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COURT OF APPEALS

STATE OF NEW YORK

IKB INTERNATIONAL,

Respondent,

-against-

No. 51

WELLS FARGO,

Appellant.

33-----

20 Eagle Street
Albany, New York
May 18, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Joy Rako
Official Court Transcriber



1 CHIEF JUDGE WILSON: Good afternoon, everyone.
2 The first case on the docket is IKB International v. Wells
3 Fargo.

4 Counsel?

5 MR. INGBER: Thank you, Your Honor.

6 Good afternoon, and may it please the court,
7 Matthew Ingber from Mayer Brown for the Bank of New York
8 Mellon. I'll be arguing today on behalf of all the
9 appellants, and with the court's permission, I'd like to
10 reserve two minutes for rebuttal.

11 CHIEF JUDGE WILSON: Yes, sir.

12 MR. INGBER: Thank you. In its divided ruling,
13 the First Department ignored the plain language of the
14 contracts, the carefully designed interplay between
15 unambiguous contract terms and the overall structure of the
16 pooling and servicing agreements.

17 Its ruling on Section 2.06 would collapse the
18 well settled distinction between the trustee's role before
19 an event of default and after an event of default, and it
20 would transform every one of the trustee's rights into
21 duties without providing any guidance to the trustee about
22 when, how, or under what circumstances to act. It would
23 violate the rule that the trustee's duties are only those
24 that are specifically set forth in the agreements.

25 JUDGE SINGAS: Well, what specific rights were

1 set out in Article 2 - - - 2.06?

2 MR. INGBER: So Article 2.06, or Section 2.06,
3 refers to "the rights referred to above".

4 JUDGE SINGAS: Yeah, which rights are those?

5 MR. INGBER: "The rights referred to above" are
6 all the rights that the depositor conveys to the trustee.
7 That's in Section 2.01. There's the consec - - - Article
8 2, in general, is the conveyance of the trust fund to the
9 trustee from the depositor and the acceptance of that trust
10 fund by the trustee from the depositor. That includes the
11 rights that the depositor holds in the mortgage loans by
12 virtue of its ownership of the mortgage loans, and then the
13 trustee, as the holder of the trust fund, takes on all of
14 those rights. It has all of those rights that are conveyed
15 by the depositor and referred to in Section 2.01 of the
16 PSAs.

17 JUDGE SINGAS: And do you think that's spelled
18 out?

19 MR. INGBER: I think "rights referred to above"
20 would refer to all of the rights that precede Section 2.06.
21 So that's 2.01. It's 2.02. It's 2.03. It - - - as I
22 said, it could include, it does include, all of the rights
23 that the trustee has by virtue of being the owner of the
24 mortgage loans.

25 CHIEF JUDGE WILSON: And so - - - and so it



1 includes the rights to enforce the note?

2 MR. INGBER: It includes the right to enforce,
3 yes. It includes the right to receive principal and
4 interest. It includes the right to collect principal and
5 interest. It includes the right to enforce repurchase
6 remedies. But it's a right. It's not a duty.

7 CHIEF JUDGE WILSON: So it says, though,
8 "exercise the rights". So what is the difference between
9 exercising - - - an obligation to the exercise the rights,
10 or an agreement to exercise the rights, and holding a duty?

11 MR. INGBER: And I'm sorry?

12 CHIEF JUDGE WILSON: Holding a duty.

13 MR. INGBER: Holding - - -

14 CHIEF JUDGE WILSON: Let's - - - let's say that a
15 duty and a right are different. Let's accept that - - -

16 MR. INGBER: Yes.

17 CHIEF JUDGE WILSON: - - - for the moment. But
18 this doesn't just say that the trustee has the rights. It
19 says it agrees to exercise the rights.

20 MR. INGBER: So "exercise" does important work
21 here, but the work is that 2.06 makes clear that when the
22 trustee is exercising rights, it's exercising rights not
23 for its own benefit, but for the benefit of
24 certificateholders. It doesn't just say that the trustee
25 shall hold the trust fund for the benefit of

1 certificateholders.

2 CHIEF JUDGE WILSON: Um-hum.

3 MR. INGBER: That's an important part of Section
4 2.06, and it embodies the trust law that says as the owner
5 of the trust fund, the trust can't - - - the trustee can't
6 put its own interests ahead of the interests of
7 certificateholders.

8 But it goes a step further, and it has to go a
9 step further. It says if the trustee is exercising rights,
10 not just holding the trust assets, but exercising rights,
11 which it can do but is not obligated to do, it can't put
12 its own interests ahead of the interests of
13 certificateholders.

14 CHIEF JUDGE WILSON: Well, when you say it can do
15 but it doesn't - - - doesn't have to do, so suppose you
16 have a winning lottery ticket, and you hand it to me and I
17 say, I agree to exercise your rights under the ticket,
18 don't you think that obligates me to turn the ticket in?

19 MR. INGBER: In this - - - in this Section 2.06,
20 the trustee is agreeing to do something for a particular
21 purpose. It's not always agreeing to do the thing. It's
22 not transforming what is otherwise a right into a duty.
23 And we know that, not just because of those plain words in
24 isolation, but also how those plain words intersect with
25 the rest of the sentence in 2.06 and how those - - - how

1 Section 2.06 intersects with other provisions in the PSA.

2 So for example, 2.06 says that "The Trustee
3 agrees to hold the Trust Fund ... for the benefit of"
4 certificateholders and agrees to exercise the rights for
5 the benefit of certificateholders, and in the very same
6 sentence, it says it agrees "to perform the duties set
7 forth in this Agreement" according to its terms. So in the
8 very same sentence, the drafters are using the word
9 "rights" and - - - and are - - - and they're using the word
10 "duties". This is not a logical way to draft this sentence
11 if the goal all along was to transform rights into duties.
12 So within the context of 2.06 itself, we can't conflate
13 rights into duties. We can't transform what is a right.

14 CHIEF JUDGE WILSON: So occasionally some of
15 those mortgages go into default - - - maybe more than
16 occasionally, right? And - - -

17 MR. INGBER: Right.

18 CHIEF JUDGE WILSON: - - - you hold the
19 mortgages. You're the - - - the noteholders have no idea
20 which ones have gone into default, right?

21 MR. INGBER: No. They know what goes into
22 default - - - in - - - into default. The trustee, on a - -
23 - on a monthly basis, issues remittance reports, and they
24 publish remittance reports on a website.

25 CHIEF JUDGE WILSON: Okay. But that's - - -



1 that's information that you have first and you're giving to
2 them, right?

3 MR. INGBER: It's - - - yes.

4 CHIEF JUDGE WILSON: So let me - - - right.

5 MR. INGBER: It is provided to the trustee by the
6 servicer, typically.

7 CHIEF JUDGE WILSON: Let me get - - - let me get
8 to the point. We've held that you have to provide - - -
9 that is, if the mortgage is in default, you've got to
10 provide that on - - - on a mortgage-by-mortgage basis,
11 right?

12 MR. INGBER: That was the DLJ case.

13 CHIEF JUDGE WILSON: Right.

14 MR. INGBER: Yes.

15 CHIEF JUDGE WILSON: So how would the noteholders
16 do that? Can they do that?

17 MR. INGBER: Sure. There's a mechanism in the
18 pooling and servicing agreements, Section 8.02(iv), that
19 allows certificateholders with the requisite percentage of
20 voting rights in the trust to direct the trustee - - -

21 CHIEF JUDGE WILSON: Twenty- - - - twenty-five
22 percent?

23 MR. INGBER: - - - to take action. Yes. That's
24 the - - -

25 CHIEF JUDGE WILSON: Twenty-five percent?

1 MR. INGBER: That's the mechanism - - -

2 CHIEF JUDGE WILSON: So what happens if only, you
3 know, twenty percent want to do that? The trustee has no
4 obligation to do anything?

5 MR. INGBER: They don't have an obligation to.
6 They certainly have the right to do that, and they can
7 exercise that right. But they don't have the obligation to
8 do that. And it makes sense to give the certificateholders
9 the decision-making over - - -

10 CHIEF JUDGE WILSON: Where I - - - where I keep
11 getting struck - - - stuck is exer - - - "agree to exercise
12 the rights". That's where I keep getting stuck.

13 MR. INGBER: Agree to exercise the rights for a
14 particular purpose. It would - - - when we think about the
15 other provisions of the PSA along with the language in
16 Section 2.06, it would make no sense to transform those
17 rights into duties.

18 For example, Section 8.01, in a post-event of
19 default world, the trustee shall exercise the rights that a
20 prudent person would exercise. If those rights were duties
21 all along, it would make no sense for the drafters to say
22 in a post-event of default world, the trustee now has
23 discretion to decide whether to exercise rights. That
24 would make no sense.

25 8.02(iv), we talked about the direction mechanism

1 where we put in the hands of those with the - - - the
2 sophisticated investors with economic stake in the - - - in
3 the transaction - - - we put in their hands the right to
4 instruct the trustee to exercise a right. That would make
5 no sense if those rights were already duties. It also
6 makes no sense to impose what could be an onerous duty to
7 enforce in a section entitled "Execution and Delivery of
8 Certificates".

9 It would make more sense to impose that duty, if
10 a duty to enforce existed, in the section of the pooling
11 and servicing agreement that actually refers to a
12 repurchase protocol, refers to the idea of a party
13 discovering a breach and giving notice of that breach to
14 the repurchase obligors.

15 But that's not what - - - that's not what 2.06
16 does. It doesn't say - - - it doesn't use the word
17 "enforce". It doesn't use the word "repurchase". It
18 doesn't specifically set forth any duty on the trustee. It
19 doesn't give the trustee any guidance in determining
20 whether - - - in determining how or under what
21 circumstances it should exercise a right. I think under
22 IKB's interpretation, it doesn't even give the trustee
23 discretion to consider whether to exercise a right. It
24 just has to flat out, according to their interpretation,
25 exercise rights, convert those rights into duties.

1 It would also be inconsistent with - - - and I
2 see my time is up. But it would be inconsistent with
3 Section 8.02(x) of the pooling and servicing agreements,
4 which say that "The rights of the Trustee to perform any
5 discretionary act enumerated in this agreement shall not be
6 construed as a duty." The drafters understood the
7 distinction between rights and duties. They understood the
8 distinction between the trustee's pre-event of default
9 role, which is limited to ministerial functions, to those
10 duties that are specifically set forth in the agreement,
11 and the trustee's post-event of default world - - -
12 responsibility in a post-event of default world where they
13 are obligated to now consider whether they should exercise
14 rights. That's not even a mandate to exercise rights.

15 In a post-event of default world, when the
16 trustee's responsibilities are at their peak, what the
17 pooling and servicing agreements say is that the trustee
18 shall exercise those rights that a prudent person would
19 exercise. So it gives the trustee discretion to think
20 about which of these rights it should exercise. It is not
21 a mandate to exercise those rights. In other words, it is
22 not a mandated conversion of rights into duties like IKB's
23 interpretation of 2.06 would be.

24 I see I'm out of time. There's much more I could
25 say.



1 JUDGE RIVERA: Let me follow up. Let me - - -
2 let me just ask, then. Under your interpretation, does
3 that - - - somewhat along these same lines, under your
4 interpretation, does that mean that it - - - the trustee
5 could not exercise those rights under 2.06?

6 MR. INGBER: No. The trustee can exercise those
7 rights. And if the trustee is exercising those rights, it
8 has to pause and say, in the first instance, am I doing
9 this for the benefit of certificateholders or am I doing
10 this to benefit myself? It could be - - -

11 JUDGE RIVERA: So it's not obligatory? It's
12 purely discretionary? Is that - - - does that impart what
13 you're saying is the import of this language?

14 MR. INGBER: Well, under their interpretation of
15 2.06, there actually is no discretion. The trustee is just
16 supposed - - -

17 JUDGE RIVERA: Yes, I got that point.

18 MR. INGBER: - - - to exercise rights.

19 JUDGE RIVERA: Yes.

20 MR. INGBER: But in what we think is the - - - is
21 the - - - the - - - the proper interpretation of 2.06 and
22 the PSAs more generally, the trustee can exercise rights.
23 It's not obligated to. It may exercise rights. And if it
24 does exercise those rights, it can't put its own interests
25 ahead of the interests of certificateholders. And so - - -

1 JUDGE RIVERA: Does that mean it could not choose
2 to act if it was contrary to what the majority of
3 certificateholders wanted?

4 MR. INGBER: So it says that it has to consider -
5 - -

6 JUDGE RIVERA: I know there's a different
7 provision about twenty-five percent, but - - -

8 MR. INGBER: Yeah.

9 JUDGE RIVERA: - - - that's not what I mean here.

10 MR. INGBER: And that's something - - - it has to
11 take into account what is in the best interest of present
12 and future certificateholders. That - - - that doesn't
13 mean that every single - - - doesn't necessarily mean that
14 every single certificateholder will agree with the
15 trustee's exercise of this right. They are different - - -
16 certificateholders are placed at different stacks on the
17 waterfall, as - - - as the court knows.

18 But the import of 2.06, we believe, is to make
19 clear, at a time when the trustee, as the owner of the
20 fund, is now distributing certificates to
21 certificateholders - - - that - - - that's what 2.06 starts
22 out by saying - - - you're distributing these certificates
23 to certificateholders; you are still the holder of the
24 trust fund.

25 JUDGE RIVERA: Um-hum.



1 MR. INGBER: You can exercise rights, but when
2 you do so, you have to do so not for your own benefit but
3 for the benefit of certificateholders.

4 So there could be a right, for example, to seek
5 mortgage loans. You could get a direction to exercise a
6 right, a direction from certificateholders to exercise a
7 right to seek mortgage loans from the repurchase obligor to
8 investigate whether there were breaches of representations
9 and warranties. But if that - - - if the trustee knows
10 that the certificateholder is giving that direction not to
11 benefit the certificateholders as a - - - as a whole, but
12 to benefit itself, to pursue some separate fraud lawsuit,
13 an individual direct action against the seller or the
14 sponsor, that's not for the benefit of certificateholders
15 as a whole.

16 If the trustee is carrying out a right because it
17 wants to line its own pockets at the expense of
18 certificateholders, that's not permissible. And that is
19 the import of 2.06. It is not a duty-imposing provision,
20 certainly not a duty-imposing provision that is - - - that
21 mandates that the trustee enforce repurchase remedies that
22 may exist.

23 CHIEF JUDGE WILSON: Thank you.

24 MR. INGBER: Thank you.

25 MR. MCFERRIN-CLANCY: May it please the court,



1 John McFerrin-Clancy for respondents, the IKB entities.

2 Just picking up on the questions to defendant's
3 counsel, I think part of the problem with defendant's
4 reading of this text in 2.06 is that they conflate rights
5 and duties, but they don't really seem to have it quite
6 correct. The rights referred to, they are the rights of
7 the trust. The duties are the duties of the trustee, all
8 right? That's really, I think, the key distinction here.

9 So when you read this, yes, as the - - - as the
10 section says, the trustee has many duties, and there are
11 various rights in - - - throughout the agreement, rights of
12 the trust. And the question is when and if the trustee has
13 an obligation to exercise particular rights.

14 Here, notably, it does - - - this Section 2.06
15 doesn't speak to every right in the - - - of the trust in
16 the PSA or in - - - with regard to other agreements with
17 other parties. It only says "the rights referred to
18 above". So with regard to those rights of the trust, which
19 counsel has admitted includes repurchase rights, the
20 trustee agrees, all right, as has been pointed out, words
21 of - - - words of commitment to exercise those rights.

22 And so it seems clear, just from the text alone,
23 that the intendment of this section is to ensure that when
24 repurchase is called for, that the trustee will do so. Nor
25 - - -

1 JUDGE GARCIA: Counsel, I'm sorry. Just a very
2 basic question, if you could help me with. When is the
3 repurchase right, duty, whatever it is - - - when is that
4 triggered?

5 MR. MCFERRIN-CLANCY: It was litigated below,
6 actually, in the First Department - - - in the decision
7 below, and the conclusion in the First Department - - -

8 JUDGE GARCIA: You don't need a default on the
9 mortgage. I mean, I assume there's a number of mortgages
10 that are going to default that, you know, the reps and
11 warranties weren't - - -

12 MR. MCFERRIN-CLANCY: Well - - -

13 JUDGE GARCIA: - - - bad, you know.

14 MR. MCFERRIN-CLANCY: Well, with the mortgage,
15 you are - - - in - - - in the Section 2.02 scenario, which
16 is mortgage file defects, there's a schedule where, upon
17 receipt, either the trustee or someone acting on the behalf
18 of custodian actually inventories what's in the mortgage
19 files, generates particular reports, and then sends them
20 back, and it generates a demand to cure based on that. How
21 soon after - - -

22 JUDGE GARCIA: But based on - - - so what would
23 they - - - and I'm just - - -

24 MR. MCFERRIN-CLANCY: Sure.

25 JUDGE GARCIA: - - - curious. What would they

1 find in the file that would trigger the repurchase
2 protocol?

3 MR. MCFERRIN-CLANCY: Things they wouldn't find
4 like an allonge, right, or the proper assignment - - -

5 JUDGE GARCIA: I see.

6 MR. MCFERRIN-CLANCY: - - - or the note, all
7 right? Certain servicing - - - files necessary for the
8 servicing of the loan. There's a list. There's a schedule
9 at the end of most of the PSAs that - - -

10 JUDGE GARCIA: Thank you.

11 MR. MCFERRIN-CLANCY: - - - sets out with it.
12 And so it's a very - - - it's a checklist. And after that,
13 as the First Department's most recently held, there - - -
14 the trustee has a reasonable time to bring a suit with
15 regard to nonconforming loans.

16 To pick up on some of defendant's other points,
17 there's no conflict between this idea that the rights in
18 Section - - - in Article 2, which are the only rights we're
19 talking about in 2.06 because it's only what's above, right
20 - - - it's 2.01, 2.02, 2.03 - - - are inconsistent with
21 other portions of the agreement.

22 For example, in Sec - - - in Section - - -
23 Article 8, Section 8.01, where it talks about the prudent
24 person duties, if you actually read the full text of the
25 section, of that sentence, it's, you know, upon events of

1 default, "the duties include" and "a prudent person duty
2 will be imposed", right? So in other words, that - - -
3 what that sentence is saying is not that there aren't
4 duties beforehand, including duties for repurchase - - -

5 CHIEF JUDGE WILSON: Well, are the duties
6 beforehand less than a prudent person would have?

7 MR. MCFERRIN-CLANCY: It turned on a - - - by and
8 - - - refer rep and warranties where they turn on awareness
9 as Your Honor no doubt will recall, this court's prior
10 holdings and in In Commerce Bank in the First Department,
11 the holding was you must show loan-by-loan knowledge that
12 the loans are nonconforming in order to have a pre-EOD
13 claim. So in other words, if we wanted to - - - we were -
14 - - as we - - - for our pre-EOD claims, we'll have to show
15 that the trustee was on notice on some PSAs or actually
16 aware on other PSAs that the loans were nonconforming. So
17 you got to get into it one by one.

18 In mortgage file defects, that's easier because
19 there's a schedule generated by the trust - - - by the
20 trustee, so the trustee's well aware of all of the schedule
21 defects.

22 So the standard is higher, all right? The proof
23 is different when the - - - when an EOD has occurred, but
24 it doesn't change the fact that there's a pre-OED duty
25 expressly set forth here.

1 JUDGE RIVERA: So do you agree with his position
2 regarding your interpretation - - - and maybe you've
3 answered this and I just missed it, so my apologies - - -
4 that that would mean that it is a mandatory exercise?
5 There's no discretion regardless of the fact that it may
6 actually be detrimental to the majority of
7 certificateholders?

8 MR. MCFERRIN-CLANCY: Well, it's difficult to see
9 in the first instance - - - well, short answer is yes.
10 There is no discretion here, all right? And - - - and
11 there - - - the first - - - it's hard to see how forcing a
12 - - - a seller, the responsible party, to put money back
13 into the trust for a nonconforming loan hurts any of the
14 share - - - any of the certificateholders. It should
15 benefit most - - - those who are most senior, which is
16 appropriate, and then depending on how many loans get
17 repurchased, that - - - what - - - that money will flow
18 down the waterfall to the benefit of the subordinate
19 certificateholders.

20 But also, to come back to a point, and I think
21 this is - - - this is why, you know, we put some emphasis
22 on the U.S. Bank v. DLJ decision from this court in our
23 brief. And I think it's really appropriate as to
24 understanding how this works practically, all right?

25 I mean, for example, so I think the language



1 here, I say on its face, calls for nondiscretionary
2 exercise of repurchase rights, the rights it set forth
3 above in Article 2. But the kind - - - you know, but as
4 this court said in DLJ, you also read the text in the
5 context of its purpose. These are residential mortgage-
6 backed securities. The mortgages are everything, right?

7 So the idea that someone's going to invest
8 millions - - - tens of millions of dollars in certificates
9 backed by mortgages without, you know - - - where the key
10 thing is, do they have the mortgage file? Can they
11 actually go out and enforce mortgages and foreclosures?
12 Can they - - - you know, do the mortgages actually look
13 like they're supposed to? Do they have the collateral
14 characteristics and risk profile that was identified in the
15 reps and warranties? The idea that, oh, well, if - - -

16 JUDGE GARCIA: Counsel, isn't that position in
17 your expressly set forth argument somewhat, to say the
18 least, undermined by the other agreements that do expressly
19 provide for this duty?

20 MR. MCFERRIN-CLANCY: I don't think so, Your
21 Honor, for a couple reasons. First, these are, you know,
22 the classic situation is, you know, you're all in one big
23 transaction or related transactions, and different
24 agreements say different things, and the court reads them
25 together and harmonizes them.

1 JUDGE GARCIA: No, but I think - - -

2 MR. MCFERRIN-CLANCY: But - - -

3 JUDGE GARCIA: - - - we've done more than that in
4 these cases, right? We've looked to other agreements to
5 see what - - - I mean, these are not individual little
6 investors. I mean, these are big institutions who are
7 signing these agreements, so - - -

8 MR. MCFERRIN-CLANCY: So I mean - - -

9 JUDGE GARCIA: - - - you know in another
10 agreement you have this. You know in this agreement you
11 don't have this.

12 MR. MCFERRIN-CLANCY: I think, Your Honor, if - -
13 - I'm sorry. I didn't mean to speak over you.

14 JUDGE GARCIA: No, no, no. Please.

15 MR. MCFERRIN-CLANCY: I think, Your Honor, if - -
16 - you know, we're talking about ninety-five trusts here. I
17 think if ninety-four of them said one - - - had - - - had
18 expressed this right in one way and we're talking about one
19 trust that's an out - - - that writes it a totally
20 different way, I think that would be a more - - - a more
21 powerful argument for the defendants to say, hey, this is
22 the one time where they said, hey, you know, we really want
23 to do it differently.

24 But as we lay on our brief, I mean, about a
25 quarter - - - there's three or four different ways that

1 different lawyers in different transactions pulling down
2 different - - - you know, different forms from their office
3 systems have articulated what is essentially the same
4 right. And so I think that the notion that, well, yes, in
5 twenty-odd deals here they did it this way; in thirty deals
6 they did it that way - - - I don't think really tells us -
7 - - I don't think it informs that much what this text
8 means.

9 JUDGE GARCIA: Do you know how many had that
10 provision here?

11 MR. MCFERRIN-CLANCY: The provision at issue
12 today?

13 JUDGE GARCIA: The provision that we were just
14 talking about that gives the specific - - - that puts the
15 specific duty on the trustee to act the way you think they
16 ought to act.

17 MR. MCFERRIN-CLANCY: Well, I think there are
18 twenty-five that are - - - that have 2.06 like this.

19 JUDGE GARCIA: Um-hum.

20 MR. MCFERRIN-CLANCY: And then at the beginning
21 of our brief, I think there are about thirty that use the
22 phrase "shall enforce". I believe it's about thirty. I
23 don't have the - - - I'm sorry. I should have memorized
24 those figures from there. But it's in the begin - - - it's
25 in the - - - it's early in on our brief. And then there's

1 another iteration for, I think, another twenty-five - - -
2 another twenty-six or so that have yet a different phrasing
3 in the relevant sections of Article 2.

4 CHIEF JUDGE WILSON: So what you're sort of
5 saying is that one law firm might prefer "shall enforce"
6 and another might prefer "agrees to enforce" and that you
7 shouldn't infer a difference from that?

8 MR. MCFERRIN-CLANCY: Yes, Your Honor. Exactly.

9 JUDGE GARCIA: But it's very different import of
10 the language, right?

11 MR. MCFERRIN-CLANCY: Well, I - - -

12 JUDGE GARCIA: It's not - - - I mean, it seems a
13 bit more than a preference to me. I mean, it seems like a
14 legal implication.

15 MR. MCFERRIN-CLANCY: Well, I think, Your Honor,
16 if you get - - - I think the starting point still needs to
17 be, what does this text say. And I still think that when
18 you say that I agree to exercise the rights above, then, in
19 fact, you are bound to exercise the rights above.

20 There are other ways to say it and, believe me -
21 - - and as you see from other arguments that arise here,
22 their argument under 3.05, all right, where they talk about
23 how there's a provision, Section 3.05 that says even post-
24 EOD, when the trustee has to take over the role of the
25 servicer, it does - - - it - - - it's not required to - - -



1 excuse me - - - it's not required to repurchase - - - make
2 repurchases. But that's - - - in fact, when you look at
3 that, that's - - - that's a clause that really relates to
4 situations where the servicer is also the responsible
5 party. And it's just making clear that in those cases, the
6 trustee doesn't have to actually repurchase loans even
7 though it's otherwise stepping into the servicer's shoes.

8 Now, that's not the case in this trust, all
9 right? And so, you know, I think it was Justice Borrok in
10 the Finkelstein case who noted that, you know, these are -
11 - - are cut and paste a lot of times, the way the corporate
12 lawyers put them together, so sometimes you see phrases
13 here or there that don't necessarily jive. So again, I
14 don't think that that - - - you need to overread how these
15 things are put together.

16 JUDGE RIVERA: Your red light is on. Do you want
17 to address the no-action clause?

18 MR. MCFERRIN-CLANCY: Yes. Thank you very much,
19 Your Honor. Very briefly.

20 Everyone - - - every court to consider the issue,
21 including this one, has stated it makes - - - it is absurd
22 to ask a trustee to sue itself. They argue - - - they make
23 a severability argument and say, well, but then you have
24 the twenty-five percent piece of the - - - of the no-action
25 clause. The problem with that, they read the twenty-five

1 percent to say, well, sure, you - - - it's absurd for you
2 to do it, but if you have twenty-five percent of the
3 holders approve of - - - give you permission, then you can
4 move forward and bring your suit. It's not what the clause
5 says, all right?

6 When you read it, it says that the twenty-five
7 percent will also make the same demand. In other words,
8 there's nothing to sever here. What the - - - what the
9 clause requires is that a certificateholder make a demand
10 and twenty-five percent of the certificateholders also make
11 that demand. So it's just as absurd to demand of the
12 twenty-five percent as it is to demand it from a single
13 certificateholder. So I - - - I - - - the argument there
14 is it just doesn't work as a matter of text.

15 And I will say that, you know, for fourteen
16 years, defendants argued that the clause - - - that the
17 language in Quadrant is dicta, where this court notes that
18 no-action clauses don't apply to claims against the
19 trustee. I don't think it's dicta. I think it's a part of
20 the - - - of the - - - of a careful, reasoned argument.

21 But even if it is, every court to consider it
22 over the last nine years has held the same way. Parties
23 filing suit have relied on that. And so the idea that now,
24 even though I think the text is completely against
25 defendants, that suddenly we're going to - - - that's going

1 to be reversed? I mean, I think that's the kind of
2 precedent with - - - with tremendous reliance where the
3 court has to be particularly persuaded that - - - that the
4 defendants were correct to overturn it.

5 May I use fifteen seconds on - - -

6 CHIEF JUDGE WILSON: Sure.

7 MR. MCFERRIN-CLANCY: - - - on the last issue in
8 the case?

9 With regard to whether or not our independent
10 tort claims can be maintained, defendant's put a lot of - -
11 - a lot of reliance on the Dormitory Authority case. That
12 case is very different. Factually, it's about whether - -
13 - it's about an architect being sued for a building that
14 collapsed. And the parallel claim there - - - one was
15 breach of contract. The other was negligence for failing
16 to meet professional standards. So it really was just the
17 same violations, just recast.

18 Here, we talk about breach of fiduciary and
19 conflict of interest - - - and we note that there are
20 discretionary things, as counsel points out. A lot of
21 things in - - - in the PSA are discretionary: whether to
22 send notices, whether to replace the servicer. And if, for
23 example, a servicer ought to have been replaced but because
24 of a conflict of interest, the trustee decided not to
25 replace the servicer, that could generate additional



1 damages: losses of principal, interest and other types of
2 damages. So we think it's truly has a separate basis
3 legally and generates, you know, cognizably separate
4 damages.

5 Thank you, Your Honors.

6 CHIEF JUDGE WILSON: Thank you.

7 MR. INGBER: I have three points. First, Mr.
8 McFerrin-Clancy says that "awareness" is the watch word in
9 Section 2.06. The word "awareness" doesn't show up in
10 2.06, and this proves our point. It doesn't show when,
11 how, or under what circumstances there is a supposed duty
12 to enforce.

13 If we compare 2.06 to provisions that actually
14 impose a duty, it's pretty stark, the difference between a
15 duty-imposing provision and one that's not. Section 2.02,
16 "The Trustee agrees to deliver at 10 a.m. on the closing
17 date initial certifications." Ninety days after closing
18 shall deliver to these specific parties a final
19 certification.

20 Second point, Judge Garcia, the "shall enforce
21 trust" established two points. Number one, the drafters
22 knew how and where to impose a duty to enforce if that was
23 the intention. They placed the "shall enforce" language in
24 the section of the pooling and servicing agreements that
25 refers to repurchase, that has a protocol for giving notice

1 if there is a material - - - I'm sorry - - - a breach of a
2 rep and warranty that has a material and adverse effect on
3 certificateholders. That makes sense. It also makes
4 clear, we think, that 2.06 can't mean what IKB says it
5 means because it would be redundant of the "shall enforce"
6 language. Those "shall enforce" trusts have both 2.06 and
7 the "shall enforce" language.

8 And then with respect to the no-action clause,
9 the condition that twenty-five percent - - - or
10 certificateholders with twenty-five percent of the voting
11 rights support the action, in this case an action against
12 the trustee, makes sense and is supported by the contract
13 for a variety of reasons.

14 Number one, applying that condition gives meaning
15 to the language in the no-action clause that
16 certificateholders covenant to one another - - - each
17 certificateholder covenants to the other and to the trustee
18 that if they are seeking to enforce a right under the
19 contract, they're doing it for the benefit of all
20 certificateholders. Just as the trustee, if it's
21 exercising a right, has to do so, not for its own benefit
22 but for the benefit of certificateholders as a whole, so
23 too with respect to certificateholders. So it gives
24 meaning to that language.

25 Applying that condition gives meaning to other



1 provisions of the pooling and servicing agreement. The
2 twenty-five percent direction mechanism in Section
3 8.02(iv), it - - - it acknowledges the collective action
4 concept in the PSAs. Twenty-five percent need to give
5 notice to a - - -

6 JUDGE GARCIA: Counsel, let me ask this. In - -
7 - in an ordinary case where you're asking the trustee to
8 sue a third party and the clause kicks in and there's a
9 lawsuit and it's unsuccessful, the costs come out of the
10 trust, right?

11 MR. INGBER: If the trustee is directed to pursue
12 a claim on behalf of the trust, yes, that is a cost to the
13 trust.

14 JUDGE GARCIA: In a case like this where this
15 party sues the trustee, who pays for the cost of the suit
16 if they lose? The trust or the party bringing the suit?

17 MR. INGBER: Well, it depends on the language of
18 the pooling and servicing agreement, and specifically the
19 indemnity language, but in many of these trusts, the
20 trustee is entitled to indemnity, absent willful misconduct
21 or bad faith. And that's the cost to the
22 certificateholders. They are bearing the cost of this
23 litigation and not benefiting from any of the recovery.

24 JUDGE GARCIA: This case today, they're bearing
25 the cost of this - - - this litigation here today?

1 MR. INGBER: The certificateholders - - - the
2 trustees are - - - yes, are entitled to get indemnity from
3 either the trust or in some cases from the servicer, who is
4 then entitled to reimbursement from the trust. So the
5 answer is yes, certificateholders are bearing the expense
6 of this type of litigation, and they're not benefiting from
7 the recovery. And - - -

8 CHIEF JUDGE WILSON: Why are they - - -

9 MR. INGBER: - - - it's not just - - -

10 CHIEF JUDGE WILSON: If they win, why aren't they
11 benefiting from the recovery?

12 MR. INGBER: Because that - - - the damages, if
13 any damages are to be paid - - - and I don't think that has
14 happened in any of these cases - - - but it would go to IKB
15 and only IKB.

16 The other harm to certificateholders is that you
17 have a single certificateholder taking positions on the
18 role of the trustee that other certificateholders might not
19 agree with, and so applying the condition in a case like
20 this serves the policy goals behind no-action clauses more
21 generally, and one of those goals is to give
22 certificateholders a significant say in litigation that
23 will affect their rights and potentially their recovery.

24 JUDGE GARCIA: Just so I'm clear, Counsel, if you
25 were to prevail in this suit, you can recover your costs

1 and get indemnified for that, related things, from the
2 trust?

3 MR. INGBER: It depends on each specific pooling
4 and servicing agreement or indenture, but there are many
5 that provide - - - we - - - on page 25 of our reply brief
6 we cite to a pooling and servicing agreement, 8.05 of the
7 pooling and servicing agreement that says the trustee shall
8 be entitled to indemnity from the trust fund. There's
9 carve-outs for willful misconduct and bad faith, but yes,
10 that's what the contracts say, and that's the contract - -
11 -

12 JUDGE RIVERA: Well - - - well, what - - - what -
13 - -

14 MR. INGBER: - - - that these sophisticated
15 investors - - -

16 JUDGE RIVERA: So then just following up on that
17 carve-out, if indeed the basis of the claim is bad faith or
18 professional misconduct or some other breach that might fit
19 within that language, then - - - there is no
20 indemnification for the trustee, right?

21 MR. INGBER: If - - - if - - -

22 JUDGE RIVERA: If I'm going to get indemnified
23 for defending their bad acts - - - if a court concludes
24 there were bad acts?

25 MR. INGBER: Sure. If a court concludes that



1 there were bad acts that fall into the carve-outs - - -

2 JUDGE RIVERA: Yeah.

3 MR. INGBER: - - - then yes, I agree. It would
4 be - - - it would be difficult for the trustee under those
5 circumstances to seek indemnity, for example, for damages
6 that it would have to pay if there is a specific finding,
7 for example, of willful misconduct. But there hasn't been
8 such a finding in these cases.

9 And in the meantime, we have individual
10 certificateholders who are taking positions that may well
11 be inconsistent with the views of other certificateholders,
12 and really, they're making an end run around 8.02(iv) of
13 the pooling and servicing agreements. I've mentioned that
14 provision a few times now. But that, as I said, allows
15 certificateholders to direct the trustee - - - if they have
16 twenty-five percent of the voting rights, it allows them to
17 direct the trustee to exercise a right to take action: to
18 file a lawsuit, to conduct an investigation.

19 If we don't apply the no-action clause here, a
20 individual investor would say 0.2 percent of the voting
21 rights of the trust can choose not to direct the trustee
22 and instead turn around and sue the trustee for not taking
23 the action that these PSAs didn't give them the ability to
24 direct the trustee to take. And that's problematic from a
25 contractual standpoint and from a policy standpoint.

1 JUDGE GARCIA: I think the argument of your
2 adversary was, in the ordinary case, again, with a third
3 party target, let's call it, there is a risk to the trust.
4 The trust potentially can lose money, so therefore, twenty-
5 five percent critical mass would be needed to take that
6 risk, let's say. But in this case, there isn't a risk to
7 the trust. I thought that was their argument.

8 MR. INGBER: I think there is risk to the trust.
9 That's where we disagree. We talked about the - - - the
10 indemnity that the trustee is entitled to. That's a risk
11 to the trust. It is a risk to the trust if the - - - if
12 IKB is taking a position that is at odds with the position
13 that other certificateholders have with respect to the role
14 of the trustee. And that has the potential, long term, to
15 increase the administration costs associated with these
16 trusts, and that's what the ABA brief focused on.

17 CHIEF JUDGE WILSON: Under your interpretation of
18 the PSA, what hap - - - what would happen if twenty-five
19 percent or more of the holders of certificates asked the
20 trustee to sue the trustee?

21 MR. INGBER: So we agree that the trustee cannot
22 sue itself, but sending that request itself is not absurd,
23 all right? The - - - the trustee suing itself is not
24 something that can happen.

25 CHIEF JUDGE WILSON: You get that - - - you get

1 that request from fifty percent of voters - - -

2 MR. INGBER: You get the - - -

3 CHIEF JUDGE WILSON: - - - and then what happens?

4 MR. INGBER: So the trustee says no, or the
5 trustee doesn't respond, and then within sixty days - - -
6 or after sixty days, the certificateholders can then sue
7 the trustee.

8 CHIEF JUDGE WILSON: The trustee can't - - -

9 MR. INGBER: So there's no harm.

10 CHIEF JUDGE WILSON: The trustee can't say yes,
11 right?

12 MR. INGBER: The trustee can say yes, but there's
13 value - - - there is value to the trustee in getting a
14 communication that serves two purposes.

15 Number one, it tells the trustee that
16 certificateholders think the trustee has done something
17 wrong or should be doing something different, and that's
18 especially important in a - - - in a post-event of default
19 scenario.

20 And number two, it communicates that a sufficient
21 number of certificateholders or certificateholders
22 representing a sufficient percentage of voting rights want
23 action to be taken against the trustee. It allows the
24 trustee and the certificateholders to communicate, to try
25 to resolve their issues, to have the trustee take action

1 that the - - - that the certificateholders think the
2 trustee should be taking, potentially staving off
3 litigation.

4 So there is value to the trustee in getting that
5 request and knowing that there is sufficient investor
6 support behind it, and there's no harm to the investors in
7 sending it because if the trustee says no, because it can't
8 sue itself, if they have twenty-five percent, they can go
9 ahead and - - - and sue the trustee, assuming the other
10 conditions are satisfied.

11 JUDGE RIVERA: I don't understand that other flip
12 side of the argument you made that - - - in response to
13 Chief Judge Wilson that the - - - the trustee could choose
14 to sue itself. When would it do that? Isn't that an
15 admission of having - - -

16 MR. INGBER: No. I don't - - - I don't - - -

17 JUDGE RIVERA: - - - violated whatever - - -
18 based on the claim, violated whatever responsibility the
19 trustee had?

20 MR. INGBER: I don't think the trustee can sue
21 itself.

22 JUDGE RIVERA: Okay. Oh, I'm sorry. I thought
23 you said - - -

24 MR. INGBER: I'm sorry if I - - - if I misspoke.

25 JUDGE RIVERA: No. I - - - I thought you did say



1 that.

2 MR. INGBER: I don't think the trustee can sue
3 itself.

4 JUDGE RIVERA: Okay. Okay.

5 MR. INGBER: But as I said, there is - - - there
6 is value in getting that request. And more importantly,
7 we're focusing on the twenty-five percent condition.
8 Before even sending a request, certificateholders have to
9 amass twenty-five percent. In our view, and we think it's
10 supported by the contract and just the - - - the goals
11 behind no-action clauses, is that that is a separate
12 condition. If they can check that box, then assuming the
13 other conditions are satisfied, they can go ahead and sue
14 the trustee.

15 And twenty-five percent is the measure of
16 sufficient support. The language says that
17 certificateholders must act for the benefit of
18 certificateholders as a whole. That twenty-five percent is
19 the - - - is the percentage that the drafters came up with
20 as the measure for what will benefit certificateholders as
21 a whole.

22 CHIEF JUDGE WILSON: Thank you.

23 MR. INGBER: Thank you.

24 (Court is adjourned)

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C E R T I F I C A T I O N

I, Joy Rako, certify that the foregoing transcript of proceedings in the Court of Appeals of Wells Fargo v. IKB International, No. 51 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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