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
of the
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.

REPLY BRIEF FOR DEFENDANT-APPELLANT

RICHARD A. JACOBSEN
BARRY S. LEVIN
JOHN ANSBRO
PAUL F. RUGANI
DANIEL A. RUBENS
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, New York 10019
Tel.: (212) 506-5000
Fax: (212) 506-5151

Attorneys for Defendant-Appellant

Dated June 25, 2020

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 case as related: *Home Equity Mortgage Trust Series 2006-1 v. DLJ Mortgage Capital, Inc.* ("*HEMT*"), APL-2019-00247.

DLJ previously identified the then-pending motion for leave to appeal in *Ambac Assurance Corp. v. Countrywide Home Loans Inc.*, 179 A.D.3d 518 (1st Dep't 2020), as a related proceeding. The Appellate Division denied that motion on June 11, 2020.

TABLE OF CONTENTS

Page

STATEMENT OF RELATED LITIGATION i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 3

I. Plaintiff Cannot Recover Damages On Loans For Which It Failed To Provide Timely Notice Of A Breach. 3

A. The Repurchase Protocol Requires Notices That Identify The Loans That Are Allegedly In Breach. 3

B. Absent Relation Back, Plaintiff's Breach Notices Are Effective Only To The Extent They Are Timely. 9

C. The Relation-Back Doctrine Does Not Permit Plaintiff To Salvage Its Untimely Claims. 12

1. Relation back applies to excuse parties from pleading mistakes, not to nullify contractual requirements. 12

2. Alleged breaches involving different loans do not arise from the same transaction or occurrence. 15

3. The timely breach letters here are distinguishable from those in *Nomura*. 18

II. Interest Does Not Accrue On Mortgage Loans That Have Been Liquidated. 20

CONCLUSION 25

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

Page(s)

Cases

159 MP Corp. v. Redbridge Bedford, LLC,
33 N.Y.3d 353 (2019) 25

ACE Sec. Corp. v. DB Structured Prods., Inc.,
25 N.Y.3d 581 (2015) 10, 15

Ambac Assurance Corp. v. Countrywide Home Loans, Inc.,
31 N.Y.3d 569 (2018) 6

BlackRock Allocation Target Shares v. Wells Fargo Bank, Nat'l Ass'n,
2017 WL 953550 (S.D.N.Y. Mar. 10, 2017) 8

Caffaro v. Trayna,
35 N.Y.2d 245 (1974) 14

Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC,
2012 WL 3201139 (Del. Ch. Aug. 7, 2012) 17, 18

Greater N.Y. Health Care Facilities Ass'n v. DeBuono,
91 N.Y.2d 716 (1998) 16

Home Equity Mortg. Tr. Series 2006-1 v. DLJ Mortg. Capital, Inc.,
175 A.D.3d 1175 (1st Dep't 2019) 10

HSBC Bank USA v. Merrill Lynch Mortg. Lending, Inc.,
175 A.D.3d 1149 (1st Dep't 2019) 10

Johnson v. State,
125 A.D.3d 1073 (3d Dep't 2015) 14

Koch v. Acker, Merrall & Condit Co.,
114 A.D.3d 596 (1st Dep't 2014) 13

MASTR Adjustable Rate Mortgs. Tr. 2006-OA2 v. UBS Real Estate Sec. Inc.,
2015 WL 797972 (S.D.N.Y. Feb. 25, 2015) 5

Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.,
133 A.D.3d 96 (1st Dep't 2015) 19, 20

Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.,
30 N.Y.3d 572 (2017) 6, 25

U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.,
33 N.Y.3d 72 (2019) ("*ABSHE*") 11

Statutes

CPLR 203(f) 13, 15, 17

CPLR 205(a) 11, 12

EPTL 11-3.3 14

Rules

Del. Ch. R. 15(c) 18

Other Authorities

Def.'s Mem. of Law in Supp. of Mot. to Dismiss, *Blackrock Allocation Target Shares v. U.S. Bank Nat'l Ass'n*, No. 14-CV-9401, Doc. No. 78 (S.D.N.Y. Aug. 14, 2015) 8

Def.'s Reply Mem. in Supp. of Mot. to Dismiss, *Blackrock Allocation Target Shares v. U.S. Bank Nat'l Ass'n*, No. 14-CV-9401, Doc. No. 65 (S.D.N.Y. Mar. 31, 2015) 8

2 Mary Anne Foran & Marvin R. Baum, *Mortgages and Mortgage Foreclosure in New York* § 38:1 22

INTRODUCTION

This is another dispute over the meaning of a contractual sole remedy provision in an RMBS transaction. Yet, as in the related case involving the same parties that is currently pending before this Court, *Home Equity Mortgage Trust Series 2006-1 v. DLJ Mortgage Capital, Inc.*, APL-2019-00247 ("*HEMT*"), Plaintiff U.S. Bank would like this Court to excuse it from complying with the contractual provisions that it no longer likes. U.S. Bank's twisting of inapplicable legal principles—often in direct contradiction to positions it advocates in other RMBS lawsuits—does not provide any basis for setting aside the terms of the bargain these sophisticated parties struck. These parties agreed to a sole remedy provision that conditions the repurchase obligation on loan-specific notice and defines the repurchase price to include interest that is "*accrued* and unpaid." This court should enforce that remedy by its terms.

First, Plaintiff should not be allowed to proceed to trial on loans it failed to identify in timely breach notices. Plaintiff's arguments to the contrary attempt to rewrite the contractual repurchase protocol, which plainly requires that notice, breach, and damages be proven on a loan-

by-loan basis. Plaintiff's pre-suit letters identifying a subset of loans as allegedly breaching do not satisfy the contractual notice requirement for the remaining loans in the trust, regardless of Plaintiff's conclusory demand for the repurchase of "all" breaching loans and boilerplate reservation of rights. Nor does the pleading doctrine of relation back provide an end-run around the sole remedy: Adopting Plaintiff's position would mean that a single timely noticed breach excuses compliance with the notice requirement for every other loan in the trust.

Second, Plaintiff still offers no viable basis to ignore the language of the PSA limiting the contractual Repurchase Price to unpaid interest that has "accrued." As the PSA and offering documents make clear, interest stops accruing once a loan is liquidated. This Court should hold the parties to their agreement to limit repurchase damages to interest that has in fact "accrued."

ARGUMENT

I. Plaintiff Cannot Recover Damages On Loans For Which It Failed To Provide Timely Notice Of A Breach.

A. The Repurchase Protocol Requires Notices That Identify The Loans That Are Allegedly In Breach.

The repurchase protocol is initiated by notices that identify specific mortgage loans as breaching. *See* OB17.[1] For DLJ to cure or repurchase any nonconforming loans, it must know which loans are allegedly in breach. DLJ does not ask this Court to "read in additional requirements to the PSA," RB13 (capitalization altered), but only to enforce its most basic requirement: that Plaintiff provide notice of the loans it believes are breaching.

In resisting any expectation that it provide "loan-specific notice for each and every breaching loan in the Trust," Plaintiff leads off with a purportedly textual argument, emphasizing that the PSA does not include the term "loan-specific." RB14-15. This argument ignores the entirety of the repurchase protocol. The PSA does not need to use the words "loan-specific" because the plain language of the repurchase

[1] This brief refers to DLJ's opening brief as "OB," to Plaintiff-Respondent's brief as "RB," and to DLJ's Reply Compendium of Cited Materials as "RC." Citations to "NYSCEF Doc. __" refer to Index No. 650369/13 (Sup. Ct. N.Y. Cty.) unless otherwise indicated.

protocol makes clear that the remedy operates loan-by-loan. Plaintiff does not explain how DLJ can cure "such breach" or repurchase the "affected Mortgage Loan," A-445, without being told what breach allegedly exists in that specific loan.

In fact, Plaintiff acknowledges that when DLJ receives notice of a "loan-specific breach," that loan-specific notice is what "affords DLJ the opportunity to cure the breach or repurchase the loan." RB14-15. And here, for loans that were specifically identified in timely breach notices, the facts show precisely that: After receiving loan-specific notice, DLJ repurchased 40 of the identified loans. RB18. That repurchase was possible only because the notices identified the loans alleged to be breaching.

Indeed, U.S. Bank has itself asserted in prior litigation that repurchase protocols like these provide "an *individualized, loan-specific obligation* to cure, replace or repurchase a breached loan." C-62; *see also* C-17 ("'The [contractual] repurchase remedy … rests on the ability of an RMBS trustee to undertake defined, concrete measures' as 'to a specific defect, in a specific loan.'" (alterations in original)). Plaintiff strains to reconcile U.S. Bank's prior submissions by emphasizing that

RMBS trustees have only limited duties to investigate and respond to suspected breaches. RB35-36. But the quoted language from U.S. Bank's prior submissions has no relation to the trustee's duty to investigate; it instead describes how the repurchase protocol operates. There is no getting around U.S. Bank's inconsistent positions on this question.

Unable to ground its position in the PSA's text, Plaintiff argues that a repurchase demand provides "sufficient notice for *all* breaching loans in an RMBS trust," as a matter of law, if the demand "identifies a significant number of breaching loans and requests repurchase of all breaching loans." RB15. In other words, Plaintiff submits that once DLJ is put on notice that some "significant" number of loans is allegedly breaching, the burden shifts to DLJ to reexamine each of the thousands of loans in the Trusts and determine for itself which ones are in material breach. As other courts have recognized in rejecting similar "pervasive breach" theories, that is not the remedy Plaintiff agreed to in the PSA. *See, e.g.*, *MASTR Adjustable Rate Mortgs. Tr. 2006-OA2 v. UBS Real Estate Sec. Inc.*, 2015 WL 797972, at *4 (S.D.N.Y. Feb. 25, 2015) ("The parties could have, but did not, bargain for an obligation

that if the aggregate number of loans in breach exceeded a certain threshold, a duty to reexamine all loans would be triggered. Instead, the specified remedies are the 'sole remedies.'").

In fact, this Court has already put to rest the idea that the RMBS sole remedy provision can be nullified whenever a large number of breaches are alleged. In *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 585 (2017), this Court rejected an RMBS trustee's attempt to plead around the repurchase protocol by alleging "pervasive" and "systemic" breaches of representations and warranties across the loan pool. In ruling against the trustee, this Court noted that the transaction agreements there (like the ones here) "do not provide a carve-out from the Sole Remedy Provision where a certain threshold number of loan breaches are alleged." *Id.* Accordingly, the plaintiff seeking repurchase is "expressly limited" to the sole remedy provision, "however many defective loans there may be." *Id.*; *accord Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569, 581 (2018) (rejecting RMBS plaintiff's assertion that allegations of "'broader' or numerous violations of representations and warranties" exempt claims from the sole remedy provision).

Plaintiff attempts to distinguish *Nomura* and *Ambac* because the plaintiffs there sought "general contract damages" for "transaction-level" breaches, whereas here, Plaintiff supposedly "seeks damages only as measured by the Repurchase Protocol formula." RB17-18. That distinction fails because Plaintiff, despite paying lip service to the repurchase protocol, is in fact attempting to use a conclusory demand for repurchase of "all" breaching loans to circumvent the repurchase protocol altogether. *Nomura* and *Ambac* reaffirmed the important proposition that alleging a large or "significant" number of breaches does not change the meaning of the sole remedy provision. That holding forecloses the theory that Plaintiff asserts here: No matter how many breaches are alleged, the sole remedy provision still operates loan by loan.

Plaintiff also cites several federal and lower-court cases that regarded pervasive breach allegations as providing sufficient notice (RB15-17 & n.7), but all of those decisions either predate or fail to cite this Court's guidance in *Nomura* and *Ambac*. Many of those decisions are further distinguishable because they addressed the sufficiency of the pleadings on a motion to dismiss, where courts have been more

inclined to accept "theories of generalized wrongdoing." *BlackRock Allocation Target Shares v. Wells Fargo Bank, Nat'l Ass'n*, 2017 WL 953550, at *4 (S.D.N.Y. Mar. 10, 2017). As U.S. Bank has itself acknowledged in other RMBS cases, "at summary judgment, plaintiffs' proof must be loan-specific." C-17. And Plaintiff's position that no loan-specific notice is required again flatly contradicts U.S. Bank's positions in other cases as to how the RMBS sole remedy provision operates. *See* Def.'s Mem. of Law in Supp. of Mot. to Dismiss, *Blackrock Allocation Target Shares v. U.S. Bank Nat'l Ass'n*, No. 14-CV-9401, Doc. No. 78, at 13-14 (S.D.N.Y. Aug. 14, 2015) ("A trustee can only putback a specific loan; it may not obtain recovery based on … allegations of trust-wide violations."), *available at* RC-49-50; Def.'s Reply Mem. in Support of Mot. to Dismiss, *Blackrock*, Doc. No. 65, at 17 (S.D.N.Y. Mar. 31, 2015) ("[A] trustee's putback rights on behalf of certificateholders are contractually directed to particular loans and not to loan pools, groups, or entire trusts."), *available at* RC-25.

For similar reasons, Plaintiff is wrong to complain that enforcing the loan-specific notice requirement as written would prevent the Trustee from using the "tools of discovery" in litigation to identify

additional breaching loans. RB14-15. For one thing, Plaintiff is not prevented from using the "tools of discovery" for that purpose so long as Plaintiff provides loan-specific notice and commences suit sufficiently in advance of the statute of limitation's expiration—as opposed to waiting until the last possible moment to assert claims, as Plaintiff did here. Moreover, nothing stopped the FHFA or Plaintiff from conducting a detailed investigation of their claims before the limitations period expired. That is what the certificateholder in the pending *HEMT* appeal was capable of doing by April 2012, and there is no reason FHFA could not have done the same here. *See* Appendix in APL-2019-00247, at 213 (April 20, 2012 letter from certificateholder reporting that it had retained a reunderwriting firm and conducted a "complete reunderwriting" of a sample of loan files from the trusts at issue).

B. Absent Relation Back, Plaintiff's Breach Notices Are Effective Only To The Extent They Are Timely.

For the first time in this litigation, Plaintiff now argues that it does not matter if the PSA requires loan-specific notice or if relation back is available, because in its view the notice provision "can be satisfied even *after* suit has been filed and *after* the limitations period has expired." RB19. Neither of the courts below ruled on that basis. In

fact, the Appellate Division has repeatedly rejected this view, noting that repurchase demands are not "timely" if submitted after the limitations period expires. *Home Equity Mortg. Tr. Series 2006-1 v. DLJ Mortg. Capital, Inc.*, 175 A.D.3d 1175, 1176 (1st Dep't 2019), *appeal pending*, APL 2019-00247; *HSBC Bank USA v. Merrill Lynch Mortg. Lending, Inc.*, 175 A.D.3d 1149, 1150 (1st Dep't 2019) (referring to such notices as "untimely breach notices").

In an ordinary breach of contract case, absent relation back, a plaintiff cannot add new contract claims to its suit after the limitations period expires. In arguing otherwise here, Plaintiff in effect seeks to overrule *ACE Securities Corp. v. DB Structured Products, Inc.*, 25 N.Y.3d 581 (2015), which held that repurchase claims are subject to a six-year statute of limitations that begins to run upon a transaction's closing. *Id.* at 599. If Plaintiff were correct that the sole remedy provision can be satisfied by post-suit notice regardless of when the limitations period expired, RMBS plaintiffs would be able to convert the repurchase obligation into a warranty that would "continue for the life of the investment," *see id.*—exactly what this Court held it is not—

simply by providing a timely notice confined to a single loan in the trust.

Perhaps recognizing that *ACE* forecloses its position, Plaintiff maintains that this Court authorized untimely post-suit notices in *U.S. Bank National Ass'n v. DLJ Mortgage Capital, Inc.*, 33 N.Y.3d 72 (2019) ("*ABSHE*"). But *ABSHE* held no such thing. Instead, this Court considered a different type of notice failure: The *ABSHE* trustee sent pre-suit notice of specific breaching loans to the "secondary, backstop defendant," but failed to provide such notice to the loan originator as required under the repurchase protocol in that transaction. RB20 n.8. And in evaluating the consequences of failing to send notice to one of the parties entitled to receive it, *ABSHE* turned entirely on the construction of CPLR 205(a)—a provision that Plaintiff admits "is not at issue here." RB21.

ABSHE did not, as Plaintiff would have it, permit RMBS trustees to comply with the notice requirement at any time post-suit, even years after the limitation period expired, merely because they had timely identified other loans in the trust as breaching. It instead addressed whether an action that was dismissed in its entirety had been "timely

commenced" under CPLR 205(a), a provision that Plaintiff concedes is "unripe" on this appeal. RB 21 n.9. This Court should take Plaintiff at its word and decline to "apply CPLR 205(a) now," RB21 n.9, rather than engage with speculation that an adverse relation-back ruling would ultimately leave Plaintiff here "in a worse position than the ABSHE plaintiff," RB21.[2]

C. The Relation-Back Doctrine Does Not Permit Plaintiff To Salvage Its Untimely Claims.

1. Relation back applies to excuse parties from pleading mistakes, not to nullify contractual requirements.

Plaintiff's brief fails to grapple with the overarching legal flaw in its relation-back theory: The doctrine does not serve to relieve parties from contractual requirements. Plaintiff is suing to enforce a contractual obligation that arises (as relevant) only upon provision of notice within the limitations period. But when Plaintiff filed its original

[2] Because *ABSHE* did not involve the relation back of additional breach claims for loans not identified in timely breach notices, Plaintiff is incorrect to claim that *ABSHE* "confirms the correctness" of the First Department's relation-back holdings. RB21. And Plaintiff fails to recognize the inconsistency in arguing that *ABSHE* supports relation back—a doctrine that applies only when claims are not otherwise timely—at the same time it reads *ABSHE* to mean that additional post-suit notices can *never* be untimely. *See* RB20-21.

pleading, it was already too late to comply with those provisions for loans other than the 1,204 identified in pre-suit notices as breaching. Whether that pleading or later filings gave DLJ "ample notice of [the] claims" Plaintiff now seeks to assert at trial, RB22 (capitalization altered), is beside the point.

Plaintiff fails to identify a single non-RMBS case where a court applied relation back to excuse a party from timely compliance with contractual remedy provisions.[3] This silence is unsurprising, because the relation-back statute (CPLR 203(f)) addresses the relationship between claims in an amended pleading and those in the original pleading. Relation back does not change the facts as they existed when the limitations period expired. Plaintiff's emphasis on concepts of notice and prejudice, RB22-26, therefore cannot justify the unprecedented application of the doctrine sought here. Nor do Plaintiff's citations to the same inapposite trial court decisions on the

[3] Plaintiff incorrectly suggests (RB25) that the First Department's decision in *Koch v. Acker, Merrall & Condit Co.*, 114 A.D.3d 596 (1st Dep't 2014), is such a case. *Koch* did not involve a contractual sole remedy provision or a notice requirement. *Id.* at 596-97. All the plaintiff had to do there was *amend* his complaint to add *pre-suit* facts about additional counterfeit wine bottles. *Id.* at 597.

sufficiency of pervasive breach allegations at the motion to dismiss stage, RB26 n.11, *see supra* 7-8, have any bearing on the applicability of the relation-back doctrine.

To the limited extent Plaintiff actually confronts DLJ's position, its arguments are meritless. Plaintiff is wrong to suggest (RB27) that *Caffaro v. Trayna*, 35 N.Y.2d 245, 252 (1974), supports applying relation back on these facts. *Caffaro* was a medical malpractice case that relied on a statute (EPTL 11-3.3) that expressly permits a decedent's representative to add wrongful death claims in an existing personal injury action if the decedent later dies because of the malpractice. In treating that death as "an additional consequence of defendant's conduct" rather than a "subsequent transaction[]," *id.*, this Court was not addressing a breach of contract claim or excusing a party from timely compliance with a remedial provision in its contract.

For similar reasons, Plaintiff's position is foreclosed by the rule that relation back is inapplicable when "proposed causes of action are based upon events that occurred after the filing of the initial claim." *Johnson v. State*, 125 A.D.3d 1073, 1074 (3d Dep't 2015). To be sure, Plaintiff's claims here for representation and warranty breaches

accrued when these transactions closed. *See ACE*, 25 N.Y.3d at 597-99. But in attempting to proceed on loans beyond those identified in pre-suit notices, Plaintiff necessarily brings claims that turn on post-filing events. That is so because the PSA conditions the repurchase obligation on DLJ's receipt of timely notice as to each allegedly breaching loan. Here, at the time Plaintiff filed its complaint, it had provided timely notice only as to 1,204 loans in the Trust, so the requisite notices for any other loans were by definition provided post-filing.[4]

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

Even if the relation-back doctrine were capable of excusing noncompliance with contractual requirements, the untimely notices here do not involve the same "transactions" or "occurrence[s]" as the timely noticed claims, and cannot relate back for that reason. *See* CPLR 203(f). Plaintiff's various breach claims require examining the

[4] Plaintiff suggests that *Johnson* and similar cases are distinguishable because the proposed amended claims depended on the *defendant*'s post-suit conduct. RB31-32. But the reasoning of those cases did not turn on which party's post-suit conduct was implicated. In any event, Plaintiff's claims on untimely noticed loans likewise implicate DLJ's post-suit conduct: These claims turn on DLJ's failure to cure or repurchase loans identified as breaching.

origination and underwriting of distinct mortgage loans, all involving different borrowers, secured by different homes across the country, and often underwritten under different guidelines by different originators. As a result, claimed breaches of representations and warranties as to one loan do not arise out of the same transaction or occurrence as those relating to a different loan. *See* OB30-34.

Plaintiff argues to the contrary (RB27-30), but fails to address this Court's critical holding in *Greater New York Health Care Facilities Ass'n v. DeBuono*, 91 N.Y.2d 716 (1998), regarding how to define the relevant "transaction" (or "series of transactions") for relation-back purposes. As *DeBuono* explained, even though all of the plaintiff nursing homes' injuries flowed from the same change in Medicaid reimbursement rates, relation back was unavailable because "each nursing home has an individualized reimbursement rate and the injury claimed varies from facility to facility and from year to year." 91 N.Y.2d at 721. The same reasoning applies here: Even though Plaintiff alleges multiple breach claims stemming from representations and warranties set forth in the same PSA, the repurchase claim for each allegedly breaching loan represents a "different, not identical, transaction[]," *id.*, involving loan-

specific questions as to which representation or warranty was breached and whether that breach was material.

That DLJ *securitized* the loans through a single transaction does not change the analysis. It does not matter that DLJ "made common representations and warranties," RB28, because an examination of whether a particular loan breached a particular representation or warranty still turns on facts specific to each loan. For similar reasons, Plaintiff's emphasis on CPLR 203(f)'s reference to a "series" of transactions, RB29, is unavailing. The relevant "series" here consists of the loans in the Trusts that Plaintiff had identified in timely notices as breaching; it does not extend to other potential breaches in distinct loans that it failed to identify until after the limitations period expired.

Nor can Plaintiff explain away the Delaware Court of Chancery's persuasive treatment of this issue in *Central Mortgage*, where then-Chancellor Strine concluded that each alleged representation-and-warranty breach "as to each individual loan constitutes a separate transaction or occurrence [for relation-back purposes], regardless of the fact that the loans might have been part of the same loan pool." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 2012 WL

3201139, at *18 (Del. Ch. Aug. 7, 2012). As the opinion makes clear, the quoted language is an independent alternative holding, not "dicta," RB33, and considered a repurchase protocol materially identical to the one here, even though relation back was unavailable for the further reason that distinct loan sale agreements were involved.[5]

3. The timely breach letters here are distinguishable from those in *Nomura*.

Plaintiff repeatedly asserts that its timely pre-suit letters put DLJ on notice for "all breaching loans" in the trust, but it overlooks the significant differences between the letters here and those that the First Department had previously deemed sufficient to support relation back. The relevant letters here did not disclose any intention of bringing additional claims beyond those pertaining to the loans specifically identified. The FHFA's November 2011 letter simply reserved its right

[5] Plaintiff cites nothing to support its assertion that relation back under Delaware law, which looks to whether the new claims arise from the "*conduct*, transaction or occurrence set forth *or attempted to be set forth* in the original pleading," Del. Ch. R. 15(c) (emphasis added), is more stringent than New York's standard. Plaintiff also inaccurately states that the plaintiff in *Central Mortgage* "had expressly *disclaimed* the later-added claims," RB33 (emphasis added), but that disclaimer applied to only a subset of the proposed new claims that were held not to qualify for relation back. *See* 2012 WL 3201139, at *12, *19.

to identify further breaches. A-710. U.S. Bank's December 2011 letter inaccurately reported that FHFA demanded repurchase of "any other[] [loans]" that breached representations and warranties, and purported to "reiterate" the nonexistent demand for repurchase of "all" breaching loans. A-707; *see also id.* (reminding DLJ of its obligation to repurchase "every" breaching loan). The relevant letters in *Nomura*, by contrast, provided extensive descriptions of the certificateholders' ongoing investigation, including detailed allegations that the breaches were "systemic" in nature. *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 133 A.D.3d 96, 103 (1st Dep't 2015); *see, e.g.*, RC-80 (*Nomura* breach notice requesting repurchase based on the "systemic nature" of the breaches thoroughly documented in the notice); RC-91 (same); RC-103 (same); *see also* RC-69 (*Nomura* breach notice complaining of missing files for specified loans and noting that "many more files" beyond those specified "may be missing"). A simple comparison makes plain that the notices here are hardly "indistinguishable" from the ones "held to be sufficient in *Nomura*." RB34 (capitalization altered).

Plaintiff argues that *Nomura* "did not turn on the use of any special language in the notice," RB34, but it is hard to understand what else the decision could have turned on. The relevant holding consists of a single paragraph noting that there were "some timely claims," and then specifying that "[p]laintiffs' presuit letters put defendant on notice that the certificateholders whom plaintiffs (as trustees) represented were investigating the mortgage loans and might uncover additional defective loans for which claims would be made." 133 A.D.3d at 108. Here, the timely letters from U.S. Bank and FHFA did neither of those things. Thus, relation back is not warranted even under the First Department test that Plaintiff urges this Court to follow.

II. Interest Does Not Accrue On Mortgage Loans That Have Been Liquidated.

The parties agree that the damages available for breaching loans are controlled by the PSA's definition of "Repurchase Price," which includes "accrued and unpaid interest" on the unpaid principal balance of any Mortgage Loan subject to repurchase. *See* OB41; RB36-37; A-425. Plaintiff also admits that a mortgage "cease[s] to exist upon liquidation." RB38-39. As a matter of straightforward contract interpretation, because a loan that no longer exists cannot accrue

interest, the Repurchase Price does not include, and Plaintiff cannot recover, interest for the period of time after a loan is liquidated. *See* OB41-47.

Plaintiff attacks a straw man by suggesting that DLJ seeks an "exception for liquidated loans." RB37. But Plaintiff is the one seeking such an exception. DLJ agrees that the same Repurchase Price definition applies to liquidated and unliquidated loans alike, but that definition specifies that the recoverable unpaid interest must have "accrued" on the loan in question. A-425. As a matter of the English language and common sense, interest cannot "accrue" on an obligation once that obligation ceases to exist. Yet Plaintiff interprets the Repurchase Price definition as affording it unpaid interest beyond what accrued on a loan, but only if that loan has been liquidated.

To resist this conclusion, Plaintiff contends that the "*unpaid principal balance*" is the unit on which interest "accrue[s]," RB38, and claims that the balance remains after a loan is liquidated. But the Repurchase Price definition refers to interest that accrues "thereon"—*i.e.*, on the unpaid balance "of the Mortgage Loan." A-425. That accrual

ceases once the loan is liquidated, *see* OB43-44, and nothing in the PSA provides otherwise.

Plaintiff's reference to deficiency judgments (RB38-39) is another red herring. While in some states a foreclosure can give rise to the separate remedy of a deficiency judgment, a deficiency judgment is not the same thing as the underlying debt itself, which is extinguished at foreclosure. *See, e.g.*, 2 Mary Anne Foran & Marvin R. Baum, *Mortgages and Mortgage Foreclosure in New York* § 38:1 (a deficiency is a "remedy [that] is primarily equitable in nature," the right to which "rests entirely on statutory provisions"), *available at* RC-108. The PSA calculates damages based on interest that "accrued" on the Mortgage Loan at issue, not on an additional state-law remedy that might be available for some (but not all) loans in the Trust. The contractual Repurchase Price definition could have been written to account for deficiency judgments, but it instead refers only to interest that has "accrued" on a loan itself. A-425.

Plaintiff is similarly wrong to ascribe significance to the fact that the Repurchase Price definition does not include the word "actually." *See* RB39. That certain other references to principal and interest

payments in the PSA are modified with "actually" does nothing to support Plaintiff's position here. The passages that Plaintiff quotes do not address interest that "actually accrued," but instead refer to interest or principal that was "actually received." RB39. Read in context, the language Plaintiff cites makes clear that the PSA uses the word "actually" to refer to amounts that have been paid, as distinguished from amounts owed but not yet paid. *See id.* Consistent with that usage, there is no need to specify that the Repurchase Price formula is limited to interest that "actually accrued": The formula refers to interest that has accrued on a loan but remains unpaid, and the word "accrued" already connotes accumulation of interest on an existing loan. *See* OB42-43.

Nor is it correct that "where DLJ intended that interest would *not* accrue upon the occurrence of a certain event, the relevant trust document says so." RB39. To the contrary, the transaction documents use variations of "accrued and unpaid interest"—without more—to indicate interest that accrues up to, but not, after liquidation. *See, e.g.*, A-124 (describing waterfall of losses "realized when the unpaid principal balance on a mortgage loan and accrued but unpaid interest

on such mortgage loan exceeds the proceeds recovered upon liquidation"); A-310 (explaining that the amount of any claim on a primary mortgage insurance policy for a mortgage loan in the trust will include "the insured portion of the unpaid principal amount of the covered mortgage loan and accrued and unpaid interest thereon"). The language Plaintiff cites, which addresses whether RMBS certificates will stop generating interest if the PSA is terminated, RB39-40, is inapposite.

Whether the Prospectus Supplement ("ProSupp") "warn[s] certificateholders that they might receive less interest because DLJ materially breached its R&Ws," RB37, is beside the point. DLJ cited the ProSupp's disclosure that "liquidated mortgage loans will no longer be outstanding and generating interest," OB44 (quoting A-249), because it confirms, as Plaintiff have admitted, that liquidated mortgage loans "cease to exist," RB38. Plaintiff's premise is also incorrect; the ProSupp did warn of the risk that repurchases of breaching loans could affect certificate payments. *See, e.g.*, A-200 ("The rate of principal payments on the mortgage loans will … be affected by … liquidations of defaulted mortgage loans and repurchases of mortgage loans due to certain

breaches of representations and warranties or defective documentation.").

Nor does adherence to the contractual formula encourage opportunistic behavior by RMBS sponsors. *See* RB40-41. If an RMBS sponsor is required to repurchase a liquidated loan under the repurchase protocol, the sponsor will still be responsible for "100% of the unpaid principal balance of the Mortgage Loan." A-425. In any event, New York law does not allow a court to rewrite a contractual damages formula between sophisticated, counseled parties based on its own notions of fairness. *159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353, 367-68 (2019); *Nomura*, 30 N.Y.3d at 581.

CONCLUSION

For the foregoing reasons and those in DLJ's opening brief, the Appellate Division's decision should be reversed.

June 25, 2020

Respectfully submitted,

Richard A. Jacobsen
Barry S. Levin
John Ansbro
Paul F. Rugani
Daniel A. Rubens
ORRICK, HERRINGTON
& SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000

Attorneys for Defendant-Appellant

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 4,826 words, excluding parts identified as common requirements by § 500.13(c)(3).

Richard A. Jacobsen
Attorney for Defendant-Appellant