To be Argued by:
DANIEL A. RUBENS
(Time Requested: 15 Minutes)

New York County Clerk's Index Nos. 156016/12 and 653787/12

New York Supreme Court
Appellate Division – First Department

Appellate Case Nos.: 2019-619 2019-620

HOME EQUITY MORTGAGE TRUST SERIES 2006-1, HOME EQUITY MORTGAGE TRUST SERIES 2006-3, and HOME EQUITY MORTGAGE TRUST SERIES 2006-4, by U.S. BANK NATIONAL ASSOCIATION, solely in its capacity as Trustee,

Plaintiffs-Respondents,

– against –

DLJ MORTGAGE CAPITAL, INC.,

Defendant-Appellant,

Index No. 156016/12

– and –

SELECT PORTFOLIO SERVICING, INC.,

Defendant.

(For Continuation of Caption See Reverse Side of Cover)

BRIEF FOR DEFENDANT-APPELLANT

ROBERT M. LOEB
(of the bar of the District of Columbia)
By Permission of the Court
ORRICK, HERRINGTON
& SUTCLIFFE LLP
1152 15th Street N.W.
Washington, DC 20005
(202) 339-8475
rloeb@orrick.com

DARREN S. TESHIMA
(of the bar of the State of California)
By Permission of the Court
ORRICK, HERRINGTON
& SUTCLIFFE LLP
405 Howard Street
San Francisco, California 94105
(415) 773-5700
dteshima@orrick.com

BARRY S. LEVIN
JOHN ANSBRO
RICHARD A. JACOBSEN
PAUL F. RUGANI
DANIEL A. RUBENS
ORRICK, HERRINGTON
& SUTCLIFFE LLP
51 West 52nd Street
New York, New York 10019
(212) 506-5000
blevin@orrick.com
jansbro@orrick.com
rjacobsen@orrick.com
prugani@orrick.com
drubens@orrick.com

Attorneys for Defendant-Appellant

HOME EQUITY MORTGAGE TRUST SERIES 2006-5,
by U.S. BANK NATIONAL ASSOCIATION, solely in its
capacity as Trustee,

Plaintiff-Respondent,

– against –

Index No.
653787/12

DLJ MORTGAGE CAPITAL, INC.,

Defendant-Appellant,

– and –

SELECT PORTFOLIO SERVICING, INC.,

Defendant.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF RELATED CASES 1

PRELIMINARY STATEMENT 2

STATEMENT OF QUESTIONS PRESENTED 5

BACKGROUND 6

I. The Securitizations At Issue 6

II. Plaintiffs Provide Timely Breach Notices As To Only 1,354 Specific Loans 9

III. The Trial Court Proceedings 12

A. Plaintiffs Seek to Prove Breach and Damages Through Sampling Rather Than on a Loan-By-Loan Basis. 13

B. The Trial Court Issues Summary Judgment Rulings Permitting Plaintiffs to Rely on Untimely Noticed Loans and Sampling and to Obtain Interest on Breaching Liquidated Loans. 15

ARGUMENT 17

I. Plaintiffs' Untimely Breach Notice Letters Do Not Relate Back To Earlier Timely Notices. 18

A. The Repurchase Protocol Provides a Loan-Specific Remedy That Is Triggered by Timely, Loan-Specific Breach Notices. 18

B. The Relation-Back Doctrine Does Not Authorize Plaintiffs to Proceed to Trial on Allegedly Breaching Loans That They Failed to Identify in Timely Breach Notices. 22

II. The PSAs Require Plaintiffs To Prove Breach And Damages On A Loan-By-Loan Basis. 32

A. The PSAs Do Not Permit Plaintiffs to Use Statistical Sampling to Substitute for Loan-By-Loan Proof of a Breach, a Material and Adverse Effect, and Damages. 32

B. The Trial Court's Mistaken Reliance on Law of the Case Does Not Bind This Court. 39

III. The Trial Court's Interpretation Of The Ambiguous Contractual Term "Material And Adverse" Effect Should Be Reversed. 40

IV. The Repurchase Price Should Not Include Interest That Never Actually "Accrued" On A Loan. 46

CONCLUSION 49

PRINTING SPECIFICATION STATEMENT 51

TABLE OF AUTHORITIES

Page(s)

Cases

2138747 Ontario, Inc. v. Samsung C&T Corp.,
31 N.Y.3d 372 (2018) 29, 38

ACE Sec. Corp. Home Equity Loan Tr. v. DB Structured Prods., Inc.,
5 F. Supp. 3d 543 (S.D.N.Y. 2014) 37

ACE Sec. Corp. v. DB Structured Prods.,Inc.,
40 Misc. 3d 562 (Sup. Ct. N.Y. Cty. 2013) 38

ACE Sec. Corp. v. DB Structured Prods., Inc.,
25 N.Y.3d 581 (2015) 3, 11, 21, 26, 28, 30, 31

Ambac Assurance Corp. v. Countrywide Home Loans, Inc.,
Index No. 651612/2010, 2015 WL 6471943 (Sup. Ct. N.Y. Cty. Oct. 22, 2015) 41

Ambac Assurance Corp. v. Countrywide Home Loans, Inc.,
151 A.D.3d 83 (1st Dep't 2017) 27, 41

Assured Guar. Mun. Corp. v. Flagstar Bank, FSB,
892 F. Supp. 2d 596 (S.D.N.Y. 2012) 44

Assured Guar. Mun. Corp. v. DB Structured Prods., Inc.,
44 Misc. 3d 1206(A), 2014 WL 3282310 (Sup. Ct. N.Y. Cty. 2014) 38

BlackRock Allocation Target Shares v. Wells Fargo Bank, Nat'l Ass'n,
No. 14-CV-9371 (KPF) (SN), 2017 WL 953550 (S.D.N.Y. Mar. 10, 2017) 37

Blackrock Balanced Capital Portfolio (FI) v. Deutsche Bank Nat'l Tr. Co.,
No. 14-CV-9367 (JMF), 2018 WL 3120971 (S.D.N.Y. May 17, 2018) 36, 39

Buran v. Coupal,
87 N.Y.2d 173 (1995) 23, 29

Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC,
Civ. No. 5140-CS, 2012 WL 3201139 (Del. Ch. Aug. 7, 2012) 21, 24

CitiMortgage, Inc. v. Equity Bank, N.A.,
261 F. Supp. 3d 942 (E.D. Mo. 2017) 47

Deutsche Bank Nat'l Tr. Co. v. Morgan Stanley Mortg. Capital Holdings LLC,
289 F. Supp. 3d 484 (S.D.N.Y. 2018) 37

Deutsche Bank Nat'l Tr. Co. v. Flagstar Capital Mkts. Corp.,
32 N.Y.3d 139 (2018) 31

Eujoy Realty Corp. v. Van Wagner Commc'ns, LLC,
22 N.Y.3d 413 (2013) 29, 39

Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc.,
873 F.3d 85 (2d Cir. 2017) 37

First Union Nat'l Bank v. Pictet Overseas Tr. Corp.,
477 F.3d 616 (8th Cir. 2007) 40

Gansett One, LLC v. Husch Blackwell, LLP,
168 A.D.3d 579 (1st Dep't 2019) 39

Gen. Supply & Constr. Co. v. Goelet,
241 N.Y. 28 (1925) 21

Greater N.Y. Health Care Facilities Ass'n v. DeBuono,
91 N.Y.2d 716 (1998) 24, 25, 27

Greenfield v. Philles Records, Inc.,
98 N.Y.2d 562 (2002) 49

Homeward Residential, Inc. v. Sand Canyon Corp.,
298 F.R.D. 116 (S.D.N.Y. 2014) 44

Homeward Residential, Inc. v. Sand Canyon Corp.,
No. 12-CV-5067 (JFK), 2017 WL 5256760 (S.D.N.Y. Nov. 13, 2017) 36

Martin v. City of Cohoes,
37 N.Y.2d 162 (1975) 39

MASTR Adjustable Rate Mortgs. Tr. 2006-OA2 v. UBS Real Estate Sec. Inc.,
No. 12-CV-7322 (PKC), 2013 WL 4399210 (S.D.N.Y. Aug. 15, 2013) 44

MASTR Adjustable Rate Mortgs. Tr. 2006-OA2 v. UBS Real Estate Sec. Inc.,
No. 12-CV-7322 (PKC), 2016 WL 1449751 (S.D.N.Y. Apr. 12, 2016) 27

MASTR Adjustable Rate Mortgs. Tr. 2006-OA2 v. UBS Real Estate Sec. Inc.,
No. 12-CV-7322 (PKC), 2015 WL 764665 (S.D.N.Y. Jan. 9, 2015) 21, 32

MASTR Asset Backed Sec. Tr. 2006-HE3 ex rel. U.S. Bank Nat'l Ass'n v. WMC Mortg. Corp.,
No. 11-CV-2542 (JRT) (TNL), 2012 WL 4511065 (D. Minn. Oct. 1, 2012) 46

MBIA Ins. Corp. v. Countrywide Home Loans, Inc.,
39 Misc. 3d 1220(A), 2013 WL 1845588 (Sup. Ct. N.Y. Cty. Apr. 29, 2013) 41

MBIA Ins. Corp. v. Countrywide Home Loans, Inc.,
105 A.D.3d 412 (1st Dep't 2013) 27, 45

MBIA Ins. Corp. v. Credit Suisse Sec. (USA) LLC,
55 Misc. 3d 1204(A), 2017 WL 1201868 (Sup. Ct. N.Y. Cty. Mar. 31, 2017) 41, 44, 45

MBIA Ins. Corp. v. Credit Suisse Sec. (USA) LLC,
165 A.D.3d 108 (1st Dep't 2018) 42

McMahon v. Pfister,
49 A.D.2d 729 (1st Dep't 1975) 42

Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital Inc.,
133 A.D.3d 96 (1st Dep't 2015) 3, 16, 23, 26, 47, 48

People v. Evans,
94 N.Y.2d 499 (2000) 39

Ret. Bd. of the Policemen's Annuity & Benefit Fund of Chi. v. Bank of N.Y. Mellon,
775 F.3d 154 (2d Cir. 2014) 19, 26, 36

RM 14 FK Corp. v. Bank One Tr. Co. N.A.,
37 A.D.3d 272 (1st Dep't 2007) 29

Royal Park Investments SA/NV v. HSBC Bank USA Nat'l Ass'n,
No-14-CV-88175 (LGS) (SN), 2017 WL 945099 (S.D.N.Y. Mar. 10, 2017) 37

Schmidt v. Magnetic Head Corp.,
97 A.D.2d 151 (2d Dep't 1983).....29, 38

S. Wine & Spirits of Am., Inc. v. Impact Envtl. Eng'g, PLLC,
80 A.D.3d 505 (1st Dep't 2011) 30

Sport Rock Int'l, Inc. v. Am. Cas. Co. of Reading, Pa.,
65 A.D.3d 12 (1st Dep't 2009) 27

Syncora Guarantee Inc. v. Countrywide Home Loans, Inc.,
36 Misc. 3d 328 (Sup. Ct. N.Y. Cty. Jan. 3, 2012).....41

Thomas v. City of New York,
154 A.D.3d 417 (1st Dep't 2017) 29

U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc.,
147 A.D.3d 79 (1st Dep't 2016) 22, 26, 27, 28

U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.,
No. 7, 2019 WL 659355 (N.Y. Feb. 19, 2019).....30

U.S. Bank, Nat'l Ass'n v. UBS Real Estate Sec. Inc.,
205 F. Supp. 3d 386 (S.D.N.Y. 2016) 43

W. & S. Life Ins. Co. v. Bank of N.Y. Mellon,
No. A1302490, 2017 WL 3392855 (Ohio Com. Pl. Aug. 4, 2017) 37

Wells Fargo Bank, N.A. v. Bank of Am., N.A.,
No. 10-CV-9584, 2013 WL 1285289 (S.D.N.Y. Mar. 28, 2013).....44

Wells Fargo Bank, N.A. v. JPMorgan Chase Bank, N.A.,
No. 12-CV-6168, 2014 WL 1259630 (S.D.N.Y. Mar. 7, 2014).....44

Other Authorities

CPLR 203(f).....23, 29

CPLR 205(a) 30

CPLR 5001.....46

Defendant-Appellant DLJ Mortgage Capital, Inc. ("DLJ") respectfully submits this brief in support of its appeal from the trial court's January 9, 2019 Decision and Order (the "Decision") granting in part and denying in part the parties' motions for partial summary judgment.

STATEMENT OF RELATED CASES

Several of the issues presented in this appeal overlap with those raised in (1) DLJ's pending appeal in *U.S. Bank National Association v. DLJ Mortgage Capital, Inc.*, Appeal No. 2019-219 (1st Dep't) ("*HEAT 07-1*"), perfected for the June 2019 Term, and (2) the pending appeal of Countrywide Securities Corp. and Countrywide Financial Corp. in *Ambac Assurance Corp. et al. v. Countrywide Home Loans, Inc. et al.*, Appeal No. 2019-26 (1st Dep't), perfected for the May 2019 Term. In particular, (i) all three appeals raise issues about how the relation-back doctrine applies in residential mortgage backed securities ("RMBS") repurchase actions where plaintiffs timely comply with contractual remedial requirements, but only for a subset of the mortgage loans upon which they seek relief at trial; (ii) this appeal and the *Ambac* appeal present the question whether liability and damages in RMBS repurchase actions can be proven through statistical sampling; and (iii) this appeal and the *HEAT 07-1* appeal address the accrual of interest on liquidated loans under RMBS contractual damages provisions. DLJ respectfully submits that the Court's consideration of these issues

would be aided by calendaring argument in all three appeals for the same date.

PRELIMINARY STATEMENT

Plaintiffs, the trustees of four RMBS trusts containing over 42,000 loans, allege that DLJ breached representations and warranties relating to those loans set forth in each Trust's Pooling and Servicing Agreement ("PSA"). In the proceedings below, Plaintiffs have decided to attempt to prove their claims by re-underwriting a sample of a mere 1,600 loans (400 from each Trust). For many of the loans for which Plaintiffs seek damages, Plaintiffs never provided any notice of a breach, much less the timely pre-suit notice of breach required under the PSAs and New York law. Moreover, Plaintiffs would extrapolate the alleged breach rates from the loans in the samples to the general population of loans for which they seek repurchase. DLJ moved for partial summary judgment because the clear terms of the PSAs require timely, loan-by-loan notice and proof of a material breach, and limit the damages available for any breaching loan. In denying DLJ's motion and granting Plaintiffs' motion in part, the trial court misapplied the relation-back doctrine and disregarded important contractual requirements for proving liability and damages. This Court should reverse those aspects of the summary judgment ruling and enforce the PSAs as written.

First, the trial court erred in applying the relation-back doctrine to excuse Plaintiffs from the PSAs' requirement that breaches be proven loan-by-loan.

Under those agreements, the "sole remedy" for any breach of a loan-related representation and warranty is set forth in the contractual repurchase protocol, which requires notice of the breach and an opportunity to cure or repurchase the loan in question before a suit can be maintained. Here, Plaintiffs timely noticed alleged breaches as to only a small subset of the loans contained in the Trusts at issue. The trial court nonetheless held that Plaintiffs may proceed to trial on loans that were never identified in a timely breach notice, concluding that those untimely claims can relate back to Plaintiffs' initial pleadings. The relation-back doctrine is not available, however, to resuscitate these untimely claims; each individual loan reflects a separate and independent transaction as to which pre-suit notice is required. The trial court's erroneous contrary holding misreads this Court's decision in *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital Inc.*, 133 A.D.3d 96 (1st Dep't 2015), and creates a roadmap for RMBS plaintiffs to nullify *ACE Securities Corp. v. DB Structured Products, Inc.*, 25 N.Y.3d 581 (2015), which held that timely compliance with the repurchase protocol is a precondition to suit.

Second, the trial court impermissibly deviated from the PSAs in allowing Plaintiffs to prove their claims through sampling and extrapolation. Plaintiffs' sampling methodology would predicate liability and damages on numerous loans that were never subject of a timely repurchase demand, even though notice of a

loan-specific breach is plainly a condition to recovery under the PSAs, and would circumvent the key contractual requirement of proving a material breach on a loan by-loan basis. The doctrine of law of the case, which Justice Scarpulla mistakenly understood to bind her to a prior interim ruling on sampling, does not prevent this Court from holding the parties to the terms of their remedial bargain.

Third, the trial court erred in granting Plaintiffs summary judgment on what it means for a breach to "materially and adversely affect" the interests of certificateholders. This ambiguous contractual term is an element of the repurchase protocol that, like other elements, must be proven on a loan-by-loan basis. It is not susceptible to an abstract interpretation as a matter of law. The trial court should have deferred interpreting that term until after the parties had the opportunity to introduce evidence at trial regarding what a material and adverse effect means in the context of specific breaches in specific loans—as every other state trial court facing the same question has done.

Fourth, the trial court incorrectly ruled that Plaintiffs are entitled to recover interest on breaching loans even for periods after a loan has been liquidated. The PSAs' explicit damages provisions allow for recovery of only "accrued unpaid interest" on breaching loans; when a loan has been liquidated, interest no longer accrues. This Court should hold that the contractually defined repurchase price cannot include interest after a breaching loan is liquidated.

STATEMENT OF QUESTIONS PRESENTED

Question 1: Whether Plaintiffs may assert a repurchase claim under RMBS PSAs for individual loans as to which Plaintiffs did not provide notice of an alleged breach of a representation or warranty and an opportunity for the seller to cure the breach in those specific loans prior to suit or prior to six years after the representation was made. The trial court permitted Plaintiffs to assert such claims by holding that untimely noticed breaches related back to Plaintiffs' timely noticed breaches in connection with entirely distinct loans and, for one trust for which no timely notice was provided, in connection with entirely separate trusts.

Question 2: Whether the trial court should have precluded Plaintiffs from relying on statistical sampling to prove their breach of contract claims at trial, when the repurchase protocol links the parties' sole remedy for loan-related breaches to loan-specific proof. The trial court allowed liability and damages to be proven at trial through sampling.

Question 3: Whether the trial court should have denied summary judgment on the meaning of the repurchase protocol's requirement of a "material and adverse" effect on a certificateholder's interests without testimony or evidence explaining how that term applies to individual breaches of representations and warranties in individual mortgage loans. The trial court ruled as a matter of law

that a breach has a "material and adverse" effect if it "materially increased the risk of loss."

Question 4: Whether a contractual provision providing for the payment of "accrued" interest allows Plaintiffs to recover as damages interest amounts that never actually accrued on the relevant mortgage loans because those loans had been liquidated. The trial court allowed for recovery of such interest.

BACKGROUND

I. The Securitizations At Issue

These cases arise from four RMBS trusts known as Home Equity Mortgage Trust Series ("HEMT") 2006-1, HEMT 2006-3, HEMT 2006-4, and HEMT 2006-5 (together, the "Trusts"). DLJ sponsored the four Trusts at issue, which contain approximately 42,670 mortgage loans, the majority of which are second-lien loans (i.e., loans that are junior in priority to, and therefore riskier than, a first-lien mortgage loan). The Trusts all closed between June and October 2006. A1625-1626.[1] These mortgage loans represent the collateral for certificates issued by the Trusts and sold to investors (the "certificateholders"). *See, e.g.*, A637.[2] The

[1] The HEMT 2006-1 transaction closed on February 28, 2006, HEMT 2006-3 closed on June 30, 2006, HEMT 2006-4 closed on August 30, 2006, and HEMT 2006-5 closed on October 21, 2006. A46.

[2] In the above-captioned actions, U.S. Bank, as Trustee of the Trusts, seeks identical relief from the same Defendants. *See* A143-190 (complaint in *Home Equity Mortg. Trust Series 2006-1, et al. v. DLJ Mortg. Capital, Inc., et al*., Index No. 156016/2012); A224-261 (complaint in *Home Equity Mortg. Trust Series 2006-5 v. DLJ Mortg. Capital, Inc.*, Index No. 653787/2012). On

certificateholders receive payments from the Trusts based on loan payments made on the underlying mortgages.

As disclosed in the Trusts' offering documents, the Trust loans had features that created a high risk of default. *See, e.g.*, A626-636. For example, roughly two-thirds of the loans were reduced documentation loans, meaning that the borrower's income or assets (or both) were not verified at origination. *See, e.g.*, A642. For a so-called "stated income" loan, the underwriter would assess only the reasonableness of the borrower's *stated* (as opposed to verified) income and not whether the amount stated was accurate. A3500, 3503-3504, 3525.[3]

Each of the four Trusts was created and governed by a Pooling and Servicing Agreement entered into by, *inter alia*, DLJ, as Seller, and U.S. Bank, as Trustee for each respective Trust. The PSAs include schedules setting forth representations and warranties about the mortgage loans contained in each Trust. *See, e.g.*, A1331-1335. For purposes of this appeal, the key provision of the PSAs is the repurchase protocol, set forth in Section 2.03(g) of the agreements, which

---

February 11, 2014, the 2006-1 Action and the 2006-5 Action were consolidated "for scheduling, discovery and trial." A136. When citing to documents or allegations that do not materially differ among the different cases or Trusts, this brief cites only to the 2006-1 document or case.

[3] Plaintiffs' re-underwriting expert, Richard Payne, agreed that stated income loans were riskier products with a higher likelihood of default than full documentation loans. A3595-3596. Mr. Payne likewise testified to the common understanding that an assessment of the reasonableness of a borrower's stated, unverified income would not eliminate the risk of borrower misrepresentation, which is why stated income loans had a higher interest rate. A3698.

serves as the "sole remedy" for any breach of a loan-related representation or warranty. A949.

The repurchase protocol is written in loan-specific terms and requires proof of three elements for remedying a claimed nonconforming loan.[4] First, there must be "a breach of a representation or warranty" relating to the identified nonconforming loan. *Id.* Second, that breach must "materially and adversely affect[] the interests of the Certificateholders in any Mortgage Loan." *Id.* Third, a party to the PSA must notify DLJ of, or DLJ must discover, "such breach." *Id.* DLJ then has 120 days to "cure such breach in all material respects." *Id.*

The repurchase protocol further provides that if, after notice or discovery, DLJ cannot cure a breach that has the requisite material and adverse effect, DLJ shall "repurchase the affected Mortgage Loan from the Trustee" at a contractually

---

[4] The repurchase protocol provides as follows:

> Upon discovery by any of the parties hereto of a breach of a representation or warranty made pursuant to Section 2.03(f) that materially and adversely affects the interests of the Certificateholders in any Mortgage Loan, the party discovering such breach shall give prompt notice thereof to the other parties. The Seller hereby covenants that within 120 days of the earlier of its discovery or its receipt of written notice from any party of a breach of any representation or warranty made by it pursuant to Section 2.03(f) which materially and adversely affects the interests of the Certificateholders in any Mortgage Loan sold by the Seller to the Depositor, it shall cure such breach in all material respects, and if such breach is not so cured, shall, (i) if such 120-day period expires prior to the second anniversary of the Closing Date, remove such Mortgage Loan (a "Deleted Mortgage Loan") from the Trust Fund and substitute in its place a Qualified Substitute Mortgage Loan … or (ii) repurchase the affected Mortgage Loan from the Trustee at the Repurchase Price in the manner set forth below.

A949.

defined "Repurchase Price." *Id.* That price includes the sum of "(i) 100% of the unpaid principal balance of the Mortgage Loan on the date of such purchase," and "(ii) accrued unpaid interest thereon at the applicable Mortgage Rate." A926.[5] A breach can be cured or repurchased only as to a specific loan that has been identified in a timely manner, as required by the repurchase protocol.

II. Plaintiffs Provide Timely Breach Notices As To Only 1,354 Specific Loans

On November 22, 2011, four affiliated certificateholders (referred to collectively as "Euphrates") sent a letter to DLJ and U.S. Bank demanding that DLJ repurchase loans in all four Trusts. A1338-1339. Euphrates' demand letter alleged that DLJ committed "systemic breaches of representations and warranties" and went on to list particular loans they identified as breaching based on their

[5] The full definition of Repurchase Price is as follows:

> Repurchase Price: With respect to any Mortgage Loan required to be purchased by the Seller pursuant to this Agreement … an amount equal to the sum of (i) 100% of the unpaid principal balance of the Mortgage Loan on the date of such repurchase, (ii) accrued unpaid interest thereon at the applicable Mortgage Rate from the date through which interest was last paid by the Mortgagor to the Due Date in the month in which the Repurchase Price is to be distributed to Certificateholders, (iii) any unreimbursed Servicing Advances and (iv) any costs and damages actually incurred and paid by or on behalf of the Trust (including, but not limited to late fees) in connection with any breach of the representation and warranty set forth in clause (xx) of Schedule IV hereto as the result of a violation of a predatory or abusive lending law applicable to such Mortgage Loan.

A926.

sampling of loans from each securitization. A1339.[6] The letter further asserted that "additional investigation, including a re-underwriting of the loan files themselves, will reveal substantial additional evidence of breaches." A1341. Citing the repurchase protocol, on December 7, 2011, U.S. Bank forwarded that letter to DLJ and demanded that DLJ cure or repurchase "the identified loans." A1337. In the ensuing months, U.S. Bank sent several further letters demanding repurchase of additional specified loans from the Trusts.[7]

Meanwhile, on February 22, 2012—shortly before the six-year anniversary of the HEMT 2006-1 Trust's closing date—DLJ entered into a tolling agreement with U.S. Bank as Trustee for the HEMT 2006-1, 2006-3, and 2006-4 Trusts. That agreement tolled the statute of limitations and all time-related claims or defenses pertaining to those Trusts, to the extent any such time periods had not yet expired. A1394. On July 12, 2012, DLJ provided written notice that it would terminate the

[6] The November 22, 2011 letter identified 288 defective loans from the HEMT 2006-1 Trust; 522 defective loans from the HEMT 2006-3 Trust; 359 defective loans from the HEMT 2006-4 Trust; and 284 defective loans from the HEMT 2006-5 Trust. A1340.

[7] On April 27, 2012, U.S. Bank sent a letter to DLJ demanding the repurchase of 510 loans from the HEMT 2006-1 Trust. A1410. On August 22, 2012, U.S. Bank sent a letter demanding the repurchase of 244 loans from the HEMT 2006-3 Trust, and 42 loans from the HEMT 2006-4 Trust. A1428. On December 14, 2012, U.S. Bank sent a letter demanding the purchase of 20 loans from the HEMT 2006-5 Trust. A1437. On February 27, 2013, U.S. Bank sent a letter demanding the repurchase of 235 loans from the HEMT 2006-5 Trust. A1441. On November 19, 2013, U.S. Bank sent a letter demanding the repurchase of 2,563 loans in the HEMT 2006-4 Trust. A1447. On May 28, 2014, U.S. Bank sent a letter to DLJ demanding the repurchase of 4,056 loans in the 2006-5 Trust. A1531.

tolling agreement. Pursuant to the terms of that agreement, the termination became effective on August 26, 2012. *See* A1397, 1426.

The upshot of this chronology is that most of Plaintiffs' repurchase demands were untimely. That is because the obligation to repurchase a loan expires if DLJ has not received notice of, or discovered, a breach such that the specified cure period (here, 120 days) would elapse within six years of closing. *See ACE*, 25 N.Y.3d at 595-97. Here, several of Plaintiffs' demands came too late for the cure period to elapse before the limitations period ended. Specifically, with respect to HEMT 2006-1, DLJ received *no* timely demands before the expiration date of November 1, 2011,[8] but received untimely demands for 2,237 loans in letters dated December 7, 2011, and April 27, 2012. *See* A1337, 1410. With respect to HEMT 2006-3, DLJ received timely demands for 766 loans in letters dated December 7, 2011, and August 22, 2012. *See* A1337, 1428. With respect to HEMT 2006-4, DLJ received timely demands for 401 loans in letters dated December 7, 2011, and August 22, 2011, before the expiration date of August 26, 2012,[9] but received untimely demands for 2,563 loans in a letter dated November 19, 2013. *See* A1337, 1428, 1447. And with respect to HEMT 2006-5, DLJ received timely

[8] The expiration date is calculated as six years after each Trust's closing date, minus the 120-day contractual cure period.

[9] For the loans in HEMT 2006-3 and HEMT 2006-4, the tolling agreement extended the statute of limitations, which was set to expire on March 3, 2012 (HEMT 2006-3), and May 4, 2012 (HEMT 2006-4), until DLJ's termination of the tolling agreement effective August 26, 2012.

demands for 284 loans in a letter dated December 7, 2011, before the expiration date of July 4, 2012, but received untimely demands for 6,429 loans in letters dated December 14, 2012, February 27, 2013, and May 28, 2014. *See* A1337, 1437, 1441, 1531.

In sum, DLJ received timely notices of potential breaches for only 1,351[10] identified particular loans.

III. The Trial Court Proceedings

In 2012, Plaintiffs filed these suits claiming breaches of the PSAs' representations and warranties in mortgage loans in these four Trusts.[11] In Index No. 156016/2012, U.S. Bank, as Trustee, commenced a suit concerning breaches in HEMT 2006-1, HEMT 2006-3, and HEMT 2006-4 on August 31, 2012. A137. U.S. Bank commenced a separate suit in HEMT 2006-5 by filing a summons with notice on October 30, 2012, under Index No. 653787/2012. A218. In their complaints, Plaintiffs alleged that based on their review of the loan files, they had discovered breaches of the representations and warranties in the loans identified in their breach notices. A145-146, 170, 226-227, 246-247. As against DLJ, Plaintiffs

[10] Some loans were identified in more than one letter.

[11] The Euphrates certificateholders directed the Trustee to sue on behalf of these Trusts. A2399. As required by the PSAs, the certificateholders are indemnifying the Trustee for expenses incurred in bringing this lawsuit. A2399 ("The Directing Certificateholders directed and indemnified the Trustee, U.S. Bank, to sue on behalf of each of the Trusts[.]").

sought damages under the repurchase protocol for these nonconforming loans, "and also all other Mortgage Loans with such breaches." A181, 255.[12]

A. Plaintiffs Seek to Prove Breach and Damages Through Sampling Rather Than on a Loan-By-Loan Basis.

In November 2013, while DLJ's motion to dismiss remained pending, Plaintiff submitted a three-page letter to the trial court requesting its "approval for the use of statistical sampling to prove liability and damages on all of Plaintiffs' claims." A121. Without addressing the terms of the repurchase protocol or the elements of their claims, Plaintiffs merely asserted that sampling would save time and money for the parties and the Court and, citing federal cases, suggested the same would be appropriate here. *Id.*; *accord* A122 ("[A] statistically significant, random sample of Loans would conserve the resources of the parties and the Court, streamline the trial, and promote judicial economy and efficiency, without compromising the quality or reliability of the evidence adduced to prove Plaintiffs' claims."). DLJ's responsive letter argued that the request was premature, as there was a pending motion to dismiss that would dispose of all of Plaintiffs' claims and the parties had not even begun expert discovery. A132. DLJ also requested that, in the event the court ultimately reached the sampling question, "the gravity of the issue and fundamental fairness require that it be done on full briefing and motion."

[12] Plaintiffs also sued the mortgage servicer for these Trusts, Select Portfolio Servicing, Inc., which is not a party to these appeals.

Id.

Three days later, the trial court (Schweitzer, J.) issued a two-sentence Interim Order:

> After review of plaintiffs' November 11, 2013 correspondence, the court agrees that plaintiffs' use of statistical sampling to prove liability and damages would streamline the trial, promote judicial economy, and conserve the resources of the parties and the court. Accordingly, it is hereby ORDERED that plaintiffs may use a statistical sampling to prove liability and damages on all of their claims; and it is further ORDERED that the parties shall meet and confer as to the sample to be used.

A120.

Following the Interim Order, Plaintiffs opted to present their evidence of breaches through sampling, selecting 1,600 loans out of the 42,670 loans underlying these transactions. A2745. Plaintiffs chose those sample loans without regard to whether any notice—timely or otherwise—had been provided to DLJ with respect to any particular loan in the sample. A2895. Plaintiffs' re-underwriting expert, Richard Payne, reviewed the sample loans and ultimately opined that 709 of them breached representations or warranties. A2909, 3002-3003, 3445-3446. Only 34 of those loans fall within the population of 1,351 loans for which Plaintiffs had served timely notices of a breach. A1899, 2418.1-.2. Without identifying specific loans, Plaintiffs' damages expert, Dr. Karl Snow, "extrapolat[ed]" Mr. Payne's alleged "defect rate" from the sample population to the Trusts as a whole to estimate purported damages. A2952-2953, 2963-2964.

B. The Trial Court Issues Summary Judgment Rulings Permitting Plaintiffs to Rely on Untimely Noticed Loans and Sampling and to Obtain Interest on Breaching Liquidated Loans.

In 2015, following Justice Schweitzer's retirement, these actions were reassigned to Justice Scarpulla. After the close of discovery, the parties filed cross-motions for partial summary judgment.[13] The trial court granted Plaintiffs' motion in part and denied it in part, and denied DLJ's motion. A76-77. As relevant to this appeal, the trial court ruled in Plaintiffs' favor on four issues:

Notice and relation back: DLJ moved for a summary judgment ruling that Plaintiffs may seek damages for only the 34 loans in Plaintiffs' samples that were included in timely pre-suit notices. Plaintiffs, for their part, sought a summary judgment ruling that, as a matter of law, DLJ received notice of all defective loans in all four trusts though the November 11, 2012 demand letter, which alleged pervasive breaches. The trial court held that Plaintiffs' "November 22, 2011 and December 7, 2011 demand letters, timely notifying DLJ of specific breaches in the mortgage loans, satisfy the prongs of the repurchase protocol and set the stage for plaintiffs to establish liability as to any loans noticed as alleged breaches of the PSAs, whether pre-suit or post-commencement of this action." A54. Citing this Court's decision in *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital,*

[13] Justice Scarpulla consolidated for disposition the cross-motions for partial summary judgment filed under both index numbers. A10-11.

Inc., 133 A.D.3d 96 (1st Dep't 2015), *aff'd as modified*, 30 N.Y.3d 572 (2017), the trial court concluded that because timely notices identified *some* allegedly breaching loans and alerted that certificateholders were continuing their investigation, the doctrine of relation back permitted plaintiffs to proceed to trial on *any* allegedly breaching loan, even if such loans were not identified until plaintiffs' post-suit notice letters or expert reports. A52-54.

Sampling: The parties cross-moved for summary judgment as to whether Plaintiffs are permitted to use statistical sampling to prove DLJ's liability and damages at trial. The trial court held that it was bound by Justice Schweitzer's Interim Order, which it understood to permit the use of sampling to prove breaches in loans and resulting damages, as law of the case. A66-69.

"Material and adverse": Plaintiffs moved for summary judgment on the meaning of the term "material and adverse," contending that to prove that a breach caused a "material and adverse effect" on a mortgage loan, Plaintiffs need not establish that the loan was in default, but rather that the breach "significantly increased a loan's risk of loss." The trial court granted this aspect of Plaintiffs' motion, holding that a material and adverse effect "requir[es] only a showing that the alleged breach of a warranty materially increased the risk of loss." A64-66.

Accrued interest on liquidated loans: DLJ sought a summary judgment ruling that, under the terms of the PSAs, no interest can accrue on a breaching

mortgage loan in a Trust after that loan has been liquidated. Plaintiffs' damages expert, by contrast, had included interest on allegedly breaching loans through a specified "repurchase date" regardless of whether the loan had been liquidated. The trial court rejected this aspect of DLJ's motion. Relying on this Court's holding in *Nomura*, the trial court held that "the remedy for all loans, liquidated or not, is subject to the terms of the repurchase protocol," which it understood to provide for accrued interest on all breaching loans. A75.

DLJ timely appealed from these aspects of the trial court's order. A3, 5.

ARGUMENT

The trial court erred to the extent it granted Plaintiffs' motion for summary judgment and denied DLJ's motion for summary judgment on four key issues. First, it erred in holding Plaintiffs can prove liability and damages on allegedly breaching loans that Plaintiffs failed to identify in their timely repurchase demands. § I. Second, the court erred in holding that Plaintiffs can use breaches in a "sample" of Trust loans to prove DLJ's liability and damages by extrapolating "breaches" to other Trust loans. § II. Third, it erred in interpreting the contractual element "material and adverse" effect as a matter of law. § III. Finally, the court erred in holding that Plaintiffs can recover interest for loans that purportedly "accrued" after those loans were liquidated and therefore no longer existed. § IV.

I. Plaintiffs' Untimely Breach Notice Letters Do Not Relate Back To Earlier Timely Notices.

A. The Repurchase Protocol Provides a Loan-Specific Remedy That Is Triggered by Timely, Loan-Specific Breach Notices.

Plaintiffs seek to nullify the specific terms of the agreements they negotiated with DLJ. For thousands of loans for which they claim damages, Plaintiffs failed to comply with the contractual repurchase protocol's requirement of timely notice of a breach to DLJ, depriving DLJ of the opportunity to cure before Plaintiffs can file suit. Accordingly, absent proof at trial of DLJ's independent discovery of a breach, Plaintiffs cannot recover damages for loans where no timely notice was given.

Under the repurchase protocol, DLJ is required to cure any material breach of a representation or warranty concerning an individual loan, or, if it cannot cure, repurchase the defective loan. The right to cure or repurchase as to a loan is established only if three preconditions are met. First, there must be a material breach of a representation or warranty of a claimed nonconforming loan. Second, that breach must have "materially and adversely affected" the interests of the certificateholders in that loan. A949. Third, DLJ must have discovered or received written notice from any party of that material breach in that loan. DLJ then has 120 days to "cure such breach in all material respects." *Id.* If "such breach is not so cured," then DLJ "shall … substitute … [or] repurchase the

affected Mortgage Loan from the Trustee." *Id.*

The repurchase protocol thus unambiguously requires that, to be contractually valid as to an individual loan, a notice of breach specifically identify that loan. Without notice of a specific breach in a particular loan, DLJ cannot cure "such breach," remove "such Mortgage Loan" from the Trust, or repurchase "the affected Mortgage Loan." *Id.* Therefore, Plaintiffs must, as the trial court recognized here, prove either "loan-by-loan notice" or discovery of "a breach" in "certain loans" they allege are nonconforming. A52-54; *accord Ret. Bd. of the Policemen's Annuity & Benefit Fund of Chi. v. Bank of N.Y. Mellon*, 775 F.3d 154, 162 (2d Cir. 2014) ("[A]lleged misconduct must be proved loan-by-loan and trust-by-trust."), *cert. denied*, 136 S. Ct. 796 (2016).

The Trustee here for all four Trusts, U.S. Bank, has itself urged courts to conclude that the plain language of similar repurchase provisions requires loan-by-loan notice or discovery of a material breach of a representation or warranty. In defending against suits alleging that U.S. Bank failed to timely enforce repurchase obligations under materially similar trust agreements, U.S. Bank argued that "the parties intended that any 'discovery' of breaches of [representations and warranties] could only be on a loan-by-loan level because *such information is essential to 'enforce' the … obligations to cure, repurchase, or substitute a breaching loan*." A2316 (emphasis added); *see also*, *e.g.*, A1905 (arguing that

trustees must have "actual knowledge" of specific breaches because "the contracts contemplate the trustee undertak[ing] defined, concrete measures … with respect to a specific defect, in a specific loan, and [a] trustee cannot [do so] without knowing the specific … breach" (alterations in original) (internal quotation marks omitted)). That is, U.S. Bank argued that its own discovery of any breaches was required to occur at a loan-specific level because it needed to provide that same information to a seller to satisfy the enforcement mechanism under the repurchase protocol. Indeed, U.S. Bank has cited language identical to the repurchase protocols in this case to advocate for loan-specific notice, arguing that "when a trustee seeks a repurchase" from a seller, it "bear[s] th[e] burden [of proof] with respect to *each* alleged breach for *each* loan because the PSAs provide[] for … an *individualized, loan-specific obligation* to cure, replace or repurchase a breached loan." A2503 (emphasis and alterations in original) (highlighting that the duties in a repurchase protocol are "*loan-specific*" in part because the seller is required to "'cure *such breach*' or 'repurchase *the affected Mortgage Loan* or Mortgage Loans'").[14]

[14] *See also* A2343-2344 (citing a PSA provision "predicating response to representation and warranty breaches '[u]pon discovery or receipt of written notice of … the breach by the Seller of any representation, warranty or covenant … in respect of any Mortgage Loan'" as support for the proposition that trustee action is required only upon discovery or notice of a specific breach (alterations in original)); A2378-2379 ("[U]nder the express terms of the PSAs, a trustee can only putback a specific loan—it must first discover or receive written notice of breaches of specific representations and warranties that remain uncured after notice is sent to the seller, before it can putback the related loan.").

There is no shortcut to this contractual remedial protocol. A repurchase demand under the PSA is a demand for DLJ to repurchase specifically identified breaching loans, not entire swaths of loans contained within Trusts. *See, e.g.*, *MASTR Adjustable Rate Mortgs. Tr. 2006-OA2 v. UBS Real Estate Sec. Inc.*, No. 12-CV-7322 (PKC), 2015 WL 764665, at *11 (S.D.N.Y. Jan. 9, 2015) ("*MARM I*") ("[T]he repurchase remedy negotiated by the parties is loan specific … [and] is targeted to a specific loan, and not to a group or category of loans."); *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, Civ. No. 5140-CS, 2012 WL 3201139, at *18-19 (Del. Ch. Aug. 7, 2012). New York law has long recognized that it is imperative that a contractual remedial protocol bargained for between two sophisticated commercial parties be enforced according to its terms. *See, e.g.*, *Gen. Supply & Constr. Co. v. Goelet*, 241 N.Y. 28, 34 (1925) (holding termination of contract "without the required previous notice … in accordance with the terms of the contract was wrongful").

Moreover, timely invocation and completion of the repurchase protocol's notice-and-cure procedures is a condition precedent to filing suit. *See ACE*, 25 N.Y.3d at 598-99 (notice is a "procedural prerequisite to suit"). An RMBS plaintiff, like Plaintiffs here, has "no right" to commence an action seeking the repurchase of a loan "unless and until" a sponsor like DLJ was either notified of the breaching loan or independently discovered a breach and the cure period under

the relevant repurchase protocol has elapsed. *U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc.*, 147 A.D.3d 79, 87 (1st Dep't 2016).

Plaintiffs commenced these actions on August 31, 2012, for the HEMT 2006-1, HEMT 2006-3, and HEMT 2006-4 Trusts, and on October 30, 2012, for the HEMT 2006-5 Trust. But at the time they filed those suits, Plaintiffs had sent breach notices with sufficient time to cure before the limitations period expired for only 1,351 loans in only three of the four Trusts at issue here. *See supra* at 9-12. Plaintiffs' later efforts to provide notice regarding additional loans, months after the time to provide timely notice and an opportunity to cure expired, were untimely under the repurchase protocol and under *ACE*. Therefore, Plaintiffs' untimely notices cannot serve as the basis to recover damages for those loans.

B. The Relation-Back Doctrine Does Not Authorize Plaintiffs to Proceed to Trial on Allegedly Breaching Loans That They Failed to Identify in Timely Breach Notices.

Here, the trial court agreed that notice must proceed loan-by-loan and that the subsequent notices were untimely. The court, however, erred in holding that Plaintiffs may nevertheless proceed to trial on *any* loan breach that was alleged at any point in this litigation, on the theory that those belatedly noticed breaches relate back to Plaintiffs' initial notices. A53-55.[15] No procedural doctrine,

[15] The trial court separately held that Plaintiffs sufficiently raised an issue of fact as to whether they can establish at trial that DLJ independently discovered breaching loans. A19-20 (quoting

including the relation-back doctrine codified at CPLR 203(f), can unwind the express terms of the repurchase protocol to save Plaintiffs' untimely claims.

New York law allows additional claims to "relate back" to the filing of the complaint only if the untimely claims "arose out of [the] same conduct, transaction or occurrence." *Buran v. Coupal*, 87 N.Y.2d 173, 178 (1995). But the origination of each individual mortgage loan is a separate event—loans are obtained by different borrowers, on different homes in different parts of the country, from different originators using different guidelines. Claims as to the breach of a representation regarding one loan therefore do not arise out of the same "conduct, transaction or occurrence" as another loan. A2905 ("Every mortgage loan is different, and every combination of defects affects each mortgage differently."). Providing DLJ with notice that, for example, the borrower for a loan originated by Originator A in California may have misrepresented his income does not put DLJ on notice that a loan originated by Originator B in Florida may be missing a child support agreement showing that the borrower had additional income.

For this reason, in *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, the Delaware Chancery Court recognized that notice as to one group of loans did not open the door to later adding additional loans after the

Nomura, 133 A.D.3d at 108). DLJ does not challenge that aspect of the trial court's order in this appeal.

notice-and-cure period and statute of limitations expired. 2012 WL 3201139, at *18. The court properly reasoned that each alleged breach of a representation "as to each individual loan constitutes a separate transaction or occurrence, regardless of the fact that the loans might have been part of the same loan pool." *Id.* That "is because a separate independent violation of the same contract provision does not 'arise' out of the same conduct, transaction or occurrence as did the first, unrelated violation." *Id.* Breaches for unnoticed loans "are entirely separate instances of breach from those alleged" previously, in that "they are based on different loans and distinct instances of misrepresentation." *Id.*

In analogous contexts, the New York Court of Appeals has found relation back inapplicable to "claims of injury [] based on different, not identical, transactions," noting that the individual claims at issue were subject to "an individualized reimbursement rate" that varied from claim to claim. *Greater N.Y. Health Care Facilities Ass'n v. DeBuono*, 91 N.Y.2d 716, 721 (1998). In *DeBuono*, the plaintiffs, an association of nursing homes along with eight individual nursing homes, timely filed an Article 78 proceeding challenging the State's Medicaid rules and seeking an upward revision of their reimbursements for prior years. *Id.* at 718. Other, similarly affected nursing homes attempted to intervene in the plaintiffs' suit and relate their untimely claims back to the original complaint. *Id.* The Court of Appeals rejected the application of the relation-back

doctrine, holding that even though the intervenors' claims were based on the same state Medicaid policies, the injuries to different nursing home facilities in different years "are based on different, not identical, transactions" such that the State was not fairly on notice of their claims. *Id.* at 721.

The relationship here between timely and untimely claims is similarly attenuated as it was in *DeBuono*. Plaintiffs' repurchase claims are also subject to "an individualized" repurchase protocol, and the "injury claimed"—the specific alleged breaches—also must be determined loan by loan. Because each loan was originated under different circumstances, the breach of a representation or warranty in one loan does not put DLJ on notice of a breach in another loan.

The trial court found it significant that the Euphrates certificateholders' demand letter provided notice of an "ongoing investigation of possible breaches of additional loans." A53. That is irrelevant for relation-back purposes. The issue is not whether the letters put DLJ on notice that the certificateholders might be able to identify additional loans as breaching. Rather, the question is whether those additional, untimely noticed loans arise from the *same transaction or occurrence* such that they qualify for relation back.

They do not. The result in *DeBuono* would not have been different if the initial complaint had said the plaintiffs thought they could identify other nursing homes that were similarly affected by the changes to the State's Medicaid

policies—a fact that was obviously true and apparent to the State. The same analysis precludes relation back here. "Notice" that a plaintiff might find *other* claims is not notice of a claim relating to the same transaction for purposes of relation back.[16]

The trial court nevertheless invoked this Court's decision in *Nomura Home Equity Loan*, 133 A.D.3d at 108, to allow every loan breach that plaintiffs noticed at any point in this litigation to proceed to trial, reasoning that all such claims relate back to the timely pre-suit breach notices. A52-53. *Nomura* decided a different question in a distinct procedural posture and does not call for that illogical result. The appeals in *Nomura* were taken from rulings on motions to dismiss. As relevant, the Court held that, at the *pleading* stage, it was sufficient to allege that the plaintiff "might uncover additional defective loans for which claims would be made." *Nomura*, 133 A.D.3d at 108. That decision addressed only the standard

[16] This is doubly true for the breach notices for loans in HEMT 2006-1, all of which were untimely. U.S. Bank never made a repurchase demand for *any* HEMT 2006-1 loan with sufficient time for the cure period to elapse before the statute of limitations expired. *See supra* at 11; *accord ACE*, 25 N.Y.3d at 598-99 (holding Trustee fails to comply with repurchase protocol where it does not give notice with sufficient time for the cure period to elapse within the limitations period). An untimely notice for a breach in a wholly independent Trust cannot relate back to a timely notice in an entirely different transaction. *See Ret. Bd. of the Policemen's Annuity & Benefit Fund of Chi.*, 775 F.3d at 162 ("[A]lleged misconduct must be proved loan-by-loan and trust-by-trust."). Each Trust is governed by its own PSA, and thus, notice of a breaching loan under one PSA cannot be said to provide notice of breaching loans under a separate PSA that would trigger DLJ's obligation to repurchase breaching loans in that Trust. *See GreenPoint*, 147 A.D.3d at 88-89 (refusing to allow relation back where the trustee never sent a "precommencement breach notice … to GreenPoint, so its obligation to cure (repurchase) or otherwise respond *was not triggered* [under the PSA]" (emphasis added)).

for adequate notice pleading, not what Plaintiffs must prove at trial to establish the "notice" element of its claim under the contractual repurchase protocol.

Misreading *Nomura* to allow relation back here would be inconsistent with the Court of Appeals' decision in *DeBuono*, which held that individualized details concerning numerous claims regarding the same challenged regulation prevented the claims from being part of the "same transaction or occurrence." 91 N.Y.2d at 721; *accord GreenPoint*, 147 A.D.3d at 89 (refusing to "extend" *Nomura* beyond its facts). Here, each alleged breach, remedy, and associated Repurchase Price is inherently loan-specific. Under *DeBuono*, a claim as to one loan would not relate back just because a plaintiff has a timely claim as to another loan. Accordingly, even if *Nomura* had any application to a summary judgment motion, which it does not, DLJ respectfully submits that it was wrongly decided and should not be followed here. *See, e.g.*, *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 151 A.D.3d 83, 87 n.3 (1st Dep't 2017) ("declin[ing] to follow" part of First Department RMBS decision in *MBIA Insurance Corp. v. Countrywide Home Loans, Inc.*, 105 A.D.3d 412 (1st Dep't 2013)); *accord Sport Rock Int'l, Inc. v. Am. Cas. Co. of Reading, Pa.*, 65 A.D.3d 12, 27 (1st Dep't 2009) (declining to follow prior contrary First Department decision).[17]

[17] The trial court also relied on a federal district court opinion in *MASTR Adjustable Rate Mortgages Trust 2006-OA2 v. UBS Real Estate Securities Inc.*, No. 12-CV-7322, 2016 WL

Moreover, to allow relation back here would permit blatant circumvention of the Court of Appeals' decision in *ACE*. As *ACE* recognized, the repurchase protocol affords RMBS sellers the contractual right to cure or repurchase defective loans before being sued. Giving the seller a meaningful opportunity to exercise that right is thus "a procedural prerequisite to suit." *ACE*, 25 N.Y.3d at 599. But here, the untimely notices were not sent to DLJ with the contractually specified time to cure before the limitations period expired—indeed, most were not sent until after the start of litigation. *See supra* at 14-15. As a result, Plaintiffs did not fulfill the procedural condition precedent of giving DLJ prompt notice and an opportunity to cure, substitute, or repurchase allegedly defective loans. *See ACE*, 25 N.Y.3d at 598.

Thus, under the clear terms of the repurchase protocol, claims based on Plaintiffs' untimely breach notices should not have been allowed to proceed. *See GreenPoint*, 147 A.D.3d at 87 (holding that a plaintiff has "no right" to commence an action seeking the repurchase of a loan unless the plaintiff complies with the contractual protocol). By permitting "relation back" for these untimely notices, the

---

1449751 (S.D.N.Y. Apr. 12, 2016) ("*MARM II*"). There, the federal court held that the defendant could not claim "prejudice" from the untimely notification of additional breaching loans in the plaintiffs' expert report, well into discovery. *Id.* at *6. DLJ respectfully submits that *MARM II* was wrongly decided and the trial court erred in relying in it here. The question is not whether DLJ suffers "prejudice" from disclosure through post-suit versus pre-suit notice, but whether it is appropriate to relate back an untimely notice identifying a breach in one mortgage loan to a timely notice identifying breaches in other loans.

trial court deprived DLJ of its contractual right to pre-suit notice and an opportunity to cure. Yet "parties must live with the consequences of their agreement." *Eujoy Realty Corp. v. Van Wagner Commc'ns, LLC*, 22 N.Y.3d 413, 424 (2013). New York courts "enforce contracts and do not rewrite them" and will not "by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties." *Schmidt v. Magnetic Head Corp.*, 97 A.D.2d 151, 157 (2d Dep't 1983) (internal quotation marks omitted); *see also RM 14 FK Corp. v. Bank One Tr. Co. N.A.*, 37 A.D.3d 272, 274 (1st Dep't 2007) (rejecting one party's interpretation where it "vitiate[d] the principle that a contract should not be interpreted so as to render any clause meaningless"). This is especially true where, as here, the contract "was negotiated between sophisticated, counseled business people negotiating at arm's length." *2138747 Ontario, Inc. v. Samsung C&T Corp.*, 31 N.Y.3d 372, 381 (2018).

The trial court's holding cannot be squared with the limited purpose of the relation-back doctrine under CPLR 203(f), which serves to "enable[] a plaintiff to correct a pleading error," *Buran*, 87 N.Y.2d at 177, not to excise contractual requirements or excuse a plaintiff's failure to comply with a precondition to suit. *See Thomas v. City of New York*, 154 A.D.3d 417, 418 (1st Dep't 2017) ("Application of the relation back doctrine is not warranted since plaintiff failed to comply with the condition precedent to suit by serving a timely notice of

claim[.]"); *S. Wine & Spirits of Am., Inc. v. Impact Envtl. Eng'g, PLLC*, 80 A.D.3d 505, 505 (1st Dep't 2011) (holding that relation back did not apply when "plaintiffs failed to comply with the express, bargained-for condition precedent to [the] right to bring an action against defendants").

The Court of Appeals' recent decision in *U.S. Bank National Association v. DLJ Mortgage Capital, Inc.*, No. 7, 2019 WL 659355 (N.Y. Feb. 19, 2019), is not to the contrary. There, the Court of Appeals simply held that if an action is commenced before the statute of limitations expires, the trustee's failure to provide timely notice under the repurchase protocol "does not foreclose the refiling of its action … pursuant to CPLR 205(a)" and the complaint was therefore properly dismissed without prejudice. *Id.* at *5. The Court's ruling on the procedural availability of CPLR 205(a), however, expressed no view on the merits of claims as to loans for which the trustee fails to provide contractually required pre-suit notice and an opportunity to cure. CPLR 205(a) has no application to this case whatsoever unless and until this "action" is terminated in a manner other than a "final judgment upon the merits."

Moreover, applying relation back in these circumstances would render *ACE*'s procedural-prerequisite holding all but meaningless, and would also undermine the Court of Appeals' approach to statutes of limitations, which favors "objective, reliable, predictable" rules. *ACE*, 25 N.Y.3d at 594. The purpose of

these predictable rules, the Court of Appeals has explained, is not only to "save litigants from defending stale claims, but also [to] express[] a societal interest or public policy of giving repose to human affairs," principles that require "reject[ing] accrual dates which cannot be ascertained with any degree of certainty, in favor of a bright line approach." *Id.* at 593-94 (second alteration in original) (internal quotation marks omitted); *accord Deutsche Bank Nat'l Tr. Co. v. Flagstar Capital Mkts. Corp.*, 32 N.Y.3d 139, 151-53 (2018) (holding that "public policy" undergirding the statute of limitations forbids parties to an RMBS agreement from delaying the accrual of a repurchase claim by contract).

But under the trial court's reasoning, a plaintiff would be free to make a timely repurchase demand identifying a single loan as breaching; reserve its rights by claiming it was "continuing to investigate" other breaches and demand repurchase of "all" nonconforming loans, however many there might be; file suit seeking repurchase of the single identified loan; and then use relation back to pursue any additional breaches it identified at any point during discovery. Following that path would allow a plaintiff to sue without ever giving DLJ the opportunity to *avoid* litigation with respect to hundreds or thousands of allegedly breaching loans. That would defeat the very purpose of the cure period and repurchase protocol that the parties agreed to as the sole remedy for any loan-related breach. Plaintiffs cannot escape what they bargained for in the PSAs; if

they failed to give timely notice of an alleged brief in a specific loan, they cannot recover damages for those notice-based claims.

II. The PSAs Require Plaintiffs To Prove Breach And Damages On A Loan-By-Loan Basis.

Plaintiffs' proposed methodology for "proving" their claims involves evaluating only a small subset of the loans at issue for purported breaches and then extrapolating from the sample to find breaches and damages across the entire population of loans for which Plaintiffs seek damages. This sampling approach is flatly inconsistent with the PSAs, which require that Plaintiffs prove breach, materiality, and damages on a loan-by-loan basis, just as they require that Plaintiffs afford loan-specific notice of breaches in the first instance. § II.A. In determining that sampling was appropriate, the trial court declined to analyze the language of the PSAs at all, instead erroneously concluding that sampling was the "law of the case" based on a two-sentence 2013 interim order. § II.B.

A. The PSAs Do Not Permit Plaintiffs to Use Statistical Sampling to Substitute for Loan-By-Loan Proof of a Breach, a Material and Adverse Effect, and Damages.

Under the clear terms of the PSAs, Plaintiffs agreed to identify any breaches on a loan-by-loan basis and are entitled to only loan-specific remedies. *See, e.g.*, *MARM I*, 2015 WL 764665, at *11 ("[T]he repurchase mechanism established by the parties is targeted to a specific loan, and not to a group or category of loans."). Several textual features of the repurchase protocol confirm that liability and

damages must be proven separately for each individual loan.

As an initial matter, the representations and warranties that trigger the repurchase protocol operate at a loan-specific level, referring to "*the* Mortgage," "*the* Mortgage Note," "*the* Mortgaged Property," "*the* Mortgage Loan," "*each* Mortgage Loan," and "*such* Mortgage Loan" in singular form throughout. A1331-1335 (emphasis added). And the repurchase protocol—which represents the parties' agreed-upon "sole remedy" for the breach of any loan-related representation or warranty—necessarily involves a series of loan-specific steps. This remedial mechanism is initiated by the discovery by any party of "*a* breach of a representation or warranty" in "*any* Mortgage Loan" where that particular breach has a "material and adverse effect" upon the interests of the certificateholders in the particular loan. A949.

Next, upon DLJ's discovery or receipt of written notice of "*a* breach," DLJ has 120 days to cure "*such* breach," again requiring action at a breach- and loan-specific level. *Id.* If that 120-day period expires without cure of the material breach with respect to the loan in question, DLJ has the option to "remove *such* Mortgage Loan" from the Trust and "substitute in *its* place *a* Qualified Substitute Mortgage Loan"—defined as a loan having similar attributes, such as principal balance, interest rate, CLTV, and term to maturity, as the "Deleted Mortgage Loan"—or "repurchase *the affected Mortgage Loan* or Mortgage Loans from the

Trustee" at the contractually defined Repurchase Price. *Id.* Determination of the Repurchase Price, in turn, requires a loan-specific calculation involving the "unpaid principal balance of *the* Mortgage Loan" and "accrued unpaid interest" "at *the* applicable Mortgage Rate." A926.

Despite the repurchase protocol's plain terms, Plaintiffs seek to prove the requisite elements of their breach claims for only a small proportion of the Trust loans for which they claim damages and then simply extrapolate—for purposes of both liability and damages—across the entire pool of loans at issue. Plaintiffs have attempted to develop loan-specific proof for less than 5% of the loans at issue in this case. They selected a sample of 400 loans from each Trust, for a total of 1,600 loans, and evaluated only those loans to identify purported breaches. Plaintiffs thus seek liability and damages determinations for loans that they never reviewed nor subjected to the agreed-upon remedial mechanism.

This sampling process should be foreclosed as a matter of law because it cannot identify *actual*, loan-specific breaches for the majority of loans upon which Plaintiffs predicate their claims. As explained, the contractual repurchase protocol requires Plaintiffs to make several loan-specific showings to prevail on a repurchase claim. They must (1) show that DLJ had notice of or discovered a breach of a representation or warranty in a mortgage loan; (2) prove that there was in fact such a breach; (3) demonstrate that the breach had a material and adverse

effect on the interests of certificateholders; (4) show that DLJ failed to cure the specifically identified breach or repurchase the specifically identified breaching loan; and (5) calculate the contractual Repurchase Price for that loan. All of that must be performed on a loan-by-loan basis.

Sampling does not offer *any* of the requisite information about out-of-sample loans. It does not permit the trier of fact to determine when DLJ received notice of, or otherwise discovered, a purported breach in an out-of-sample loan and thus the point at which the cure period for that loan began to run. It establishes nothing about which representation or warranty any out-of-sample loan may have breached. Even under Plaintiffs' preferred standard for evaluating whether a breach had a "material and adverse effect" on the interests of certificateholders, *see infra* § III, sampling fails entirely to address whether a specific breach "materially increased the risk of loss" for any unsampled loan. A66. For any out-of-sample loan, DLJ was by definition deprived of its opportunity to cure or rebut the claim of a breach or repurchase the breaching loan. And proof of Plaintiffs' damages under the Repurchase Price requires a calculation based on the outstanding principal and accrued interest on a given breaching loan, but sampling does not identify which out-of-sample loans include breaches and thus need to be repurchased.

In short, sampling offers only a statistical, poolwide view of out-of-sample

loans rather than supporting any conclusion about those loans on an individual level, making it insufficient to prove Plaintiffs' claims under the clear terms of the PSAs. "Because Plaintiffs need to prove liability and damages on a trust-by-trust and loan-by-loan basis, there is no benefit to sampling beyond what it reveals about the loans within the sample." *Blackrock Balanced Capital Portfolio (FI) v. Deutsche Bank Nat'l Tr. Co.*, No. 14-CV-9367 (JMF), 2018 WL 3120971, at *2 (S.D.N.Y. May 17, 2018). Indeed, Plaintiffs' damages expert agreed that the sampling exercise "did not lead [him] to opine that any specific loan outside of the sampled population was in fact a breaching loan." A3259.

Numerous courts have rejected sampling in analogous lawsuits when it is used to circumvent a contractually mandated loan-specific inquiry. As a New York federal district court recently held, the repurchase protocol—a bargained-for remedial process with "[p]recisely defin[ed]" terms calling for "proof of breach on a loan-by-loan basis"—would "make[] little sense" if plaintiffs could "use statistical means to 'prove' that a loan is in breach without actually identifying the specific loan (and specific breach)." *Homeward Residential, Inc. v. Sand Canyon Corp.*, No. 12-CV-5067 (JFK), 2017 WL 5256760, at *7 (S.D.N.Y. Nov. 13, 2017). This is because, as the Second Circuit has recognized, a sampling approach does not reveal "which loans, in which trusts, were in breach of the representations and warranties." *Ret. Bd. of the Policemen's Annuity & Benefit Fund of Chi.*, 775

F.3d at 162 ("[A]lleged misconduct must be proved loan-by-loan and trust-by-trust."). Thus, courts have found that where "plaintiffs must prove their case 'loan by loan,' the use of sampling to prove breaches … is impermissible: a breach in one loan says nothing about a breach in another, much less whether that breach has a 'material and adverse effect' on Certificateholders." *W. & S. Life Ins. Co. v. Bank of N.Y. Mellon*, No. A1302490, 2017 WL 3392855, at *10 (Ohio Ct. Com. Pl. Aug. 4, 2017).[18]

Cases in which trial courts have permitted proof by sampling in RMBS actions have involved different contractual language or arisen under distinct postures. *See, e.g.*, *Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc.*, 873 F.3d 85, 131 (2d Cir. 2017) (addressing an RMBS sponsor's liability for violations of securities law, where a contractual repurchase protocol was not at issue); *Deutsche Bank Nat'l Tr. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 289 F. Supp. 3d 484, 497, 501 (S.D.N.Y. 2018) (holding that the loan-specific repurchase protocol might be "voidable in light of the allegations of gross negligence" in the

[18] *See also, e.g.*, *Royal Park Investments SA/NV v. HSBC Bank USA Nat'l Ass'n*, No-14-CV-88175 (LGS) (SN), 2017 WL 945099, at *4 (S.D.N.Y. Mar. 10, 2017) ("[A]t trial or summary judgment, plaintiffs must prove their claims loan-by loan and trust-by-trust."); *BlackRock Allocation Target Shares v. Wells Fargo Bank, Nat'l Ass'n*, No. 14-CV-9371 (KPF) (SN), 2017 WL 953550, at *4 (S.D.N.Y. Mar. 10, 2017) (same); *ACE Sec. Corp. Home Equity Loan Tr. v. DB Structured Prods., Inc.*, 5 F. Supp. 3d 543, 560 (S.D.N.Y. 2014) (noting plaintiff's "burden of proving loan-by-loan breaches at later stages of litigation" as opposed to pleadings).

action and thus permitting statistical sampling as "an acceptable method of proof"). Other cases permitting sampling were wrongly decided. For instance, in *Assured Guaranty Municipal Corp. v. DB Structured Products, Inc.*, the trial court permitted sampling to prove damages simply because "forcing [the plaintiff] to re-underwrite all of the loans is commercially unreasonable," without any consideration of the language of the repurchase protocol giving rise to the damages at issue. 44 Misc. 3d 1206(A), 2014 WL 3282310, at *6 (Sup. Ct. N.Y. Cty. 2014). But "[t]he degree to which bargained for remedies are simple or convoluted is a matter for sophisticated commercial actors to address before the execution of a contract. It is not something to complain about in subsequent litigation." *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 40 Misc. 3d 562, 570 (Sup. Ct. N.Y. Cty. 2013), *rev'd on other grounds*, 112 A.D.3d 522 (1st Dep't), *aff'd*, 25 N.Y.3d 581 (2015).

Plaintiffs undoubtedly prefer to proceed via sampling because it would be more difficult to prove individual breaches on a loan-by-loan basis, as the PSAs mandate. But it is not the role of New York courts to "by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties," especially when those parties are sophisticated entities who have simply come to regret the terms they negotiated. *Schmidt*, 97 A.D.2d at 157 (internal quotation marks omitted); *2138747 Ontario*, 31 N.Y.3d at 372.

Plaintiffs "must live with the consequences of their agreement," *Eujoy Realty*, 22 N.Y.3d at 424, however inconvenient, and their after-the-fact dissatisfaction with the bargain they struck is no basis for this Court to rewrite the contract to eliminate the requirements for demonstrating a breaching loan. "[B]ecause Plaintiffs cannot avoid the need for loan-specific evidence," this Court should reject sampling. *Blackrock*, 2018 WL 3120971, at *2.

B. The Trial Court's Mistaken Reliance on Law of the Case Does Not Bind This Court.

The trial court declined to analyze the PSA and determine whether it permitted Plaintiffs to prove each element of their claims through sampling. Instead, it simply concluded that the 2013 Interim Order entered by Justice Schweitzer had resolved that question and was law of the case. A68, 120. For this Court's purposes, however, "law of the case is of no moment; the doctrine of law of the case does not apply to a court reviewing an order on appeal." *Gansett One, LLC v. Husch Blackwell, LLP*, 168 A.D.3d 579, 581 (1st Dep't 2019); *accord, e.g.*, *People v. Evans*, 94 N.Y.2d 499, 503 n.3 (2000); *Martin v. City of Cohoes*, 37 N.Y.2d 162, 165 (1975). Thus, this Court should review the sampling issue on its merits and reject plaintiffs' approach for the reasons set forth above.

In any event, Justice Scarpulla erred in viewing herself as bound by the Interim Order. "[P]reclusion under the law of the case contemplates that the parties had a 'full and fair' opportunity to litigate the initial determination." *Evans*,

94 N.Y.2d at 502. DLJ was never given such an opportunity before the Interim Order was issued.[19]

III. The Trial Court's Interpretation Of The Ambiguous Contractual Term "Material And Adverse" Effect Should Be Reversed.

Plaintiffs can invoke the contractual repurchase remedy only for loans that breached a representation and warranty where that breach "materially and adversely affects the interest of the Certificateholders in any Mortgage Loans." The trial court, granting Plaintiffs' motion for summary judgment, held that the term "material[] and adverse[]" in the PSAs "requir[es] only a showing that the alleged breach of a warranty materially increased the risk of loss." A66. The court erred in interpreting that ambiguous contractual term as a matter of law.

This case represents the first trial court in New York state to interpret "material and adverse" effect in an RMBS contract as a matter of law. Every other New York state trial court to address this issue has held that the meaning of this key contractual provision cannot be resolved on summary judgment. Applying the well-established standard that a court must deny summary judgment where the

[19] In its response to Plaintiffs' initial request to use sampling, DLJ objected that the request was premature, and noted that "the gravity of the issue and fundamental fairness" required that when the sampling issue was eventually taken up by the court, it should be done "on full briefing and motion." A132. Yet the trial court refused to consider the sampling arguments in DLJ's eventual summary judgment briefs, relying entirely on law of the case to conclude that sampling was permitted under the two-sentence, unreasoned Interim Order. A33-34. *Cf. First Union Nat'l Bank v. Pictet Overseas Tr. Corp.*, 477 F.3d 616, 621 (8th Cir. 2007) (in order for law of the case doctrine to apply, the court must resolve an issue "with sufficient directness and clarity to establish the settled expectations of the parties").

contractual language is ambiguous, they have correctly held that the interpretation of "material and adverse" in analogous RMBS contracts is a fact question that must be settled at trial. *See MBIA Ins. Corp. v. Credit Suisse Sec. (USA) LLC*, 55 Misc. 3d 1204(A), 2017 WL 1201868, at *5-6 (Sup. Ct. N.Y. Cty. Mar. 31, 2017) ("*MBIA v. Credit Suisse I*"), *aff'd as modified*, 165 A.D.3d 108 (1st Dep't 2018) ("*MBIA v. Credit Suisse II*"); *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, Index No. 651612/2010, 2015 WL 6471943, at *11 (Sup Ct. N.Y. Cty. Oct. 22, 2015), *aff'd as modified on other grounds*, 151 A.D.3d 83, *aff'd*, 31 N.Y.3d 569 (2018); *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 39 Misc. 3d 1220(A), 2013 WL 1845588, at *23 (Sup. Ct. N.Y. Cty. Apr. 29, 2013); *Syncora Guarantee Inc. v. Countrywide Home Loans, Inc.*, 36 Misc. 3d 328, 334-36 (Sup. Ct. N.Y. Cty. Jan. 3, 2012).

Indeed, this consensus approach in the trial courts is consistent with the First Department's broader instruction for interpreting terms in RMBS contracts: The proper course for trial courts is to wait until trial to interpret such terms and not to define them as a matter of law. *See, e.g.*, *Ambac*, 151 A.D.3d at 88-90 (holding trial court erred in interpreting representation as a matter of law, and that the "better course is to hold a trial to inquire into and develop the facts to clarify the relevant legal principles and their application to these representations and warranties" (internal quotation marks omitted)); *accord MBIA v. Credit Suisse II*,

165 A.D.3d at 115-16 (applying *Ambac*'s "reasoning" to a different representation).

This Court should affirm the otherwise universal approach in New York courts that the meaning of this ambiguous contractual language—"materially and adversely affect"—cannot be resolved on summary judgment. The nature of the ruling Plaintiffs sought demonstrates the ambiguity inherent in "material and adverse." Plaintiffs did not ask for summary judgment on whether specific breaches of representations or warranties in specific loans had the requisite material and adverse effect. Rather, Plaintiffs sought only a generic, abstract ruling that a "material and adverse" effect means any significant increase in a loan's credit risk, totally untethered from the evidence Plaintiffs will have to introduce at trial to prove breaches and damages for specific Mortgage Loans. Substituting one vague term for another in this way—"materially increase[] the risk of loss," A66—does not provide the parties more guidance on a loan-specific basis than the PSA's language of a "material[] and adverse[]" effect. Because the trial court's generic legal interpretation will not resolve any of the issues for trial, the court should not have attempted to half-decide these issues at summary judgment. *See, e.g.*, *McMahon v. Pfister*, 49 A.D.2d 729, 730 (1st Dep't 1975) (reversing grant of partial summary judgment where "[n]o time or effort of either the court or the litigants is spared by resort to it").

The recent opinion in *HEAT 07-1* demonstrates why a trial is necessary and why "material and adverse" should not be interpreted, as the trial court did here, in the abstract on summary judgment as a matter of law. *See U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, Index No. 650369/2013, 2018 WL 6809404 (Sup. Ct. N.Y. Cty. Dec. 27, 2018) ("*HEAT 07-1*"), *appeal pending*, No. 2019-219 (1st Dep't). As the trial court there explained, "The materiality of a [representation or warranty] breach is loan-specific, so whether that happens to be the case with respect to a particular loan is something that must be explored through cross examination of the experts at trial." *Id.* at *12 (internal quotation marks, citations, and ellipses omitted); *see U.S. Bank, Nat'l Ass'n v. UBS Real Estate Sec. Inc.*, 205 F. Supp. 3d 386, 477 (S.D.N.Y. 2016) (post-trial decision noting that "[t]he Court has considered the totality of the evidence relating to a loan in making findings on any specific issue relating to that loan. The evidence most directly applicable to the claimed breach has not been considered in isolation but in conjunction with the totality of the evidence concerning the loan."). Accordingly, the court in *HEAT 07-1* held, a trial is necessary to determine which loans may remain materially defective after some of their breaches are disproven and which may not. *HEAT 07-1*, 2018 WL 6809404, at *12

The trial court and Plaintiffs here relied almost exclusively on federal cases that purport to interpret the meaning of "material and adverse" as a matter of law.

But, as the trial court in *MBIA v. Credit Suisse I* noted, those cases at most demonstrate that there is a split between federal and New York courts on whether "material and adverse" is a fact issue or can be resolved as a matter of law. 2017 WL 1201868, at *5-6 (collecting cases). Moreover, only one of the federal cases Plaintiffs relied on in their summary judgment briefing granted summary judgment in the plaintiff's favor on the meaning of "material and adverse."[20]

The trial court nevertheless cited the *MBIA v. Credit Suisse I* decision as the only New York state court case in support of its holding that "material and adverse" effect means significant risk of loss. A66. Presumably, it was referring to that decision's discussion—in dicta—of the "apparent consensus" favoring a "risk of loss interpretation" over a "loss causation interpretation." *MBIA v. Credit Suisse I*, 2017 WL 1201868, at *5. But in doing so, the court here ignored that decision's *holding* on the procedural appropriateness of summary judgment as a vehicle to define "material and adverse": Consistent with the New York state court

[20] *Compare Assured Guar. Mun. Corp. v. Flagstar Bank, FSB*, 892 F. Supp. 2d 596, 607 (S.D.N.Y. 2012) (denying defendant's motion for summary judgment); *MASTR Adjustable Rate Mortgs. Tr. 2006-OA2 v. UBS Real Estate Sec. Inc.*, No. 12-CV-7322 (HB), 2013 WL 4399210, at *6 (S.D.N.Y. Aug. 15, 2013) (denying motion to dismiss); *Wells Fargo Bank, N.A. v. JPMorgan Chase Bank, N.A.*, No. 12-CV-6168 (MGC), 2014 WL 1259630, at *4-5 (S.D.N.Y. Mar. 7, 2014) (granting motion to dismiss on timeliness grounds), *aff'd*, 643 F. App'x 44 (2d Cir. 2016); *Homeward Residential, Inc. v. Sand Canyon Corp.*, 298 F.R.D. 116, 131 (S.D.N.Y. 2014) (denying motion to dismiss in part), *with Wells Fargo Bank, N.A. v. Bank of Am., N.A.*, No. 10-CV-9584 (JPO), 2013 WL 1285289, at *10-11 (S.D.N.Y. Mar. 28, 2013) (granting plaintiff summary judgment that it need not prove loans are in default to show material and adverse effect), *vacated and remanded on other grounds*, 627 F. App'x 27 (2d Cir. 2015).

side of the state/federal "split" on whether material and adverse can be interpreted as a matter of law, the trial court concluded that it could not interpret the term on summary judgment, as MBIA had failed to "submit[] evidence adduced in discovery that definitively proves the parties' intended meaning of 'material and adverse.'" *Id.* at *5-6.

The same is true here. The trial court did not rely on discovery evidence that shed light on the parties' definitive intent in using the term "material and adverse." Rather, it relied on only on the absence of any specific language regarding default in the text of the PSAs and federal district court cases interpreting "material and adverse" as a matter of law. A65-66. No New York state court case supports that approach to interpreting material and adverse effect.[21] This Court should accordingly reverse the trial court's premature interpretation of this necessarily ambiguous term.

[21] This Court's decision in *MBIA v. Countrywide* is not to the contrary. There, the plaintiff merely sought a finding that a loan need not necessarily be in default to trigger the repurchase obligation. 105 A.D.3d at 413. This Court agreed with that limited request in a very short analysis, but it went no further. Holding that "to the extent plaintiff can prove that a loan which continues to perform 'materially and adversely affect[ed]' its interest, it is entitled to have defendants repurchase that loan," the Court nevertheless explained that it was not definitively resolving what actually constituted a "material and adverse effect": "Whether or not such proof is actually possible is irrelevant to plaintiff's summary judgment motion." *Id.*

IV. The Repurchase Price Should Not Include Interest That Never Actually "Accrued" On A Loan.

The trial court erred in concluding that the Repurchase Price for a breaching loan may include interest that never actually "accrued" on the loan. As explained, the repurchase protocol in the PSAs establishes the exclusive process for remedying the material breach of any representation or warranty, including the formula for calculating the price for repurchasing a breaching loan. Specifically, upon DLJ's failure to timely cure the properly noticed material breach of a particular loan, DLJ must "repurchase the affected Mortgage Loan or Mortgage Loans from the Trustee" at a contractually determined "Repurchase Price." This Repurchase Price is defined, in relevant part, as "the sum of (i) 100% of the unpaid principal balance of the Mortgage Loan on the date of such purchase, [and] (ii) *accrued unpaid interest thereon* at the applicable Mortgage Rate." A926 (emphasis added).[22]

It is plain from the contractual language that the repurchase price of a liquidated loan must be fixed at the time of liquidation. Once a loan is liquidated and charged off from a trust, that loan ceases to exist. *MASTR Asset Backed Sec. Tr. 2006-HE3 ex rel. U.S. Bank Nat'l Ass'n v. WMC Mortg. Corp.*, No. 11-CV-

[22] The repurchase protocol's damages calculation refers to "interest" that had accrued and remained unpaid on the underlying mortgage loan. This contractual interest provision is distinct from prejudgment interest, which may be recoverable in actions for breach of contract and which begins to accrue at the time of the breach. *See* CPLR 5001.

2542 (JRT) (TNL), 2012 WL 4511065, at *6 & n.9 (D. Minn. Oct. 1, 2012); *accord CitiMortgage, Inc. v. Equity Bank, N.A.*, 261 F. Supp. 3d 942, 960 (E.D. Mo. 2017). Upon the loan's liquidation, the borrower is no longer obligated to make interest payments, because the obligation has been discharged and interest is no longer accruing. Accordingly, the "accrued unpaid interest" on a liquidated loan necessarily can refer only to the interest that accrued before the loan was charged off. Plaintiffs' damages expert therefore erred by calculating the repurchase price for liquidated loans to include interest that accrued for a period after the date of liquidation.

In holding that interest was available for breaching liquidated loans, the trial court relied on this Court's decision in *Nomura*, which held that plaintiffs could seek monetary damages for liquidated loans even though their PSAs stated that repurchase was the sole remedy for breaches of loan-related representations and warranties. 133 A.D.3d at 105. Noting that specific performance of the repurchase obligation is an "equitable remedy," this Court reasoned that "where the granting of equitable relief appears to be impossible or impracticable, equity may award damages in lieu of the desired equitable remedy." *Id.* at 106 (internal quotation marks omitted) (quoting *Bank of N.Y. Mellon v. WMC Mortg., LLC*, No. 12-CV-7096, 2015 WL 2449313, at *2 (S.D.N.Y. May 22, 2015)). *Nomura* held that

"plaintiffs may pursue monetary damages with respect to any defective mortgage loan in those instances where cure or repurchase is impossible." *Id.* at 107.

Nomura does not authorize awarding interest as part of the Repurchase Price for liquidated loans. In allowing monetary damages where equitable relief would otherwise be impossible, *Nomura* did not address a contractual provision that specifies how repurchase damages are to be calculated. There is no argument here that Plaintiffs are limited to seeking some form of "impossible" equitable relief: The parties do not dispute that liquidated loans are covered by the repurchase protocol, and DLJ does not contest that Plaintiffs are entitled to seek *some* money damages if they can prove liability, regardless of whether those loans are liquidated or continue to exist. There is thus no risk that applying the contract as written would foreclose all equitable relief, which was the basis for crafting an equitable remedy in *Nomura*. The repurchase protocol need not be "extended" to the liquidated loans at issue here, because it already applies.

In allowing Plaintiffs to recover damages that go beyond those authorized by the PSAs, the trial court appears to have been motivated by a concern that the contractual definition would encourage opportunistic behavior by RMBS sponsors. A75 (noting the risk that a sponsor might "seek to fill a trust with junk mortgages that would expeditiously default so they can be liquidated before a repurchase claim is made" (internal quotations marks omitted) (quoting *Nomura*, 133 A.D.3d

at 106)). But the trial court identified no evidence to ground that speculative concern in the real world or the facts of these transactions. If anything, the trial court's damages ruling creates a competing set of perverse incentives: the risk that plaintiffs in cases such as this will run out the clock on litigation and waste judicial resources simply to rack up "accrued" interest on nonexistent loans. Thus, applying the PSAs as written would appropriately encourage parties to assert their contractual rights promptly.

In any event, New York law does not permit a court to substitute a damages formula it believes to be socially optimal for the one the parties incorporated in their contract. *See Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002) ("[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms."). This Court should hold that repurchase damages cannot include interest after a breaching loan is liquidated.

CONCLUSION

For the reasons and upon the authorities set forth above, the Court should reverse the trial court's summary judgment rulings as set forth above.

Dated: New York, New York
March 18, 2019

Respectfully submitted,

Darren S. Teshima
(of the bar of the State of California)
By Permission of the Court
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, California 94105
(415) 773-5700

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

Robert M. Loeb
(of the bar of the District of Columbia)
By Permission of the Court
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street N.W.
Washington, D.C. 20005
(202) 339-8475

Attorneys for Defendant-Appellant

PRINTING SPECIFICATION STATEMENT

Pursuant to 22 NYCRR § 1250.8(f) and (j)

This computer-generated brief was prepared using a proportionally spaced typeface.

Name of typeface:	Times New Roman
Point size:	14 (text), 12 (footnotes)
Line spacing:	Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, certificate of compliance, or any authorized addendum is 12,587.

This brief and the word count were prepared using Microsoft Word.

STATEMENT PURSUANT TO CPLR 5531

Supreme Court of the State of New York

APPELLATE DIVISION – FIRST DEPARTMENT

Appeal No. 2019-619

HOME EQUITY MORTGAGE TRUST SERIES 2006-1, HOME EQUITY MORTGAGE TRUST SERIES 2006-3, AND HOME EQUITY MORTGAGE TRUST SERIES 2006-4, BY U.S. BANK NATIONAL ASSOCIATION, SOLELY IN ITS CAPACITY AS TRUSTEE,

Plaintiffs--Respondents,

– against–

DLJ MORTGAGE CAPITAL, INC.,

Defendant-Appellant,

–and–

SELECT PORTFOLIO SERVICING, INC.,

Defendant.

Appeal No. 2019-620

HOME EQUITY MORTGAGE TRUST SERIES 2006-5, BY U.S. BANK NATIONAL ASSOCIATION, SOLELY IN ITS CAPACITY AS TRUSTEE,

Plaintiff--Respondent,

– against–

DLJ MORTGAGE CAPITAL, INC.,

Defendant-Appellant,

–and–

SELECT PORTFOLIO SERVICING, INC.,

Defendant.

1. The index number for the *Home Equity Mortgage Trust Series 2006-1 et al. v. DLJ Mortgage Capital Inc. et al.* action in the court below is New York County Clerk's Index No. 156016/2012. The index number for the *Home Equity Mortgage Trust Series 2006-5 v. DLJ Mortgage Capital et al.* action in the court below is New York County Clerk's Index No. 653787/2012.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The actions were commenced in the New York Supreme Court, New York County.

4. The *Home Equity Mortgage Trust Series 2006-1* action was commenced on or about August 31, 2012, by the filing and serving of a summons with notice. Defendant DLJ Mortgage Capital, Inc. filed and served a verified answer on or about January 27, 2014. Defendant Select Portfolio Servicing, Inc. filed and served a verified answer on or about February 3, 2014. The *Home Equity Mortgage Trust Series 2006-5* action was commenced on or about October 30, 2012, by the filing and serving of a summons with notice. Defendant DLJ Mortgage Capital, Inc. filed and served a verified answer on or about February 3, 2014. Defendant Select Portfolio Servicing, Inc. filed and served a verified answer on or about February 10, 2014.

5. The nature and object of the actions are claims for breach of contract arising from loan-level representations and warranties in Pooling and Servicing Agreements pertaining to four residential mortgage-backed securitization trusts.

6. These appeals are from a decision and order of the Honorable Saliann Scarpulla, dated January 9, 2019, and entered on January 10, 2019.

7. These appeals are being perfected on the appendix method.