To Be Argued By:
Brian S. Weinstein
Time Requested: 30 Minutes

APL-2019-00127

New York County Clerk's Index No. 652877/14

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 DEFENDANTS-APPELLANTS

DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
212-450-4000
brian.weinstein@davispolk.com
matthew.cormack@davispolk.com
craig.cagney@davispolk.com

Attorneys for Defendants-Appellants

Of Counsel:

Brian S. Weinstein
Matthew Cormack
Craig T. Cagney

Date Completed: August 29, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1 of the Rules of Practice for the Court of Appeals of the State of New York, Defendants-Appellants state the following:

Morgan Stanley Mortgage Capital Holdings LLC is a wholly owned subsidiary of Morgan Stanley. Morgan Stanley is a publicly held corporation that has no parent corporation.

Morgan Stanley ABS Capital I Inc. is a corporation organized under Delaware law. It is a direct, wholly owned subsidiary of Morgan Stanley.

Based on Securities and Exchange Commission Rules regarding beneficial ownership, Mitsubishi UFJ Financial Group, Inc., 7-1 Marunouchi 2-chrome, Chiyoda-ku, Tokyo 100-8330, beneficially owns greater than 10% of Morgan Stanley's outstanding common stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

JURISDICTION 6

QUESTIONS PRESENTED 7

STATEMENT OF THE CASE 8

A. The MSAC 2007-NC4 Securitization and the Sole Remedy Provision 8

B. The Trustee's Lawsuit and the IAS Court's Decision on Defendants' Motion to Dismiss 12

C. The Appellate Division's Decision 16

ARGUMENT 19

I. THE SOLE REMEDY PROVISION IS NOT UNENFORCEABLE AS A MATTER OF PUBLIC POLICY, AND IS NOT ANALOGOUS TO EXCULPATORY CLAUSES THAT ELIMINATE LIABILITY OR LIMIT IT TO A NOMINAL SUM 19

II. AS IN *NOMURA II* AND *AMBAC*, THE TRUSTEE CANNOT CIRCUMVENT THE SOLE REMEDY PROVISION THROUGH ALLEGATIONS OF PERVASIVE BREACHES 27

A. Re-characterizing Loan-Level Breaches of Representations and Warranties as "Gross Negligence" Does Not Render the Sole Remedy Provision Unenforceable, or Lead to a Different Result than in *Nomura II* and *Ambac* 28

B. The Trustee Has Not Alleged the Type of Conduct Necessary to Invoke the Public Policy Exception 31

III. THE TRUSTEE'S ALLEGATIONS DO NOT SUPPORT A DEMAND FOR PUNITIVE DAMAGES 38

IV. THE PARTIES' CONTRACT DOES NOT MEET THE *HOOPER* TEST FOR SHIFTING ATTORNEY'S FEES 40

A. Under the *Hooper* Test, the Intent to Shift Attorney's Fees Must Be Unmistakably Clear 40

B. The PSA Does Not Express An Unmistakable Intent to Shift Attorney's Fees 41

CONCLUSION 49

TABLE OF AUTHORITIES

CASES

PAGES

Abacus Fed. Sav. Bank v. ADT Sec. Servs., Inc.,
18 N.Y.3d 675 (2012)....3, 20, 35

ACE Sec. Corp. v. DB Structured Prods., Inc.,
25 N.Y.3d 581 (2015)....24, 25, 26

ACE Sec. Corp. Home Equity Loan Tr., Series 2007-ASAP2 v. DB Structured Prods., Inc.,
2014 N.Y. Slip Op. 32451 (Sup. Ct. Aug. 28, 2014) 48

A.H.A. Gen. Constr., Inc. v. N.Y. City Hous. Auth.,
92 N.Y.2d 20 (1998)....3, 24, 26

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

Bank of N.Y. v. Fleet Bank, N.A.,
671 N.Y.S.2d 945 (Sup. Ct. N.Y. Cty. 1998)....43

Colnaghi, USA. v. Jewelers Prot. Servs., Ltd.,
81 N.Y.2d 821 (1993)....20

Matter of Columbus Park Corp. v. Department of Hous. Preserv. and Dev. of City of N.Y.,
80 N.Y.2d 19 (1992)....46

Congel v. Malfitano,
31 N.Y.3d 272 (2018)....40

Deutsche Bank Nat'l Tr. Co. (SABR 2007-BR2, 3, 4, 5) v. Barclays Bank, PLC,
2016 N.Y. Slip Op. 31056 (Sup. Ct. June 8, 2016)....48

Eujoy Realty Corp. v. Van Wagner Commc'ns, LLC,
22 N.Y.3d 413 (2013)....19

Gotham Partners, L.P. v. High River Ltd. P'ship,
76 A.D.3d 203 (1st Dep't 2010)....41

Gross v. Sweet,
49 N.Y.2d 102 (1979)...3, 21, 31

Hayman v. Morris,
37 N.Y.S.2d 884 (Sup. Ct. N.Y. Cty. 1942)...43

Hooper Assocs., Ltd. v. AGS Computers, Inc.,
74 N.Y.2d 487 (1989)...*passim*

Kalisch-Jarcho, Inc. v. City of N.Y.,
58 N.Y.2d 377 (1983)...*passim*

Lawyers' Fund for Client Prot. of State of N.Y. v. Bank Leumi Tr. Co. of N.Y.,
94 N.Y.2d 398 (2000)...46

Metro. Life Ins. Co. v. Noble Lowndes Int'l, Inc.,
84 N.Y.2d 430 (1994)...*passim*

Moran v. Erk,
11 N.Y.3d 452 (2008)...24, 25

Morgan Stanley Mortg. Loan Tr. 2006-13ARX v. Morgan Stanley Mortg. Capital Holdings LLC,
143 A.D.3d 1 (1st Dep't 2016)..*passim*

New York Univ. v. Cont'l Ins. Co.,
87 N.Y.2d 308 (1995) ....*passim*

Nomura Asset Acceptance Corp., Mortg. Pass-Through Certificates, Series 2006-AF2 v. Nomura Credit & Capital, Inc., 2014 WL 10646128 (Sup. Ct. N.Y. Cty. July 18, 2014)...14

Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.,
No. 650337/2013, 2014 WL 5243512 (Sup. Ct. N.Y. Cty. July 18, 2014) ..15, 16

Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Cap., Inc.,
133 A.D.3d 96 (1st Dep't 2015)...18, 22

Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, Nat'l Ass'n v. Nomura Credit & Capital, Inc.,
30 N.Y.3d 572 (2017)...*passim*

OFSI Fund II, LLC v. Canadian Imperial Bank of Commerce,
82 A.D.3d 537 (1st Dep't 2011)..32

Quadrant Structured Prods. Co. v. Vertin,
23 N.Y.3d 549 (2014) 44

In re Refco Sec. Litig.,
890 F. Supp. 2d 332 (S.D.N.Y. 2012) 45

Rich v. N.Y. Cent. & Hudson River R.R. Co.,
87 N.Y. 382 (1882) 38

Riverside South Planning Corp. v. CRP/Extell Riverside, L.P.,
13 N.Y.3d 398 (2009) 44

Rocanova v. Equitable Life Assurance Soc'y of U.S.,
83 N.Y.2d 603 (1994) 39

Royal Discount Corp. v. Luxor Motor Sales Corp.,
170 N.Y.S.2d 382 (1st Dep't 1957) 43

SACO I Tr. 2006-5 v. EMC Mortg. LLC,
2014 N.Y. Slip Op. 31432 (Sup. Ct. May 29, 2014) 48

Sommer v. Fed. Signal Corp.,
79 N.Y.2d 540 (1992) .... *passim*

Tonking v. Port Auth. of NY & NJ,
3 N.Y.3d 486 (2004) 41

U.S. Bank N.A. v. DLJ Mortg. Capital, Inc.,
140 A.D.3d 518 (1st Dep't 2016) 19

U.S. Bank Nat'l Ass'n v. Greenpoint Mortg. Funding, Inc.,
No. 651954/2013, 2015 WL 915444 (Sup. Ct. N.Y. Cty. Mar. 3, 2015) 9

Vermont Teddy Bear Co. v. 538 Madison Realty Co.,
1 N.Y.3d 470 (2004) 45

Waverly Mews Corp. v. Waverly Stores Assocs.,
294 A.D.2d 130 (1st Dep't 2002) 43

Statutes & Rules

26 C.F.R. § 1.860G-2(f)(1)(iv) 11

26 C.F.R. § 1.860G-2(f)(2) 11

26 U.S.C. § 860A 10

26 U.S.C. § 860D(a)(4) 11

26 U.S.C. § 860F(a)(2) 11

26 U.S.C. § 860F(a)(2)(A) 11

Other Authorities

Admin. Order (Sup. Ct. N.Y. Cty. May 23, 2013), http://www.nycourts.gov/courts/1jd/supctmanh/AO_Mortgage_Secs_513.pdf 13

Restatement (First) of Contracts § 575 (1932) 31

Restatement (Second) of Contracts § 195(1) (1981) 31, 32

Defendants-Appellants Morgan Stanley Mortgage Capital Holdings LLC, as Successor-by-Merger to Morgan Stanley Mortgage Capital Inc., and Morgan Stanley ABS Capital I Inc. (collectively, "Morgan Stanley") respectfully submit this brief in support of their appeal from the Decision and Order of the Appellate Division, First Department, dated January 17, 2019 (the "Decision"), which, insofar as appealed from, reversed the order of the Supreme Court, New York County (Marcy S. Friedman, J.).

PRELIMINARY STATEMENT

In two prior appeals over the past two years, this Court rejected efforts by trustees and insurers of residential mortgage-backed securitization ("RMBS") trusts to circumvent the sole remedy provision in RMBS contracts. *See Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569, 584 (2018) ("*Ambac*"); *Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, National Association v. Nomura Credit & Capital Inc.*, 30 N.Y.3d 572, 584 (2017) ("*Nomura II*"). The sole remedy provision, which is a standard provision in hundreds if not thousands of RMBS and other agreements governed by New York law, provides that if loans within the securitization trust breach contractual representations and warranties, the trustee's sole remedy is to require the defendant to cure or repurchase the loans that are in breach. In both *Nomura II* and *Ambac*, this Court rejected the plaintiffs' efforts to plead around this exclusive remedy by

arguing that “pervasive” loan-level breaches, of which the defendants were allegedly aware, transformed the breaches into a different type of violation to which the sole remedy provision did not apply. *Ambac*, 31 N.Y.3d at 582; *Nomura II*, 30 N.Y.3d at 585-87. This appeal involves a *third* effort by an RMBS trustee to avoid the sole remedy provision by re-characterizing allegedly pervasive loan-level breaches as a different type of violation. As in *Nomura II* and *Ambac*, this Court should likewise reject this latest effort and enforce the express terms of the contract, which provides a complete and exclusive remedy for allegedly breaching loans.

The trustee attempts to circumvent the sole remedy provision here by arguing that the provision should be deemed unenforceable as a matter of public policy. In particular, it argues that the alleged loan-level breaches were so numerous that Morgan Stanley must have or should have been aware of them and, on that basis, seeks to fit this case within a line of precedents holding that parties may not exculpate themselves from liability for their own willful misconduct or gross negligence.

There are several serious flaws in the trustee’s position. First, the sole remedy provision does not violate public policy, because it does not exculpate Morgan Stanley from liability resulting from alleged gross negligence or willful misconduct. To the contrary, by requiring Morgan Stanley to cure or repurchase

any breaching loan, it provides a complete remedy with respect to any breach that the trustee can prove. As the trustee's own complaint alleges, the sole remedy provision "make[s] the Trust whole." (A50 ¶ 3.) It is therefore entirely unlike the types of exculpatory provisions that this Court has deemed unenforceable in the face of a defendant's willful misconduct or gross negligence—provisions that eliminate a defendant's liability entirely or limit it to a nominal sum. *See Abacus Fed. Sav. Bank v. ADT Sec. Servs., Inc.*, 18 N.Y.3d 675, 681 (2012); *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 549 (1992); *Kalisch-Jarcho, Inc. v. City of N.Y.*, 58 N.Y.2d 377, 380 (1983); *Gross v. Sweet*, 49 N.Y.2d 102, 105 (1979).

Second, because the sole remedy provision provides full relief for any proven breach, what the trustee really appears to be objecting to is the need to prove its claims on a loan-by-loan basis. But that is precisely what the contract between these sophisticated parties requires by its plain terms. Contract provisions that set forth procedural requirements for a party to obtain relief under the contract, and then provide full relief for all proven claims, are not inimical to public policy. *See A.H.A. General Construction, Inc. v. N.Y.C. Housing Authority* ("*A.H.A.*"), 92 N.Y.2d 20, 30-32 (1998). Such provisions bear no resemblance to provisions that eliminate liability or limit it to a nominal sum, and New York law does not permit them to be treated as void.

Third, even if the sole remedy provision were analogous to exculpatory clauses that eliminate liability or limit it to a nominal sum, the complaint does not allege the type of conduct necessary to render such clauses unenforceable. The trustee's allegations of "pervasive" breaches are still allegations of breach of contract (for which the contract provides a complete remedy), and not of any independent duty owed to the trustee. Indeed, they are the same type of allegations made in *Nomura II* and *Ambac*, allegations which this Court held could not circumvent the sole remedy provision despite the number of loans alleged to be in breach and despite plaintiffs' attempts to re-characterize them as something other than breaches of the loan-level representations and warranties. Under New York law, a breach of contract—even an *intentional* breach motivated by the breaching party's financial self-interest—does not suffice to invoke the narrow public-policy exception to the enforcement of remedial clauses absent the breach of some independent duty owed to the plaintiff. *See Metro. Life Ins. Co. v. Noble Lowndes Int'l, Inc.,* 84 N.Y.2d 430, 438 (1994) ("*Metro. Life*").

In addition to trying to write the sole remedy provision out of the parties' contract, the trustee also seeks punitive damages in this breach-of-contract case. But like its attempt to void the sole remedy provision, the trustee's demand for punitive damages is flawed because the complaint alleges no breach of any duty owed to the trustee that is outside the bounds of the contract, nor do its allegations

satisfy the other stringent requirements for seeking punitive damages in a breach-of-contract action.

Finally, the trustee seeks to invert the default "American Rule" that each party must bear its own attorney's fees, purporting to rely on language in the parties' contract that is at best ambiguous on this issue. Since *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487 (1989) ("*Hooper*"), which was decided long before the parties entered the agreements here, this Court has held that to depart from the "American Rule," parties must "unmistakably" demonstrate their intention to shift attorney's fees. *Id.* at 492. Here, however, the trustee relies on language shifting only "costs and expenses," in contrast to *other* indemnification provisions in the contract—which do not apply here—that *explicitly* shift the trustee's "attorney's fees," "counsel fees" or "legal fees." Black letter law dictates that, by including attorney's fees in some places and excluding it in others, the parties should be presumed to have intentionally excluded them where the phrase is omitted. By referring only to "costs and expenses," the parties cannot have demonstrated the "unmistakable intent" to shift attorney's fees required under *Hooper* and its progeny.

JURISDICTION

This Court has jurisdiction to entertain this appeal from an Order of the Appellate Division pursuant to CPLR 5602(b)(1). The Appellate Division certified, pursuant to CPLR 5713, the following question of law to this Court: "Was the order of this Court, which reversed the order of the Supreme Court, properly made?" (A511.)

The appeal is timely because the Appellate Division issued its Order granting Morgan Stanley's motion for leave to appeal on June 4, 2019, the Clerk of Court issued a scheduling order by letter dated June 20, 2019, and the Clerk of Court so-ordered the extension requested by the parties by letter dated June 26, 2019.[1]

All of the questions raised herein were raised below.[2]

---

[1] Letter from Brian S. Weinstein to John P. Asiello, Clerk of the Court, New York State Court of Appeals (June 26, 2019). This letter is not part of the Appendix, but has previously been provided to the Court in connection with the instant appeal.

[2] *See* A509–10; Morgan Stanley's Memorandum of Law in Support of its Motion to Dismiss dated March 9, 2015 at 1–2, 4–7, 10; Morgan Stanley's Reply in Support of its Motion to Dismiss dated May 13, 2015 at 1–6, 8; Morgan Stanley's Brief in Opposition to Plaintiff's Appeal dated August 10, 2016 at 1–5, 13–29. These documents are not part of the Appendix, but have separately been provided to the Court in connection with the instant appeal.

QUESTIONS PRESENTED

1. Do the complaint's allegations permit the sole remedy provision in the parties' contract to be deemed unenforceable as a matter of public policy, where the provision does not eliminate Morgan Stanley's liability or limit it to a nominal sum, but instead requires Morgan Stanley to make the trust whole for any loan proven to be in breach?
2. Even if the sole remedy provision were analogous to provisions that eliminate a defendant's liability or limit it to a nominal sum, would allegations of intentional or reckless breaches of contract, absent the breach of some independent duty to plaintiff, be sufficient to invoke the public policy exception to the enforcement of remedial clauses?
3. Do the complaint's allegations, which fail to allege the breach of any duty owed to plaintiff outside of the parties' contract, permit the trustee to seek punitive damages in this breach-of-contract lawsuit?
4. Does the parties' contract express an "unmistakable intent" to shift responsibility for the trustee's attorney's fees in this litigation?

STATEMENT OF THE CASE

A. The MSAC 2007-NC4 Securitization and the Sole Remedy Provision

The Morgan Stanley ABS Capital I Inc. Trust 2007-NC4 ("MSAC 2007-NC4" or the "Trust") is a securitization of 5,337 mortgage loans (the "Mortgage Loans") originated by New Century Mortgage Corp. and its affiliates ("New Century"). (A49 ¶ 2; A50 ¶ 4.) Morgan Stanley acquired the Mortgage Loans in public foreclosure auctions held after New Century's highly publicized April 2007 bankruptcy filing. (A52 ¶ 14.)

The securitization was effectuated through a series of contracts. First, Morgan Stanley Mortgage Capital Inc., the predecessor to Morgan Stanley Mortgage Capital Holdings LLC (collectively, "MSMC" or the "Sponsor"), sold the Mortgage Loans to its affiliate Morgan Stanley ABS Capital I Inc. ("MSAC" or the "Depositor") pursuant to a Representations and Warranties Agreement dated June 20, 2007 (the "RWA"). (A84–100.) MSAC assigned all rights, title, and interest in the Mortgage Loans to the Trust pursuant to a Pooling and Servicing Agreement among MSAC, Deutsche Bank National Trust Company, as trustee for MSAC 2007-NC4 ("Deutsche Bank" or the "Trustee"), the Securities Administrator, and the servicer, with a closing date of June 20, 2007 (the "PSA"). (A101–491.)

In the RWA and PSA, MSMC and MSAC, respectively, made certain representations and warranties regarding the Mortgage Loans. (A52-53 ¶¶ 16-18.) These contracts expressly set forth a loan-specific protocol for remedying any breaches of representations and warranties that are identified (the "Repurchase Protocol") and expressly state that this protocol "constitutes the sole remedy" for such breaches. (*See* A87-88 § 4(a), A89 § 4(c); A178 § 2.03(g), A180 § 2.03(q).) This sole remedy provision is a standard provision in RMBS contracts.[3] As in other RMBS contracts, the RWA sole remedy provision states that, if a loan in the Trust materially breaches a representation and warranty, Morgan Stanley, within a prescribed period of time following identification of the breach, "shall cure such breach in all material respects and, if such breach cannot be cured," Morgan Stanley "shall . . . repurchase such Mortgage Loan at the Repurchase Price." (A87 § 4(a).) The PSA sole remedy clause likewise provides that, if a loan in the Trust materially breaches a representation and warranty, Morgan Stanley, within the prescribed time period, "shall use its best efforts to promptly cure such breach in all material respects and, if such defect or breach cannot be remedied, [Morgan

---

[3] *See, e.g.*, *U.S. Bank Nat'l Ass'n v. Greenpoint Mortg. Funding, Inc.,* No. 651954/2013, 2015 WL 915444, at *1 (Sup. Ct. N.Y. Cty. Mar. 3, 2015) (describing equivalent sole remedy provision as "typical in an RMBS securitization"); *Ambac*, 31 N.Y.3d at 576 (describing same); *Nomura II*, 30 N.Y.3d at 579-80 (describing same).

Stanley] shall purchase such Mortgage Loan at the Repurchase Price." (A178 § 2.03(g).)[4]

The PSA defines the "Repurchase Price" for "any Mortgage Loan repurchased by" Morgan Stanley to include the full unpaid principal balance on the loan plus interest, as well as costs and expenses.[5] (A165.) As stated in the Trustee's complaint, by requiring Morgan Stanley to cure any proven breaches or pay the contractually defined Repurchase Price, the sole remedy provision would "make the Trust whole." (A50 ¶ 3.)

The sole remedy provision, among other things, seeks to preserve certain benefits under federal tax law. Like many RMBS securitizations, the PSA provides that the Trust will elect to be treated as one or more real estate mortgage investment conduits ("REMICs") for federal income tax purposes. (A105-06; A180 § 2.05.) A REMIC is a special type of investment vehicle, created under federal tax law, that generally is not subject to entity-level income tax. 26 U.S.C. § 860A. In order to qualify for this tax status, among other requirements,

[4] Both contracts also provide, in the alternative, that Morgan Stanley may "substitute" a new loan for the breaching loan, but only within the first two years after the close of the securitization. (A87 § 4(a); A178 § 2.03(g); A438 § 4(a).)

[5] The RWA incorporates this definition by reference. (A84 § 1(a).)

substantially all of a REMIC's assets must be comprised of a fixed pool of "qualified mortgage" loans and "permitted investments." 26 U.S.C. § 860D(a)(4). Unless an exception applies, a REMIC generally may not receive net income from any other source, including the disposition of a mortgage loan. *See* 26 U.S.C. § 860F(a)(2). If a REMIC sells a mortgage loan, and an exception does not apply, the net income from this "prohibited transaction" would be subject to a 100% tax. *Id*. The regulations establish narrow exceptions to this rule for, among other things, the disposition of a mortgage loan that does not "conform to a customary representation or warranty given by the sponsor or prior owner of the mortgage." 26 C.F.R. § 1.860G-2(f)(1)(iv). The law expressly permits such a mortgage loan to be cured, substituted, or repurchased without triggering a "prohibited transaction." *See id.* § 1.860G-2(f)(2) (permitting such a "defective" mortgage to be cured or disposed of); 26 U.S.C. § 860F(a)(2)(A) ("prohibited transactions" do not include disposing of defective mortgages by substitution or "repurchase in lieu of substitution"). Because the regulations do not provide any other express remedy for curing a defective mortgage, the Trust's governing documents make cure, substitution, or repurchase the exclusive remedies for a breach and thereby avoid any risk that another remedy would have adverse tax consequences and jeopardize investors' ability to receive the full income received from the Mortgage Loans. (*See* A178 § 2.03(g) (providing that cure, substitution or repurchase are the

sole remedies for a breach of the representations and warranties); *see also* A247 § 8.11 (prohibiting actions that would result "in the imposition of a tax upon any Trust REMIC or the Trust Fund (including but not limited to the tax on 'prohibited transactions' as defined in Section 860F(a)(2) . . .)").).

B. The Trustee's Lawsuit and the IAS Court's Decision on Defendants' Motion to Dismiss

Like other breach-of-contract lawsuits filed by RMBS trustees, the complaint here alleges that there were "pervasive" breaches of representations and warranties in the loans underlying the Trust, and that the defendants knew or must have known of these alleged breaches. (*See, e.g.*, A49 ¶ 1; A58-75 ¶¶ 35-71.) The complaint also cites a July 24, 2014 SEC Cease-and-Desist Order relating to this securitization (the "SEC Order") to argue that MSMC breached a particular representation that, other than certain specified loans, none of the loans was more than 30 days delinquent as of the closing date of the securitization. (A61-63 ¶¶ 37–42.) The SEC Order found that the offering materials for MSAC 2007-NC4 were misleading with respect to the delinquency status of a small percentage of loans in this Trust (approximately three percent), because Morgan Stanley did not

use the more recent delinquency figures it received the week before closing. (A63 ¶ 41; A497-98.)[6]

Notwithstanding the sole remedy provision in the underlying contracts, the complaint sought not only repurchase of all allegedly breaching loans, but also rescission or rescissory damages, compensatory damages, and consequential damages, as well as punitive damages and attorney's fees. (A75-83 ¶¶ 72–115.) Defendants filed a motion to dismiss, which the IAS Court granted in part and denied in part on October 20, 2015. (A25-31.) As relevant here, defendants moved to dismiss the demands for all damages that went beyond the contract's sole remedy provision (i.e., beyond payment of the contractually defined Repurchase Price for loans proven to be in breach), and to dismiss the demands for punitive damages and attorney's fees. Justice Friedman, who was designated by administrative order dated May 23, 2013 to hear all RMBS cases filed after the date of the order,[7] granted these aspects of defendants' motion. (A26-30.)

---

[6] The SEC Order refers to "4.5%" (A493, A498), but this is inclusive of the 1% of loans already disclosed to have been more than 30 days delinquent (A493, A497-98). In addition, 4.5% is the percentage based on the aggregate principal balance of the affected loans; the number of loans affected amounts to approximately 3% of the 5,337 loans in the Trust. (A493, A497-98.)

[7] *See* Admin. Order (Sup. Ct. N.Y. Cty. May 23, 2013), http://www.nycourts.gov/courts/1jd/supctmanh/AO_Mortgage_Secs_513.pdf.

With respect to the sole remedy provision, the Trustee argued that it should be deemed unenforceable as a matter of public policy. Justice Friedman rejected that argument, incorporating by reference (*see* A26-27) her earlier decision rejecting the same arguments made in the *Nomura* litigation:

> As this court has previously held, concurring with the weight of authority in RMBS repurchase actions, the relief available to plaintiff is limited by the sole remedy provision to specific performance of the repurchase protocol, or if loans cannot be repurchased, to damages consistent with its terms. Here, plaintiff apparently argues that the sole remedy provision is unenforceable because defendant willfully or with gross negligence included numerous defective loans in the pool and failed to repurchase such loans on demand. On this record, however, plaintiff fails to submit legal authority which demonstrates that the sole remedy provision at issue is the type of exculpatory clause that is rendered unenforceable by willful conduct or gross negligence. In any event, the allegations of the complaint fall far short of alleging the "willful inten[t] to inflict harm on [the] plaintiff" or the tortious conduct that "smack[s] of intentional wrongdoing," which is necessary to obtain relief from a contractual limitation on liability or damages. (*See Metropolitan Life Ins. Co. v. Noble Lowndes Intl., Inc.*, 84 N.Y.2d 430, 438 [1994], *rearg denied* 84 NY2d 1008 [quoting *Sommer v. Federal Signal Corp.*, 79 NY2d 540, 554 [1992]].)

Nomura Asset Acceptance Corp., Mortg. Pass-Through Certificates, Series 2006-AF2 v. Nomura Credit & Capital, Inc., 2014 WL 10646128, at *1 (Sup. Ct. N.Y. Cty. July 18, 2014) ("*NAAC 2006-AF2*") (citations omitted, alterations in original), *mod. on other grounds, Nomura Home Equity Loan, Inc. v. Nomura Credit &*

Capital, Inc., 133 A.D.3d 96, 106-08 (1st Dep't 2015) ("*Nomura I*"), *rev'd on other grounds*, *Nomura II*, 30 N.Y.3d 572, 581 (2017). Justice Friedman further held that the allegations regarding the SEC Order did not distinguish this case because it "does not make findings as to the willful misconduct or gross negligence that would support rescissory relief or relief from the sole remedy provisions into which the parties entered," but rather "specifically provides in the conclusion that the violation of the Securities Act 'may be established by a showing of negligence.'" (A27 (internal citation omitted).)

Justice Friedman also dismissed the Trustee's claim for punitive damages, holding that, "[c]ontrary to plaintiff's contention, an independent claim of fraud is not pleaded; nor does the complaint plead a wrong aimed at the public, generally." (A28.) Finally, the Court dismissed the Trustee's claim for attorney's fees, cross-referencing its decision dismissing such a claim involving substantially the same contractual language in an earlier case. (A29.) In that prior case, Justice Friedman held that "[i]t is well settled that '[i]nasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise.'" *NAAC 2006-AF2*, 2014 WL 5243512, at *2 (quoting

Hooper Assocs., Ltd. v. AGS Computers, Inc., 74 N.Y.2d 487, 492 (1989)). Justice Friedman then held that "the parties' intent to indemnify plaintiff for its attorney's fees in litigating [*NAAC 2006-AF2* was] not unmistakably clear from the terms of the parties' agreements," because, in contrast to "other provisions providing for indemnification of different parties [which] expressly include[d] indemnification for attorney's fees," the "provisions providing for indemnification for the Trustee's expenses in enforcing the Seller's obligations d[id] not expressly include attorney's fees among the covered expenses." *Id.*

C. The Appellate Division's Decision

The Appellate Division reversed these rulings, relying on certain of its own prior decisions that defendants respectfully submit were erroneous.

With respect to whether the Trustee could seek to void the sole remedy provision, the Appellate Division recognized that *Nomura II* and *Ambac* held that the sole remedy provision "cannot be nullified by allegations of multiple, systemic breaches" (A523 (internal citations, quotations marks and punctuation omitted)), but followed its own earlier decision in *Morgan Stanley Mortgage Loan Trust 2006-13ARX v. Morgan Stanley Mortgage Capital Holdings LLC*, 143 A.D.3d 1 (1st Dep't 2016) ("*13ARX*") to allow the Trustee to attempt to nullify the sole remedy provision. In *13ARX*, Morgan Stanley had argued that the public policy exception to the enforceability of exculpatory clauses did not properly apply to the

sole remedy provision because, far from eliminating liability or limiting it to a nominal sum, it required the defendant to make the trust whole. The Appellate Division in *13ARX* declined to resolve the enforceability of the sole remedy provision at the pleadings stage, however, speculating that it *could* become analogous to such exculpatory clauses if the sole remedy turned out to be "illusory" in practice. *13ARX*, 143 A.D.3d at 9. In particular, the Appellate Division raised the prospect that the repurchase remedy could potentially preclude the trust from being compensated for so-called "liquidated loans"—i.e., loans for which actual repurchase may be impossible because the loans have already been foreclosed upon and removed from the trust. The *13ARX* Court stated:

> In *Nomura [I]*, we recognized that the remedy of specific performance in put-back cases might be impossible to fulfill (*Nomura* [*I*] at 106). It is for this reason we left open the possibility that, even for ordinary breach of contract claims, equity may require an award of monetary damages in lieu of specific performance. *Nomura* [*I*] is now pending before the Court of Appeals. The issue of whether the sole remedies clause in these contracts will make the investors whole cannot be ascertained at this stage of the litigation, militating in favor of permitting the allegations of gross negligence to remain.

Id.

This concern about the effect of the pending appeal in *Nomura I*, and whether it could cause trustees to lose all available remedies for liquidated loans, proved unfounded. *Nomura II* did not disturb *Nomura I*'s ruling that, with respect

to breaching loans that had already been liquidated, the defendant would be required to pay equitable damages in the amount of the Repurchase Price, and thereby make the trust whole, even if the defendant could not literally "repurchase" these loans and receive them in return. *Nomura I*, 133 A.D.3d at 106; *Nomura II*, 30 N.Y.3d 572. The Appellate Division in *13ARX* did not identify any other scenario in which the sole remedy provision could become "illusory."

Nonetheless, despite providing no basis to conclude that the sole remedy provision might become "illusory" in this case, the Appellate Division left the enforceability of the sole remedy clause unsettled by merely citing *13ARX* and holding that "at this stage of the case, the actual effect of the sole remedy clause in making the investors whole cannot be ascertained." (A525 (citing *13ARX*, 143 A.D.3d at 9).) The Appellate Division likewise followed *13ARX* in holding that "gross negligence," of the type that could render an exculpatory clause unenforceable, was sufficiently pled based on "the complaint's allegations of pervasive, knowing breaches of the representations and warranties on multiple grounds as to the quality of loans throughout the pool." (*Id.* (citing *13ARX*, 143 A.D.3d at 9).)

The Appellate Division also reinstated the trustee's demand for punitive damages, concluding that the complaint's allegations regarding the SEC Order were sufficient to allege fraud on the *certificateholders* (but not the Trustee, which

is the plaintiff here). (A525-26.) Finally, the Appellate Division reinstated the Trustee's demand for attorney's fees based on its prior decision in *U.S. Bank N.A. v. DLJ Mortgage Capital, Inc.*, 140 A.D.3d 518 (1st Dep't 2016) ("*DLJ*"), a decision that was issued after the Trustee submitted its opening brief below and which addressed similar contractual language to that presented here. (A527.) For the reasons set forth in Point IV, *infra*, Defendants respectfully submit that *DLJ* was wrongly decided and is at odds with this Court's holding in *Hooper*, 74 N.Y.2d 487 (1989), and its progeny.

On June 4, 2019, the Appellate Division granted Morgan Stanley leave to appeal its Decision. (A511-12.)

ARGUMENT

I. THE SOLE REMEDY PROVISION IS NOT UNENFORCEABLE AS A MATTER OF PUBLIC POLICY, AND IS NOT ANALOGOUS TO EXCULPATORY CLAUSES THAT ELIMINATE LIABILITY OR LIMIT IT TO A NOMINAL SUM

It is a fundamental principle of New York contract law that parties' agreements will be enforced as written. *See, e.g.*, *Nomura II*, 30 N.Y.3d at 581 ("It is fundamental that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." (internal quotation marks and citations omitted)); *Eujoy Realty Corp. v. Van Wagner Commc'ns, LLC*, 22 N.Y.3d 413, 424 (2013) ("Courts will give effect to the contract's language and the parties must live with the consequences of their

agreement."). "In accordance with these principles, courts must honor contractual provisions that limit liability or damages because those provisions represent the parties' agreement on the allocation of the risk of economic loss in certain eventualities." *Nomura II*, 30 N.Y.3d at 581 (citing *Metro. Life*, 84 N.Y.2d at 436).

This fundamental principle governs, except, as relevant here, in a narrow set of cases where enforcing such a provision would violate "the public policy of this State . . . that a party may not insulate itself from damages caused by grossly negligent conduct." *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 554 (1992). This public policy exception "applies equally to contract clauses purporting to exonerate a party from liability and clauses limiting damages to a nominal sum." *Id.* This Court has never applied this narrow exception to any other type of remedial clause. *See Abacus Fed. Sav. Bank v. ADT Sec. Servs., Inc.*, 18 N.Y.3d 675, 681 (2012) (clauses "exculpated defendants from liability for their own negligence and limited their liability, under all circumstances, to $250"); *Colnaghi, U.S.A. v. Jewelers Protection Servs.*, 81 N.Y.2d 821, 823 (1993) ("clauses in [the] subscriber agreement exonerat[ed] [defendant] from liability for negligence"); *Sommer*, 79 N.Y.2d at 549 (clause eliminated "damages . . . caused by performance or nonperformance of obligations imposed by this contract or by negligent acts or omissions" and "limited its liability to the lesser of $250 or 10%

of the annual service charge"); *Kalisch-Jarcho, Inc. v. City of New York*, 58 N.Y.2d 377, 380 (1983) (clause provided that plaintiff shall "make no claim for damages for delay . . . occasioned by any act or omission to act of the [defendant]"); *Gross v. Sweet*, 49 N.Y.2d 102, 105 (1979) (clause absolved defendant from "any liability").

The sole remedy provision in RMBS contracts, which this Court has twice enforced in cases involving similar allegations of "pervasive" breaches, is not analogous to such clauses because it neither eliminates defendant's liability for any gross negligence that allegedly caused such "pervasive" breaches, nor limits it to a nominal sum. Precisely to the contrary, the sole remedy provision *fully remedies* any breach that the Trustee can prove, including those resulting from any alleged gross negligence, by requiring that any such breaching loans either be cured or repurchased at their full unpaid principal balance plus accrued interest. As the Trustee's own complaint acknowledges, this remedy "make[s] the Trust whole." (A50 ¶ 3 ("[F]or any Mortgage Loans that did not meet these representations and warranties, among others, Defendants MSMCH and MSAC agreed to . . . make the trust whole by repurchasing or curing Mortgage Loans in breach of their respective representations and warranties.").)

The Appellate Division's decisions in *13ARX* and here fail to articulate any sound basis to conclude that the sole remedy clause might violate this public

policy. In *13ARX*, the Appellate Division apparently believed that the sole remedy might be "illusory" if damages equal to the Repurchase Price were not available for mortgage loans that had been liquidated and therefore could not literally be repurchased by the defendant. *13ARX*, 143 A.D.3d at 9. But the Appellate Division had already concluded in *Nomura I* that "while a provision providing for equitable relief as the 'sole remedy' will generally foreclose alternative relief, where the granting of equitable relief appears to be impossible or impracticable, equity may award damages in lieu of the desired equitable remedy [of specific performance]." *Nomura I*, 133 A.D.3d at 106 (internal quotation marks omitted). In other words, if a breaching loan has already been liquidated, the defendant will still be liable to pay the Repurchase Price, and thereby make the Trust whole, even if actual repurchase of the loan (i.e., specific performance) is impossible because the loan no longer exists.

Although an appeal from *Nomura I* was still *sub judice* before this Court when the Appellate Division decided *13ARX*—which might have created some uncertainty at the time about the availability of damages for liquidated loans—this Court's decision in *Nomura II* ultimately did not disturb the Appellate Division's

holding regarding liquidated loans, which is now binding law in this case.[8] Accordingly, there is no longer any basis to conclude that the sole remedy could prove "illusory" with respect to liquidated loans. Nor has the Appellate Division offered any other basis to reasonably conclude that the sole remedy clause is "illusory," and therefore akin to clauses that eliminate liability or limit liability to a nominal sum. Nonetheless, the Appellate Division in this case still relied upon its decision in *13ARX* and the concern expressed in that case regarding liquidated loans, holding that "at this stage of the case, the actual effect of the sole remedy clause in making the investors whole cannot be ascertained. The fact that monetary damages may be required in lieu of specific performance is further reason to permit the allegations of gross negligence to remain." (A525 (citing *13ARX*, 143 A.D.3d at 9).) In short, the Appellate Division: (1) wrongly analogized the sole remedy provision—which does not insulate defendants from liability, but requires them to make the Trust whole for any proven breaches—to the type of exculpatory clauses previously addressed by this Court; (2) did so based on an unfounded concern that the sole remedy could prove "illusory" with respect

---

[8] As Morgan Stanley argued before the Appellate Division in seeking leave to appeal the *13ARX* decision to this Court, the appellant in *Nomura II* had not even appealed that portion of *Nomura I*. The Appellate Division granted leave to appeal in *13ARX* while the appeal in *Nomura II* was still pending, but the *13ARX* appeal was voluntarily dismissed after the parties reached a settlement.

to liquidated loans, even though that prospect was foreclosed by the Appellate Division's own precedents; and (3) as a result, improperly left the enforceability of a clear contractual provision in doubt, violating the core principles of certainty and predictability that are the touchstones of New York contract law. *See, e.g.*, *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 25 N.Y.3d 581, 593 (2015) (referring to the objectives of "certainty and predictability that New York's contract law endorses"); *Moran v. Erk*, 11 N.Y.3d 452, 458 (2008) (emphasizing the importance of "clarity" and "predictability" in enforcing contracts, rather than relying on "the subjective equitable variations of different Judges and courts" (quoting *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 403 (1993)).

Moreover, there is no support for the Appellate Division's conclusion that the enforceability of the sole remedy provision turns on its "actual effect," rather than the parties' intent as reflected in the contract's plain language. In *A.H.A. General Construction, Inc. v. N.Y.C. Housing Authority*, 92 N.Y.2d 20 (1998) ("*A.H.A.*"), this Court previously clarified that contractual provisions that "are *not intended* to absolve or exculpate [a party] from liability, nor . . . provide any rule of substantive contract liability," but merely "require the [plaintiff] to promptly notice and document its claims," are not "exculpatory clauses" even though, in that case, they had the actual effect of precluding any recovery. *Id.* at 30-31 (reversing

Appellate Division's conclusion that the notice and documentation provisions were "exculpatory clauses") (emphasis supplied).

Here, nothing in the sole remedy provision demonstrates an intent to exculpate Morgan Stanley in any way. On the contrary, as the Trustee admitted in the complaint, it serves to "make the Trust whole" by requiring the cure or repurchase of any loan proven to be in breach. (A50 ¶ 3.) Groundless speculation that this remedy somehow may fall short of that goal in practice does not come close to transforming the sole remedy provision into an "illusory" protection comparable to clauses that explicitly eliminate liability altogether or limit it to a nominal sum. And conditioning the enforceability of a contractual remedy provision on some unknown and hypothetical "effect" not only dramatically expands the narrow public policy previously recognized by this Court, but, again, is entirely at odds with New York's bedrock principles of certainty and predictability in contract enforcement. *See*, *e.g.*, *Ace Sec. Corp.*, 25 N.Y.3d at 593; *Moran*, 11 N.Y.3d at 458.

Indeed, because the sole remedy provision makes the Trust whole for any breach the Trustee can prove, the Trustee has not articulated any "damages" from which Morgan Stanley is being "insulated" by the sole remedy provision. *Sommer*, 79 N.Y.2d at 554. Instead, what the Trustee is really objecting to is that the sole remedy provision and the accompanying Repurchase Protocol require it to prove

its alleged breaches on a loan-by-loan basis. But that is simply what the contract between these sophisticated parties provides.[9] Like the notice and reporting requirements in *A.H.A.*, these provisions simply set forth the protocol required for the Trustee to prosecute its claims, but then provide *full relief* for any claims the Trustee does prove. Thus, as in *A.H.A.*, these provisions are procedural "conditions [] precedent [to] suit or recovery, not . . . exculpatory clauses" like those which this Court has held to be void as against public policy. *A.H.A.*, 92 N.Y.2d at 30-31; *see ACE Sec. Corp.*, 25 N.Y.3d at 599 (holding that the Repurchase Protocol is a "procedural prerequisite to suit"). In short, the sole remedy provision—which by its plain terms remedies any breaches the Trustee can prove—is not the type of exculpatory clause that violates public policy, even if the Trustee could demonstrate the requisite grossly negligent conduct. These sophisticated parties agreed on a provision that provides appropriate relief, and

---

[9] The Repurchase Protocol requires the identification of the particular loans in breach so that those loans can be remedied. The RWA provides that the obligation to cure, substitute, or repurchase a loan arises upon defendant's discovery or its receipt of notice of a material breach in that particular loan, following which defendant has 60 days to "cure *such breach*" or repurchase "the *affected Mortgage Loan*." (A87 § 4(a)) (emphasis supplied). The equivalent provision in the PSA states that, upon discovery or receipt of written notice of a breach "that materially and adversely affects the value of any Mortgage Loan," the defendant shall cure "*such breach*" or repurchase "*such Mortgage Loan*." (A178 § 2.03(g)) (emphasis supplied). Without knowing which loans have material breaches, and what those alleged breaches are, one cannot cure "such breach" or repurchase "the affected Mortgage Loan" or "such Mortgage Loan"; nor can one calculate the Repurchase Price for unidentified loans. The Repurchase Protocol is *inherently* loan-specific.

under core principles of New York contract law, it must be reliably and predictably enforced.

II. AS IN *NOMURA II* AND *AMBAC*, THE TRUSTEE CANNOT CIRCUMVENT THE SOLE REMEDY PROVISION THROUGH ALLEGATIONS OF PERVASIVE BREACHES

Even if the sole remedy provision were deemed comparable to exculpatory provisions, the type of conduct alleged here is not the type of conduct that can render such a provision unenforceable. In *Nomura II* and *Ambac*, this Court held that allegations that the defendants were aware of "pervasive" breaches did not allow the trustee to circumvent the sole remedy provision by re-characterizing those alleged breaches as a different type of transaction-wide violation. The same conclusion should apply here: repackaging the same allegations of "pervasive breach" made in *Nomura II* and *Ambac* as "gross negligence" should not lead to a different result. Moreover, other precedents from this Court establish that breaches of contract—even if intentional and self-interested—do not render remedial provisions unenforceable, absent the willful breach of a duty outside of the contract. Here, the Trustee has not alleged the breach of any duty owed to it outside of the contract, either through its "pervasive breach" allegations or the allegations relating to the SEC Order.

A. Re-characterizing Loan-Level Breaches of Representations and Warranties as "Gross Negligence" Does Not Render the Sole Remedy Provision Unenforceable, or Lead to a Different Result than in *Nomura II* and *Ambac*

The allegations of widespread breaches of representations and warranties in this case are not meaningfully different than those in *Nomura II* and *Ambac*, and should not lead to a different result regarding the enforceability of the sole remedy provision. In *Nomura II*, the RMBS trustee who was the plaintiff in that case had alleged "widespread, pervasive and material misrepresentations and omissions with respect to the Mortgage Loans" as well as in the offering documents for those loans. 30 N.Y.3d at 580, 582. The trustee in *Nomura II* argued that, because it had alleged pervasive, systemic breaches, it was not constrained by the sole remedy provision and could instead assert a broader violation—a breach of the so-called "No Untrue Statement" provision, which was in a different section of the contract to which the sole remedy provision did not apply. *Id.* at 580. This Court rejected that argument and applied the sole remedy provision to the trustee's allegations of pervasive breaches. The Court began by stating that "[c]ontract terms providing for a sole remedy are sufficiently clear to establish that no other remedy was contemplated by the parties at the time the contract was formed, for purposes of that portion of the transaction, especially when entered into at arm's length by sophisticated contracting parties." *Id.* at 582. The Court then rejected the trustee's argument that alleging pervasive breaches allowed the sole remedy provision to be

disregarded. Insofar as the supposedly broader "No Untrue Statement" claim was, in fact, nothing more than an aggregation of the trustee's allegations that a large number of loans were in breach, the Court held that the Trustee could not subvert the sole remedy provision "by simply re-characterizing its claims." *Id.* at 584. The Court continued:

> [T]here is no support in the governing agreements for the position of [the trustee] that the Sole Remedy Provision applies only to occasional mortgage loan-specific breaches . . . . [T]he agreements do not provide a carve-out from the Sole Remedy Provision where a certain threshold number of loan breaches are alleged. . . . [The trustee] is expressly limited to the . . . Sole Remedy Provision negotiated by the parties, however many defective loans there may be.

Id. at 585.

In *Ambac*, this Court stated that "[o]nce again, as in our recent decision in [*Nomura II*], we are confronted with an argument that a sole remedy provision executed by sophisticated parties as part of a complex securitization process can be avoided by alleging 'broader' or numerous violations of representations and warranties contained in the governing contract." 31 N.Y.3d at 581. There, the plaintiff—a monoline insurer—alleged that there were pervasive breaches of representations and warranties in the loans, and that defendants had fraudulently induced plaintiff to insure the 17 transactions at issue. *Id.* at 575, 577. The plaintiff in *Ambac* argued that, based on these allegations, it had asserted broader transaction-level breaches that were not limited by the sole remedy provision. *Id.*

at 581. The Court again rejected this argument for the reasons expressed in *Nomura II*: sophisticated parties had contracted for a sole remedy provision; alleging that the breaches were "pervasive" or "systemic" did not render this provision void; and plaintiff could not "subvert an exclusive remedies provision by simply re-characterizing its claims." *Id.* at 582.

The same result should apply here. The allegations here are in line with the allegations in *Nomura II* and *Ambac*, and do not differ in any way that would justify a different outcome. As in this case, the plaintiffs in *Nomura II* and *Ambac* alleged that the defendants were aware or should have been aware of pervasive breaches. *See Nomura II*, 30 N.Y.3d at 582–83; *Ambac*, 31 N.Y.3d at 577, 579. Yet despite these allegations, this Court correctly enforced the parties' contract, and rejected the plaintiffs' efforts to re-characterize their breach claims as a broader or qualitatively different violation that would avoid the sole remedy provision. Re-labeling the same type of allegations made in *Nomura II* and *Ambac* as "gross negligence" should not lead to a different result, for the same reasons provided by this Court in both of these recent cases. A contrary conclusion would effectively undo the effect of *Nomura II* and *Ambac*, as the plaintiffs in those cases and any similar case could simply assign a new label to the same allegations and obtain a different outcome.

B. The Trustee Has Not Alleged the Type of Conduct Necessary to Invoke the Public Policy Exception

In addition to *Nomura II* and *Ambac*, the conclusion that the Trustee's allegations do not allow it to circumvent the sole remedy provision is supported by this Court's precedents on the public policy exception to the enforcement of contractual remedy provisions, as well as the legal principles underlying that narrow exception.

The public policy exception is rooted in the principle that a party cannot insulate itself from damages caused by conduct that is *tortious* in nature, i.e., conduct that breaches a duty separate from the express terms of the contract. If the duty arises solely from the contract, a breach of that duty does not trigger the public policy exception, even if it is intentional and motivated by financial self-interest. *See Metro. Life*, 84 N.Y.2d at 438-39 (1994). This Court recognized the public policy against "agreements [that] purport to grant exemption for liability for willful or grossly negligent acts" in *Gross v. Sweet*, 49 N.Y.2d 102, 106 (1979). The Court cited the Restatement (First) of Contracts, which at the time provided that an "exemption from liability for the consequences of a wilful [sic] *breach of duty* . . . [or] the consequences of *negligence* is illegal." Restatement (First) of Contracts § 575 (1932) (emphasis supplied), *cited in Gross*, 49 N.Y.2d at 106. In subsequent decisions applying this doctrine, this Court has relied on the Restatement (Second) of Contracts, which provides that "[a] term exempting a

party from *tort liability* for harm caused intentionally or recklessly is unenforceable on grounds of public policy." Restatement (Second) of Contracts § 195(1) (emphasis supplied), *cited in Sommer*, 79 N.Y.2d at 554 *and Kalisch-Jarcho, Inc.*, 58 N.Y.2d at 384-85.

Here, the allegations that there were widespread breaches that Morgan Stanley knew about or was grossly negligent in failing to discover still amount to no more than breaches of contract, and not breaches of some other independent duty owed to the Trustee. *See, e.g.*, *New York Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 319-20 (1995) ("*N.Y.U.*") ("[T]he use of familiar tort language in the pleading does not change the cause of action to a tort claim in the absence of an underlying tort duty . . . .") (first citing *Rocanova v. Equitable Life Assurance Soc'y of U.S.*, 83 N.Y.2d 603, 614 (1994); and then citing *Clark-Fitzpatrick*, 70 N.Y.2d at 389–90)); *OFSI Fund II, LLC v. Canadian Imperial Bank of Commerce,* 82 A.D.3d 537, 539 (1st Dep't 2011) (finding that "alleging a breach of contract was 'maliciously intended,'" let alone grossly negligent, "does not give the breach of contract claim a separate and independent identity as a tort claim" (citing *La Fleur v. Montgomery*, 70 A.D.2d 545, 546 (1st Dep't 1979))).

In *N.Y.U.*, this Court described the types of circumstances in which tortious conduct may occur within the context of a contractual relationship: (1) when the defendant "has breached a duty of reasonable care distinct from its contractual

obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations"; (2) when "[t]he very nature of [the] contractual obligation, and the public interest in seeing it performed with reasonable care, . . . give[s] rise to a duty of reasonable care in performance of the contract obligations"; (3) "[w]here a party has fraudulently induced the plaintiff to enter into a contract"; or (4) "where a party engage[d] in conduct outside the contract but intended to defeat the contract." 87 N.Y.2d at 316 (citations omitted).

This Court's precedents regarding the enforceability of exculpatory clauses are consistent with the understanding that in order to trigger the public policy exception, the conduct must fall into categories such as those summarized in *N.Y.U.*—i.e., it must breach some independent duty, as distinguished from an intentional or reckless breach of contract. In *Metro. Life*, this Court drew a distinction between breaches of contract—even those that are intentional and motivated by the breaching parties' financial self-interest—and breaches that are "tortious in nature," and indicated that the public policy exception applies only to the latter. 84 N.Y.2d at 438-39 (first citing *Sommer*, 79 N.Y.2d at 554; then citing 5 Corbin, Contracts § 1068, at 389 ("[C]ontractual exemption from liability for *tortious* conduct may be held against the public interest and illegal[.]"); and then citing Restatement (Second) of Contracts § 195(1)). In contrast, in *Kalisch-Jarcho*, the Court held that a clause eliminating damages for any delays caused by

the defendant could be unenforceable under the fourth category described above—extraneous conduct intended to defeat the contract—if "the [defendant] acted in bad faith and with deliberate intent [to] delay[ ] the plaintiff in the performance of its obligation." 58 N.Y.2d at 384-86 (internal quotation marks omitted). In *Sommer*, the Court concluded that the alleged conduct fell into the second category above, as the "nature of [defendant's fire alarm] services and its relationship with its customer . . . gives rise to a duty of reasonable care that is independent of [its] contractual obligations." 79 N.Y.2d at 552-53.

The Trustee has failed to identify any breach of duty owed to the Trustee outside of the parties' contracts. Rather, the essence of its complaint is that Morgan Stanley was allegedly aware of widespread breaches of representations and warranties and engaged in this conduct to further its own economic self-interest. (*See, e.g.*, A49 ¶ 1; A53-54 ¶ 21; A63 ¶ 42.) Under governing case law, such allegations, even if they are credited on a motion to dismiss, are not the type of allegations that invoke the public policy exception. Instead, the Trustee is limited to the remedies expressly agreed to by the parties—which in this case, allows the Trust to be made whole and in no way offends public policy.

Nor does this case fall into the second category listed above, where the contractual relationship itself gives rise to a duty to exercise due care. As the *Sommer* Court explained:

> Some claims plainly sound in tort—for example, the case of a pedestrian struck by a careless driver. Others are clearly contract, like the case of the merchant who fails to deliver goods as promised. . . . This case partakes of both categories, and thus falls in the borderland between tort and contract, an area which has long perplexed courts. . . . These borderland situations most often arise where the parties' relationship initially is formed by contract, but there is a claim that the contract was performed negligently. That is the case here. Holmes owed no duty to 810 prior to their contract; once they had contracted, however, Holmes had certain obligations to 810, including a duty to make timely reports to the fire department. The question is whether Holmes' failure to report, allegedly the result of negligence, is a breach of contract, a tort, or both.

79 N.Y.2d at 550-51 (internal citations omitted). In "borderland" situations like *Sommer*, which involved fire alarm services, the nature of the contractual relationship itself gives rise to ongoing duties of care, and "negligence" in the performance of those duties may amount to "a breach of contract, a tort, or both." *Id.*; *see also id.* at 552 ("Holmes' duty to act with reasonable care" is both "a function of its private contract" as well as "the nature of its services"). Where the nature of the services provided by a contract are such that they give rise to an ongoing duty of care, and where a party fails to fulfill this duty in a grossly negligent manner, such conduct may render an exculpatory clause unenforceable whether the breach of that duty gives rise to damages in tort, *see Sommer*, 79 N.Y.2d at 552, or only in contract, *see, e.g.*, *Abacus Fed. Sav. Bank v. ADT Sec. Servs., Inc.*, 18 N.Y.3d 675, 683-85 (2012).

None of that applies, however, in "the case of the merchant who fails to deliver goods as promised," which "clearly [sounds in] contract." *Sommer*, 79 N.Y.2d at 550. Sales contracts like the RWA and PSA do not give rise to any ongoing duties of care owed by the seller to the purchaser and are qualitatively different from a contract to provide fire alarm services. Even assuming the truth of the allegations that Morgan Stanley knew, or was reckless in not knowing, that there were widespread breaches of representations among the loans in the Trust, those allegations are breach-of-contract allegations, not breaches of any independent duty of care that could trigger the public policy exception.

Finally, the Complaint's allegations regarding the SEC Order fail to bring this case within the public policy exception. First, the allegation that the SEC Order is evidence that Morgan Stanley breached a particular representation concerning the delinquency status of certain loans (A61–63 ¶¶ 37–42), is no different from any other alleged breach of any other representation—it is still an allegation of breach of contract. Second, insofar as the Trustee purports to cite the SEC Order as evidence of fraud, or purports to argue that the disclosure requirements of the securities laws impose independent duties that trigger the public policy exception, these are not duties that are owed to the Trustee, who is

the plaintiff here.[10] Any such duties would be owed to the certificateholders who received the offering materials and invested in the securitization. (It is for that reason that RMBS *certificateholders*—not trustees—have been the plaintiffs in an entirely different set of lawsuits against RMBS sponsors, including with respect to this Trust, for alleged disclosure violations. (*See* A73 ¶ 66.)) As the Trustee lacks standing to redress any alleged harm other than for alleged breach of its contract with Morgan Stanley, its efforts to rely on alleged breaches of duties owed to others are unavailing to pierce the parties' negotiated remedy for breaches of contract.[11]

In sum, Morgan Stanley's duties to the Trustee are limited to those expressly set forth in the governing agreements, where the sophisticated parties also set forth an exclusive remedy for any breach of those duties. The complaint fails to allege that Morgan Stanley breached any other duty to the Trustee that could justify disregarding the sole remedy provision in the parties' contracts.

---

[10] Unsurprisingly, therefore, the Trustee did not, because it could not, assert a fraud claim or allege that it was fraudulently induced to enter into the transaction.

[11] Even if an alleged breach of duty to *certificateholders* were relevant to the enforceability of the sole remedy provision in the contract with the *Trustee*, the breach alleged in the SEC Order relates to approximately *three percent* of the loans in the Trust, and would not be a basis for voiding the sole remedy provision with respect to all of the remaining loans.

III. THE TRUSTEE'S ALLEGATIONS DO NOT SUPPORT A DEMAND FOR PUNITIVE DAMAGES

The Appellate Division's reinstatement of Deutsche Bank's demand for punitive damages was erroneous and should be reversed. As this Court has held, "damages arising from the breach of a contract will ordinarily be limited to the contract damages necessary to redress the private wrong," and punitive damages will only be available in "limited circumstances" where "necessary to vindicate a public right." *N.Y.U.*, 87 N.Y.2d at 315-16.

"Where a lawsuit has its genesis in the contractual relationship between the parties, the threshold task for a court considering defendant's motion to dismiss a cause of action for punitive damages is to identify a tort independent of the contract." *Id.* at 316. This requires identifying the breach of a duty to the plaintiff that "is 'apart from and independent of promises made and therefore apart from the manifested intention of the parties' to a contract." *Id.* (quoting Prosser & Keeton, Torts § 92, at 655 (5th ed.)); *see also Rich v. N.Y. Cent. & Hudson River R.R. Co.*, 87 N.Y. 382, 398 (1882) ("It may be granted that an omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty.").

For all the reasons described in Point II.B, *supra*, the complaint fails to allege the breach of an independent duty, outside of the contract, owed to the Trustee in tort. The allegations of "pervasive breaches" in the loans are allegations

of breach of contract, not of any independent duty owed to the Trustee. And insofar as the Trustee purports to rely, as it did below, on the SEC's findings that the offering materials provided to *certificateholders* misstated the delinquency status of three percent of the loans, that allegation likewise does not support the *Trustee's* claim for punitive damages.

First, this Court has held that the tortious conduct necessary to support a punitive damages claim must be committed *against the plaintiff* itself, not solely against others. *See N.Y.U.*, 87 N.Y.2d at 319 ("[I]nasmuch as plaintiff has failed to adequately plead a fraud perpetrated against it, 'no inference of fraudulent intent can be drawn in this case from the mere compilation' of the experiences of [others]." (quoting *Rocanova*, 83 N.Y.2d at 614)); *Rocanova*, 83 N.Y.2d at 614 (explaining that allegations of fraudulent acts committed against various others, in "an attempt to satisfy the 'public wrong' requirement of punitive damages awards, possesses no legal significance absent [plaintiff's] ability to state a claim to the effect that he was personally the victim of a cognizable tort arising out of his contractual relationship with [defendant]"). The Trustee therefore cannot rely on alleged tortious conduct directed at *certificateholders* to support its claim for punitive damages, where the complaint alleges no breach of duty owed to the

Trustee outside of the contract.[12] Thus, the Appellate Division's conclusion that the alleged *breaches of contract* were material to both the Trustee and the certificateholders (A526–27) is irrelevant because no "fraud" was alleged to have been committed against the Trustee.

Second, not only must the alleged tortious conduct be directed at the plaintiff, but it must be of a particularly "egregious" nature, even relative to other fraud cases. *N.Y.U.*, 87 N.Y.2d at 316 (citing *Walker v. Sheldon*, 10 N.Y.2d 401, 404-05 (1961)). Even accepting the allegations in the SEC Order as true, they cannot satisfy this extremely high standard insofar as the allegations only relate to disclosure violations relating to *three percent* of the loans in the Trust.[13]

IV. THE PARTIES' CONTRACT DOES NOT MEET THE *HOOPER* TEST FOR SHIFTING ATTORNEY'S FEES

A. Under the *Hooper* Test, the Intent to Shift Attorney's Fees Must Be Unmistakably Clear

The "American Rule" that litigants bear their own attorney's fees "has now long been the universal rule in this country." *Congel v. Malfitano*, 31 N.Y.3d 272,

---

[12] Indeed, as noted above, certificateholders themselves have brought their own disclosure-based claims relating to this Trust. (*See* A73 ¶ 66.)

[13] As Justice Friedman correctly held, the SEC Order "does not make findings as to the willful misconduct or gross negligence that would support . . . relief from the sole remedy provisions into which the parties entered," but rather "specifically provides . . . that the violation of the Securities Act 'may be established by a showing of negligence.'" (A27.)

291 (2018) (quoting *Mighty Midgets, Inc. v. Centennial Ins. Co.*, 47 N.Y.2d 12, 21-22 (1979)). As this Court established in *Hooper*, in light of the well-established "American Rule," a court should only conclude that a contract intended to depart from this rule if "the intention to do so is unmistakably clear." 74 N.Y.2d at 492. The Court must consider the "language and purpose of the entire agreement," *id.* at 491-92, and if "the language of the parties is not clear enough," this Court is "unwilling to rewrite the contract and supply a specific obligation the parties themselves did not spell out." *Tonking v. Port Auth. of NY & NJ*, 3 N.Y.3d 486, 490 (2004). Courts applying the *Hooper* standard have noted that it is "exacting" and "requires more than merely an arguable inference of what the parties must have meant" and that the conclusion that the parties intended to shift attorney's fees "must be virtually inescapable." *Gotham Partners, L.P. v. High River Ltd. P'Ship*, 76 A.D.3d 203, 206, 209 (1st Dep't 2010).

B. The PSA Does Not Express An Unmistakable Intent to Shift Attorney's Fees

The PSA does not evidence any intent, let alone an unmistakable intent, to award the Trustee attorney's fees in this litigation. The parties to the contract, which are sophisticated financial institutions that were well advised by legal counsel, referred to "attorney's fees," "counsel fees," or "legal fees" *seventeen times* in the PSA when they intended to refer to attorney's fees, but those sections are not applicable here, and the PSA does not refer to "attorney's fees," "counsel

fees," or "legal fees" in the sections upon which the Trustee relies to seek attorney's fees in this litigation.

In its briefing below, the Trustee based its argument for attorney's fees on the fact that the contract entitled it to demand repurchase of any breaching loan at the "Repurchase Price," and that the PSA defined the Repurchase Price to include "all costs and expenses incurred by the . . . Trustee . . . arising out of or based upon a breach or defect, including without limitation, costs and expenses relating to the . . . Trustee's enforcement of the repurchase obligation." (Plaintiff-Respondent's Brief in Support of Appeal to the First Department dated May 18, 2016 at 31-32) (emphasis omitted) (first citing A437-38 § 4(a); and then citing A165); Plaintiff-Respondent's Reply in Support of Appeal to the First Department dated August 19, 2016 at 15 (same).)[14] The Trustee further relied on Section 2.07 of the PSA, which provides that upon discovery and notice of a breach, "[t]he Trustee shall pursue such legal remedies available to the Trustee with respect to such breach under the Representations and Warranties Agreement, as may be necessary or appropriate to enforce the rights of the Trust with respect thereto, in

---

[14] Plaintiff-Respondent's Brief in Support of its Appeal to the First Department dated May 18, 2016 and Plaintiff-Respondent's Reply in Support of its Appeal to the First Department dated August 19, 2016 are not part of the Appendix, but have been provided to the Court in connection with the instant appeal.

accordance with customary industry practices or if such asset were its own property." (A182 § 2.07.) These portions of the PSA do not express the "unmistakable intent" to shift attorney's fees required by *Hooper*.

The reference to "costs" and "expenses" in the definition of the Repurchase Price does not unmistakably refer to attorney's fees. On the contrary, for decades, New York courts have held that the terms "costs" and "expenses" do *not* include attorney's fees where "attorney's fees" or "legal fees" are not expressly referenced. *See, e.g.*, *Waverly Mews Corp. v. Waverly Stores Assocs.*, 294 A.D.2d 130, 132 (1st Dep't 2002) (affirming dismissal of claim for attorney's fees because contract that awarded "all costs and expenses incurred in the event of defendant's default of obligations . . . [did] not expressly provide for the recovery of legal fees"); *Royal Discount Corp. v. Luxor Motor Sales Corp.*, 170 N.Y.S.2d 382, 383 (1st Dep't 1957) ("The terms 'costs' and 'expenses' as employed in the assignment agreement do not include attorney's fees, and attorney's fees are not recoverable in the absence of express language in the contract or statute."); *see also Bank of New York v. Fleet Bank, N.A.*, 671 N.Y.S.2d 945, 946 (Sup. Ct. N.Y. Cty. 1998) ("[I]t is generally agreed that the term 'costs' or 'expenses', as employed in a statute, ordinarily do not [sic] include 'attorneys fees'." (citation omitted)); *Hayman v. Morris*, 37 N.Y.S.2d 884, 891 (Sup. Ct. N.Y. Cty. 1942) (same).

It is particularly clear that the parties to the PSA did not intend "costs and expenses" to encompass attorney's fees when "the language and purpose of the entire agreement" is considered, as it must be. *Hooper*, 74 N.Y.2d at 491-92; *see also Riverside South Planning Corp. v. CRP/Extell Riverside, L.P.*, 13 N.Y.3d 398, 404 (2009) ("The entire contract must be reviewed and particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby." (alteration, internal quotation marks and citation omitted)). Reading the PSA as a whole reveals that when the parties intended to refer to attorney's fees or legal fees, they did so explicitly—a total of seventeen separate times in the contract.[15] None of those sections of the contract apply to the Trustee's demand for attorney's fees in this litigation. Under the doctrine of "*expressio unius est exclusio alterius*," the omission of this reference to attorney's fees or legal fees from the definition of Repurchase Price, combined with the explicit use of these terms elsewhere in the contract, leads to "the inescapable conclusion . . . that the parties intended the omission." *Quadrant Structured Prods. Co., Ltd. v. Vertin*, 23 N.Y.3d 549, 560 (2014). This is particularly true here because, as this Court has recognized, RMBS

---

[15] *See* A166-67 ("Servicing Advances"); A185 § 3.02(c); A233 § 6.03; A234 § 6.04; A234-35 § 6.05(a); A235 § 6.05(b); A241 § 8.05; A252-53 § 8.12; A259 § 9.03(c); A264-65 § 9.12; A266 § 10.01; A268 § 10.05.

contracts are the result of arms' length negotiations by sophisticated parties, and the contracts should not be read to include terms that the parties could have easily included if they had intended. *See Ambac*, 31 N.Y.3d at 585 (emphasizing that courts must honor contractual provisions "especially when entered into at arm's length by sophisticated contracting parties" (quoting *Nomura II*, 30 N.Y.3d at 582)); *see also Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004) ("[C]ourts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include." (internal quotation marks and citation omitted)). As a result, when one provision of an agreement expressly refers to attorney's fees and another does not, the latter provision "should be construed to not include recovery of attorney's fees." *In re Refco Sec. Litig.*, 890 F. Supp. 2d 332, 344-45 (S.D.N.Y. 2012).

Indeed, a number of provisions of the contract refer to both "expenses" and "attorney's fees."[16] If "expenses" included attorney's fees, then the additional

---

[16] *See* A241 § 8.05 ("[T]he Trustee shall be indemnified by the Trust Fund against any loss, liability, or expense (including reasonable attorney's fees)."); A264 § 9.12 ("The Master Servicer agrees to indemnify and hold harmless the Trustee from and against any and all claims, losses, penalties, fines, forfeitures, legal fees and related costs, judgments, and any other costs, liability, fees and expenses (including reasonable attorney's fees)."); A268 § 10.05 ("[T]he Securities Administrator shall be indemnified by the Trust and held harmless against any loss, liability or expense (including reasonable attorney's fees).").

clause specifying "attorney's fees" would be rendered superfluous, a result that must be avoided. *See, e.g.*, *Nomura II*, 30 N.Y.3d at 581 ("[A] contract must be construed in a manner which gives effect to each and every part, so as not to render any provision meaningless or without force or effect." (internal quotation marks and citation omitted)); *Lawyers' Fund for Client Protec. of State of N.Y. v. Bank Leumi Tr. Co. of New York*, 94 N.Y.2d 398, 404 (2000) ("[The party's] interpretation would render the second paragraph superfluous, a view unsupportable under standard principles of contract interpretation."); *Matter of Columbus Park Corp. v. Department of Hous. Preserv. and Dev. of City of N.Y.*, 80 N.Y.2d 19, 31 (1992) (explaining that an interpretation that "render[ed] the covenant superfluous" was "contrary to basic principles of contract interpretation").

The Trustee's attempt to rely on Section 2.07 fares no better under the *Hooper* standard. This provision does not address attorney's fees, or even "costs" and "expenses," at all; it simply provides that the Trustee shall pursue available legal remedies for breach as may be necessary to enforce the Trust's rights in accordance with customary industry practices or if such asset were its own property. The Trustee's argument is that the "enforcement of the repurchase obligation" referred to in the definition of "Repurchase Price" includes litigation, and that Section 2.07 contemplates litigation insofar as it refers to "legal

remedies." But the attempt to combine the definition of "Repurchase Price" and Section 2.07 falls well short of an "unmistakable intent" to shift the Trustee's attorney's fees in litigation. Even if the Trustee's enforcement of the repurchase remedy could include litigation, the definition of "Repurchase Price" would still only refer to "costs" and "expenses," not attorney's fees. As discussed above, New York law has long drawn a distinction between the two, and here, when the parties wanted to address attorney's fees specifically, they did so expressly. In addition, even the reference to "enforcement" of the repurchase remedy here does not unambiguously refer to litigation, insofar as the contract sets up an explicit extrajudicial Repurchase Protocol that the Trustee must comply with to effectuate its remedies under the contract, and that Repurchase Protocol has associated costs and expenses (relating to work necessary to substantiate the alleged breaches, providing notice, releasing custodial files, etc.). (*See* A179 § 2.03(o).) The contract does not unambiguously refer to litigation, but even if it did, the relevant sections of the contract do not unambiguously refer to attorney's fees, while inapplicable sections of the contract do.

In short, the PSA does not satisfy the *Hooper* test. Prior to *DLJ*—the case relied upon by the Appellate Division here—a number of courts addressed

comparable contractual language and reached that same conclusion.[17] *DLJ* failed to appropriately apply *Hooper*'s "unmistakable intent" standard, particularly when the PSA is read as a whole.[18] The Appellate Division's decision should be reversed.

---

[17] *See, e.g.*, *Deutsche Bank Nat'l Trust Co. (SABR 2007-BR2, 3, 4, 5) v. Barclays Bank, PLC*, 2016 N.Y. Slip. Op. 31056 (N.Y. Sup. Ct. June 8, 2016); *ACE Sec. Corp. Home Equity Loan Trust, Series 2007-ASAP2 v. DB Structured Prods., Inc.*, 2014 N.Y. Slip. Op. 32451 (N.Y. Sup. Ct. Aug. 28, 2014); *SACO I Trust 2006-5 v. EMC Mortg. LLC*, 2014 N.Y. Slip. Op. 31432 (N.Y. Sup. Ct. May 29, 2014).

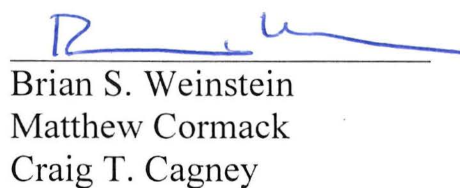
[18] The cases cited in *DLJ* do not change this conclusion either. Among other things, none of those cases addressed a situation where the contract explicitly referred to "attorney's fees" and "legal fees" in other portions of the contract, but only referred to "costs and expenses" in the operative section.

CONCLUSION

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

Dated: New York, New York
August 29, 2019

DAVIS POLK & WARDWELL LLP

By: 

Brian S. Weinstein
Matthew Cormack
Craig T. Cagney

450 Lexington Avenue
New York, New York 10017
(212) 450-4000

Attorneys for Defendants-Appellants Morgan Stanley Mortgage Capital Holdings LLC, as Successor-by-Merger to Morgan Stanley Mortgage Capital Inc., and Morgan Stanley ABS Capital I Inc.

<u>CERTIFICATE OF COMPLIANCE</u>

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

A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

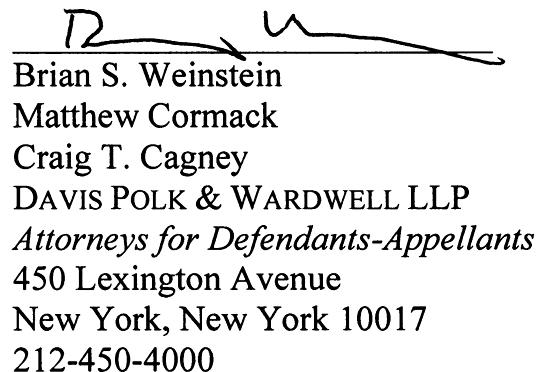
Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by § 500.1(h) is 11,379.

Dated: August 29, 2019

Respectfully submitted,



Brian S. Weinstein
Matthew Cormack
Craig T. Cagney
DAVIS POLK & WARDWELL LLP
Attorneys for Defendants-Appellants
450 Lexington Avenue
New York, New York 10017
212-450-4000