To Be Argued By:
RICHARD A. JACOBSEN
Time Requested: 30 Minutes

APL-2020-00018
New York County Clerk's Index No. 650369/13

Court of Appeals

STATE OF NEW YORK

U.S. BANK NATIONAL ASSOCIATION, solely in its capacity as Trustee of the HOME EQUITY ASSET TRUST 2007-1 (HEAT 2007-1),

Plaintiff-Respondent,

—against—

DLJ MORTGAGE CAPITAL, INC.,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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March 27, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rules 500.1(f) and 500.13(a), Defendant-Appellant DLJ Mortgage Capital, Inc. ("DLJ") hereby states that it is a wholly owned subsidiary of Credit Suisse (USA) Inc., which in turn is a wholly owned subsidiary of Credit Suisse Holdings (USA) Inc., which in turn is a jointly owned subsidiary of: (1) Credit Suisse AG, Cayman Islands Branch, which is a branch of Credit Suisse AG, and (2) Credit Suisse AG, which in turn is a wholly owned subsidiary of Credit Suisse Group AG, which is a corporation organized under the laws of Switzerland whose shares are publicly traded on the Swiss Stock Exchange and are also listed on the New York Stock Exchange in the form of American Depositary Shares. No publicly held company owns 10% or more of Credit Suisse Group AG.

STATEMENT OF RELATED LITIGATION

As set forth in DLJ's letter to the Clerk of the Court dated January 31, 2020, DLJ identifies the following proceedings as related to this case:

- *Home Equity Mortgage Trust Series 2006-1 v. DLJ Mortgage Capital Inc.* ("*HEMT*"), APL-2019-00247, opening brief submitted (Mar. 11, 2020).

- *Ambac Assurance Corp. v. Countrywide Home Loans Inc.*, Index No. 651612/10, 2020 WL 236714 (1st Dep't Jan. 16, 2020), *motion for leave to appeal pending* (1st Dep't Mot. No. 661).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

Yet again, a sophisticated trustee of a residential mortgage-backed securities ("RMBS") trust seeks to disregard a contractually binding sole remedy provision that it agreed to in its contract. As is typical in RMBS transactions, the parties here crafted an exclusive contractual remedy for breaches of representations and warranties relating to the mortgage loans underlying the securities. But, just as in another case involving the same parties pending before this Court, *Home Equity Mortgage Trust Series 2006-1 et al. v. DLJ Mortgage Capital, Inc. et al.*, APL-2019-00247 ("*HEMT*"), Plaintiff seeks to change the terms of its bargain, attempting to recover damages for purported breaches of representations and warranties without complying with the agreed-upon sole remedy provision in its contract.

This sole remedy provision operates on a loan-specific basis at every step. First, unless the trustee can prove that DLJ (the sponsor of this transaction) independently discovered a material breach, the trustee must provide DLJ timely notice identifying each allegedly breaching loan. Then, if the trustee's breach allegations are disputed, the trustee must prove the existence of a material breach in that loan

that has a material and adverse effect on investors' interests in that loan. If DLJ does not cure that breach, the trustee may obtain repurchase at a contractually specified repurchase price, calculated based on characteristics of the breaching loan.

As this Court has already recognized, RMBS sole remedy provisions like these mean what they say and must be enforced by their terms: "[C]ourts must honor contractual provisions that limit liability or damages because those provisions represent the parties' agreement on the allocation of the risk of economic loss in certain eventualities." *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 581 (2017). Even if the parties "'may later regret their assumption of the risks of non-performance in this manner[,] … the courts let them lie on the bed they made.'" *Id.* Under these settled principles, an RMBS sole remedy provision's loan-specific requirements cannot be disregarded by a plaintiff merely because it later determines that compliance would be inconvenient.

Yet, Plaintiff here has disavowed any obligation to comply with the agreed-upon repurchase protocol. Plaintiff intends to go to trial on 783 loans that it claims breached representations and warranties, even

though Plaintiff provided timely pre-suit notice for only 303 of those loans. And with six-years to timely assert its claims, Plaintiff has not explained why it could not have provided the requisite pre-suit notice for the other 480 allegedly breaching loans it now wishes to pursue. Instead, Plaintiff has argued that it need not comply with the repurchase protocol's requirement of loan-by-loan notice: Plaintiff believes its demand that DLJ repurchase "all" breaching loans in the trust—without any further indication of which loans Plaintiff contended were breaching—was sufficient to put DLJ on notice of every allegedly breaching loan in the trust. In addition, as in *HEMT*, Plaintiff has invoked the doctrine of relation back, which it claims permits it to ignore the contractual requirements and instead provide belated "notice" at any time, for any loan in the trust. And, just as in *HEMT*, Plaintiff seeks to recover interest on breaching loans even for periods after a loan has been liquidated, which runs directly contrary to the contractually defined repurchase price.

Notwithstanding its current litigation position, Plaintiff knows precisely what these contracts require: When Plaintiff has been sued in RMBS-related litigation, it has taken the exact same position DLJ

advocates for here, arguing that the sole remedy provision must be enforced as written. Plaintiff should be held both to the terms of its agreement and to the legal consequences of its failure to timely pursue its remedies.

In affirming the motion court's summary judgment rulings, the Appellate Division ignored the repurchase protocol's requirement of loan-by-loan notice, misapplied the relation-back doctrine, and disregarded the contractually defined repurchase price:

First, relying on its decision in *HEMT*, the Appellate Division erred in applying the doctrine of relation back to excuse Plaintiff from the requirement of loan-specific pre-suit notice. This Court has never endorsed an application of relation back that would relieve a party of its obligation to comply with a contractual requirement within the limitations period, and should not do so here. The relation-back doctrine exists to correct pleading errors, not to allow parties to shed their contractual obligations. Contrary to the Appellate Division's view, the existence of some timely claims as to any specified loan—even a single loan in a single trust—does not give Plaintiff carte blanche to disregard the repurchase protocol for every other loan. And relation

back is unavailable here for still another reason: Plaintiff's newfound allegations of distinct breaches pertaining to distinct loans do not arise from the same "transactions" or "occurrences" identified in the initial pleadings. *See* CPLR 203(f). Further, the Appellate Division had no basis to treat a conclusory demand to repurchase "all" breaching loans as sufficient to satisfy the repurchase protocol's loan-specific requirements.

Second, and again relying on its decision in *HEMT*, the Appellate Division incorrectly construed the term "accrued and unpaid interest" in the contractual formula for calculating repurchase damages as applied to loans that have been liquidated. Contrary to the Appellate Division's atextual holding, that term refers only to unpaid interest that actually accrued on a loan. Once a loan has been liquidated, it no longer exists and does not accrue further interest. The contractually defined repurchase price does not permit recovery of interest that never in fact accrued.

This Court should reverse these holdings and enforce the repurchase protocol the parties agreed to when entering into their contract.

QUESTIONS PRESENTED

1. Did the Appellate Division err by applying the doctrine of relation back to permit Plaintiff to pursue otherwise untimely breach claims for 480 loans, and thereby excuse Plaintiff's failure to comply with the repurchase protocol's notice-and-cure requirement for those alleged breaches, merely because Plaintiff had sent timely repurchase demands relating to different identified loans and made a conclusory demand for repurchase of "all" breaching loans?

2. Where RMBS contracts provide for the payment of "accrued" interest as part of the repurchase remedy, did the Appellate Division err in holding that repurchase damages on liquidated loans include interest that did not, in fact, accrue?

JURISDICTIONAL STATEMENT

The Court has jurisdiction over this appeal from a nonfinal Order of the Appellate Division under CPLR 5602(b)(1). The Appellate Division certified, pursuant to CPLR 5713, the following question of law to this Court: "Was the order of Supreme Court, as affirmed by … this

Court, properly made?" A-3,[1] and the questions presented have been preserved for the Court's review, NYSCEF Doc. No. 604, at 23-28 (notice/relation back), 28-29 (liquidated loans).

STATEMENT OF THE CASE

I. Background

A. The parties execute a Pooling and Servicing Agreement to create the securitization at issue.

This case arises from an RMBS trust known as the Home Equity Asset Trust 2007-1, which closed on February 1, 2007. A-114. DLJ sponsored the trust and originated or acquired approximately 5,153 residential mortgage loans in the trust. A-71. These mortgage loans represent the collateral for certificates issued by the trust and sold to investors (the "certificateholders"). A-114. The certificateholders receive payments from the trust based on loan payments made on the underlying mortgages.

The trust was created and governed by a Pooling and Servicing Agreement ("PSA") entered into by, *inter alia*, DLJ, as Seller, and U.S.

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[1] Citations to "A-__" refer to the Appendix; citations to "C-__" refer to the Compendium of Cited Materials; and citations to "NYSECF Doc. No. __" refer to Index No. 650369/13 (Sup. Ct. N.Y. Cty.) unless otherwise noted.

Bank National Association ("U.S. Bank"), as Trustee. A-375. The PSA includes a schedule setting forth representations and warranties about the mortgage loans underlying the trust. For purposes of this appeal, the key provision of the PSA is the repurchase protocol, set forth in Section 2.03(d), which serves as the "sole remedy" for any breach of a loan-related representation or warranty. A-445-447.

B. The parties agree to a loan-specific sole remedy for representation and warranty breaches.

The repurchase protocol is written in loan-specific terms and requires proof of three elements for remedying a claimed nonconforming loan.[2] First, there must be a material breach of a representation or

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[2] The repurchase protocol provides in relevant part as follows:

> Upon discovery by any of the parties hereto of a breach of a representation or warranty made pursuant to Section 2.03(b) that materially and adversely affects the interests of the Certificateholders in any Mortgage Loan, the party discovering such breach shall give prompt notice thereof to the other parties. The Seller hereby covenants that within 90 days of the earlier of its discovery or its receipt of written notice from any party of a breach of any representation or warranty made by it pursuant to Section 2.03(b) which materially and adversely affects the value of the related Mortgage Loan or the interests of the Certificateholders, it shall cure such breach in all material respects, and if such breach is not so cured, shall, (i) if such 90-day period expires prior to the second anniversary of the Closing

warranty relating to the identified nonconforming loan. A-445. Second, that breach must "materially and adversely affect[] the value of the related Mortgage Loan or the interests of the Certificateholders." *Id.* Third, DLJ must be notified of or independently discover "such breach." *Id.* DLJ then has 90 days to "cure such breach in all material respects." *Id.*

The repurchase protocol further provides that if, after notice or discovery, DLJ cannot cure a breach that has the requisite material and adverse effect, DLJ shall "repurchase the affected Mortgage Loan or Mortgage Loans from the Trustee" at a contractually defined "Repurchase Price." *Id.* That price includes, in relevant part, the sum of "(i) 100% of the unpaid principal balance of the Mortgage Loan on the date of such purchase" and "(ii) accrued and unpaid interest thereon at the applicable Mortgage Rate … from the date through which interest was last paid by the Mortgagor to the Due Date in the month in which

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> Date, remove such Mortgage Loan … from the Trust Fund and substitute in its place a Qualified Substitute Mortgage Loan … or (ii) repurchase the affected Mortgage Loan or Mortgage Loans from the Trustee at the Repurchase Price in the manner set forth below ….

A-445.

the Repurchase Price is to be distributed to Certificateholders." A-425. A breach can be cured or repurchased only as to a specific loan that has been identified in a timely manner, as required by the repurchase protocol.

C. Plaintiff provides timely breach notices as to less than 25% of the loans in the trust.

Plaintiff sent DLJ only two timely pre-suit breach notices, which identified just a fraction of the trust loans as allegedly breaching. Plaintiff's December 6, 2011, letter stated that a certificateholder, the Federal Housing Finance Agency ("FHFA"), in its capacity as conservator for Freddie Mac, had requested that DLJ repurchase 304 specified loans in addition to "any others that did not comply with the representations and warranties." A-707. While FHFA's demand letters, which Plaintiff forwarded to DLJ, limited the repurchase requests to specified loans, *see* A-709-710, 714-715, Plaintiff's December 2011 letter "demand[ed] that DLJ repurchase *all* loans that breached representations and warranties, including the 112 and 192 of the loans [that] did not comply with the representation and warranty that the loans were underwritten in accordance with the underwriting guidelines," A-707 (emphasis added).

On March 30, 2012, Plaintiff forwarded a second letter demanding repurchase of an additional 900 loans identified in an attached schedule, but that letter did not include a demand to purchase any further loans beyond those specified in the letter. A-720. DLJ agreed to repurchase 40 of the loans identified in Plaintiff's pre-suit letters, but otherwise disputed Plaintiff's breach allegations. A-730, 733, 833. No other repurchase demands were made, timely or otherwise.

II. The Proceedings Below

A. The motion court permits Plaintiff to proceed with repurchase claims on hundreds of loans that it failed to identify in timely breach notices.

Plaintiff initiated this action by filing a summons and complaint on February 1, 2013, A-42, which it thereafter amended twice. Plaintiff's operative complaint alleges breaches of the PSA's representations and warranties in mortgage loans in the trust. A-71-106. Specifically, Plaintiff alleges that, based on FHFA's review of the loan files, it had discovered breaches in the 1,204 loans identified in its breach letters. A-74-75. Plaintiff seeks damages under the repurchase protocol for these nonconforming loans, "as well as all other Mortgage

Loans in the Trust" as to which DLJ allegedly breached its representations and warranties. A-75.

In August 2014, DLJ moved to dismiss the second amended complaint for failure to state a claim. In support of that motion, DLJ argued, *inter alia*, that the court should dismiss Plaintiff's claim for breach of loan-related representations and warranties for the 3,949 loans in the trust for which Plaintiff did not send DLJ a timely breach notice. The court (Bransten, J.) denied the motion. In rejecting DLJ's argument that the complaint should be dismissed as to loans not identified in Plaintiff's pre-suit breach letters, the court held:

> The Trustee's December 6, 2011 breach letter clearly provided notice to DLJ of its obligation to repurchase "all loans that breached representations and warranties." The letter cited to two batches of 112 and 192 loans for which the Federal Housing Finance Authority sought repurchase but noted that DLJ's obligation under Section 2.03 of the PSA went beyond these loans to include "any others that did not comply with the representations and warranties" made by DLJ in the PSA. While DLJ now seeks to impose a more stringent notice requirement upon the Trustee, this is beyond what the PSA language requires.

U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc., Index No. 650369/2013, 2015 WL 5915285, at *2 (Sup. Ct. N.Y. Cty. Oct. 8, 2015) (citations omitted).

As the case progressed, Plaintiff made clear that it would seek to prove liability and damages based on alleged breaches in hundreds of loans not identified in the pre-suit notices. On December 1, 2015, Plaintiff informed DLJ that it would pursue repurchase claims as to, at most, 1,059 specific loans. A-735, 833. Of the loans DLJ identified, 622 were not listed in Plaintiff's 2011 and 2012 repurchase demand letters. A-111, 803-815, 834. In 2016, Plaintiff's underwriting expert, Robert Hunter, identified breaches in 783 loans out of the 1,059 he reviewed. A-767, 834.

Out of those 783 loans, only 303 were specifically identified as breaching in Plaintiff's December 2011 and March 2012 breach letters. A-111, 816-825, 834. In other words, out of the 1,204 loans Plaintiff initially alleged as breaching in its December 2011 and March 2012 breach letters, Plaintiff dropped its claims with respect to 901 of those loans. At the same time, it *added* claims for 480 loans for which DLJ had not received prior notice.

After the close of discovery, the parties filed cross-motions for partial summary judgment. As relevant to this appeal, the trial court denied DLJ's motion in the following respects:

Notice and relation back: DLJ moved for summary judgment on the 480 loans for which Plaintiff did not provide a timely breach notice. The court denied the motion. Relying on its prior opinion denying DLJ's motion to dismiss, the court first held that Plaintiff's December 2011 letter "clearly provided notice to DLJ of its obligation to repurchase all loans that breach representations and warranties." A-35 (quoting *U.S. Bank*, 2015 WL 5915285, at *2). In the alternative, citing the First Department's decision in *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 133 A.D.3d 96 (1st Dep't 2015), *aff'd as modified*, 30 N.Y.3d 572 (2017), the court held that because the December 2011 letter identified some breaching loans and made a repurchase demand for all breaching loans, "the later-identified claims relate back to the original filing." A-36-37.

Interest on liquidated loans: As noted, the PSA defines a Repurchase Price for any loan that DLJ is obligated to repurchase, and that price includes the sum of "(i) 100% of the unpaid principal balance of the Mortgage Loan on the date of such purchase" and "(ii) accrued and unpaid interest thereon at the applicable Mortgage Rate." A-425. Plaintiff's damages expert, Dr. Karl Snow, included in his calculations

interest on allegedly breaching loans for periods where the loans had been liquidated and were not actually accruing interest. A-750.

DLJ sought a summary judgment ruling that the calculation of the Repurchase Price for any breaching loan does not include "accrued interest" for the period after the loan was liquidated, because once a loan is liquidated, interest no longer accrues. The court denied the request and held that "interest should continue to accrue on the loans despite their liquidation." A-39. The court further concluded that the applicable date for the contractual repurchase date "can reasonably be set as March 5, 2012, 90 days from the date of Plaintiff's demand for the repurchase of the loans." *Id.*

B. The Appellate Division affirms and grants leave to appeal to this Court.

Relying largely on its decision in *HEMT*, the Appellate Division affirmed the motion court's summary judgment rulings. The Appellate Division first concluded that Plaintiff's December 6, 2011 letter "informed [DLJ] that a substantial number of identified loans were in breach, and that the pool of loans remained under scrutiny, with the possibility that additional nonconforming loans might be identified." 176 A.D.3d 466, 466 (1st Dep't 2019). Accordingly, the court held that

"subsequently identified loans, including the 480 identified by plaintiff's expert during discovery, related back to the time of the initial notice." *Id.* (citing *Home Equity Mortg. Tr. Series 2006-1 v. DLJ Mortg. Capital, Inc.*, 175 A.D.3d 1175, 1176 (1st Dep't 2019) ("*HEMT*"); *U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc.*, 147 A.D.3d 79, 88-89 (1st Dep't 2016); and *Nomura*, 133 A.D.3d 96). The Appellate Division further held that the motion court "properly ruled that interest could be calculated on liquidated loans, at the applicable mortgage rate, up until the repurchase date." *Id.* at 467 (citing *HEMT*, 175 A.D.3d at 1177, and *Nomura*, 133 A.D.3d at 106-07). In addition, the Appellate Division agreed with the motion court that March 5, 2012, was the applicable repurchase date, concluding that DLJ "was placed on written notice of breach as to all loans on December 6, 2011." *Id.* at 466.

The Appellate Division granted DLJ's motion for leave to appeal and certified the following question for review: "Was the order of Supreme Court, as affirmed by … this Court, properly made?" A-3.

ARGUMENT

I. The PSA Requires Timely Notice As To Every Loan For Which Plaintiff Asserts A Claim.

A. The courts below ignored that the parties agreed to a loan-specific sole remedy that requires timely, loan-specific breach notices.

The motion court premised its notice analysis on a critical error: Although the repurchase protocol requires loan-by-loan notice or discovery of a breach of a representation or warranty, the court disregarded that provision and held that Plaintiff's December 2011 letter "provided notice to DLJ of its obligation to repurchase all loans that breach representations and warranties," including loans that the December 2011 letter never specifically identified. A-34-35. Although the Appellate Division did not expressly affirm the motion court's notice holding on this basis, it likewise stated that December 2011 letter provided DLJ with "written notice of breach as to *all* loans." 176 A.D.3d at 466 (emphasis added). And Plaintiff is likely to argue the same in this Court.

In determining what the contractual notice requirement requires, one need look no further than the repurchase protocol's plain text. Under that provision, which represents the parties' negotiated sole

remedy for any loan that breaches a representation or warranty, DLJ is required to cure any material breach, or, if it cannot cure, repurchase the defective loan. The cure-or-repurchase remedy is triggered only when DLJ discovers or receives written notice from any party of a breach that materially and adversely affects the interests of certificateholders. DLJ then has 90 days to "cure *such breach* in all material respects." A-445 (emphasis added). If "such breach is not so cured," then DLJ "shall … substitute … [or] repurchase the affected Mortgage Loan … from the Trustee." *Id.* The repurchase protocol thus requires a breach notice to identify the particular loan or loans that are allegedly nonconforming. Without loan-specific notice, DLJ cannot cure "such breach," remove "such Mortgage Loan" from the trust, or repurchase "the affected Mortgage Loan." *Id.*

The December 2011 letter in no way complies with these loan-by-loan requirements for the 480 loans that were identified as breaching for the first time in expert discovery. That December 2011 letter attached two letters from FHFA that specifically identified only 112 and 192 loans, respectively, as breaching. A-707-718. The December 2011 letter then "demand[ed] that DLJ repurchase *all* loans that breached

representations and warranties, *including* the 112 and 192 of the loans [that] did not comply with the representation and warranty that the loans were underwritten in accordance with the underwriting guidelines." A-707 (emphasis added). It made no attempt to identify with any specificity which of the *other* 4,849 loans in the Trust that Plaintiff believed were breaching.

To treat this blunderbuss demand as sufficient runs counter to the repurchase protocol's plain terms, which require notice to be provided on a loan-specific basis. As this Court has already held, the sole remedy provision cannot be "nullified," even in those instances where a plaintiff has alleged "multiple, systemic breaches." *Ambac Assurance Corp. v. Countrywide Home Loans Inc.*, 31 N.Y.3d 569, 582 (2018) (internal quotation marks and brackets omitted). As a result, demanding that the sponsor repurchase "all" breaching loans, without any further detail, cannot change what the contract requires. *See Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 585 (2017) (holding there is no "carve-out from the Sole Remedy Provision" merely because "a certain threshold number of loan breaches are alleged").

Plaintiff agreed to a sole remedy provision requiring loan-specific notice, and under New York law, courts must "honor[] the exclusive remedy that these sophisticated parties fashioned." *Id.* at 584 (internal quotation marks and brackets omitted). Yet, in treating Plaintiff's conclusory repurchase demand here as providing sufficient notice for every loan in the trust, the courts below have effectively read the repurchase protocol's terms out of the contract.

Remarkably, in other cases where the same Trustee (U.S. Bank) has been a defendant rather than a plaintiff, it has cited language identical to the repurchase protocol in this case to argue that a generalized demand for repurchase of every breaching loan is *not* enough to trigger the repurchase remedy. In particular, U.S. Bank has contended that "when a trustee seeks a repurchase" from a seller, it must prove "each alleged breach for each loan because the PSAs provide[] for … an individualized, loan-specific obligation to cure, replace or repurchase a breached loan." Defs.' Joint Mem. of Law in Support of Mot. to Dismiss 10, *IKB Int'l S.A. v. U.S. Bank Nat'l Ass'n*, Index No. 654442/2015 (Sup. Ct. N.Y. Cty. Oct. 5, 2016) (NYSCEF Doc. No. 44), *available at* C-62; *accord* U.S. Bank's Mem. of Law, *Phoenix*

Light SF DAC v. U.S. Bank Nat'l Ass'n, No. 14-CV-10116 (VSB) (DCF), Doc. No. 244 (S.D.N.Y. Mar. 30, 2018) (arguing that U.S. Bank's obligations under RMBS governing agreements are triggered by the Trustee's "knowledge of specific breaches as to specific loans" because the repurchase remedy is itself "loan-specific"), *available at* C-17. Noting that the repurchase protocol is phrased in singular terms ("cure *such breach*"), U.S. Bank has emphasized the "*loan-specific*" nature of the remedy as a reason why pervasive breach allegations are insufficient to trigger the repurchase protocol. Defs.' Joint Mem. of Law in Support of Mot. to Dismiss 10, *IKB Int'l S.A.*, Index No. 654442/2015, *available at* C-62. Now that the shoe is on the other foot, U.S. Bank argues the exact opposite. Its inconsistent arguments, however, provided the courts below no basis for departing from the plain terms of its contracts.

B. Relation back cannot be used to excuse timely compliance with contractual requirements.

The Appellate Division further erred in holding that Plaintiff may proceed to trial on 480 loans that were first identified as breaching during discovery, on the theory that all belatedly noticed breaches "relate[] back" to Plaintiff's initial notice. 176 A.D.3d at 466. The

relation-back doctrine does not permit Plaintiff to excuse itself from express conditions the repurchase protocol places on its ability to pursue a contractual remedy.

As a rule, causes of action are untimely if they are interposed after the limitations period expires. *See* CPLR 203(a). CPLR 203(f) codifies a limited exception, known as the relation-back doctrine, for amended pleadings that raise new claims: If the original pleading "give[s] notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading," then the claims in the amended pleading are "deemed to have been interposed at the time the claims in the original pleading were interposed." The doctrine thus strikes a balance between, on the one hand, "liberalizing … strict, formalistic pleading requirements," and on the other, "respecting the important policies inherent in statutory repose." *Buran v. Coupal*, 87 N.Y.2d 173, 177 (1995); *see also Duffy v. Horton Mem. Hosp.*, 66 N.Y.2d 473, 476-77 (1985) (emphasizing "the need to protect the judicial system from the burden of adjudicating stale and groundless claims"); *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 25 N.Y.3d 581, 593 (2015) ("Our

statutes of limitation serve the same objectives of finality, certainty and predictability that New York's contract law endorses.").

To be sure, allowing relation back "does not conflict with these policies" when the amendment to the pleading "merely adds a new theory of recovery or defense arising out of a transaction or occurrence already in litigation." *Duffy*, 66 N.Y.2d at 477. But relation back neither addresses nor remedies a party's failure to comply with agreed-upon preconditions to a contractual remedy. The point of the doctrine is to "enable[] a plaintiff to correct a *pleading error*—by adding either a new claim or a new party—after the statutory limitations period has expired." *Buran*, 87 N.Y.2d at 177 (emphasis added). The ability to correct an erroneously drafted pleading, however, does not endorse the expansion of the doctrine to excuse a plaintiff's real-world failure to heed contractual pre-suit requirements.

Here, Plaintiff—with the imprimatur of the Appellate Division—is using relation back to do far more than fix a pleading error or introduce a new cause of action. Plaintiff seeks an application of the doctrine that would reward its lack of diligence in bringing timely claims—an outcome that would dishonor the "important policies inherent in

statutory repose." *Id.* The problem is not with the sufficiency of Plaintiff's initial pleading, but with its failure to timely comply with the sole remedy provision—a contractually agreed upon "procedural prerequisite" to its ability to pursue the repurchase remedy. *ACE*, 25 N.Y.3d at 598. Plaintiff was entirely capable of investigating its breach claims and complying with the repurchase protocol within New York's generous six-year statute of limitations for contract actions. It bears noting that the certificateholder here that initiated the repurchase demands and is directing this litigation—FHFA in its capacity as conservator for Freddie Mac—is a "highly sophisticated player[] in the mortgage-backed securities market." *Fed. Hous. Fin. Agency v. UBS Americas, Inc.*, 858 F. Supp. 2d 306, 335 (S.D.N.Y. 2012), *aff'd*, 712 F.3d 136 (2d Cir. 2013). A sophisticated investor like FHFA can be expected to investigate and pursue potential claims within the limitations period. There is no reason to distort pleading doctrines in order to relieve FHFA and Plaintiff of that obligation.

Apart from the line of cases spawned by the First Department's *Nomura* decision, no decision from this Court or any other appellate body supports applying CPLR 203(f) to excuse a party from the

consequences of failing to comply with mandatory contractual dispute resolution provisions until after the limitations period elapses. Outside the RMBS context, every Appellate Division Department to consider the question has held the relation-back doctrine inapplicable where "the proposed causes of action are based upon events that occurred after the filing of the initial claim, rather than upon the events giving rise to the cause of action in the initial claim." *Johnson v. State*, 125 A.D.3d 1073, 1074 (3d Dep't 2015); *accord Cooper v. Sleepy's, LLC*, 126 A.D.3d 664, 665-66 (2d Dep't 2015); *Clairol Dev., LLC v. Vill. of Spencerport*, 100 A.D.3d 1546, 1547 (4th Dep't 2012).

At the time Plaintiff filed its original pleading here, however, it could not have properly included claims for the untimely noticed loans because Plaintiff had not yet satisfied a contractual precondition to asserting such claims—namely, giving DLJ timely notice of and an opportunity to cure alleged breaches. *See ACE*, 25 N.Y.3d at 599; *GreenPoint*, 147 A.D.3d at 87-88. Claims based on loans that were not timely identified are thus necessarily "based upon events that occurred after the filing of the initial claim." *Johnson*, 125 A.D.3d at 1074. These claims did not exist until Plaintiff satisfied the contractual

precondition to the repurchase remedy—which occurred *after* the filing of the initial claim.

In sum, to allow relation back in these circumstances would defeat the purpose of the repurchase protocol: to serve as "a procedural prerequisite" to pursing a remedy for any alleged breach of a loan-related representation or warranty. *ACE*, 25 N.Y.3d at 598. As *ACE* recognized, the repurchase protocol affords RMBS sellers the contractual right to cure or repurchase defective loans before being sued on an alleged breach. Thus, under the clear terms of the repurchase protocol, claims based on Plaintiff's untimely breach notices should not have been allowed to proceed. *See GreenPoint*, 147 A.D.3d at 87-88; *S. Wine & Spirits of Am., Inc. v. Impact Envtl. Eng'g, PLLC*, 80 A.D.3d 505, 505 (1st Dep't 2011) (relation back does not apply when "plaintiffs failed to comply with the express, bargained-for condition precedent to [the] right to bring an action against defendants").

C. The First Department's RMBS-specific relation-back holdings are unsound.

Beginning with its *Nomura* decision, the First Department has endorsed an ever-broadening application of relation-back in favor of

RMBS plaintiffs,[3] including in the decision below, 176 A.D.3d 466, and in another case currently pending before this Court, *HEMT*, APL-2019-00247. The First Department, however, has never attempted to explain how its authorization of relation back is consistent with the above principles. Its justifications for applying the doctrine not only fail on their own terms, but also permit blatant circumvention of the parties' negotiated sole remedy provision. In addition, the Appellate Division has erred in implicitly concluding that untimely noticed breaches arise from the same transactions and occurrences pleaded in the original pleadings, as required under CPLR 203(f) for relation back to apply.

1. The presence of "some timely claims" does not nullify contractual preconditions to additional claims.

In allowing Plaintiff to "relate back" its untimely breach notices in this case, the Appellate Division relied principally on its decision in *HEMT*, which in turn relied on its prior decision in *Nomura*, where the court had allowed relation back for "claims relating to loans that plaintiffs failed to mention in their breach notices or that were

[3] *See Nomura*, 133 A.D.3d at 108; *HSBC Bank USA v. Merrill Lynch Mortg. Lending, Inc.*, 175 A.D.3d 1149, 1150 (1st Dep't 2019).

mentioned in breach notices sent less than 90 days before plaintiffs commenced their actions." *Nomura*, 133 A.D.3d at 108; *accord HEMT*, 175 A.D.3d at 1176.[4] *Nomura*, for its part, emphasized that there were "some timely claims" pertaining to timely breach notices, as distinguished from a situation where no timely notices were sent pre-suit. 133 A.D.3d at 108. But *Nomura* offered no explanation for why the presence of "some timely claims" might excuse a plaintiff from timely compliance with a contractual precondition to pursuing the repurchase remedy as to other loans, nor did it cite any decision from this Court to support that proposition. The First Department's distinction was unfounded, and this Court should not endorse it here.

As an initial matter, it is beyond dispute that "CPLR 203(f) applies only in those cases where a *valid* preexisting action has been filed." *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 33 N.Y.3d 84, 90 (2019) ("*HEAT 2006-5*") (emphasis added). In so holding in *HEAT 2006-5*, this Court rejected a similar attempt by an RMBS trustee (the

[4] In *Nomura*, on appeal to this Court, the parties did not challenge or address the First Department's relation-back holding. *See Nomura*, 30 N.Y.3d 572.

same plaintiff here) to invoke relation back to override its failure to comply with the sole remedy provision within the limitations period. That rule is entirely consistent with the principle described above: that relation back does not excuse plaintiff from timely compliance with a contractual condition precedent.

It does not follow, however, that as long as there are "*some* timely claims," the need for timely compliance with remedial prerequisites goes out the window. The repurchase protocol here is not just a precondition to *suit*; it is the sole means by which Plaintiff may recover for any alleged "breach" of a loan-related representation or warranty. There is simply no basis in the parties' contracts—or New York law—to treat timely compliance with the repurchase protocol for a single breaching loan as excusing Plaintiff from that obligation for all other loans in a trust.

The effect of the Appellate Division's rule is to all but nullify the contractual notice requirement. As this Court recognized in *ACE* and as discussed above, timely compliance with that requirement is no mere formality. The repurchase protocol serves important purposes, and this "procedural prerequisite" must be satisfied within the six-year

limitations period in order to "serve the … objectives of finality, certainty and predictability." 25 N.Y.3d at 593-94. As the Appellate Division has applied *Nomura*, however, RMBS plaintiffs may now file a timely notice limited to a *single breaching loan* and then enjoy carte blanche to proceed on otherwise untimely notices as to hundreds (or even thousands) of loans. That rule enables near-total circumvention of the notice-and-cure requirement—an outcome that is by no means hypothetical. *See HSBC Bank USA*, 175 A.D.3d at 1150 (allowing relation back of "untimely breach notices" because the plaintiff sent "two timely notices"), *modifying* Index No. 652793/2016, 2018 WL 2722870, at *11 (Sup. Ct. N.Y. Cty. June 6, 2018) (explaining that each of the two timely notices identified only one loan as breaching, and the "vast majority" of loans (at least 973) were identified for the first time in untimely notices served years later).

2. Alleged breaches involving different loans do not arise from the same transaction or occurrence.

New York law allows additional claims to "relate back" to the filing of the original pleading only if the untimely claims "arose out of [the] same conduct, transaction or occurrence." *Buran*, 87 N.Y.2d at 178. The Appellate Division has not expressly addressed how that

requirement applies in RMBS repurchase suits, but in holding that untimely noticed claims relate back to "the time of the initial notice" identifying other breaching loans, 176 A.D.3d at 466, that court implicitly treats each securitization as the relevant "transaction" or "occurrence." *See also HEMT*, 175 A.D.3d at 1176 (untimely noticed claims relate back to "timely complaints that identified certain breaching loans" in the same trust).

That is error. The origination of each individual mortgage loan is a separate event—loans are obtained by different borrowers, secured by different homes in different parts of the country, and often underwritten by different originators using different guidelines. Claims as to the breach of a representation regarding one loan therefore do not arise out of the same "conduct, transaction or occurrence" as another loan. Providing DLJ with notice that, for example, the borrower for a loan originated by Originator A in California may have misrepresented his income does not put DLJ on notice that the borrower for a loan originated by Originator B in Florida may have failed to disclose the full extent of his outstanding debt.

Although the Appellate Division's RMBS relation-back holdings have never grappled with this question, the Delaware Court of Chancery addressed it at length in *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, Civ. No. 5140-CS, 2012 WL 3201139, at *18-19 (Del. Ch. Aug. 7, 2012). That carefully reasoned decision, authored by then-Chancellor Strine, is instructive.

In *Central Mortgage*, the court considered whether, for relation-back purposes, claims pertaining to loans beyond those identified in timely breach notices relate to the same "transaction or occurrence" as the claims in the original pleading. The court concluded that those late claims could not relate back, because "each alleged breach of contract due to a breach of representation … as to each individual loan constitutes a separate transaction or occurrence, regardless of the fact that the loans might have been part of the same loan pool." *Id.* at *18. As that court explained, "a separate independent violation of the same contract provision does not 'arise' out of the same conduct, transaction or occurrence as did the first, unrelated violation," as "evaluating the accuracy of … representations as to Loan A is an independent inquiry from that evaluation as to Loan B." *Id.* That result also follows from

the fact that the sole remedy provision required "loan-specific" notice and an opportunity to cure. *Id.* at *19. Further, a contrary rule would turn relation back "into a license for sloth" and "undermine the finality of contracts by subjecting sellers to a series of late-filed claims brought by amended pleadings based on stale records." *Id.* at *20. The sound reasoning of *Central Mortgage* correctly balances the remedial purpose of relation back with the parties' bargained-for contractual expectations and the statute of limitations.

In analogous contexts, this Court has found relation back inapplicable to "claims of injury [] based on different, not identical, transactions," noting that the individual claims at issue were subject to "an individualized reimbursement rate" that varied from claim to claim. *Greater N.Y. Health Care Facilities Ass'n v. DeBuono*, 91 N.Y.2d 716, 721 (1998). In *DeBuono*, the plaintiffs, an association of nursing homes along with eight individual nursing homes, timely filed an Article 78 proceeding challenging Department of Health regulations establishing Medicaid reimbursement rates. *Id.* at 718. Other, similarly affected nursing homes attempted to intervene in the plaintiffs' suit and assert additional claims. *Id.* at 719. The Court held that the otherwise

untimely claims of proposed intervenors could not relate back. Some of the Court's reasoning turned on the fact that the proposed intervenors were new parties not closely related to the original challengers. *Id.* at 721. But the Court's critical holding revolved entirely on how to define the relevant "transaction"—the same question at issue here. *Id.*

In that regard, the Court held that the proposed intervenors' claims of injury "are based on different, not identical, transactions." *Id.* That was so, the Court explained, because "each nursing home has an individualized reimbursement rate and the injury claimed varies from facility to facility and from year to year." *Id.* That reasoning is fatal to relation back here, where the question of whether a given loan in the trust materially breached representations and warranties is necessarily "individualized." Plaintiff's repurchase claims are also subject to a repurchase protocol that operates on an "individualized" basis, and the "injury claimed"—the specific alleged breaches—also must be determined loan by loan.

D. Even under the First Department's erroneous *Nomura* decision, Plaintiff's timely breach letters fail to give notice of "systemic" breaches in the trust.

Even if this Court were to treat *Nomura* as articulating the correct standard for relation back in RMBS repurchase actions, the Appellate Division would still have erred in allowing relation back here given the factual differences between the breach notices in *Nomura* and the notices in this case. The timely notice letters in *Nomura* referenced certificateholders' demands for repurchase of "all loans in the trust due to the 'systemic nature of the [alleged] breaches.'" *Nomura*, 133 A.D.3d at 103. And they put defendant on notice that certificateholders were "investigating the mortgage loans and might uncover additional defective loans for which claims would be made." *Id.* at 108.[5]

[5] Until recently, the First Department had consistently required that a timely repurchase demand, in order to support the relation back of later claims, must notify the defendant of an investigation and the possibility of additional claims. *GreenPoint*, 147 A.D.3d at 88-89; *see also HEMT*, 175 A.D.3d at 1176. The First Department since appears to have retreated from that requirement, *see HSBC Bank USA*, 175 A.D.3d at 1150 (applying relation back based on notices identifying a single loan as breaching), without explaining or acknowledging that change in its approach.

Unlike in *Nomura*, the demand letters here made no reference to "systemic" or "pervasive" breaches in the trust, nor did they assert that there was a continuing, ongoing investigation that could lead to more claims. *See* A-706-727. The Appellate Division erred when it held that Plaintiff's letters told DLJ not only that "a substantial number of identified loans were in breach," but *also* told DLJ that "the pool of loans remained under scrutiny, with the possibility that additional nonconforming loans might be identified." 176 A.D.3d at 466. Plaintiff's December 2011 letter said no such thing. Instead, the letter referenced two letters Plaintiff had received from a certificateholder, FHFA, and requested that DLJ repurchase 304 specifically identified loans and "any others that did not comply with the representations and warranties." A-707. Plaintiff's tacked-on statement in one repurchase demand that DLJ should repurchase "any other[]" breaching loans cannot constitute actual notice for unidentified loans in the securitization, let alone provide an anchor for relation back under *Nomura*. *See, e.g.*, *Bank of N.Y. Mellon Tr. Co. v. Morgan Stanley*

Mortg. Capital, Inc., No. 11-CV-505 (CM) (GWG), 2017 WL 737344, at *4-8 (S.D.N.Y. Feb. 10, 2017).[6]

In this way, this case is identical to *GreenPoint*, which refused to allow relation back. There, the Appellate Division distinguished *Nomura* as allowing relation back where "the breach notices … *expressly stated*" that trustees or certificateholders "were still investigating the matter and that further nonconforming mortgages might be discovered." *GreenPoint*, 147 A.D.3d at 88 (emphasis added). *GreenPoint* refused to "extend[]" *Nomura* beyond its facts where the defendant had been warned of the pending investigation and likelihood of additional forthcoming claims. *Id.* at 89. For the same reasons, Plaintiff's untimely breach notices should not relate back to the breaches identified in the December 2011 letter.

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[6] The letters from FHFA that Plaintiff attached to its December 2011 letter fare no better, as they also do not identify "systemic" breaches or a "continuing" investigation but merely "reserve [FHFA's] rights … to identify other Mortgage Loans with respect to which the Seller *may have* breached one or more of the representations and warranties contained in the PSA." A-710, 715 (emphasis added). The March 2012 letter from Plaintiff is even more cursory, merely demanding that DLJ cure or repurchase "the Subject Loans held in the Transaction collateral pool, based upon breach[es] … identified for each such loan on Schedule I." A-720; *see also* A-722-727 (listing specific loans in "Schedule I").

E. Plaintiff's untimely invocation of CPLR 205(a) has no bearing on relation back here.

In responding to DLJ's relation-back arguments, Plaintiff is likely to invoke this Court's decision in *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 33 N.Y.3d 72 (2019) ("*ABSHE*"), where a repurchase action was dismissed for failure to comply with the sole remedy provision, but that dismissal was entered without prejudice to refiling under CPLR 205(a).[7] This Court need not reach that issue, however, because Plaintiff has failed to preserve an argument that CPLR 205(a)'s hypothetical availability should inform the application of relation back in this case. Plaintiff's summary judgment briefing did not mention CPLR 205(a)—or the 2016 Appellate Division decision in *ABSHE* that this Court later affirmed, 141 A.D.3d 431 (1st Dep't 2016), *see* NYSCEF Doc. No. 704—and the motion court thus did not mention CPLR 205(a) in its summary judgment decision, A-35-37. Nor did the Appellate

[7] CPLR 205(a) provides that within six months after an "action … is terminated," under specified circumstances, the plaintiff may "commence a new action upon the same transaction or occurrence or series of transactions or occurrences."

Division address CPLR 205(a) or *ABSHE* in affirming the motion court's relation-back ruling. 176 A.D.3d at 466.

Indeed, this Court recently declined to address an unpreserved CPLR 205(a) argument asserted by the same trustee and counsel here, where U.S. Bank failed to raise "the specific argument in Supreme Court and ask the court to conduct that analysis in the first instance." *HEAT 2006-5*, 33 N.Y.3d at 89 (internal quotation marks and brackets omitted). That restraint is especially sensible in the CPLR 205(a) context, where "it would seem that the propriety of an action based on CPLR 205(a) should be decided in the subsequent action, and not the action that is dismissed." David D. Siegel, New York Practice § 49 (6th ed.). And that is particularly so when the lower courts in this case have never even addressed the potential availability of refiling under CPLR 205(a) or its significance to the relation-back issue.

In any event, even if the Court were to consider it, *ABSHE*'s discussion of CPLR 205(a) does not justify relation back in this case. *ABSHE* held that dismissal without prejudice to refiling was appropriate on facts quite different than the ones here, where the trustee failed to provide contractually required pre-suit notice of

breaching loans to the mortgage originator, and instead only provided pre-suit notice to DLJ, which was liable as a "backstop" to the originator's repurchase obligation. 33 N.Y.3d at 76-77. *ABSHE*'s ruling on the potential availability of CPLR 205(a) expressed no view on the viability of claims as to loans for which the trustee fails to provide *any* party with contractually required pre-suit notice and an opportunity to cure.

ABSHE is distinguishable for a further reason. There, it was undisputed that the prior dismissal disposed of the entire "action," 33 N.Y. 3d at 77, whereas here, DLJ is not seeking the dismissal of an action or even a claim, but rather to limit the population of loans upon which Plaintiff can pursue notice-based claims at trial. By its terms, CPLR 205(a) applies only where, *inter alia*, an "action" is terminated, and the termination is in a manner other than a "final judgment upon the merits." That has not happened yet in this case, and there is no indication that it ever will. Quite to the contrary, this case will proceed to a final judgment, one way or the other, on the merits.

The bottom line is that CPLR 203(f) and 205(a) address distinct issues and operate in different ways. *See Carrick v. Cent. Gen. Hosp.*,

51 N.Y.2d 242, 248-49 (1980) (drawing a "sharp distinction" between the operation of relation back and CPLR 205(a)); *accord HEAT 2006-5*, 33 N.Y.3d at 90-91. Whether, and how, CPLR 205(a) might apply to a hypothetical refiled action is a question for another day.

II. The PSA's Specified Remedy Does Not Include Interest That Never Actually "Accrued" On A Loan.

The repurchase protocol in the PSA establishes the exclusive remedy for the material breach of any loan-related representation or warranty. That remedy incorporates a contractual formula for calculating the "Repurchase Price" DLJ must pay to repurchase a breaching loan. The Repurchase Price is defined, in relevant part, to include "the sum of (i) 100% of the unpaid principal balance of the Mortgage Loan on the date of such purchase, [and] (ii) *accrued and unpaid interest thereon* at the applicable Mortgage Rate." A-425 (emphasis added). DLJ does not dispute that its obligation to pay the specified Repurchase Price extends to breaching loans that have been liquidated. The parties disagree, however, on how the "accrued and unpaid interest" component of the Repurchase Price is to be calculated for liquidated loans. As explained below, interest does not accrue on

loans that have been liquidated, and the Repurchase Price should be calculated accordingly.

A. The PSA's Repurchase Price limits Plaintiff's recovery for liquidated loans to unpaid interest that actually "accrued" before the loan was extinguished through liquidation.

The Appellate Division erred in holding that "interest could be calculated on liquidated loans, at the applicable mortgage rate, up until the repurchase date." 176 A.D.3d at 467. The proper analysis begins—and should end—with the terms of the contract. *See 159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353, 356 (2019) ("[A]greements negotiated at arm's length by sophisticated, counseled parties are generally enforced according to their plain language….").

The contractual term "accrued and unpaid interest" is unambiguous. When referring to interest connected to a financial instrument, "accrued" means "[a]ccumulated or increased by growth." *Accrued*, Oxford English Dictionary (3d ed. 2011). "Accrued interest" therefore refers to "[i]nterest that is earned but not yet paid." *Interest – Accrued Interest*, Black's Law Dictionary (11th ed. 2019).

Once a loan has been liquidated, however, interest no longer accrues, because there is nothing left upon which interest can

"accumulate[] or increase[]." That follows, again, from the terms of the contract. Although the PSA does not define "liquidation," it specifies that a loan is treated as liquidated only when it has "defaulted" and its servicer has "received all amounts it expects to receive in connection with the [loan's] liquidation." A-409. The PSA definition of "Liquidation Proceeds," in turn, refers to "[a]mounts … received in connection with the partial or complete liquidation of defaulted Mortgage Loans, whether through trustee's sale, foreclosure sale or similar dispositions." *Id*.

As a matter of state law, "a foreclosure decree operates to merge the interests of mortgagor and mortgagee, and vest in the purchaser the entire interest and estate as it existed at the date of the mortgage." *MASTR Asset Backed Sec. Tr. 2006-HE3 ex rel. U.S. Bank Nat'l Ass'n v. WMC Mortg. Corp.*, No. 11-CV-2542 (JRT) (TNL), 2012 WL 4511065, at *4 (D. Minn. Oct. 1, 2012). Thus, under New York law, for example, "[o]rdinarily the note and mortgage would be extinguished by their merger into the foreclosure judgment." 35 Jenean Taranto, Mortgage Liens in New York § 20:1 (2d ed.). Similar principles apply under the

laws of other states.[8] That is why the Prospectus Supplement for this trust specifically warned investors that "[d]efaulted mortgage loans may be liquidated, and liquidated mortgage loans will no longer be outstanding and generating interest." A-249. Accordingly, the "accrued and unpaid interest" on a liquidated loan refers only to the interest that accrued before liquidation.

Nor does the potential availability of a deficiency judgment *after* foreclosure mean that the underlying loan continues to exist and accrue interest after liquidation. A deficiency judgment is not the same as the original debt. In addition, some states do not permit deficiency judgments at all, and others impose various restrictions on a lender's ability to pursue that remedy. *See, e.g.*, 2 Law of Distressed Real Estate

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[8] *See, e.g.*, *CitiMortgage, Inc. v. Equity Bank, N.A.*, 942 F.3d 861, 866 (8th Cir. 2019) ("[S]ometimes residential-mortgage loans cease to exist after foreclosure, such as by operation of state law[.]" (citing Texas law)); *First Place Bank v. Skyline Funding, Inc.*, No. 10-CV-2044, 2011 WL 3273071, at *4 (N.D. Ill. July 27, 2011) ("[A] default order or foreclosure decree merges the real estate mortgage and the mortgage indebtedness into a judgment[.]"); *Esoimeme v. Wells Fargo Bank*, No. 10-CV-2259 (JAM) (EFB) (PS), 2011 WL 3875881, at *7 (E.D. Cal. Sept. 1, 2011) (under California law, "non-judicial foreclosure sale extinguish[es] the note and deed of trust"); *Peterson v. Metro. Life Ins. Co.*, 248 N.W. 667, 668 (Minn. 1933) ("The mortgage, both as contract and security, [is] exhausted by the foreclosure….").

App'x 19A (identifying restrictions under laws of different states). The PSA calculates damages based on interest that actually "accrued" on the mortgage loan at issue, not on an additional state-law remedy that might be available with respect to some (but not all) liquidated loans in the trusts.

B. The lower courts' reasons for disregarding the plain meaning of "accrued and unpaid interest" lack merit.

The Appellate Division disposed of this question with a single sentence: "The motion court properly ruled that interest could be calculated on liquidated loans, at the applicable mortgage rate, up until the repurchase date." 176 A.D.3d at 467 (citing *HEMT*, 175 A.D.3d at 1177; *Nomura*, 133 A.D.3d at 106-07). But neither of the cases cited justifies departing from the applicable contractual language. The cited portion of *Nomura* merely allowed RMBS plaintiffs to "pursue monetary damages with respect to any defective mortgage loan in those instances where cure or repurchase is impossible," such as where a loan has been liquidated. 133 A.D.3d at 105, 107. This language from *Nomura* is irrelevant here: No one disputes that damages can be awarded where the equitable specific performance remedy is impossible.

The *HEMT* decision relied on this same sentence in *Nomura* in concluding that "the repurchase price, as defined in the PSAs, applies to liquidated and non liquidated loans, and thus, includes accrued interest on loans after they have been liquidated." 175 A.D.3d at 1177. The former part of this statement is accurate, in that both parties here agree that damages must be calculated pursuant to the contractual Repurchase Price (including loans that have been liquidated). But, as DLJ argues before this Court in *HEMT*, *see* DLJ Opening Br. 69-71, APL-2019-00247, the latter part of the statement finds no support in the contractual language. By asserting that the Repurchase Price "thus[] includes accrued interest," *HEMT* ignored the plain meaning of Repurchase Price, which as explained above, is limited to interest that "accrue[s]" on a loan in existence. The Appellate Division repeated the same error by applying *HEMT*'s erroneous holding here.

In allowing Plaintiff to recover damages that go beyond those authorized by the PSA, the motion court appears to have been motivated by a concern that the contractual definition might encourage opportunistic behavior by RMBS sponsors. A-38 (noting the risk that a seller might be "incentivized to fill the Trust with junk mortgages that

would expeditiously default so that they could be released, charged off, or liquidated before a repurchase claim is made" (quoting *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 40 Misc. 3d 562, 567, 569 (Sup. Ct. N.Y. Cty. 2013)). But the motion court identified no evidence to ground that speculative concern in the real world or the facts of these transactions. If anything, the rule adopted below creates a competing perverse incentive: the risk that RMBS plaintiffs will run out the clock on litigation and waste judicial resources simply to rack up "accrued" interest on nonexistent loans.

In any event, New York law does not permit a court to substitute a damages formula it believes to be socially optimal for the one that sophisticated counseled parties incorporated into their contract. *See 159 MP Corp.*, 33 N.Y.3d at 367-68. To the contrary, this Court has emphasized the need to "honor [RMBS] contractual provisions that limit liability or damages because those provisions represent the parties' agreement on the allocation of the risk of economic loss in certain eventualities." *Nomura*, 30 N.Y.3d at 581. Here, the plain meaning of those provisions rules out an award of "accrued and unpaid interest" with respect to loans no longer in existence.

CONCLUSION

For the foregoing reasons, the Appellate Division's decision should be reversed.

March 27, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), I hereby certify that the total word count for all printed text in the body of the brief is 9,148 words, excluding parts identified as common requirements by § 500.13(c)(3).

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