)). Claims which "essentially challenge the propriety" of actions previously approved by a court "constitute collateral attacks on those prior orders, and are barred." [*Greer v. Pro. Fiduciary, Inc., 792 N.W.2d 120, 129 (Minn. Ct. App. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:51W1-HJJ1-F04H-10DJ-00000-00&context=1000516) (citing [*Winjum v. Jesten, 191 Minn. 294, 300 (1934)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-5P20-003G-V309-00000-00&context=1000516)). Plaintiffs' repurchase-related claims against Wells Fargo substantively challenge the propriety of the TIP courts' judgment that Wells Fargo would have no further duty or obligation to trust beneficiaries with respect to the enforcement of repurchase claims. See, e.g., Stanton Decl. Ex. 103 at 3-4. The TIP orders are facially valid [\*51]  and not subject to such attack.

Finally, Minnesota's rule of collateral estoppel prohibits the relitigation of an issue when "(1) the issue was identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue." [*Ellis v. Minneapolis Comm'n on C.R., 319 N.W.2d 702, 704 (Minn. 1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-2PY0-003G-V29M-00000-00&context=1000516) (quoting [*Victory Highway Vill., Inc. v. Weaver, 480 F. Supp. 71, 74 (D. Minn. 1979)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-8VH0-0054-723X-00000-00&context=1000516)).

Plaintiffs argue that collateral estoppel does not apply because Plaintiffs' claims against Wells Fargo were themselves not at issue in the Minnesota proceedings. See [*Hauschildt v. Beckingham, 686 N.W.2d 829, 837-38 (Minn. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4DBS-M2W0-0039-435V-00000-00&context=1000516) ("The issue must have been distinctly contested and directly determined in the earlier adjudication for collateral estoppel to apply."). Plaintiffs identify the wrong issue: it is Wells Fargo's duty to enforce repurchase obligations that was before the TIP courts, the same duty Plaintiffs allege in this litigation. The remaining prongs of collateral estoppel are also satisfied. The TIP orders were binding and went unappealed. See [*Minn. Stat. § 501C.0204*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5HFC-MDX1-DXC8-02XX-00000-00&context=1000516); [*In re Warner's Tr., 263 Minn. at 456*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-4810-003G-V09M-00000-00&context=1000516) ("[I]n a trust matter the issues actually settled in the hearing may not later be attacked after the time for appealing has expired . . . ."). And while "a party [\*52]  who refuses to appear or defend an *in rem* action" is not bound by decisions on issues in an *in rem* proceeding other than their interest in the property "in subsequent *in personam* litigation," [*Johnston, 198 F.3d at 349*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3Y3X-HS90-0038-X4M1-00000-00&context=1000516), beneficiaries are considered to be parties to, and have had a full and fair opportunity to participate in, *in rem* TIPs where they were given notice of the proceeding. See [*Matter of Trs. Created by Hormel, 504 N.W.2d 505, 509 (Minn. Ct. App. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX4-6V50-003F-V499-00000-00&context=1000516) (trust beneficiaries collaterally estopped by TIP order where they had notice of the proceedings and made no formal objection). Plaintiffs received notice, Wells Fargo 56.1 ¶¶ 181-82, 223, 226, 229, 232, 235, 238, 241, 244, 247, 251, and there is no evidence that they objected to the proceedings.

The Minnesota statute governing *in rem* TIPs, Minnesota's rule that facially valid judgments are not subject to collateral attack, and Minnesota's rule of collateral estoppel all bind Plaintiffs to the TIP courts' judgment.

**C. The PSAs' Effect**

The parties spar over whether two PSA provisions affect Wells Fargo's reliance on and duties after the TIP orders: first, a provision permitting Wells Fargo to "rely and [] be protected in acting or refraining from acting upon any resolution," "order," "opinion," or other "document believed by it [\*53]  to be genuine and to have been signed or presented by the proper party or parties," e.g., Stanton Decl. Ex. 20 § 6.02(a) (§ 8.02(a) in other PSAs); second, a provision obligating Wells Fargo to perform all duties "jointly" with an appointed separate trustee, e.g., id. § 6.09(b) (§ 8.10 in other PSAs).

With regards to the provision permitting trustee reliance on court orders, Plaintiffs are correct that a previous sub-part of this provision prohibits the construal of any PSA provisions "to relieve the Trustee from liability for its own negligent action, its own negligent failure to act or its own willful misconduct." E.g. id. § 6.01(c). But Wells Fargo does not cite the provision to excuse any alleged negligent action or inaction. The TIP orders established that Wells Fargo *had no repurchase obligations* for the adjudicated trusts—Wells Fargo cannot be negligent in its action or inaction concerning those obligations if it had no duty to perform them. To the extent that Wells Fargo had not discovered breaches requiring its action as trustee as of the TIP orders' issuance, Wells Fargo may rely on the TIP orders pursuant to this provision of the PSAs.

As for the provision requiring Wells [\*54]  Fargo to perform duties jointly with any appointed separate trustee, the section of the PSAs which governs separate and co-trustees' duties describes a specific contractual process by which such trustees are appointed. See, e.g., id. [*§ 6.09(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5DCP-BP91-DYB7-W0NM-00000-00&context=1000516); [*L. Debenture Tr. Co. of New York v. Maverick Tube Corp., 595 F.3d 458, 467 (2d Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XV5-9F80-YB0V-D05D-00000-00&context=1000516) (under New York law, where parties dispute the meaning of a clause, contracts and their clauses are considered as a whole). The separate trustee appointed by the TIP orders was not appointed using this process and is not the kind of separate trustee that the cited PSA provision contemplates. Wells Fargo's obligation to perform duties jointly with separate trustees does not extend to encompass the TIP orders. Insofar as Plaintiffs suggest Wells Fargo was obligated to perform duties jointly with the appointed separate trustee *regardless* of the TIP orders, the Court has held that the TIP orders' extinguishment of Wells Fargo's repurchase obligations was final. The PSA provisions do not change the TIP orders' effect.

**D. The FFML 2006-FFA Trust Settlement**

Wells Fargo contends that a separate TIP order further bars Phoenix Light's repurchase claims for loans within the FFML 2006-FFA Trust identified by Phoenix Light as associated with an R&W breach. After the [\*55]  separate trustee was appointed by TIP order, the separate trustee agreed to settle the Trust's repurchase claims as to every specific loan Phoenix Light had identified to be associated with an R&W breach. The settlement agreement settled all claims arising out of "any alleged or actual breach of . . . Representations and Warranties in any of the Governing Agreements" and "any alleged or actual obligation to repurchase." Stanton Decl. Ex. 127 at Ex. 1 § 1.10(a). Certificateholders holding interests aggregating at least 25 percent of the classes of certificates at issue notified the separate trustee that they believed the settlement offer was "in the best economic interests of the Trust" and instructed the separate trustee to accept the settlement. Stanton Decl. Ex. 131 at 4-5. In 2018, a TIP order authorized the separate trustee to accept the settlement offer, noting that doing so was "within the bounds of [the separate trustee's] discretion, reasonable and . . . in good faith." Id. at 7. The TIP order was binding on "the Trustee," Wells Fargo. Id. at 8.

Plaintiffs' argument that this TIP order lacked jurisdiction and was not binding is rejected; this TIP order is no different from the [\*56]  other TIP orders analyzed above. As for Plaintiff's contention that the settlement was deficient, Phoenix Light objected to the settlement offer on this basis in 2018. Stanton Decl. Ex. 128. That objection was rejected, both by the separate trustee, which chose nevertheless to accept the settlement agreement, and by the TIP court, which found that the separate trustee's decision was reasonable and within the bounds of its discretion. Stanton Decl. Ex. 131 at 7. The Court sees no reason to disturb the Minnesota court's order. And last, while it is true that, *at the motion-to-dismiss stage*, a settlement agreement may not preclude claims against an RMBS trustee, [*Pacific Life, 2018 WL 1382105, at \*12*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RWF-MJK1-F7G6-61N9-00000-00&context=1000516), at this point, Plaintiffs must offer more than "non-speculative evidence that [the trustee] could have obtained more than it did," [*Fixed Income Shares: Series M v. Citibank N.A., 314 F. Supp. 3d 552, 560 (S.D.N.Y. 2018)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RXR-FP61-FD4T-B02S-00000-00&context=1000516) (noting also that at-issue settlement agreement was endorsed by the reviewing court as "in the best interests" of the trust). The TIP order bars Phoenix Light's repurchase claims for the FFML 2006-FFA Trust.

**E. Wells Fargo's Discovery of Breaches**

Plaintiffs briefly argue that, for some subsets of loans otherwise subject to the TIP orders, Wells Fargo is nevertheless liable because, all before the [\*57]  separate trustee was appointed, it discovered R&W breaches and breached its duties concerning them, let the statute of limitations expire on repurchase obligations, and failed to enforce uncured document defects. I find Plaintiffs' argument unavailing for those loans whose "enforcement dates" *postdate* the separate trustee appointment and are drawn from Plaintiffs' own discovery responses.[[8]](#footnote-9)8See Andreoli Decl. Ex. D; Andreoli Opp. Decl. Exs. V-Y. The TIP orders relieved Wells Fargo of its repurchase obligations as to these loans.

**V. Timeliness of Plaintiffs' Claims**

"When a nonresident sues on a cause of action accruing outside New York, [*CPLR 202*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5CT3-08C1-6RDJ-8458-00000-00&context=1000516) requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued." [*Glob. Fin. Corp. v. Triarc Corp., 93 N.Y.2d 525, 528 (1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WR3-TFR0-0039-418X-00000-00&context=1000516). The parties do not dispute that New York and Germany are the relevant jurisdictions, but Wells Fargo argues that many of Plaintiffs' claims are untimely under New York law, and all of Commerzbank's claims that accrued in Germany are untimely under German law. I agree.

**A. New York Statute of Limitations**

Under New York law, breach of contract claims are subject to a six-year statute of limitations and accrue [\*58]  when the contract is breached. *N.Y. CPLR § 213(2)*; [*Deutsche Bank Nat'l Tr. Co. Tr. for Harborview Mortg. Loan Tr. v. Flagstar Cap. Markets Corp., 32 N.Y.3d 139, 145-46 (2018)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5TH2-FFB1-FGCG-S0N3-00000-00&context=1000516); see also [*Ely-Cruikshank Co. v. Bank of Montreal, 81 N.Y.2d 399, 402 (1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S2R-7DP0-003V-B4N2-00000-00&context=1000516). It is "settled that 'the contractual language fixes the boundaries of the legal obligation of a defendant.'" [*Fed. Hous. Fin. Agency for Fed. Home Loan Mortg. Corp. v. Morgan Stanley ABS Cap. I Inc. ("FHFA"), 73 N.Y.S.3d 374, 388 (Sup. Ct. 2018)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTP-S2J1-JFSV-G14M-00000-00&context=1000516) (cleaned up) (quoting [*Phoenix Acquisition Corp. v. Campcore, Inc., 81 N.Y.2d 138, 141 (1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S2R-7J00-003V-B482-00000-00&context=1000516)).

Wells Fargo identifies three groups of trusts for which it claims Plaintiffs have raised untimely claims under New York law: eight Exception Report Trusts,[[9]](#footnote-10)9 17 trusts with liquidated loans, and five Early EOD Trusts.[[10]](#footnote-11)10

**1. Exception Report Trusts**

The Exception Report Trusts' PSAs provide that Wells Fargo's duty to provide notice of document defects arises "promptly" upon discovery or receipt of notice of a material defect, and that its repurchase enforcement duty arises after the expiration of the contractually prescribed period for the responsible party to cure the defect.[[11]](#footnote-12)11See Wells Fargo 56.1 App'x M. Wells Fargo contends that the only discovery or notice associated with the at-issue loans is the issuance of a final exception report, which lists missing or defective documents identified by Wells Fargo during its post-closing review of the trust's mortgage files. Thus, the event that triggered Wells Fargo's enforcement duties must have been the issuance of the final exception report. Plaintiffs dispute that Wells [\*59]  Fargo's obligations are fixed in time. They contend that its duty to notify and enforce repurchase obligations are continuing duties that accrued independently from—and well later than—other PSA parties' breaches of those duties.

The Exception Report Trust PSAs largely do not explain what it means to provide "prompt" notice (other than OWNIT 2006-2's PSA, which cabins the term with the phrase, "and in any event within no more than five Business Days"). See Wells Fargo 56.1 App'x M. Under the PSAs' terms, once Wells Fargo provides notice of a document defect, the responsible party has a certain amount of time (between 30 and 120 days) to cure the defect. Id. If the responsible party does not cure or correct the document defect "during" or "within" "such period," Wells Fargo "shall" enforce the repurchase obligation. Id.

Plaintiffs contend that none of the PSAs expressly specifies deadlines for Wells Fargo's duty to provide notice or enforce repurchase, and that those duties are triggered only after the passage of a "reasonable time."[[12]](#footnote-13)12 But Plaintiffs' respective complaints closely link Wells Fargo's issuance of the final exception report both to its obligation to provide notice [\*60]  of document defects and to other PSA parties' "cure period" to address those defects—which, in turn, implicates Wells Fargo's enforcement duty. See ECF No. 80 ¶¶ 119-21, 126 ("Events of Default occurred shortly after the final exception reports were delivered for each of the Covered Trusts"); CB ECF No. 1 ¶¶ 38-42, 94-95. The PSAs similarly relate exception reports and contractual obligations: for four of the Exception Report Trusts,[[13]](#footnote-14)13 Wells Fargo's notice duty is described in the same provision as the requirement to produce a final exception report. Taken together, the PSAs' language and Plaintiffs' own complaints support Wells Fargo's argument that the issuance of a final exception report triggered its notice duties, and the expiry of each Exception Report Trust's prescribed cure period triggered its enforcement duties.

Plaintiffs argue that cases involving claims against originators and issuers are not persuasive authority for their claims against a trustee. See [*Bank of N.Y. Mellon v. WMC Mortg., LLC, 151 A.D.3d 72, 75-76 (N.Y. App. Div. 2017)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NHH-W1N1-F04J-712Y-00000-00&context=1000516) (claim for failure to repurchase "accrued after [defendant] failed to meet its backstop obligations following [another party's] failure to repurchase the loans"). Plaintiffs fail to explain how the defendant's identity [\*61]  changes the court's analysis, which was based on contractual language. Plaintiffs also are incorrect that there are no dates or deadlines for Wells Fargo's enforcement duties. The PSAs provide specific numbers of days during which responsible parties must cure any document defects, and once those periods conclude, Wells Fargo "shall" enforce the repurchase obligation thereafter. Cf. [*Guilbert v. Gardner, 480 F.3d 140, 149 (2d Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4N6R-C7K0-0038-X1PF-00000-00&context=1000516) ("Where a contract does not specify a date or time for performance, New York law implies a reasonable time period.").

Even assuming Plaintiffs' argument that Wells Fargo's duties to notify and enforce repurchase obligations are continuing duties which accrue independently from other PSA parties' breaches of their duty to notify or repurchase, "[a]s the [New York] Court of Appeals has explained, where a contract provides for a continuing obligation, the statute of limitations 'run[s] separately for the damages occasioned each time a breach of the obligation . . . occur[s].' . . . Claims for breaches of the obligation will therefore only be timely if the breaches occurred within the six years immediately preceding such commencement." [*FHFA, 73 N.Y.S.3d at 393*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RTP-S2J1-JFSV-G14M-00000-00&context=1000516) (first two alterations added, others in original) (quoting [*Bulova Watch Co. v. Celotex Corp., 46 N.Y.2d 606, 611 (1979)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRS-9YR0-003C-F2ND-00000-00&context=1000516)). Here, Wells [\*62]  Fargo prepared the final exception reports for the Exception Report Trusts no later than March 2008. See Wells Fargo 56.1 ¶¶ 350-82; Stanton Decl. Exs. 28-33, 39, 42. Its enforcement duties were triggered no later than October 2008. See Wells Fargo 56.1 ¶¶ 342, 378. More than six years passed before Plaintiffs commenced their actions in December 2014 and December 2015. Plaintiffs' document defect claims regarding loans in the Exception Report Trusts are therefore untimely under New York law.

**2. Liquidated Loans**

With respect to 17 Trusts, many document-defect claims relate to liquidated loans. Plaintiffs claim that events of default occurred because servicers liquidated loans that could have been tendered to the seller for repurchase because of uncured material document defects, and that Wells Fargo was aware of the alleged servicer breaches and associated events of default. In response to Wells Fargo's interrogatories, Commerzbank has averred that, more than six year before the commencement of its action, Wells Fargo was aware of such alleged servicing breaches for 3,377 liquidated loans with document defects. Stanton Decl. Ex. 151 at App'x C; Andreoli Decl. Ex. G. Phoenix Light submits [\*63]  the same for 526 liquidated loans with document defects. Stanton Decl. Ex. 151 at App'x C; Andreoli Decl. Ex. H. In Plaintiffs' own words, "Wells Fargo was aware on the dates specified . . . that the seller was not able or willing to cure outstanding exceptions for a large number of loans years after closing and, thus, the servicers' failure to tender loans to either the seller or trustee to commence the repurchase process was a material breach." Stanton Decl. Ex. 151 at 11.

As discussed above, Wells Fargo's notice and repurchase duties (whether continuing duties or not) were triggered at the time of breach—that is, when it became aware of the servicing breaches. Wells Fargo was aware of breaches for 3,377 Commerzbank loans and 526 Phoenix Light loans, and it did not provide notice or enforce repurchase for those loans for over six years before either Plaintiff filed its suit. Document-defect claims based on the liquidation of these loans are therefore untimely under New York's statute of limitations.

**3. Early EOD Trusts**

Finally, Wells Fargo challenges the timeliness of post-Event of Default ("EOD") claims related to five Trusts (the "Early EOD Trusts"). Plaintiffs have alleged that, [\*64]  "upon the occurrence of Events of Default," Wells Fargo failed to act prudently and fulfill its duty as a trustee to take "appropriate steps to ensure all mortgage loan documentation was completely and accurately transferred to the trusts," to ensure that "the appropriate parties were receiving notification of breaches of representations and warranties from servicers," and to "enforce[] the responsible parties' obligations with respect to breaching mortgage loans." ECF No. 80 ¶ 77; CB ECF No. 1 ¶ 52.

Regardless of whether Wells Fargo's duty to act prudently required it to undertake an investigation to discover all document defects or R&W breaches upon the occurrence of an Event of Default ("EOD"), its duty arose "upon" the EOD's occurrence, or, in other words, when the EOD occurred. And for five trusts, the EODs occurred—and Wells Fargo provided certificateholders with notice of those EODs—by August 2008, more than six years before the filing of Phoenix Light's and Commerzbank's complaints. Wells Fargo 56.1 ¶¶ 398-401; Stanton Decl. Exs. 44-48. Whether the notices that Wells Fargo sent said that Wells Fargo would not take further action is immaterial; to the extent that Wells Fargo [\*65]  had post-EOD duties, the notices informed the Early EOD Trust certificateholders of the EODs, and their post-EOD claims accrued accordingly.

Because the post-EOD claims regarding the five Early EOD trusts accrued over six years before Plaintiffs filed suit, these claims are outside New York's statute of limitations.

**4. American Pipe Tolling**

Plaintiffs briefly argue that they are entitled to tolling for certain trusts based on the application of [*American Pipe & Const. Co. v. Utah, 414 U.S. 538 (1974)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CFH0-003B-S4JT-00000-00&context=1000516), which, upon the commencement of a class action, suspends the applicable statute of limitations for all asserted class members who would have been parties. [*Pacific Life, 2018 WL 1382105, at \*8*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RWF-MJK1-F7G6-61N9-00000-00&context=1000516). Plaintiffs cite two cases in support: BlackRock Allocation Target Shares: Series S Portfolio v. Wells Fargo Bank, Nat'l Ass'n, No. 0651867/2014 (N.Y. Cnty. Sup. Ct.) ("BlackRock I") and BlackRock Series S, No. 14-cv-09371 (S.D.N.Y. 2014) (referred to in this section as "[*BlackRock II*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N6R-PX91-F04F-03CS-00000-00&context=1000516)").

BlackRock I is inapposite; it is a derivative, not class, action, and the Court is unaware of any binding precedent extending [*American Pipe*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CFH0-003B-S4JT-00000-00&context=1000516) to derivative actions. See Krinsk v. Fund Asset Mgmt., Inc., 85-cv-8428 (JMW), 1986 WL 205, at \*3 (S.D.N.Y. May 9, 1986) ("[T]he broad reading of [*American Pipe*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CFH0-003B-S4JT-00000-00&context=1000516) sought by the plaintiffs would logically lead to an endless succession of representative actions not contemplated by the Supreme Court in holding [\*66]  that the *individual* claims in [*American Pipe*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CFH0-003B-S4JT-00000-00&context=1000516) were not time barred." (emphasis in original)) (refusing to apply [*American Pipe*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CFH0-003B-S4JT-00000-00&context=1000516) to derivative action).

[*BlackRock II*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N6R-PX91-F04F-03CS-00000-00&context=1000516), on the other hand, was filed as a putative class action and included some of Plaintiffs' trusts. As the parties noted in their notices of supplemental authority, New York law recognizes cross-jurisdictional tolling (i.e. tolling of New York statutes of limitations for class actions filed outside New York state court). [*Bermudez Chavez v. Occidental Chem. Corp., 35 N.Y.3d 492, 503-04 (2020)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:613T-6351-DXWW-24CX-00000-00&context=1000516), reargument denied sub nom. *Chavez v. Occidental Chem. Corp., 36 N.Y.3d 962 (2021)*. Even though it was filed in federal court, [*BlackRock II*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N6R-PX91-F04F-03CS-00000-00&context=1000516) thus tolls some of Plaintiffs' claims, by 29 days for Phoenix Light and 395 days for Commerzbank. But its application is limited.

First, [*BlackRock II*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N6R-PX91-F04F-03CS-00000-00&context=1000516) does not toll Commerzbank's claims arising from six Trusts not included in the [*BlackRock II*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N6R-PX91-F04F-03CS-00000-00&context=1000516) action (CMLTI 2005-OPT4, GPMF 2005-AR4, GPMF 2006-AR1, GPMF 2006-AR2, GPMF 2006-AR3, and OOMLT 2006-2). See Exhibit 1 to Complaint, [*BlackRock II*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N6R-PX91-F04F-03CS-00000-00&context=1000516), 14-cv-09371 (S.D.N.Y. 2014), ECF No. 1-1. Second, [*BlackRock II*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N6R-PX91-F04F-03CS-00000-00&context=1000516)'s putative class was comprised of "all *current* owners of certificates in the Trusts," Complaint, [*BlackRock II*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N6R-PX91-F04F-03CS-00000-00&context=1000516), 14-cv-09371 (S.D.N.Y. 2014), ECF No. 1, and thus did not include claims related to certificates that Commerzbank had sold before the filing of the [*BlackRock II*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N6R-PX91-F04F-03CS-00000-00&context=1000516) complaint on June 18, 2014. [*BlackRock II*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N6R-PX91-F04F-03CS-00000-00&context=1000516) only [\*67]  tolls Commerzbank's claims arising from two trusts in which it continued to own certificates after that date (ABFC 2006-OPT1 and ABFC 2006-OPT2)[[14]](#footnote-15)14 —but Commerzbank's claims as to the M3 tranche of ABFC 2006 OPT1 are still untimely under the German statute of limitations, which, as discussed below, does not recognize equitable tolling. Third, to the extent that [*BlackRock II*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N6R-PX91-F04F-03CS-00000-00&context=1000516) tolls Phoenix Light's claims, it affects only those claims that, with an additional 29 days, became timely under New York law (i.e. accrued within six years of Phoenix Light's complaint). Finally, [*BlackRock II*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N6R-PX91-F04F-03CS-00000-00&context=1000516) does not affect the untimeliness of Plaintiffs' post-EOD claims regarding the five Early EOD trusts, as those claims accrued no later than August 2008.

**B. German Statute of Limitations**

The parties do not dispute that Commerzbank's claims relating to 11 trusts and certificates in 2 others[[15]](#footnote-16)15 accrued in Germany and must satisfy the German statute of limitations in addition to New York's. The Court, like others before, is presented with "dueling expert reports—from Doctor Heinz-Peter Mansel on behalf of Commerzbank, and Doctor Mathias Rohe on behalf of [Wells Fargo], respectively—regarding the application of German law to this case." [*CB/Deutsche, 234 F. Supp. 3d at 472*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MVB-KVM1-F04F-007F-00000-00&context=1000516).

According [\*68]  to [*Rule 44.1 of the Federal Rules of Civil Procedure*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02G-00000-00&context=1000516), questions of foreign law are treated as questions of law, and the Court "may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." [*Fed. R. Civ. P. 44.1*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-22N1-6N19-F02G-00000-00&context=1000516). "Accordingly, foreign law should be argued and briefed like domestic law. As with domestic law, judges may rely on both their own research and the evidence submitted by the parties to determine foreign law." *Sealord Marine Co. v. Am. Bureau of Shippins, 220 F. Supp. 2d 260, 271 (S.D.N.Y. 2002)* (citation omitted); see [*IKB Deutsche Industriebank AG v. McGraw Hill Fin., Inc., 14-cv-3443 (JSR), 2015 WL 1516631, at \*3 n.1 (S.D.N.Y. Mar. 26, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FNB-N441-F04F-0133-00000-00&context=1000516), aff'd, [*634 F. App'x 19 (2d Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HMS-JX41-F04K-J063-00000-00&context=1000516) (courts "may reject the opinion of an expert on foreign law or give it whatever probative value the court believes it deserves" (citation omitted)).

In the context of RMBS litigation, "the relevant provision of German law is Section 195 of the German Civil Code, which has a three-year limitations period."[[16]](#footnote-17)16[*IKB Deutsche Industriebank AG, 634 F. App'x at 22*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FNB-N441-F04F-0133-00000-00&context=1000516). "That period begins to run at the end of the calendar year in which 1) the claim arose and 2) the plaintiff either has knowledge of the circumstances giving rise to the claim and the identity of the defendant, or would have had such knowledge but for gross negligence." Id. (citing Bürgerliches Gesetzbuch ("BGB") §§ 195, 199).

A claim arises under BGB Section 199(1) when it can be "asserted for the first time and if necessary enforced [\*69]  by way of a complaint," which occurs when a defendant breaches a duty and the breach results in the plaintiff's financial injury. ECF No. 565 ("Rohe Aff.") ¶ 19. The parties dispute whether the German statute of limitations is calculated separately for each breach and every violation of a continuing duty. Commerzbank's expert, Dr. Mansel, argues that "every single claim" is considered independently for timeliness, ECF No. 596 ("Mansel Aff.") ¶ 10, and that, for breaches of continuing duties, "if a German court does not find there was one continued act or omission but rather a continuous breach of the same duty by many repeated acts or omissions, then the court would find a separate breach every [time] for purposes of the German Statute of Limitations," id. ¶ 11.

Wells Fargo's expert, Dr. Rohe, argues that this formulation fails to distinguish between the breach of a continuing duty and continuing breaches of a duty. ECF No. 614 ("Rohe Reply Aff.") ¶ 22. Dr. Rohe posits that, under the principle of "unity of damages," once a plaintiff suffers a cognizable financial injury, any subsequent damages incurred as a result of the original breach or course of conduct are irrelevant for statute [\*70]  of limitations purpose as long as they are "the kind of damages that could have been reasonably expected based on the initial injury." Rohe Aff. ¶ 20. Where the alleged breach is a failure to act, additional failures to act are not considered new breaches that cause new damages or trigger a new limitations calculation, so the first time that a contractual duty is breached is when the plaintiff's claim arises. Id. Per Dr. Rohe, this theory of accrual applies to a party's course of action (or inaction) that persists over time, not to repeated breaches of an "independent nature." Rohe Aff. Ex. I; see Rohe Aff. ¶ 20 n.27.

The Court finds Dr. Rohe's testimony the more persuasive of the two experts, especially in light of Commerzbank's complaint, which emphasizes Wells Fargo's "continual" breach of and "failure" to perform its contractual and fiduciary obligations. E.g., CB ECF No. 1 ¶¶ 90, 133. Wells Fargo's alleged conduct is best understood as a persistent course of inaction rather than a series of "multiple unlawful [in]actions," Mansel Aff. Ex. 2, and the financial ramifications of any failure by Wells Fargo to enforce repurchase obligations logically originate from the point in time [\*71]  when Wells Fargo first failed to act on knowledge that it had or should have had. The cases quoted by Dr. Mansel do not change this conclusion given that they either concern repeated affirmative acts (rather than inaction) or do not specify the type of at-issue conduct. See Mansel Aff. Ex. 2; Rohe Reply Aff. Ex. FFFF. The timeliness of Commerzbank's claims may be assessed separately for each category of *claim* (i.e., R&W versus document defect breaches), but not for each *action* that Wells Fargo may or may not have taken regarding each duty.

Commerzbank has claimed that Wells Fargo should have exercised EOD-related duties no later than 2011, Stanton Decl. Ex. 151 at 15, that Wells Fargo had a duty to investigate R&W breaches by March 2010, id. at 18-19, that Wells Fargo should have enforced repurchase obligations for loans with uncured document exceptions by 2010, Stanton Decl. Ex. 170 ¶ 208, and that the document exceptions identified in Wells Fargo's exception reports, created before 2010, materially and adversely affected certificateholders' interests, Pls. 56.1 ¶ 204. Commerzbank's claims thus arose no later than 2011.

The next question is whether, by 2011, Commerzbank either had knowledge [\*72]  of both the circumstances giving rise to its claim and Defendant's identity, or if it would have had such knowledge but for gross negligence. "Under German law, Commerzbank must have had sufficient knowledge of each element of each of its claims with respect to each Trust for Section 195 to bar all of the claims that accrued in Germany."[[17]](#footnote-18)17[*CB/Deutsche, 234 F. Supp. 3d at 473*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MVB-KVM1-F04F-007F-00000-00&context=1000516). But "a plaintiff need not know all the relevant details or have conclusive proof available; knowledge of the factual circumstances underlying the claim is sufficient." [*IKB Deutsche Industriebank AG, 634 F. App'x at 22*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5FNB-N441-F04F-0133-00000-00&context=1000516). The plaintiff is deemed to have sufficient knowledge "of the circumstances giving rise to the claim when she obtains knowledge of the facts necessary to commence an action in Germany with an expectation of success or some prospect of success, though not without risk and even if the prospects of success are uncertain." Id. (internal quotation marks omitted); see also [*In re Countrywide Fin. Corp. Mortg.-backed Sec. Litig., No. 11-ml-02265 (MRP), 2014 WL 4162382, at \*5 (C.D. Cal. June 18, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D10-CHN1-F04C-T3C4-00000-00&context=1000516) ("[T]he relevant inquiry under German law is the possibility of success, not the probability of success.").

The defendant has the burden of proving knowledge or grossly negligent ignorance, but "[p]laintiffs cannot deliberately shut their eyes to a practically obvious means of gaining knowledge that is readily available to them, [\*73]  and which would not incur considerable effort.," [*Deutsche Zentral-Genossenchaftsbank AG v. HSBC N. Am. Holdings, Inc., No. 12-cv-4025 (AT), 2013 WL 6667601, at \*8 (S.D.N.Y. Dec. 17, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5B39-WR01-F04F-04KW-00000-00&context=1000516), like "newspaper articles and media reports," [*id. at \*12*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5B39-WR01-F04F-04KW-00000-00&context=1000516). In general, "German courts will find that a plaintiff would have obtained knowledge but for gross negligence if a plaintiff's lack of actual knowledge is the result of the plaintiff's manifest failure to exercise the degree of reasonable care expected of a prudent person in the same position." [*Id. at \*8*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5B39-WR01-F04F-04KW-00000-00&context=1000516). "[S]ophisticated plaintiffs have a heightened duty to investigate possible claims." [*Id. at \*10*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5B39-WR01-F04F-04KW-00000-00&context=1000516).

Wells Fargo first argues that Commerzbank's complaint, which relied on pre-2011 news articles and publicly available allegations from lawsuits and government investigations, is enough to establish Commerzbank's knowledge for purposes of timeliness under German law. The Court has already held that "it cannot determine, from the face of the Complaint, 'that Commerzbank had sufficient knowledge of each element of each of its claims with respect to each, or any, Trust [at the relevant time] such that it could have commenced this action [in Germany] with an expectation, or some prospect, of success.'" [*BlackRock Series S, 247 F. Supp. 3d at 420*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N6R-PX91-F04F-03CS-00000-00&context=1000516) (quoting [*CB/Deutsche, 234 F. Supp. 3d at 473*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MVB-KVM1-F04F-007F-00000-00&context=1000516)) (first alteration in original, second added). The complaint is not enough, but the Court noted that "[d]iscovery [\*74]  may prove Defendant's timeliness challenge meritorious," id., and I consider the additional information submitted by the parties accordingly.

There is plenty of evidence that, by 2011, Commerzbank was not only monitoring news articles and investigations relevant to potential R&W breaches and document defects but was also considering RMBS-related litigation. As early as 2007, employees of Commerzbank's predecessor in interest, Eurohypo, recognized that "[f]raudulent activity would be deemed a breach of a rep or warranty provided by a loan originator to the buyer of a loan" but advised against "bringing in a third party to identify fraud" or pursuing litigation because of the expense and lack of guaranteed success. Stanton Decl. Ex. 35. By October 2007 at the latest, Commerzbank had begun formally monitoring Eurohypo's RMBS portfolio. Stanton Decl. Ex. 50. In April and August 2008, Wells Fargo issued notices to certificateholders regarding servicer events of termination for certain trusts; the notices specified that Wells Fargo would take no action absent direction from the certificateholders. Wells Fargo 56.1 ¶¶ 457-58. Later that year, Dresdner Bank and Commerzbank received a report [\*75]  from Dresdner's investment advisor, PIMCO, suggesting [TEXT REDACTED BY THE COURT] and to [TEXT REDACTED BY THE COURT] Stanton Decl. Ex. 58. In September 2010, a Commerzbank employee forwarded a news article describing [TEXT REDACTED BY THE COURT] and suggested [TEXT REDACTED BY THE COURT]; a Dresdner employee replied that [TEXT REDACTED BY THE COURT] Stanton Decl. Ex. 61.

Moreover, before the end of 2011, at least three lawsuits were filed against trustees alleging breaches similar to those alleged by Commerzbank. Wells Fargo 56.1 ¶ 543. While Commerzbank disputes that it had any knowledge of those actions, Commerzbank was keeping a spreadsheet tracking active RMBS-related litigation, which stated that [TEXT REDACTED BY THE COURT] Stanton Decl. Exs. 67; ECF No. 612 ("Stanton Opp. Decl.") Exs. 273, 275, and Commerzbank employees were tracking potential and active litigation more broadly as well, Stanton Decl. Ex. 64. And in 2007, a Eurohypo employee had said, regarding a lawsuit which named an RMBS trustee as a defendant, "we should watch this development very closely to determine whether or not we enter into such proceedings." Stanton Opp. Decl. Ex. 263. Taken together, it is clear [\*76]  that, by 2011, Commerzbank was aware of possible problematic conduct related to the trusts, cognizant of the potential need to direct Wells Fargo to investigate said conduct, and considering RMBS-related litigation—that is, Commerzbank knew or was grossly negligent in not knowing of the circumstances underlying its claims against Wells Fargo. Its 2015 claims regarding the German SOL Trusts are therefore untimely under German law.

**C. Equitable Tolling**

The Court is not persuaded by Commerzbank's argument that equitable tolling applies. In New York, "the applicable doctrine" to state causes of action "is equitable estoppel" rather than equitable tolling. *Ari v. Cohen, 107 A.D.3d 516, 517 (N.Y. App. Div. 2013)*. "Under this doctrine, a defendant is estopped from pleading a statute of limitations defense if the 'plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action.'" [*Ross v. Louise Wise Servs., Inc., 8 N.Y.3d 478, 491 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NMV-PV10-0039-441K-00000-00&context=1000516) (quoting [*Simcuski v. Saeli, 44 N.Y. 2d 442, 449 (1978)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRS-B280-003C-F3HM-00000-00&context=1000516)). "[M]ere silence or failure to disclose the wrongdoing is insufficient" to trigger this "uncommon remedy;" the plaintiff "may not rely on the same act that forms the basis of the claim" but must point to "later fraudulent misrepresentation . . . for the purpose of concealing the former [breach]." Id. (citation omitted). [\*77]  Plaintiffs fail to point to sufficient instances of fraud, misrepresentation, or deception that would satisfy the New York standard—only failures to notify, which are not enough. See, e.g., Pls. 56.1 ¶¶ 31, 67, 275.3.

Under German law, even accepting *arguendo* that Wells Fargo concealed evidence of its breaches from Plaintiffs, such concealment would mean that the plaintiff did not have the requisite knowledge of the underlying circumstances of their claim to trigger the statute of limitations, not that the statute of limitations would begin to run and subsequently be tolled. The German case Dr. Mansel cites to support his claim that equitable tolling is available under German law explains that a client has a right to rely on their lawyer's legal advice, and that, when incorrect legal advice is given, the client cannot be held to have knowledge of a claim against their lawyer for purposes of timeliness. This analysis is not broadly applicable to the question of equitable tolling. See CB ECF Nos. 86-3, 86-8. Given the lack of other supporting authority, the Court declines to find that German law otherwise recognizes equitable tolling.

**CONCLUSION**

The parties have briefed numerous other issues, [\*78]  including detailed positions related to pre- and post-EOD claims. The Court declines to make recommendations on these fact-intensive claims in light of its recommendation that summary judgment should be granted to Wells Fargo on all or nearly all of Plaintiffs' claims. Accordingly, to conserve judicial resources, the Court issues this Report related to matters that are more readily dispensed with. Upon a determination by Judge Failla with respect to this Report, I respectfully request that the matter be remanded to me for further consideration of any remaining claims. Until then, I recommend that the Court:

• GRANT summary judgment in Wells Fargo's favor regarding Commerzbank's standing to bring claims based on the Sold Certificates and Phoenix Light's standing to bring claims based on the champertous assignments and on the Non-Transferred Securities;

• GRANT summary judgment in Wells Fargo's favor regarding Plaintiffs' contractual ability to bring claims based on the Negating Clause Securities, except that I defer ruling on the four loans whose claimed enforcement dates were determined by reviewing Dr. Snow's report, see Andreoli Opp. Decl. Exs. S, T, and GRANT summary judgment in Plaintiffs' [\*79]  favor regarding their contractual ability to bring claims based on the No-Action Clause Securities;

• With respect to the TIP orders, GRANT summary judgment in Wells Fargo's favor regarding most of the Separate Trustee Claims, except that I defer ruling on the eight loans whose claimed enforcement dates were determined by reviewing Dr. Snow's report, see Andreoli Opp. Decl. Exs. V, W, and the twenty loans with R&W breaches in the OOMLT 2007-3 and GPMF 2005-AR4 trusts; and

• GRANT summary judgment in Wells Fargo's favor regarding Commerzbank's claims based on the German SOL Trusts, Plaintiffs' document-defect claims based on the Exception Report Trusts and 17 trusts with liquidated loans, and Plaintiffs' post-EOD claims based on the Early EOD Trusts, except that Commerzbank is entitled to [*American Pipe*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CFH0-003B-S4JT-00000-00&context=1000516) tolling for claims based on ABFC 2006-OPT1 and ABFC 2006-OPT2 (other than the M3 tranche of ABFC 2006-OPT1), and Phoenix Light is entitled to [*American Pipe*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CFH0-003B-S4JT-00000-00&context=1000516) tolling of those claims that, with an additional 29 days, accrued within six years of Phoenix Light's complaint.

The parties are further ORDERED to file a joint letter within 14 days of a final decision on this Report identifying any outstanding issues that require further judicial [\*80]  consideration.

/s/ Sarah Netburn

SARAH NETBURN

United States Magistrate Judge

DATED: December 6, 2021

New York, New York

**End of Document**

1. 1Unless otherwise noted, all ECF citations refer to filings in the Phoenix [\*5]  Light SF Ltd. v. Wells Fargo Bank, N.A., 14-cv-10102 (KPF)(SN) (S.D.N.Y.), action. "CB ECF" citations are to filings in Commerzbank AG v. Wells Fargo Bank, N.A., 15-cv-10033 (KPF)(SN) (S.D.N.Y.). Citations to "Wells Fargo 56.1" refer to ECF No. 607, which collates Wells Fargo's initial Rule 56.1 Statement in support of its motion for summary judgment, Plaintiffs' responses to each statement, and Wells Fargo's replies to Plaintiffs' responses, or to ECF No. 622, which collates Wells Fargo's additional statements in response to Plaintiffs' opposition and cross-motion, and Plaintiffs' responses to those additional statements. Citations to "Pls. 56.1" refer to ECF No. 620, which collates Plaintiffs' counterstatement of facts, Wells Fargo's responses to each statement, and Plaintiffs' replies to Wells Fargo's responses. [↑](#footnote-ref-2)
2. 2The two trusts for which Wells Fargo moves but Plaintiffs do not are BAFC 2005-C and MABS 2007-NCW. Plaintiffs apparently do not seek even nominal damages for those two trusts, see Wells Fargo 56.1 ¶ 4, and the Court should grant Wells Fargo's motion for summary judgment on these trusts. [↑](#footnote-ref-3)
3. 3Relatedly, Plaintiffs' renewed contention (previously before the Court of Appeals) that assignment of claims does not assign away injury is immaterial. [*Fund Liquidation Holdings LLC v. Bank of Am. Corp., 991 F.3d 370, 381-82 (2d Cir. 2021)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:627C-NFD1-FC1F-M0FC-00000-00&context=1000516), addressed Article III standing, not champerty. Plaintiffs again improperly "entwine discussions of Article III standing and the [*Love Funding*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4XFY-9HV0-TXFV-S2B1-00000-00&context=1000516) champerty analysis." [*PL/U.S. Bank, 2021 WL 4515256, at \*2*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:63S6-TGG1-JKHB-62KM-00000-00&context=1000516). [↑](#footnote-ref-4)
4. 4The certificates are: ABFC 2005-HE2 (all tranches), ABFC 2005-OPT1 (all tranches), ABFC 2006-OPT1 (M1 and M3 tranches only), ABSHE 2005-HE5 (all tranches), CMLTI 2005-OPT4 (all tranches), GPMF 2005-AR4 (all tranches), GPMF 2006-AR1 (all tranches), GPMF 2006-AR2 (all tranches), GPMF 2006-AR3 (all tranches), MSAC 2005-WMC2 (all tranches), MSAC 2005-WMC3 (all tranches), MSAC 2005-WMC5 (all tranches), MSAC 2006 HE1 (all tranches), OOMLT 2006-2 (2A4 tranche only) (collectively the "Sold Certificates"). Wells Fargo 56.1 ¶ 55. [↑](#footnote-ref-5)
5. 5These tranches are one M3 tranche (CUSIP 318340AH9), a second M3 tranche (CUSIP 318340AH9) and an M1 tranche (CUSIP 318340AE6). Wells Fargo 56.1 ¶¶ 73-79. [↑](#footnote-ref-6)
6. 6The securities in question are: (i) all at-issue securities in the ABFC 2005-HE2 Trust; (ii) all at-issue securities in the ABFC 2005-OPT1 Trust; (iii) all at-issue securities in the ABFC 2006-OPT1 Trust; (iv) all at-issue securities in the ABFC 2006-OPT2 Trust (for Commerzbank only); (v) all at-issue securities in the ABSHE 2005-HE5 Trust; (vi) all at-issue securities in the CMLTI 2005-OPT4 Trust; (vii) all at-issue securities in the OOMLT 2006-2 Trust; (viii) the M3 tranche of the FFML 2006-FFA Trust; (ix) the certificate in the M1 tranche of the FFML 2006-FFA Trust that was allegedly acquired on February 13, 2012; (x) the M1 tranche of the IMM 2005-6 Trust; and (xi) the four certificates in the 1A1 tranche of the IMM 2005-6 Trust that were allegedly acquired on September 9, 2005 (collectively the "Negating Clause Securities"). Wells Fargo 56.1 ¶¶ 86-92, 139-62, 165-68. At this time, I defer ruling on the negating clauses' effect on the four loans whose claimed enforcement dates were determined by reviewing Dr. Snow's report, see ECF No. 616 ("Andreoli Opp. Decl.") Exs. S, T. If the Court disagrees with my conclusions as to the rest of the Report & Recommendation, I request that this issue be remanded to me for further consideration. [↑](#footnote-ref-7)
7. 7The at-issue trusts are: GPMF 2005-AR4, GPMF 2006-AR1, GPMF 2006-AR2, and GPMF 2006-AR3 (collectively the "No-Action Clause Trusts"). [↑](#footnote-ref-8)
8. 8At this time, I defer ruling on the TIP orders' effect on: (1) the eight loans whose claimed enforcement dates were determined by reviewing Dr. Snow's report, see Andreoli Opp. Decl. Exs. V, W, and (2) the 20 loans with R&W breaches in the OOMLT 2007-3 and GPMF 2005-AR4 trusts, see Andreoli Decl. Ex. C. If the Court disagrees with my conclusions as to the rest of the Report & Recommendation, I request that this issue be remanded to me for further consideration. [↑](#footnote-ref-9)
9. 9The Exception Report Trusts are: ABFC 2006-OPT2, CMLTI 2005-OPT4, GPMF 2005-AR4, GPMF 2006-AR1, GPMF 2006-AR3, MSAC 2005-WMC5, OOMLT 2007-3, and OWNIT 2006-2. [↑](#footnote-ref-10)
10. 10The Early EOD Trusts are: ABFC 2005-HE2, ABFC 2005-OPT1, ABFC 2006-OPT1, ABFC 2006-OPT2, and OOMLT 2006-2. [↑](#footnote-ref-11)
11. 11Two Exception Report Trusts, MSCA 2005-WMC5 and OWNIT 2006-2, do not impose a repurchase enforcement duty on Wells Fargo with respect to document defects. Wells Fargo 56.1 ¶¶ 347-49, 370; see Stanton Decl. Ex. 25 § 2.02 (if sponsor does not cure document defect, "[t]he Trustee shall *request* . . . that the Sponsor purchase such Mortgage Loan from the Trust Fund within 90 days from the date the Trustee notified the Sponsor of such omission, defect or other irregularity" (emphasis added)). MSCA 2005-WMC5 also does not impose a duty to provide notice of document defects on Wells Fargo. Stanton Decl. Ex. 14 § 2.03(e). [↑](#footnote-ref-12)
12. 12Plaintiffs suggest that a "reasonable time expired in 2010," once the sellers had largely stopped curing. The Court rejects this after-the-fact accrual date as entirely unworkable in practice. See [*ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v. DB Structured Prods., Inc., 25 N.Y.3d 581, 593-94 (2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G67-XY21-F04J-6002-00000-00&context=1000516) (courts "have repeatedly rejected accrual dates which cannot be ascertained with any degree of certainty, in favor of a bright line approach") (cleaned up). In any event, two years is not a reasonable delay to enforce mandatory obligations upon the expiry of a cure period. [↑](#footnote-ref-13)
13. 13GPMF 2005-AR4, GPMF 2006-AR1, GPMF 2006-AR3, and OWNIT 2006-2. [↑](#footnote-ref-14)
14. 14Commerzbank also continues to own certificates in BOAMS 2006-B and HVMLT 2007-3, for which it seeks nominal damages. [↑](#footnote-ref-15)
15. 15The at-issue trusts are ABFC 2005-HE2, ABFC 2005-OPT1, ABFC 2006-OPT1 Trust (M3 tranche only), ABSHE 2005-HE5, CMLTI 2005-OPT4, GPMF 2005-AR4, GPMF 2006-AR1, GPMF 2006-AR2, GPMF 2006-AR3, MSAC 2005-WMC3, MSAC 2005-WMC5, MSAC 2006-HE1, and OOMLT 2006-2 Trust (A4 tranche only) (collectively the "German SOL Trusts"). [↑](#footnote-ref-16)
16. 16Plaintiffs' German-law expert, Dr. Mansel, suggests in one paragraph of his affidavit that the German statute of limitations is *ten* years by default, not three. ECF No. 596 ("Mansel Aff.") ¶ 8. But Section 195 of the Bürgerliches Gesetzbuch defines the "standard limitation period" as three years, ECF No. 565 ("Rohe Aff.") Ex. 1 at 30, and the Court declines to adopt a statute of limitations different from other courts in this District. See [*CB/Deutsche, 234 F. Supp. 3d at 472*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5MVB-KVM1-F04F-007F-00000-00&context=1000516); [*CB/U.S. Bank, 457 F. Supp. 3d at 246*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5YSG-RBX1-JTGH-B32J-00000-00&context=1000516). [↑](#footnote-ref-17)
17. 17Dr. Mansel misconstrues the Court's previous order on Wells Fargo's motion to dismiss. The Court held that Commerzbank must have sufficient knowledge as to each *claim*—not breach. [*BlackRock Series S, 247 F. Supp. 3d at 419-20*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5N6R-PX91-F04F-03CS-00000-00&context=1000516). [↑](#footnote-ref-18)