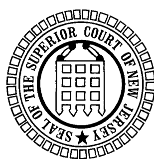
SUPERIOR COURT OF NEW JERSEY

CIVIL DIVISION
ESSEX VICINAGE



Chambers of
James S. Rothschild, Jr., J.S.C.

Historic Courthouse
470 Dr. MLK Jr. Blvd
Newark, New Jersey 07102

January 2, 2015

Robin H. Rome, Esq.
Nukk-Freeman & Cerra, PC
26 Main Street, Suite 301
Chatham, New Jersey 07928

Philip S. Rosen, Esq.
Zeichner Ellman & Krause LLP
103 Eisenhower Parkway
Roseland, NJ 07068

Zachary D. Rosenbaum, Esq.
Lowenstein Sandler LLP
65 Livingston Avenue
Roseland, NJ 07068

Kevin H. Marino, Esq.
Marino, Tortorella & Boyle, P.C.
437 Southern Boulevard
Chatham, NJ 07928

Alan S. Naar, Esq.
Greenbaum, Rowe, Smith & Davis, LLP
99 Wood Avenue South
Iselin, NJ 08830

Re: The Prudential Insurance Co. et al. v. Barclays Bank et al.
Docket No. L-3080-12; L-6206-12; L-2049-13

Dear Counsel:

The court has before it several applications by defendants[1] to dismiss several portions of the amended complaints and second amended complaints of plaintiffs The Prudential Company of America; Prudential Bank and Trust, FSB; The Gibraltar Life Insurance Co., LTD.; Prudential

[1] The current defendants herein are RBS, Morgan Stanley, and Countrywide. Prudential filed a complaint against RBS on **August 21, 2012**, a first amended complaint on September 14, 2012, and a second amended complaint on December 16, 2013. Prudential filed a complaint against Morgan Stanley and its subsidiaries on **April 25, 2012** and an amended complaint on October 16, 2012. Prudential filed a complaint against Countrywide on March 14, 2013**.** The case was removed from state court on March 28, 2013, and remanded back to the state court on March 31, 2014. However, prior to the litigation, the parties entered inot a tolling agreement effective **February 6, 2012**. Other defendants settled prior to these motions.

Investment Portfolios 2; Prudential Trust Company: Pru Alpha Fixed Income Opportunity Master Fund I, L.P.; The Prudential Investment Portfolios, Inc.; and The Prudential Series Fund ("Prudential"). The applications were precipitated by the decision of the United States District Court for the Central District of California in Prudential Insurance Company, Ltd., et al. v. Countrywide Financial Corporation, et al., Case No. 2:13-CV-05833-MRP (MANx) (C.D. Cal. Mar. 25, 2014) (the "Countrywide opinion"), which was supplied to the court the day before a major oral argument in these cases, and the decision of the United States District Court for the District of New Jersey in Prudential Insurance Company of America et.al. v. Bank of America, National Association, et. al. (the "Bank of America opinion"), which was decided the day after the oral argument. The purpose of this letter opinion is to address these applications.

I. **The New Jersey RICO Statute of Limitations Issue**

To put the applications in perspective, on July 19, 2013, this court issued an opinion in Prudential v. J.P. Morgan, ESX-L-3085-12 (hereinafter "J.P. Morgan").That opinion denied each and every aspect of J.P. Morgan's Motion to Dismiss. However, numerous aspects of the Motion to Dismiss were deemed meritorious enough to cause the court to engage in a detailed analysis. Of immediate importance, on pages 45 to 48 of that opinion, the court specifically addressed J.P. Morgan's argument that Prudential's New Jersey RICO claims are time-barred. Citing three Third Circuit opinions — Cetel v. Kirwan Fin. Grp., Inc., 460 F. 3d. 494, 510 (3d Cir., 2006), Cnty. of Hudson v. Janiszewski, 520 F. Supp. 2d 631, 640 (D.N.J. 2007), aff'd 351 F. App'x 662 (3d Cir. 2009) and Patettta v. Wells Fargo Bank, NA., No. 09-cv2848-FLW, 2009 WL 2905450, at *6 (D.N.J. Sept. 10, 2009)—this court held that New Jersey RICO claims are time-barred if brought more than four years after the plaintiff knew or should of known of the alleged injury, which, in J.P. Morgan, meant four years before the April 25, 2012 filing date of Prudential's

complaint. Since that holding was premised on the assumption that the NJ RICO statute of limitations period should be four years, and there is now one New Jersey decision to the contrary, the court will begin by addressing the four year-five year dispute.

a. NJ RICO Contains a Four Year Statute of Limitations

The court notes that one New Jersey state court has held that NJ RICO has a five year statute of limitations. See Tr. of R. at 62-65, Jarwick Devs., Inc., ADA Reichmann and Halpern v. Wilf, et. al., No. MRS-C-184-92 (N.J. Super. Ct. Ch. Div. Aug. 5, 2013). In Jarwick, Judge Wilson adopted a five year statute of limitations, reasoning that the statute of limitations for RICO actions should be consistent with the statute of limitations for civil actions initiated under the criminal code generally. See Transcript of Record at 64. However, the case Judge Wilson cites to support her decision, Matter of Integrity, 245 N.J. Super. 133, 136 (Ch. Div 1990), expressly states that the statute of limitations for NJRICO claims should be four years:

> New Jersey's "borrowing" of Federal RICO structure, purpose and remedies justifies the appropriateness of "borrowing" the new federal statute of limitations as well. Since Federal RICO is followed so closely in *N.J.S.A.* 2C:41-1 *et seq.* and since New Jersey's Antitrust Act, *N.J.S.A.* 56:9-14, also has a four-year statute of limitation and is followed by the New Jersey RICO statute, this court feels compelled to follow federal law in the case at bar and apply the four year federal statute of limitations for actions brought under New Jersey civil RICO claims. This decision will provide New Jersey with a uniform statute of limitations period clarifying an area of uncertainty and reducing needless litigation.

Thus, this court is compelled to reject Judge Wilson's proposed five year statute of limitations in favor of a four year statute of limitations. This court's holding is consistent with Judge Pfaelzer's opinion in Countrywide. This decision is also consistent with NJ RICO case law outside the RMBS area. See Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 149-50 (1987); Janiszewski, 520 F. Supp. at 640; Patettta, 2009 WL at *6; Cetel, 460 F. 3d. at 510; Matter of Integrity, supra. See, more recently, Lee v. Carabetta, et. al., No. A-2412-12T2,

slip op. at 19-20 (N.J. App. Div. Aug. 21, 2014) (using a four year statute of limitations period to reject a plaintiff's contention that he was entitled to NJ RICO relief seven years after demanding the return of a $500,000 deposit made to the defendant).

b. **The Pension Trust Decision**

This court's opinion next focused on the then-pending appeal of District Judge Cecchi's decision in Pension Trust Fund for Operating Engineers v. Mortgage Asset Securitization Transactions, Inc., 2012 WL 3113981 (D.N.J. July 31, 2012). This court wrote as follows:

> In Pension Trust, Judge Cecchi dismissed a February 22, 2010 Securities Act Complaint against entities which sold plaintiff mortgage backed securities "collateralized by loans principally originated by Countrywide Home Loans, Inc. ...and IndyMac Bank, F.S.B." Judge Cecchi noted that Countrywide and IndyMac originated 91% of the loans. The applicable statute of limitations was the one year/ three year limitation set out by the United Supreme Court in Lampf, Pleva, Lipking, Prupis and Petigrow v. Gilbertson, 501 U.S. 350, 111 S. Ct. 2773, 115 L.Ed.2d 321 (1991) and then codified by Congress. Judge Cecchi found that "[p]ublicly available news reports alone were sufficient to put Plaintiff on inquiry notice of its claims prior to February of 2009." Accordingly, she dismissed the Complaint.
>
> Obviously, Pension Trust involves Federal law, not New Jersey law, a different statute of limitations, and different defendants than this case. On the other hand, while the bulk of Judge Cecchi's opinion concerned publicly available information or "storm warnings" as to Countrywide and IndyMac specifically, there is one sentence in her opinion that is broader: "The sheer volume of reports, articles, and lawsuits concerning the mortgage lending industry, and MBS available prior to February 2009 alone would have been more than sufficient to put Plaintiff on inquiry notice of its claims." If the Third Circuit addresses that concept in its opinion, this court would be interested in its conclusions. Obviously a Circuit Court affirmance based on "storm warnings" for the entire industry, rather than just Countrywide and IndyMac could have broad ramifications for this case. An affirmance based on just Countrywide and IndyMac could have somewhat different ramifications. A reversal would have extraordinary significant ramifications. At least until Pension Trust is decided, the RICO claim must withstand the statute of limitations defense.

J.P. Morgan, Order at 47. The Third Circuit affirmed.

However, the affirmance never addressed whether the various publications and lawsuits surrounding the mortgage lending industry were sufficient to trigger inquiry notice.

Defendants, nevertheless, argue that it does, while Prudential argues that Pension Trust supports this court's previous determination in J.P. Morgan that "we have juries" to determine the relevance of general storm warnings. (Supplemental Mem.in Opp'n to Def.'s Mot. to Dismiss, 7 [hereinafter Pl. Supp. Mem.] (citing Prudential v. J.P. Morgan, Order at 47)). As a result, Judge Fischer's detailed analysis deserves to be quoted in full:

> We next decide whether the District Court erred in determining that the claims in the Original Complaint were untimely. The court rejected the Operating Engineers' argument that general storm warnings referencing Countrywide and IndyMac "were not specific enough to place [a reasonably diligent plaintiff] on inquiry notice" because they did not reference UBS, the Certificates, or the Offering Documents. Instead, in light of the "sheer volume of reports, articles, and lawsuits concerning the mortgage lending industry and [mortgage-backed securities] available prior to February of 2009," the court opined that "a reasonable investor of ordinary intelligence would not need to know the details of the specific loans that comprised their certificates in order to trigger an investigation."
>
> On appeal, the Operating Engineers admit that there were storm warnings about Countrywide and IndyMac more than a year before the Original Complaint was filed, ("Beginning as early as August 2006, numerous lawsuits, governmental investigations, and press reports revealed significant misconduct at numerous mortgage loan originators, such as Countrywide and IndyMac, concerning various mortgage loan underwriting practices."), and that the Offering Documents indicated that Countrywide and IndyMac collectively originated about 92% of the loans underlying the Certificates. But based on *Merck* and *MBIA,* the Operating Engineers argue that because a reasonably diligent plaintiff does not discover a fact constituting a violation until she can state a plausible claim about her particular security, the storm warnings must be certificate-specific. We disagree.
>
> As discussed above, the *Merck* Court preserved a limited role for inquiry notice in a statute of limitations analysis. Thus, we look to our pre-*Merck* precedent, which instructs that a reasonably diligent plaintiff would undertake an investigation based on "[t]he filing of related lawsuits," "news articles and analyst's reports," and "prospectuses, quarterly reports, and other information related to their investments," even when the information therein is not "company-specific" or security-specific. Nonetheless, the *Merck* Court ultimately rejected the inquiry notice standard as the trigger for the statute of limitations. **Thus, while a reasonably diligent plaintiff would have started an investigation based on these non-security-specific storm warnings, the statute of limitations would not have begun to run until she discovered the untrue statements or the omissions concerning her particular Certificates.**

The Operating Engineers next contend that a reasonably diligent plaintiff would not have discovered the untrue statements or the omissions regarding the Certificates until the rating downgrade by Moody's on February 20, 2009 because UBS made two reassuring, specific statements about the Certificates that dissipated the general storm warnings about Countrywide and IndyMac. First, on September 18, 2007, when the Operating Engineers purchased the Certificates, the Offering Documents reassured that there were 'no material legal proceedings currently pending against any of [UBS Real Estate], [MASTR] or the [MASTR Trust].' Second, on March 31, 2008, MASTR filed a public SEC Form 10–K reassuring that MASTR 'kn[ew] of no material pending legal proceedings involving [Countrywide or IndyMac], other than routine litigation incidental to the duties" of those companies.'

We have recognized that 'reassurances can dissipate apparent storm warnings if an investor of ordinary intelligence would reasonably rely on them to allay the investor's concerns.' Here, we agree that, despite widely-publicized reports about widespread problems with underwriting standards at Countrywide and Indy–Mac, an investor of ordinary intelligence would reasonably rely on UBS's reassurances that the particular loans underlying its specific Certificates were not afflicted with the common ailment. Thus, as of March 31, 2008, a reasonably diligent plaintiff would not have inquired about potential claims related to the Certificates.

However, we conclude that by September 9, 2008, a reasonably diligent plaintiff would have begun investigating his Certificates. The record reflects that on that date, a class of plaintiffs—**including the Operating Engineers**—filed an amended class action complaint in the California Superior Court against both Countrywide and UBS Securities, asserting claims under Sections 11, 12(a)(2), and 15 of the Securities Act that were substantially similar to those in this case. That complaint specifically alleged that Countrywide was the 'originator of the majority of the underlying mortgages supporting the securitization transactions,' and that UBS Securities 'drafted and disseminated the offering documents for the Certificates,' and 'issued false and misleading Prospectuses in connection therewith.' In particular, the 'Prospectus Supplements' were 'false and misleading' because they contained 'omissions and misrepresentations' related to 'the underwriting process for the mortgages,' including 'creditworthiness of borrowers, debt-to-income levels and loan-to-value ratios.'

A reasonably diligent plaintiff who had purchased mortgage-backed securities **from UBS Securities based on loans that were largely originated by Countrywide** would have noticed that complaint. The allegations in the complaint, which suggest that UBS Securities could not be trusted to verify Countrywide's underwriting standards for the loans underlying the securities it sold, would have undermined UBS's prior reassurances about the Certificates. Thus, a reasonably diligent plaintiff would have begun to inquire about her Certificates by September 9, 2008.

Pension Trust Fund for Operating Engineers v. Mort. Asset Securitization Transactions, Inc., 730 F.3d 263, 276-78 (3d Cir. 2013) (emphasis added) (internal citations omitted).

Defendants argue the Pension Trust affirmance stands for the proposition that a reasonably diligent plaintiff would start an investigation based on publicly available information, such as news reports, prospectuses, quarterly reports and the filing of related lawsuits, even when the information is not company or security specific. (Joint Supplemental Mem. in Supp. of Def.'s Mot. to Dismiss, 2 ("Defs. Joint Supp. Mem.")); see also id. at 34, 36. Therefore, widespread news reports, prospectuses, and lawsuits about the RMBS market in general should have alerted Prudential of potential claims four years prior to the filing of its NJ RICO claims. Thus, according to Defendants, Prudential's claims are time-barred.

In support of this argument, Defendants rely heavily on Judge Fischer's statement that "[a] reasonably diligent plaintiff who had purchased mortgage-backed securities from UBS Securities based on loans that were largely originated by Countrywide would have noticed" a complaint filed against Countrywide alleging fraudulent origination practices. (Defs. Joint Supp. Mem., 35) (citing Pension Trust, 730 F.3d at 279). However, when placed in proper context, this statement clearly references the fact that "a class of plaintiffs—**including the Operating Engineers**—filed an amended class action complaint in the California Superior Court against both Countrywide and UBS Securities, asserting claims . . . substantially similar to those in this case." Pension Trust, 730 F.3d at 277-278 (emphasis added). Put differently, the Third Circuit merely stated that the same plaintiff who alleged the same claims in an earlier lawsuit against the same defendants could not plead ignorance of those claims in a later lawsuit.

That is not the case presently before the court. The voluminous binders of storm warnings submitted by Defendants do not include a single lawsuit filed on behalf of Prudential against any

of the Defendants, or originators, for anything relating to RMBS prior to August 2008. Defendants also fail to identify one pre-August 2008 lawsuit involving the Certificates at issue. Under Pension Trust, the analogous indicator of when a reasonably diligent investor had sufficient knowledge of a defendant's fraudulent scheme would be when the first RMBS fraud claims were filed against a defendant. Here, the Defendants have not provided the court one RMBS fraud claim filed prior to August 2008—the latest cut-off for statute of limitations purposes in this case—against any of the defendants herein.

Defendants next argue that Pension Trust suggests storm warnings should be interpreted broadly. Therefore, "the sheer volume of reports, articles, and lawsuits concerning the mortgage lending industry and [mortgage-backed securities]" in general are sufficient to trigger the statute of limitations under civil NJ RICO claims. (Defs. Joint Supp. Mem., 2) (citing Pension Trust, 730 F.3d at 276)); see also id. at 34, 36. As shown above, this portion of the court's opinion is only a quotation of the district court's initial ruling, and the court affirmed on the narrower ground that a similar complaint had been filed against the **same defendants** over a year prior to the complaint before the court. Pension Trust, 730 F.3d at 278 (emphasis added).

Lastly, in regards to Pension Trust, Defendants highlight language referencing available information, "even when the information is not 'company specific' or 'security specific.'" (Defs. Joint Supp. Mem., 2); see also id. at 4, 29, 36. However, the Third Circuit also held "as of March 31, 2008, a reasonably diligent plaintiff would not have inquired about potential claims related to the Certificates," because of two reassurances made to the plaintiff about its Certificates. Pension Trust, 730 F.3d at 277. Again, the court stresses that the clock on the statute of limitations only began to run after "a class of plaintiffs—**including the Operating Engineers**—filed an amended class action complaint . . . against both Countrywide and UBS

Securities." Id. at 278 (emphasis added). Here, Prudential has not filed a similar, fraud-based RMBS complaint against any of the Defendants.

Ultimately, Pension Trust does not support Defendants' argument, which is the **same** argument put forth in the J.P. Morgan case. Specifically, J.P. Morgan argued, "Prudential knew the RMBS market was declining and is therefore time-barred, could not have reasonably relied, was not damaged, etc. . . ." J.P. Morgan, Order at 47. Pension Trust, in fact, supports Prudential's position. According to Prudential, the statute of limitations does not begin to run under New Jersey's injury discovery rule until "(i) [the] plaintiff . . . [knows] there was an injury attributable to the fault of a defendant, as opposed to *e.g.*, a loss caused by market disruption, and (ii) with respect to each defendant, the plaintiff [has] facts revealing that particular defendant's fault." (Mem. in Opp'n to Def.'s Renewed Mot. to Dismiss, 22-23 [hereinafter Pl. Mem.]). In Pension Trust, Judge Fischer explicitly stated, "the statute of limitations would not have begun to run until [the plaintiff] discovered the untrue statements or omissions concerning [its] particular Certificates." Pension Trust, 730 F.3d at 275. Consequently, the affirmance of Pension Trust—one of two cases that caused this court to invite re-briefing on the timeliness issue—does not justify dismissing Prudential's NJ RICO claims on timeliness grounds.[2]

c. **The Countrywide Decision**

The Third Circuit opinion in Pension Trust must be compared to Judge Pfaelzer's opinion in Countrywide, which examined Prudential's New Jersey RICO allegations concerning Countrywide originated mortgages. She began by recognizing that New Jersey RICO claims are

[2] The court's opinion is buttressed by Fed. Hous. Fin. Agency v. HSBC N. Am. Holding, Inc., 11-cv-6189(DLC), Dkt. No. 863 (S.D.N.Y. July 25, 2014), in which government-sponsored entities ("GSEs"), purchased RMBS from defendant banks. Judge Cote held that generalized evidence of weakening origination practices did "not support a finding that the GSEs actually knew that the Defendants' specific representations about the specific mortgage loans underlying the Securities was false." Id. at 66. Indeed, no evidence demonstrated that the GSEs actually knew "of the alleged false statements in the Offering Documents" or that "the GSEs would have believed that [defendants] were incapable of identifying defective loans." Id. at 43-44, 63.

governed by a four-year statute of limitations. Prudential Ins. Co., Ltd., et al. v. Countrywide Fin. Corp., et al., No. 13-cv-05883, at 5 (C.D. Cal. Mar. 25, 2014).

Assuming that Judge Pfaelzer was correct in utilizing the four-year limitations period, we can continue analyzing her decision. She then determined when the NJ RICO claim accrued. Importantly, Judge Pfaelzer noted, "There is ample authority holding that . . . the Court applies the injury discovery rule." Countrywide, slip op. at 3-4 (citing Janiszewski, 520 F. Supp. 2d at 640)). According to Judge Pfaelzer, under New Jersey's injury discovery rule, the statute of limitations is triggered when "[p]laintiffs had inquiry notice of their injuries, which is shown by the existence of storm warnings." Id. at 4 (internal quotations omitted). Prudential had sued Countrywide on February 5, 2012, making the critical date February 5, 2008. Id. Judge Pfaelzer analyzed two other suits brought against Countrywide: Stichting Pensioenfonds ABP v. Countrywide Fin. Corp., 802 F. Sup. 2d 1125, 1140 (C.D. Cal. 2011) and Am. Int'l Grp., Inc. v. Countrywide Fin. Corp., 834 F. Supp. 2d 949, 961 (C.D. Cal. 2012). Her discussion of the statute of limitations holdings in Stichting and AIG is instructive:

> New Jersey's injury discovery is familiar to this Court and parallels the inquiry notice standard applied in *Stichting* and *AIG*. *See Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F. Sup. 2d 1125, 1140 (C.D. Cal. 2011) (hereinafter, "*Stichting*") ("[A] plaintiff need not be aware of every fact that it ultimately relies upon in its pleadings before the statute begins to run. It is enough that it be on inquiry notice that the injury was 'caused by wrongdoing.'") (quotation omitted); *Am. Int'l Grp., Inc. v. Countrywide Fin. Corp.*, 834 F. Supp. 2d 949, 961 (C.D. Cal. 2012) (hereinafter "*AIG*") ("A Plaintiff is on inquiry notice when it at least suspects a factual basis, as opposed to a legal theory. For [the elements of the cause of action], even if [it] lacks knowle*dge* thereof-when, simply put, [it] at least suspects that someone has done something wrong to [it], wrong being used, not in any technical sense, but rather in accordance with its lay understanding.") (internal quotation marks and citation omitted).
>
> Defendants contend that Stichting and AIG compel the conclusion that Prudential's New Jersey RICO claims are untimely as a matter of law. The Court agrees. In Stichting, the Court held that inquiry notice existed as a matter of law

> by February 14, 2008 because "[t]he widespread public press coverage combined with the filings of the shareholder suits in August 2007, the *Ark. Teachers Ret. Sys.* action in November 2007, and the New York City Emp. Ret Sys. action in January 2008 were enough to alert a reasonable person to wrongdoing in Countrywide's loan origination business." All three of these events substantially predate February 5, 2008. But more importantly, Prudential identifies no additional "storm warnings" that were revealed in the eight days between February 5, 2008 and February 14, 2008 to distinguish this case from Stichting.
>
> The reasoning in AIG further supports the conclusion that Prudential's New Jersey RICO claims are untimely. There, the Court held that inquiry notice did not exist as a matter of law by January 15, 2008 because "Bank of America announced its acquisition of Countrywide only four days before the January 15, 2008, trigger date, and several other significant events occurred between January 15, 2008, and February 14, 2008. The AIG order identified two of those significant events, both of which substantially precede the operative date in this case – namely, the appointment of lead plaintiff in a consolidated shareholders case, which occurred on January 22, 2008, and the filing of New York City Employees Retirement System, which occurred on January 25, 2008. In sum, Prudential identifies no event or news development that differentiates February 14, 2008 from February 5, 2008, for purposes of inquiry notice. Furthermore, the significant events mentioned in AIG, which had not occurred by the operative date in that case, substantially pre-date February 5, 2008. The Court is therefore persuaded that inquiry notice existed by February 5, 2008 and grants Defendants' motion with respect to the New Jersey RICO claims.

Countrywide, slip op. at 4-6. Due to a series of letters sent to counsel, both parties have focused heavily on whether Judge Pfaelzer's decision affects this case. Defendants argue that Countrywide supports their argument that non-defendant specific storm-warnings can be sufficient to trigger the statute of limitations for civil NJ RICO claims. (Mem. in Supp. of Def's Renewed Mot. to Dismiss, 5-7 [hereinafter Defs. Mem.]); see also Defs. Supp. Mem., 28-29. Specifically, Defendants argue that Judge Pfaelzer's decision demonstrated that "inquiry notice is triggered when a sufficient 'accumulation of data' in the public domain 'would alert a reasonable person to the probability'—not certainty—'that Defendants have engaged in wrongdoing.'" (Defs. Mem., 7) (citing Countrywide at 4 (quoting Janiszewski, 52 F. Supp. 2d at 641)); see also Defs. Supp. Mem., 28. Prudential, on the other hand, argues that Judge Pfaelzer

misstates New Jersey's injury discovery rule and, even under this articulation, Judge Pfaelzer still required storm-warnings to be defendant specific for the statute of limitations to begin to run. (Pl. Mem., 38-41).

In regards to Judge Pfaelzer's articulation of the New Jersey injury discovery rule, Prudential argues:

> Judge Pfaelzer did not state the correct standard for the New Jersey discovery rule. Notably, Judge Pfaelzer did not cite a single New Jersey **state** court case to articulate the New Jersey **state** discovery rule. . . . New Jersey does not adhere to an 'inquiry notice' and 'storm warning' standard. If storm warnings are simply another way of asking what plaintiff should have known and when, then Judge Pfaelzer misinterpreted the extent of information plaintiffs must discover before accrual begins. . . . New Jersey requires discovery of injury, the fact that the injury was the fault of another, the defendant whom fault is attributable, and, as here, facts supporting the element of scienter. Until such time, the statute [sic] of limitations cannot accrue.

(Pl. Mem., 38). New Jersey case law discussing New Jersey's injury discovery rule supports plaintiff's position. R.A.C. v. P.J.S., Jr., 192 N.J. 81, 98 (2007) (discovery rule prevents the statute of limitations from running until the plaintiff discovers, or through reasonable diligence should have discovered, "the fact[s] essential to the cause of action"); Vispisiano v. Ashland Chem. Co., 107 N.J. 81, 98 (2007) (holding that the statute of limitations begins to run under the discovery rule when the plaintiff learns, or should have learned, the existence of "facts which may equate in law with a cause of action"); Caravaggio v. D'Agostini, 166 N.J. 237, 245 (2001) (noting that the statute of limitations does not begin to run under the discovery rule until the plaintiff knows the injury is attributable to the fault of another); Martinez v. Cooper Hosp. Univ. Med. Ctr., 163 N.J. 54, 66 (1998) (explaining that the plaintiff must know that the injury is due to the fault of an identifiable party). However, none of these cases is within the RMBS context.

Therefore, no published opinion in New Jersey has had occasion to address the precise issue before this court.

Ultimately, the court does not need to decide whether the "inquiry notice" standard applied by Judge Pfaelzer or the standard articulated by Prudential governs the present case. Even under the "inquiry notice" and "storm warning" standard advocated by Defendants, the statute of limitations would not have begun to run because the proffered storm-warnings are not defendant- or security-specific. Instead, the extensive compilation of storm warnings submitted by Defendants speaks only to the poor underwriting standards of the originators of the loans at issue and says nothing of the fraud allegedly committed by **these defendants**.[3]

Defendants' contention that Judge Pfaelzer's decision, combined with the Third Circuit's decision in Pension Trust, shows that generalized storm warnings about originators and the RMBS market can trigger inquiry notice is unpersuasive.[4] As shown above, Pension Trust does not stand for such a proposition. Further, a closer look at Countrywide reveals that the "storm warnings" Judge Pfaelzer considered were defendant specific.

In Countrywide, the only underwriter-defendant at issue was Countrywide. As a result, Judge Pfaelzer adhered to the Countrywide-specific timeline she previously laid out in Stichting, where she held that investors were on notice of their claims against Countrywide as of February 14, 2008. Countrywide, slip op. at 5. Judge Pfaelzer determined inquiry notice existed on that date because of **Countrywide-specific** lawsuits having been filed, including fraud based claims,

---

[3] The court chooses the word "defendant" carefully. In Countrywide, the only defendant was Countrywide and the storm warnings Judge Pfaelzer found sufficient to trigger the statute of limitations were specific to Countrywide. The court understands the argument that the existence of a lawsuit against an originator might be sufficient to trigger notice. Yet the only case the court has found where a lawsuit against an originator was sufficient to trigger notice was Pension Trust. In Pension Trust, Countrywide and IndyMac originated 92% of the loans at issue and the previous lawsuit was filed by the same plaintiff. Pension Trust, 730 F.3d 263, 276. That is not the case here. See infra note 5.

[4] For additional support, see the court's discussion of the Federal Housing Finance Agency case, supra, note 2.

and claims based on the same certificates purchased by the plaintiff. Stichting, 802 F. Sup. 2d 1125, 1136-1137 (C.D. Cal. 2011). Further, the "public press reports" referred to "problems with underwriting at Countrywide." Id. at 1137. Thus, although Judge Pfaelzer speaks generally about storm warnings, she only looked at defendant specific information when determining the timeliness of the claims. Consequently, the mere fact that Judge Pfaelzer dismissed claim against Countrywide as an underwriter-defendant based on a set of facts specifically detailing the corruption within Countrywide does not support dismissal of Prudential's claims.

Even if Countrywide does allow for generalized storm warnings to set a statute of limitations date—it does not—the decision would be an outlier. A far greater number of other courts have held that "storm warnings" need to be defendant or security specific to establish inquiry notice. Alaska Elec. Pension Fund v. Pharmacia Corp., 554 F.3d 342, 348 (3d Cir. 2009) (noting that storm warnings in the context of a falsely-held opinion or belief claim must have sufficient information to suspect that the defendants engaged in culpable activity); Staehr v. Hartford Fin. Servs. Grp., Inc., 547 F.3d 406, 427 (2d Cir. 2008) (holding that storm warnings must relate directly to the misrepresentations and omissions later alleged in the plaintiff's complaint against the defendant); Thompson v. Metro. Life Ins. Co., 149 F. Supp. 2d 38, 51 (S.D.N.Y. 2001) (explaining that dozens of articles about public awareness of industry corruption did not trigger inquiry notice in respect to a specific defendant); Capital Venture Int'l v. UBS Secs., LLC, 2012 WL 4469101, at 13 (D. Mass. Sep. 28, 2012) (holding that general storm warnings are insufficient because they did not reference the defendants); Public Employees' Ret. Sys. of Miss. V. Goldman Sachs Grp., Inc., 2011 WL 135281 at 9 (S.D.N.Y. Jan 12, 2011) (holding that general storm warnings were insufficient to trigger inquiry notice because they did not directly relate to the issuing trusts at issue).

In addition to the case law in opposition to their position, even if this court found that defendants have established the existence of sufficient "storm warnings," under the principles of the injury discovery rule, the burden would shift to Prudential to show that "[it] exercised reasonable due diligence and yet were [sic] unable to discover [its] injuries." Janiszewski, 520 F. Supp. 2d at 641. Defendants argue Prudential admits it did not investigate its claims diligently. (Defs. Joint Supp. Mem., 37-38). In response, Prudential argues it could not have discovered the source of its injury until 2010 when CoreLogic made it possible for it to investigate the certificates more closely. (Pl. Supp. Mem., 42). As was true in J.P. Morgan, "This is why we have juries."

After considering these arguments, the court hastens to add that its focus on the Countrywide opinion in its letters was rooted in a fear of inconsistency. Put differently, the court wished to avoid a situation where Prudential was deemed on inquiry notice of Countrywide problems in one case, but allowed to assert claims based on Countrywide loans in a different case. Since Defendants have not identified a single Countrywide loan at issue in any of the remaining cases, the inconsistencies this court feared will not present themselves in this case.[5]

d. **Other Courts Have Held Claims Against Originators At Issue Here Were Timely**

Perhaps even more harmful to Defendants' argument is the fact that courts have held that recent claims involving many of the originators at issue in this case to be timely. Fed. Hous. Fin. Agency v. UBS Americas, Inc., 858 F. Supp. 2d 306, 321 (S.D.N.Y. 2012) (finding claims based

[5] The court is aware that J.P. Morgan has identified Countrywide as an originator of some of the mortgages in its case. (Defs. Joint Supp. Mem., App. C). However, Prudential has reached an agreement in principle to settle its claims with respect to J.P. Morgan. As a result, barely any Countrywide loans are present in the remaining claims. In this regard, the recent December 29, 2014, New York Times article, *Court Filing Illuminates Morgan Stanley Role in Lending*, would be irrelevant to this court's decision.

on loans originated by Option One, Freemont, New Century, and WMC timely); In re IndyMac Mort.-Backed Sec. Litig., 718 F. Supp. 2d 495, 505 (S.D.N.Y. 2010) (finding claims based on loans originated by New Century timely); New Jersey Carpenters Health Fund v. Res. Capital, LLC, 2011 WL 2020260, at 5 (S.D.N.Y. May 19, 2011) (finding claims based on loans originated by Encore timely); Public Employees v. Merrill Lynch, 2009 WL 2460186, at 20 (S.D.N.Y. June 17, 2009) (finding claims based on loans originated by Ameriquest, New Century, and Freemont timely).

e. **Conclusion as to the New Jersey RICO Statute of Limitations as to Morgan Stanley**

Ultimately, the two cases that invited this court to allow re-briefing on the timeliness issue—Pension Trust and Countrywide—do nothing to alter the legal landscape since this court issued its opinion in J.P. Morgan. As a result, what this court wrote in J.P. Morgan is equally applicable to the present motions:

> The difference between Prudential and [Defendants] on the time-bar issue mirrors the difference between Prudential and [Defendants] on almost every issue in this case: [Defendants] assert[], plausibly, that Prudential knew the RMBS market was declining and is therefore time-barred, could not have reasonably relied, was not damaged, etc., while Prudential argues that it did not know that **[these] particular defendants** [were] misrepresenting specific facts as to **these particular loans**. This is why we have juries.

J.P. Morgan, Order at 47. Accordingly, as was the case in J.P. Morgan, Defendants' Motion to Dismiss Prudential's NJ RICO claims on timeliness grounds is denied.

f. **Conclusion as to the Countrywide Defendant Statute of Limitations Issues**

The Countrywide defendant faces a different landscape on the statute of limitations issue, as four of the eleven plaintiffs are not located in New Jersey. Prudential Annuities Life Assurance Corporation and Prudential Retirement Insurance and Annuity Company have their

principal places of business in Connecticut, Prudential Trust Company has its principal place of business in Pennsylvania, and the Prudential Life Insurance Company has its principal place of business in Japan. Connecticut has a three-year statute of limitations period, Pennsylvania has a two-year statute of limitations period, and Japan has a three-year statute of limitations period. [Countrywide's Mem. 10-11, 14]. Due to the shorter statute of limitations periods in Connecticut, Pennsylvania, and Japan, plaintiffs are time-barred from bringing claims by these specific plaintiffs against Countrywide.

g. **Conclusion as to the RBS Defendants' Statute of Limitations Issues**

The RBS defendants argue that Connecticut law should be applied to plaintiffs' claims. More specifically, RBS points out that the various Prudential plaintiffs are incorporated and have their principal places of business in New Jersey, Connecticut, Delaware, and Pennsylvania. RBS argues that Connecticut law should control the case because it has the most significant relationship to the case since it is the locale in which the alleged fraud occurred by the RBS defendants. RBS asserts that the place of the alleged misrepresentations carries heavier weight than the place in which the reliance occurred. Moreover, RBS argues that the reliance did in fact occur in Connecticut rather than New Jersey. RBS asserts that Prudential Investment Management's ("PIM") involvement in the suit is irrelevant to the choice of law matter, as PIM is not a party to the action, and thus its reliance on the alleged misrepresentations is irrelevant for choice of law purposes.

In making its argument, RBS relies on the plaintiffs' January 18, 2013 reply brief in support of its motion to remand in Prudential Ins. Co. of Am. v. RBS Fin. Prods., Inc., 12-06822, ECF No. 8. In that brief, Prudential argued that "PRIAC was the direct legal 'purchaser' of the Certificates fraudulently sold by RBS. . . .While PIM, its investment advisor, effectuated the

purchases at issue subject to PRIAC's 'investment restrictions,' the purchases were made in PRIAC's name, for the benefit of PRIAC, using PRIAC's funds, and the Certificate's legal ownership transferred from RBS to PRIAC's account." Prudential's Reply Br. at 11-12 (Jan. 18, 2013) (citations omitted).

Prudential counters in its opposition that these arguments were made in the context of a fraudulent joinder issue, in which Prudential asserted that PRIAC did, in fact, have a claim because it personally relied on the alleged misstatements. Prudential further argues that these arguments should not be read to estop Prudential from asserting that New Jersey has the most significant relationship to the suit.

The court agrees with RBS that the inconsistencies between Prudential's arguments in the remand motion and those before the court here directly contradict one another with regard to PRIAC's role compared to PIM's role in the purchase arrangements. In the remand motion, Prudential asserted that PRIAC was the primary actor for the purpose of claiming that "there is no diversity jurisdiction." Id. at 11. In the remand motion, Prudential was successful in having the case remanded to the state level. Now, Prudential argues that "Prudential's reliance took place *entirely* in New Jersey." Pl.'s Br. in Opp., Docket No. L-6206-12 at 5 (Mar. 24, 2014) (emphasis in original). Thus, the elements of judicial estoppel are present. See Bray v. Cape May City Zoning XXX, 378 N.J. Super. 160, 166 (App. Div. 2005) ("The doctrine of judicial estoppel bars a party who has successfully asserted a position before a court or other tribunal from asserting an inconsistent position in the same or a subsequent proceeding."). It would be improper to apply New Jersey law to PRIAC's claims after Prudential argued that it was a diversity-destroying entity before the federal court.

Therefore, this court must apply Connecticut law to PRIAC's claims. (While RBS urges the court to judicially estop all of the Prudential plaintiffs from asserting their claims, the court finds that Prudential's arguments were only inconsistent with regard to PRIAC.) The application of Connecticut law time bars PRIAC's claims, and they are therefore dismissed.

II. The RICO Enterprise Issue

N.J.S.A. § 2C:41-1(c) states that "'[e]nterprise' includes any individual, sole proprietorship, partnership, corporation, business or charitable trust, association, or other legal entity, any union or group of individuals associated in fact although not a legal entity, and it includes illicit as well as licit enterprises and governmental as well as other entities." In J.P. Morgan, this Court did not dismiss Prudential's RICO claims despite J.P. Morgan's contention that Prudential had failed to adequately plead the existence of an "enterprise." Op. at 48, 52. More specifically, this Court held that, because of NJRICO's broad scope, Prudential should be allowed to demonstrate why it was entitled to RICO relief. Id. at 52.

In Prudential Ins. Co. of Am. v. Bank of Am., Nat'l Ass'n, No. 13 Civ. 1586 (SRC), 2014 WL 1515558 at *17 (D.N.J. April 17, 2014), Judge Chesler addressed the issue of whether an NJRICO enterprise must adhere to the federal RICO's distinctiveness requirement. Under this requirement, a plaintiff bringing a federal RICO claim "must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001). The defendants in Bank of America (Bank of America and its subsidiaries) argued that New Jersey should follow the federal distinctiveness requirement. Bank of America, 2014 WL 1515558 at *17. Applying the distinctiveness requirement, the defendants then asserted that the plaintiffs had "failed to plead a RICO person who is distinct from a RICO enterprise" because

the alleged enterprise contained Bank of America and its subsidiaries, which were only different branches of a singular RICO entity. Id. Prudential, on the other hand, argued that NJRICO should not adhere to the federal distinctiveness requirement because NJRICO is broader than its federal counterpart. Id. Judge Chesler sided with the defendants, predicting "that the New Jersey Supreme Court would follow federal RICO law in interpreting whether or not there is a distinctiveness requirement under NJRICO." Id. at *18.

To support this conclusion, Judge Chesler stated that NJRICO and the federal RICO should not be read to conflict with one another. Id. at *19. Indeed, the U.S. Supreme Court and the New Jersey Supreme Court have held that both the federal RICO and the NJRICO should be interpreted broadly. See Sedima v. Imrex Co., 473 U.S. 479, 497-98 (1985); State v. Ball, 141 N.J. 142, 156-57 (1995). Although some state courts have interpreted Ball to represent a direct conflict between the NJRICO and federal RICO in the form of a federal distinctiveness requirement, Chesler asserted that Ball represents "striking agreement between the New Jersey Supreme Court, regarding NJRICO, and the United States Supreme Court, regarding RICO, on the broad interpretation of the term, 'enterprise.'" Bank of America, 2014 WL 1515558 at *19. Judge Chesler quoted the Third Circuit in Cetel to support his interpretation of Ball:

> [P]laintiffs rely on *State v. Ball,* . . . in which, according to plaintiffs, the New Jersey Supreme Court declined to interpret NJRICO coextensively with federal interpretations of RICO, instead opting to interpret NJRICO as governed by state law principles. We disagree. A close reading of *Ball* suggests, contrary to plaintiffs' contention, that the New Jersey Supreme Court believed the New Jersey RICO statute was and should be consistent with the federal RICO statute. *Ball,* 661 A.2d at 258 . . . . Moreover, subsequent New Jersey cases belie plaintiffs' contention that the New Jersey RICO is somehow divergent from the federal RICO statute. *See, e.g., Interchange State Bank v. Veglia,* 286 N.J.Super. 164, 668 A.2d 465, 472 (App.Div.1995) ("There is no state decisional law on this aspect of civil RICO law. Therefore, parallel federal case law is an appropriate reference source to interpret the RICO statute.").

460 F.3d at 510.

Rather than interpret Ball to represent a divergence between NJRICO and the federal RICO in terms of the distinctiveness requirement, Judge Chesler held that "*Ball* [simply] stands for the proposition that, in determining whether an enterprise-in-fact has been demonstrated, a court is to interpret the enterprise requirements broadly and may consider the pattern of racketeering established by the evidence in determining whether the existence of an enterprise has been established." Bank of America, 2014 WL 1515558 at *20. Moreover, Judge Chesler noted that Ball does not explicitly mention any distinctiveness requirement, and, even if NJRICO were broader than the federal RICO, that does not necessarily imply that NJRICO does not have a distinctiveness requirement. See id. at *20. Therefore, given the clear concurrence between NJRICO and the federal RICO and the lack of evidence for such a sharp divergence between the two statutes on the issue of distinctiveness, Judge Chesler predicted that the New Jersey Supreme Court would apply a distinctiveness rule in order to avoid an interpretative conflict. See id.

While NJRICO may be slightly more expansive than the Federal RICO, Judge Chesler is correct in claiming that both statutes should be interpreted broadly (and therefore, at least implicitly, similarly). See Sedima, 473 U.S. at 497-98; Ball, 141 N.J. at 155-63. Furthermore, because NJRICO is modeled after the federal RICO, it follows that courts analyzing NJRICO claims should use federal jurisprudence as a guide.[6] If federal law were followed in NJRICO cases, as Judge Chesler predicted, any plaintiff would certainly need to show that two or more

[6] "[T]he definitions of 'enterprise' in the federal and New Jersey RICO statutes are similar. Indeed, as originally introduced in the Assembly in February 1980, the New Jersey RICO statute paralleled federal RICO. The [New Jersey] Legislature, however, came to perceive purposes and goals . . . distinct from those of the federal statutory scheme. Consequently, in many respects our Legislature departed from the federal example. Nevertheless, because the federal statute served as an initial model for our own, we heed federal legislative history and case law in construing our statute." Ball, 141 N.J. at 156.

entities were "distinct" from one another in order to successfully plead "enterprise."[7] To be sure, it is clear that "an individual cannot 'associate[] with an enterprise comprised solely of himself.'" J.P. Morgan, Defs.' Joint Mem., 41 (quoting State v. Kuklinski, 234 N.J. Super. 418, 422 (Law Div. 1988)). Therefore, Judge Chesler properly points out that both federal and state courts have held that "a corporation generally cannot conduct an enterprise consisting of an association-in-fact between the [parent] corporation and its wholly-owned subsidiary" because a parent and its subsidiaries comprise a single entity in many circumstances. In re Schering-Plough Corp., 2009 WL 2043604 at *28; see, e.g., Gasoline Sales, 39 F.3d at 73.

However, Judge Chesler's analysis overlooks the possibility that a corporation and its subsidiaries might play differing roles in the racketeering activity, thus separating the RICO person from the RICO enterprise and satisfying the distinctiveness requirement. In this case, the Third Circuit "has not entirely foreclosed the possibility of finding that a parent corporation and its subsidiary is the enterprise" for RICO purposes. In re Schering-Plough Corp., 2009 WL 2043604 at *28. "In order to sustain a RICO claim on such grounds, the plaintiff would have to plead facts which 'would clearly show that the parent corporation played a role in racketeering activity which is distinct from the activities of its subsidiary.'" Id. (quoting Lorenz v. CSX Corp., 1 F.3d 1406, 1412 (3d Cir 1993)). To this effect, the New Jersey Supreme Court held in Ball that:

> [B]ecause the enterprise is distinct from the incidents constituting the pattern of activity, it must have an 'organization.' The organization of an enterprise need not feature an ascertainable structure or a structure with a particular configuration. The hallmark of an enterprise's organization consists rather in those kinds of interactions that become necessary when a group, to accomplish its goal, divides

[7] See, e.g., State v. Ball, 268 N.J. Super. 72, 155-63, (N.J. Super. Ct. App. Div. 1993) aff'd, (1995); see Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001); Gasoline Sales, Inc. v. Aero Oil Co., 39 F.3d 70, 73 (3d Cir 1994); In re Schering-Plough Corp. Intron/Temodar Consumer Class Action, No. 2:06-cv-5774, 2009 WL 2043604 at *28-30 (D.N.J July 10, 2009).

> among its members the tasks that are necessary to achieve a common purpose. The division of labor and the separation of functions undertaken by the participants serve as the distinguishing marks of the 'enterprise' because when a group does so divide and assemble its labors in order to accomplish its criminal purposes, it must necessarily engage in a high degree of planning, cooperation and coordination, and thus, in effect, constitute itself as an 'organization.'[8]

Such "organization" among the various parents and subsidiaries is present among all Defendants in the case at bar (see below). Indeed, Prudential has specifically alleged several "well coordinated, integrated" RICO enterprises, each of which requires a high degree of planning.[9] More specifically, although New Jersey would most likely adhere to the federal distinctiveness requirement, Prudential has nonetheless satisfied the distinctiveness requirement (and thus the enterprise element) by demonstrating precisely how each Defendant played a discrete role in the racketeering activity.[10] In this respect, the court notes the following "division of labor" taken directly from Prudential's complaints:

1. Morgan Stanley: Morgan Stanley's "business units include its Institutional Securities division, which, among other things, provides warehouse lending to mortgage originators; trades, makes markets, and takes proprietary positions in RMBS; and structures debt securities and derivatives involving mortgage-related securities." Am. Compl. ¶ 30. Morgan Stanley is the parent to all other Defendants mentioned in this section. Id. Defendant Morgan Stanley Capital Holdings LLC ("MSMC") "merged with and became successor-in-interest to Morgan Stanley

---

[8] Ball, 141 N.J. at 162. But see In re Schering Plough Corp., 2009 WL 2043604 at *28 ("The Court has explained that such an arrangement" between parents and subsidiaries "is generally not sufficient under RICO because parent[s] . . . and their . . . subsidiaries usually share a unity of purpose.").

[9] Tr. of R. at 50-51, Jarwick Developments, Inc., ADA Reichmann and Joseph Halpern v. Joseph Wilf, et. al., No. MRS-C-184-92 (N.J. Super. Ct. Ch. Div. Aug. 5, 2013).

[10] See id. at 51-52 ("*Ball* . . . is a very instructive case. It tells a judge what to look at in order to ascertain whether there exists an enterprise. It tells trial courts to look at how the participants in the enterprise associate with each other. Look at whether or not they have discrete roles. Look at the level of planning involved, how decisions are made. Look at the amount of coordination that is involved in the implementation of achieving their common goal, and how frequently the group, the participants engage in these incidents of an enterprise." "[A]ny kind of entity can be an enterprise, partnership, corporation, group of more loosely associated people.").

Mortgage Capital Inc., as sponsor for 26 of the Securitizations." Id. at ¶ 31. Moreover, Defendant Morgan Stanley ABS Capital 1, Inc. "was the depositor for 34 of the Securitizations[,]" and Defendant Morgan Stanley & Co. Incorporated "acted as the underwriter for 36 of the Securitizations[.]" Id. at ¶ 32-33.

Furthermore, Defendant Saxon Capital ("SCI") "merged with Angle Merger Subsidiary Corporation, a wholly owned subsidiary of MSMC." Id. at ¶ 36. Defendant Saxon mortgage Services, Inc. "is a direct or indirect subsidiary of SCI and was a servicer for 21 of the Securitizations"; Defendant Saxon Funding Management is "a wholly-owned subsidiary of SCI" and "was the sponsor of five of the Securitizations"; and Defendant Saxon Asset Securities Company is "a wholly-owned subsidiary of" Saxon Funding Management and "was the depositor for seven of the Securitizations." Id. at ¶ 34-37.

2. RBS: Defendant RBS Securities, or its predecessor Greenwich Capital, "was the underwriter for each of the Certificates [at] issue here[,]" and Defendant "RBS Financial Products acted as sponsor and seller for certain . . . offerings[.]" Second Am. Compl. ¶ 36, 38 Additionally, Defendants Financial Asset Securities Corp. (an affiliate of RBS) and RBS Acceptance were the depositors. Id. at ¶ 40-41.

a. **Conclusion as to the RICO Enterprise Issue**

Therefore, given that Prudential has adequately pled the existence of an enterprise based on the discrete roles of each parent and its subsidiaries, Prudential's RICO claims cannot be dismissed on "distinctiveness" grounds.

Very truly yours,

JSR:kfb

JAMES S. ROTHSCHILD, JR., JSC