Nomura Asset Acceptance Corp. Alternative Loan Trust v Nomura Credit & Capital, Inc.
2018 NY Slip Op 30928(U)
May 14, 2018
Supreme Court, New York County
Docket Number: 653390/2012
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

NOMURA ASSET ACCEPTANCE CORPORATION ALTERNATIVE LOAN TRUST SERIES 2006-S4, BY HSBC BANK USA, NATIONAL ASSOCIATION, in its capacity as Trustee,

Plaintiff,

- against -

NOMURA CREDIT & CAPITAL, INC.,

Defendant,

NOMURA CREDIT & CAPITAL, INC.,

Third-Party Plaintiff,

- against -

WELLS FARGO BANK, N.A., and OCWEN LOAN SERVICING, LLC,

Third-Party Defendants.

DECISION/ORDER
Index No.: 653390/2012

The main (or underlying) residential mortgage-backed securities (RMBS) breach of contract action is brought by HSBC Bank USA, National Association, as Trustee of Nomura Asset Acceptance Corporation Alternative Loan Trust Series 2006-S4 (the Trust), against defendant Nomura Credit & Capital, Inc. (Nomura), the Seller of the loans that were securitized. The Trustee pleads, among other things, that the interests of certificateholders in the loans were materially and adversely affected by pervasive breaches of representations and warranties made by Nomura regarding the quality and characteristics of the loans that it sold; that Nomura is obligated to cure or repurchase defective loans; and that Nomura breached its contractual

obligation to notify the Trustee promptly upon Nomura's discovery of material breaches of representations and warranties.

The third-party action is brought by Nomura against Wells Fargo Bank, N.A. (Wells Fargo) and Ocwen Loan Servicing, LLC (Ocwen). Wells Fargo is the Master Servicer, Securities Administrator, and Custodian of the securitization. Ocwen is a Servicer of the loans (together with Wells Fargo, the Servicers). As discussed below, Nomura pleads, among other things, that the Servicers breached their obligations to review the loan files of delinquent loans for breaches of representations and warranties and to notify Nomura of such breaches. (See Third-Party Compl., ¶¶ 21, 33, 46.) Instead, the Servicers allegedly "charged off" or liquidated delinquent loans, depriving Nomura of an opportunity to cure, repurchase, or replace those loans in accordance with the agreements governing the securitization. (Id., ¶ 46.) Nomura further pleads that, if Nomura is found liable to the Trustee for damages, Ocwen and Wells Fargo are obligated to indemnify Nomura for such damages. (See id., ¶ 55.)

Wells Fargo and Ocwen now separately move, pursuant to CPLR 3211 (a) (1), (5), and (7), to dismiss the causes of action asserted against them in the third-party complaint.[1]

BACKGROUND

Both the main action and the third-party action are based on alleged breaches of a Pooling and Servicing Agreement (PSA), dated as of September 1, 2006. The PSA was entered into between and among the Trustee; Nomura as Seller; Wells Fargo as Securities Administrator, Master Servicer, and Custodian; Ocwen and non-party GMAC Mortgage Corporation (GMAC)

[1] The Servicers' arguments in support of their respective motions are largely, but not entirely, overlapping. This decision will address the parties' arguments by subject matter. If the Servicers make the same argument with respect to a particular subject matter, it will be referred to as the Servicers' argument. If the parties address the same subject matter, but their arguments differ in some respect, the party advancing the argument will be identified by name.

as Servicers; and non-party Nomura Asset Acceptance Corporation as Depositor.[2] Nomura's representations and warranties regarding the loans are set forth in section 2.03 (b) of the PSA. Subsection (c) of section 2.03 establishes both a notification obligation and a remedy for breaches of representations and warranties. More specifically, 2.03 (c) provides that, "[u]pon discovery by any of the parties hereto of a breach of a representation or warranty set forth in [specified sections] that materially and adversely affects the interests of the Certificateholders in any Mortgage Loan, the party discovering such breach shall give prompt written notice thereof to the other parties" (the notification obligation). Section 2.03 (c) further provides that, within 90 days of Nomura's discovery of a material breach, Nomura must cure the breach in all material respects and, if not so cured, either substitute the affected loans or repurchase such loans from the Trustee at a contractually-defined Purchase Price (the repurchase protocol).[3] The Purchase Price is calculated according to a contractual formula and includes, among other sums, "an amount equal to the sum of (i) 100% of the outstanding principal balance of the Mortgage Loan as of the date of [the] [re]purchase plus (ii) accrued interest thereon at the applicable Mortgage Rate through the first day of the month in which the Purchase Price is to be distributed to the related Certificateholders, plus any portion of the Servicing Fee, Master Servicing Fee, Servicing Advances and Advances payable to the Servicers or the Master Servicer of the Mortgage Loan . . . ." (PSA, § 1.01, Purchase Price definition.) The referenced servicing fees and advances are calculated pursuant to a separate formula, but include "[a]ll customary, reasonable and necessary 'out of pocket' costs and expenses (including reasonable legal fees) incurred prior to, on or after

[2] The third-party complaint pleads that GMAC's servicing rights were sold to Ocwen shortly after the transaction closed, and that GMAC thereafter filed for bankruptcy protection. (Third-Party Compl., ¶ 1 n 1.)

[3] The option to substitute loans affected by breaches of representations and warranties was only available during the first two years of the securitization. (See PSA § 2.03 [c].)

the Cut-Off Date in the performance by a Servicer of its servicing obligations hereunder . . . ." (Id., Servicing Advances definition.)

The duties of Ocwen and Wells Fargo in their respective capacities as Servicer and Master Servicer of the loans are also detailed in the PSA, and are discussed below.

THE DUTIES OF OCWEN AS SERVICER

The PSA provides that "[e]ach of the Depositor, the Master Servicer [Wells Fargo] and the Servicers [e.g. Ocwen] shall be liable in accordance herewith only to the extent of the obligations specifically imposed upon and undertaken by it herein." (PSA, § 7.01.) Section 3.01 of the PSA requires Ocwen to service and administer the loans "on behalf of the Trust and in the best interest of and for the benefit of the Certificateholders (as determined by such Servicer in its reasonable judgment)," and to "exercis[e] the same care in performing those practices that each Servicer customarily employs and exercises in servicing and administering mortgage loans for its own account . . . ."[4] Section 3.01 further provides that, "[s]ubject only to the above-described applicable servicing standards (the 'Accepted Servicing Practices') and the terms of this Agreement and of the respective Mortgage Loans, each Servicer shall have full power and authority . . . to do or cause to be done any and all things that it may deem necessary or desirable in connection with such servicing and administration . . . ." Section 1.01, in turn, defines the term "Accepted Servicing Practices" as follows:

> "With respect to any Mortgage Loan, as applicable, either (x) those servicing practices of prudent mortgage lending institutions which service mortgage loans of the same type and quality as such Mortgage Loans in the jurisdiction where the related Mortgaged Property is located to the

[4] PSA § 3.01 provides, more fully, that "[e]ach Servicer shall service and administer the related Mortgage Loans (other than any Mortgage Loans transferred to a Special Servicer pursuant to Section 3.24 hereof) on behalf of the Trust and in the best interest of and for the benefit of the Certificateholders (as determined by such Servicer in its reasonable judgment) in accordance with the terms of this Agreement and the Mortgage Loans and to the extent consistent with such terms and in accordance with and exercising the same care in performing those practices that each Servicer customarily employs and exercises in servicing and administering mortgage loans for its own account (including, compliance with all applicable federal, state and local laws)."

> extent applicable to the Servicer, or (y) as provided in Section 3.01 hereof, but in no event below the standard set forth in clause (x)."

The PSA requires that "[e]ach Servicer shall use reasonable efforts to foreclose upon or otherwise comparably convert the ownership of properties securing such of the Mortgage Loans as come into and continue in default and as to which no satisfactory arrangements can be made for collection of delinquent payments." (PSA, § 3.09 [a] [i].) In this regard, the PSA empowers Ocwen to choose between a number of potential courses of action to recover value from the loan. (See PSA, § 3.09 [a] [i].) The PSA thus authorizes Ocwen to elect to

> "(1) foreclose upon the Mortgaged Properties securing such Mortgage Loans, (2) write off the unpaid principal balance of the Mortgage Loans as bad debt, (3) take a deed in lieu of foreclosure, (4) accept a short sale (a payoff of the Mortgage Loan for an amount less than the total amount contractually owed in order to facilitate a sale of the Mortgaged Property by the Mortgagor) or permit a short refinancing (a payoff of the Mortgage Loan for an amount less than the total amount contractually owed in order to facilitate refinancing transactions by the Mortgagor not involving a sale of the Mortgaged Property), (5) arrange for a repayment plan, or (6) agree to a modification in accordance with this Agreement."

(Id.)

In addition, section 3.09 (a) (ii) sets forth a procedure for Ocwen to "charge off" a mortgage loan that is one hundred twenty (120) days delinquent. This procedure first requires Ocwen to obtain a "broker's price opinion" and to "use all reasonable efforts to obtain a total indebtedness balance." If Ocwen determines, based on this information, that the potential recovery "is insufficient to warrant proceeding through foreclosure or other liquidation of the related Mortgaged Property, it may, at its discretion, charge off such delinquent Mortgage Loan in accordance with" specified further procedures.

DUTIES OF WELLS FARGO AS MASTER SERVICER

As noted above, the PSA provides that Wells Fargo, among others, "shall be liable in accordance herewith only to the extent of the obligations specifically imposed upon and undertaken by it herein." (PSA, § 7.01.) Section 3A.01 of the PSA requires Wells Fargo to "supervise, monitor and oversee the obligation of the Servicers to service and administer the Mortgage Loans in accordance with the Agreement," and gives Wells Fargo the "full power and authority to do any and all things which it may deem necessary or desirable in connection with such master servicing and administration."

Section 3A.01 also requires Wells Fargo, "[i]n performing its obligations hereunder . . . [to] act in a manner consistent with Accepted Master Servicing Practices," and to "cause the Servicers to perform and observe the covenants, obligations and conditions to be performed or observed by the Servicers under this Agreement." The term Accepted Master Servicing Practices is defined in section 1.01 of the PSA as "either (x) those master servicing practices of prudent mortgage lending institutions which master service mortgage loans of the same type and quality as such Mortgage Loans in the jurisdiction where the related Mortgaged Property is located to the extent applicable to the Master Servicer, or (y) as provided in Section 3A.01 hereof, but in no event below the standard set forth in clause (x)."

ALLEGATIONS OF THE THIRD-PARTY COMPLAINT

Nomura's third-party complaint pleads that, "pursuant to the PSA, Ocwen and Wells Fargo were obligated to (i) provide prompt written notice to Nomura upon discovery of a breach of the representations and warranties set forth in [specified provisions] that materially and adversely affected the interests of the Certificateholders (see PSA § 2.03(c)), and (ii) service and administer the Mortgage Loans in the Trust in the best interest of and for the benefit of the Certificateholders (see PSA § 3.01)." (Third-Party Compl., ¶ 41.) Nomura further pleads that

the PSA requires Ocwen, under Wells Fargo's supervision, to determine expeditiously, upon a loan default, the best course of action to maximize value for certificateholders. (See id., ¶¶ 21-23, 33-34, 45, 53.) In the course of making this determination, Ocwen allegedly must review the loan files for breaches of representations and warranties. (Id., ¶¶ 21, 33.) Nomura also relies on the Trustee's allegation in the main action that breaches of representations and warranties were readily apparent in the loan files and, thus, "should have been apparent to Ocwen and Wells Fargo" as they serviced the loans (id., ¶¶ 42-43), many of which allegedly began to default "nearly immediately" after the Closing Date. (Id., ¶ 25.)

According to Nomura, "Ocwen and Wells Fargo charged off or liquidated Mortgage Loans without providing Nomura prompt written notice of any breach of representation or warranty in breach of the PSA and Nomura is now being called upon to 'repurchase' loans which do not exist. As a result, Nomura has been deprived of an opportunity to cure, repurchase, or replace them, and thus, breached their obligations under the PSA." (Id., ¶¶ 46, 20.) Nomura further pleads that "Ocwen did not examine delinquent Mortgage Loans as required by the PSA, and/or Wells Fargo did not enforce that requirement, resulting in Mortgage Loans that were allowed to languish and lose value causing damages to Nomura." (Id., ¶ 47; see also id., ¶ 22 [pleading that "[d]elays in taking action [upon a loan default] – particularly in declining market conditions – result in reduced values for the properties which secure the Mortgage Loans. In addition, if Mortgage Loans are allowed to languish, the collateral property will lose market value and may physically deteriorate"].)

Based on these allegations, Nomura pleads a single cause of action for breach of contract against both Ocwen and Wells Fargo (the second cause of action). (Id., ¶¶ 40-49.) Nomura also pleads a cause of action for indemnification against these parties (the third cause of action). (Id.,

¶¶ 50-57.) The latter claim is based on sections 7.03 (b) and (c) of the PSA, which are quoted in full below.

DISCUSSION

CPLR 1007

Ocwen first contends that the third-party complaint is improper under CPLR 1007 because Nomura's claims against Ocwen "do not arise from" Nomura's potential liability to the Trustee in the main action. (Ocwen Memo. In Supp., at 10.)[5] As argued by Ocwen:

> "The liability alleged against Nomura in the underlying action arises, if at all, from the Trustee's claim that certain Mortgage Loans in the Trust materially and adversely breached representations and warranties made by Nomura, as Seller, concerning the Loans. Yet, Nomura does not and cannot allege in the Third-Party Complaint that Ocwen bears any responsibility for alleged breaches of representations and warranties that Nomura itself made to the Trust. . . .
>
> . . . By contrast, Nomura's claims against Ocwen in the Third-Party Complaint are premised on alleged breaches of servicing obligations and failures to notify [Nomura upon Ocwen's discovery of breaches of representations and warranties] that purportedly took place after the Transaction closed. It follows inescapably that those alleged breaches and failures to notify could not have caused or even contributed to the breaches of representations and warranties at issue in the underlying action."

(Id., at 11 [internal citations omitted].)

Nomura contends that impleader is proper under CPLR 1007 because the third-party complaint pleads that Ocwen "exacerbated" the damages for which Nomura may be liable to the Trustee in the main action, by failing to comply with its notification and servicing obligations.

[5] The briefs on Ocwen's motion to dismiss are referred to in this decision as Ocwen Memo. In Supp., Nomura Memo. In Opp. To Ocwen, and Ocwen Reply Memo. The briefs on Wells Fargo's motion to dismiss are referred to in this decision as Wells Fargo Memo. In Supp., Nomura Memo. In Opp. To Wells Fargo, and Wells Fargo Reply Memo.

(Nomura Memo. In Opp. To Ocwen, at 10.) Nomura further contends that impleader in this action facilitates the complete resolution of the dispute between the parties to the PSA. (See id.)

CPLR 1007 provides that, "[a]fter the service of his answer, a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant, by filing . . . a third-party summons and complaint . . . ." In George Cohen Agency, Inc. v Donald S. Perlman Agency, Inc. (51 NY2d 358, 364-365 [1980]), the Court of Appeals agreed with prior precedent which had "recognize[d] that although third-party practice has its origins in strict indemnity, it has grown beyond its early limitations and should now be seen primarily as a tool for economical resolution of interrelated lawsuits." As held by the Court:

> "[CPLR 1007] places no limit upon the amount which may be recovered or upon the legal theories which may be asserted as a basis for the claim. Indeed, a narrower reading would subvert the purpose of the statute. It has long been clear that one of the main purposes of third-party practice is the avoidance of multiplicity and circuity of action, and the determination of the primary liability as well as the ultimate liability in one proceeding, whenever convenient."

(Id., at 365 [internal quotation marks and citations omitted].)

Following George Cohen Agency, Courts have held that "the liability sought to be imposed upon a third-party defendant must arise from or be conditioned upon the liability asserted against the third-party plaintiff in the main action." (E.g. BBIG Realty Corp. v Ginsberg, 111 AD2d 91, 93 [1st Dept 1985]; accord Sunbelt Rentals, Inc. v Tempest Windows, Inc., 94 AD3d 1088, 1089 [2d Dept 2012].) Courts applying this rule have also reasoned that impleader is proper if the third-party claim is "sufficiently related to the main action to at least raise the question of whether the third-party defendant may be liable to defendant-third-party plaintiff, for whatever reason, for the damages for which the latter may be liable to plaintiff."

(Qosina Corp. v C & N Packaging, Inc., 96 AD3d 1032, 1034 [2d Dept 2012] [internal quotation marks and citations omitted]; Zurich Ins. Co. v White, 129 AD2d 388, 390 [3d Dept 1987] [CPLR 1007 "requires some minimal jural relationship, aside from possible common questions of fact or law, between the liability of the defendant asserted in the main action and the liability over claim in the third-party complaint. At the least, the third-party claim must be sufficiently related to the main action to at least raise the question of whether the third-party defendant may be liable to defendant-third-party plaintiff, for whatever reason, for the damages for which the latter may be liable to plaintiff" [internal quotation marks and citations omitted], quoting Rausch v Garland, 88 AD2d 1021, 1021-1022 [3d Dept 1982].)

Impleader will be permitted where the third-party defendant is alleged to have caused or contributed to the conduct of the defendant/third-party plaintiff for which the plaintiff seeks relief in the main action, and thus to have played a role in bringing about the plaintiff's damages. (See De Pan v First Natl. Bank of Glens Falls, 98 AD2d 885, 885-886 [3d Dept 1983].) In contrast, some decisions have declined to permit impleader where the defendant/third-party plaintiff fails to plead any causal relationship between the alleged conduct of the third-party defendant and that of the defendant/third-party plaintiff, but also where there exists no apparent connection between the third-party defendant's alleged conduct and the plaintiff's damages. (See Qosina Corp., 96 AD3d at 1034-1035; Zurich Ins. Co. v White, 129 AD2d at 391; Rausch v Garland, 88 AD2d at 1021-1022.)

The parties have not cited case law on impleader that involves theories of liability or factual circumstances analogous to those presented here. As is common in the RMBS litigation, this case thus requires application to the complex financial instruments and contracts at issue of general legal precepts that were developed in materially different contexts. Considering the

particular claims advanced in the main and third-party complaints and the terms of the PSA governing the obligations of the parties, and applying the liberal standards for impleader under CPLR 1007 (see generally Oosina Corp., 96 AD3d at 1034; Rausch, 88 AD2d at 1022), the court holds that impleader is proper.

This case involves a hybrid in which the theories of liability in the main and third-party actions differ, but the damages sought by defendant/third-party plaintiff in the third-party action relate directly to the damages sought against defendant in the main action. More particularly, the alleged breaches of contract by Ocwen and Nomura in the third-party and main actions, respectively, are not causally connected. It is not claimed, for example, that Ocwen's alleged breaches of its servicing and/or notification obligations caused Nomura's alleged breaches of representations and warranties or prevented Nomura from notifying the Trustee upon its own, separate discovery of breaches. However, Ocwen was a party to the PSA, under which the Trustee's sole remedy for breaches of representations and warranties is the repurchase protocol. As pleaded by Nomura, each of the parties, including Ocwen, had the ability to either facilitate or frustrate that remedy. For its part, Nomura was required to cure, substitute, or repurchase defective loans at the Purchase Price, which is calculated pursuant to a contractual formula. Nomura claims that this contractual formula has been or will be affected by Ocwen's separate breaches of contract, resulting in an increase in the amounts for which Nomura may be liable to the Trustee for breaches of representations and warranties. (See infra at 13-14.) There is thus a claimed causal relationship between Ocwen's alleged breaches of contract and the specific damages for which Nomura may be liable to the Trustee. (See LaSalle Bank N.A. v Nomura Asset Capital Corp., 47 AD3d 103, 107 [1st Dept 2007].)[6]

[6] In LaSalle, a trustee for certificateholders of commercial mortgage pass-through certificates sued a Nomura entity, as securitizer, for breaches of representations and warranties regarding the loans. The Court held that the trustee

Moreover, there is no dispute that Ocwen's alleged liability to Nomura is entirely dependent upon Nomura's alleged liability to the Trustee. (See Nomura Memo. In Opp. To Ocwen, at 1-2, 6, 10.) Unless Nomura is found liable to the Trustee in the main action, Nomura will have no claim against Ocwen in the third-party action. Given that Ocwen's liability is dependent upon Nomura's liability to the Trustee, it would also be inefficient to hear the two actions separately.[7]

The court rejects Ocwen's contention that allowing impleader in this case would create a standard under which any party whose conduct indirectly increases a plaintiff's damages may be impleaded. (See Ocwen Reply Memo., at 4-5.) Although the alleged breaches of contract by Ocwen and Nomura are separate, this is not a case in which the acts of the third-party defendant are related only in an attenuated fashion to the plaintiff's damages and the conduct alleged in the main action. Ocwen had a prescribed role in the repurchase protocol, which constitutes the Trustee's sole remedy for breaches of representations and warranties and which it allegedly breached: It purportedly failed to notify the other parties upon its discovery of breaches of representations and warranties, assertedly depriving Nomura and the Trustee of the options of substitution, cure, or repurchase early in the life of the loans. Affording Nomura the benefit of all favorable inferences, as the court must do on a motion to dismiss (see infra, at 18), it was also reasonably foreseeable that breaches by Ocwen of its servicing and/or notification obligations would "exacerbate" the damages for which Nomura may be held liable. Foreseeability that

was required to mitigate its damages and that determination of whether it had done so involved consideration as to "whether or to what extent plaintiff unreasonably delayed in notifying defendants of the claimed breaches, or in taking other necessary steps to protect the value of the investment property, thereby unreasonably failing to mitigate damages, so as to preclude any award of damages." (47 AD3d at 107.)

[7] Even if impleader were improper, the court could properly exercise its discretion to sever rather than dismiss the third-party action (see Oosina, 96 AD3d at 1035) and, as appropriate, join or consolidate the two actions for discovery and trial.

Ocwen's alleged breaches could affect the Trustee's injury in the main action further supports impleader. (See generally Hanley v Fox, 97 AD2d 606, 607 [3d Dept 1983].)

Finally, in holding that impleader is proper, the court finds that the complaint pleads facts which—particularly when read in conjunction with the PSA—raise a plausible inference that Ocwen's alleged breaches of its servicing and notification obligations resulted in an increase of the Purchase Price for numerous defective loans. The third-party complaint pleads in effect that, as a result of Ocwen's breaches, Nomura is unable to actually repurchase "charged off" or liquidated loans and thus will receive no value in return for any payment it may be obligated to make to the Trustee. (See Third-Party Compl., ¶¶ 20, 46.) Nomura also pleads that the value of the loans it remains able to repurchase has been diminished by Ocwen's conduct. (Id., ¶¶ 22, 47.) In its briefs, Nomura more specifically explains that Ocwen's conduct increased the Purchase Price of defective loans. (See Nomura Memo. In Opp. To Ocwen, at 10, 18 [arguing that, because of "Ocwen's failure to provide Nomura with prompt notice, Nomura was deprived of its contractual right to repurchase certain of the Mortgage Loans" and, "[a]s a result, . . . the Repurchase Price for the Mortgage Loans increased as Ocwen and Wells Fargo incurred servicing fees while the value of the collateral properties (the offset to the Repurchase Price) declined due to market conditions and lack of attention to the properties"].) As discussed earlier in this decision, the Purchase Price of a loan is contractually defined to include all outstanding principal and accrued interest, as well as certain servicing fees. (PSA, § 1.01, Purchase Price definition.) It is plausible to infer from Nomura's allegations that Ocwen's alleged servicing and/or notification breaches, which are claimed to have delayed or frustrated the exercise of the repurchase protocol, have increased the Purchase Price of defective loans and/or altered the value of the exchanges contracted for by the parties.

"Although perhaps not classic in form," the claims against Ocwen thus satisfy CPLR 1007. (See generally JPMorgan Chase Bank, N.A. v Strands Hair Studio, LLC, 2009 WL 5244923 [Sup Ct, Nassau County, Dec. 17, 2009, No. 015554/2008], affd 84 AD3d 1173 [2d Dept 2011].)

EFFECT OF NOMURA'S ALLEGED BREACHES ON THE PLEADING OF THE CONTRACT CLAIM

Both Servicers contend that New York law bars Nomura from recovering in contract unless Nomura pleads that it performed all of its own contractual obligations and is not itself in breach of the contract. They further contend that Nomura fails to meet this pleading burden because its claims are premised on the existence of its own breaches of representations and warranties. (See Wells Fargo Memo. In Supp., at 8-11; Ocwen Memo. In Supp., at 13.) Nomura contends that the Servicers' notification and servicing obligations are independent of Nomura's representations and warranties regarding the loans, and that Nomura's alleged breaches thus do not excuse the Servicers' alleged breaches or bar Nomura's claims. (Nomura Memo. In Opp. To Wells Fargo, at 7-10.)

The Servicers rely on federal cases applying New York law, which broadly hold that "a party to a contract who is already personally in default cannot, as a general principle . . . maintain a suit for its breach, even if the other party subsequently breaches the contract as well since a contracting party cannot benefit from its own breach." (Guardian Music Corp. v James W. Guercio Enters., Inc., 459 F Supp 2d 216, 223 [SD NY 2006] [internal quotation marks, brackets, and citation omitted, emphasis supplied, ellipses in original], affd 271 Fed Appx 119 [2d Cir 2008]; see also Onex Food Servs., Inc. v Grieser, 1996 WL 103975, * 5 [SD NY, Mar. 11, 1996, Nos. 93 Civ. 0278, 94 Civ. 3063, Chin, D.J.] [holding that "one who breaches a contract may not seek to enforce other provisions of that contract to his or her benefit"].)

Although some case law appears to hold that a party must plead performance of all of its own contractual promises in order to sue for breach of the contract, the long-standing, and more precise, rule in New York is that a party must plead only that it performed "all those concurrent and dependent promises, which were the consideration for the contract . . . ." (See Saperstein v Mechanics' & Farmers' Savings Bank of Albany, 228 NY 257, 262 [1920]; 22 NY Jur 2d Contracts, § 316 [same]; 15 Williston on Contracts, § 44:6 [same].) As long held by the Court of Appeals, dependent covenants are those "in which the performance of one depends on the prior performance of another, and therefore, till this prior condition is performed, the other party is not liable to an action on his covenant." (Rosenthal Paper Co. v National Folding Box & Paper Co., 226 NY 313, 319 [1919] [internal quotation marks and citation omitted].) In contrast, independent covenants are those as to which "either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant, to allege a breach of the covenants on the part of the plaintiff." (Id.; accord Pfizer, Inc. v Stryker Corp., 348 F Supp 2d 131, 147 [SD NY 2004] [applying New York law and holding that "[i]f two promises are independent, breach of one does not excuse performance of the other"], rearg denied 2005 WL 44383 [SD NY, Jan. 10, 2005].) This rule has been articulated in numerous contract treatises discussing the law of New York and other jurisdictions. (See e.g. 22 NY Jur 2d Contracts, § 316 ["If the promises are independent of each other, a party must perform his or her part of the contract when the time for performance has arrived, irrespective of whether the other party has performed"]; 28A NY Prac, Contract Law, § 20:24 ["The rule that breach excuses performance may not apply where the promises of the parties are independent of each other with one performance not being the quid pro quo for the other"];15 Williston on Contracts, § 44:32 [4th ed] ["If the promises are independent, when one

performance becomes due, the promisor cannot refuse to perform on the ground that the other party has not performed; rather, the promisor whose performance is due is relegated to an action for damages based on the other party's failure to perform"].)

It is well settled that "the question whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties, as expressed by them, and by the application of common sense to each case submitted for adjudication." (Rosenthal, 226 NY at 320; accord Greasy Spoon Inc. v Jefferson Towers, Inc., 75 NY2d 792, 795 [1990]; Pfizer, 348 F Supp 2d at 147 [same, citing Rosenthal]; see also Jacob & Youngs v Kent, 230 NY 239, 241-242 [1921] [holding that "[s]ome promises are so plainly independent that they can never by fair construction be conditions of one another," and that "[c]onsiderations partly of justice and partly of presumable intention are to tell us whether this or that promise shall be placed in one class or in another"—i.e., classified as dependent or independent].)

Nomura's breach of contract claim in the third-party action is based, in part, on the Servicers' alleged failure to notify Nomura of breaches of representations and warranties. The PSA unambiguously required each Servicer to provide prompt notice to Nomura upon that Servicer's discovery of a qualifying breach of representation or warranty. (PSA, § 2.03 [c].) In arguing that Nomura's own alleged breaches of representations and warranties deprive Nomura of the right to enforce the Servicers' notification obligations, the Servicers fail to recognize that the parties' covenants are independent. Indeed, a breach of a representation or warranty was a condition that, once discovered by the Servicers, triggered their duty to notify Nomura (among others) of the defect. The Servicers' position in effect would preclude Nomura from ever enforcing the Servicers' notification obligation. There is no support in the language of the PSA

for such a result. The Servicers' notification obligation was plainly integral to Nomura's own obligation, under the repurchase protocol, to cure, substitute, or repurchase defective loans. The third-party complaint pleads that "[o]nce the Mortgage Loans were conveyed to the Trust, Nomura had no ownership interest with respect to the thousands of Mortgage Loans and relied on the parties with ongoing contact with the Mortgage Loans for information." (Third-Party Compl., ¶ 20.) As the third-party complaint further pleads, "[i]t, therefore, made sense for these sophisticated contracting parties to agree that any party to the PSA discovering a breach would promptly notify all other parties – including Nomura – of any issues with regard to a Mortgage Loan in order that Nomura could expeditiously resolve the problem, provide the Trust with a replacement Mortgage Loan if a breach was discovered during the first two years following securitization, or repurchase the Mortgage Loan and obtain its remaining value through sale, foreclosure, modification, or any other option." (Id., ¶ 20.) Had these sophisticated parties intended to bar Nomura from enforcing the Servicers' notification obligations, they could easily have expressed that intent in their contract. (See generally ACE Secs. Corp. v DB Structured Prods., Inc., 25 NY3d 581, 596 [2015], affg 105 AD3d 522 [1st Dept 2013]; Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc., 133 AD3d 96, 107-108 [1st Dept 2015], mod on other grounds 30 NY3d 572 [2017].)

The court reaches the same conclusion with respect to the Servicers' argument that Nomura's breaches of representations and warranties bar Nomura from suing to enforce the servicing obligations. These obligations exist independently of, and must be performed regardless of, the truth or falsity of Nomura's representations and warranties. If the parties had intended to bar Nomura from suing to enforce the servicing obligations, they could have expressly so provided.

The court accordingly holds that Nomura's alleged breaches of representations and warranties do not bar it from pursuing its breach of contract claims against the Servicers for their alleged breaches of their notification and servicing obligations.

SUFFICIENCY OF ALLEGATIONS OF SERVICING AND NOTIFICATION BREACHES

It is well settled that on a motion to dismiss pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) When documentary evidence under CPLR 3211(a) (1) is considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Leon v Martinez, 84 NY2d at 88.)

The Servicers contend that Nomura's breach of contract claim must be dismissed because Nomura fails to adequately plead that the Servicers breached their servicing obligations under the PSA or that they discovered breaches of representations and warranties. The parties dispute whether the claims of breaches of servicing obligations are pleaded with sufficient specificity. The Servicers also dispute Nomura's allegation that they were obligated under the PSA to investigate whether delinquent loans complied with Nomura's representations and warranties. (See Ocwen Memo. In Supp., at 13-16; Wells Fargo Memo. In Supp., at 11-14.) Nomura contends that the PSA required the Servicers to examine delinquent loans for breaches of representations and warranties, and argues that it has alleged facts raising an inference that the

Servicers gained actual knowledge of such breaches in servicing the loans. (See Nomura Memo. In Opp. To Ocwen, at 13-16; Nomura Memo. In Opp. To Wells Fargo, at 10-14.)

Servicing Obligations

The provisions of the PSA governing the Servicers' respective servicing obligations are set forth at the outset of this decision. (Supra, at 4-7.) As previously noted, Nomura pleads that these provisions impose an obligation upon Ocwen to determine expeditiously, upon a default in payment on a loan, the best method to "maximize value for the Certificateholders." (Third-Party Compl., ¶¶ 21, 26.) According to Nomura, "[i]n making its determination, Ocwen has access to the Mortgage Loan file for any delinquent Mortgage Loan. Consequently, Ocwen is empowered to determine whether a delinquency appears to be the result of a breach of any of the representations or warranties made by Nomura and, if it so determines, it is obligated to give notice to all of the parties." (Id., ¶ 21.) The third-party complaint also expressly pleads that "[u]pon default, Ocwen, with Wells Fargo supervising Ocwen, was responsible for determining if the Mortgage Loan failed to conform to the representations and warranties in [the pertinent sections of the governing agreements] so as to trigger the repurchase protocol." (Id., ¶ 33.) Nomura alleges that "Ocwen did not act promptly to resolve delinquency and default issues, but often simply determined to charge off Mortgage Loan balances as unrecoverable." (Id., ¶¶ 29, 46.)

As a threshold matter, the court rejects the Servicers' contention that the pleading as to the Servicers' breaches of their servicing obligations is insufficient because it lacks detail as to the specific obligations that were breached and as to how and when they were breached. (See Ocwen Memo. In Supp., at 15; Wells Fargo Memo. In Supp., at 12.) As discussed below, the third-party complaint adequately alleges breaches of Ocwen's duty to evaluate the proper course

of action following a loan default in order to maximize value for certificateholders and, more specifically, to review the loan files of defaulting loans for breaches of representations and warranties. This pleading is "sufficiently particular" to give the court and parties notice of the transactions and occurrences sought to be proved. (See CPLR 3013.) Moreover, as discussed below with respect to the pleading of discovery of breaches of representations and warranties, the pleading is sufficient even absent loan-level detail. (See infra, at 24-25.)

Although the PSA does not expressly require Ocwen to review the loan files of defaulting loans for breaches of representations and warranties, the PSA does require Ocwen to make a good faith evaluation of the appropriate course of action following a loan default to maximize value for certificateholders. Under the PSA, the options available to Ocwen following a loan default include writing off the unpaid principal balance, permitting a short refinancing, arranging for a repayment plan, agreeing to a modification, or commencing foreclosure proceedings. (PSA, § 3.09 [a] [i] [quoted supra, at 5].) The allegations of the third-party complaint, although perhaps inartful, raise a reasonable inference that Ocwen's good faith evaluation of these options under the PSA requires, at the very least, review of the loan file of the delinquent loan. The third-party complaint also raises a reasonable inference that the existence of a breach of a representation or warranty is relevant to a servicer's good faith evaluation of the proper course of action following a default: By the terms of PSA section 2.03 (c), notice of a breach can result in the cure of the breach, the substitution or replacement of the affected loan, or the repurchase of the loan at the contractually defined Purchase Price. These options may be more beneficial to the Trust than the foreclosure or modification options that the Servicers may consider under PSA section 3.09 (a) (i). Therefore, in light of the PSA provisions, and affording the third-party

complaint the benefit of all reasonable inferences, Nomura's allegation that Ocwen had a duty to investigate defaulting loans for breaches of representations and warranties is plausible.

Whether Ocwen was in fact required to review the loan files of delinquent loans for breaches of representations and warranties cannot be determined on this record. Under the express terms of the PSA, this question requires consideration of the care that Ocwen "customarily employs and exercises in servicing and administering mortgage loans for its own account" (PSA § 3.01), and the "servicing practices of prudent mortgage lending institutions which service mortgage loans of the same type and quality as such Mortgage Loans in the jurisdiction where the related Mortgaged Property is located. . . ." (See id.; § 1.01, Accepted Servicing Practices definition.) These standards have not been discussed in any substantive respect by the parties on this motion. Their application likely will require consideration of expert opinion or evidence of industry custom.

In so holding, the court rejects Ocwen's argument that, because the PSA does not expressly require Ocwen to review defaulting loans for breaches of representations and warranties, Nomura fails to plead a claim for breach of servicing obligations. (Ocwen Memo. In Supp., at 14-15.) Section 7.01 of the PSA provides that Ocwen "shall be liable in accordance herewith only to the extent of the obligations specifically imposed upon and undertaken by it herein." As discussed above, however, PSA sections 3.01 and 1.01 also expressly require Ocwen to perform its servicing obligations in accordance with Accepted Servicing Practices. Whether Accepted Servicing Practices required Ocwen to review the loan files of defaulting loans for breaches of representations and warranties cannot be decided on this motion.

For the same reasons that Nomura sufficiently pleads breaches of Ocwen's servicing obligations, Nomura sufficiently pleads breaches of Wells Fargo's supervisory servicing

obligations. The PSA requires Wells Fargo to "cause the Servicers to perform and observe the covenants, obligations and conditions to be performed or observed by the Servicers under this Agreement." (PSA, § 3A.01.) The PSA also requires Wells Fargo to act in accordance with "those master servicing practices of prudent mortgage lending institutions which master service mortgage loans of the same type and quality as such Mortgage Loans in the jurisdiction where the related Mortgaged Property is located to the extent applicable to the Master Servicer." (Id., § 1.01, Accepted Master Servicing Practices definition.) As Nomura correctly argues, on this factually undeveloped record, the court cannot determine "[w]hether Wells Fargo (and Ocwen under its supervision) can discharge its responsibilities without considering (or making sure that Ocwen considers) if a claim for breach of representations and warranties exists . . . ." (Nomura Memo. In Opp. To Wells Fargo, at 11-12.)

Discovery of Breaches of Representations and Warranties

The third-party complaint also pleads allegations raising a reasonable inference that, in the course of administering and servicing the loans, the Servicers discovered at least some of the breaches of representations and warranties described in the Trustee's complaint and in Nomura's third-party complaint.

In arguing that the third-party complaint does not adequately plead discovery of breaches of representations and warranties, Ocwen cites the allegation in the third-party complaint that "Ocwen did not examine delinquent Mortgage Loans as required by the PSA, and/or Wells Fargo did not enforce that requirement . . . ." (Third-Party Compl., ¶ 47; see also id., ¶ 56.) Ocwen then contends that it cannot have discovered breaches "in a loan file that it [Nomura] alleges Ocwen never examined." (Ocwen Memo. In Supp., at 14.)

Contrary to Ocwen's apparent contention, the third-party complaint does not plead that the Servicers engaged in a wholesale failure to review any loan files at any point in their administration and servicing of the loans. Nomura does allege, and Ocwen disputes, that the PSA required Ocwen, under Wells Fargo's supervision, to examine the loan files of defaulting loans specifically for breaches of representations and warranties. For the reasons stated above, however, the third-party complaint also adequately alleges that Ocwen's good faith evaluation of potential courses of action following a loan default required, at the very least, that Ocwen review the loan file of the delinquent loan—if not specifically for the purpose of investigating the existence of breaches of representations and warranties, then for the purpose of evaluating, for example, whether to commence foreclosure proceedings or to permit a modification. Thus, although the third-party complaint pleads that the Servicers failed to investigate the loan files of delinquent loans for breaches of representations and warranties, it also supports an inference that the Servicers reviewed loan files in the course of administering and servicing the loans.

The Trustee in the main action pleads that there were pervasive breaches of representations and warranties in the loan pool (Compl., ¶¶ 63, 90), which were "readily apparent in the Mortgage Loan Files." (Compl., ¶¶ 59, 63, 90.) Nomura relies on these allegations in its own complaint, pleading that any breaches of representations and warranties "should have been apparent to Ocwen and Wells Fargo" as they serviced the loans. (Third-Party Compl., ¶ 42.) Given these allegations that pervasive breaches were apparent in the loan files, the court holds that the third-party complaint adequately pleads that the Servicers discovered at least some breaches of representations and warranties in the course of servicing the loans.[8]

[8] As discussed above, the potential options available to Ocwen in response to a loan default include writing off the unpaid principal balance, permitting a short refinancing, arranging for a repayment plan, agreeing to a modification, or commencing foreclosure proceedings. (PSA, § 3.09 [a] [i].) A question exists for trial as to whether a good faith evaluation of these potential options requires a servicer to communicate with the borrower, and possibly to perform

In concluding that the discovery allegations are sufficient to withstand the motion to dismiss, the court rejects the Servicers' contention that the third-party complaint pleads a "theory of constructive discovery—not actual discovery." (Ocwen Memo. In Supp., at 14; see also Wells Fargo Memo. In Supp., at 13 [arguing that the allegations "fail to establish Wells Fargo's actual discovery of breaches"].) On this motion, the court need not, and does not, make a determination as to whether a standard of actual or "constructive" discovery applies to Nomura's claims. (See Federal Hous. Fin. Agency v Morgan Stanley ABS Capital I Inc., 2018 WL 1187676, * 15 n 14 [Sup Ct, NY County, Mar. 6, 2018, Nos. 650291/2013, 651959/2013] [FHFA (Morgan Stanley)] [this court's prior decision discussing the impact on the RMBS litigation generally of application of an "actual knowledge" standard, as opposed to "inquiry notice" standard, for proof of discovery of breaches of representations and warranties].) Rather, the court assumes for purposes of this motion that the Servicers' notification obligations are triggered only by actual discovery, and holds that the third-party complaint sufficiently pleads that the Servicers discovered at least some defective loans.

This court's determination as to the sufficiency of Nomura's pleading of discovery is consistent with the weight of authority on the pleading of discovery in RMBS put-back actions brought by trustees against originators and securitizers. Put-back actions have generally been permitted to proceed in this and other Courts, despite the trustees' inability to allege discovery on a loan-by-loan basis, based on the alleged existence of pervasive defects in the loan pools and the defendants' due diligence on the loans in connection with their origination and/or securitization. (See Natixis Real Estate Capital Trust 2007–HE2 v Natixis Real Estate Holdings, LLC, 149

a property valuation. A further question exists as to whether such communication and valuation would expose breaches of representations and warranties, such as misrepresentations by the borrower in his or her initial loan application concerning income or employment status, or errors in the initial loan-to-value ratio of the property.

AD3d 127, 136–137, 139–140 [1st Dept 2017] [upholding pleading of breach of representation and warranty claims against defendant sponsor based on its discovery of breaches, where the complaint identified the representations and warranties that were breached and pleaded allegations that the sponsor performed due diligence on the loans, "that at least 60% of the loans in the Trust [were] defective, and that Natixis's due diligence 'would have revealed that Loans were plagued with defects'"]; see also Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc., 133 AD3d at 108; ACE Secs. Corp., Series 2007-ASAP2 v DB Structured Prods., Inc., 2014 WL 4785503, * 4-6 [Sup Ct, NY County, Aug. 28, 2014, No. 651936/2013] [this court's prior decision, citing federal and state authorities and summarizing allegations of discovery that have been held sufficient]; Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2006–S4 v Nomura Credit & Capital, Inc., 2014 WL 2890341, * 15 [Sup Ct, NY County, June 26, 2014, No. 653390/2012] [same].)

This court recently upheld the pleading of discovery in the context of a trustee's failure to notify claims brought against a depositor more than six years after the closing dates of two securitizations. The complaints pleaded pervasive breaches of representations and warranties and the depositor's discovery of breaches while performing post-securitization due diligence on the loans in connection with, among other things, its monitoring of mortgage loan performance, repurchase requests made to originators, and repurchase requests received from parties to the securitization. (FHFA [Morgan Stanley], 2018 WL 1187676, at * 15-16.) As the decision noted, whether the depositor discovered breaches of representations and warranties post-securitization was likely a matter peculiarly within the depositor's knowledge. (Id., at * 16.)

The main and third-party complaints in this case similarly plead that numerous securitized loans were affected by breaches of representations and warranties, and that the

Servicers were in a position—albeit, by virtue of their involvement in administering and servicing the loans, rather than in originating or performing due diligence on the loans—to discover breaches of representations and warranties. This pleading of discovery suffices, even assuming that an actual knowledge standard applies.[9]

Finally, the very existence of the Servicers' notification obligations supports an inference that the Servicers were in a position to discover breaches of representations and warranties. If, as the Servicers now appear to claim, they were under no duty to investigate loan files for breaches of representations and warranties upon default and were not in a position to discover breaches of representations and warranties, those obligations would serve little, if any, purpose. The third-party complaint pleads facts raising a valid inference that, as the party in possession of the mortgage loan files and administering the loans, Ocwen was in a position to discover breaches of representations and warranties. The pleading also raises a reasonable inference that Wells Fargo gained actual knowledge of breaches from its supervision of Ocwen's work.

STANDING

Ocwen argues that Nomura lacks standing to enforce Ocwen's servicing obligations. In support of this contention, Ocwen cites section 3.01 of the PSA (quoted more fully, supra at 4 n 5), which requires Ocwen to service the loans "on behalf of the Trust and in the best interest of and for the benefit of the Certificateholders (as determined by such Servicer in its reasonable

[9] The Servicers rely on two federal cases decided by Judge Daniels of the Southern District of New York. (U.S. Bank Natl. Assn. v Citigroup Global Mkts. Realty Corp., 2014 WL 7714382 [SD NY, Nov. 14, 2014, No. 13 Civ. 6989] [asserting claims against sponsor, master servicer, and sub-servicer]; Citigroup Mortgage Loan Trust 2007-AMC3 ex rel. U.S. Bank, Natl. Assn. v Citigroup Global Mkts. Realty Corp., 2014 WL 1329165 [SD NY, Mar. 31, 2014, No. 13 Civ. 2843] [Citigroup (AMC3)] [asserting claims against sponsor].) As this court has previously held, Citigroup (AMC3) requires more specific allegations of discovery than the allegations which this court, and the weight of authorities, have found sufficient to support breach of contract claims in RMBS cases. (See ACE Secs. Corp., Series 2007-ASAP2, 2014 WL 4785503, * 5.) U.S. Bank, which involved a claim against a servicer, similarly applies a stricter standard than that generally imposed by federal and state cases applying New York law on the pleading of discovery in RMBS put-back actions.

judgment) . . . ." Ocwen then contends that Nomura has no claim against it "because Ocwen's obligations under [PSA section 3.01] flow to the Certificateholders . . . ." (See Ocwen Memo. In Supp., at 16; Ocwen Reply Memo., at 9-10.)

Contrary to Ocwen's apparent further contention, section 3.01 does not provide that Ocwen's servicing-related covenants in the PSA are made only to certificateholders or that certificateholders alone are intended to benefit from Ocwen's servicing obligations. Ocwen does not otherwise demonstrate on this record that certificateholders alone benefit from Ocwen's servicing of the loans on their behalf.

Servicing is plainly integral to the performance of RMBS securitizations. The appointment of a professional loan servicer facilitates the repayment of principal and interest over time. Although certificateholders, of course, have an interest in the repayment of principal and interest on securitized loans, as discussed above (supra, at 8-14), Nomura plausibly pleads that loan sellers also benefit from the proper administration of loans in securitizations in which they are involved. In particular, Nomura pleads that Ocwen's alleged improper servicing affected the timeliness of breach notices, increased the Purchase Price of defective loans, and diminished the value of loans Nomura may be, or may have been, required to repurchase.[10]

Section 3.01 of the PSA also does not identify, and thus limit, the contracting parties entitled to enforce Ocwen's servicing obligations. The court thus finds unpersuasive Ocwen's argument that a finding that Nomura has standing would violate the settled precept that "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby

[10] Nomura also pleads that one of the servicing duties that Ocwen breached was a duty to investigate defaulting loans for breaches of representations and warranties, or at least to review loan files of defaulting loans. As pleaded, Ocwen's servicing obligations thus facilitate the performance of its obligation to give prompt notice of its discovery of breaches of representations and warranties, which Ocwen does not dispute was owed directly to Nomura, among other parties, pursuant to PSA section 2.03 (c).

make a new contract for the parties under the guise of interpreting the writing." (Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co., 1 NY3d 470, 475 [2004] [internal quotation marks and citation omitted].) Rather, section 3.01, read in the context of the PSA as a whole, establishes a standard for the evaluation of Ocwen's conduct. The provision unquestionably obligates Ocwen to service the loans on behalf of the Trust and in the best interest of certificateholders. It accordingly bars Ocwen from servicing the loans in its own self interest—for example, by prioritizing the collection of servicing fees over the recovery of principal and interest.[11]

Significantly, Ocwen cites no authority that Nomura, as a party to the PSA, lacks standing to sue for Ocwen's breach of this servicing obligation to the extent that the breach has also caused damage to Nomura.[12] The case on which Ocwen principally relies, Asset Securitization Corp. v Orix Capital Markets, LLC (12 AD3d 215 [1st Dept 2004], lv denied 4 NY3d 704 [2005] [Orix]), is inapposite. There, the Court held that the plaintiff, an issuer and seller of commercial mortgage pass-through certificates, was not authorized "to commence litigation on behalf of the certificateholders," as "[t]hat authority is committed [under the PSA] solely to the trustee of the pooled loans, which is not a party to this action." (Id., at 215.) Ocwen ignores that in dismissing the action for lack of standing, the Court reasoned not only that "plaintiff is without standing under the PSA to sue on the certificateholders' behalf," but also

[11] At the pleading stage, the court cannot find that self-dealing by a servicer does not also potentially harm parties like Nomura, as the PSA provides that servicing fees are incorporated into the Purchase Price Nomura must pay for defective loans. (PSA, § 1.01, Purchase Price and Servicing Advances definitions.)

[12] A significant body of law addresses a person's standing to sue for breach of contract as a purported third-party beneficiary. It is well settled that a party asserting rights as a third-party beneficiary must establish "'(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit and (3) that the benefit to [it] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost.'" (Mendel v Henry Phipps Plaza W., Inc., 6 NY3d 783, 786 [2006] [internal quotation marks and citation omitted]; accord Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 182 [2011]; State of Cal. Pub. Empls.' Retirement Sys. v Shearman & Sterling, 95 NY2d 427, 434-435 [2000].) Here, as Nomura is a party to the PSA, this heightened standard for determining standing to sue is not applicable.

that plaintiff "failed to allege a valid contractual or extracontractual claim on its own behalf." (Id.) The instant third-party action is distinguishable from Orix because Nomura does not purport to sue "on the certificateholders' behalf" but, rather, seeks to recover the damages it allegedly suffered itself as a result of Ocwen's failure to service the mortgage loans on behalf of the Trust and its certificateholders.[13]

The court accordingly holds that Nomura has standing to enforce Ocwen's servicing obligations in PSA section 3.01.

TIMELINESS

Wells Fargo contends that Nomura's breach of contract claim is untimely to the extent that it pleads breaches of Wells Fargo's obligations as Master Servicer. (Wells Fargo Memo. In Supp., at 14.) Wells Fargo bases this contention solely upon Nomura's allegations that the loans began to experience delinquencies "nearly immediately" after the securitization and that, by December 2007, "265 Mortgage Loans had been liquidated" and "12.33% of the Mortgage Loans in the Securitization were either delinquent, in bankruptcy, in foreclosure, or the underlying properties were real estate owned or 'REO,' properties owned by the Trust." (Third-Party Compl., ¶ 25.) Contrary to Wells Fargo's apparent further contention, these allegations do not constitute an admission or raise an inference that all of Wells Fargo's alleged breaches of its servicing and notification obligations occurred by December 2007.

[13] This PSA, as is typical of PSAs in RMBS transactions, generally contemplates that the Trustee will enforce the PSA on behalf of the Trust and certificateholders. (See e.g. PSA, §§ 2.01, 2.03 [c], 11.08.) Indeed, the rights of certificateholders to enforce the PSAs are limited. Under section 11.08 of the PSA, certificateholders lack authority to "institute any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement" unless they comply with the conditions set forth in that clause, which include first demanding that "the Trustee institute such action, suit or proceeding in its own name as Trustee." This decision is not intended to suggest that Nomura has the right to enforce the PSA on behalf of certificateholders.

Ocwen makes the more limited argument that at least "some portion" of Nomura's breach of contract claim is untimely. More specifically, Ocwen contends that any claims are time-barred to the extent that they are "tied to loans that entered delinquency at or before August 2008"—six years before the third-party complaint was filed in August 2014. (Ocwen Memo. In Supp., at 21.) Ocwen does not, however, demonstrate that breaches of servicing and notification obligations could not occur on a date later than that on which a loan first entered delinquency.

Resolution of the timeliness issue must await further development of the Servicers' duties and the facts regarding their servicing and supervisory servicing of the particular loans at issue in this case. Nomura will not be permitted to recover for breaches of contract by the Servicers that occurred more than six years before Nomura's claims against the Servicers were asserted. (See FHFA [Morgan Stanley], 2018 WL 1187676, at * 13-14 [this court's similar holding in connection with a trustee's failure to notify claims against a depositor].)

BREACH OF WELLS FARGO'S DUTIES AS CUSTODIAN

Nomura agreed in its opposition papers to withdraw the branch of its breach of contract claim against Wells Fargo as Custodian. (Nomura Memo. In Opp. To Wells Fargo, at 2 n 4.)

DAMAGES FOR BREACH OF CONTRACT

Nomura seeks to recover, as damages on its failure to notify claim against Ocwen, increases in the Purchase Price of defective loans between the time Ocwen discovered breaches of representations and warranties and failed to notify Nomura, and the time Nomura's liability to the Trustee is determined. (See Nomura Memo. In Opp. To Ocwen, at 18.) In moving to dismiss, Ocwen contends that such amounts represent consequential damages and are impermissibly speculative. (See Ocwen Memo. In Supp., at 16-17.) Nomura argues in opposition that its damages "flow directly from Ocwen's failure to provide prompt notice" and

are thus "general damages to which Nomura is contractually entitled." (Nomura Memo. In Opp. To Ocwen, at 18.)

In determining whether damages are general or consequential, Courts will consider whether the damages flow directly or indirectly from the breach. As explained by the Court of Appeals:

> "General damages are the natural and probable consequence of the breach of a contract. They include money that the breaching party agreed to pay under the contract. By contrast, consequential, or special, damages do not directly flow from the breach."

(Biotronik A.G. v Conor Medsystems Ireland, Ltd., 22 NY3d 799, 805 [2014] [internal quotation marks and citations omitted.) Consequential damages are only recoverable when "(1) it is demonstrated with certainty that the damages have been caused by the breach, (2) the extent of the loss is capable of proof with reasonable certainty, and (3) it is established that the damages were fairly within the contemplation of the parties." (See id., at 806 [internal quotation marks and citations omitted]; see also 28A NY Prac, Contract Law, § 22:22.)

As this court has previously held, it is apparent from the plain terms of the PSA that the notification obligations serve primarily to facilitate the repurchase remedy for breaches of representations and warranties. (FHFA [Morgan Stanley], 2018 WL 1187676, at * 17.) Ocwen does not dispute that the Purchase Price of defective loans may increase as a result of delays in repurchase. At this preliminary stage, and on this cursorily briefed record, the court is not persuaded that the damages sought by Nomura are not general damages, which flow directly from the breach, as opposed to consequential damages, to which a heightened pleading standard would apply.

Moreover, assuming arguendo that the damages sought by Nomura are consequential in nature, the record does not support a finding, as a matter of law, that they are speculative or

incapable of proof with reasonable certainty. Ocwen contends that Nomura's damages theory depends on speculation that the Purchase Price at the time of Ocwen's discovery was lower than the Purchase Price Nomura may ultimately pay the Trustee, and that Nomura would have acted swiftly to remedy defective loans had it received prompt notice of breaches from Ocwen. (Ocwen Reply Memo., at 10-11.) Ocwen merely identifies potential factual issues, which cannot be decided at the pleading stage. Its strongest argument is that Nomura cannot be heard to argue that it would have acted swiftly to remedy defective loans upon notice from Ocwen, given that Nomura refused to repurchase any of the 1,298 loans identified by the Trustee as defective in repurchase demands sent to Nomura on May 8, 2012, September 25, 2012, and February 1, 2013. (See Ocwen Reply Memo., at 11-12; Compl., ¶¶ 68-70.) Although this history of failing to repurchase allegedly defective loans may ultimately convince the fact-finder that Nomura would not have responded to earlier notifications of breaches, the court cannot make that determination at this stage in the proceedings. Each of the Trustee's repurchase demands (most of which were filed either after or mere days before the passing of the limitations period on September 28, 2012) identified hundreds of allegedly defective loans. (Compl., ¶¶ 68-70.) The third-party complaint pleads that, by the time of these notices, Nomura's right to substitute affected loans had long since passed, and many of the affected loans had been liquidated, making it impossible for Nomura to actually repurchase them. (Third-Party Compl., ¶ 37.) The third-party complaint also pleads that large "blanket" repurchase demands are difficult, if not impossible, to investigate within the contractually-specified 90 day response period. (See id., ¶ 35.) These allegations raise a plausible inference that Nomura's response to notices of breaches with respect to almost 1,300 mortgage loans, most received in the final days of the statute of limitations period, long

after many of the identified loans became delinquent or were liquidated, would differ from Nomura's response to rolling notifications of breaches years earlier.

INDEMNIFICATION

Nomura's third cause of action seeks indemnification from the Servicers if Nomura is found liable for damages to the Trustee. This cause of action is based on allegations as to the Servicers' failure to investigate for and provide prompt notice of breaches of representations and warranties (Third-Party Compl., ¶¶ 54, 56), and their gross negligence in charging off or liquidating loans without providing Nomura an opportunity to cure, repurchase or replace such loans, or in causing loans to lose value. (Id., ¶¶ 55-56.) These allegations are pleaded as follows:

> "54. If Ocwen determined that a delinquent Mortgage Loan breached the representations and warranties made by Nomura and that breach materially and adversely affected the interests of the Certificateholders, Ocwen was required to give prompt notice to Nomura and determine if "any Significant Net Recovery is possible through foreclosure proceedings or other liquidation of the related Mortgaged Property." See PSA §§ 2.03(c) and 3.09(a)(ii). Neither Ocwen nor Wells Fargo ever provided Nomura with such notice.
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> 55. If Nomura is found liable for damages with respect to any Mortgage Loan that Ocwen and Wells Fargo charged off or liquidated without providing Nomura an opportunity to cure, repurchase, or replace, then Ocwen and Wells Fargo were grossly negligent and/or failed to materially comply with their obligations under the PSA. Ocwen and Wells Fargo are therefore obligated to indemnify Nomura in an amount to be proved at trial.
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> 56. Similarly, if Ocwen did not examine a delinquent Mortgage Loan as required by the PSA, and/or if Wells Fargo did not enforce that requirement, and a Mortgage Loan was allowed to languish and lose value, then Ocwen and/or Wells Fargo were grossly negligent and/or failed to materially comply with their obligations under the PSA. Ocwen and Wells Fargo are therefore obligated to indemnify Nomura in an amount to be proved at trial."[14]

[14] As pleaded, the indemnification claim is also based on Wells Fargo's alleged failure to review loan files and notify Nomura of any missing documentation. (Third-Party Compl., ¶ 57.) This allegation relates to Nomura's

Ocwen's duty to indemnify Nomura is set forth in section 7.03 (b) of the PSA, which requires Ocwen to indemnify Nomura against

> "any loss, liability or expense (including reasonable legal fees and disbursements of counsel) incurred on their [Nomura's] part that may be sustained in connection with, arising out of, or relating to, any claim or legal action (including any pending or threatened claim or legal action) relating to such Servicer's gross negligence in the performance of its duties under this Agreement or failure to service the related Mortgage Loans in material compliance with the terms of this Agreement and for a material breach of any representation, warranty or covenant of such Servicer contained herein."

Ocwen contends that the indemnification claim against it should be dismissed because Nomura's allegations of servicing breaches "have nothing to do with Nomura's potential liability in the underlying action for alleged breaches of representations and warranties." (Ocwen Memo. In Supp., at 17-18.) Nomura contends that the indemnification claim is sufficiently stated against Ocwen because it has alleged that Ocwen's servicing failures and failures to notify "resulted in Nomura's incurring potential losses, liabilities, and expenses." (Nomura Memo. In Opp. To Ocwen, at 19.)

Unlike impleader, which is governed by a liberal standard (see supra at 11), indemnification is governed by the parties' contractual language, which "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances." (Hooper Assocs., Ltd. v AGS Computers, Inc., 74 NY2d 487, 491-492 [1989] [internal citations omitted]; accord Tonkins v Port Auth. of N.Y. & N.J., 3 NY3d 486, 490 [2004]; Abax Lotus Ltd. v China Mobile

withdrawn claim against Wells Fargo for alleged breaches of Wells Fargo's obligations as Custodian. (See supra, at 30.) The court deems this branch of the indemnification claim to have been withdrawn as well.

Media Tech. Inc., 149 AD3d 535, 536 [1st Dept 2017], lv dismissed 30 NY3d 1090 [2018], rearg denied 2018 WL 2122419 [May 8, 2018].) In its discussion of the Servicers' objections to impleader (supra, at 8-14) this court held that Nomura sufficiently pleads that Ocwen's servicing and notification failures increased the Purchase Price of defective loans, thereby exacerbating the damages for which Nomura may be liable to the Trustee. This relationship between Ocwen's acts and the Trustee's damages in the underlying action warranted impleader under CPLR 1007 of the claims in the third-party complaint.

Under the plain language of section 7.03 (b) of the PSA, however, Nomura's contractual right to indemnification is not triggered by acts of Ocwen that merely exacerbate the damages for which Nomura may be liable. Indemnity is required only when Nomura suffers a loss in connection with a "claim or legal action" that "relat[es] to" Ocwen's gross negligence in the performance of its servicing obligations or material breach of other contractual obligations. Put another way, unlike CPLR 1007, which this court has concluded permits impleader based on a causal relationship between the claim in the third-party action and the damages for which the defendant/third-party plaintiff may be liable in the main action, section 7.03 (b) requires a relationship between the claim or action being indemnified and the indemnitor's (here, Ocwen's) gross negligence or material breaches of contract.

The complaint in the main action alleges breaches of representations and warranties made by Nomura and breaches of Nomura's separate notification obligation. The third-party complaint alleges Ocwen's gross negligence or material breaches of its covenants in servicing the loans and Ocwen's breaches of its obligation to notify Nomura of its discovery of Nomura's breaches of representations and warranties. The main action does not meet the requirements for indemnification under PSA section 7.03 (b) because it does not allege any "claim . . . relating to"

Ocwen's alleged gross negligence and material breaches of its servicing and notification obligations. However negligent Ocwen may have been in the performance of its own obligations, its conduct is not pleaded to have contributed or given rise to breaches of representations and warranties that were true or false as of the closing date. Nor does the third-party complaint plead any facts indicating that Ocwen's conduct is in any way related to Nomura's own failure, upon its alleged independent discovery of breaches, to notify the Trustee and other parties of such breaches.

Wells Fargo's indemnification obligation is set forth in section 7.03 (c) of the PSA. Despite minor differences of wording, this provision is substantively similar to section 7.03 (b).[15] It does not require Wells Fargo to indemnify Nomura against a damages award to the Trustee in the first-party action because the Trustee's claims do not "relate[] to" Wells Fargo's alleged gross negligence or breaches of its contractual obligations. The cause of action will accordingly be dismissed in its entirety.[16]

SUCCESSOR LIABILITY

Finally, Ocwen contends that the third-party complaint should be dismissed to the extent that it seeks to hold Ocwen liable for breaches of contract committed by non-party GMAC, a

[15] Section 7.03 (c) requires Wells Fargo to indemnify Nomura against

> "any loss, liability or expense (including reasonable legal fees and disbursements of counsel) incurred on their [Nomura's] part that may be sustained in connection with, arising out of, or relating to, any claim or legal action (including any pending or threatened claim or legal action) relating to this Agreement or the Certificates (i) related to the Master Servicer's failure to perform its duties in compliance with this Agreement (except as any such loss, liability or expense shall be otherwise reimbursable pursuant to this Agreement) or (ii) incurred by reason of the Master Servicer's willful misfeasance, bad faith or gross negligence in the performance of duties hereunder or by reason of reckless disregard of obligations and duties hereunder."

[16] The indemnification cause of action does not appear to plead that the Servicers are obligated to indemnify Nomura for its costs in litigating this third-party action, and Nomura does not seek to avoid dismissal of the indemnification cause of action based on a claim for such costs.

predecessor Servicer. According to Ocwen, the third-party complaint fails to plead any basis for successor liability. (Ocwen Memo. In Supp., at 21-22.)

In opposition to this branch of Ocwen's motion, Nomura fails to cite any allegation in the third-party complaint that Ocwen is liable for the acts of GMAC. This court's review of the third-party complaint reveals that GMAC is mentioned in a single footnote, which states merely that GMAC was an original Servicer and that, "after the transaction closed . . . its servicing rights were sold to Ocwen." (Third-Party Compl., ¶ 1 n 1.)

The third-party complaint thus does not expressly plead that any of the traditional bases for successor liability exists in this case. (See Kretzmer v Firesafe Prods. Corp., 24 AD3d 158, 158 [1st Dept 2005] [specifying four bases for finding successor liability in a breach of contract action, including the successor corporation's express or implied assumption of the predecessor's liability]; see also Schumacher v Richards Shear Co., Inc., 59 NY2d 239, 245 [1983].) Based on Nomura's failure to allege facts that support a basis for successor liability, the pleading fails to state a cause of action. (See e.g. Bardere v Zafir, 63 NY2d 850, 852 [1984]; Jaliman v D.H. Blair & Co. Inc., 105 AD3d 646, 648 [1st Dept 2013]; Worldcom Network Servs., Inc. v Polar Communications Corp., 278 AD2d 182, 183 [1st Dept 2000].)

Rather than defend its purported claim with reference to its pleading (or seek leave to amend its third-party complaint), Nomura argues that PSA section 7.05 (a) obligated Ocwen to assume the obligations of GMAC when it succeeded GMAC as Servicer. (Nomura Memo. In Opp. To Ocwen, at 21-22.)[17] The court declines to entertain this argument, as the third-party

[17] PSA section 7.05 (a) provides, in pertinent part:

> "No appointment of a successor to a servicer shall be effective hereunder unless . . . such successor has agreed in writing to assume the obligations of the related Servicer hereunder to the extent of the related Mortgage Loans. . . . No [] resignation [of a predecessor Servicer] shall become effective until a Successor Servicer shall have assumed the related Servicer's responsibilities and obligations hereunder."

complaint fails to plead a claim for successor liability.[18]

ORDER

It is accordingly hereby ORDERED that the motion of Ocwen Loan Servicing, LLC (Ocwen) to dismiss the third-party complaint is granted solely to the extent of dismissing the third cause of action for indemnification as against Ocwen, and the second cause of action for breach of contract to the extent that it purports to plead a claim for successor liability against Ocwen based on the acts of GMAC Mortgage Corporation; and it is further

ORDERED that the motion of Wells Fargo Bank, N.A. (Wells Fargo) to dismiss the third-party complaint is granted solely to the extent of dismissing the third cause of action for indemnification as against Wells Fargo, and the second cause of action for breach of contract to the extent that it pleads that Wells Fargo breached its duties as Custodian.

This constitutes the decision and order of the court.

Dated: New York, New York
May 14, 2018

MARCY FRIEDMAN, J.S.C.

[18] It is noted that Nomura makes no showing on this motion that Ocwen's assumption of "obligations" or "responsibilities and obligations" included the assumption of liabilities. Indeed, there is a possible factual dispute in this regard, as Ocwen argues that in the Asset Purchase Agreement by which Ocwen acquired GMAC, Ocwen disclaimed all liability related to GMAC's prior servicing of loans. (Ocwen Reply Memo., at 15 n 10; see also Ocwen Memo. In Supp., at 22 n 5.) Ocwen does not attach this document to its motion papers or even quote its pertinent language. Instead, Ocwen asks the court to undertake the effort and expense of retrieving the document from the docket of a federal bankruptcy court proceeding in which it was apparently previously filed.