UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMMERZBANK AG, Plaintiff, -against- U.S. BANK NATIONAL ASSOCIATION, Defendant.	Case No. 16-cv-04569 (WHP)

U.S. BANK NATIONAL ASSOCIATION'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION, OR, IN THE ALTERNATIVE, FOR CERTIFICATION OF INTERLOCUTORY APPEAL AND CERTIFICATION OF QUESTION OF LAW TO THE SUPREME COURT OF OHIO

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GLOSSARY

This brief will use the following terms and symbols for ease of reference, many of which overlap with Plaintiff's abbreviations and those used in U.S. Bank's summary-judgment briefing:

Auld Decl.	Declaration of Stephen Auld Q.C. in Support of Plaintiff's Opposition to Partial Summary Judgment (ECF No. 319)
Boelstler Decl.	Declaration of Robert Boelstler (ECF No. 327)
CFU	Part Two of Defendant U.S. Bank National Association's Reply and Response to Plaintiff's Counter-Statement of Undisputed Facts Pursuant to Rule 56.1 of the Local Civil Rules for the Southern District of New York (including Plaintiff's counter-statement paragraphs and U.S. Bank's responses to those paragraphs)
ECF No.	Documents on this Court's Electronic Docket (No. 16-cv-04569)
EOD	Event of Default
Duke Repo Certificates	Certificates defined as the Duke Repo Certificates in footnote 7 of the Order
German Certificates	Certificates defined as the German Certificates in footnote 8 of the Order
Kane Ex.	Exhibits to the Declaration of Ryan A. Kane in Opposition to Defendants' Motions for Summary Judgment
Marcucci Ex.	Exhibits to the Declaration of Michael T. Marcucci in Support of U.S. Bank National Association's Motion for Partial Summary Judgment and the Supplemental Declaration of Michael T. Marcucci in Support of U.S. Bank National Association's Motion for Partial Summary Judgment
Moriarty Decl.	Expert Declaration of Stephen Moriarty Q.C., submitted in support of U.S. Bank's Motion

Mot.	Commerzbank's Memorandum of Law in Support of its Motion for Reconsideration, or, in the Alternative, for Certification of Interlocutory Appeal and Certification of Question of Law to the Supreme Court of Ohio (ECF No. 400)
Order	This Court's Opinion and Order granting in part and denying in part U.S. Bank's Motion for Partial Summary Judgment (ECF No. 393)
Pl.'s Opp'n	Commerzbank's Memorandum of Law in Opposition to Defendants' Motions for Summary Judgment (ECF No. 322)
ProSupps	Prospective Supplements
PSA	Pooling and Servicing Agreement or Master Servicing and Trust Agreement
R&Ws	Representations and warranties
Restatement	Restatement (Second) of Conflict of Laws (1971)
RMBS	Residential Mortgage-Backed Securities
Rohe Aff.	Affidavit of Prof. Dr. Mathias Rohe in Support of U.S. Bank's Motion for Partial Summary Judgment (ECF No. 309)
Sold Certificates	Certificates defined as the Sold Certificates in footnote 5 of the Order
Stmt.	Part One of Defendant U.S. Bank National Association's Reply and Response to Plaintiff's Counter-Statement of Undisputed Facts Pursuant to Rule 56.1 of the Local Civil Rules for the Southern District of New York (including U.S. Bank's statement paragraphs, Plaintiff's responses to those paragraphs, and U.S. Bank's replies to those responses)

INTRODUCTION

Gone with the Wind has no epilogue, and neither should the briefing on U.S. Bank's summary-judgment motion. To be sure, U.S. Bank disagrees with much of what is in the *merits* portion of the Court's summary-judgment decision and would appreciate an additional 50 pages of combined briefing on those issues. But disagreement with the Court's resolution of arguments already presented and decided is no ground for reconsideration. So U.S. Bank did not add a reconsideration motion to the summary-judgment pile.

Plaintiff has taken a different tack. It asks for reconsideration of the Court's standing and statute-of-limitations rulings. But Plaintiff's reconsideration arguments are not just wrong: they are the wrong *kind* of arguments. Plaintiff simply rehashes the same arguments that it previously raised many times over—in its brief, in its statements of "facts," in its sur-reply, in its letters regarding supplemental authority, in its oral-argument slide deck, and in its oral argument. Plaintiff cannot seriously claim that the Court ignored these issues, because they were among the specific issues the Court instructed the parties to address at oral argument, and they were clearly resolved in the Court's 44-page summary-judgment decision. Perhaps Plaintiff hoped for a longer opinion, with point-by-point discussion of every argument made in the 400,000-plus words of summary-judgment filings—but that is not required. The issues raised in Plaintiff's motion were plainly presented, considered, and resolved, and thus are an improper basis for seeking a reconsideration. Plaintiff's motion can be denied on that basis alone.

Plaintiff fares no better on the merits. The Court correctly held that New York rather than English law governs Plaintiff's certificate sales, that Plaintiff lacks evidence that it has standing to bring claims on the Duke Repo Certificates, and that Plaintiff's claims on the German Certificates are time-barred under German law. The Court should deny Plaintiff's motion.

ARGUMENT

I. PLAINTIFF DOES NOT MEET THE STRICT STANDARD FOR RECONSIDERATION.

Plaintiff's motion falters from the start. It never even discusses the standard for reconsideration. And for good reason: that standard is "strict." *Van Buskirk v. United Grp. of Cos., Inc.*, 935 F.3d 49, 54 (2d Cir. 2019). Reconsideration under Local Rule 6.3 is an "extraordinary remedy." *Prendergast v. Analog Modules, Inc.*, 2011 WL 5843437, at *1 (S.D.N.Y. Nov. 21, 2011) (Pauley, J.). The party must show an intervening change in controlling law, availability of new evidence, or "the need to correct a clear error or prevent manifest injustice." *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 108 (2d Cir. 2013).

Plaintiff never identifies which of these grounds it thinks applies. Presumably "manifest injustice," because Plaintiff's motion contains no reference to a change in controlling law or any newly available evidence. The manifest-injustice standard, however, "is, by definition, 'deferential to [the district court's decision] and provide[s] relief only in the proverbial rare case.'" *Corsair Special Situations Fund, L.P. v. Nat'l Res.*, 595 F. App'x 40, 44 (2d Cir. 2014) (citations omitted) (addressing identical standard under Rule 59(e)). The moving party must identify "controlling law or factual matters" that "the Court overlooked" and that would "alter the outcome of the Order." *Guerrero v. United States*, 2016 WL 4991683, at *1 (S.D.N.Y. Sept. 19, 2016). Where a party just "reargue[s] those issues already considered" because the "party does not like the way the original motion was resolved," reconsideration should be denied. *Lifschitz v. Hexion Specialty Chems., Inc.*, 2009 WL 734040, at *1 (S.D.N.Y. Mar. 18, 2009).

That is all Plaintiff does here. Plaintiff simply repeats arguments already presented to the Court—in a 45-page opposition brief, in thousands of pages of responses to U.S. Bank's

statement of facts and Plaintiff's own counter-statement (containing much legal argument), in nearly 50 pages of slides submitted to the Court, during oral argument, and in multiple supplemental-authority letters and replies. Rehashing these arguments yet again while hoping for a different outcome is not a proper basis for a reconsideration motion.

Take Plaintiff's arguments on Ohio's borrowing statute. Plaintiff argues that, in following the Ohio Supreme Court's decision in *Taylor*, Order at 13, the Court "overlook[ed] controlling precedent," Mot. at 10. But *Taylor* is *the* controlling precedent. And Plaintiff cannot seriously contend that the Court overlooked Plaintiff's contrary view. *Taylor* has been front-and-center from the beginning. *See, e.g.*, ECF No. 307 at 7-8. In fact, the Court specifically directed the parties to address the issue at oral argument. ECF No. 364. Plaintiff took the position that, "unlike New York, Ohio does not adopt the place of injury test under its borrowing statute," arguing that Ohio intermediate-appellate-court cases "indicate[] that the most significant relationship test is applied," including "Walker v. Nationwide Mutual Insurance Co." Hr'g Tr. at 48-49, ECF No. 382 (Dec. 19, 2019). Plaintiff made the same arguments in a supplemental-authority letter filed shortly after argument. *See* ECF No. 379 at 1. Plaintiff now just repeats those arguments, *see* Mot. at 12-13, but cannot seriously contend the Court overlooked them.

The story is the same for Plaintiff's arguments on the German statute of limitations. Plaintiff claims that the Court "overlook[ed] evidence" of post-2011 EODs or other things that Plaintiff says triggered trustee duties. Mot. at 1. But even Plaintiff admits that the supposedly overlooked evidence was "cited elsewhere by the Court." Mot. at 1; *see also id.* at 17, 19. As for arguments about U.S. Bank's breach of "continuing dut[ies]"—for example, that "prudent person duties continue until the EOD is cured" and that U.S. Bank "breached its duties by permitting repurchase claims to expire," Mot. at 16-17—Plaintiff does not even pretend that

these are anything other repeat arguments. Plaintiff already made these same arguments to the Court. *E.g.*, Pl.'s Opp'n at 10-11 ("[T]he complaint alleges ongoing breaches, each of which triggers anew any applicable limitations period."); *id.* ("[U.S. Bank's] repurchase protocol obligations are continuing duties . . . , so the statute does not begin to run until after a reasonable time to perform has expired."); *see also* ECF No. 369 at 1 ("Duty to Act Within Reasonable Time Generally Means Within Limitations Period"). And in finding all claims untimely, the Court necessarily rejected those arguments.

Plaintiff's various standing arguments follow the same pattern. On whether New York or English law applies to the transfer of the Sold Certificates, Plaintiff just recycles arguments that everything happened at its London branch, that bank branches are separate entities, and that DTC's role should not matter. *Compare* Mot. at 4-8, *with* Pl.'s Opp'n at 4-6. On the Duke Repo Certificates, Plaintiff now just says in three paragraphs what it previously said in one. *Compare* Mot. at 9-10, *with* Pl.'s Opp'n at 7.[1]

Plaintiff has no basis for arguing that the court "overlooked" any of this—certainly not anything that would change the outcome. True, the Court's opinion weighed in somewhat lighter than the parties' summary-judgment submissions, and the Court did not specifically address every last jot and tittle in those papers. But happily for the Court, it was not required to do so. *See Liburd v. Bronx Lebanon Hosp. Ctr.*, 2009 WL 1605783, at *3 (S.D.N.Y. June 9, 2009).

In short, none of Plaintiff's arguments are proper fodder for reconsideration. Plaintiff's motion can and should be denied on this basis alone.

[1] Plaintiff newly claims that it has "metadata" and "[t]he full spreadsheet" showing the spreadsheet is from 2009. Mot. at 9. But a motion for reconsideration is not the place to "attempt[] to advance new facts" that were previously available. *Silverman v. Miranda*, 2017 WL 1434411, at *1 (S.D.N.Y. Apr. 10, 2017).

II. THE COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON THE SOLD CERTIFICATES, DUKE REPO CERTIFICATES, AND GERMAN CERTIFICATES.

Even if the Court addresses Plaintiff's arguments, the Court should again reject them.

A. The Court correctly concluded that Plaintiff lacks standing to sue the trustee regarding the Sold Certificates.

To begin with, the Court correctly concluded that Plaintiff lacks standing as to the Sold Certificates. Plaintiff's contrary arguments are familiar but unconvincing.

1. New York law applied to the transfer of the Sold Certificates.

All agree that Plaintiff lacks standing if New York law applied to the transfer of the Sold Certificates. That is because, "under New York law, claims travel with the security unless expressly reserved in writing," Order at 10 (citing N.Y. Gen. Oblig. Law § 13-107), and there is no dispute that the claims here were not expressly reserved.

In determining that New York law, rather than English law, governed those transfers, the Court correctly applied Ohio's "most significant relationship" test—the test that Ohio uses to decide which jurisdiction's substantive law applies to a transaction. Order at 8. The Restatement provides several factors to consider in applying that test. As the Court noted, § 6 of the Restatement says to consider a number of overarching factors, including "the protection of justified expectations, [] the basic policies underlying the particular field of law, []certainty, predictability and uniformity of result, and [] ease in determination and application of law to be applied." Order at 9 n.6. Section 188 in turn says to consider the place of contracting, the place of negotiation, the place of performance, the location of the subject matter, and the residence of the parties. Restatement § 188.

In applying these factors, Ohio emphasizes the place of performance as most important. Order at 9. As this Court explained, "[g]enerally Ohio follows the rule that where a conflict of

law issue arises in a case involving a contract, the law of the state where the contract is to be performed governs." *Id.* at 9 (quoting *Gries Sports Enters., Inc. v. Modell*, 473 N.E.2d 807, 810 (Ohio 1984)). *Gries* quoted *Schulke Radio Productions, Ltd. v. Midwestern Broadcasting Co.*, 453 N.E. 2d 683 (1983), which itself relied on a long line of Ohio cases. The Sixth Circuit too has explained that the "general Ohio choice of law rule" for contract issues is that "the law of the state where the contract will be performed should govern." *Nat'l Union Fire Ins. Co. v. Watts*, 963 F.2d 148, 151-52 (6th Cir. 1992).

In view of these standards, the Court correctly concluded that the transfers of the Sold Certificates were governed by New York law. Order at 9-10. "[T]he actual transactions" were performed "in New York through DTC, a clearing house." *Id.* at 9. All of the parties to these transfers are broker-dealers that are either DTC participants (in the case of the transferees) or that used a wholly owned subsidiary that is a DTC participant (in the case of Plaintiff). Stmt. ¶ 65.3-65.8. There is no dispute that the transfers—both of Plaintiff's interests in the RMBS certificates and of the money from the buyers to Plaintiff—all happened at DTC in New York. *Id.* ¶¶ 65.1-65.10. And this is how Plaintiff's own employee described DTC's involvement. Order at 9.

The operative documents likewise could not be clearer that transfers in the RMBS certificates occur at DTC in New York, governed by New York law. Stmt. ¶ 65.2. The RMBS certificates themselves incorporate the terms of the PSAs. *See, e.g.*, Compl. ¶ 22; Moriarty Decl. ¶ 48. The PSAs for all of the Sold Certificates are governed by New York law (save one, governed by Delaware law)—and all say that "ownership" transfers through DTC. Marcucci Exs. 26, 54. The ProSupps given to investors and the PSAs provide that "ownership and transfers of registration of the Book-Entry Certificates on the books of [DTC] shall be governed by the applicable rules established by [DTC]." Marcucci Exs. 54, 284. And DTC rules adopt

New York law. Stmt. ¶¶ 63-64; Marcucci Exs. 292, 293.[2]

In short, the transfer of interests and funds—*i.e.*, performance—happened at DTC in New York, governed by DTC rules that themselves invoke New York law, all as provided in RMBS certificates, ProSupps, and PSAs governed by New York law (save one instance of Delaware law). This is more than enough to conclude that New York law governed these transfers.

But other factors also point to New York. Start with the justified-expectations factor: it too is New York-oriented. Given the New York governing-law provision in the certificates, the PSAs, and the DTC rules, it could not possibly have come as a surprise to broker-dealers that New York law would govern transfers of interests in these certificates. As explained below, *infra* at 12-13, and in U.S. Bank's summary-judgment papers, the record here confirms this. In particular, Plaintiff proposed a rider providing that New York law would govern transfers—and no one objected to New York law governing, though many objected to Plaintiff's proposal to retain legal claims on the certificates. ECF No. 363 at 43-44; Marcucci Exs. 60-61, 344-347.

The same result obtains when focusing on predictability and ease of determining the governing law—two additional potential factors. These transfers involved simple internal trade confirmations between broker-dealers, and those records provided precious little information about the framework that would govern the transfer of the interests in the RMBS certificates or the transfer of funds. *See* Marccuci Ex. 46; Kane Ex. 56. What are the payment terms? How are

[2] DTC's rules say that "[t]he [DTC rules] and the rights and obligations under the [DTC rules], shall be governed by, and construed in accordance with, the laws of the State of New York applicable to contracts executed and performed therein." Rule 1, § 4. They say that DTC rules "shall be a part of the terms and conditions of every contract or transaction which [a DTC Participant] may make or have with [DTC]." Rule 2, § 1. They say that "[d]eliveries of Securities through the facilities of [DTC] shall be made in accordance with [DTC's rules]." Rule 9(A), § 1. And they say that "[p]ayments through the facilities of [DTC] shall be made in accordance with [DTC's rules]." *Id.*

the transfers of the certificate interests and funds to be performed? When? What happens if the payment fails to go through or the interests fail to transfer? And what law governs? The trade confirmations did not need to provide these details, because DTC's rules provide the framework for transactions between DTC participants, and those rules are governed by New York law—the same law that happens to govern the vast majority of RMBS certificates, ProSupps, and PSAs.

The location of the subject matter and the residence of the parties also point to New York—or at least not to England. The subject matter is located in New York, at DTC. Stmt. ¶¶ 65.1-65.3; Marcucci Exs. 54, 284. The principal place of business of seven of the eleven counterparties is New York. *See* Stmt. ¶ 57; Marcucci Exs. 281-83, 285-90, 343. And though not all of the parties are residents of New York, none has its principal place of business or is incorporated in England. Plaintiff is a German bank. And Plaintiff produced no evidence regarding the residence of the remaining four parties (Nomura Int'l PLC, Goldman Sachs, G2 Capital Markets, and Merrill Lynch International). CFU ¶¶ 21-22, 24-25.

Against all of these factors is the place of negotiation and contracting: London. But describing what happened in London as a "negotiation" overstates things. There was no actual negotiation, just an exchange of emails. *See* Boelstler Decl. ¶ 8; Auld Decl. Ex. B-3. In any event, Ohio law downplays these factors compared to the place of performance. *See Gries*, 473 N.E.2d at 809-10. And so does the Restatement: it says that the place of "contracting" standing alone "is a relatively insignificant contact." Restatement § 188 cmt. e.

In sum, New York is all over these transactions. Most importantly, it was the place of performance. Numerous documents in this record invoke New York law, and not a single one even mentions English law. These participants had every reason to assume that New York law would govern. The subject matter was located in New York. Most of the parties are residents of

New York, and none are residents of England. And predictability and ease of determining the governing law in trades between broker-dealers commend New York law. Based on this record, the Court unquestionably was correct in concluding that New York law applies.

2. Plaintiff's contrary arguments are meritless.

Plaintiff's motion offers a dog's breakfast of deficient reasons for reconsideration.

(i) Plaintiff's feature argument (Mot. at 3) is that the Court "mistakenly" applied *tort* cases to a *contract* issue. It is true that the question here is a contract issue, namely what law governed the contractual transfer of the Sold Certificates. It is also true that, in discussing this issue, the Court quoted *Morgan v. Biro Mfg. Co.*, 474 N.E.2d 286 (Ohio 1984), a case "analyzing choice of law for [a] tort claim," Mot. at 3. Gotcha, says Plaintiff.

But this is an underwhelming argument for reconsideration. To begin with, Plaintiff *itself* cited *Morgan* for Ohio's choice-of-law standard. Pl.'s Opp'n at 5. More importantly, Plaintiff fails to mention the very next sentence of this Court's opinion. It quotes a binding Ohio Supreme Court decision explaining how Ohio applies the most-significant-relationship test to *contract* issues: "'Generally, Ohio follows the rule that where a conflict of law issue arises in a case involving a contract, the law of the state where the contract is to be performed governs.' Gries Sports Enter., Inc. v. Modell, 473 N.E. 2d 807, 810 (Ohio 1984)." Order at 9. That is the major premise of this Court's choice-of-law analysis. One cannot miss it. And yet Plaintiff's motion does not even cite *Gries*, much less explain how it was error for the Court to quote and rely on that case. That is reason enough to deny reconsideration.

Plaintiff further asserts (Mot. at 3-4) that the Court made a similar error in concluding that the branch of a bank (here, Plaintiff's London branch) is not a separate entity from the bank itself (here, Plaintiff). According to Plaintiff, the Court mistakenly (and again) relied on tort cases relating to statutes of limitations. Mot. at 3. It is true that the cases the Court cited

happened to involve statute of limitations issues (though not just for tort claims). But the principle that a bank branch is indistinct from the bank is a general and well-accepted one. This is clear from the cases the Court cited (Order at 9), which themselves rely on a laundry list of authorities, including ones applying the principle to issues of standing (*Bayerische Landesbank, New York Branch v. Aladdin Capital Management LLC*, 692 F.3d 42, 51 (2d Cir. 2012)), seizure of funds (*In re Liquidation of the New York Agency and Other Assets of Bank of Credit and Commerce Int'l*, 90 N.Y.2d 410 (1997)), and banking laws (*see id.*). And Plaintiff cites no contrary authority. Plaintiff's newly cited cases (Mot. at 4) involve a rental company, *see United Rentals, Inc. v. Pruett*, 296 F. Supp. 2d 220 (D. Conn. 2003), and a steel manufacturer, *Eberstadt v. Heppenstall Co.*, 1987 WL 15984 (N.D. Ill. Aug. 20 1987), not banks. Plaintiff thus offers no reason to revisit the Court's reliance on the bank-branch cases.

(ii) Plaintiff next claims (Mot. at 4-5) that the Court conflated the place where a trade is agreed to with the place that it later settles. But the Court did no such thing. The Court acknowledged that the place of "negotiation" and contracting was London. What matters under Ohio law, however, is "where the contract will be performed." *Nat'l Union Fire Ins. Co.*, 963 F.2d at 151-52. And that was New York.

As for Plaintiff's cases "apply[ing] non-New York law to RMBS transactions cleared through DTC" (Mot. at 5), they are nothing like this one. *Pacific Life Ins. Co. v. Bank of New York Mellon* was a motion-to-dismiss ruling, so the court accepted Pacific Life's allegations as true and considered no evidence. 2018 WL 1382105 (S.D.N.Y. Mar. 16, 2018). Pacific Life alleged that all relevant events occurred in California and all parties resided in California. The case thus did not consider DTC's role, much less in trades between DTC participants.

The *Sealink* cases are even farther afield. The *Sealink* litigants "[we]re *in agreement* that

the transfers to Sealink are governed by English law" because the structured finance agreements transferring the certificates contained "*governing law clauses*" expressly adopting English law. 2014 WL 1511156, at *3 (Sup. Ct. N.Y. Cty. April; 17, 2014) (emphasis added); *see also Sealink Funding Ltd. v. UBS AG*, 2014 WL 3408569, at *4 (Sup. Ct. N.Y. Cty. July 9, 2014) (same). Here, of course, there are no written transfer agreements like the complex agreements in *Sealink*, much less ones with an English governing-law provision.

Plaintiff next objects that it is not a party to the governing-law provision in the DTC participant agreement. Mot. at 5. But Plaintiff concedes that it "used" a wholly owned subsidiary (Commerz Markets LLC) that *is* a DTC participant. Stmt. ¶¶ 60, 65.3; *see* Marcucci Ex. 49 at 215 (Plaintiff's witness describing sale of RMBS "to Commerzbank via DTC"); Marcucci Ex. 59 (Plaintiff's email referring to the Commerz Markets DTC account as "Commerzbank NY"). "Our depot" on the screenshots that Plaintiff says are the trade tickets for these trades refers to Plaintiff's DTC account. *See* Kane Ex. 56; Marcucci Ex. 56 at 102. And all of the counter-parties were DTC participants. Anyway, whether Plaintiff or its subsidiary is the DTC participant, performance happened in New York.

(iii) The next section of Plaintiff's motion (Mot. at 6) attacks the Court for supposedly mischaracterizing a Delaware decision, *Bear Stearns Mortgage Funding Trust 2006-SL1 v. EMC Mortgage LLC*, 2015 WL 139731 (Del. Ch. Jan. 12, 2015). Plaintiff argues that the Court ignored that DTC's role was just one of "many" factors considered by the *Bear Stearns* court. Mot. at 6. This is grasping at straws. The Court accurately described *Bear Stearns*. Order at 10 (describing the case as finding that New York had the most significant relationship "*in part* because 'the physical location of the Certificates at the Depository Trust Company [was] located in New York'") (emphasis added). And whatever DTC's role was in *Bear Stearns*, it is central

here—it is the place of performance, it provides the framework for the transfer of interests and funds between these broker-dealers, and it is all over the certificates and relevant agreements.

Plaintiff does no better rehashing arguments based on *In re Petrobras Securities Litigation*, 152 F. Supp. 3d 186 (S.D.N.Y. 2016). *See* Pl.'s Opp'n at 5; Stmt. ¶ 65 (same arguments). That case involved whether pension funds could assert claims under U.S. securities law just because trades in Petrobras' securities cleared through DTC. *Id.* at 193. It did not involve RMBS, it did not involve Ohio's most-significant-relationship test, it did not involve whether claims transferred on the sale of certificates, and it did not involve trades between broker-dealers that are DTC participants. It thus has nothing to say about the issues here.

(iv) Finally, Plaintiff argues that the Court's ruling "globalizes" New York's automatic-transfer rule and thwarts settled expectations. Mot. at 7. But Plaintiff is doubly wrong.

The first part—about globalizing New York's rule—is obvious hyperbole. This case involves Ohio's most-significant-relationship test, a sale of interests in RMBS certificates that is executed through DTC between broker-dealers that are DTC participants, with little or no documentation aside from DTC rules to provide the terms of the transfer. That hardly describes a global rule. For similar reasons, Plaintiff's attacks on DTC's supposed lack of an "interest" in these transactions simply disregards the evidence of DTC's central role here.

As for market expectations, the evidence here points to expectations that New York law would apply. In 2015, Plaintiff circulated a proposed rider to the same group of broker-dealers involved in the earlier sales. Plaintiff proposed two things: (1) that New York law would govern transfers and (2) that Plaintiff would expressly reserve any legal claims associated with the RMBS certificates it sells. ECF No. 363 at 43-44; Marcucci Exs. 60, 61, 344-47. The counterparties' response is telling. Not one questioned why New York law would apply—

because applying New York law to transfers between broker-dealers was entirely consistent with their expectations. *Id.* But all objected to Plaintiff retaining legal claims—because retaining legal claims while transferring interests was contrary to their expectations. *Id.*

Plaintiff neglects to even mention this evidence. Instead, Plaintiff argues that other "evidence"—namely, legal briefs filed by trustees in other cases—creates a jury issue. Mot. at 8. There are many problems with this argument, but mentioning three will suffice. *First*, Plaintiff did not submit any such "evidence": it merely argued that U.S. Bank was taking inconsistent legal positions (Stmt. ¶ 65), and it was wrong even about that (*id.*). *Second*, even if this were evidence of U.S. Bank's expectations regarding RMBS trading, Plaintiff fails to explain why a trustee's expectations are relevant to *trading* in RMBS. And *third*, in no event could this create a jury issue, because choice-of-law issues are for the Court, not the jury. *See Liberty Mut. Fire Ins. Co. v. Burlington Ins. Co.*, 2016 WL 4046875, at *3 (S.D.N.Y. July 27, 2016) ("A dispute as to choice of law is a question of law, rather than fact."); *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522, 562 (E.D.N.Y. 2011) (choice of law is "to be resolved by the court" and "any disputed facts underlying that determination must also be resolved by the court").

The Court correctly held that New York law applied to the transfer of the Sold Certificates, the legal claims therefore transferred, and Plaintiff consequently lacks standing.[3]

B. The Court correctly concluded that Plaintiff failed to meet its burden to show that it has standing to bring claims on the Duke Repo Certificates.

The Court also correctly concluded that Plaintiff lacks standing as to the Duke Repo Certificates. Order at 12. Plaintiff sold these certificates to third parties in tri-party repo

[3] It also bears mentioning that, even if English law applied, the result would be the same. English law, like New York and Delaware law, provides that the right to enforce the PSA travels with the security. *See* Moriarty Decl. ¶¶ 45-68, 112; *see also FDIC v. Citibank N.A.*, 2016 WL 8737356, at *5 (S.D.N.Y. Sept. 30, 2016) (same under Delaware and New York law).

transactions. Yet Plaintiff never "identified to whom the certificates were transferred," *id.* at 11, or any other facts about the transfers—the who, where, and when. And without those facts, Plaintiff could not show what claims it owns on the certificates, if any. Stmt. ¶¶ 46-55. Plaintiff thus fell well short of its burden "[t]o defend against summary judgment for lack of standing" by presenting "'specific facts' supporting standing" to bring its claims. *Nat. Res. Def. Council, Inc. v. FDA*, 710 F.3d 71, 79 (2d Cir. 2013).

Plaintiff's sole argument on reconsideration is that it can prove it owned the certificates at various points in time after 2007. Mot. at 9-10. Even crediting Plaintiff's evidence, however, the flaw that doomed Plaintiff's arguments the first time around remains: Plaintiff cannot show that it owns the *claims* on these certificates. To start, Plaintiff's evidence showing that it held the certificates at isolated points in time is *not* evidence that it held the certificates at all relevant points in time—after all, it is undisputed that Plaintiff sold these certificates in tri-party repo transactions. To be sure, Plaintiff tried to pretend these transactions never happened. It refused to provide requested information in discovery, Stmt. ¶¶ 53, 54.1, 55, ignored the transactions in its self-serving standing declaration, *see* Boelstler Decl. ¶¶ 12-13, and then at argument disclaimed its own document showing the certificates went to the "street," Tr. at 51-52. But Plaintiff cannot avoid that it transferred away its certificates. Consequently, to show that it owns the claims, Plaintiff needed to present evidence about the tri-party repo transactions, like when the certificates traded hands, what law governed those sales, the "street" counterparties' identities, what those counterparties did with the certificates and claims, and other terms of the transactions. *See* Stmt. ¶ 55.1-55.6. Plaintiff still has not done so—tellingly, it fails to address the tri-party repo transactions at all. In sum, nothing Plaintiff offers changes that Plaintiff "lacks standing as to the Duke Repo Certificates." Order at 12.

C. The Court correctly concluded that claims on the German Certificates are untimely.

The Court properly held that Ohio's borrowing statute requires Plaintiff's claims to be timely under the law of the place "where the plaintiff resides and sustains the economic impact of the loss." Order at 13 (quoting *Taylor v. First Resolution Inv. Corp.*, 72 N.E.3d 573, 587 (Ohio 2016)). For the 51 German Certificates, that place is Germany. And applying German law, this Court correctly concluded that Plaintiff's claims are untimely.

1. Ohio applies a place-of-injury test, not the most-significant-relationship test, for borrowing-statute purposes.

As the Court properly concluded, Ohio, like New York, "look[s] to 'where the plaintiff resides and sustains the economic impact of the loss'" to determine where a claim accrues for borrowing-statute purposes. Order at 13 (quoting *Taylor*, 72 N.E.3d at 587). The Ohio Supreme Court's decision in *Taylor* is directly on point. *Taylor* held that, although the most-significant-relationship test set forth "in *Gries Sports Ents. v. Modell* and 1 Restatement of the Law 2d, Conflict of Laws, Section 188" governs "questions as to the applicable *substantive* law," that test does not govern the "*procedural* law" question of where a claim accrues. 72 N.E.3d at 585. To answer that procedural question, the Ohio Supreme Court adopted a place-of-injury test, following the "precedent . . . of New York's highest court." *Id.* at 587.

Plaintiff's arguments for avoiding *Taylor* are no more convincing this time around than they were the last time around. Plaintiff first emphasizes that this Court quoted *Taylor* quoting a *New York* case that sets forth the *New York* borrowing-statute test. Mot. at 13; *see also id.* at 11. But that only reinforces that *Taylor* adopted a place-of-injury test—because *Taylor* was clear that it was "follow[ing] . . . [the] precedent of New York's highest court." 72 N.E.3d at 587. *Taylor*, then, did not merely "agree with the results" of the New York cases. Mot. at 13. It expressly adopted them. And New York applies a place-of-injury test in cases like this one. *E.g.*,

Commerzbank AG v. U.S. Bank Nat'l Ass'n, 277 F. Supp. 3d 483, 490 (S.D.N.Y. 2017); *Commerzbank AG v. Deutsche Bank Nat'l Tr. Co.*, 234 F. Supp. 3d 462, 469 (S.D.N.Y. 2017).

Plaintiff fares no better citing cases that apply the "most significant relationship" test. The reason is straightforward: *Taylor* expressly rejected that test for borrowing-statute purposes, explaining that the Restatement's test applies only to "questions as to the applicable *substantive* law." 72 N.E.3d at 585. None of Plaintiff's cases controls over *Taylor*—none is an Ohio Supreme Court decision overruling *Taylor*. Just the opposite, in fact. Plaintiff continues to rely on an intermediate-court-of-appeals decision, *Jarvis v. First Resolution Mgmt. Corp.*, Mot. at 12, but inexcusably omits the subsequent history of that case. The subsequent history of *Jarvis* is (sub nomine) *Taylor*. *See* 72 N.E.3d at 580 n.1. Plaintiff thus offers no reason for this Court to reconsider its conclusion that "Ohio courts look to 'where the plaintiff resides and sustains the economic impact of the loss.'" Order at 13. And for the 51 German Certificates, that is Germany, so Germany's statute of limitations applies.[4]

2. U.S. Bank's alleged breaches arose before December 2011.

Under German law, accrual turns on "(1) when the breach occurred, and (2) when the plaintiff has knowledge of the claims." *Id.* at 15. Applying this framework, this Court first held that "U.S. Bank's breaches occurred prior to December 2011," relying on the "mountain of evidence" Plaintiff submitted showing that "breaches occurred long before December 2011." *Id.* at 16. The Court also held that "Commerzbank had 'knowledge of the factual circumstances,' with an 'expectation of success' or 'some prospect of success' prior to December 2011," or at the

[4] We feel compelled to note that Plaintiff's assertion (Mot. at 11) that U.S. Bank has "not argued that any of Commerzbank's claims are untimely" under New York's statute of limitations is incorrect. U.S. Bank argued that, "[e]ven if the most-significant-relationship test controls, many of Plaintiff's claims would still be time-barred," including document-defect claims for all trusts and certain R&W claims in some trusts. ECF No. 307 at 8 n.5; Ex. 130.

very least would have learned those facts "but for gross negligence." *Id.* at 16-18. As a result, this Court concluded that all of Plaintiff's German Certificate claims are untimely. *Id.* at 18.

On reconsideration, Plaintiff challenges only the Court's conclusion that U.S. Bank's breaches happened no later than December 2011. Plaintiff's arguments are unconvincing.

To begin, Plaintiff's own allegations—"judicial admission[s] by which [Plaintiff] [is] 'bound'" here, *Official Comm. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167 (2d Cir. 2003)—defeat its arguments. Plaintiff itself says that, by 2011, "it was apparent that Defendants had breached their duties and would not take steps to remedy their failures." Compl. ¶ 143.

But there is much more, as the Court noted. Order at 16. Plaintiff's pre-EOD claims assert that, when U.S. Bank discovered R&W breaches and document defects, U.S. Bank was required to take action to address those problems (by, for example, investigating and filing litigation), but failed to do so. *E.g.*, Compl. ¶¶ 92-93. All of that occurred no later than 2011. In Plaintiff's view, U.S. Bank discovered R&W breaches in each of the trusts based on generalized, publicly available information that emerged by "2009 or 2010," Compl. ¶ 79; Marcucci Ex. 277; *see* Order at 17, and discovered document defects in exception reports received no later than 2008, Order at 16. And U.S. Bank breached at the latest in 2011, when U.S. Bank made clear that it would not take action to address breaches without investor direction. Stmt. ¶¶ 37, 69, 453.

For post-EOD claims, too, U.S. Bank's alleged breaches happened before 2011. Plaintiff says that, after *any* EOD, U.S. Bank had a continuing duty "to affirmatively exercise all of its powers under the Governing Agreements to maximize recovery for the certificateholders." Marcucci Ex. 137 at 7. As the Court recognized, that duty arose as early as 2008, when EODs happened in each of the trusts based on "U.S. Bank's failure to cure" document defects "within a prescribed period." Order at 16 (citing Compl. ¶ 107 (EODs occurred "shortly after the final

exception reports were delivered for each of the Covered Trusts")); *see also* Marcucci Ex. 277 (summarizing pre-2012 servicer breaches alleged in complaint for each of the trusts). Plaintiff claims that U.S. Bank breached by failing to "exercise all of its powers"—*e.g.*, by failing to "conduct[] an inquiry to determine if defaulted loans were subject to repurchase claims"—beginning in 2008. Marcucci Ex. 137 at 7; Compl. ¶¶ 69-100.

Plaintiff disputes none of this on reconsideration. It instead argues that U.S. Bank continued to breach these *same* duties after 2011, and claims based on these "separate breaches" must be timely. Mot. at 15. But in doing so, Plaintiff ignores its own theories of liability. For example, the loan-specific notices that U.S. Bank received after 2011 simply do not matter, because Plaintiff's theory is that U.S. Bank discovered these very same breaches years earlier, based on generalized, publicly available information. That is what matters for timeliness—as the Court put it, the "loan-by-loan and trust-by-trust" standard is "the standard to survive summary judgment, not to consider when the statute of limitations begins to run." Order at 17. Equally misguided are Plaintiff's arguments that, after 2011, U.S. Bank breached by failing to act within a reasonable time (thus letting putback actions expire) or otherwise failing to enforce. Mot. at 17-18. That is simply another way of saying that U.S. Bank breached by refusing to take action after it discovered problems. And Plaintiff does not dispute that this breach happened no later than 2011, when U.S. Bank made clear that it would not act to address defective loans without direction and indemnity.

Plaintiff likewise mischaracterizes its own post-EOD claims. It emphasizes the many different *servicer* breaches that it says triggered EODs after 2011. But Plaintiff asserts only one kind of *trustee* breach—U.S. Bank failure to "exercise all of its powers" after an EOD. And because that asserted duty is "continuing," *e.g.*, Compl. ¶ 93, once that duty is breached, the

"mere continuation of such a breach does not constitute a new breach" for limitations purposes. Rohe Aff. ¶ 25. Any EODs that happened after 2011, then, are "meaningless" for purposes of German limitations law, because they did "not trigger different or new post-[EOD] duties." *Id.* ¶ 26; *see also id.* ¶¶ 24-29 (explaining Germany's unity-of-damages principle).

For all of these same reasons, Plaintiff is wrong to accuse the Court of "inconsistent" conclusions. Mot. at 15. In deciding that Plaintiff raised triable issues as to whether EODs and R&W breaches occurred (including after 2011), the Court was addressing U.S. Bank's particular summary-judgment arguments. It was not addressing German limitations law. And when the Court addressed German law, it correctly concluded that post-2011 events were irrelevant.

Plaintiff's last argument is that the Court ran afoul of decisions like *Commerzbank AG v. Deutsche Bank Nat'l Tr. Co.*, which Plaintiff says "emphasize[] the claim-by-claim analysis demanded to invoke the three-year period under German law." Mot. at 19; *see also id.* at 15. That argument is wrong for many reasons. For one, the Court relied on *Commerzbank v. Deutsche Bank* to "summarize[] the German statute of limitations standard"—including the supposedly overlooked principle that the plaintiff must have "knowledge of the circumstances giving rise to *the claim*." Order at 17 (emphasis added). For another, Plaintiff does not explain how the Court failed to analyze each of Plaintiff's claims. The Court addressed examples of evidence of both "pre- and post-EOD breaches" in each of the trusts—examples that it said were "but a fraction of the voluminous evidence" supporting its conclusion—to hold that Plaintiff's "claims accrued before December 2011." Order at 16. If Plaintiff thinks that each R&W breach or each EOD gives rise to a separate claim against the trustee, Plaintiff once again forgets its own view of the trustee's duties. *See supra* at 17-18.

Accordingly, Plaintiff provides no grounds for this Court to reconsider its conclusion that, under German law, all of Plaintiff's claims "arose" before the end of 2011.

III. THE COURT SHOULD DENY PLAINTIFF'S REQUESTS TO CERTIFY VARIOUS APPEALS.

Plaintiff makes two alternative requests regarding appeals, but neither is appropriate.

First, Plaintiff asks the Court for certification under 28 U.S.C. § 1292(b). But Plaintiff merely parrots the § 1292(b) standard. *E.g.*, Mot. at 1. It never explains *how* the standard is satisfied here. That is reason enough to deny the request. If the Court grants the request, however, it should certify the entire order for review, including the merits issues decided against U.S. Bank. *See City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 391-92 (2d Cir. 2008).

Second, Plaintiff asks the Court to certify to the Ohio Supreme Court the question of whether Ohio, like New York, applies a place-of-injury test for borrowing-statute purposes. This request is rich: U.S. Bank previously noted that, if the Court thought Ohio law was unsettled, it could certify the question to the Ohio Supreme Court, *see* ECF No. 374 at 3, and Plaintiff *vehemently opposed* certification, accusing U.S. Bank of "seek[ing] to shop the issue" to another court, ECF No. 379 at 2. At any rate, this Court already concluded—correctly—that there is no doubt that *Taylor* applies here, so certification should be denied.

CONCLUSION

The Court should deny Plaintiff's motion in its entirety. If, however, the Court certifies an interlocutory appeal, it should certify the whole order, not just Plaintiff's issues.

Dated: May 28, 2020

Respectfully submitted,

/s/ David F. Adler

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CERTIFICATE OF SERVICE

I, David F. Adler, certify that on May 28, 2020, I caused the foregoing document to be served on all counsel of record by electronic delivery via the ECF system.

/s/ David F. Adler
David F. Adler