To Be Submitted By:
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Court of Appeals

STATE OF NEW YORK

IN RE: PART 60 PUT-BACK LITIGATION

DEUTSCHE BANK NATIONAL TRUST COMPANY, solely in its capacity as Trustee of the MORGAN STANLEY ABS CAPITAL I INC. TRUST 2007-NC4,

Plaintiff-Respondent,

against

MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS LLC, as Successor-by-Merger to MORGAN STANLEY MORTGAGE CAPITAL INC., and MORGAN STANLEY ABS CAPITAL I INC.,

Defendants-Appellants.

BRIEF FOR *AMICI CURIAE* NEW YORK CONTRACT LAW PROFESSORS AND SCHOLARS IN SUPPORT OF DEFENDANTS-APPELLANTS

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IDENTITIES AND INTERESTS OF *AMICI CURIAE*

We are law professors and scholars at American Bar Association-accredited law schools in New York State who teach or write in contract law. Pursuant to Section 500.23(a)(4)(i) of the Rules of the Court of Appeals, we submit this brief because we expect it to be "of assistance to the Court." None of us has a personal or direct financial stake in the outcome of this litigation.[1] Our teaching and scholarship concerns contract law, and we have a collective professional interest in the sound and consistent development of New York law. Some of us joined an amicus brief on behalf of several New York contract law professors in *Ace Securities Corp. v. DB Structured Products, Inc.*, 25 N.Y.3d 581 (2015), which the Court found useful and cited approvingly. *Id.* at 595 n.3.

This case presents an opportunity for the Court to render a decision that will reinforce New York's long history and central animating goals of providing sophisticated parties certainty, predictability, and finality under the contract and procedural law of this state. We write here to emphasize this case's importance to

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[1] Although Professor Leib is being compensated at his customary rate by Nomura Credit & Capital, Inc. and Barclays Bank PLC for the time spent preparing this *amicus curiae* brief, the opinions and conclusions expressed in the brief represent his own independent views and the views of the other New York Contract Law Professors and Scholars joining the brief. The brief does not represent the views of any of the institutions at which the professors and scholars are affiliated.

the fabric of New York's law upon which so many in varied professional communities rely.

The scholars joining this brief are:[2]

- Miriam R. Albert, Maurice A. Deane School of Law at Hofstra University
- Tal Kastner, NYU Law School
- Ethan J. Leib, Fordham Law School
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BACKGROUND

The transactions at issue in this litigation are sales of interests in pooled residential mortgages as security instruments. In such transactions, a sponsor – here, Morgan Stanley Mortgage Capital Holdings LLC ("Sponsor") – bundles a set of residential mortgage loans and sells them through an intermediary – here, Morgan Stanley ABS Capital I Inc. ("Depositor") – to a trust, which then issues securities that entitle investors to cash flows generated by the loans in the trust. The investment

[2] Institutions are provided here for identification purposes only.

is generally known as a Residential Mortgage-Backed Security ("RMBS") and, in this case, the relevant RMBS is governed by a Representations and Warranties Agreement ("RWA") dated June 20, 2007 and a Pooling and Servicing Agreement ("PSA") dated May 1, 2007 (collectively, "Agreements"), both providing for the application of New York law. *See* RWA § 6; PSA §12.03.

The relevant Agreements are contracts in which the Sponsor and Depositor made certain representations and warranties about the nature of the underlying mortgage loans in the RMBS trust. In addition, the Agreements specify and limit the remedies available to the trustee, on behalf of investors, if it turns out that the representations or warranties about the underlying loans are inaccurate or if the documentation for the underlying loans is defective. The remedial provisions in both the RWA (§ 4(a) & (c)) and the PSA (§ 2.03(g) & (q)) create a dispute resolution framework under which the "sole remedy" for defective representations and warranties and/or defective documentation is that the Sponsor will cure, substitute, or repurchase the individual loans affected at their "Repurchase Price," which is defined as the unpaid principal balance of the loan plus interest, costs, and expenses. This explicitly delineated "sole remedy" is intended to be in lieu of rescission or other methods of calculating the damages associated with an underlying breach but is drafted with the purpose of meeting the investors' expectancy and is a reasonable approximation thereof by making the Trust whole in respect of any breaching loans.

The "sole remedy" does not insulate, absolve, or exonerate the Sponsor from liability, nor was it calibrated to provide a nominal sum under New York law.

In part, at issue in this case is whether the "sole remedy" clause can be invalidated upon a pleading of "gross negligence" under New York law. Because the Court of Appeals in New York has only permitted gross negligence to invalidate a remedial clause when that clause fully exculpates a contracting party from liability or limits a party's liability to a contemplated nominal sum certain, the "sole remedy" clause here is enforceable under New York law, notwithstanding a pleading of gross negligence.

This case is an excellent vehicle to underscore and reaffirm the central commitment of New York law that the "gross negligence exception" to the enforcement of remedial clauses is and should be limited in New York only to those cases where the clause "purport[s] to *exonerate* a party from liability" or where the clause "limit[s] damages to a nominal sum," *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 554 (1992) (emphasis added), and not to clauses that are tailored precisely to remedy the specific harm suffered by a plaintiff. There is confusing dicta in the New York Court of Appeals' most recent reaffirmation of this principle in *Abacus Federal Savings Bank v. ADT Security Services, Inc.*, 18 N.Y.3d 675 (2012), suggesting that perhaps *any* "liquidated damages clause" might not be "enforceable against allegations of gross negligence," *id.* at 683. But that suggestion

is clearly neither the law of *Sommer*, nor the law of New York, and it was not required for the holding in *Abacus.* In that case, this Court was evaluating a remedial clause that "limited [defendant's] liability, under all circumstances, to $250," *id*. The nominal sum certain in *Abacus* – $250 to compensate an alleged loss of several million dollars – comes squarely within *Sommer*'s clear parameters for the "gross negligence exception." However, when a remedial clause makes a meaningful effort to make an aggrieved party whole, it does not risk invalidation under *Sommer*.

ARGUMENT

I. NEW YORK CONTRACT LAW HAS A MOTIVATING POLICY PREFERRING CERTAINTY, PREDICTABILITY, AND FINALITY – AND ENFORCEABLE REMEDIAL CLAUSES BETWEEN SOPHISTICATED PARTIES PROMOTE THOSE OBJECTIVES.

A. New York's Contract Law Design

Scholars of contract law disagree about what rules and standards would make for the best kind of contract law. Some favor formalist rules of interpretation that maximize predictability in adjudication and others prefer more contextual standards that welcome implied terms during the interpretative process. *See generally* Ronald J. Gilson, *et al.*, *Text* and *Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23 (2014); Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926 (2010). However, scholars of New York

contract law agree that New York has chosen formalist rules because courts in New York prefer certainty, predictability, and finality for commercial parties. Empirical, historical, and doctrinal evidence place these core policy concerns at the center of New York contract law. *See IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A.*, 20 N.Y.3d 310, 315-16 (2012) (highlighting that New York law seeks to "promote and preserve New York's status as a commercial center and to maintain predictability for the parties" to contracts); *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162-63 (1990) (deciding to "impart[] stability to commercial transactions" in its approach to contract law); Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475 (2009); Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073 (2009); WILLIAM E. NELSON, THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920-1980, at 80-92 (2001). Indeed, just a few months ago, the New York Court of Appeals confirmed in *159 MP Corp. v. Redbridge Bedford*, 33 N.Y.3d 353, 359 (2019), that its approach to contract interpretation is "[i]n keeping with New York's status as the pre-eminent commercial center in the United States, if not the world."

New York is widely known among commentators, judges, lawyers, and the sophisticated parties they represent to "follow the traditional Willistonian approach

to interpretation, which embodies a hard parol evidence rule, retains the plain meaning rule, gives presumptively conclusive effect to merger clauses, and, in general, permits the resolution of many interpretation disputes by summary judgment." Schwartz & Scott, *Contract Interpretation Redux*, 119 YALE L.J. at 932. New York's formalist approach is credited as a substantial reason sophisticated parties choose New York law to bind them in their choice-of-law clauses: "[t]he revealed preferences of sophisticated parties [by choosing New York law to govern their contracts] support arguments . . . that formalistic rules offer superior value for the interpretation and enforcement of commercial contracts." Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 CARDOZO L. REV. 1475, 1475 (2010). Parties are often drawn to New York contract law in their choice-of-law because they know and prefer New York's approach, which prizes parties' autonomy to plan their deals carefully in advance and not rely on reformation by the courts. *See IRB-Brasil Resseguros*, 20 N.Y.3d at 315-16; *see also* Avery Wiener Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 508-09 (2004) (highlighting how parties use choice-of-law to opt into formalism).

One commentator put it this way after studying New York's approach to contract law in areas as varied as formation doctrines, validity doctrines, statute of

frauds doctrine, and dispute resolution doctrines related to arbitration, settlement, the jury, and class action waivers:

> New York's contract jurisprudence is formalistic, literalistic, nonjudgmental, and deferential to the freedom of parties to bargain for mutual advantage. The job of the [New York] courts is not to intrude into the contractual relationship but rather to enforce the deal the parties actually struck. To this end New York courts place a high value on *clarity* and *predictability*, especially in commercial contracts: . . . [contracts are enforced as written, not reformed or rejected] to satisfy ideas of fairness or equity.

Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 CARDOZO L. REV. at 1522 (emphasis added).

B. The "Gross Negligence Exception" to Enforcement of Specific Types of Remedial Clauses

Enforceable remedial clauses promote objectives of certainty, predictability, and finality for sophisticated parties who enter into contracts with one another because they enable parties to evaluate the consequences of breach by simply looking to contract terms – and because they enable courts quickly and efficiently to tell the parties how to remediate their disputes. Although there are some narrow exceptions to this general principle – such as "fraud in the inducement" or "unconscionability" – enforcing remedial clauses allows commercial parties to plan their affairs with certainty, predictability, and finality. *See, e.g.*, *Fifty States Mgmt. Corp. v. Pioneer Auto Parks, Inc.*, 46 N.Y.2d 573 (1979).

To be sure, there are a few other well-known exceptions to this general principle. For example, freedom of contract notwithstanding, parties cannot agree to exact penalties upon one another for breaches through their remedial clauses; a "liquidated damages" provision must be a good faith way of attempting to estimate a party's likely damages from breach. *See, e.g.*, *Equitable Lumber Corp. v IPA Land Dev. Corp*, 38 N.Y.2d 516, 521 (1976). As the Uniform Commercial Code ("UCC") adds: "A term fixing unreasonably large liquidated damages is void as a penalty." N.Y.U.C.C. § 2-718(1).

There is another exception to the enforceability of certain kinds of remedial clauses, one in dispute in this case. New York's public policy is that a defendant cannot "insulate itself from damages caused by grossly negligent conduct." *Sommer*, 79 N.Y.2d at 554. This "gross negligence exception," however, has been limited at the Court of Appeals to target only two kinds of remedial clauses: (1) those that are fully exculpatory, insofar as they insulate and immunize a party from any liability whatsoever, *see Kalisch-Jarcho, Inc. v. City of New York*, 58 N.Y.2d 377, 384 (1983) (highlighting that exculpatory agreements will not apply to grossly negligent conduct to "*exonerate* a party from liability under all circumstances"); and (2) those that limit a non-breaching party to a nominal sum, *see Sommer*, 79 N.Y.2d at 554 (holding that the "gross negligence exception" "applies equally to contract clauses purporting to exonerate a party from liability and *clauses limiting damages*

to a nominal sum"). The rationale for this limited exception is that parties should not be able to negotiate for and close a deal intended to wholly insulate one of the parties from liability for harm caused to the other party through conduct that "evinces a reckless indifference to the rights of others." *Id.*[3]

The discussion above highlights that substantive contract law in New York is informed by New York's policy in favor of predictability. These background principles help reinforce the correct reading of the New York cases and statutes at issue in the current litigation, orienting them towards certainty, predictability, and finality.

II. NEW YORK LAW IS CLEAR THAT THE "GROSS NEGLIGENCE EXCEPTION" APPLIES ONLY TO TRULY EXCULPATORY CLAUSES

A. Summary Rule

The New York Court of Appeals has not had many opportunities to develop the state's "gross negligence exception" to exculpatory clauses in contracts between sophisticated parties. But it is easy to see that the "gross negligence exception"

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[3] It is worth noting that such remedial clauses are still incontrovertibly enforceable against claims of *ordinary negligence* – so parties can exempt themselves from all liability or limit counterparties to nominal sums in cases of an ordinary tort of negligence, so long as they write these provisions sufficiently clearly. *Id.* The very narrow exception to enforceability applies only for gross negligence.

applies only to truly extraordinary efforts by parties to immunize, insulate, absolve, exonerate, and wholly disclaim liability for their conduct. There is plenty of other law available – in fraud and other tort law, the law of liquidated damages and penalty clauses, and the law of unconscionability – to attack limitations of liability that are not full exculpation efforts nor efforts to limit a non-breaching party to a nominal sum. Loose language separated from the core holdings of the main cases in this Court should not be used to extend this doctrine into new and unpredictable terrain.

B. Relevant Caselaw

The touchstone case for the "gross negligence exception" in New York is the 1992 case of *Sommer*, in which the Court of Appeals articulated the doctrine in the context of an action against a fire alarm company that failed to report a fire in a building to a central station, causing substantial losses to plaintiffs. Although plaintiffs had signed contracts with the fire alarm company that purported to insulate fully the alarm company from any liability for breach or, alternatively, to limit its liability to "the lesser of $250 or 10% of the annual service charge," 79 N.Y.2d at 549, the Court of Appeals held that gross negligence can be asserted to render unenforceable the exculpatory clause or the nominal sum limitation, *id.* at 553-54. The Court cited and followed *Kalisch-Jarcho, Inc.*, 58 N.Y.2d at 384-85, emphasizing that parties cannot shield grossly negligent conduct with "exonerat[ion]" or "exemption" clauses, and *Gross v. Sweet*, 49 N.Y.2d 102, 106

(1979), emphasizing that New York public policy doesn't allow parties to give themselves "exemptions" for gross negligence. The next year in *Colnaghi, U.S.A, Ltd. v. Jewelers Protection Services, Ltd.*, 81 N.Y.2d 821, 823-24 (1993), in another alarm failure case, this Court reemphasized that the "gross negligence exception" could be used to render unenforceable exculpatory clauses that "exonerate," "absolve," and help parties "attempt to escape" all liability for gross negligence (though it found that no gross negligence occurred in that case).

The only other major case on this issue from the New York Court of Appeals is the 2012 case of *Abacus Federal Savings Bank v. ADT Security Services, Inc.*, 18 N.Y.3d 675 (2012). It, too, was an alarm services case, in which the underlying contract at issue "exculpated defendants from liability for their own negligence and limited their liability, under all circumstances, to $250," *id.* at 681, a nominal sum in light of the millions of dollars of losses plaintiffs were claiming. Indeed, the $250 sum certain was the exact same amount at issue in *Sommer*.

In describing the exculpatory clause, the Court in *Abacus* noted that the contract sought to "absolve" the defendant and attempted to effectuate a "waiver" for gross negligence, *id.* at 682. In holding in that case that the conduct alleged by the plaintiffs could constitute gross negligence, the Court did not change the underlying law about the ambit of the "gross negligence exception." Although it did, in dicta, suggest that the "gross negligence exception" might apply more

generally to any liquidated damages clause – even ones that aren't exculpatory or limit damages to a nominal sum – the Court never explained how that could reflect the cases that preceded it, nor was that errant suggestion part of the holding of *Abacus*, which involved the "nominal sum" limitation, included in the exception by *Sommer* explicitly. Indeed, no case in New York's highest court has ever held that standard remedial clauses, whether liquidated damages clauses (which have their own quite elaborate body of law)[4] or procedural clauses explaining how an aggrieved party is supposed to engage in dispute resolution under a contract,[5] come within the "gross negligence exception."

To be sure, as other lower federal and state courts have attempted to implement the narrow "gross negligence exception," some have lost their way in a tangle of loose talk about the varied kinds of remedial clauses. For example, in *Turkish v. Kasenetz*, 27 F.3d 23, 28 (2d Cir. 1994), the court there seemed to be persuaded that the "gross negligence exception" under New York law could be

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[4] Sometimes this Court has been more fastidious about delineating when something is truly to be classified as "liquidated damages" proper. *See Florence v. Merchants Centr. Alarm Co.*, 51 N.Y.2d 793, 795 (1980) (upholding an exculpatory clause and one limiting defendant's liability to a nominal sum, notwithstanding the contract's "erroneous reference to 'liquidated damages'") (citation omitted).

[5] Indeed, this Court has corrected the Appellate Division when it mistook such remedial clauses (that took the form of conditions precedent to suit) as exculpatory clauses. *See A.H.A. Gen. Constr., Inc. v. N.Y.C. Hous. Auth.*, 92 N.Y.2d 20, 30-31 (1998).

extended to a limitation of liability clause that was neither exculpatory nor for a nominal sum. But that court misunderstood that fraudulent inducement is a separate doctrine that is powerful enough to invalidate any remedial clause; when actual fraud is alleged, the entire contract rather than just the remedial clauses can be on the chopping block. Thus the plaintiffs in *Turkish* did not need the "gross negligence exception" to invalidate the clause, since they were alleging fraud. Indeed, the only authority that court cited to try to extend the "gross negligence exception" was a Massachusetts fraud case. *See id.* (citing *Bates v. Southgate*, 308 Mass. 170 (1941)). Fraud has a higher standard of proof, of course, and is a much more general defense to any contract provision whatsoever, unlike gross negligence, with its weaker standards of proof and a much narrower ambit over only certain kinds of remedial clauses.

Additional claims of fraud in plaintiff pleadings have also led other lower courts astray in mistakenly assuming that since fraud can invalidate many kinds of remedial clauses, the "gross negligence exception" must function in the same way. *See, e.g.*, *Cirillo v. Slomin's Inc.*, 196 Misc. 2d 922 (N.Y. Sup. Ct. Nassau Cty. 2003) (holding an exculpatory clause and a limitation of damages clause to a nominal sum unenforceable against a claim of fraud and gross negligence – but speaking too loosely about other kinds of remedial clauses that do not come within the *Sommer* rule); *E*Trade Fin. Corp. v. Deutsche Bank AG*, No. 05 Civ. 0902, 2008 WL

2428225 (S.D.N.Y. June 13, 2008) (incorrectly holding that remedial clauses excluding punitive and consequential damages can be found unenforceable under the "gross negligence exception" in the context of a fraud pleading).

Notwithstanding some lower courts' misunderstandings, however, the authoritative rule in *Sommer* is clear and easy to apply. This case is an opportunity to apply *Sommer*'s rule and to help instruct lower courts applying New York law, which aspires to certainty, predictability, and finality.[6]

C. Justification

The general policy in New York law favoring certainty, predictability, and finality for commercial parties underlies *Sommer*'s clarity about the two narrow kinds of remedial clauses that can be held to be unenforceable under the "gross negligence exception." There is other law adequate to limit other kinds of remedial

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[6] When a court focused on this classification issue surrounding remedial clauses, it was easy for it to conclude (there under Pennsylvania law) that there is a real difference between exculpatory clauses and clauses that limit an aggrieved party to a nominal sum on the one hand – and remedial clauses that purport only to limit rather than insulate from liability on the other. *See Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195, 202-04 (3d Cir. 1995) (finding a $50,000 damages cap not to run afoul of a policy disfavoring exculpatory clauses and nominal sum clauses that effectively immunize parties from liability); *Great N. Ins. Co. v. ADT Sec. Servs., Inc.*, 517 F. Supp. 2d 723, 749, 751-52 (W.D. Pa. 2007) (clearly differentiating exculpatory clauses and more generous limitation of liability clauses). *A fortiori*, clauses that are intended to provide a complete remedy pursuant to a defined formula cannot be seen as true exculpatory clauses under New York law.

clauses: all such clauses are unenforceable in cases of unconscionability and fraud in the inducement of the underlying contract – and the law of liquidated damages renders all penalty clauses unenforceable, even without a showing of gross negligence. Ultimately, it only sows confusion to expand the "gross negligence exception" into other remedial clause environments. *See generally* Michael Pillow, *Clashing Policies or Confusing Precedents: The "Gross Negligence" Exception to Consequential Damages Disclaimers*, 4 WM. & MARY BUS. L. REV. 493 (2013) (arguing that conscious risk allocations between commercially sophisticated parties in remedial clauses should generally be enforced and the "gross negligence exception" should be limited very substantially, mentioning New York standards as appropriately restrictive). Accordingly, it makes sense that *Sommer* delineates the narrow exception only to fully exculpatory clauses and those that limit damages to a nominal sum, which effectively operate with the purpose of insulating, exonerating, and absolving a breaching party from egregious conduct.

The clarity of the narrow exception is further supported in two different ways, under New York law. First, in evaluating how to interpret a remedial clause agreed upon by two commercially sophisticated parties in *Metro. Life Ins. Co. v. Noble Lowndes Int'l, Inc.*, 84 N.Y.2d 430 (1994), this Court enforced a consequential damages exclusion where a party intentionally repudiated the contract "motivated exclusively by its own economic self-interest," *id.* at 439. Even in the context of

such intentional breaches, this Court has agreed that between sophisticated parties, such limitations of liability, which are not wholly exculpatory and do not limit plaintiffs to nominal sums, are enforceable.

Second, the distinction that the New York common law draws within its "gross negligence exception" between wholly exculpatory clauses on the one hand, and other forms of limitations of liability and/or liquidated damages on the other tracks well-understood law in Article 2 of the UCC, embraced by New York's legislature since 1964. To wit, N.Y.U.C.C. § 2-316, which covers total exclusions of warranties, is a legal rule that applies only to fully exculpatory clauses, which fully insulate parties from liability. There, the UCC is clear that efforts by sellers to exclude implied warranties of merchantability or fitness must be conspicuous and must utilize very specific language. Thus, both the UCC and New York common law provide specialized rules to clauses that seek to immunize a party from liability completely. But the UCC treats remedial clauses that seek only to limit the amount and form of remedy differently: N.Y.U.C.C. § 2-718 controls liquidated damages clauses and N.Y.U.C.C. § 2-719 controls "sole remedy" clauses and consequential damages limitations, just as separate law aside from the "gross negligence exception" controls such clauses under the common law in New York.

It is thus coherent with the rest of long-standing New York contract law to treat wholesale exclusions from liability (and attendant nominal sum certain clauses,

which effectively do the same)[7] as different from other remedial clauses that merely limit liability in one way or another. The "gross negligence exception" applies to the former but not the latter, since New York law generally prefers commercially sophisticated parties to be able to allocate the risks of their own agreements, reserving non-enforcement only for extreme cases of egregious conduct and only for clauses that purport to clearly insulate, exonerate, or absolve liability completely.

III. THE "SOLE REMEDY" CLAUSE IN THE RMBS INSTRUMENTS HERE IS NOT AN EXCULPATORY CLAUSE UNDER NEW YORK LAW AND IS NOT SUBJECT TO THE "GROSS NEGLIGENCE EXCEPTION"

In this case, the Agreements effectuate the sale of the RMBS loans to the trustee for the benefit of investors. The Agreements detail the Sponsor's and Depositor's representations and warranties. The Agreements also direct how the Sponsor and Depositor will remedy defective representations and warranties, explaining what the trustee has to do to get its remedies. These remedial provisions specify how to make demands upon the Sponsor or Depositor and limit the forms of

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[7] The official comments to § 2-718 clearly differentiate between "unreasonably large liquidated damages," which are "expressly made void as a penalty," and "unreasonably small amount[s]," which are not covered by the liquidated damages section but need to be analyzed differently. N.Y.U.C.C. § 2-718 official cmt. 1. The nominal sum cases that follow *Sommer* are also different from standard liquidated damages analysis and get the benefit of the "gross negligence exception" under New York law.

remediation delineated in the Agreements as the "sole remedy" available. The "sole remedy" provision does not purport to insulate, exonerate, or absolve the Sponsor from liability for defective representations and warranties, nor is the remedial clause designed to award the trustee or investors only a nominal sum. Accordingly, the "sole remedy" clause does not come within *Sommer*'s "gross negligence exception."

After recognizing that *Sommer* only permits fully exculpatory and nominal sum clauses to be challenged as unenforceable under the "gross negligence exception," the court below relied on an Appellate Division case claiming that the exception can apply "to sole remedies that are illusory." *Morgan Stanley Mortg. Loan Trust 2006— 13ARX v. Morgan Stanley Mortg. Capital Holdings LLC*, 143 A.D.3d 1, 9 (1st Dep't 2016). If what the Appellate Division in *13ARX* and here meant to say was that sole remedy clauses that *are designed* to immunize conduct also come within *Sommer*, that would be consistent with *Sommer*'s rationale of including remedial clauses that limit damages to nominal sums certain. In all the cases the New York Court of Appeals has found to come within the "gross negligence exception," the illusory nature of the nominal sum was essentially knowable *at formation* – and the sum amount was articulated in the contract itself. But the Appellate Division in this case and in *13ARX* seems to be suggesting that if through some idiosyncrasy it just turns out that the "sole remedy" clause in practice is unavailable or hard to apply, *Sommer* should be extended. That would introduce

an element of unpredictability that is plainly inconsistent with *Sommer*'s clear rule, which allows sophisticated parties to allocate risks however they choose, so long as they do not on the face of their agreements fully disclaim their own liability and then engage in gross negligence.

In the Appellate Division decision in this case, the court admitted that "the actual effect of the sole remedy clause in making the investors whole cannot be ascertained." *In re Part 60 Put-Back Litig.*, 169 A.D.3d 217, 225 (2019). Given New York's clear interest in certainty, predictability, and finality, it should not embrace the Appellate Division's seeming extension of the *Sommer* rule. By the trustee's own admission here, the "sole remedy" clause was designed to "make the Trust whole," Compl. ¶ 3 (A50), not to immunize, exonerate, or absolve the Sponsor or Depositor.

CONCLUSION

For the foregoing reasons, this Court should hold that the "sole remedy" clause is not an exculpatory clause, nor is it designed to limit plaintiffs to a nominal sum. Accordingly, the "gross negligence exception" to enforcement does not apply.

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Respectfully Submitted,

By:______________________________

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR §500.13(c) that the foregoing brief was prepared on a computer.

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