| **HSBC Bank USA, N.A. v Merrill Lynch Mtge. Lending, Inc.** |
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| 2018 NY Slip Op 31110(U) |
| June 6, 2018 |
| Supreme Court, New York County |
| Docket Number: 652793/2016 |
| 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.

HSBC BANK USA, NATIONAL ASSOCIATION, in its capacity as Trustee of MERRILL LYNCH ALTERNATIVE NOTE ASSET TRUST, SERIES 2007-OAR5,

Plaintiff,

-against-

MERRILL LYNCH MORTGAGE LENDING, INC., BANK OF AMERICA, N.A., and COUNTRYWIDE HOME LOANS, INC.,

Defendants.

DECISION/ORDER
Index No.: 652793/2016

This residential mortgage-backed securities (RMBS) breach of contract action is brought by HSBC Bank USA, National Association, in its capacity as Trustee of Merrill Lynch Alternative Note Asset Trust, Series 2007-OAR5 (the Securitization or Trust). Defendant Merrill Lynch Mortgage Lending, Inc. (Merrill or MLML), the Sponsor, selected the mortgage loans to be included in the Trust. (Compl., ¶¶ 1, 20.) Defendant Countrywide Home Loans, Inc. (Countrywide or CHL) was the Originator and original Servicer of more than 90% (by principal balance) of the loans. (Id., ¶¶ 1, 38.) Defendant Bank of America, N.A. (Bank of America or BANA) was a successor Servicer, until late 2013, of the loans originated by Countrywide. (Id., ¶¶ 11, 21.)

The Trustee pleads that Merrill breached numerous representations and warranties regarding the quality and characteristics of the loans, and that all of the defendants breached their obligations to notify the Trustee upon their discovery of breaches of representations and

warranties. Defendants now jointly move to dismiss the complaint, pursuant to CPLR 3211 (a) (1), (5), and (7).

THE GOVERNING AGREEMENTS

This securitization was effectuated by means of four separate but interrelated governing agreements. The first was a Master Mortgage Loan Purchase and Servicing Agreement (MLPSA), dated as of February 1, 2007, between Merrill as Purchaser and Countrywide as Seller and Servicer. (Corrected Aff. of P. Miller [counsel for defendants], Exh. C [NYSCEF No. 92].)[1] The second was an Assignment, Assumption and Recognition Agreement (AARA), "made as of October 1, 2007," between and among Merrill as Assignor, non-party Merrill Lynch Mortgage Investors, Inc. (MLMI or the Depositor) as Assignee, and non-party Countrywide Home Loans Servicing LP (CHLS) as the Company. Countrywide as Seller also signed the AARA, although it was not named as a party. (Miller Aff. In Supp., Exh. D [opening paragraph and signature pages].) The third was a Mortgage Loan Purchase Agreement (MLPA), "dated as of October 1, 2007," between Merrill as Seller and MLMI as Purchaser. (Id., Exh. E.) The fourth and final agreement was a Pooling and Servicing Agreement (PSA), "dated as of October 1, 2007," between and among MLMI as Depositor, the Trustee, and non-party Wells Fargo Bank, N.A. as Master Servicer and Securities Administrator. (Id., Exh. F.) Merrill agreed to sections 2.02, 2.03, and 2.04 of the PSA, although it was not named as a party. (Id., signature pages.)[2]

As discussed more fully below, in the MLPSA, Merrill agreed to purchase certain loans originated by Countrywide. (See MLPSA, § 2.) Countrywide made certain representations and

[1]Defendants were recently authorized to file a substituted MLPSA, after advising the court that the incorrect MLPSA was attached to their moving papers; that the substitution does not affect their arguments on the motion; and that, although the Trustee could not agree that the substituted MLPSA was the final version of the agreement, the Trustee did not object to its filing. (See March 29, 2018 Letter [NYSCEF No. 90].) All citations in this decision are to the substituted MLPSA (NYSCEF No. 92).

[2] These Agreements are collectively referred to as the Governing Agreements.

warranties about the quality and characteristics of the loans. (Id., § 7.02.) Countrywide also agreed to give "prompt written notice" to Merrill and its assignees upon Countrywide's discovery of breaches of representations and warranties that materially and adversely affected the value of the loans or the interests of Merrill or its assignees. (Id., § 7.03.) The MLPSA also set forth a repurchase protocol, typical of RMBS governing agreements, under which Countrywide was obligated, within 60 days of either discovery or notice of breaches of representations and warranties, to cure such breaches in all material respects or to substitute or repurchase loans affected by such breaches. (Id.) As is also typical of RMBS governing agreements, the MLPSA contained a sole remedy provision. That provision stated that "the obligations of the Seller [Countrywide] set forth in this Subsection 7.03 to cure, substitute for or repurchase a defective Mortgage Loan and to indemnify the Purchaser [Merrill and assignees] as provided in this Subsection 7.03 constitute the sole remedies of the Purchaser respecting a breach of the foregoing representations and warranties."

In section 11 of the MLPSA, Countrywide also agreed, "as independent contract servicer," to "service and administer the Mortgage Loans" during a specified preliminary period "in accordance with the terms and provisions set forth in the Servicing Addendum attached as Exhibit 8. . . ." The Servicing Addendum did not expressly require Countrywide to notify Merrill and its assignees upon its discovery of breaches of representations and warranties in its "independent" capacity as Servicer.

In the AARA, Merrill transferred to the Depositor, with certain exceptions, all of Merrill's right, title and interest in the loans acquired from Countrywide and all of Merrill's related rights under the MLPSA. This transfer was expressly made subject to the following exception: "Notwithstanding anything to the contrary contained herein, Assignor [Merrill] is retaining the right to enforce the representations and warranties made by the Seller

[Countrywide] prior to the date hereof with respect to the Assigned Loans and the Seller." (AARA, § 1.) The AARA also noted, in a Whereas Clause, that "the Seller [Countrywide] has assigned its servicing rights related to the Assigned Loans and servicing obligations related thereto under the Purchase and Servicing Agreement [the MLPSA] to the Company [affiliate Countrywide Home Loan Servicing LP (CHLS)] and the Company is currently servicing the Assigned Loans for the benefit of the Assignor [Merrill] in accordance with the terms and conditions of the [MLPSA]."

In the MLPA, which is dated contemporaneously with the AARA, Merrill made its own representations and warranties to the Depositor about the quality and characteristics of the loans that would make up the Trust corpus. These representations and warranties overlapped, in significant respects, with the representations and warranties made by Countrywide in the MLPSA. (Compare e.g. MLPSA, § 7.02 [i], [xvii], [xxvi], with MLPA, § 7 [a], [h], [k], [s].) Section 7 required that the party discovering or receiving notice of a material breach of these representations "shall give prompt written notice to the others." The parties upon whom section 7 imposed this notification obligation were "the Seller [Merrill], the Purchaser [MLMI], a Servicer [not defined] or the Trustee." Section 7 also set forth a repurchase protocol which provided that, within 90 days of discovery by or notice to Seller of a material breach of a representation or warranty, Seller will cure, repurchase, or, if within two years of the Closing Date, substitute breaching loans. Section 7 contained a sole remedy provision stating that this obligation to cure, repurchase, or substitute loans "shall constitute the Purchaser's [MLMI's], the Trustee's and the Certificateholder's sole and exclusive remedy under this Agreement or otherwise respecting a breach of representations or warranties hereunder with respect to the Mortgage Loans."

Finally, the PSA provided that the Depositor "hereby assigns to the Trustee, on behalf of the Certificateholders, all of its right, title and interest in the Mortgage Loan Purchase Agreement, including but not limited to Depositor's rights pursuant to the Servicing Agreements (noting that the Seller [Merrill] has retained the right in the event of breach of the representations, warranties and covenants, if any, with respect to the related Mortgage Loans of the related Servicer under the related Servicing Agreement [defined to include the MLPSA] to enforce the provisions thereof and to seek all or any available remedies)." (See PSA, §§ 2.03 [a], 2.01.) Section 2.03 (b) of the PSA, like section 7 of the MLPA, provided that Merrill, within 90 days of discovery or notice of a breach of representations and warranties, shall cure the breach in all material respects or substitute or repurchase affected loans. Section 2.03 (b) further provided that "[e]nforcement of the obligation of the Seller [Merrill] to purchase (or substitute a Substitute Mortgage Loan for) any Mortgage Loan . . . (or pay the Purchase Price as set forth in the above proviso) as to which a breach has occurred and is continuing shall constitute the sole remedy respecting such breach available to the Certificateholders or the Trustee on their behalf."

DISCUSSION

The complaint pleads six causes of action. The first and second causes of action are pleaded only against Merrill, and are based on alleged breaches of Merrill's representations and warranties in section 7 of the MLPA. The first cause of action seeks recovery for Merrill's alleged failure to cure or repurchase loans identified in pre-action breach notices. (Compl., ¶¶ 208-217.) The second seeks recovery for Merrill's alleged failure to cure or repurchase loans following Merrill's alleged independent discovery of breaches. (Id., ¶¶ 218-229.) The third and fourth causes of action, also pleaded only against Merrill, are for rescission (id., ¶¶ 230-240) and breach of the implied covenant of good faith and fair dealing. (Id., ¶¶ 241-246.) The fifth and

sixth causes of action plead failure to notify claims against Countrywide (id., ¶¶ 247-253) and Bank of America (id., ¶¶ 254-258), respectively.

FAILURE TO NOTIFY CLAIM AGAINST BANK OF AMERICA (SIXTH CAUSE OF ACTION)

The Trustee's sixth cause of action pleads that Bank of America had a contractual obligation (the notification obligation), under the MLPA and PSA, to notify the Trustee upon Bank of America's discovery of breaches of representations and warranties made by Merrill in section 7 of the MLPA. (Compl., ¶ 256.) This cause of action further pleads that, in its capacity as Servicer, Bank of America discovered breaches of Merrill Lynch's representations and warranties, and that Bank of America breached its notification obligation. (Id., ¶¶ 257-258.)

Defendants contend, and the Trustee disputes, that "[t]his claim fails as a matter of law because (i) BANA [Bank of America] had no such contractual obligation, (ii) any such claim for breach of contract by BANA would be untimely, (iii) the governing agreements' sole remedy provisions bar any failure-to-notify claim, and (iv) the Complaint fails to allege damages from BANA's alleged breach." (Defs.' Memo. In Supp., at 9; Tee.'s Memo. In Opp., at 21.)

Existence of Contractual Obligation

The court first addresses whether any of the governing agreements imposed a notification obligation upon Bank of America, and whether Bank of America at any point assumed another party's notification obligation. Section 7 of the MLPA (quoted supra at 4) does include "a Servicer" among the parties required to give prompt notice to the other parties upon discovery of a material breach of a representation or warranty of Seller (Merrill) set forth in section 7. The MLPA does not, however, define the term Servicer, and Bank of America was not a party to the MLPA. Nor was Bank of America a party to the PSA. Moreover, the complaint does not contain any allegation that Bank of America ever assumed any of the obligations of any of the

parties to either the MLPA or the PSA. The complaint accordingly fails to plead a failure to notify claim against Bank of America based on either of those agreements.

As defendants acknowledge (Defs.' Memo. In Supp., at 9), however, the complaint elsewhere pleads that "[t]he MLPSA requires Bank of America to notify Merrill Lynch and the Trustee of any breach of a Countrywide representation and warranty." (Compl., ¶ 194.) Although Bank of America was not a party to the MLPSA, Countrywide was a party in its capacity as both Seller of the loans to Merrill and as Servicer. It is undisputed that, subsequent to its entry into the MLPSA, Countrywide as Servicer assigned its servicing obligations to Countrywide Home Loans Servicing LP (see AARA, Whereas Clause 2), and that defendant Bank of America later succeeded to the rights and obligations assigned by Countrywide to CHLS. (Defs.' Memo. In Supp., at 3-4; Tee.'s Memo. In Opp., at 6; see also Compl., ¶ 21.)

As framed by defendants, the issue is whether the servicing obligations transferred by Countrywide to CHLS, and later assumed by Bank of America, included Countrywide's MLPSA section 7.03 notification obligation. More particularly, defendants argue that under section 7.03, Countrywide had a notification obligation—i.e., an obligation to notify Merrill of Countrywide's discovery of breaches of Countrywide's representations and warranties—only in its capacity as Seller of the loans to Merrill, not in its capacity as Servicer. According to defendants, Bank of America's assumption of Countrywide's duties as Servicer therefore did not include a notification obligation. (Defs.' Memo. In Supp., at 9-10; Defs.' Reply Memo., at 3-4.)

By its terms, MLPSA section 7.03 imposes the notification obligation upon the "Seller"—Countrywide—and the "Purchaser"—Merrill or its assignees.[3] In support of their

[3] MLPSA section 7.03 provides, in pertinent part:

> ". . . Upon discovery by either the Seller [Countrywide] or the Purchaser [Merrill and its assignees] of a breach of any of the foregoing representations and warranties which

contention that Countrywide had a notification obligation only in its capacity as Seller, defendants argue that Countrywide's obligations as Seller and Servicer are set forth in different sections of the agreement; that the notification obligation is specified in section 7.03, which also provides for the repurchase protocol obligating Countrywide, as Seller, to cure or repurchase loans affected by material breaches of its representations and warranties; and that the servicing-related obligations are specified in separate provisions of the MLPSA—Section 11 and a related Servicing Addendum—which do not specifically require Countrywide as Servicer to give notice of any breaches of representations or warranties. (Defs.' Memo. In Supp., at 9-10.)

Although defendants' argument is seemingly persuasive, review of the MLPSA as a whole shows that the MLPSA does not, on its face, clearly distinguish between the obligations imposed upon Countrywide as Seller and those imposed upon it as Servicer. As the Trustee correctly argues in opposition, while section 7.03 refers to Countrywide as the "Seller," "[t]he MLPSA defines and refers to Countrywide as the 'Seller' throughout the MLPSA," including in the servicing-related provisions—section 11 and the Servicing Addendum. (See Tee.'s Memo. In Opp., at 22.)

Contrary to defendants' apparent further contention, the AARA does not demonstrate that Countrywide did not transfer its MLPSA section 7.03 notification obligation to CHLS and thus ultimately to Bank of America. Defendants emphasize that only the servicing rights and

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> materially and adversely affects the value of the Mortgage Loans or the interest of the Purchaser (or which materially and adversely affects the interests of the Purchaser in the related Mortgage Loan in the case of a representation and warranty relating to a particular Mortgage Loan), the party discovering such breach shall give prompt written notice to the other."

The MLPSA defines the Purchaser as Merrill "or the Person, if any, to which the Initial Purchaser [Merrill] has assigned its rights and obligations hereunder as Purchaser with respect to a Mortgage Loan pursuant to this Agreement, and each of their respective permitted successors and assigns." (MLPSA, opening paragraph.) The term thus includes the Trustee, but not Bank of America.

obligations were assigned, citing the second Whereas Clause of the AARA, which states: "Seller [Countrywide] has assigned its servicing rights . . . and servicing obligations related thereto under the Purchase and Servicing Agreement [i.e., the MLPSA]" to CHLS. (Defs.' Memo. In Supp., at 10.) This clause is plainly insufficient to demonstrate what servicing rights and obligations were transferred. Significantly also, the agreement by which Countrywide effectuated the assignment of its servicing obligations to CHLS does not appear to have been provided to the court.

On this record, the court does not find that defendants have demonstrated as a matter of law that Countrywide's transfer of servicing obligations to CHLS did not include transfer of Countrywide's MLPSA section 7.03 notification obligation. (See generally Leon v Martinez, 84 NY2d 83, 88 [1994] [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"]; Amsterdam Hospitality Group, LLC v Marshall-Alan Assocs., Inc., 120 AD3d 431, 432 [1st Dept 2014].)

Timeliness[4]

Defendants' assertion that the failure to notify claim is untimely is decided in accordance with this court's recent decision in Federal Housing Finance Agency v Morgan Stanley ABS Capital I Inc. (2018 WL 1187676 [Sup Ct, NY County, Mar. 6, 2018, Nos. 650291/2013, 651959/2013] [the Failure to Notify Decision]), which involved notification provisions substantially similar to MLPSA section 7.03. This decision held that the trustee's failure to notify claims accrued upon the defendant securitizer's discovery of material breaches of representations and warranties and failure to provide prompt written notice to the trustee. (Id., at * 8-13.) The same accrual rule applies to the Trustee's failure to notify claims in this case.

Defendants argue that all of the failure to notify claims against Bank of America are untimely because the complaint pleads that Bank of America learned of Countrywide's breaches of representations and warranties when Bank of America performed due diligence on Countrywide in connection with an acquisition in 2007-2008, more than six years before the commencement of this action. (Defs.' Memo. In Supp., at 10-11, 6-7; Compl., ¶¶ 13, 199-202.)[5] The Trustee does not contend that Bank of America was a party to the tolling agreement that it entered into with Merrill and Countrywide, among others. (See Tee.'s Memo. In Opp., at 24-25.) The failure to notify cause of action, insofar as based on Bank of America's discovery of breaches as a result of this due diligence, is therefore untimely. To the extent that the Trustee

[4] The remaining branches of the motion to dismiss the sixth cause of action against Bank of America assert bases for dismissal that have previously been considered by this court and, in some instances, by the appellate courts, on substantially similar pleadings and provisions of RMBS governing agreements. These arguments will not be discussed at length here.

[5] Defendants assert that the due diligence was in fact performed by Bank of America's parent in connection with an acquisition of Countrywide's parent. (Defs.' Memo. In Supp., at 10-11.) In opposition, the Trustee acknowledges that Bank of America's parent company conducted the due diligence, but continues to assert that Bank of America discovered breaches as a result of this due diligence. (Tee.'s Memo. In Opp., at 24.)

argues that the continuing obligation doctrine renders its failure to notify claim against Bank of America timely even as to discoveries of breaches that occurred in 2007-2008, that argument is rejected for the reasons stated, and on the authorities cited, in the Failure to Notify Decision. (2018 WL 1187676, at * 13-14.)

In arguing that the sixth cause of action is untimely in its entirety, defendants ignore that the complaint also pleads that Bank of America serviced the loans until late 2013, and, in performing specified servicing functions, learned of breaches of representations and warranties by Countrywide and Merrill Lynch, but failed to notify the Trustee of such breaches. (Compl., ¶¶ 11, 196.)[6] For the reasons stated in the Failure to Notify Decision, the court holds that the cause of action is timely to the extent based on discovery of breaches by Bank of America, or failure to provide prompt written notice thereof, within the six-year period prior to the assertion of this failure to notify cause of action. (2018 WL 1187676, at * 16 [holding, on a similar pleading, that the allegations of the complaint supported the inference that the defendant securitizer discovered breaches of representations and warranties not only at or before the securitization closed, but also within the six-year period prior to the assertion of the failure to notify claims].)

Contrary to defendants' apparent contention, the pleading of the complaint is not defective based on its failure to allege discovery on a loan-by-loan basis. This court has repeatedly held that a trustee need not allege discovery of breaches on a loan-by-loan basis in

[6] The complaint pleads that "Bank of America's ordinary servicing duties required it to review the documentation supporting each loan and to obtain additional information from the related borrower(s) about their income, assets and other debts, and about the mortgaged properties." (Compl., ¶ 11.) The complaint further pleads that "in considering whether to modify a Loan, Bank of America would have to re-underwrite the Loan and would thereby identify violations of the applicable underwriting guidelines. As another example, when dealing with a borrower's bankruptcy, Bank of America would learn about inaccuracies in a borrower's loan application, including the borrower's debts, income and assets." (Id., ¶ 196.)

order to plead an RMBS breach of contract claim against a defendant securitizer or servicer, provided that it pleads the existence of pervasive or widespread defects in the loan pool and that the defendant was in a position, by virtue of its performance of due diligence or servicing duties, to discover breaches of representations and warranties. (See Failure to Notify Decision, 2018 WL 1187676, at * 12-13 [applying this pleading standard to discovery by a securitizer, and collecting authorities]; Nomura Asset Acceptance Corp. Alternative Loan Trust Series 2006-S4 v Nomura Credit & Capital, Inc., 2018 WL 2197830 [Sup Ct, NY County, May 14, 2018, No. 653390/2012] [same as to servicer].)

Sole Remedy Provisions

The court also rejects defendants' argument that the sole remedy provisions of the governing agreements bar the failure to notify claim against Bank of America. Defendants base this argument on MLPSA section 7.03 (a), MLPA section 7, and PSA section 2.03 (b) (quoted supra at 3-5). Each of these sole remedy clauses provides that the applicable repurchase protocol (and, in some cases, the repurchase protocol together with certain indemnification obligations), constitutes a party's sole remedy "respecting" breaches of representations and warranties. Defendants argue that the "broad" wording of these provisions—and, in particular, the use of the word "respecting"—bars the failure to notify claim by bringing that claim within the scope of the sole remedy clause. (See Defs.' Memo. In Supp., at 11-14.) In support of this argument, defendants attempt to distinguish the sole remedy provisions here from that at issue in Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc. (133 AD3d 96, 108 [1st Dept 2015], mod on other grounds 30 NY3d 572 [2017] [Nomura])—the first RMBS case in which the Appellate Division recognized a failure to notify claim independent of a claim for breaches of representations and warranties. Defendants argue that in Nomura, the sole remedy provision was restricted to breaches of specified representations and warranties whereas, here, the sole

remedy provisions more broadly cover all claims "respecting" breaches of representations and warranties.

Any confusion that may have existed at the time of the briefing of this motion regarding the effect of such sole remedy provisions on the viability of failure to notify claims has been eliminated by the Appellate Division's decision in Bank of New York Mellon v WMC Mortgage, LLC (151 AD3d 72 [1st Dept 2017] [BNYM]). There, the Appellate Division characterized its prior decisions as holding—and reaffirmed—that "claims for failure to notify [a]re not claims 'respecting a warranty breach' subject to the 'sole remedy' clause" in the governing agreements. (Id., at 81.)[7] As discussed in the Failure to Notify Decision, the Appellate Division rejected this court's holding that the notification obligation was part of the remedy for breaches of representations and warranties and, in a series of decisions, held that

[7] In their reply memorandum, defendants argue that PSA section 2.03 (a)—a sole remedy provision not cited in the moving papers—bars the failure to notify claim against Bank of America. (Defs.' Reply Memo., at 6-7.) As this argument was raised for the first time in reply, it is not properly before the court. (See e.g. Brunero v City of New York Dept. of Parks & Recreation, 121 AD3d 624, 626 [1st Dept 2014].) The court notes parenthetically, however, that the argument is not persuasive.

Section 2.03 (a) provides, in pertinent part:

> "The Depositor hereby assigns to the Trustee, on behalf of the Certificateholders, all of its right, title and interest in the Mortgage Loan Purchase Agreement, including but not limited to Depositor's rights pursuant to the Servicing Agreements [defined as including the MLPSA] (noting that the Seller [Merrill] has retained the right in the event of breach of the representations, warranties and covenants, if any, with respect to the related Mortgage Loans of the related Servicer under the related Servicing Agreement to enforce the provisions thereof and to seek all or any available remedies.) The obligations of the Seller to substitute or repurchase, as applicable, a Mortgage Loan shall be the Trustee's and the Certificateholders' sole remedy for any breach thereof."

Defendants contend, without elaboration, that the phrase "for any breach thereof" in the last sentence of the quoted provision means "for any breach by any party of either the MLPSA or the MLPA, including a breach of the duty to notify." (Reply Memo., at 7 [defendants' emphasis].) The word "thereof" does appear to refer to the MLPSA and MLPA. Defendants' interpretation would, however, drastically limit the rights that were actually assigned to the Trustee in the PSA. It is questionable that the parties would agree to limit the Trustee's remedies for any breach of the MLPA and MLPSA to substitution or repurchase, or that the mere use of the word "thereof" signified such intent. Moreover, repurchase protocols are ordinarily remedies for breaches of representations and warranties, not remedies for other covenants and promises made in RMBS governing agreements, like the MLPA and MLPSA, which may include not only notification obligations but also servicing obligations.

breach of a notification obligation gives rise to a cause of action independent of and separate from a cause of action for breaches of representations and warranties. (See Failure to Notify Decision, 2018 WL 1187676, at * 7 [discussing BNYM (151 AD3d at 81), Morgan Stanley Mtge. Loan Trust 2006–13ARX v Morgan Stanley Mtge. Capital Holdings LLC (143 AD3d 1, 3-4, 7 [1st Dept 2016], appeal docketed No. APL–2016–00240 [Morgan Stanley]) and Nomura (133 AD3d at 108), the Appellate Division's prior decisions holding that breach of a notification obligation gives rise to a cause of action independent of a cause of action for breach of representations and warranties].)

Damages

Finally, the court rejects defendants' argument that the sixth cause of action fails to allege that the Trust was damaged by Bank of America's alleged failure to notify. (See Defs.' Memo. In Supp., at 15.) The complaint pleads that Bank of America's "failure to give the required notice of breaches to Merrill Lynch and to the Trustee interfered with and delayed both Merrill Lynch's cure or repurchase of defective Mortgage Loans and the Trustee's exercise of its rights, including its right to demand that Merrill Lynch cure or repurchase defective Mortgage Loans." (Compl., ¶ 204.) The complaint further pleads that, "[a]s a result of Bank of America's breach, the Trust suffered damages, including, but not limited to, the amount that should have been paid to repurchase the defective Loans." (Id., ¶ 205.) The complaints at issue in the Failure to Notify Decision advanced a substantially similar damages theory on substantially similar pleadings. For the reasons stated in that Decision, the allegations are sufficient to withstand the motion to dismiss. (See 2018 WL 1187676, at * 16-19.) At the least, the sixth cause of action is maintainable for nominal damages. (Id., at * 19.)

Failure to Notify Claim Against Countrywide (Fifth Cause of Action)

The Trustee's fifth cause of action pleads that Countrywide breached its obligation under section 7.03 of the MLPSA to notify Merrill and the Trustee upon its discovery of a breach of Countrywide's representations and warranties. The complaint pleads that this obligation was assigned to the Trustee under the AARA and PSA. (Compl., ¶¶ 247-253.)[8] Defendants contend that the Trustee lacks standing to assert this claim against Countrywide, and otherwise raise the same grounds for dismissal of this cause of action as those raised in the branch of their motion to dismiss the failure to notify claim against Bank of America—untimeliness, the purported bar of the sole remedy provision, and failure to plead damages. (Defs.' Memo. In Supp., at 15.)

Standing

As to standing, defendants argue that Countrywide's duty to notify under section 7.03 of the MLPSA was not assigned to the Trustee. As discussed above (supra at 7, 7 n 3), section 7.03 of the MLPSA by its terms requires Countrywide to notify the "Purchaser" upon Countrywide's discovery of a breach of a representation or warranty made in the MLPSA. The MLPSA, in turn, defines the Purchaser as Merrill (also denominated the "Initial Purchaser"), "the Person, if any, to which the Initial Purchaser has assigned its rights and obligations hereunder as Purchaser with respect to a Mortgage Loan pursuant to this Agreement, and each of their respective permitted successors and assigns." (MLPSA, opening paragraph.) Defendants do not dispute that the Trustee was an ultimate assignee of Merrill pursuant to the AARA and the PSA. (See Defs.' Memo. In Supp., at 16.) Rather, defendants rely on Merrill's express retention in AARA section 1 of "the right to enforce the representations and warranties made by the Seller [Countrywide] prior to the date hereof with respect to the Assigned Loans and the Seller." Specifically, they

[8] The fifth cause of action alleges that the "obligation" of Countrywide to provide notice of breaches of representations and warranties "was assigned to the Trustee via the Assignment Agreement [AARA] and the PSA." (Compl., ¶ 251.) The word obligation would appear to be a scrivener's error. The court construes the complaint, consistent with the Trustee's motion papers, as pleading that the right to enforce Countrywide's MLPSA section 7.03 notification obligation, rather than the obligation itself, was assigned to the Trustee.

contend that Merrill retained the right to enforce Countrywide's representations and warranties, and that the enforcement right "necessarily include[d] both the right to receive notice and the right to exercise the contractual remedy because . . . it would be difficult (if not impossible) to exercise the repurchase remedy without notice of a breach." (Defs.' Memo. In Supp., at 16-17.)

The court holds that, under the plain language of the AARA and PSA, which effectuated an assignment to the Trustee of Merrill's rights under the MLPSA, the Trustee is an assignee of Merrill's right to enforce the MLPSA section 7.03 notification obligation. In section 1 of the AARA, Merrill assigned its rights under the MLPSA to MLMI, subject to an express retention of the "right to enforce the representations and warranties" made by Countrywide in the MLPSA. In section 2.03 (a) of the PSA, MLMI as Depositor, in turn, assigned to the Trustee its rights under the MLPA and its rights under the Servicing Agreements, which were defined as including the MLPSA.

PSA section 2.03 (a) arguably describes the scope of the rights retained by Merrill in the AARA more broadly than does AARA section 1 itself.[9] It is the AARA, however, that defines the scope of Merrill's assignment to the Depositor. The PSA is a separate agreement which

[9] Section 1 of the AARA states that "Assignor [Merrill] hereby grants, transfers and assigns to Assignee [MLMI] all of the right, title, interest and obligations of Assignor in the Assigned Loans and, as they relate to the Assigned Loans, all of its right, title, interest and obligations in, to and under the Purchase and Servicing Agreement [defined as the MLPSA]. . . ." The section concludes: "Notwithstanding anything to the contrary contained herein, Assignor is retaining the right to enforce the representations and warranties made by the Seller [Countrywide] prior to the date hereof with respect to the Assigned Loans and the Seller."

PSA section 2.03 (a) states that "[t]he Depositor [MLMI] hereby assigns to the Trustee, on behalf of the Certificateholders, all of its right, title and interest in the Mortgage Loan Purchase Agreement, including but not limited to Depositor's rights pursuant to the Servicing Agreements." It then "not[es] that the Seller has retained the right in the event of breach of the representations, warranties and covenants, if any, with respect to the related Mortgage Loans of the related Servicer under the related Servicing Agreement to enforce the provisions thereof and to seek all or any available remedies." (Parentheses omitted.)

A colorable argument can be made that a promise to notify another party upon discovery of a breach of representations and warranties is a "covenant . . . with respect to the related Mortgage Loans," and that the retention of rights included a retention of the right to enforce the MLPSA section 7.03 notification obligation.

assigns to the Trustee all of the Depositor's rights in the MLPA and the MLPSA, and merely summarizes what rights were retained by Merrill in the AARA.

In any event, defendants do not rely on the difference between the PSA and the AARA with respect to the description of Merrill's retention of rights. Rather, they contend that the right to assert a failure to notify claim against Countrywide was not assigned to the Trustee because Merrill retained "the right to enforce the representations and warranties" made by Countrywide, and this right purportedly included the right to receive notice of breaches from Countrywide. (Defs.' Memo. In Supp., at 16-17; Defs.' Reply Memo., at 8-9.)

The court rejects this contention. As discussed above (supra at 12-14), the Appellate Division has repeatedly held that an RMBS defendant's breach of a notification obligation gives rise to a cause of action independent of and separate from a cause of action based on the defendant's breach of representations and warranties. Applying the Appellate Division's holding to the instant dispute, this court holds that Merrill's retention of the "right to enforce the representations and warranties" by Countrywide in the MLPSA did not encompass the right to enforce Countrywide's separate notification obligation. The court may not, under the guise of contract interpretation, add a reservation of a right that Merrill, a sophisticated entity, "neglected to specifically include." (See generally ACE Secs. Corp. v DB Structured Prods., Inc., 25 NY3d 581, 597 [internal quotation marks and citation omitted]; Nomura, 133 AD3d at 107-108, mod on other grounds 30 NY3d 572].)

Finally, in holding that the Trustee was assigned the right to enforce the MLPSA section 7.03 notification obligation, the court rejects defendants' argument that "[i]t would be nonsensical to require that a breach notice be given to a party that has no right to exercise the remedy for that breach." (Defs.' Memo. In Supp., at 17.) The Trustee persuasively argues in response that Countrywide's representations and warranties, which Merrill retained the right to

enforce, overlap substantially with the representations and warranties made by Merrill in the MLPA, which the Trustee does have the right to enforce. (Tee.'s Memo. In Opp., at 17-18; Compl., ¶¶ 132-134.) The assignment of the notification obligation thus facilitates the Trustee's ability to enforce Merrill's overlapping representations and warranties. Merrill, in turn, retained its own remedy against Countrywide with respect to loans that it was or may be required to repurchase from the Trustee.

Timeliness

In challenging the timeliness of the failure to notify claim against Countrywide, defendants contend that the complaint pleads that Countrywide discovered breaches of representations and warranties only in the course of its origination of the loans, and that the last loan was sold to Merrill on October 1, 2007, more than six years before the effective date of a Tolling Agreement between the Trustee and Merrill, MLMI, Countrywide, and a certain holder of Trust certificates. (See Defs.' Memo. In Supp., at 17, 7; Defs.' Reply Memo., at 9-10.) In opposition, the Trustee argues, among other things, that Countrywide's notification obligation required it to give "prompt"—not immediate—notice, and also that the complaint pleads that Countrywide discovered defective loans "during its post-closing (i.e., post October 31, 2007) surveillance, quality control reviews and audit activities relating to the Mortgage Loans. . . ." (Tee.'s Memo. In Opp., at 19-20.)

On this record, defendants fail to meet their burden of making a prima facie showing that the cause of action against Countrywide is time barred. (See generally Lebedev v Blavatnik, 144 AD3d 24, 28 [1st Dept 2016].) In particular, defendants do not submit documentary evidence sufficient to show that Countrywide did not discover breaches of representations and warranties between October 1, 2017 and the closing date of the securitization, October 31, 2017. The Trustee's failure to notify claim, to the extent based on such breaches, may benefit from the

Tolling Agreement, which defendants admit was in effect between October 16, 2013 and May 18, 2016. (See Defs.' Memo. In Supp., at 7.)

Affording the complaint the benefit of all reasonable inferences (Leon, 84 NY2d at 87-88), the court holds that the complaint also pleads that Countrywide discovered breaches of representations and warranties through post-closing internal quality control and review processes. (See Compl., ¶¶ 182-190.) Contrary to defendants' contention (Defs.' Reply Memo. at 10), the failure to notify claim is maintainable based on these allegations as to post-closing discovery. As held in connection with the Trustee's failure to notify claim against Bank of America, the complaint pleads a timely cause of action against Countrywide to the extent that it is based on Countrywide's discovery of breaches, and failure to provide prompt written notice thereof, within the six-year limitations period preceding the assertion of the failure to notify cause of action, accounting for the tolling period.

Sole Remedy Provisions and Damages Pleading

Defendants' remaining arguments for dismissal—namely, that the MLPSA's sole remedy provision bars a failure to notify claim against Countrywide, and that the Trust was not damaged by Countrywide's alleged breach of its notification obligation—are rejected for the reasons stated in this court's discussion of the sixth cause of action against Bank of America, above.

BREACH OF REPRESENTATIONS AND WARRANTIES CLAIM AGAINST MERRILL BASED ON NOTICE (FIRST CAUSE OF ACTION)

The first cause of action pleads that Merrill conveyed numerous loans to the Trust that breached its representations and warranties in section 7 of the MLPA, and that Merrill was obligated under PSA section 2.03 (b) to repurchase loans within 90 days of notice of a material breach. (Compl., ¶¶ 210-211.) As further alleged in the complaint, the Trustee notified Merrill of breaches on five separate occasions: October 16, 2013, April 8, 2015, February 29, 2016,

March 25, 2016, and May 19, 2016 (collectively, the Breach Notices). (Id., ¶¶ 212, 119-120.) "The cure periods for the breaches identified in the Breach Notices expired on November 14, 2013, July 7, 2015, May 29, 2016, June 23, 2016 and August 17, 2016, respectively. In each case, Merrill Lynch refused to repurchase the relevant Mortgage Loans." (Id., ¶ 212.) This action was commenced on May 24, 2016, after all five of the Breach Notices had been sent, but before the expiration of the 90-day cure period applicable to any but the October 16, 2013 and April 8, 2015 Breach Notices (the Initial Breach Notices).

Defendants argue that this cause of action must be dismissed because the complaint fails to allege compliance with the contractual condition precedent to suit with respect to all but two loans—the loans identified in the Initial Breach Notices. (Defs.' Memo. In Supp., at 19.) The Trustee counters that because the 90-day period expired as to some loans before the Trustee commenced the action, the Trustee may proceed as to the loans in all of the Breach Notices. (Tee.'s Memo. In Opp., at 11.)

Contrary to the Trustee's contention, Nomura (133 AD3d 96, supra) does not stand for the blanket proposition that "where there are 'some timely claims,' a court should not 'dismiss claims relating to loans that plaintiffs failed to mention in their breach notices or that were mentioned in breach notices sent less than 90 days before plaintiffs commenced their actions.'" (Tee.'s Memo. In Opp., at 11, quoting Nomura, 133 AD3d at 108.) In Nomura, the Court upheld this court's denial of a motion to dismiss claims "relating to loans that plaintiffs failed to mention in their breach notices or that were mentioned in breach notices sent less than 90 days before plaintiffs commenced their actions." (Id. at 108.) The Court reasoned that there were "some timely claims" in the cases; that the breach notices "put defendant on notice that the certificateholders whom plaintiffs (as trustees) represented were investigating the mortgage loans and might uncover additional defective loans for which claims would be made" (id.); and that "in

addition to sending defendant notices of breach, plaintiffs allege[d] that defendant already knew, based on its own due diligence, that certain loans in the trusts at issue breached its representations and warranties." (Id.)

Subsequent to Nomura, in U.S. Bank National Assn. v GreenPoint Mtge. Funding, Inc. (147 AD3d 79 [2016]), the Appellate Division, over a vigorous dissent, dismissed notice-based claims for breaches of representations and warranties, where the notices that identified the affected loans and sought cure or repurchase were sent only after the commencement of the action. Considering a substantially similar repurchase protocol to that at issue here, the Court held that, for breach of representation and warranty claims based on notice to the defendant, "[t]he breach notices [a]re a contracted-for condition precedent to bringing this action,"[10] and "[t]he doctrine of relation back cannot render these otherwise untimely breach notices timely." (Id. at 86.) In holding that the Trustee's post-suit breach notices did not relate back to the timely filed summons with notice, the Court reasoned that "the inherent nature of a condition precedent to bringing suit is that it actually precedes the action." (Id. at 87.) The Court distinguished Nomura, stating that the "critical distinction" between the two cases, with respect to the application of the relation-back doctrine, was that the trustees in Nomura "complied with the condition precedent of providing that defendant with notice of its default. . . . Furthermore, although the precommencement breach notices in Nomura did not specifically identify every alleged nonconforming mortgage, the trustees' presuit demands put the defendant on notice that the certificate holders whom the plaintiffs (as trustees) represented were investigating the mortgage loans and might uncover additional defective loans for which claims would be made." (Id. at 88-89.)

[10] The GreenPoint decision upheld the breach of contract claim to the extent based on the defendant's own discovery of breaches of representations and warranties regarding the mortgage loans. (147 AD3d at 86.)

Here, although there were two pre-suit breach notices (the Initial Breach Notices) sent more than 90 days before the action was commenced, these notices, unlike those in Nomura, were insufficient to have put defendant on notice of breaches regarding loans mentioned in later breach notices that were sent less than 90 days before commencement of this action. Each of these two Breach Notices mentioned only one loan. The vast majority of loans allegedly affected by material breaches were first identified in the May 19, 2016 notice, which specified 973 loans but was not sent until five days before the commencement of the action. (Compl., ¶ 212.) Moreover, neither of the Initial Breach Notices informed defendant that an investigation of the loans was in process and that further breaches might be discovered. (See Compl., Breach Notices, Exhs. 4-8.)[11]

Given the insufficiency of the Initial Breach Notices to support the notice-based breach of contract cause of action for loans other than those mentioned in those Notices, this cause of action will be dismissed to the extent based on the February 29, March 25, and May 19, 2016 Breach Notices. The Trustee has requested that any dismissal be granted without prejudice to refiling of an action under CPLR 205 (a). (Tee.'s Memo. In Opp., at 12, n 6.) As this action was timely commenced, failure to meet the condition precedent to enforcement of defendant's cure or repurchase obligation is not a bar to such refiling. (See U.S. Bank Natl. Assn. v DLJ Mtge. Capital, Inc., 141 AD3d 431, 432 [1st Dept 2016] [DLJ] [lv granted 29 NY3d 910 (2017)], affg 2015 WL 1331268 [Sup Ct, NY County Mar. 24, 2015, No. 654147/2012]; U.S. Bank Natl. Assn. v DLJ Mtge Capital, Inc., 2016 WL 1306279 [Sup Ct, NY County Mar. 29, 2016, No. 654147/2012] [this court's decision of a motion to reargue the motion to dismiss decided by the

[11] The breach notices merely directed Merrill's attention to attached letters from Wells Fargo, in which Wells Fargo notified the Trustee that it "has received, or otherwise has obtained actual knowledge of, certain facts and/or information that may arise to potential breaches of representations and warranties made by the Seller [Merrill]. . . ." (See Letter from Nancy Luong [for HSBC] to Merrill, dated Oct. 16, 2013; Letter from Andres D. Cordero [for HSBC] to Merrill, dated Apr. 8, 2015.)

Mar. 24, 2015 decision, adhering to the prior holding that the action was timely commenced by the Trustee's filing of the summons and complaint before the statute of limitations expired, and that the action was not rendered untimely commenced by the Trustee's failure to satisfy the repurchase demand condition precedent prior to the commencement of the action or the expiration of the statute of limitations]; ACE Securities Corp. v DB Structured Products, Inc., 52 Misc 3d 343 [Sup Ct, NY County Mar. 29, 2016] [this court's decision extensively discussing CPLR 205 [a] authorities, and holding that a dismissal for failure to comply with a repurchase demand condition precedent is not a dismissal for untimeliness].)[12]

BREACH OF REPRESENTATIONS AND WARRANTIES CLAIM AGAINST MERRILL—BASED ON MERRILL'S OWN DISCOVERY (SECOND CAUSE OF ACTION)

Like the first cause of action, the second cause of action pleads that Merrill conveyed numerous loans to the Trust that breached its representations and warranties in section 7 of the MLPA, and that Merrill was obligated under PSA section 2.03 (b) to repurchase loans within 90 days of notice of a material breach. (Compl., ¶¶ 210-211.) The second cause of action further

[12] In BNYM (151 AD3d 72, supra), decided after the parties briefed this motion, the Appellate Division stated that "[t]o assert a timely claim" for breaches of representations and warranties against the defendant originator (WMC), the plaintiff (BNY) was required to file suit within six years of the date on which the representations and warranties were made "and also had to satisfy the procedural condition precedent"—i.e., a breach notice providing the contractually required cure or repurchase period. (Id., at 79.) This language is dicta. The summons with notice in BNYM was not filed until several months after the expiration of the statute of limitations for suit against WMC. Thus, the plaintiff's claims against the originator in BNYM would have been untimely even if the action had been commenced only after the cure or repurchase period had elapsed on the breach notice sent to WMC. (Id., at 75-76, 79-80.) Moreover, the Court permitted the plaintiff to proceed on a "backstop" claim against the defendant-sponsor, based on a breach notice sent to WMC when WMC was still obligated to repurchase, notwithstanding that the statute of limitations on a suit against WMC had expired before WMC's cure or repurchase period expired.

To the extent that the above-quoted language from BNYM is not dicta, it appears to be inconsistent with DLJ (141 AD3d 431, supra). (Compare BNYM, 151 AD3d at 79 [holding that "even if BNY had filed a summons on or before June 28, 2012 [the last day of the statute of limitations period], it would not have been able to file a timely suit against WMC based on the June 7 notice because the 60- and 90-day periods for cure and repurchase would not have elapsed before the expiration of the limitations period"], with DLJ, 141 AD3d at 432 [holding that "[a]lthough the trustee commenced this [put-back] action within the applicable statute of limitations, it did not meet the condition precedent to enforcement of defendant [sponsor's] secondary 'backstop' repurchase obligation, which required that the trustee first provide notice of the alleged breaches to defendant [originator], and allow a 90-day cure period to expire. Under these circumstances, the [t]rustee's timely claims were properly dismissed without prejudice to refiling pursuant to CPLR 205 [a]."]

pleads that Merrill was required to cure or repurchase a mortgage loan affected by a material breach within 90 days of discovery of a breach, and that Merrill discovered breaches during both pre-closing and post-closing due diligence on the loans and on Countrywide, but failed to repurchase the loans or to notify the Trustee. (Id., ¶¶ 220, 223-226.)

Defendants argue that the second cause of action fails to state a claim because "[t]he Complaint does not adequately allege that MLML [Merrill] actually discovered a specific representation and warranty breach with respect to any Mortgage Loan, much less how or when it discovered any breaches." (Defs.' Memo. In Supp., at 20.) The Trustee contends in opposition that its allegations of discovery are supported by allegations that Merrill conducted due diligence on the loans it securitized, and by allegations that there were pervasive breaches of representations and warranties. (Tee.'s Memo. In Opp., at 9-10.)

The court holds that the Trustee's allegations as to discovery are at least as specific as the allegations which this court, and the weight of authorities, have found sufficient to support claims for breaches of representations and warranties based on a defendant securitizer's discovery of such breaches. As this court has previously held, "many put-back actions have 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 securitizer's due diligence." (See Failure to Notify Decision, 2018 WL 1187676, at * 12 [collecting authorities]; ACE Secs. Corp. v DB Structured Products, Inc., 2014 WL 4785503, * 5 [Sup Ct, NY County, Aug. 28, 2014, No. 651936/2013] [this court's prior decision, also collecting authorities].)

Finally, defendants claim that the sole remedy provision of the MLPA bars the second cause of action to the extent that it pleads a claim that Merrill breached its duty to notify under the MLPA. (See Compl., ¶¶ 221, 226; Defs.' Memo. In Supp., at 22.) This claim is rejected for

the reasons stated in the court's discussion of the failure to notify claims against Bank of America and Countrywide.

"FUNDAMENTAL BREACH/RESCISSION/RESCISSORY DAMAGES" CLAIM AGAINST MERRILL (THIRD CAUSE OF ACTION)

The Trustee's third cause of action, which is "pleaded as an alternative to the preceding [second] cause of action" (Compl., ¶ 231), alleges that "the parties contemplated the possibility that the Trust could inadvertently receive a few defective Mortgage Loans," but that the alleged pervasiveness of defects in the loan pool "is so far afield from the bargain the parties struck that it defeats the bargain entirely." (Id., ¶¶ 236, 238.) This cause of action also alleges that Merrill's breaches were "willful and grossly negligent." (Id., ¶ 240.) The Trustee seeks rescission or, if rescission is not practical, rescissory damages. (Id.)

Defendants contend that the sole remedy clause bars any claim for rescissory relief, and that "[t]his is true regardless of the Complaint's allegations of gross negligence." (Defs.' Memo. In Supp., at 22.) They further contend that rescissory damages in this case "would effectively be equivalent to repurchase damages," which it contends "are a sufficient remedy." (Id., at 22-23.)

The Trustee "acknowledges that this Court has previously held that rescission or rescissory damages are not available in cases similar to this action," and "simply notes for purposes of appeal, with respect to rescission, that the severity and extent of the breaches alleged in the Complaint warrant an award of rescissory damages for the same reasons they warrant a finding of gross negligence." (Tee.'s Memo. In Opp., at 15.)

Assuming arguendo that proof of the Trustee's gross negligence claim would render the sole remedy provision ineffective, the court does not allege facts sufficient to support a reasonable inference that damages are inadequate. (See Nomura, 133 AD3d at 108 [upholding dismissal of a rescission claim at the pleading stage, the Court reasoning that "[e]ven if section

9(c) of the MLPA and section 2.03(e) of the PSA [the governing agreements' sole remedy provisions] did not waive plaintiffs' right to seek such relief, rescission would be unwarranted because damages are available"]; Rudman v Cowles Communications, Inc., 30 NY2d 1, 13-14 [1972].)

The court accordingly holds that the third cause of action fails to state a claim. Moreover, to the extent that the third cause of action is for gross negligence, it is duplicative of the first and second causes of action, each of which pleads that Merrill was "reckless or grossly negligent" in securitizing the loans, and that the Trustee therefore "is not limited to its contractual repurchase remedy." (Compl., ¶¶ 217, 229.)

BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING CLAIM AGAINST MERRILL (FOURTH CAUSE OF ACTION)

The fourth cause of action, for breach of the implied covenant of good faith and fair dealing, is based on Merrill's alleged knowing breaches of representations and warranties and concealment of defects in the loans. (Compl., ¶ 243-244.) This claim is dismissed in accordance with extensive authority dismissing implied covenant claims based on substantially similar allegations. (See e.g. Nomura, 133 AD3d at 108, mod on other grounds 30 NY3d 572; Quicken Loans Natl. Trust Co. v Quicken Loans Inc., 810 F3d 861, 869 [2d Cir 2015]; MBIA Ins. Corp. v Countrywide Home Loans, Inc., 87 AD3d 287 [1st Dept 2011]; see also Freedom Trust 2011-2 v DB Structured Products, Inc., 2018 WL 1523357, * 6-8 [Sup Ct, NY County, Mar. 28, 2018, Nos. 652985/2012, 650949/2013] [this court's recent decision, collecting additional authorities].)

It is accordingly hereby ORDERED that defendants' motion to dismiss the complaint is granted solely to the following extent, and is otherwise denied:

It is ORDERED that the Trustee's first cause of action, which is pleaded against defendant Merrill Lynch Mortgage Lending, Inc. (Merrill) for breaches of representations and

warranties, is dismissed except to the extent that it is based on loans identified in the Trustee's October 16, 2013 and April 8, 2015 Breach Notices; and it is further

ORDERED that the Trustee's third cause of action, which is pleaded against Merrill for "Fundamental Breach/Rescission/Rescissory Damages," is dismissed in its entirety; and it is further

ORDERED that the Trustee's fourth cause of action, which is pleaded against Merrill for breach of the implied covenant of good faith and fair dealing, is dismissed in its entirety; and it is further

ORDERED that the Trustee's sixth cause of action, which is based on the alleged failure of defendant Bank of America, N.A. (Bank of America) to notify the Trustee upon its discovery of breaches of representations and warranties, is dismissed to the extent that it is based on Bank of America's alleged discovery of breaches of representations and warranties and failure to provide prompt notice more than six years before the commencement of this action; and it is further

ORDERED that the remaining claims are severed and shall continue.

This constitutes the decision and order of the court.

Dated: New York, New York
June 6, 2018

MARCY FRIEDMAN, J.S.C.