

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NEW YORK : CIVIL TERM : PART 3
3 -----X
4 FREEDOM TRUST 2011-2 and ARI INVESTMENTS LLC,,

5 Plaintiff,

6 -against-

INDEX NO:
653319/2021

7 HSBC BANK USA, N.A., as Trustee,

8 Defendant.

9 -----X
10 New York Supreme Courthouse
11 60 Centre Street
12 New York, New York 10007
13 April 4, 2022

14 B E F O R E:

15 THE HONORABLE JOEL COHEN,
16 J U S T I C E

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Senior Court Reporter

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1 THE COURT: Good morning, Counsel. Thank you for
2 joining me here in person today. Let's start with
3 appearances beginning with the Plaintiff.

4 MR. KLEBAN: Good morning, your Honor. My name is
5 David Kleban from the law firm of Patterson Belk. We
6 represent the Plaintiffs. I am joined today by Peter
7 Tomlinson.

8 THE COURT: If you do speak from the chair, you can
9 stay seated and just turn the mike on because it's kind of
10 hard to hear.

11 And for the Defendants.

12 MS. UHLIG: Good morning. Lauren Uhlig on behalf
13 of HSBC, and with me is my colleague Greg Bowman.

14 THE COURT: Well, for a self-described legal nerd,
15 this is quite a bounty in this deceptively simple motion.
16 Issues of first impression, strange inter-relationships
17 between different states. It was a pleasure reading, and I
18 can't wait to hear the argument.

19 So Defense, want to take us out.

20 MS. UHLIG: Sure.

21 THE COURT: If you can do it from up there, that
22 would be helpful, so Karen and I can both see you.

23 MS. UHLIG: And I brought some slides because we
24 are dealing with dates here, and I think it might be a
25 little easier to see.

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1 THE COURT: Are you planning to share them?

2 MS. UHLIG: I have a USB and so we tested it out.

3 THE COURT: Is anyone joining on Teams that we need
4 to let in?

5 MS. UHLIG: Not that I'm aware of.

6 THE COURT: Okay. Great.

7 MS. UHLIG: Good morning.

8 Plaintiffs here are sophisticated investors who
9 claim to own certificates in a residential mortgage backed
10 security or RMBS. The trust is ACE 2006-FM1 for which HSBC
11 serves as the indentured trustee. Unlike a common-law
12 trustee, an indentured trustee is not a fiduciary. Instead,
13 HSBC's duties are governed exclusively by contract.
14 Specifically, a Pooling and Servicing Agreement or PSA.

15 Here in their single count Complaint, Plaintiffs
16 allege that HSBC as trustee breached provisions in the PSA.
17 Specifically, they claim that HSBC should have instituted a
18 repurchase litigation at Freedom Trust's request on or
19 before August 24, 2012.

20 What Plaintiffs ignore is that the PSA makes clear
21 that HSBC had no obligation to institute repurchase
22 litigation unless it was offered reasonable indemnity
23 satisfactory to HSBC.

24 Among other deficiencies, Freedom Trust simply did
25 not meet this requirement. Accordingly, if this case were

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1 to proceed past the pleading stage, Plaintiffs' claim will
2 fail on the merits. We are here today because the Complaint
3 should not be permitted to proceed. HSBC has moved to
4 dismiss for two reasons which dispose of the case.

5 First, Freedom Trust's claim is time barred, and
6 second, ARI fails to allege facts sufficient to establish
7 standing. I'll plan to start with Freedom Trust.

8 THE COURT: Just so I'm clear, with this same
9 issue, was there a tolling agreement with ARI also?

10 MS. UHLIG: There was a tolling agreement with ARI
11 but it is not at issue in the motion.

12 THE COURT: Okay.

13 MS. UHLIG: Well, whether Freedom Trust's claim is
14 timely hinges on whether the tolling agreement between the
15 parties is enforceable and specifically the 12th extension
16 to that agreement. There is no dispute that if the 12th
17 extension is not enforceable, then Freedom Trust's claim is
18 untimely. First I'm going to explain why the 12th extension
19 is unenforceable regardless of what limitations period
20 applies here, and then I'll go through Freedom Trust's
21 arguments as presented in their opposition brief.

22 So let's start with the relevant facts. Freedom
23 Trust claims that HSBC breached the contract at issue on
24 August 24, 2012. Yet, Freedom Trust did not file it's
25 Complaint until May 19, 2021. This is almost nine years

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1 from the time of the claimed accrual date. Under any
2 limitations period that the parties have raised, this would
3 be indisputably untimely unless there is an enforceable
4 tolling agreement.

5 With regard to tolling agreements, New York
6 strictly limits their manner and length. Under New York
7 General Obligations Law 17-103, when parties enter into a
8 tolling agreement, it's as though the claim accrued as of
9 the date of the agreement.

10 Also under 17-103, parties can only toll for a
11 period of time within the time that would be applicable if
12 the cause of action had arisen at the date of promise. In
13 other words, tolling -- a tolling agreement is enforceable
14 only if the purported tolling period is less than or equal
15 to the applicable limitations period running from the time
16 of the agreement.

17 THE COURT: Time of the promise.

18 MS. UHLIG: Yes. Time of the promise.

19 As the Court of Appeals in Deutsche Bank v Flagstar
20 described, 17-103 "Allows extension of the limitations
21 period only for at most the time period that would apply if
22 the cause of action had accrued on the date of the
23 agreement, i.e. six years from the date that the agreement
24 was made if the limitations period is six years."

25 Significantly, the Court concluded that an

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1 "agreement to extend the Statute of Limitations that does
2 not comply with these requirements has no effect."

3 In Bay Ridge, the Court of Appeals further
4 explained that courts may not rewrite an agreement that
5 violates 17-103. In other words, if the parties' agreement
6 is unenforceable, the Court can not alter it to make it
7 enforceable. In the Court's words, an agreement can -- "
8 That can not be enforced according to it's terms is
9 ineffective to extend the limitations period."

10 Here, the 12th extension to the tolling agreement
11 which must be enforceable for Freedom Trust's claim to be
12 timely can not be enforced according to the terms because it
13 violates 17-103.

14 Let's go back to our facts. On May 20, 2015 nearly
15 three years after the claimed accrual date, Freedom Trust
16 and HSBC entered into a tolling agreement. The tolling
17 period in that original agreement was for two years from May
18 20, 2015 to May 19, 2017. This tolling agreement was
19 Exhibit 4 to HSBC's opening motion. Under 17-103 we must
20 view the claim as though it accrued on the date of the
21 agreement here, which in this original agreement is May 20,
22 2015. This original agreement complies with 17-103 because
23 the tolling period is for two years which is less than the
24 three-year period under Delaware and Maryland law and the
25 six-year period under New York Law.

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1 Subsequently, the parties entered into 12
2 extensions, each of which encompassed all periods covered by
3 prior agreements, each which had an effective date of
4 May 20, 2015, and each of which is expressly governed by
5 New York Law.

6 The 12th and final extension and the one in
7 question here purported to toll -- extend the tolling period
8 for six years and 2 months from an effective date of May 20,
9 2015 to a termination date of July 19, 2021. This extension
10 agreement is Exhibit 5 to HSBC's opening motion. And now
11 recall that 17-103 only permits parties to toll for the
12 applicable limitations period, and it's undisputed that the
13 applicable limitations period for Delaware and Maryland is
14 three years and for New York it's six.

15 So regardless of whether you use limitations period
16 from Delaware, Maryland or New York, the 12th extension
17 violates 17-103.

18 THE COURT: Now, the statutes really -- never
19 really been applied this way before. Maybe it's not been
20 tried. All the cases that I've seen, almost all of them I
21 think are pre-accrual -- either pre-accrual extensions which
22 are barred by different parts of the statute or an unlimited
23 duration extension which was the principle evil. That last
24 -- that 12th one that you are talking about, the issue I
25 think it's dated January of 2021. So the incremental

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1 extension is only a matter of months.

2 So what's the basis for applying the statute which
3 has been around for 50 years for the first time in this case
4 to a very common fact pattern where parties extend the
5 tolling agreement so that they don't have to litigate. They
6 can continue doing whatever they were doing presumably
7 negotiating.

8 MS. UHLIG: And I think that goes to one of
9 Plaintiffs' arguments which was that if each successive
10 extension complied with 17-103, then collectively they could
11 toll for a period longer than the applicable Statute of
12 Limitations. And I think the legislative history and the
13 case law we cite in our brief shows that is not correct.
14 Because the end result of that logic would mean that if we
15 were to apply the New York limitations period, and we look
16 at the situation here, we had 12 extensions. That means the
17 parties could have extended the tolling period six years for
18 each one of these agreements for up to 78 years and they
19 could continue to do so infinitely. And I just don't think
20 that is the legislature's intention.

21 THE COURT: Why not? Because it just said that --
22 the legislative history said we didn't want indefinite
23 extensions. This is not what this is. These are each of
24 the parties coming up with a finite extension. This happens
25 all the time. I'm sure you've done it a million times

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1 yourself. It would be a -- and I'm sure it is and probably
2 was a surprise. I don't know. There's not discovery yet.
3 But I don't know. Are we going to find that when HSBC was
4 sitting there about to sign this, they were thinking, well,
5 we can sign it. It's not enforceable. Or were they saying
6 we assume it's enforceable and only really lawyers years
7 later decided that it wasn't.

8 It is an odd set of facts to have the party that --
9 typically, the Defendant is the one who urges tolling rather
10 than going to court to then come back and say, Oh, that last
11 one was a bridge too far even though we signed it.

12 MS. UHLIG: Well, I think the point, your Honor,
13 comes back to whether the agreement can be enforced
14 according to it's terms, and it plainly can't here because
15 there is a tolling period in the 12th extension that is May
16 20, 2015 to July 2021.

17 THE COURT: What's the date of the promise in the
18 12th one?

19 MS. UHLIG: In the 12th one, it is in January,
20 2021.

21 THE COURT: Right. So the date of promise using
22 the words from the statute, it's an incremental promise to
23 be sure and you have to stitch them together; otherwise, you
24 would have a gap maybe, but the date of promise is only a
25 few months before they filed suit.

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1 MS. UHLIG: I don't know if that's correct, your
2 Honor, because these are extensions to the original tolling
3 agreement. So I think the date of the promise necessarily
4 has to be the beginning date of the tolling agreement. And
5 if you look at each extension, and the 12th extension, it
6 specifically adopts all the prior periods, and it
7 specifically says the effective date is May 20, 2015.

8 THE COURT: Well, you being careful lawyers, you
9 would have to do that I would think because otherwise some
10 equally -- almost equally clever lawyer later on would say,
11 well, there is now a gap because the agreements are back to
12 back.

13 I mean, I grant you, it's an unusual -- it's not
14 come up before, but it's -- you know, just the fact they
15 incorporate it by reference, I mean, if the legislature
16 wanted to have a -- basically, a statute of repose type rule
17 that just said the statute can be extended by 2X and no more
18 period, they could have done that. That -- but they instead
19 did it by reference to the date of the promise. So it's
20 hard for me to see exactly how, especially given that you
21 had two sophisticated parties acting as if these were each
22 valid to say that, well, at some point a four-month
23 agreement becomes a 12-year agreement or whatever it is.

24 MS. UHLIG: Therein lies several issues.

25 So one is, what is the date of the promise. Here I

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1 would contend that it is May 15, 2015. It goes back to the
2 original agreement, and the obvious problem with
3 interpreting this differently and saying that the effective
4 date or date of promise has to restart with each agreement
5 is that we run into the situation that I just described
6 where we have infinite tolling, and that really -- based on
7 the legislative intent that we put in our reply brief, that
8 clearly isn't the case.

9 The legislature wanted to respect a period of
10 repose, and so I think here, we necessarily have to view the
11 date of promise as May 20, 2015. And if you look at the
12 text of the 12th extension which I'll show you, it
13 specifically says, the effective date is May 20, 2015.

14 THE COURT: Yep. It's vexing.

15 MS. UHLIG: All right. Well, because the 12th
16 extension violates 17-103 by its terms, it has no effect.
17 And because it has no effect, Freedom Trust's claim
18 therefore is time barred because without the 12th extension,
19 there is nothing that would permit Freedom Trust to delay
20 its filing until May 19, 2021.

21 THE COURT: So as you read it, when the parties
22 were approaching actually either the three-year date maybe,
23 May 20, 2018 which is one of the earlier extensions or May
24 20 of 2021, the only options were to litigate or for them to
25 drop it.

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1 There was -- there could be no further -- and
2 again, I don't know what was going on, whether parties were
3 having settlement discussion or not, but the law that you
4 think New York has imposed would mean at some point -- in
5 this case, it would have been I think 2018 -- it was either
6 litigate or drop it.

7 MS. UHLIG: So if you were to apply the three-year
8 Statute of Limitations from Maryland or Delaware, yes, in
9 2018, that would have been the maximum limit that 17-103
10 would have permitted the tolling agreement to extend to.

11 THE COURT: And are you familiar with any cases
12 anywhere where such a rule has been applied where parties
13 were really left with no alternative that the law of the
14 State of New York which in almost every other situation
15 encourages settlement would apply to essentially prohibit or
16 mandate litigation rather than settlement?

17 MS. UHLIG: Well, I think the two Court of Appeals
18 cases actually do support this position.

19 As your Honor noted, I believe they dealt with
20 tolling agreements that did not have a deadline; right. And
21 so the result, there is indefinite tolling. And if we were
22 to interpret this as each extension begins separately and
23 starts a new period for 17-103, we end up with the same
24 result.

25 THE COURT: Well, let me posit a difference. In

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1 the indefinite situation, the day you sign the indefinite,
2 you're the Defendant. You're stuck forever with this
3 uncertainty that you could be sued in any time in the
4 future.

5 With the successive extensions, each extension has
6 to by definition be less than either three years or
7 six years or whatever. So there is a finite nature of the
8 promise which again, if you look back to the text, so it
9 doesn't keep the parties in limbo forever.

10 The courts may end up dealing with a 70-year old
11 case, unlikely but maybe, but the parties are not locked in
12 to uncertainty for an extended period. That's the
13 difference. Here, they are only locked in for the next
14 extension.

15 MS. UHLIG: I guess I would just come back to the
16 fact that that ultimately could result in indefinite
17 tolling, and I just don't think that was the intent of the
18 legislature.

19 THE COURT: The question is what were they solving
20 for? Just there should be a certain age limit that we'll
21 let a case accrue to, and that's it or that nobody -- nobody
22 can agree by promising to more than a certain period in any
23 one chunk, and I don't know -- you know, that's -- it's --
24 the idea of sequential tolling agreements is -- it's very
25 common, and there would be a big step to say once you step

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1 over some trip wire where again, when you add in the fun mix
2 of the borrowing statute, parties may not even know which
3 trip wire they are tripping on because it could be any of
4 three jurisdictions at this point, and it kind of just
5 depends on who the party as the plaintiff is.

6 I'm just sort of thinking out loud here which is
7 always a bit of a problem, but I do worry about the -- you
8 know, the implications of the rule you have here and we
9 haven't really gotten into things like estoppel yet. So
10 that's your statutory argument.

11 Just to crystallize it, you read "promise," and
12 when you say -- when you read "promise" for purposes of the
13 statute, the 12th amended agreement; although, it is dated
14 January 15, '21 and effectively I would say the promise is
15 to extend it to another period, but you think that promise
16 as a matter of law is really made as of May 20, 2015.

17 MS. UHLIG: I do, your Honor, particularly here
18 where we just have extensions to that original agreement.
19 It has to be the date of the promise.

20 THE COURT: Okay.

21 MS. UHLIG: Just to follow-up on one comment your
22 Honor made about whether parties would be unsure of signing
23 an agreement, what laws apply, and etc., the Plaintiffs are
24 responsible for knowing what Statute of Limitations applies
25 to them, and the extension is clearly governed by New York

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1 substantive law.

2 THE COURT: Well, let's talk about that. It has
3 quirky language in it which I'm curious your thoughts on.
4 It says that the construction effect of the tolling
5 agreement shall be governed by the laws of the State of New
6 York without giving rise -- giving effect to conflicts of
7 laws principles. So far, so good.

8 Then provided, however, that New York Law shall not
9 be deemed by operation of this provision to govern the issue
10 of which jurisdiction's law shall apply to any TIME-BASED
11 DEFENSE, all caps, and time-based defense is defined about
12 as broadly as I could figure out how to define it. And
13 given that this agreement is entirely about time-based
14 defenses, why doesn't the proviso swallow the rule?

15 MS. UHLIG: The first part of it makes clear that
16 the contract is governed by New York substantive law; right.
17 The second part of that provision I think is intended to
18 make clear New York's borrowing statute will apply in terms
19 of the Statute of Limitations. I don't think that's meant
20 to preclude any part of New York substantive law which would
21 be 17-103. That is a substantive law governing the
22 enforceability of contracts. So I think that's how you
23 reconcile those two parts of that particular provision

24 THE COURT: And I know you're probably back to the
25 Barclay's case where it was just a regular New York choice

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1 of law provision. In the RMBS contract itself, here you
2 have I think the more difficult challenge that it's in the
3 tolling agreement, and I don't know how -- what's your
4 definition of "time-based defense" that would limit it to
5 simply the borrowing statute?

6 MS. UHLIG: I think that's when we consider, right,
7 the net limitation, the type of net limitations period that
8 would apply under the borrowing statute which would apply
9 only to Statute of Limitations and statutory tolling and
10 statutory extensions.

11 Here, we are dealing with a contractual agreement,
12 and 17-103 governs a contractual agreement. So I do think
13 they are separate concepts for the purposes of the carve out
14 here in this.

15 THE COURT: But you agree that the agreement for
16 purposes of trying to apply the Barclay's holding in this
17 case, it's the tolling agreement, not the RMBS agreement;
18 right.

19 MS. UHLIG: Sorry.

20 THE COURT: In Barclay's, the pre-accrual Statute
21 of Limitations related item was in the underlying contract
22 between the parties that -- the commercial transaction.

23 MS. UHLIG: Yep.

24 THE COURT: Here, it's -- the tolling is in a
25 separate and distinct agreement that's only about the

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1 Statute of Limitations.

2 MS. UHLIG: The content of the tolling agreement
3 only governs Statute of Limitations? Is that what you're
4 saying?

5 THE COURT: Yes. That's what it's for.

6 MS. UHLIG: I think the tolling agreement covers,
7 you know, when the parties can bring claims and that goes
8 back to statutory language, right, and that is different.
9 It's a different concept from contractual interpretation.

10 THE COURT: Because you brought up the net approach
11 which, you know, I've been struggling the last few hours
12 with Barclay's trying to piece it all together. And you
13 know, the basic principle, and this kind of makes intuitive
14 sense. Under the borrowing statute, you compare the two
15 states' law in total including the statutory period also
16 tolling in other kind of exclusions and you compare the two.
17 That's part of the idea behind avoiding forum shopping, and
18 Barclay's has this sort of quirk to it where it's -- it
19 states that general principle, and then says, but here
20 because the parties selected New York Law, and the Court
21 made several references to the importance of consistency and
22 the like, I imagine part of what was going through their
23 mind was if we have the construction of RMBS contracts
24 varying throughout the country based on who happens to be
25 the plaintiff, there will be a certain amount of chaos which

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1 is not something we have here. But how do you sort of
2 reconcile this net concept? And that's where I think your
3 argument has a little more difficulty because, you know --
4 at some level your argument could apply to say that the
5 matter is timely under both laws separately. But when you
6 read them together, then it's not. It's a strange -- it's a
7 strange argument, a good one, but you know, I don't see how
8 we are comparing net to net under your approach.

9 MS. UHLIG: Well, I think the net is referring to
10 statutory elements. So you're going -- if you're going to
11 use the borrowing statute in New York, you're going to
12 import the Statute of Limitations and all statutory relating
13 tolling.

14 THE COURT: Right.

15 MS. UHLIG: That doesn't include contractual
16 issues; right. The tolling agreement here is governed by
17 New York choice of law. And so when we look at how to
18 enforce the agreement, we have to look at New York Law and
19 17-103 is what tells us.

20 THE COURT: So if we are applying Delaware Statute
21 of Limitations or Maryland, is Barclay's the only authority
22 you have for the idea that in that situation, despite the
23 netting principle that's in many, many cases, we should
24 apply the New York limitation in applying the Delaware
25 statute?

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1 MS. UHLIG: No. That's not the only authority. I
2 think we cited several. One that comes to mind is the EGI
3 VSR case which is where the federal limitations applied, but
4 the Court still applied 17-103 to find that the tolling
5 agreement was not valid for the same reason that I gave your
6 Honor that there is a difference between the procedural rule
7 that governs Statute of Limitations and the contractual
8 interpretation rule that 17-103 embodies.

9 THE COURT: Okay. Do you want to move on now to
10 ARI or do a little more on -- I think I have your argument
11 pretty well in hand.

12 MS. UHLIG: Would you like me to discuss any of the
13 differences between the Statute of Limitations periods,
14 New York, Maryland?

15 THE COURT: No. Look, I think the -- most of my
16 questions on the borrowing statute are to your colleagues.

17 MS. UHLIG: Sure. All right. So we can move on to
18 ARI. And like Freedom Trust, ARI alleges that HSBC breached
19 the contract on August 24, 2012, and ARI does not dispute
20 that it didn't exist until November 2017. We attached ARI's
21 Certificate of Formation dated November 8, 2017 as
22 Exhibit 3.

23 With that knowledge, ARI could not have purchased
24 certificates in Ace 2006 FM1 until at the very earliest
25 November 17. That's over five years from what they are

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1 claiming is the accrual date here. An entity that didn't
2 exist until five years after the fact could not have held
3 certificates at the time of the alleged breach and so would,
4 therefore, lack standing to bring this claim.

5 Furthermore --

6 THE COURT: Well, I mean, I know there is a --
7 there is a -- you can acquire commercial paper and other
8 kind of contractual rights and still have standing to sue
9 under them. You just have to show it with certain other
10 things; right.

11 MS. UHLIG: Exactly, your Honor. You actually have
12 to plead those things. And here ARI doesn't dispute that it
13 doesn't make any allegations concerning a transfer of a
14 valid timely claim from some prior certificate holder.
15 There is absolutely nothing in the Complaint concerning
16 that, and that has a number of different implications.

17 If we think of -- there is a number of different
18 ways where ARI would not inherit a valid claim. So if we
19 consider the date of the alleged breach accrual, right,
20 which was in 2012, let's say that the certificate holder at
21 that time was a Delaware entity, and let's say Delaware law
22 governs. So that claim expired in 2015.

23 If Freedom Trust -- if ARI later purchased
24 certificates in 2017, there would be no claims to transfer
25 because they would have already expired in 2015.

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1 THE COURT: So the assignment can only convey what
2 the assignor had.

3 MS. UHLIG: Yes. Exactly, your Honor.

4 Another scenario where there would be no valid
5 claims to transfer would be if we had an entity that had
6 valid claims at the time it transferred certificates to ARI,
7 but that transfer was governed by a state law that did not
8 allow the automatic transfer of rights. So there is a
9 number of situations where they simply would not have a
10 valid claim, and the problem here is that they haven't pled
11 anything for the Court to make any sort of inference that
12 they would actually have the right to bring a timely and
13 valid claim here.

14 THE COURT: Right. The assignor can only assign
15 what they had. So if it was a stale claim at the time of
16 assignment, the argument would be it doesn't revive just by
17 virtue of the assignment.

18 MS. UHLIG: Exactly.

19 THE COURT: Even if that happens, you would have to
20 show tolling so that it all stitches together all the way up
21 to May 2021.

22 MS. UHLIG: And I think the key is there just
23 simply are no allegations related to this issue whatsoever.

24 THE COURT: Right. Okay. Thank you. Plaintiffs.
25 You'll have some time for rebuttal, if you'd like.

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1 MR. KLEBAN: Good morning, Judge. David Kleban.

2 THE COURT: Good morning.

3 MR. KLEBAN: I'm going to begin by discussing why
4 the Freedom Trust claims is barred timely as a matter of law
5 and why ARI has standing to bring these claims or at worse,
6 why it's standing or non-standing can't be determined at the
7 motion to dismiss stage.

8 Beginning with Freedom Trust, I think the Court
9 observes this, but I'd like to make it perfectly clear.
10 HSBC needs three holdings from this Court to succeed on it's
11 Statute of Limitations defense. It needs it's
12 interpretation of 17-103 to be correct in that it bars
13 successive agreements that together toll the limitations
14 period for longer than the underlying periods set by the
15 legislature. No Court has ever held that, and it's wrong in
16 a textural matter.

17 THE COURT: No Court has ever held it one way or
18 the other.

19 MR. KLEBAN: No Court has ever applied it in the
20 way they ask. No Court has ever rendered a decision. I
21 don't think I need the decision because I've got the text of
22 the statute.

23 The second thing they need to go right is for
24 17-103 to apply even when we are borrowing another state's
25 Statute of Limitations under the borrowing statute.

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1 Something else no Court has ever held and which we know is
2 wrong because we take all of the foreign states Statute of
3 Limitations, not just the length of time. We don't just
4 plug in the length of time to the New York -- other aspects
5 of the New York regime.

6 THE COURT: Except in Barclay's.

7 MR. KLEBAN: Well, I'm going to get to Barclay's.
8 I'm going to get to Barclay's.

9 There was a choice of law provision in Barclay's
10 which is different from the choice of law provision in our
11 case. And finally, they also need Freedom Trust to be a
12 resident of Delaware or of Maryland to state with a
13 three-year Statute of Limitations which they can not get
14 that ruling from this Court on this record.

15 So first of all, I'm actually going to go a little
16 bit out of order. I'm going to talk --

17 THE COURT: Start with that last.

18 MR. KLEBAN: The last one, okay. Sure. Sure.

19 THE COURT: This is the one that gets you, if
20 you're correct, out of the borrowing statute.

21 MR. KLEBAN: Right. Right. And before I do that,
22 I just want to make clear I think Ms. Uhlig said in her
23 presentation that we lose even if New York supplies the
24 Statute of Limitations because that 12th extension purports
25 to extend for more than six years.

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1 I'm going to talk about hopefully why that's a
2 wrong and incorrect interpretation of that 12th agreement.
3 It's also incorrect even if they are right about that
4 because I don't need six years of tolling if New York
5 Statute of Limitations applies because we started tolling in
6 2015, less than three years into -- less than three years
7 after the date of accrual. I need far less than the full
8 six years of contractual tolling to make these claims timely
9 under New York Law. Okay. But why we are not a Delaware or
10 Maryland resident, certainly not at the motion to dismiss
11 statement.

12 The argument for Maryland -- this was what went in
13 their opening brief. They said the Maryland Statute of
14 Limitations controls. They do not try to argue that Freedom
15 Trust is a Maryland resident. They are trying to say that
16 Freedom Trust's trustee Wells Fargo is a Maryland resident.

17 Now, we pointed out in our brief why that is a
18 sharp mischaracterization of the Barclay's decision. In
19 Barclay's, the RMBS trustee, the trustee of the New York
20 common-law trust was the Plaintiff. So it was the -- it was
21 the Plaintiff's residence. And what Barclay's said is the
22 Court of Appeals told us there that we are going to go with
23 the Plaintiff's residence rule even though in this case the
24 economic injury wasn't felt in Deutsche Bank's pocket. It
25 was felt in the pocket of the trust. But for in the

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1 interest of uniformity and predictability, we are going to
2 go with the Plaintiff resident rule that we typically go
3 with. Freedom Trust is the Plaintiff in our case, not the
4 trustee. The trustee is a stranger to this litigation.

5 So now they have retreated in that argument, and in
6 their reply brief, they pivot to say that we're a resident
7 of Delaware now because it's a Delaware statutory trust.
8 And by the way, I think that the sort of -- the evolving
9 nature of the argument is itself a good reason not to
10 resolve this factual question.

11 THE COURT: Well, we should get it right no matter
12 which time it got.

13 MR. KLEBAN: That's right, your Honor. That's
14 fair.

15 Well, Delaware is also wrong because a business
16 entity's residence is not determined based on it's state of
17 incorporation. It's based on it's principal place of
18 business.

19 THE COURT: Well, maybe it's both, but it's -- I
20 don't think it's a bit of an overstatement to say that it's
21 residence is not based on it's state of incorporation.
22 That's the traditional first stop; isn't it?

23 MR. KLEBAN: Well, let's put it this way.

24 Where those two things diverge, I think the case
25 law is clear that Courts will go with the principal place of

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1 business rather than the state of incorporation.

2 THE COURT: Okay. So tell me about your client's--
3 I don't even know what your client's business is or where
4 it's human beings operate. But in what way do you plead
5 facts that could support a finding that in 2011, Freedom
6 Trust's principal place was in New York?

7 MR. KLEBAN: I think it would be 2012, but either
8 way, I think we get there.

9 So I have an allegation in the Compliant we are a
10 principal place of business. They call that a legal
11 conclusion. I think it's a factual.

12 THE COURT: It's also present tense.

13 MR. KLEBAN: Indeed, so let's talk about the record
14 that's before the Court.

15 They submitted a tolling agreement from 2015 to
16 which Freedom Trust was a party. The parties provide their
17 addresses for notices under that tolling agreement. Freedom
18 Trust's address is on Madison Avenue in midtown. That's
19 2015.

20 THE COURT: That's a mailing address.

21 MR. KLEBAN: No. It's an office.

22 THE COURT: I know, but does it say -- principal
23 place of business is a thing for these purposes because it
24 has -- let's just take your reasoning that, you know, the
25 place of incorporation is a historical artifact. But in

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1 some cases a -- to use the jurisdictional case law which is
2 maybe broadly analogous, where is the company at home.
3 Where does it actually operate from? And I don't really
4 have a great sense for what this trust is.

5 They are not pumping out widgets on Madison Avenue.
6 So they are a financial entity. The trustee's not a
7 New York entity. So what do you have in New York that makes
8 it a principal place of business other than just saying that
9 it is?

10 And have you ever said it in any other context
11 before this one?

12 MR. KLEBAN: So your Honor, I guess I would say a
13 few things to that.

14 Principal place of business is a shorthand for
15 facts including the nerve center of where decisions are
16 made.

17 THE COURT: Okay.

18 So where in the Complaint does it give me this
19 nerve center kind of factual allegation?

20 MR. KLEBAN: So this Complaint does not contain a
21 litany of facts about the day-to-day business affairs.

22 THE COURT: You could have submitted an affidavit
23 supplement. Plaintiffs do that all the time in New York
24 State.

25 MR. KLEBAN: I respectfully disagree because in

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1 their moving brief, they didn't challenge the adequacy of my
2 pleading that we are a principal place of business. They
3 ignored that allegation and went with the Maryland -- the
4 Wells Fargo Maryland theory. So we didn't know that the
5 sufficiency of our pleading was under attack until their
6 reply brief. And so now I'm pointing the Court to things in
7 the record that I think allow an inference that in discovery
8 and at summary judgment, if necessary, we are going to be
9 able to prove that we are a New York resident which the
10 First Department in the Oxbow case said we should be able to
11 do, that resolution of a borrowing statute defense is not
12 appropriate at the motion to dismiss stage.

13 THE COURT: Well, Oxbow was a real -- you know, an
14 actual company doing business. So they were able to -- what
15 -- what will I see in my future that suggests that in 2012
16 which, again, there's -- just strictly speaking, there's
17 nothing in the Complaint that says is and has always been
18 it's principal place of business is New York. What is
19 there? What is the "there" that I'm going to see?

20 MR. KLEBAN: So you do have some things in the
21 Complaint though, your Honor. And you know, you have the
22 fact that Freedom Trust conducted an analysis of the
23 mortgages in the underlying RMBS trust of the mortgage loans
24 and Freedom Trust sent a note to the trustee of the FM-1
25 trust saying we had a bunch of bad mortgages. Please do

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1 something to remedy them. Freedom Trust sent a direction,
2 an identity letter to the trustee saying, Please sue.

3 So if discovery proceeds which I think it ought to,
4 you're going to see that Freedom Trust had people acting on
5 it's behalf making strategic decisions, investment
6 decisions, decisions pertaining to this very trust to the
7 RMBS trust, and those people were doing that in New York
8 from Madison Avenue.

9 THE COURT: Okay. So they have -- so that's what I
10 was getting at. So there are human beings sitting in
11 Madison Avenue writing letters presumably on some sort of
12 letterhead that also says Madison Avenue.

13 MR. KLEBAN: Well, I think they may use lawyers in
14 Philadelphia at times, but the people making the decisions
15 were in New York.

16 THE COURT: And they're employees of the trust or of
17 the trustee?

18 MR. KLEBAN: So your Honor, I hesitate to
19 characterize the employment relationship on this record. I
20 think that they would be employees of the collateral manager
21 for the Freedom Trust.

22 THE COURT: Right.

23 MR. KLEBAN: But I expect discovery to show that
24 they were in New York at the relevant times when making the
25 relevant decisions.

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1 THE COURT: Why don't you move on to the other fun
2 stuff that clearly was being tortured with.

3 MR. KLEBAN: Which of course in my view, Judge,
4 renders the residency question irrelevant because we win as
5 a matter of law, but -- so it is settled how 202 is applied.
6 I said this before. You take all of the foreign state's
7 limitation regime in Maryland and Delaware -- there is no
8 dispute though states allow indefinite tolling. They don't
9 impose a restriction like the one HSBC says apply in
10 New York.

11 Under a straight forward application of the
12 borrowing statute, we'd be in the clear because we would
13 take Maryland's three-year statute of limitations, but we
14 would also take it's policy about tolling. But they don't
15 want a straightforward application of the borrowing statute.
16 They want an application that's modified by this choice of
17 law provision in the tolling agreement which they say is a
18 substantive choice of law provision that because 17-103 is
19 substantive, we have to be governed by 17-103. So I think
20 that's wrong on two levels. First of all, I don't know that
21 17-103 is substantive. I mean, it is part of the law
22 governing the Statute of Limitations in New York which is
23 typically understood to be procedural.

24 THE COURT: Isn't the very statute that Barclay's
25 applied -- that the Court of Appeals applied in the

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1 Barclay's case?

2 MR. KLEBAN: The Barclay's decision, I don't think
3 mentions 17-103.

4 THE COURT: Well, it sort of does. The -- doesn't
5 say it, but they mention I believe unlike New York,
6 California doesn't prohibit pre-accrual extensions. That's
7 the only statute I'm aware of that they could have been
8 referring to.

9 MR. KLEBAN: I see. Okay. So your Honor, let me
10 move on to the more important point. This choice of law
11 provision is -- it does not make a distinction between
12 substance and procedure. That's not the line it draws. The
13 line it draws between it's effectiveness and what it didn't
14 apply to is different. It applies to everything other --
15 everything in this agreement other than a time-based
16 defense, and I think that -- I think this bears focus
17 because the parties -- the parties to this agreement clearly
18 intended to be agnostic as to the forum that suit might be
19 brought in or as to the limitations regime might apply.
20 That's why you have the super broad definition of time-based
21 offense which includes things like statutes of repose
22 anywhere in the world, any jurisdiction.

23 So the parties didn't take a position on, you know,
24 what state's Statute of Limitations might apply to the
25 underlying claims, and they didn't want to affect that

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1 decision by virtue of this tolling agreement which is just a
2 standstill agreement.

3 So if the parties tell us that this choice of law
4 provision doesn't apply to time-based defenses and HSBC is
5 bringing a time-base defense, the basis for which is nothing
6 other than this choice of law agreement, I think their
7 argument has to fail.

8 And to put an even finer point on it, your Honor, a
9 couple of paragraphs -- I'm looking at Exhibit 5 to Ms.
10 Uhlig's affirmation.

11 In Paragraph 16 which follows a few paragraphs
12 after the choice of law provision, parties say that they
13 represent and warrant that they're authorized to enter it
14 and that they intend the tolling agreement to be a valid and
15 binding obligation enforceable in accordance with it's
16 terms. And I think that together with their choice of law
17 provision makes it clear that the parties did not select the
18 body of law to govern this agreement that renders the
19 agreement a nullity.

20 Now, this carve out from the choice of law
21 provision of law pertinent to a time-based defense, that
22 takes this case out of Barclay's because Barclay's didn't
23 have a similar carve out in it's similar law provision, and
24 it takes this case out of EGI VSR which similarly had no
25 limitation.

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1 As for the construction of 17-103 itself, the Court
2 already observed this, but in every decision finding an
3 agreement invalid under this statute, it analyzed a promise,
4 and it found that that promise failed under the terms of
5 17-103 because it allowed an indefinite period of tolling.
6 That's the Bay Ridge air rights case. That's the Flagstar
7 case. And that analysis make sense because in Bay Ridge air
8 rights in particular, the Court focused on the phrase in the
9 statute that the agreement must be enforceable according to
10 it's terms.

11 The terms of the promise in Bay Ridge air rights
12 was tied to an event that may or may not come to pass and
13 that could come to pass at some undefined point in the
14 future. We don't have that here. Okay. We have agreements
15 that purport to toll Statute of Limitations for defined
16 limited periods of time each time. So there was the first
17 agreement limited, paused the running of time for two years.
18 Later ones pause it by only six months. Each time the
19 parties do one of these agreements, they say that they are
20 doing so -- this is Page 3 of the most recent agreement.
21 They say that they are doing so in consideration of the
22 mutual promises contained herein. And each time they sign
23 their names in a new agreement. None of them standing alone
24 according to it's terms runs afoul of the restrictions on a
25 promise set up by 17-103. And in this way, I want to

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1 challenge the assertion that, you know, the 12th agreement
2 or any of the later agreements is invalid simply because it
3 recites the fact that there was an effective date earlier
4 on.

5 The -- I think that -- that those recitations
6 acknowledge the fact that the previous agreements had the
7 effect of tolling the time leading up to this moment when
8 we're now negotiating a new agreement. But the only legal
9 effect of the new agreement is to add some incremental time
10 in the future. And frankly, I don't think the parties
11 could -- well, I guess we don't know, but the parties did
12 not purporting to back and retroactively toll time that
13 hadn't been tolled. They are just saying this is what we
14 started. Now we are going to do it another six months.

15 And then I'd like to talk about the policy briefly
16 about the specter of long -- long tolling. So your Honor,
17 first of all, I think generally it is dangerous to apply
18 statutes in a way that their text doesn't support by virtue
19 of a policy or a legislative history argument, and it's
20 particularly dangerous in a case like this one where
21 litigants or potential litigants who are entering into that
22 tolling agreements are dealing with the harsh and dramatic
23 effect of a Statute of Limitations and the importance of
24 predictability and certainty about the effect of a tolling
25 agreement is particularly important. They should be able to

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1 rely on the text of the statute when entering an agreement
2 like that.

3 I'd also like to point out that the -- even the
4 history, the legislative history quoted by HSBC doesn't
5 really help them. So the sentence they like is that --
6 well, it's a snippet of a sentence. It says the parties --
7 this is something that the commission said in it's report
8 about the adoption of this statute. This is back in 1960 or
9 '61 I think. "The parties should not be permitted to create
10 periods between themselves in excess of the periods set by
11 the legislature." So that's what they quoted. I find that
12 a little bit hard to parse, frankly, because any tolling
13 agreement is -- any tolling agreement creates the potential
14 for a longer period than the one set by the legislature. So
15 this goes to the danger of relying on legislative history,
16 but the immediately --

17 THE COURT: That one might make more sense when
18 applied to the pre-accrual idea.

19 MR. KLEBAN: Indeed, but I think that -- I think
20 the following sentence which wasn't quoted in HSBC's brief
21 which I'd like to quote now clarifies it. It says,
22 "Instead, the commission believes that the extension should
23 be limited to the time that would be allowed if the cause of
24 action had arisen at the date of the promise or such shorter
25 time as may be provided in the promise." And so that -- so

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1 that sentence that immediately follows the one they like, I
2 think makes clear that the -- that the drafters did not have
3 any broader intent to then what they actually wrote in the
4 statute itself.

5 THE COURT: Okay.

6 MR. KLEBAN: I'd also like to point out that when
7 the drafters talk about the periods set by the legislature,
8 and this is a minor point, Judge, but it's worth noting,
9 they talk about the legislature with a capital L which I
10 think is more evidence that New York legislature did not
11 purport to extend it's limitation, it's restriction on
12 tolling agreements when a different state's Statute of
13 Limitations is brought in through the borrowing statute.
14 Capital L, I think, typically means the New York
15 legislature.

16 THE COURT: Why don't we just -- given the time,
17 why don't we move to ARI. I think I have your argument.

18 MR. KLEBAN: Okay. Thank you, Judge.

19 THE COURT: How do I know ARI has or how ARI has --
20 has these rights, whether they were validly assigned,
21 whether when they were assigned, they were already stale. I
22 mean -- there is not a huge burden of pleading in an
23 assignment context, but it does have to be something.

24 MR. KLEBAN: So let me put it this way, Judge. My
25 first -- any first response is going to be I don't think we

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1 have that pleading burden.

2 THE COURT: You have to plead facts that if true
3 would give you a right to relief -- give ARI a right to
4 relief.

5 What are the facts if true that give ARI a right to
6 relief if it didn't exist at the time so it had to have
7 acquired it somehow?

8 MR. KLEBAN: Well, so I think the question is
9 addressed by the First Department's Royal Park v Morgan
10 Stanley case. So let me back up and say the facts if true
11 that entitle us to relief would be in the transfers of these
12 bonds that led to ARI's ownership either expressly conveyed
13 the right to sue the trustee or implicitly conveyed it which
14 is the effect of -- which is the effect of New York Law
15 which is the effect of Delaware Law which is the effect of
16 New Jersey Law and potentially the law of other states that
17 haven't been addressed in this case.

18 So but -- so Royal Park v Morgan Stanley tells us
19 we don't need to do a center of gravity test to ascertain
20 what -- to ascertain whether the Plaintiff has standing.
21 Royal Park v Morgan Stanley says that standing is a question
22 governed by New York Law.

23 In that case, the Plaintiff was asserting fraud
24 claims, and it was about -- it was actually about RMBS. So
25 the Plaintiff was asserting fraud claims that were

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1 purportedly associated with bonds that it had acquired in a
2 agreement acquired by Belgium Law.

3 Okay. The First Department said that it didn't
4 care about the Belgium Law on this issue because it's a
5 procedural issue standing. It's governed by New York Law.
6 And that was bad for the Plaintiff because the rule for
7 fraud claims in New York for tort claims is that you need an
8 express assignment to be able to sue on the cause of action.
9 But it's good for ARI because the default rule in New York
10 is just the opposite.

11 Under 13-107 -- General Obligations Law 13-107, the
12 claims automatically travel, and because we look to New York
13 Law, 13-107 is what controls us here.

14 THE COURT: But what if you pleaded -- 13-107 says,
15 "A transfer of any bond shall vest in the transferee of all
16 claims or demands of the transferor," right, among other
17 things.

18 What do you plead in the Complaint that says that
19 you're a transferee, who you got it from, what their rights
20 were? I mean, doesn't -- if we went to trial tomorrow, I
21 don't have any facts to give to a jury or me to say, Well,
22 here stands ARI. Their title to this claim is the
23 following. Right now your Complaint just assumes it. It
24 doesn't say anything to tie it together.

25 MR. KLEBAN: Well, I think it's great fodder for

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1 discovery.

2 THE COURT: You don't need discovery for your
3 own -- how you got your own claim.

4 MR. KLEBAN: That's true, but -- well, it actually
5 may not be true, your Honor. Let me revise that.

6 If as HSBC says we need to trace the chain of title
7 back to the original owner or the owner at the time of
8 accrual, I am going to need to take third-party discovery I
9 think. And so I don't think I'm in a position to be able to
10 plead the litany of facts that they're asking, the catalog
11 of previous ownership.

12 THE COURT: You don't even plead, I don't think --
13 tell me if you do -- who your client acquired it from.

14 MR. KLEBAN: We haven't pled that. No, your Honor.
15 Again, I don't think we need to because I think the
16 inferences need to be drawn in our favor at this point and
17 as we saw in Royal Park --

18 THE COURT: Inferences can be drawn from factual
19 allegations.

20 You know, again, I don't think it's a high bar, but
21 there is --

22 MR. KLEBAN: Well --

23 THE COURT: There's got to be some gate to the
24 courthouse, don't you think?

25 MR. KLEBAN: Then I respectfully request leave to

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1 replead if that's something that would give -- that would
2 give the Court comfort.

3 THE COURT: That's what I expected. Let me give Ms.
4 Uhlig some time of rebuttal.

5 MR. KLEBAN: Thank you, your Honor.

6 MS. UHLIG: Thank you, your Honor.

7 I'll address a few points that were discussed.

8 With regard to the tolling agreement and how 17-103
9 applies, I think we are continuing to come back to this idea
10 that infinite tolling is not allowed. And the way that
11 Plaintiffs want to interpret 17-103 inevitably would allow
12 parties to toll indefinitely.

13 My colleague on the other side quoted the
14 legislative history that we included in our brief, and I
15 think that makes it clear the legislature wanted to have a
16 period of repose that was limited to the applicable
17 limitations period.

18 THE COURT: Well, can you direct me to the language
19 you are talking about because I heard them saying things
20 like they didn't like indefinite tolling which is different
21 than infinite. Because what we are talking about here is a
22 series of finite tolling agreements which is different than
23 an indefinite.

24 MS. UHLIG: So the problem Courts have had from Bay
25 Ridge and of a couple of other cases we cited, we have

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1 indefinite tolling was because it was infinite. That's the
2 issue.

3 THE COURT: That's never come up within this context
4 before. The ills that they have gone after are baking into
5 the contract itself before this is an accrued claim, an
6 indefinite thing where the promise has no boundary.

7 Here, each of these promises has a boundary.

8 MS. UHLIG: I agree with that, your Honor.

9 What my point is is if we are going to permit -- so
10 if we were going to look at the situation instead of taking
11 the date May 20, 2015 as the date of promise and instead we
12 are going to take each extension's date as the date of the
13 promise, the end result is that parties are enabled to toll
14 indefinitely.

15 THE COURT: It depends on which of -- what's the
16 veil that you are trying to address? Is it that the courts
17 should never have to deal with old cases or that the parties
18 should not bind themselves to an indefinite thread of suit?

19 MS. UHLIG: I think it comes back to the
20 legislature's intent in enacting 17-103 which clearly was to
21 have a period of repose so that claims that are 78 years old
22 are not brought before courts.

23 THE COURT: What do you do with the -- I thought
24 this was an interesting point that the contract itself, you
25 know, in terms of if -- I'm trying to interpret what the

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1 contract meant. Both parties express their intention that
2 it be a binding and enforceable agreement, Paragraph 16.

3 Shouldn't I do everything possible to interpret it
4 consistent with that intention?

5 MS. UHLIG: Well, your Honor, there would be no
6 reason to have 17-103 if it didn't apply to tolling
7 agreements. And pretty much every tolling agreement I've
8 ever seen says it's enforceable. So I think again, the
9 legislative intent is that this 17-103 is going to trump the
10 parties' chosen language in the agreement. And it all comes
11 back down to the actual way the agreement is written is
12 unenforceable because of the time period given.

13 THE COURT: Is it in the record who the drafter of
14 the contract is?

15 MS. UHLIG: No, your Honor.

16 THE COURT: Okay.

17 MS. UHLIG: There are a few other points that I
18 want to address.

19 THE COURT: Sure.

20 MS. UHLIG: One is relating to the -- again, the
21 net limitations period that is brought in through the
22 borrowing statute.

23 I think Barclay's makes very clear that the
24 borrowing statute is different from contract interpretation.
25 In that case it brought in California Law under the

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1 borrowing statute but used New York contract interpretation.

2 And I mentioned earlier that EGV SRI did the same,
3 and I'll just read a quote that we had in our brief on the
4 reply on Page 5. It specifically says, "Unlike 17-103 which
5 applies explicitly to and governs the validity of certain
6 private agreements, the borrowing provision applies only to
7 certain legal actions for specific procedural purpose." And
8 that Court then concluded that the tolling agreement was
9 governed by New York Law and subject to 17-103 even where it
10 applied the federal limitations period.

11 So again, I just think that demonstrates that we're
12 dealing with two separate concepts that can be used
13 together. And again, it would only be relevant if we are
14 not using the New York limitations period. Right. If we
15 use the New York limitations period, this argument isn't
16 relevant. And instead, what we have is the six-year Statute
17 of Limitations period. And we know that 17-103 must apply
18 because we have a New York Statute of Limitations and a
19 New York --

20 THE COURT: Yeah. Help me with the math on that.
21 If it's a six-year statute, that means you can extend it by
22 six years, but you're still dating it from the first
23 extension. So you can make it only -- you could make it a
24 total of 12 years if you did it exactly right. But in this
25 case, it's only nine years because you started the tolling

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1 three years in. Is that right?

2 MS. UHLIG: Well, the tolling started on May 20,
3 2015 and then was subsequently extended 12 times, and the
4 last extension was to July 2021.

5 So it's certainly longer than a six-year period
6 under New York Law.

7 THE COURT: Right. But you could -- if -- if you
8 had waited to toll until six years in, you could have a
9 total of 12 -- your view, your statute of repose is that
10 under no circumstances can it ever be more than 12. But
11 it's actually -- there are times when it can be less than
12 that because if -- just comment on when the first tolling
13 happens.

14 MS. UHLIG: Correct, your Honor. So let's say the
15 six-year limitation period did apply and three years in, the
16 parties entered into a tolling agreement, that would restart
17 for the purposes of 17-103, restart the tolling period. So
18 as of May 20, 2015, the parties would then have either the
19 max limitations period that applies or something less than
20 that.

21 THE COURT: So here's an annoying hypothetical. So
22 if they had done it slightly differently and each tolling
23 agreement expired and then a day later a new one was done
24 and then it goes for three years and then the day later it
25 expired, then actually leaving that gap, they would all be

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1 fine and you'd only have one day of running of the Statute
2 of Limitations between each of the 12 and they would be fine
3 because we are still within the 12-year outer boundary.

4 MS. UHLIG: I don't think I understand the
5 hypothetical.

6 THE COURT: Well, tolling is -- you know, the time
7 stops. And then when the tolling is over, it doesn't mean
8 that all the tolling is gone. It just means that period is
9 not considered for the statute; right.

10 In other words, let's assume the first tolling
11 agreement -- I don't know when it expired, but let's assume
12 it expired in '17.

13 MS. UHLIG: It did.

14 THE COURT: That doesn't mean that there was never
15 any tolling. Most tolling agreements provide that you just
16 subtract that period out. Is that the way this one works?

17 MR. UHLIG: No. Because it's governed by 17-103,
18 and that's not the way 17-103 works.

19 THE COURT: I'm living in your world under 17-103,
20 but under the terms of it -- I forgot your timeline, but --
21 so when the tolling agreement was signed after three
22 years -- after accrual, right?

23 MS. UHLIG: Shortly before three years.

24 THE COURT: So then let's assume that the next --
25 that tolling agreement lasted for three years and then

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1 ended.

2 Is it your view that the -- that you start the
3 clock over, you know, subtracting out the three years that
4 were tolled and then continue counting and then still have
5 some time or is it all over all at once?

6 MS. UHLIG: It's all over because the parties have
7 indicated their intention to create contractual --
8 contractually binding tolling periods, and I think it's
9 clear from the language of 17-103 that once the parties
10 enter into a tolling agreement and they elect a new period,
11 that is the tolling period.

12 So if they choose to enter into a tolling agreement
13 before what would otherwise be the limitations period
14 expires --

15 THE COURT: It says -- the contract says that the
16 -- that the time period is hereby temporarily tolled for the
17 duration of and shall not run at any time during the tolling
18 period.

19 What I'm trying to get at -- maybe I'm not
20 describing it well. When you do the math, once this
21 expires, does the three-year period then starts -- all of
22 that counts. The period during which the tolling agreement
23 applied, it's as if the tolling agreement never happened.

24 MS. UHLIG: No. I don't think that's right.

25 THE COURT: Right. You have to have six untolled

KM

Proceedings

1 periods. Six years of untolled periods have to go by;
2 right?

3 I'm going way beyond what we need, but my point
4 only is of this nine years between when the claim accrued
5 and when the claim was brought, a large portion of it if
6 they had all been separate and distinct and discrete
7 agreements would be subtracted out of the nine years. And
8 again, I'm possetting a two-year agreement. It ends. Then
9 we let two days go by and then a new agreement. No as of
10 date. Just each one. Wouldn't you just take all those
11 periods out?

12 MS. UHLIG: So I think in many states that is how
13 this would work. I think New York is different because of
14 17-103.

15 THE COURT: Even though in that situation there
16 would not have been any -- clearly, any agreement in which
17 more than six years was taken out in any particular
18 agreement or even in combination; right. Because here's --
19 this is the part I'm stretching maybe too hard to do, but if
20 in this nine-year period, there was five years of
21 intermittent tolling, right, five years, so still fine
22 within 17-103. Nothing more than six. You would still have
23 time left because there was only four years of untolled
24 time.

25 MS. UHLIG: So I don't think that's correct, your

KM

DECISION

1 Honor.

2 Like I said, I think that is correct in many states
3 in the way they interpret tolling agreements, but the
4 language of 17-103 says that we -- once there is a tolling
5 agreement, we now consider it as though the claim accrued at
6 the date of tolling agreement. So it's as though we restart
7 the claim on that date and we now go forward to whatever the
8 tolling period is.

9 THE COURT: You wipe out the tolling. You don't
10 count it at all, you don't, and you track it from the time
11 period.

12 MS. UHLIG: I think the tolling period now becomes
13 the time period. I don't think you then get whatever years
14 were left over.

15 You know, if you had a six-year limitations period,
16 you waited three years to enter into tolling, you tolled for
17 five years, I don't think you then get three years at the
18 end.

19 THE COURT: You think it replaces the entire
20 tolling period and restarts.

21 MS. UHLIG: I do, your Honor.

22 THE COURT: All right. I'm going to take a short
23 break, give Karen's hands time to rest a little. I'll
24 either have questions or I'll give you a ruling or I will
25 tell you I'm taking it under submission.

KM

DECISION

1 MS. UHLIG: Thank you, your Honor.

2 THE COURT: Thank you.

3 (Whereupon, at this time when was a recess taken.)

4 THE COURT: Okay. Thank you. You can sit please.

5 Well, the argument was as engaging as I was
6 expecting it to be. These are interesting issues, but I'm
7 ready to give you a ruling.

8 The motion to dismiss is denied as to Freedom Trust
9 and granted as to ARI with leave to amend if they have the
10 available facts to do so. I'll get into the specifics of
11 it.

12 Let's start with Freedom Trust. First of all, I
13 find that the borrowing statute does apply. The breaching
14 contract claim accrued no later than August, 2012. The
15 question initially is whether Freedom Trust's claim is
16 governed by the six-year Statute of Limitations or the
17 three-year period prescribed by Delaware law.

18 Now, based on the allegations of the Complaint
19 which I'm taking as true, I think I have to apply the
20 borrowing statute.

21 The absence of a showing by Plaintiff that Freedom
22 Trust was a resident of New York at the time the claim
23 accrued in 2012, New York's borrowing statute compels
24 application I think of Delaware's three-year limitation
25 period. I don't think the Maryland Law likely applies given

KM

DECISION

1 that the trustee is not a party here.

2 Under the borrowing statute, CPLR 202, the claim
3 must be timely under the limitation period of both New York
4 and the jurisdiction where the action accrued. The design
5 of course is to discourage forum shopping.

6 The cause of action accrues at the time and in the
7 place of the injury. Typically in a commercial case like
8 this one and when the injury is purely economic, the place
9 of injury usually is where the Plaintiff resides and
10 sustains the economic impact of the loss.

11 So the question is what is Freedom Trust and where
12 is it and when? In the case of corporate plaintiffs, the
13 State may -- the residence may be the state of incorporation
14 or the principal place of business. That's from the Oxbow
15 case that the Plaintiffs rely on from the First Department,
16 96 A.D.3d 646.

17 If relying on the latter, that is the principal
18 place of business, the question is where was the principal
19 place of business when the cause of action accrued, and the
20 Complaint here alleges that Freedom Trust is a Delaware
21 statutory trust created in 2011 with it's principal place of
22 business in New York. It's a little vague, but I did not
23 read that as a specific allegation of where the principal
24 place of business was at the time of the cause of action
25 accruing.

KM

DECISION

1 In any event, because Freedom Trust was
2 incorporated in Delaware, it's certainly a resident at least
3 of Delaware for purposes of CPLR 202. Assuming that Freedom
4 Trust can be a resident of more than one place for purposes
5 of CPLR 202 -- again, it's a trust. Not a corporation. It
6 hasn't alleged in my view in the Complaint that it's
7 principal place of business in 2021 is New York and
8 certainly no facts to support that.

9 Freedom Trust doesn't allege in the Complaint
10 anyway that it had employees in New York in 2012, that it
11 conducted any business activity in New York in 2012 or paid
12 taxes here in 2012. The conclusionary assertion in
13 Paragraph 10 of the Complaint in my opinion is insufficient
14 as a matter of law to compel a finding for purposes of this
15 motion to dismiss that it is outside the borrowing statute.

16 Oxbow which Plaintiff spends a lot of time on
17 specifically alleged that although the company's principal
18 place of business, current principal place of business was
19 Florida, it's principal place of business had been New York
20 at the time the underlying claim accrued, and those
21 allegations the Court held if proven would establish
22 Plaintiffs' principal office was in New York when the cause
23 of action accrued. And that in that case anyway, the
24 Defendants didn't -- did not submit documentary evidence
25 that would have conclusively disproved those allegations.

KM

DECISION

1 Here, the Complaint doesn't make the necessary
2 assertion about the location of Freedom Trust's principal
3 office in 2012. So Oxbow I don't think is on point.

4 So simply put, it doesn't matter for the borrowing
5 statute what Freedom Trust's residence is today and
6 parenthetically, there is really nothing in the Complaint
7 that describes other than a conclusory way where that
8 principal place of business is today. It matters what it
9 was in 2012.

10 The Complaint as it stands now contains no
11 allegation regarding residence in 2012 aside from the fact
12 that it's organized under the laws of Delaware, and in fact,
13 there are no facts even about it's operations today.

14 Freedom Trust because this came up in reply, I
15 guess they didn't have an opportunity to submit affidavits
16 to bolster it's allegation with respect to it's principal
17 place of business, New York. As you know, Plaintiffs are
18 allowed to supplement their Complaint in an affidavit, but I
19 take the point that they had no reason to do that. But
20 because it has -- there is no allegations that support the
21 assertion that Freedom Trust was a resident of New York for
22 the purposes of the borrowing statute, I'm going to assume
23 for purposes of this motion that Delaware's three-year
24 Statute of Limitations applies.

25 If it becomes relevant, and it may or may not

KM

DECISION

1 depending on what with the rest of this decision, depending
2 on how one rules on the remaining issues in the case, in an
3 amended Complaint, Freedom Trust does add additional
4 allegations that might bolster and support a different
5 conclusion on the borrowing statute.

6 But based on the Complaint that I have in front of
7 me now, I believe the Delaware statute has to be complied
8 with. As a result, Freedom Trust's claims would have
9 expired at the latest in August 2015 but for the parties'
10 tolling agreement entered into in May 2015.

11 So that brings us to the engaging questions of
12 whether the tolling agreements, 12 of them in combination
13 are enforceable. I find that they are. Broadly speaking,
14 two main reasons.

15 First, the general principle explained by the Court
16 of Appeals in Barclay's and in many other cases is that when
17 borrowing a foreign jurisdiction's Statute of Limitations
18 under CPLR 202, we import that Jurisdiction's limitations
19 period along with the extensions and tolls applied in the
20 foreign state so that the entire foreign Statute of
21 Limitations applies and not merely it's period.

22 Put another way, as the Court says, CPLR 202 calls
23 for a comparison of New York's "net" limitations period.
24 Integrating all relevant New York extensions and tolls and
25 the foreign state's net limitations period with all foreign

KM

DECISION

1 tolls and extensions integrated. And if the foreign
2 limitations period is shorter, the foreign net period
3 determines the timeliness of the action. Again, that is all
4 consistent with the overarching purpose of the borrowing
5 statute to inhibit forum shopping.

6 Here, importing the entirety of Delaware's law and
7 limitations period, the tolling agreement is valid. That's
8 because Delaware law permits written, open-ended waiver of
9 the Statute of Limitations, and HSBC does not dispute the
10 validity of the tolling agreement under Delaware law. And
11 so if Delaware law applies which I think it does, the
12 tolling agreement is plainly enforceable in this case.

13 The Barclay's decision in my view is not to the
14 contrary. In that case the Court found that even though the
15 California Statute of Limitations applied, the parties agree
16 that New York substantive law would govern the
17 interpretation of the language in the contract which in that
18 case precluded tolling.

19 Here, the relevant choice of law provision is
20 contained in the tolling agreement itself; although,
21 New York Law has chosen generally to govern the construction
22 and effect of the tolling agreement. Critically, it goes on
23 to state that "New York Law shall not be deemed by operation
24 of this provision to govern the issue of which
25 jurisdiction's law shall apply to any time-based defense,

KM

DECISION

1 the latter term being broadly defined." Those circumstances
2 -- so the phrasing is a bit peculiar given that the entire
3 agreement is arguably about time-based defenses. So it's
4 not clear what New York Law would apply to exactly.

5 I see no reason to deviate from the default rule of
6 applying and comparing each state's net Statute of
7 Limitations laws accordingly because the tolling agreement
8 is clearly enforcement under Delaware law. The extension in
9 the agreement is enforceable, and this action is timely.

10 Two quick points to make. I think in the Barclay's
11 case, the Court was obviously concerned that when the
12 parties chose New York Law as the governing law for the RMBS
13 contract, having uniformity and predictably in terms of how
14 that contract would be applied was very important. And in
15 that case, the Statute of Limitations issue was embedded in
16 the RMBS contract itself. So that if you were to permit
17 differing Statute of Limitations interpretations based on
18 who the plaintiff happened to be, you would have arguably a
19 fairly chaotic, at least potentially chaotic situation. We
20 don't have any such concerns here. This is a series of
21 bilateral tolling agreements between two parties who knew
22 exactly what they were doing, and it is distinct from the
23 RMBS contract, and it doesn't have any of those downsides in
24 my view. And I do think that the fact that the parties in
25 their contract have a provision Paragraph 16 from the most

KM

DECISION

1 -- from the last extension agreement that the parties
2 represent and warrant that they are authorized to enter into
3 the tolling agreement and that they intend the tolling
4 agreement to be a valid and binding obligation enforceable
5 in accordance with it's terms. And while Defendant is
6 correct that it still can't trump New York statutory law,
7 but if I'm trying to look at the definition at the language
8 about which law applies which is also in the same contract
9 and there is one way of interpreting that that would render
10 the contract entirely unenforceable and another way to
11 interpret that the contract is enforceable, I think that
12 there are sound principles of interpretation that would lead
13 me to interpret it in a way that is consistent with the
14 parties' overall intent of this being an enforceable
15 agreement.

16 So in that narrow circumstances, you know, even if
17 the choice of law provision is a little peculiar, I think,
18 first, it's natural reading to me is that New York Law is
19 not mandated for purposes of time-based defenses. But even
20 if it could be read either way, I think given the
21 overarching intention to have this being an enforceable
22 agreement, it would be arguably irrational to read it in a
23 way that undermined that overarching intent.

24 However, in any event, even if New York Law
25 applied, the tolling agreement would be enforceable. The

KM

DECISION

1 key statute is, General Obligations Law 17-103. That
2 statute requires an agreement to extend the Statute of
3 Limitations to be made after accrual of the cause of action,
4 and it allows extension of the limitations period for only
5 at most, the time period that would apply if the cause of
6 action had accrued on the date of the agreement.

7 It seems to be an interesting question of first
8 impression here, whether and how the statute applies to a
9 series of sequence tolling agreements, each one extending
10 the prior one.

11 I would note that that is far from an unusual
12 situation. That's the way in the real world parties
13 negotiate. And then you come to the -- toward the end of
14 the tolling period and you have to decide do we break off
15 and litigate or do we toll it again so it's not an unusual
16 fact pattern. Although, strangely, it has apparently never
17 come up in the context of this particular statute.

18 I think that the natural reading of the statute by
19 it's terms, it limits the amount of tolling that can be
20 attached to "a promise," a single agreement.

21 Tolling here was pursuant to a series of separate
22 agreements and promises each, one in compliance with Section
23 17-103 because each one came after accrual of the cause of
24 action, and each one extends the limitations period by a
25 permissible amount.

KM

DECISION

1 The fact that each successive agreement
2 incorporates the prior does not change the fact that the
3 relevant promise in each one is the one to extend the
4 tolling which is effective at the date of extension. So the
5 key 12th extension is dated January of 2021 and ended up
6 being, you know, in effect for less than a year.

7 HSBC doesn't cite any case law interpreting Section
8 17-103 to prohibit successive agreements that cumulatively
9 extend the State of Limitations past what the statute
10 allows.

11 If the legislature intended for there to be an
12 ironclad rule of, you know, no extensions beyond a set
13 number of years, they could have done that. Instead, they
14 tied the time period of the extension to the date of
15 promise, and there is nothing in the statute that prohibits
16 the parties from having multiple promises.

17 The case law on this statute is fairly thin, and it
18 focuses on two main and obvious problems. It either focuses
19 on -- a lot of it focuses on cases where the extension is
20 pre-accrual of the cause of action. So where a party is
21 trying to bake a longer Statute of Limitations period into
22 the contract itself, and that plainly was one of the targets
23 of this statute, and those have been struck down. Another
24 kind of problem that this statute was addressed to are
25 indefinite tolling agreements.

KM

DECISION

1 Examples of that are the Bay Ridge case, the air
2 rights case, and the evil there is that as I said during the
3 argument that the parties are then locked in to an
4 indefinite period. You can't figure out when it ends, and
5 you could end up with the parties being in suspension for an
6 indefinite period of time.

7 Here, the tolling agreement went into effect after
8 the claim accrued so we don't have that problem. And each
9 agreement set forth a date certain by which it would
10 expire -- by which it would expire each time certainly less
11 than the three-year period of Delaware Law and obviously
12 less than the six-year period of New York Law, if that
13 applied.

14 So the January 15, 2021 agreement which is the
15 relevant one here, the parties agree that the tolling
16 agreement would terminate no later than July 19, 2021. So
17 that agreement and that promise does not offend the public
18 policy considerations or the language of Section 17-103. I
19 think that this is mostly about statutory language and not
20 policy. But if we're going to veer into the policy for a
21 moment, HSBC makes the point that having Statute of
22 Limitations go on forever could be problematic in certain
23 ways, but prohibiting parties from successive Statute of
24 Limitation extensions creates equal and arguably worse
25 public policy problems in that it sets an artificial limit

KM

DECISION

1 on the parties' negotiations. And that it -- it would lead
2 to a situation where at some point during the time of
3 parties having potentially productive discussions, New York
4 Law unlike law of any other State that I'm aware of would be
5 construed to prohibit that discussion from continuing and
6 mandate essentially that the Plaintiff file suit when the
7 parties would otherwise prefer not to.

8 The legislature could certainly draft a statute
9 like that, but I don't think it did. There is also a sort
10 of an odd result to reading it HSBC's way. Under their
11 reading, Freedom Trust's claim is timely under Delaware Law
12 because Delaware allows open-ended extensions of the
13 limitations period and timely under New York Law because
14 New York Law allows a six-year extension from the date of
15 the initial tolling agreement but untimely through a
16 combination of the two. I don't think that the law requires
17 that either.

18 And as a final matter, we didn't really get into
19 this because I don't think we need to get beyond the statute
20 itself. I think you could -- would be hard to find a better
21 candidate for equitable estoppel than what we have here
22 where sophisticated parties are meeting with each other,
23 expending the period over time, and I have no evidence as to
24 whether any party was intending to mislead the other. But
25 clearly, everybody was proceeding as assuming that each of

KM

DECISION

1 these extensions was at a minimum legal and enforceable and
2 to then come up with this argument either later and to give
3 it effect to undermine what the parties clearly intended, I
4 think would likely give rise to an equitable estoppel. I
5 don't have to reach that because I find that the statute
6 doesn't read the way that HSBC urges. If that were -- if
7 another Court has a different view on appeal, obviously, I
8 would think that there would at least have to be some fact
9 finding as to whether equitable estoppel would apply to
10 prohibit HSBC from employing a Statute of Limitations
11 defense on these facts.

12 Moving on to ARI, I find that the burdens of
13 establishing standing are not significant, but they are --
14 there is some burden, and it has not been met here.
15 Standing's a threshold determination. So whether a person
16 seeking relief is a proper party to request an adjudication
17 is an aspect of justiciability which when challenged must be
18 considered at the outset of the litigation.

19 On the Defendant's motion to dismiss the Complaint
20 based on Plaintiff's lack of standing, the burden is on the
21 Defendant to establish prima facie the Plaintiffs' lack of
22 standing as a matter of law, and if that initial burden is
23 met which I think it is here, the burden then shifts to the
24 Plaintiff who must submit evidence which raises a question
25 of fact as to standing in order to defeat the motion.

KM

DECISION

1 In a different Royal Park case in the RMBS context,
2 specifically the Southern District held that investors
3 claiming losses incurred by previous holders must prove that
4 they have the standing to do so. The fact that Plaintiff
5 currently holds the certificates does not establish their
6 standing as to losses incurred by previous certificate
7 holders. The lack of standing or the Defendant's argument
8 for lack of standing I think is established prima facie by
9 the undisputed fact that it did not exist at the time the
10 underlying claim arose and the lack of any allegations
11 anywhere in the Complaint explaining when, how or from whom
12 ARI allegedly acquired an interest in these bonds.

13 At this point ARI has no allegations and has
14 submitted no evidence which raises a question of fact about
15 standing.

16 Again, it is true that under the General
17 Obligations Law 13-107, a transfer of any bond shall vest in
18 the transferee. All claims of demands of the transferor,
19 whether or not such claims or demands are known to exist
20 unless expressly reserved in writing, but ARI is still
21 missing the factual predicate.

22 The Complaint doesn't allege that that General
23 Obligations Law statute applies to any particular transfer
24 or transaction that's relevant here nor does it allege facts
25 showing that such transfer or transaction dates back to the

KM

DECISION

1 claims accrual. So because ARI fails to allege facts
2 sufficient to at least raise a question of fact as to
3 standing, the claim must be dismissed. Though in this case
4 without prejudice to seeking leave to amend if it can allege
5 in good faith the required facts to show that it has
6 standing to pursue these claims.

7 So that resolves the motion. I will say that with
8 respect to Freedom Trust, absent some reason to pick a
9 different date, I would have the answer typically due within
10 20 days, so I have chosen April 25. If there is any
11 particular reason why additional time is needed, I'll
12 certainly consider it, and I'd like to schedule a
13 preliminary conference for May 3 at 11:00 a.m. That one will
14 be telephonic to set up a briefing -- discovery schedule and
15 the like.

16 I think that the -- it would be I think sensible to
17 say that the time period to seek leave to amend, I would
18 like to keep it similar to the answer periods.

19 So is three weeks enough time to determine if you
20 want to seek leave to amend?

21 MR. KLEBAN: It is, Judge. Thank you.

22 THE COURT: Why don't we make it the same April 25.
23 And if you seek leave to amend, then I'll hold off on doing
24 anything further with respect to ARI in terms of entering
25 judgment.

KM

DECISION

1 If you do not seek leave to amend, then the
2 dismissal will be with prejudice, and I will enter judgment
3 accordingly.

4 Okay. Anything else we need to address?

5 MR. BOWMAN: Your Honor, just briefly. This is
6 Mr. Bowman. It occurs to me that if there is -- that the
7 two sets of Plaintiffs have filed a single Complaint, and if
8 there is going to be an amendment, it may be appropriate
9 here to push the answer date until the amendment is filed
10 and give us the traditional amount of time.

11 THE COURT: Well, the amendment -- to the extent
12 the amendment is just going to be about ARI, I don't think
13 it gives rise to any real problems.

14 MR. BOWMAN: Well, there's certainly common
15 allegations employed. I think we can work around them, but
16 it also occurred to me that Freedom Trust may take the
17 opportunity to amend as well with regard to it's principal
18 place of business. So subject to what our colleagues have
19 to say about that, it might make sense to push out the
20 answer a little bit further.

21 MR. KLEBAN: Your Honor, my understanding based on
22 the Court's rule is that Freedom Trust's principal of place
23 of business has no legal relevance.

24 THE COURT: It could depending on what happens on
25 appeal. But look, we have kind of run out of our runway for

KM

DECISION

1 the morning time. Here's what I'll say.

2 Let's say -- let's have the preliminary conference
3 on May 3rd. We'll give the Plaintiffs until April 25 to
4 move for leave to amend and answers are terribly not
5 credibly illuminating pieces of legal craftsmanship. So I
6 think that the case can probably continue without an answer
7 until there is one Complaint to shoot at. So given the
8 nodding of heads, there is likely to be leave to amend. Why
9 don't we hold off on the answer.

10 Often times, I'll hold off on the preliminary
11 conference until there is an answer, but I rather not have
12 this case just languish while we do that. So I think
13 it's -- I think it's okay to have a preliminary conference
14 to just talk about schedule, see if there are any ESI issues
15 that need to be dealt with. Okay.

16 So May 3rd, preliminary conference telephonic
17 11:00 a.m. The time to move for leave to amend is April 25.
18 All right. Thank you all very much. Appreciate you making
19 the trip down here, and I hope to see you again soon.

20
21 CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE
22 ORIGINAL MINUTES TAKEN OF THIS PROCEEDING.
23
24

22

23

24

25

KAREN MANGANO, CSR
Senior Court Reporter
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