To be Argued by:
HECTOR TORRES
(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.

BRIEF FOR PLAINTIFF-RESPONDENT

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Date Completed: May 28, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 500.1(f) and 500.13(a) of the Rules of Practice of the Court of Appeals, U.S. Bank National Association, solely in its capacity as trustee of Plaintiff-Respondent Home Equity Asset Trust Series 2007-1 (the "Trust"), hereby states that it is a wholly owned subsidiary of U.S. Bancorp, and that it has the following subsidiaries and affiliates:

111 Tower Investors, Inc.
C'est La Vie, Inc.
Daimler Title Co.
DSL Service Company
Eclipse Funding LLC
Elavon, Inc.
First Bank LaCrosse Building Corp.
Forecom Properties, Inc.
FSV Payment Systems, Inc.
Galaxy Funding, Inc.
HTD Leasing LLC
HVT, Inc.
Integrated Logistics, LLC
Mercantile Mortgage Financial Company
MMCA Lease Services, Inc.
NILT, Inc.
Northwest Boulevard, Inc.
Pomona Financial Services, Inc.
Red Sky Risk Services, LLC (fka USB Lending Support Services, LLC)
RTRT, Inc.
SA California Group, Inc.
SA Challenger, Inc.
SA Group Properties, Inc.
SCBD, LLC
SCDA, LLC
SCFD LLC
Telluride Financial Center Owners' Association, Inc.
TI Fleet Co.

TLT Leasing Corp.
TMTT, Inc.
USB Americas Holdings Company
USB European Holdings Company

U.S. Bank National Association further states that it is acting solely in its capacity as trustee of the Trust and does not have any financial interest in the outcome of this litigation.

STATEMENT OF RELATED LITIGATION

Defendant-Appellant DLJ Mortgage Capital, Inc. has identified *U.S. Bank National Association v. DLJ Mortgage Capital, Inc.*, APL-2019-00247, and *Ambac Assurance Corp. v. Countrywide Home Loans Inc.*, Index No. 511512/10, 179 A.D.3d 518 (1st Dep't 2020), *motion for leave to appeal pending* (1st Dep't Mot. No. 2020-661), as related litigation. Plaintiff-Respondent is not aware of any other related proceedings in this Court or related motions for leave to appeal pending in the Appellate Division.

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PRELIMINARY STATEMENT

DLJ Mortgage Capital, Inc. ("DLJ") seeks to avoid liability for its breaches of representations and warranties ("R&Ws") made at the time it pooled shoddy and non-compliant residential mortgages in the residential mortgage-backed securities ("RMBS") trust at issue. In affirming the IAS Court, the First Department correctly rejected DLJ's baseless arguments that U.S. Bank National Association, solely in its capacity as trustee (the "Trustee") of the Trust, was required to identify each and every breaching loan on a loan-by-loan basis before filing suit, and that the Trustee could recover the contractually-stated repurchase price for only those breaching loans expressly identified in pre-suit repurchase notices. The First Department also correctly held that DLJ's contractual obligation to pay "accrued interest" on breaching loans through the date of repurchase applies to all breaching loans, irrespective of whether the loan has been liquidated. DLJ offers no credible reason to overturn the rulings below.

First, as repeatedly recognized by the courts below, the Trustee's pre-suit notices and timely complaint were more than adequate to alert DLJ to its massive breaches of its R&Ws as to all breaching loans in the Trust and to satisfy the contractual notice requirement. Those notices identified over 1,200 specific breaching loans out of the 5,153 loans in the Trust, and expressly demanded repurchase of all breaching loans. As this Court recently held in *U.S. Bank*

National Association v. DLJ Mortgage Capital, Inc., 33 N.Y.3d 72 (2019) ("*ABSHE*"), contractual notice requirements like that at issue here are purely procedural prerequisites that do not affect the timeliness of the suit. Moreover, nothing in the governing agreement precludes the Trustee from identifying additional breaching loans through discovery in the litigation. Thus, the Trustee may identify additional breaching loans after commencing the action, and its claims concerning those loans relate back to its claims based on the initial pre-suit notices, as the First Department properly held.

DLJ's argument that the Trustee cannot recover for additional breaching loans specifically identified through discovery in litigation, because DLJ was entitled to a pre-suit opportunity to cure or repurchase each breaching loan, is not supported by the governing documents or this Court's precedents. There is no dispute that the Trustee was entitled to file this action when it did, and the only relation-back question is whether the original complaint put DLJ on notice that all breaching loans in the Trust were at issue. As the lower courts concluded, it unquestionably did so here. DLJ had its opportunity to cure or repurchase the breaching loans and thereby avoid a lawsuit. It failed to do so, choosing instead to repurchase at most 40 loans and engage in protracted litigation. No rule of procedure, and no decision of any New York court, permits it to avoid the consequence of that choice.

Second, DLJ's contractual obligation to pay "accrued interest" applies to the unpaid principal balance of all breaching loans, as the First Department correctly held. Nothing in the governing agreements provides that interest should stop accruing for purposes of calculating the loan repurchase price when a loan is foreclosed or liquidated. The governing agreement provides an express right to interest from the date the borrower stopped paying interest to the date DLJ repurchases the loan. Refusing to include accrued interest as part of the contractually defined repurchase price for liquidated loans would merely give DLJ an enormous and unauthorized windfall for all the breaching loans that were liquidated soon after their origination.

For these reasons, the First Department's decision should be affirmed.

COUNTER-QUESTIONS PRESENTED

1. May an RMBS trustee that has provided pre-suit loan-by-loan notice of material breaches in over a thousand loans and expressly demanded repurchase of all breaching loans in the trust pursue breach of contract claims for all identified breaching loans?

2. In the alternative, does the relation-back doctrine permit a trustee to pursue claims for breaching loans identified after a suit was timely filed, where the breaches arise out of the same transaction and occurrence, or series of transactions

and occurrences, as breaches identified in the timely pre-suit notices and timely complaint?

3. Does a contractual damages provision requiring payment of accrued interest on the unpaid principal balance of a breaching loan from the date the borrower stopped paying interest through the date of repurchase apply after the loan has been liquidated?

COUNTERSTATEMENT OF THE CASE

A. DLJ's Securitization Of The Loans, Representations And Warranties As To Their Quality, And Promise To Repurchase Breaching Loans

DLJ and its affiliates created the Trust by (i) aggregating 5,153 home mortgage loans DLJ had acquired from numerous sellers and/or originators, including originators DLJ owned or controlled, (ii) depositing the loans in the Trust and (iii) arranging the sale of Trust certificates ("Certificates") to investors (the "Certificateholders"). DLJ did so by, among other things, issuing a Prospectus and Prospectus Supplement ("ProSupp") in which it provided assurances to Certificateholders about the quality of the loans and the expected income to the Trust. A-113-373.[1] Neither the Certificateholders nor the Trustee had access to

[1] Citations to "(Br.__)" are to DLJ's appeal brief; citations to "A-__" are to the appendix; citations to "NYSCEF Doc. No. __" refer to Index No. 650369/13 (Sup. Ct. N.Y. Cnty.)

the loans' underwriting files, nor any ability to conduct due diligence or quality control on the loans before they were securitized. As a result, DLJ made numerous representations and warranties ("R&Ws") to prospective investors pursuant to a Pooling and Servicing Agreement ("PSA") concerning the loans' qualities and characteristics, as well as the processes by which the loans were evaluated before being deposited into the Trust, in order to induce investors to purchase Certificates issued by the Trust. A-445, 698-704 (PSA §2.03(b), Schedule III).

To give force and effect to its R&Ws, DLJ agreed that, upon discovering or receiving notice of a breach of the R&Ws that "materially and adversely affects the value of the related Mortgage Loan or the interests of the Certificateholders," it either would cure the breach within 90 days, or repurchase the Loan for the "Repurchase Price." A-445-447 (PSA § 2.03(d), the "Repurchase Protocol"). The PSA defines the Repurchase Price as "100% of the unpaid principal balance of the Mortgage Loan" plus "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 the Repurchase Price is to be distributed to Certificateholders." A-425 (PSA §1.01, definition of "Repurchase Price").[2]

[2] All emphasis in this brief is supplied unless otherwise indicated.

B. The Trustee Provides Notice To DLJ As To Every Breaching Loan in the Trust

On December 6, 2011, the Trustee sent its first breach notice to DLJ. That notice specifically identified 304 loans that materially breached at least one R&W and demanded that DLJ repurchase all loans "that did not comply with" the R&Ws. A-705-718 (the "December 6 Notice"). The December 6 Notice referenced and attached letters sent by the Federal Housing Finance Agency ("FHFA") to the Trustee dated November 3, 2011 and November 17, 2011.[3] In those letters, the FHFA had notified the Trustee of the breaching loans and, among other things, expressly stated that FHFA reserved its rights to identify additional breaching loans. A-709-715.

Slightly more than three months later, on March 30, 2012, the Trustee sent DLJ a second notice as to an additional 900 materially breaching loans. A-720-727 (together with the December 6, 2011 notice, the "Repurchase Demands"). The Repurchase Demands included CDs with detailed information regarding each breach claim. A-718,721.

Despite receiving the Repurchase Demands for 1,204 breaching loans, DLJ repurchased only 40 loans from the Trust. Br. 11.

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[3] The FHFA acted in its capacity as conservator of the Federal Home Loan Mortgage Corporation, a Certificateholder.

C. The Trustee Sues DLJ For Its Failure To Repurchase Breaching Loans

Because DLJ refused to comply with its contractual obligations to cure or repurchase the breaching loans, on February 1, 2013, the Trustee timely commenced this action, seeking a judgment requiring DLJ to repurchase all breaching loans in the Trust. In particular, the complaint specifically alleged that the Trustee "brings this action to require DLJ to repurchase . . . all other Mortgage Loans in the Trust as to which DLJ breached its R&Ws." A-47. DLJ's motion to dismiss the original complaint on timeliness grounds was denied by the IAS Court and affirmed by the Appellate Division. *See U.S. Bank v. DLJ Mortg. Capital, Inc.*, 121 A.D. 3d 535, 536 (1st Dep't 2014).

On August 7, 2014, the Trustee filed the operative Second Amended Complaint ("SAC"). The SAC added specific factual allegations about DLJ's independent discovery of breaching loans, which is an alternative contractual basis for relief.[4] On August 18, 2014, DLJ moved to dismiss the SAC, arguing that the only loans for which Plaintiff provided sufficient notice for alleged breaches of specific R&Ws were the 1,204 loans specifically identified in the pre-suit Repurchase Demands. On October 8, 2015, the IAS Court denied DLJ's motion in

[4] Whether DLJ's obligation to repurchase breaching loans was independently triggered by DLJ's "discovery" of the massive problems in its loan pools is not at issue on this appeal.

its entirety. *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 2015 WL 5915285, at *3 (Sup. Ct. N.Y. Cnty. Oct. 8, 2015). The Court held that the December 6 Notice "clearly provided notice to DLJ of its obligation to repurchase 'all loans that breached representations and warranties.'" *Id.* at *2. In so holding, the Court specifically rejected the same argument DLJ makes here, namely, that each of the breaching loans must be individually identified in the repurchase notice pre-suit in order to satisfy the procedural notice requirement in the PSA. *Id.* at *3-*4. DLJ did not appeal this ruling.

D. The Trustee's Expert Reports Identified Additional Breaching Loans and the Trustee's Damages

During discovery, the Trustee proffered two expert witnesses – an underwriting expert, Mr. Robert Hunter, and an economist and statistician, Dr. Karl Snow – to review 1,059 loans for breaches and to calculate the Repurchase Price of the loans containing material breaches. This group included 437 loans that had been specifically included in the pre-suit repurchase notices as well as 622 additional loans that had been individually identified during discovery.[5]

[5] Unlike in *U.S. Bank National Association v. DLJ Mortgage Capital, Inc.*, APL-2019-00247, currently pending before this Court, this is not a sampling case: DLJ does not dispute that every breaching loan at issue has been individually identified and the Trustee does not seek to prove liability or damages through statistical sampling.

Mr. Hunter reviewed the origination files for each loan to determine whether the loan materially breached any of DLJ's R&Ws. A-763-802. Mr. Hunter set forth his detailed findings in two reports with multiple appendices, which analyzed whether the identified breaches materially impaired the value of the loans or the interests of the Certificateholders in the loans. Based on his comprehensive review, Mr. Hunter concluded that DLJ materially breached at least one of its R&Ws in 783 of the 1,059 loans. *Id*. at A-767. DLJ does not dispute that 303 of the 783 breaching loans—nearly 40%—are explicitly referenced in the Trustee's pre-suit Repurchase Demands. Br. 13.

For each of the 783 materially breaching loans identified by Mr. Hunter (the "Breaching Loans"), Dr. Snow calculated the Repurchase Price as of the date of his reply report, February 8, 2017. Because the IAS Court had determined that the Trustee provided the requisite notice to DLJ of all Breaching Loans in the Trust on December 6, 2011, Dr. Snow calculated the Repurchase Price as of the date following the expiration of the 90-day repurchase period provided in the PSA—i.e., March 5, 2012. A-750. Specifically, Dr. Snow calculated interest on the unpaid principal balance of each Breaching Loan at the "Mortgage Rate" through March 5, 2012 and at the statutory pre-judgment interest rate from that date forward. A-750-751. The Repurchase Price, including accrued and pre-judgment

interest, for the Breaching Loans totaled $246,385,914.19 as of the date of his reply report. *See* NYSCEF Doc. No. 747.

E. The Summary Judgment Order

On June 9, 2017, the parties filed cross-motions for summary judgment. In its Decision and Order, the IAS Court (Bransten, J.S.C.) denied both motions. A-6-41. In doing so, the Court made two rulings that are the subject of this appeal, both of which should be affirmed.

First, the IAS Court denied DLJ's request to dismiss the Trustee's breach claims as to the 480 loans not specifically identified in its pre-suit repurchase notices. A-35-37. In addition to relying on its previous unappealed ruling on DLJ's motion to dismiss that the December 6 Notice provided notice of all breaching loans, the IAS Court cited two subsequent decisions that reached the same result, *Deutsche Bank Nat'l Tr. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 289 F. Supp. 3d 484, 505 (S.D.N.Y. 2018) ("*MSST 2007-1*") and *Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2006-S4 v. Nomura Credit & Capital, Inc.*, 2014 WL 2890341, at *15 (Sup. Ct. N.Y. Cnty. June 26, 2014), as modified on other grounds by *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 133 A.D. 3d 96 (1st Dep't 2015) ("*Nomura*"). The IAS Court also cited the First Department's *Nomura* decision in holding, in the alternative, that claims based on repurchase notices that were subsequently

provided by the Trustee relate back to the original filing date of the Complaint. A-36-37.

Second, the IAS Court held that the PSA requires DLJ to pay interest on the Breaching Loans through the applicable repurchase date, even if foreclosed and liquidated, based on the PSA's express requirement that the Repurchase Price for any loan —without exception—includes "accrued and unpaid interest [on the unpaid principal balance of the Mortgage Loan] 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 the Repurchase Price is to be distributed to Certificateholders." A-37-39.

F. The First Department's Decision

In a unanimous decision, the First Department (Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.) affirmed the IAS Court's orders. A-4-5. As relevant to this appeal the First Department held as follows:

Notice: The First Department affirmed the IAS Court's ruling that the Trustee could seek to recover damages for all Breaching Loans. *Id.* The Court held that the Trustee's pre-suit letters "made within the statutory limitations period and well in advance of any lawsuit, 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." *Id.*

Accordingly, "[t]he notice complied with the contractual condition precedent of notifying [DLJ] of its default" and thus subsequently identified loans "related back to the time of the initial notice." *Id.* at A-5 (citing *Home Equity Mortg. Tr. Series 2006-1 v. DLJ Mortg. Capital, Inc.*, 175 A.D. 3d 1175 (1st Dep't 2019) ("*HEMT*"); *U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc.*, 147 A.D. 3d 79 (1st Dep't 2016) ("*GreenPoint*"), and *Nomura*). The Court further stated that the December 6 Notice "placed [DLJ] on written notice of breach as to all loans." *Id.*

Accrued Interest On Liquidated Loans: The First Department held that the motion court had "properly ruled that interest could be calculated on liquidated loans, at the applicable mortgage rate up until the repurchase date." A-5 (citing *HEMT* and *Nomura*).

ARGUMENT

I. THE FIRST DEPARTMENT CORRECTLY HELD THAT THE TRUSTEE MAY SEEK DAMAGES FOR ALL BREACHING LOANS IN THE TRUST, INCLUDING THOSE SPECIFICALLY IDENTIFIED AFTER THE FILING OF THE COMPLAINT

DLJ offers no proper basis to overturn the First Department's ruling that the Trustee may seek damages for all Breaching Loans, including those identified after the commencement of this action. In arguing that the Trustee may not seek damages for the 480 loans "that were identified as breaching for the first time in

expert discovery" (Br. 18), DLJ misreads the PSA and disregards well-settled principles of New York law, including recent decisions of this Court. This Court should affirm the holding below because the Trustee's pre-suit notices satisfy the procedural requirements of the PSA, and in any event, its post-suit notices of additional Breaching Loans properly relate back to the Trustee's timely pre-suit notices and timely complaint.

A. The Trustee Has Provided a Pre-Suit Notice as Required by the PSA

This Court should affirm for the reason given by the First Department—namely, the pre-suit notices provided by the Trustee, which "informed defendant that a substantial number of identified loans were in breach, and that the pool of loans remained under scrutiny," fully complied with "the contractual condition precedent of notifying [DLJ] of its default." A-4. The First Department correctly affirmed the IAS Court's ruling that the Trustee's pre-suit repurchase notices, which expressly placed DLJ on notice that it was under an obligation to "repurchase every loan that did not comply with a [R&W]," complied with the condition precedent and that nothing further was required. A-4-5.

1. DLJ's Attempt to Read In Additional Requirements to the PSA Should Be Rejected

To avoid the consequences of its breach of the R&Ws, DLJ purports to find a requirement within the PSA that the Trustee must provide specific pre-suit notice

for each and every breaching loan in the Trust in order for the Trustee to recover for all breaching loans on the basis of notice.[6] No such requirement exists. Contrary to DLJ's contention, Br. 17-21, the PSA does not require loan-specific notice for each and every breaching loan in the Trust before filing suit as a prerequisite for recovering on all breaching loans. Although DLJ repeatedly references the Repurchase Protocol's "plain text" requiring "loan-by-loan notice" or a "loan-specific" basis for repurchase, as a textual matter these words do not appear anywhere in the Repurchase Protocol. There is also no textual basis for DLJ's suggestion (Br. 18-19) that the use of singular words like "*the* affected Mortgage Loan" (A-445) implies that a trustee pursuing a timely-commenced lawsuit must, before commencing the action, individually identify and provide notice as to every loan in the Trust for which it seeks damages. More importantly, the PSA does not require that notice of every individual breaching loan be provided before filing a lawsuit. Here, the Trustee provided loan-specific notice, based on the information available to it before filing suit, which satisfied the contractual condition precedent and validly commenced the action.

The Trustee's role, when it learns of a loan-specific breach, is to give notice to DLJ, which affords DLJ the opportunity to cure the breach or repurchase the

[6] All breaching loans will remain in the case regardless of the outcome of this appeal, based on DLJ's independent discovery of those breaches.

loan. This procedure is not designed, however, to deprive the Trustee of a remedy for breaches that avoid detection until the Trustee had access to the tools of discovery. The six-year statute of limitations is imposed by New York law, not by the PSA. Here, the PSA conditions DLJ's repurchase obligations on "notice" or "discovery" of a "breach," without specifying the timing of loan-specific notice vis-à-vis the statute of limitations. Nor does the PSA address what is required once, as here, sufficient pre-suit notice has been given, DLJ has denied responsibility, and enforcement litigation has been timely filed. Indeed, nothing in the PSA prevents the Trustee from providing additional notice after a timely suit has been filed.

In interpreting similar repurchase protocols, many New York courts, in addition to the Appellate Division and the IAS Court, have ruled that a repurchase demand delivered to an RMBS securitization sponsor such as DLJ provides sufficient notice for *all* breaching loans in an RMBS trust if, as here, it specifically identifies a significant number of breaching loans and requests repurchase of all breaching loans. *MSST 2007-1*, 289 F. Supp. 3d at 505-07 ("notice" of large number of breaching loans within a representative sample extends to all breaching loans—not just those that were specifically identified); *Deutsche Bank Nat'l Tr. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 97 F. Supp. 3d 548, 552 (S.D.N.Y. 2015) ("Plaintiff's letter gave adequate notice with respect to breaching

loans beyond the 1,620 specifically mentioned"); *Nomura Asset Acceptance Corp.*, 2014 WL 2890341, at *15 (Sup. Ct. N.Y. Cnty. June 26, 2014) (plaintiff provided effective notice of all breaching loans with notice that "request[ed] that [defendant] repurchase not only the specifically identified loans but 'any loans that did not comply with the representations and warranties made by' it"); *SACO I Trust 2006-5 v. EMC Mortg. LLC*, 2014 WL 2451356, at *6 (Sup. Ct. N.Y. Cnty. May 29, 2014) (breach notice that "referenced statistical sampling of the pools and requested repurchase of all breaching loans" provided sufficient "notice"); *Assured Guar. Mun. Corp. v. Flagstar Bank, FSB*, 920 F. Supp. 2d 475, 512-513 (S.D.N.Y. 2013) (plaintiff's notice of pervasive breaches "rendered [defendant] constructively 'aware'—or, at minimum, put [defendant] on inquiry notice—of the substantial likelihood that these breaches extended … into the broader loan portfolio") (internal quotation marks omitted).[7] In these circumstances, as the sponsor of the securitization, DLJ, the deal party that selected the loans for the Trust and knows them better than any other, has received, at minimum,

[7] *See also*, *Home Equity Mortg. Trust Series 2006-5 v DLJ Mortg. Capital, Inc.*, No., 2014 WL 317838, *5-6 (Sup. Ct. N.Y. Cnty. Jan. 27, 2014) (notice identified specific loans, notified seller of pervasive breaches, and demanded that seller repurchase all breaching loans); *Morgan Stanley Mortg. Loan Trust 2006-14SL v. Morgan Stanley Mortg. Capital Holdings LLC*, 2013 WL 4488367, at *3 (Sup. Ct. N.Y. Cnty. Aug. 16, 2013) (notice referenced allegedly breaching sampled loans and requested defendant repurchase "every other Defective Loan").

constructive notice of all breaching loans in the Trust. *See, e.g.*, *MSST 2007-1*, 289 F. Supp. 3d at 505; *Assured*, 920 F. Supp. 2d at 512-13.

DLJ wrongly contends (Br. 19) that its proposed pre-suit loan-specific notice requirement is compelled by this Court's recent decisions in *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital., Inc.*, 30 N.Y.3d 572 (2017), and *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569 (2018). However, neither decision addresses the Repurchase Protocol's notice provision or has any bearing on the notice issue presented here.

In *Nomura*, this Court rejected a trustee's attempt to claim "general contract damages" not tied to the formula in the Repurchase Protocol. 30 N.Y.3d at 584. The trustee had sought those "general contract damages" by alleging that certain "loan-level" breaches of loan-specific warranties also constituted "transaction-wide" breaches under a separate set of warranties, and thus were not subject to the Repurchase Protocol's sole remedy of cure or repurchase. *Id.* at 577-78. In *Ambac*, this Court applied *Nomura* and rejected a monoline insurer's argument that the sole remedy provision did not apply to "transaction-level" representations about a defendant's operations and financial condition. 31 N.Y.3d at 581-83. This Court instead held that the sole remedy provision applied because "the factual allegations underpinning Ambac's transaction-level breaches are the same as those for the loan-level breaches." *Id*. at 582.

Here, unlike in *Nomura* and *Ambac*, the Trustee seeks damages only as measured by the Repurchase Protocol formula, and not "general contract damages" for "transaction-level" breaches. *See* A-742-762 (plaintiff's expert quantified damages based on Repurchase Protocol formula). DLJ's attempt to use these cases to bolster its incorrect textual notice argument is thus unavailing.

DLJ further complains that without pre-suit, loan-specific notice of a breach, it is deprived of the opportunity to cure, substitute, or repurchase allegedly breaching loans. Br. 18. That is simply untrue. Here, there is no dispute that DLJ had every opportunity to voluntarily repurchase the breaching loans as to which the Trustee provided notice nearly a year before it validly commenced this action. DLJ elected not to do so, and repurchased only 40 loans from the 1,204 loans specifically listed in the Trustee's notices. Br. 10-11, 13. Importantly, DLJ has received the same opportunity to repurchase the additional 622 loans later noticed in the Trustee's expert reports, which were served in September 2016, almost four years ago—but DLJ has elected to let the 90-day voluntary repurchase period lapse for those loans as well. Even today, DLJ retains the ability to make the Trust whole for its breaches, but it has chosen to litigate instead. Any assertion that DLJ has been deprived of an opportunity to avoid litigation rings hollow.

2. The Notice Provision is a Procedural Condition Precedent That Can Be Satisfied Post-Filing

As this Court has twice held, the notice provision of the PSA is a procedural, not a substantive, condition precedent. *ACE Securities Corp. v. DB Structured Prods., Inc.*, 25 N.Y.3d 581, 598 (2015); *ABSHE*, 33 N.Y.3d at 79. As such, the condition precedent can be satisfied even ***after*** suit has been filed and ***after*** the limitations period has expired, so long as the plaintiff timely filed its complaint.

Contrary to DLJ's position (Br. 22-26), *ACE* does not preclude the Trustee from recovering damages on a given breaching loan absent specific notice of that loan at least 90 days before the six-year statute of limitations period expired. *ACE* held that an RMBS plaintiff did not "validly commence [an] action" where it neglected to provide the defendant notice and an opportunity to cure or repurchase *any* of the allegedly non-conforming loans prior to suit. *ACE*, 25 N.Y. 3d at 589. Unlike the *ACE* plaintiff, however, the Trustee here satisfied the condition precedent to suit by providing pre-suit notice of over 1,200 breaching loans.

In arguing that *ACE* implies that notice of *every* breaching loan is required prior to the expiration of the limitations period, DLJ remarkably repeats here (*e.g.*, Br. 25-26), virtually verbatim, the characterization of *ACE* that it presented—and this Court rejected—in *ABSHE*. There, this Court held that a trustee whose timely-filed complaint was dismissed for failure to provide any pre-suit notice to the

primary defendant—a "non-merits dismissal" (*ABSHE*, 33 N.Y.3d at 76)[8]—was permitted to refile its complaint under New York's savings statute, CPLR 205(a), and to rely on notice given *after* the suit was filed and *after* the statute of limitations had expired. *Id.* at 80.

In so holding, this Court repudiated DLJ's misreading of *ACE,* which it again advances here, that a trustee must "have complied with the notice and sole remedy provision—including affording [the defendant the requisite time] in which to cure—before filing a complaint within the six-year statute of limitations." *Id.* at 79; *see id.* ("We did not expressly hold [in *ACE*], and it is not implicit in our analysis, that failure to comply with those provisions before the statute of limitations rendered the trustee's action untimely"). Because the Trustee here provided DLJ with notice and the opportunity to repurchase over 1,200 breaching loans before timely filing its complaint—and thus validly commenced an action—the Trustee can provide notices as to additional breaching loans, and thereby satisfy any remaining procedural prerequisites to its claims for such loans, post-suit. Here, it has done so by identifying such loans in its expert reports. *See id.* at

[8] The trustee had provided pre-suit notice to the secondary, backstop defendant (DLJ), but that notice was held to be insufficient to satisfy the condition precedent to suit against DLJ. *See ABSHE*, 33 N.Y. 3d at 77, 81-82.

82 ("the notice and cure or repurchase condition precedent contain[s] no such 'time restriction'").

While DLJ is correct that CPLR 205(a), which formed the basis of the *ABSHE* decision, is not at issue here, *ABSHE* nevertheless confirms the correctness of the First Department's decisions in *Nomura* and subsequent cases applying the relation-back provisions of CPLR 203(f). If the *ABSHE* plaintiff could preserve a timely-filed claim by providing contractual notice to the primary defendant for the first time *after* filing suit and *after* the expiration of the statute of limitations, it follows that the Trustee here—which satisfied the condition precedent *before* filing suit—may also pursue claims based on post-suit notices. Surely, the Trustee, which provided pre-suit notice to DLJ by identifying 1,204 breaching loans and stating that it was seeking relief as to all breaching loans, cannot be in a worse position than the ABSHE plaintiff.[9]

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[9] Contrary to DLJ's assertion (Br. 38-41), the Trustee does not ask this Court to apply CPLR 205(a) now, and has not forfeited any argument under that provision. Indeed, as DLJ concedes, any such argument would be unripe before any claims for which the Trustee seeks damages have been dismissed. This Court's decision in *U.S. Bank N.A. v. DLJ Mortg. Capital, Inc.*, 33 N.Y.3d 84 (2019) ("*HEAT 2006-5*") is inapposite because the trustee in that case invoked CPLR 205(a) for the first time on appeal following the dismissal of its complaint with prejudice. *See* 33 N.Y.3d at 89.

B. The Trustee's Claims Relate Back To Its Timely Complaint

The First Department's notice ruling should be affirmed for the additional reason that the Trustee's claims based on post-suit notices relate back to its timely complaint based on the pre-suit notices. It is undisputed that the Trustee timely commenced this action within the six-year statute of limitations. *See supra* at 7. Moreover, this case, unlike many other RMBS putback cases, does not involve proving notice, liability or damages through sampling. Every breaching loan for which the Trustee seeks recovery has been specifically identified to DLJ and reunderwritten by its expert. As dictated by this Court's precedents, the Trustee's claims for damages as to all breaching loans identified post-suit, including loans identified as breaching in discovery, relate back to its timely complaint. DLJ's arguments to the contrary are meritless.

1. The Trustee's Original Complaint Gave Ample Notice Of Its Claims For Damages For All Breaching Loans

This Court has long held that, "when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the Statute of Limitations do not exist, and . . . a liberal rule should be applied." *Abrams v. Md. Cas. Co.*, 300 N.Y. 80, 86 (1949) (quoting *N.Y. Cent. & H.R.R. Co. v. Kinney*, 260 U.S. 340, 346 (1922)). The legislature codified that liberal rule in CPLR 203(f), providing that "[a] claim asserted in an amended pleading is deemed to have been interposed at

the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." CPLR 203(f); *see Buran v. Coupal*, 87 N.Y.2d 173, 177 (1995) (relation-back doctrine is "[a]imed at liberalizing … strict, formalistic pleading requirements").

New York courts are, accordingly, given "room for the exercise of sound judicial discretion to determine whether, on the facts, there is any operative prejudice precluding a retroactive amendment." *Duffy v. Horton Mem'l Hosp.*, 66 N.Y.2d 473, 477 (1985); *see, e.g.*, *Caffaro v. Trayna*, 35 N.Y.2d 245, 251 (1974) (applying relation-back doctrine because amendment had not "prejudiced [defendant] in the assembly or introduction of evidence in support of his defense as to such additional elements of damage").

Under these principles, the First Department properly concluded that the Trustee's claims as to additional breaching loans not specifically identified in the pre-suit notices relate back to the original complaint filed by the Trustee, which was premised on pre-suit notices of widespread breaching loans in the same securitization—providing DLJ with notice of the same "transactions, occurrences, or series of transactions or occurrences" as those that are at issue in the additional breaching loans. CPLR 203(f). The Trustee's complaint incorporated the broadly worded pre-suit notices, which identified over twelve hundred breaching loans by

loan number, and made clear that the Trustee's demand related to all breaching loans, and by implication, expected to seek relief for any breaching loans beyond those specifically identified in the pre-suit notices. *See* A-46-47; 64-65. Indeed, the complaint expressly stated that the Trustee was seeking damages as to "*all* . . . Mortgage Loans in the Trust as to which DLJ breached its R&Ws." A-47.

Unsurprisingly, every New York decision to consider the issue has concluded that relation back is available in circumstances like those here.[10] For example, the First Department relied on settled relation-back principles in *Nomura* to hold that the doctrine applied because "[p]laintiffs' presuit letters *put defendant on notice* that the certificateholders . . . were investigating the mortgage loans and might uncover additional defective loans for which claims might be made." 133 A.D.3d at 108. Likewise in *HEMT*, "[t]he trustee's timely presuit letters . . . put DLJ on notice that the breaches plaintiffs were investigating might uncover additional defective loans for which claims would be made." 175 A.D. 3d at 1176.

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[10] *E.g.*, A-4-5; A-35-37; *HEMT*, 175 A.D.3d at 1176; *HSBC Bank USA v. Merrill Lynch Mortg. Lending, Inc.*, 175 A.D.3d 1149, 1150 (1st Dep't 2019); *Nomura*, 133 A.D.3d at 108; *In re Part 60 RMBS Putback Litig.*, No. 777000/2015, NYSCEF No. 696, at *6-9 (Sup. Ct. N.Y. Cnty. Dec. 2, 2019) (following established First Department law); *see also GreenPoint*, 147 A.D.3d at 88-89 (reaffirming and distinguishing *Nomura* on its facts based on lack of pre-suit notice).

DLJ incorrectly contends (Br. 24-25) that these cases reflect an incorrect RMBS-only rule that has been erroneously developed in the First Department and is at odds with the relation-back doctrine in other contexts. That assertion is nonsensical. In *Nomura*, for example, the First Department cited its earlier decision in *Koch v. Acker, Merrall & Condit Co.*, 114 A.D.3d 596, 596-97 (2014), which applied well-settled relation-back doctrine in holding that a complaint alleging that some wine bottles were frauds gave fair notice of later claims that additional bottles sold by defendant were fraudulent.

DLJ's misreading of the First Department's decision in *GreenPoint*, 147 A.D.3d 79, is similarly flawed. In *GreenPoint*, the court declined to apply the relation-back doctrine because the trustee did not provide *any* pre-suit notice. *Id.* at 88. In so holding, the *GreenPoint* court expressly distinguished *Nomura*; because the trustees in *Nomura*, as here, had sent pre-suit notices that "identified some, but not all, of the nonconforming mortgages for which the trustees ultimately sought relief," they thereby "complied with the condition precedent of providing that defendant with notice of its default." *Id.*

Moreover, DLJ has never argued that its ability to defend these actions would be prejudiced by applying the relation-back doctrine. Nor could it, because—even setting aside DLJ's independent knowledge of the many breaching loans it securitized—DLJ has long been on notice with respect to the Trustee's

intent to pursue claims concerning all breaching loans in the Trust. Indeed, numerous New York state and federal courts have ruled, like the IAS Court, that a pre-suit repurchase demand delivered to an RMBS securitization sponsor—similar to that provided here—provides sufficient notice for *all* breaching loans in an RMBS trust if, as here, it identifies a large number of breaching loans and requests repurchase of all breaching loans.[11] In these circumstances, a sponsor defendant—like DLJ here—has, at a minimum, constructive notice of all breaching loans in the Trust. *See, e.g.*, *Assured*, 920 F. Supp. 2d at 512-13. Indeed, DLJ could not reasonably have understood that the Trustee's suit was limited to the breaching loans specifically identified in the pre-suit notices.

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[11] *See, e.g.*, *Nomura Asset*, 2014 WL 2890341, at *15 (Sup. Ct. N.Y. Cnty. June 26, 2014) (breach notice "request[ed] that [defendant] repurchase not only the specifically identified loans but 'any loans that did not comply with the representations and warranties made by' it"); *SACO I*, 2014 WL 2451356, at *6 (breach notice "referenced statistical sampling of the pools and requested repurchase of all breaching loans"); *Home Equity Mortg. Trust Series 2006-5*, 2014 WL 317838, *5-6 (Sup. Ct. N.Y. Cnty. Jan. 27, 2014) (notice identified specific loans, notified seller of pervasive breaches, and demanded that seller repurchase all breaching loans); *Morgan Stanley Mortg. Loan Trust 2006-14SL*, 2013 WL 4488367, at *3 (notice referenced allegedly breaching sampled loans and requested defendant repurchase "every other Defective Loan"); *Deutsche Bank*, 97 F. Supp. 3d at 552 ("Plaintiff's letter gave adequate notice with respect to breaching loans beyond the 1,620 specifically mentioned"); *Assured*, 920 F. Supp. 2d at 512-13 (notice of pervasive breaches).

2. DLJ's Arguments Disregard Settled New York Law

In seeking reversal of the First Department's relation-back rulings, DLJ advances a series of arguments that reflect a fundamental misapprehension of this Court's precedents and other settled New York law.

First, contrary to DLJ's assertion (Br. 23), the relation-back doctrine is not narrowly limited to correction of "an erroneously drafted pleading," and is available wherever an amended pleading involves the same "transactions, occurrences, or series of transactions or occurrences" as the original pleading. CPLR 203(f); *see, e.g.*, *Caffaro*, 35 N.Y.2d at 252 (wrongful death claim based on death that post-dated original complaint related back to medical malpractice claim); *Koch*, 114 A.D.3d at 596-97 (original complaint alleging that "at least" five bottles of wine were counterfeit gave defendant "notice of the transactions or series of transactions," and allowed relation back of claims as to 211 additionally discovered counterfeit bottles).

Second, the relevant "transaction" or "occurrence" is not the origination of each of the more than 5,000 loans in the Trust, as DLJ argues. Br. 30-34. Indeed, the Trustee's complaint does not allege claims against DLJ for any role it may

have had in originating the Breaching Loans.[12] Rather, the complaint seeks to hold DLJ liable as the Trust's sponsor, alleging that DLJ securitized the Trust's loans through a defective process, made common representations and warranties applicable to every loan in the Trust through the Trust's securitization documents, and breached those Trust-wide representations and warranties.

DLJ securitized all 5,153 loans in the Trust at a single time, not piecemeal, and did so pursuant to a single agreement and subject to the same R&Ws, which were breached on the same day. To characterize the Trustee's claims as relating to anything other than a single "transaction or occurrence" defies the commercial reality of RMBS transactions and strains credulity based on the Trustee's allegations in the complaint.[13]

DLJ is thus mistaken (Br. 30-34) in contending that each of the 5,153 individual loans simultaneously sold to the Trust was a distinct and separate "transaction or occurrence," and that the complaint does not provide sufficient

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[12] Although the cause of action is based on DLJ's securitization, DLJ's affiliates were responsible for originating many of these loans and its knowledge will be at issue at trial.

[13] Even where RMBS are governed by multiple agreements entered into at different times, courts have applied relation-back. *See*, *e.g.*, *HSBC*, 175 A.D.3d at 1150 ("Contrary to the [motion] court's conclusion, claims involving the loans referred to in the untimely breach notices relate back to the claims asserted in the summons with notice. Plaintiff sent two timely notices; the loans referred to in the other notices arose from the same transactions.").

notice of those loan-specific transactions or occurrences to satisfy CPLR 203(f). But even if this implausible theory were correct, CPLR 203(f) applies equally where the complaint provides notice of a "*series* of transactions or occurrences." CPLR 203(f). At the very least, the Breaching Loans as addressed in the Trustee's complaint constitute a series of transactions or occurrences for relation-back purposes. DLJ's common set of representations and warranties are applicable to the entire series of loans securitized in the Trust. The Trustee's complaint alleges that DLJ's systemic and Trust-wide disregard of applicable underwriting standards and procedures caused a "series" of breaches in loans, thereby placing DLJ on notice of *all* breaching loans in the Trust. A-44-70 (complaint); *see Koch*, 114 A.D.3d at 597.[14] DLJ contends (Br. 31) that "notice that . . . 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." However, this argument fails because DLJ was not some innocent bystander to the loans selected for securitization, and notice of breaches throughout the loans that

[14] DLJ seeks to shift fault to the FHFA, asserting that as a "sophisticated player," FHFA should have investigated all potential claims during the limitations period. (Br. 24) In making this claim, DLJ omits the key fact that the notice that DLJ is demanding would require a review of loan files that were in the possession of DLJ and its related entities and were not readily obtainable by even "sophisticated" investors.

DLJ selected for securitization in the Trust through its own flawed processes is precisely the notice that the Trustee's complaint provides.

Third, DLJ identifies no decision from this Court or any other New York court holding that the relation-back doctrine is unavailable where a timely complaint commenced a valid action, as CPLR 203(f) requires. DLJ wrongly relies (Br. 28) on *HEAT 2006-5*, 33 N.Y.3d 84. In that case, the trustee concededly filed its complaint outside the six-year limitations period, so there was no valid pre-existing action for relation back purposes. 33 N.Y.3d at 91. *Southern Wine & Spirits of Am., Inc. v. Impact Envtl. Eng'g, PPLC*, 80 A.D.3d 505 (1st Dep't 2011) (cited at Br. 26), is similarly distinguishable because in that case no pre-suit notices were provided. Here, unlike in *Southern Wine*, there indisputably is a valid preexisting action given the Trustee's pre-suit notices and timely complaint.

DLJ is also incorrect in asserting that the First Department improperly applied relation back here "based upon events that occurred after the filing of the initial claim," Br. at 25 (citing *Johnson v. State*, 125 A.D.3d 1073, 1074 (3d Dep't 2015)), and that relation-back is not appropriate because the Trustee's claims on loans first noticed in its expert reports "*did not exist* until Plaintiff satisfied the contractual precondition." *Id.* at 25-26. Under this Court's ruling in *ACE*, the provision of notice to the defendant is not an element of a repurchase cause of action, which exists from "the moment [the defendant] allegedly breached the

representations and warranties." 25 N.Y.3d at 597-98. All of the Trustee's claims here accrued before suit, on the closing date of the Trust, s*ee id.* at 591, and the Trustee's claims are not "based upon" later events.[15]

That the Trustee may not have discovered or provided specific notice of the full extent of those pre-suit breaches until after the original complaint was filed is irrelevant, so long as the original complaint, as here, provided DLJ with notice of the transactions or occurrences at issue. *See, e.g.*, *17 E. 96th Owners Corp. v. Madison 96th Assocs., LLC*, 60 A.D.3d 480, 481 (1st Dep't 2009) (reversing denial of motion to amend complaint in trespass action, where original complaint "envisioned the possibility of other" physical encroachments and thus was "sufficiently broad to encompass the encroachment subsequently discovered" after commencement of the action); *supra*, at 27 (discussing *Koch*, 114 A.D.3d at 597, and *Caffaro*, 35 N.Y.2d at 252).

Johnson and the other cases upon which DLJ misplaces reliance (Br. 25) involved attempts to bring additional claims based on a defendant's *post-suit conduct*, which the Trustee has not done here. *See, e.g.*, *Johnson*, 125 A.D.3d at 1074 (malicious prosecution claim did not relate back because prosecution

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[15] If it were true, as DLJ suggests, that the Trustee's cause of action for loans noticed post-suit "did not exist" until the Trustee provided notice, then the statute of limitations would not have begun to run until that time, contrary to *ACE*. That is surely not the result that DLJ wants, and DLJ cannot have it both ways.

occurred after action was commenced); *Cooper v. Sleepy's, LLC*, 126 A.D.3d 664, 665-666 (2d Dep't 2015) (claim for wrongful termination did not relate back because termination occurred after action was terminated); *Clairol Devt., LLC v. Vill. of Spencerport*, 100 A.D.3d 1546, 1547 (4th Dep't 2012) (claims did not relate back where alleged misconduct occurred after petition was filed).

DLJ's other authority (Br. 33-34) is also inapposite. DLJ points to *Greater New York Health Care Facilities Ass'n v. DeBuono*, 91 N.Y.2d 716 (1998), but in that case, this Court declined to hold that the third-party intervenors' proposed claims related back to the plaintiffs' claims because the defendants "had no notice of proposed intervenors' particularized claims when they entered into negotiations with the [plaintiffs]," including because the intervenors were "not closely related parties" to plaintiffs, and instead were "entirely separate claimants whose claims were otherwise time barred." *Id.* at 721. By contrast, all breach claims here are brought by the *same* party, the Trustee, who indisputably has claims that are *not* "otherwise time barred," and who *expressly gave notice* in its original complaint that further—similar, or even identical—breach claims would follow. A-47. The original complaint here is thus more than a sufficient anchor for the relation-back doctrine. *See, e.g.*, *Giambrone v. Kings Harbor Multicare Ctr.*, 104 A.D.3d 546, 547 (1st Dep't 2013) (*DeBuono* permits relation back where defendant has "notice of the proposed specific claim"); *Pendleton v. City of New York*, 44 A.D.3d 733,

736 (2d Dep't 2007) ("The *sine qua non* of the relation-back doctrine is notice"); *cf. Buran*, 87 N.Y.2d at 178 (relation back of claims against same party raises less serious policy concerns than addition of parties).

Also misplaced is DLJ's reliance (Br. 32-33) on dicta in the Delaware Chancery Court's decision in *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings* LLC, 2012 WL 3201139, *18-20 (Del. Ch. Aug. 7, 2012). No New York court has followed this decision, which applied Delaware's stricter relation-back standard, *see* Del. Ch. R. 15(c) (allowing relation back only where amended complaint "arose out of" the specific "transaction or occurrence" pled in original complaint), and which the Trustee submits was wrongly decided in any event, because the securitization of breaching loans constitutes the relevant transaction in determining relation-back of representation and warranty claims against the securitization sponsor. Moreover, DLJ fails to note that the Delaware court in *Central Mortgage* first rejected relation back because the new claims arose under as many as "26 separate contracts." *See* 2012 WL 3201139, at *7, *18 ("[E]ach sale of loan servicing rights constitutes a separate and independent transaction."). Here, in contrast, the Trustee seeks to relate back claims arising under a single PSA governing the Trust. Unlike here, *Central Mortgage* did not involve loans that had been securitized together in a single structured transactions, and the plaintiff had expressly disclaimed the later-added claims. *See id.*

3. The Repurchase Notices Here Are Indistinguishable From The Notices Held to be Sufficient in *Nomura*

DLJ cannot distinguish *Nomura* on the basis that the Trustee's pre-suit notices did not explicitly describe the breaches as "systematic" or "pervasive." Br. 35-37. *Nomura* did not turn on the use of any special language in the notice, but rather on the existence of a significant number of timely breach claims. Here, the Trustee's pre-suit notices were more than sufficient to place DLJ on notice that all breaching loans were at issue. The Trustee supplied two breach notices which provided specific notice as to 1,204 specific breaching loans out of a total of 5,153 Loans in the Trust, and further advised DLJ that it was providing notice as to all other breaching loans. *Cf. Koch,* 114 A.D. 3d at 596 (claims based on 211 bottles of counterfeit wine related back to complaint alleging sale of "at least" five counterfeit bottles, which "placed defendant on notice that as a result of 'further research', on the 'numerous bottles' of wine that defendant sold him . . . plaintiff might assert additional claims relating to other bottles").

As noted above, this case is thus readily distinguishable from *GreenPoint*, relied upon by DLJ, where the Trustee provided *no* pre-suit notice of breaches. 147 A.D. 3d at 88 (distinguishing *Nomura* on the ground that "the trustees in that case complied with the condition precedent of providing that defendant with notice of its default. Here, no such pre-commencement breach notice was ever sent . . ."). Because this case is indistinguishable from *Nomura*, the Trustee's claims based on

its post-suit identification of additional breaches relate back to the original filing date of this action and are timely as to all breach claims.[16]

C. DLJ's Reliance On Trustee-Defendant Cases Is Misplaced

DLJ's reliance on briefs filed by U.S. Bank in cases where the trustee (rather than the seller or sponsor) is a defendant, Br. 20-21, misses the mark. The cases cited by DLJ all center on the *trustee's* duties, which, in stark contrast to the broad duties of sellers and sponsors such as DLJ, are narrowly circumscribed in the applicable agreements, as the case law plainly demonstrates. *See, e.g.*, *Commerce Bank v. Bank of N.Y. Mellon*, 141 A.D.3d 413, 415-16 (1st Dep't 2016) ("the trustee of an RMBS . . . trust does not have a duty to nose to the source") (internal quotation marks omitted); *Royal Park Invs. SA/NV v. U.S. Bank Nat'l Ass'n*, 2018 WL 3350323, at *3 (S.D.N.Y. July 9, 2018) ("[U]nlike a trustee, an RMBS issuer or sponsor securitizes the loans, conducts due diligence on the loans (or at least is in a position to do so), and makes representations and warranties about the loans."); *Royal Park Invs. SA/NV v. HSBC Bank USA, N.A.*, 2018 U.S. Dist LEXIS

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[16] DLJ contends (Br. 36-37 & n.6) that the FHFA letters attached to the Trustee's pre-suit notices did not inform DLJ that the investigation into the loans was continuing or that the loan pool "remained under scrutiny," contrary to the First Department's finding. But, as DLJ concedes, FHFA's letters expressly "reserve[d] its 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." (*Id.*) These letters thus informed DLJ that the loan pool "remained under scrutiny" as held by the First Department.

31157, at *37 (S.D.N.Y. Feb. 23, 2018) ("[T]he duty of an originator or sponsor to underwrite each loan before issuing or purchasing it is not comparable to the limited and loan-specific nature of the trustee's duties under the PSAs. Originators and sponsors review each loan file and make R&Ws as to each loan. Therefore, if any loan turns out to be defective, it is fair to assume that the originator or sponsor is liable."). *See also* A-524-526 (PSA §8.01) (describing the Trustee's limited duties). The Trustee lacks DLJ's knowledge of the mortgages that DLJ selected for the Trust. Moreover, the Trustee did not make the R&Ws to the Certificateholders that DLJ did. To assign the Trustee the same obligations that DLJ has would be inconsistent with the PSA and commercially unreasonable.

II. THE COURTS BELOW CORRECTLY FOUND THAT INTEREST CONTINUES TO ACCRUE ON THE UNPAID PRINCIPAL BALANCE OF LIQUIDATED LOANS

The motion court (A-37-39) and the First Department (A-5) correctly concluded that the interest owed by DLJ to the Trustee on a materially breaching loan continues to accrue on the unpaid balance regardless of whether the loan has been liquidated. For any materially breaching loan, the PSA provides that DLJ shall pay the "Repurchase Price," which is defined as "an amount equal to 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 the Repurchase Price is to be distributed to Certificateholders." A-425. This formula provides no exception for liquidated loans, and thus requires DLJ to pay interest "at the applicable Mortgage Rate"—on the "unpaid principal balance" of *all* breaching loans—until "the Repurchase Price is to be distributed to Certificateholders." *Id*.

Applying the Repurchase Price formula to all loans regardless of liquidation not only enforces the PSA's plain language, but also enforces DLJ's promises to investors. The ProSupp assured investors that they would receive interest payments. *See, e.g.*, A-123 (describing interest certificateholders could expect to receive); A-184-186 (same). Though, as DLJ notes (Br. 44), these documents also advised investors that the Trust loans "may be liquidated, and liquidated [] loans will no longer be outstanding and generating interest" (A-249), the Repurchase Price formula applies only to loans where DLJ has materially breached its R&Ws. A-445. Nowhere does the ProSupp warn certificateholders that they might receive less interest because DLJ materially breached its R&Ws and thereby increased a loan's risk of liquidation. *See* A-127 (2007-1 ProSupp section entitled "Risk Factors," which "describe … the material risk factors related to [investors'] certificates," but nowhere reference DLJ's potential breach of its R&Ws).

DLJ objects (Br. 42-45) to the IAS Court's and the First Department's application of the contract language to the facts. It contends that (i) "accrued

interest" must be read to mean "interest that *actually* accrued" on a loan and (ii) interest cannot accrue on a liquidated loan because "there is nothing left upon which interest can accumulate." The Repurchase Protocol, however, provides that interest will accrue on "the *unpaid principal balance* of the Mortgage Loan"—not the loan itself. A-45. Moreover, the PSA defines Mortgage Loans as: "Such of the mortgage loans transferred and assigned to the Trustee pursuant to the provisions hereof as from time to time are held as a part of the Trust . . . *notwithstanding foreclosure or other acquisition of title of the related Mortgaged Property*." A-413. It is therefore not relevant to the unambiguous contractual damages calculation whether a loan is liquidated.

There is nothing surprising in this fact. New York law, as well as that of most other states, permits a lender to try to recover a deficiency judgment from the mortgagor following the foreclosure of a mortgage, which deficiency continues to accrue interest until paid. *See* N.Y. Real Prop. Acts. L. § 1371 (providing for deficiency judgments in foreclosure proceedings to be determined by reference to the judgment of foreclosure, "with interest"); 2 L. *Distressed Real Estate* § 16:46; App. 19A (2018) (multi-state survey demonstrating that, with few exceptions, deficiency judgments are generally available to mortgage lenders). Because the debt is collectible even after foreclosure, the debt survives any foreclosure and continues to accrue interest. While the *mortgage* may cease to exist upon

liquidation, the *debt obligation* resulting from the loan's unpaid principal balance remains.

DLJ's attempt to rewrite the "Repurchase Price" formula is also foreclosed by other provisions in the relevant trust documents. Where the parties agreed that interest or principal payments must be calculated by reference to what "actually" accrued or was "actually" received, they said so. The ProSupp, for example, contains references to principal that was "actually received," when determining the parties' obligations to make or receive payments. A-123 (amount of principal distributed to certificateholders will be determined by "funds *actually* received or advanced").

Similarly, the PSA definition of "Prepayment Interest Shortfall" distinguishes between "one full month's interest at the applicable Mortgage Rate" (*i.e.*, interest calculated by a formula) and "the amount of interest due and *actually* received from the related Mortgagor that accrued during the month." (*i.e.*, interest calculated by what was actually received). A-420

Likewise, where DLJ intended that interest would *not* accrue upon the occurrence of a certain event, the relevant trust document says so. *See, e.g.*, A-301 (2007-1 Prospectus, providing that if PSA is terminated and trust assets are sold, "the certificates *will no longer accrue interest*, and the only obligation of the trust

fund thereafter will be to pay . . . accrued interest that was available . . . on the date of termination.")

In sum, if the parties had intended that the unpaid principal balance component of the Repurchase Price for liquidated loans would cease accruing interest before the date of repurchase, the Repurchase Price formula would have used such language. The absence of any such language in the Repurchase Price formula supports that the parties' intent was for interest to continue to accrue through the repurchase date, irrespective of whether the loan was liquidated. *See, e.g.*, *Quadrant Structured Prods. Co. v. Vertin*, 23 N.Y.3d 549, 560 (2014) ("[I]f parties to a contract omit terms—particularly, terms that are readily found in other, similar contracts—the inescapable conclusion is that the parties intended the omission. The maxim *expressio unius est exclusio alterius*, as used in the interpretation of contracts, supports precisely this conclusion.").

This conclusion is reinforced by the First Department's decision in *Nomura,* 133 A.D. 3d at 105-107. In *Nomura*, the appellate court rejected a similar argument that the trustee had no remedy for a liquidated loan because once a loan has been liquidated, it cannot be repurchased. The court held that interpreting the Repurchase Protocol in this way "would leave plaintiffs without a remedy" for liquidated loans, which cannot have been within the contemplation of the parties when they entered into the governing agreement. *Id.* at 105. The First Department

further observed that such an interpretation would create a "perverse incentive for a sponsor 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." *Id.* at 106. So too, here, DLJ's interpretation would provide it with a windfall by denying the Trustee its remedy of continuing accrued interest until the repurchase price is paid on loans that liquidated with balances outstanding. Moreover, denying interest following liquidation would further incentivize DLJ to prolong resolution of the Trustee's claims as long as possible. DLJ's attempt (Br. 45), to distinguish *Nomura* ignores the rationale underlying that decision—namely, that there is nothing in the Repurchase Protocol or the definition of Repurchase Price that limits the Trustee's remedies based on whether a loan has been liquidated.[17]

For these reasons, the First Department's accrued-interest ruling should be affirmed.

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[17] Contrary to DLJ's suggestion (Br. 47), the First Department's interpretation creates no "risk that RMBS plaintiffs will run out the clock on litigation … simply to rack up 'accrued' interest.'" The amount of "accrued interest" the Trustee is due under the "Repurchase Price" formula is triggered by the date of notice, which in this case, was pre-suit. *See supra 9*. DLJ does not dispute that following the Repurchase Date, interest accrues at the statutory pre-judgment interest rate, not the contractual interest rate. *Id.*

CONCLUSION

The First Department's Decision and Order should be affirmed, and the certified question should be answered in the affirmative.

Dated: New York, New York
May 28, 2020

Respectfully submitted,

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NEW YORK STATE COURT OF APPEALS
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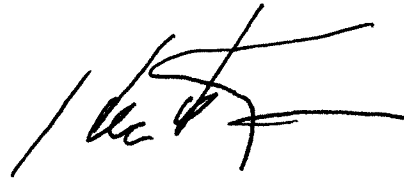
Dated: May 28, 2020



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