

Part 60 Put-Back Litigation

2020 NY Slip Op 31693(U)

May 25, 2020

Supreme Court, New York County

Docket Number: 777000/2015

Judge: Marcy Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK-PART 60

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

IN RE: PART 60 PUT-BACK LITIGATION

Index No. 777000/2015
Mot Seq. Nos. 007 and 008

DEUTSCHE BANK NATIONAL TRUST COMPANY,
solely in its capacity as Trustee of HSI ASSET
SECURITIZATION CORPORATION TRUST SERIES
2007-HE2 (HASC 2007-HE2)

Index No. 651627/2013

-against-

HSBC FINANCE CORPORATION, DECISION ONE
MORTGAGE COMPANY, LLC, and HSBC BANK
USA, NATIONAL ASSOCIATION

NATIXIS REAL ESTATE CAPITAL TRUST
2007--HE2, by COMPUTERSHARE TRUST
COMPANY, NATIONAL ASSOCIATION, solely in its
capacity as Separate Securities Administrator,

Index No. 153945/2013

-against-

NATIXIS REAL ESTATE CAPITAL, INC.

DECISION AND ORDER

These motions address the viability of claims for attorney's fees by trustees or administrators of residential mortgage-backed securities (RMBS) trusts against defendant securitizers and originators. The motions were initially filed in ten actions in the Part 60 RMBS Put-Back Litigation. The court directed coordinated briefing of the motions as a result of the

development of appellate authority on the attorney's fees claims.¹ Only the two above-captioned actions, HASC 2007-HE2 and Natixis 2007-HE2, remain active.²

In HASC 2007-HE2, a prior motion to dismiss the Trustee's claim for attorney's fees and expenses was denied without prejudice pending this further briefing. (Fed. Housing Fin. Agency v HSBC Fin. Corp., 2017 NY Slip Op 30846[U], *11, 2017 WL 1479480 [Sup Ct, NY County April 25, 2017].) On this motion, the Trustee seeks "an order concerning application of recent appellate decisions regarding attorneys' fees and expenses" and a determination that the Trustee's "claims for specific performance and damages include amounts equal to [its] attorneys' fees and expenses." (Group 2 Pls.' Notice of Motion [NYSCEF Doc. No. 409]; Group 3 Pls.'

¹ By Order of the Administrative Judge, dated May 23, 2013, this court was designated to hear "all actions hereafter brought in this court alleging misrepresentation or other wrongs in connection with or arising out of the creation or sale of residential mortgage-backed securities." The RMBS breach of contract or "put-back" actions have been proceeding on a coordinated basis in Part 60 under Master File Index No. 777000/2015. Unless the index number of a specific action is noted, all references to NYSCEF document numbers refer to the Master File.

² In the HASC 2007-HE2 action, plaintiff Deutsche Bank National Trust Company (Trustee), as Trustee of HSI Asset Securitization Corporation Trust Series 2007-HE2 (HASC 2007-HE2 or Trust), asserts claims against sponsor, HSBC Bank USA, N.A., and originator, Decision One Mortgage Company, LLC, and its successor in interest, HSBC Finance Corporation (collectively, HASC defendants). (Second Amended Complaint, at ¶¶ 8-11 [Index No. 651627/2013 NYSCEF Doc. No. 199].)

In the Natixis 2007-HE2 action, plaintiff Computershare Trust Co., N.A. (Computershare or Separate Securities Administrator), as Separate Securities Administrator of Natixis Real Estate Capital Trust 2007-HE2 (Natixis 2007-HE2 or Trust) asserts claims against sponsor Natixis Real Estate Capital, Inc. (Natixis). (Complaint, at ¶¶ 11-14 [Index No. 153945/2013 NYSCEF Doc. No. 9].)

The other eight actions that originally joined the coordinated briefing have been stayed or disposed: Merrill Lynch Alternative Note Asset Trust, Series 2007-A3, by HSBC Bank USA, N.A., as Trustee v Merrill Lynch Mtge. Lending, Inc. (Stay Order [Index No. 652727/2014 NYSCEF Doc. No. 275]); HSBC Bank USA, N.A., as Trustee of Merrill Lynch Alternative Note Asset Trust, Series 2007-OAR5 v Merrill Lynch Mtge. Lending, Inc. (Stay Order [Index No. 652793/2016 NYSCEF Doc. No. 143]); Deutsche Bank Natl. Trust Co., as Trustee of Novastar Mtge. Funding Trust Series 2007-1 v Novation Cos., Inc. (Stipulation of Discontinuance [Index No. 650693/2013 NYSCEF Doc. No. 177]); Ownit Mtge. Loan Trust, Series 2006-5 by U.S. Bank N.A., as Trustee v Merrill Lynch Mtge. Lending, Inc. (Stay Order [Index No. 651370/2014 NYSCEF Doc. No. 268]); Ownit Mtge. Loan Trust, Series 2006-7 by U.S. Bank N.A., as Trustee v Merrill Lynch Mtge. Lending, Inc. (Stay Order [Index No. 651373/2014 NYSCEF Doc. No. 275]); Specialty Underwriting & Residential Fin. Trust, Series 2006-AB3, by U.S. Bank N.A. as Trustee v Merrill Lynch Mtge. Lending, Inc. (Stay Order [Index No. 651371/2014 NYSCEF Doc. No. 275]); Specialty Underwriting & Residential Fin. Trust, Series 2007-AB1, by U.S. Bank N.A. as Trustee v Merrill Lynch Mtge. Lending, Inc. (Stay Order [Index No. 651388/2014 NYSCEF Doc. No. 277]); Specialty Underwriting & Residential Fin. Trust, Series 2007-BC1, by U.S. Bank N.A. as Trustee v Merrill Lynch Mtge. Lending, Inc. (Stay Order [Index No. 651375/2014 NYSCEF Doc. No. 69]).

Notice of Motion [NYSCEF Doc. No. 439].) In response, the HASC defendants, albeit without a formal cross-motion, seek dismissal of the Trustee's claim for attorney's fees and expenses.

(Group 3 Defs.' Opp. Memo., at 21; Group 2 Defs.' Opp. Memo., at 18.)

In *Natixis 2007-HE2*, defendant's prior motion to dismiss the Separate Securities Administrator's claim for attorney's fees and expenses was granted without opposition. (*Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC*, 2015 NY Slip Op 32360[U], 2015 WL 4038760, at *6 [Sup Ct, NY County July 1, 2015].) On this motion, the Separate Securities Administrator seeks an order "reinstating [its] claims for attorneys' fees and expenses" and a determination that the Separate Security Administrator's "claims for specific performance and damages include amounts equal to [its] attorneys' fees and expenses." (Group 3 Pls.' Notice of Motion.)

The coordinated briefing was divided by agreement of the parties into three groups "based upon the language relating to attorney's fees in their respective transaction documents." (Nov. 5, 2017 Joint Letter from Liaison Counsel [NYSCEF Doc. No. 364].)³ As described by the parties, the Group 2 transaction documents contain "indemnification language" under which the HASC 2007-HE2 Trustee claims entitlement to attorney's fees and expenses. (*Id.*) The Group 3 transaction documents contain definitions of "Repurchase Price" under which both the HASC 2007-HE2 Trustee and the *Natixis 2007-HE2* Separate Securities Administrator claim such entitlement. (*Id.*)

The coordinated briefing initially addressed the decisions of the Appellate Division, First Department in *U.S. Bank N.A. v DLJ Mtge. Capital, Inc.* (140 AD3d 518 [1st Dept 2016]),

³ Briefing was not submitted on the Group 1 cases, as the parties resolved the anticipated motions by stipulation. (Dec. 14, 2017 Joint Letter from Liaison Counsel [NYSCEF Doc. No. 400].)

Wilmington Trust Co. v Morgan Stanley Mtge. Capital Holdings LLC (152 AD3d 421 [1st Dept 2017]), and Deutsche Bank Natl. Trust Co. v EquiFirst Corp. (154 AD3d 605 [1st Dept 2017]). (Oct. 12, 2017 Tr. [NYSCEF Doc. No. 348].) Following full submission of the briefing, the court directed supplemental briefing on the impact of the Court of Appeals' decision in Assurance Corp. v Countrywide Home Loans (31 NY3d 569 [2018], affg 151 AD3d 83 [1st Dept 2017]). (July 23, 2018 Tr. 54:24-55:11.)

HASC 2007-HE2

The Amended Complaint in HASC 2007-HE2 seeks attorney's fees and expenses pursuant to a cause of action for "Declaratory Judgment: Indemnification" against defendant Decision One Mortgage Company, LLC. (Amended Complaint, Third Cause of Action, at ¶¶ 149-162; Prayer for Relief, at [c] [Index No. 651627/2013 NYSCEF Doc. No. 38].) As noted above, this claim is based upon both an indemnification provision and repurchase price definitions in the governing documents.

This court previously denied a motion to dismiss the attorney's fees claim without prejudice pending this further briefing. (Fed. Housing Fin. Agency, 2017 WL 1479480, at *7.) In the same decision, the court held that the "causes of action for breach of contract are untimely to the extent that they plead breaches of representations and warranties," and further that those "causes of action will also be dismissed to the extent that they plead breaches of contract based on defendants' purported failure to repurchase defective loans." (Id., at *5.) The court denied the branch of the motion as to the same causes of action "to the extent based on defendants' alleged failures to notify the Trustee. . . ." (Id., at *6)

Based upon this further briefing, the HASC defendants now request that the court dismiss the claim for attorney's fees in the Amended Complaint.⁴ (Group 3 Defs.' Opp. Memo., at 21; Group 2 Defs.' Opp. Memo., at 18.) Since the briefing of these motions, however, the Trustee has filed a Second Amended Complaint. (Second Amended Complaint [Index No. 651627/2013 NYSCEF Doc. No. 199]; Stipulation to Permit Filing of Second Amended Complaint [Id., at NYSCEF Doc. No. 197].) The Amended Complaint, which pleads the claim at issue on this motion, has therefore been superseded and the relief sought by the parties with respect to HASC 2007-HE2 is moot. (See Harlem Suites, LLC v Norman Ave., LLC, 88 AD3d 532, 533 [1st Dept 2011] [holding that "[d]efendants' reliance on the original complaint [was] misplaced, since the amended complaint superseded the original complaint"]; Benzies v Take-Two Interactive Software, Inc., 150 AD3d 600, 600 [1st Dept 2017] [holding that the filing of an amended complaint rendered moot the appeals of a decision of a prior motion to dismiss].) The HASC defendants' motion to dismiss the Second Amended Complaint is now fully briefed and pending before the court. (Index No. 651627/2013 NYSCEF Doc. Nos. 208-220.) The parties have incorporated by reference the arguments set forth in the coordinated briefing on the pending motion to dismiss. (Mot. to Dismiss – Defs.' Init. Memo., at 26 [Id., at NYSCEF Doc. No. 211]; Mot. to Dismiss – Pl. Opp. Memo., at 30, n. 17 [Id., at NYSCEF Doc. No. 217].) Determination of whether the Trustee is entitled to recover attorney's fees and expenses incurred in this action is appropriately determined in the context of the current pleading and on the record of the pending motion to dismiss.

⁴ As noted above, the HASC defendants did not make this request by means of a formal motion or cross-motion. The parties have effectively treated the coordinated briefing as further briefing on the prior motion to dismiss.

Natixis 2007-HE2

As is typical in RMBS transactions, the Natixis 2007-HE2 Pooling and Servicing Agreement (PSA) sets forth a repurchase protocol in which, upon discovery by an enumerated party of a specified breach of a representation or warranty by the seller of the loans, “the party discovering such breach shall give prompt written notice to the others.” (Natixis 2007-HE2 PSA, at § 2.03 [d] [NYSCEF Doc. No. 443].) The repurchase protocol further provides that “[w]ithin 90 days of the earlier of either discovery by or notice to” the Unaffiliated Seller of any breach of a representation or warranty, the Unaffiliated Seller shall cure such breach (if the cure period is unexpired) or remove the loan from the trust. (Id.)⁵ In the event that the period for cure and removal of a breaching mortgage loan has expired, the Unaffiliated Seller shall “repurchase such Mortgage Loan at the Repurchase Price.” (Id.) The repurchase protocol then explicitly states that “the obligation under this Agreement of any Person to cure, repurchase, or replace any Mortgage Loan as to which a breach has occurred and is continuing shall constitute the sole remedy against such Persons respecting such breach available to Certificateholders, the Depositor, the Unaffiliated Seller, the Custodian, the Securities Administrator or the Trustee on their behalf.” (Id., at § 2.03 [g].) As relevant here, the PSA definition of Repurchase Price includes:

“all expenses reasonably incurred by the Servicer, the Trustee, the Custodian, the Securities Administrator, the Master Servicer or the Unaffiliated Seller, as the case may be, in respect of a breach or defect, including, without limitation, expenses arising out of any such party’s enforcement of the Originator’s repurchase obligation. . . .”

(Id., Art. I, Definitions, at 59.)

⁵ Natixis is referred to in the PSA as the Unaffiliated Seller. As discussed further below, pursuant to PSA section 2.03 (d), Natixis has both an independent obligation to repurchase loans and a “back-stop” obligation in the event the originator fails to repurchase loans when required to do so under other governing agreements for the securitization.

In U.S. Bank N.A. v DLJ Mtge. Capital, Inc. (140 AD3d 518 [1st Dept 2016]) (DLJ), an appeal of two RMBS put-back actions, the Appellate Division held that a materially similar term in the PSAs evidenced the “unmistakable intent of the parties to the PSAs that enforcement expenses to be reimbursed include attorney’s fees incurred in bringing these actions.” The provision, as quoted more fully in the decision of this court, stated in pertinent part:

“The Seller shall promptly reimburse the related Servicer and the Trustee for any actual out-of-pocket expenses reasonably incurred by the related Servicer and the Trustee in respect of enforcing’ the repurchase remedy.”⁶

(Home Equity Asset Trust 2006-8 [HEAT 2006-8] v DLJ Mtge. Capital, Inc., 2014 NY Slip Op 32571[U], 2014 WL 4966133, *2 [Sup Ct, NY County Oct. 1, 2014] and Home Equity Asset Trust 2007-2 [HEAT 2007-2] v DLJ Mtge. Capital, Inc., 2014 NY Slip Op 32568[U], 2014 WL 4966127, *2 [Oct. 1, 2014], both revd 140 AD3d 518.) The Court further held that “language requiring one party ‘to indemnify the other for all expenses incurred’” in enforcement of the contract “‘must include the expenses incurred in hiring an attorney.’” (140 AD3d at 519, quoting Scheer v. Kahn, 221 AD2d 515 [2d Dept 1995].)

A materially similar repurchase price definition was subsequently addressed by the Appellate Division in Deutsche Bank Natl. Trust Co. v EquiFirst Corp. (154 AD3d 605 [1st Dept 2017]) (EquiFirst).⁷ The Court again held that the provisions at issue “reflect[ed] the

⁶ In DLJ, this provision is included in the PSA section 2.03 (d) repurchase protocol, rather than in the definition of “Repurchase Price.” The DLJ provision does not differ in any material respect from the Natixis 2007-HE2 Repurchase Price definition. The Natixis 2007-HE2 definition is also integral to, and a component of, the repurchase protocol.

⁷ The repurchase price definition, as quoted more fully in the decision of this court, includes in relevant part: “all expenses incurred by the Trustee arising out of the Trustee's enforcement of the applicable Person's purchase obligation under the EquiFirst Agreements or the Barclays Representation Agreement[.]” (Deutsche Bank Natl Trust Co. v EquiFirst Corp., 2016 NY Slip Op 30967[U], *21, 2016 WL 3017760, *11 [Sup Ct, NY County May 25, 2016], revd 154 AD3d 605.)

unmistakable intent that plaintiff may recover its legal expenses incurred in enforcing the representations and warranties at issue.”⁸ (154 AD3d at 605--606, citing Hooper Assocs. v AGS Computers, 74 NY2d 487, 492 [1989] [Hooper], Wilmington Trust Co. v Morgan Stanley Mtge. Capital Holdings LLC, 152 AD3d 421 [1st Dept 2017], and DLJ.) Most recently, in Matter of Part 60 Put-Back Litigation (169 AD 3d 217, 223 [1st Dept 2019]), the First Department upheld the trustee’s claim for attorney’s fees in a put-back action under a provision which, as described by the Court, “authoriz[ed] the trustee’s recovery of expenses for enforcement of remedies.” Indeed, the Court noted that the defendant conceded that the trustee was entitled to attorney’s fees under DLJ. (Id., at 226.)

On the above authority, the court holds that the Repurchase Price definition in the Natixis 2007-HE2 PSA similarly evidences the unmistakable intent of the contracting parties to provide for reimbursement of expenses, including attorney’s fees, incurred “in respect of a breach or defect” in a Mortgage Loan for which the Repurchase Price remedy is sought.

Defendant⁹ argues that this holding is inconsistent with the requirements for recovery of attorney’s fees imposed by Hooper (74 NY2d 487, supra) and Assurance Corp. v Countrywide Home Loans (31 NY3d 569 [2018], affg 151 AD3d 83 [1st Dept 2017]) (Ambac). (Defs.’ Supp. Memo., at 2-3 [NYSCEF Doc. No. 581].) While Hooper and Ambac both involved provisions

⁸ In EquiFirst, the plaintiff relied on both a repurchase price definition and a separate indemnification provision. The Appellate Division did not state in its decision whether each provision could independently support a claim for attorney’s fees and expenses. Prior to EquiFirst the Court had, however, held that materially similar provisions of each type independently supported a claim for attorney’s fees and expenses. DLJ addressed a repurchase protocol provision, while Wilmington Trust Co. v Morgan Stanley Mtge. Capital Holdings LLC (152 AD3d 421 [1st Dept 2017]) addressed an indemnification provision.

⁹ The court refers to defendant in the singular, as there is only one defendant in Natixis 2007-HE2. It is noted that the coordinated briefing included arguments on behalf of multiple parties and multiple trusts as well as case specific arguments.

containing indemnification language, it is undisputed that they articulate the standard for recovery of attorney's fees in litigation between the parties to a contract.¹⁰ Hooper and Ambac both held that, in order to authorize the recovery of attorney's fees in intra-party litigation, a provision must be "exclusively or unequivocally referable to claims between the parties themselves." (Ambac, 31 NY3d at 584, quoting Hooper, 74 NY2d at 492.) Relying on Ambac, defendant contends that "it is not enough that an indemnification provision could be read to require reimbursement of first-party claims. To the contrary, if the provision as a whole could encompass third-party claims, it is not 'exclusively or unequivocally referable to claims between the parties themselves.'" (Defs.' Supp. Memo., at 2, quoting Ambac, [emphasis in original].) As plaintiff correctly argues, "Hooper does not hold that a fee-shifting provision cannot cover both third-party and first-party claims." (Pls.' Supp. Memo., at 3.) Nor is Ambac to the contrary. Rather, Hooper and Ambac require only that, if the provision is susceptible to third-party claims, it must also be "unequivocally referable" to first-party claims.

The indemnification provision in Ambac was included in insurance and indemnity agreements pursuant to which the plaintiff monoline financial guaranty insurer agreed to insure payments of principal and interest to certificateholders of RMBS securities sponsored by the defendant. (31 NY3d at 575.) As quoted by the Court of Appeals:

"Section 3.03 (c) of the Insurance Agreements provide[d] that Countrywide agrees to reimburse Ambac for 'charges, fees, costs and expenses . . . including reasonable attorneys' . . . fees and expenses, in connection with . . . the enforcement, defense or preservation of any rights in respect of any of the Operative Documents, including defending, monitoring or participating in any litigation or proceeding . . . relating to any of the Operative Documents.'"

¹⁰ As discussed above, the briefing on these motions originally addressed both Group 2 (indemnification language) and Group 3 (repurchase price definition) provisions. All Group 2 cases are either resolved or stayed, with the exception of HASC 2007-HE2, in which the motion is moot. This decision therefore does not address the Group 2 indemnification provisions. While Hooper and Ambac involved indemnification provisions, the parties made similar arguments concerning the application of those decisions to both the Group 2 and Group 3 provisions. (Group 3 Defs.' Opp. Memo at 5-8, 18; Defs.' Supp. Memo. at 1-4, 8-9; Pls.' Supp. Memo. at 1-4, 8-10.)

(Id., at 577 [ellipses in Ambac].)

As defendant points out, and plaintiff does not dispute, the Operative Documents referred to in this provision include the Pooling and Servicing Agreements for the RMBS trusts and other agreements between or with third parties. (Defs.' Supp. Memo., at 3 [NYSCEF Doc. No. 581]; Pls.' Supp. Memo., at 9 [NYSCEF Doc. No. 594]; Ambac Insurance and Indemnity Agreement, First Whereas Clause, Art. I; Definitions, at 3 [NYSCEF Doc. No. 583].) The provision broadly applies to attorney's fees and expenses in connection with enforcement of the Operative Documents and does not specify any first-party claim or remedy for which attorney's fees and expenses are reimbursable. As held by the Court of Appeals:

“Here, as in Hooper, the attorneys' fees provision ‘does not contain language clearly permitting plaintiff to recover from defendant the attorney[s]' fees incurred in a suit against defendant.’ Similarly, the subjects set forth in this provision are all ‘susceptible to third-party claims,’ and ‘[n]one are exclusively or unequivocally referable to claims between the parties themselves.’ Accordingly, there is no unmistakable promise to reimburse attorneys' fees in a case brought by Ambac against Countrywide.”

(Ambac, 31 NY3d at 584, quoting Hooper, 74 NY2d at 492 [brackets in original].)

The repurchase protocol in the Natixis 2007-HE2 PSA sets forth the remedies for claims against the Unaffiliated Seller in respect of breaches of representations and warranties regarding the mortgage loans. (Natixis 2007-HE2 PSA at § 2.03 [d].) The Repurchase Price definition is a component of that protocol and, as discussed above, expressly contemplates attorney's fees and expenses for enforcement of the remedies on behalf of the Trust and as against the Unaffiliated Seller, defendant Natixis. The Natixis 2007-HE2 repurchase protocol is thus by its very nature unequivocally referable to first-party claims.

The court rejects defendant's contention that “to the extent the First Department Cases can be read to support the Trustees' argument [i.e., claim for attorney's fees], they are at odds

with the Court of Appeals' holding in Ambac and not good law.” (Defs.’ Supp. Memo. at 3.) In DLJ, Morgan Stanley, and EquiFirst, the First Department made the finding required by Hooper, and reaffirmed in Ambac, that the parties had the “unmistakable intent” to provide for the reimbursement of enforcement expenses, including attorney’s fees, for RMBS actions brought under provisions in governing agreements that were materially similar to the Natixis 2007-HE2 provision. (See DLJ, 140 AD3d at 518 [repurchase price term]; Morgan Stanley, 152 AD3d at 421 [indemnification provision]; EquiFirst, 154 AD3d at 605 [repurchase price and indemnification provisions].) Notably, the Court of Appeals in Ambac affirmed the First Department’s holding that the materially different indemnification provision at issue there did not authorize attorney’s fees. Moreover, the First Department issued its decisions in Morgan Stanley and EquiFirst post-Ambac.

Defendant also argues that Hooper and Ambac preclude the claim for attorney’s fees and expenses because the Repurchase Price definition provides for recovery of “expenses,” “without the phrase ‘legal expenses’ or litigation-related terms such as ‘claim, demand, defense [and] assertion.’” (Group 3 Defs.’ Opp. Memo., at 19 [brackets in original] [NYSCEF Doc. No. 479].) This argument is also foreclosed by the Appellate Division holdings in DLJ and EquiFirst, quoted above, which expressly rejected this court’s decision adopting the same argument.¹¹

The court is unpersuaded by defendant’s remaining arguments that the Repurchase Price definition does not provide for recovery of attorney’s fees and expenses against Natixis, as

¹¹ This court previously accepted the argument that a provision must “expressly include attorney’s fees.” (HEAT 2006-8, 2014 NY Slip Op 32571[U], 2014 WL 4966133, *2 and HEAT 2007-2, 2014 NY Slip Op 32568[U], 2014 WL 4966127, *2 [“The parties’ intent to indemnify plaintiff for its attorney’s fees in litigating this action is not unmistakably clear from the terms of the parties’ agreements. . . . The agreement does not expressly include attorney’s fees among the covered expenses”] [citing Hooper, 74 NY2d, at 492]; Deutsche Bank Natl Trust Co., 2016 NY Slip Op 30967[U], *21, 2016 WL 3017760, *11 [same].) In reversing this court, the Appellate Division expressly rejected that holding. (DLJ, 140 AD3d at 519; EquiFirst, 154 AD3d at 605.)

Unaffiliated Seller, or for recovery of fees and expenses incurred by Computershare, in its capacity as Separate Securities Administrator. (Group 3 Defs.’ Opp. Memo., at 19-20.)

More particularly, the court rejects defendant’s contention that attorney’s fees and expenses are “strictly limited to expenses arising from enforcement of repurchase against an originator of the mortgage loans—not Natixis (as Unaffiliated Seller).” (Group 3 Defs.’ Opp. Memo., at 19.) Defendant ignores that the Repurchase Price definition provides that recoverable enforcement expenses “includ[e], without limitation, expenses arising out of any such party’s enforcement of the Originator’s repurchase obligation. . . .” (Natixis 2007-HE2 PSA, Art. I, Definitions, at 59 [emphasis supplied].) Defendant also ignores that the repurchase protocol expressly requires the Unaffiliated Seller to repurchase breaching loans in the event of the Originator’s failure to do so. (Id., § 2.03 [d], at 77.)

Defendant further contends that the Repurchase Price definition does not contemplate expenses incurred by Computershare, as Separate Securities Administrator, because the definition provides only for “expenses reasonably incurred” by enumerated entities—“the Servicer, the Trustee, the Custodian, the Securities Administrator, the Master Servicer, or the Unaffiliated Seller,” as those terms are defined by the PSA. (PSA, Art. I, Definitions, at 59; see Group 3 Defs.’ Opp. Memo., at 20.) Computershare in effect argues that its appointment as Separate Securities Administrator by Wells Fargo, and its litigation of this action in that capacity on behalf of the Trust, do not affect the attorney’s fees and expenses recoverable under the Repurchase Price definition. (Group 3 Pls.’ Reply Memo., at 5 [NYSCEF Doc. No. 501].) Computershare claims that “Wells Fargo remains the Trust’s Securities Administrator and, in that capacity, Wells Fargo has incurred and is incurring the costs of this litigation—including the fees and expenses of Computershare’s attorneys and experts.” (Id., citing a fee agreement

between Wells Fargo and Computershare [emphasis in original].) Defendant does not appear to dispute that Wells Fargo remains the Securities Administrator under the PSA. In fact, defendant asserts that “Computershare is already being reimbursed for its attorneys’ fees by Wells Fargo.” (Group 3 Defs.’ Opp. Memo., at 20.)¹²

The respective roles of the Separate Securities Administrator and Securities Administrator in this action present unique interpretive issues concerning the reimbursable attorney’s fees and expenses for this litigation under the Repurchase Price definition. The parties have not developed the record relevant to the application of the term “incurred” and, specifically, the record as to the determination as to which entity or entities have “incurred” attorney’s fees and expenses within the meaning of the Repurchase Price definition. Nor have the parties addressed whether Wells Fargo or Computershare or both entities are involved in the enforcement of remedies in this litigation “in respect of a breach or defect,” within the meaning of the Repurchase Price definition. For example, the parties have not submitted a factual record as to the extent to which Wells Fargo supervises the litigation; the entity or entities that are actually billed for attorney’s fees and expenses; and the entity or entities that have actually paid such fees and expenses.

The parties also have not briefed relevant legal issues, including whether recoverable fees and expenses are limited to those incurred by the entity acting as plaintiff on behalf of the Trust in this action; the impact of the fee agreement between Wells Fargo and Computershare; and the significance of the fact that any ultimate award of attorney’s fees and expenses would be paid with the other Repurchase Price damages into the Trust’s Collection Account and distributed

¹² Defendant argues that Computershare’s claim for attorney’s fees “would result in an unwarranted windfall for Computershare” because “Computershare is already being reimbursed for its attorneys’ fees by Wells Fargo pursuant to a fee arrangement.” (Group 3 Defs.’ Opp. Memo., at 20.) As discussed below, the impact of the fee sharing agreement on any award of fees and expenses must be addressed on a developed record at a later date.

through the Trust, rather than awarded directly to either Computershare or Wells Fargo. (Natixis 2007-HE2 PSA §§ 2.03 [g], 3.10.) Further, to the extent that defendant challenges Computershare's capacity, as Separate Securities Administrator, to enforce remedies under the PSA, that defense is not determinable on this motion.¹³

Resolution of the issues discussed above will be required prior to the final determination as to whether, or to what extent, attorney's fees and expenses are recoverable in this action. The court determines on this motion merely that the Repurchase Price definition in the Natixis 2007-HE2 PSA evidences the unmistakable intent of the contracting parties to provide for reimbursement of expenses, including attorney's fees, incurred "in respect of a breach or defect" in a Mortgage Loan for which the Repurchase Price remedy is sought, and that the claim for attorney's fees is maintainable at this juncture. The claim should accordingly be reinstated.

Failure to Notify Claims - Attorney's Fees and Expenses

In this action, plaintiff Computershare asserts both breach of representation and warranty claims and failure to notify claims.¹⁴ On this motion, plaintiff does not state whether it seeks attorney's fees and expenses, pursuant to the Repurchase Price definition, for both categories of claims. It is settled that the Repurchase Price remedy is available for timely breach of representation and warranty claims. The Appellate Division has held that failure to notify claims are "not claims 'respecting a warranty breach' subject to the 'sole remedy' clause of the governing agreements. . . ." (Bank of New York Mellon v WMC Mtge., 151 AD3d 72, 81 [1st

¹³ On a prior motion in Natixis 2007-HE2, the Appellate Division held that the capacity defense is not barred by law of the case. (Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Capital, Inc., 155 AD3d 482 [1st Dept 2018]). Discovery has since proceeded on the defense, which has not yet been determined on a fully developed record. Nothing in this decision should be construed as determining whether Computershare is the proper party to assert the claim for attorney's fees and expenses incurred in this action on behalf of the Trust.

¹⁴ Failure to notify claims are discussed at length in this court's prior decision in Federal Hous. Fin. Agency v Morgan Stanley ABS Capital I Inc. (59 Misc3d 754, 762-768 [Sup Ct, NY County 2018]).

Dept 2017]), and that a seller's failure to provide notice of material breaches it discovers in the loans "'states an independently breached contractual obligation, allowing a plaintiff to pursue separate damages.'" (Id., quoting Morgan Stanley Mtge. Loan Trust 2006-13ARX v Morgan Stanley Mtge. Capital Holdings LLC, 143 AD3d 1, 7 [1st Dept 2016].) In addressing the sufficiency of the pleading of damages for a failure to notify claim, this court has determined that such damages may be measured by reference to repurchase damages where the notification obligation was breached during the period in which the repurchase remedy was still available. (Federal Hous. Fin. Agency v Morgan Stanley ABS Capital I Inc. (59 Misc3d 754, 786 [Sup Ct, NY County 2018].) The court thus held that the complaint sufficiently alleged repurchase damages where the trustee sought damages for its alleged inability to exercise its repurchase remedy as a result of the defendant's breach of its obligation to notify the trustee of its discovery of breaches. (Id. at 783, 786.)¹⁵ This decision did not consider whether such damages could include attorney's fees incurred in the litigation of the failure to notify claim. The appellate courts have not yet addressed the measure of damages for failure to notify claims.¹⁶

This decision should not be read as reaching any determination as to whether the attorney's fees and expenses included in the Repurchase Price definition may include attorney's fees and expenses incurred in the litigation of failure to notify claims.

¹⁵ Although upholding the pleading of repurchase damages on the failure to notify claims, the decision noted that serious issues as to the causation of such damages must ultimately be determined by the trier of fact. (Federal Hous. Fin. Agency, 59 Misc3d at 787-788.)

¹⁶ The Appellate Division cases addressing fee shifting provisions in RMBS put-back actions did not address whether the provisions at issue provided for attorney's fees and expenses incurred on failure to notify claims. In DLJ (140 AD3d at 518), Morgan Stanley (152 AD3d at 422), and EquiFirst (154 AD3d at 605), the plaintiffs only asserted breach of representation and warranty claims. In Matter of Part 60 Put-Back Litigation (169 AD 3d at 222), the plaintiff maintained breach of representation and warranty and failure to notify claims. The decision did not, however, address the availability of attorney's fees and expenses for the separate categories of claims.

ORDER

It is hereby ORDERED that the motion of plaintiff Deutsche Bank National Trust Company, as Trustee of HASC 2007-HE2 (Mot. Seq. Nos. 7, 8), is denied as moot; and it is further

ORDERED that the opposition of defendants HSBC Bank USA, N.A., Decision One Mortgage Company, LLC, and HSBC Finance Corporation is deemed a motion to renew the prior motion to dismiss (Index No. 651627/2013 Mot. Seq. No. 4) and is denied as moot; and it is further

ORDERED that, in light of this decision, the parties in HASC 2007-HE2 shall confer as to whether any supplemental briefing is sought as to the branch of a separate pending motion in HASC 2007-HE2 to dismiss the attorney's fees claims (Index No. 651627/2013, Mot Seq. No. 7). If supplemental briefing is sought by any party, the parties shall promptly request a conference. If supplemental briefing is not sought, the parties shall promptly so advise the court by joint letter; and it is further

ORDERED that the motion of plaintiff Computershare Trust Company, National Association, as Separate Securities Administrator of Natixis 2007-HE2, is granted to the extent of reinstating its claims for attorney's fees and expenses.

This constitutes the decision and order of the court.

May 25, 2020

DATE


MARCY S. FRIEDMAN, J.S.C.