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)

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by U.S. BANK NATIONAL ASSOCIATION, solely in its
capacity as Trustee,

Plaintiff-Respondent,

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PRELIMINARY STATEMENT

DLJ's opening brief identified four erroneous summary judgment rulings that would authorize Plaintiffs to proceed to trial on loans that were never the subject of a timely breach notice, and to seek damages in excess of what the governing contracts allow. Plaintiffs' responses would eviscerate clear contractual limitations on liability and damages, including the fundamental point that the parties agreed to a sole remedy—the repurchase protocol—that operates on a loan-by-loan basis. That remedy requires loan-specific notice and proof that a breach had a loan-specific material and adverse effect. In addition, it provides for a notice-and-cure procedure and damages calculations that are impossible to implement absent identification of specific breaching loans. Plaintiffs should not be permitted to disregard the remedial bargain they struck.

First, Plaintiffs should not be allowed to proceed to trial on loans they failed to identify in timely breach notices. Their arguments to the contrary attempt to rewrite the terms of the parties' contracts, which plainly require that notice, breach, and damages be proven on a loan-by-loan basis. Conclusory assertions of "pervasive breach" do not satisfy that contractual standard. Nor does the doctrine of relation back provide an end-run around these contractual requirements. There is no basis in existing law to treat a single timely noticed breach as the proverbial camel's nose under the tent, allowing the plaintiff to pursue liability and damages

on every loan in the securitization. And in no event should Plaintiffs be permitted to proceed on loans in the HEMT 2006-1 Trust, where they failed to provide *any* timely breach notices at all.

Second, and for related reasons, the plain terms of the PSAs do not allow Plaintiffs to prove their claims through sampling. Rather than grapple with the actual loan-specific language of the repurchase protocol, Plaintiffs assert various procedural barriers, rely on outdated caselaw, and complain that proving their claims on a loan-by-loan basis would be costly and burdensome. There is no sound legal or prudential reason, however, to treat a 2013 Interim Order as inhibiting this Court's review of a 2019 summary judgment ruling. On the merits, the more recent and better-reasoned decisions on sampling correctly conclude that this approach is foreclosed by the contractual repurchase protocol. And Plaintiffs' asserted burdens do not excuse them from the consequences of their agreements.

Third, Plaintiffs fail to justify the trial court's decision to define the term "material[] and adverse[]" as a matter of law, when other courts confronted with that question have consistently declined to do so. That ruling overlooks the loan-specific nature of this element of the repurchase protocol and fails to clarify the issues that remain for trial.

Fourth, Plaintiffs still cannot come up with a viable contractual basis to treat liquidated loans as continuing to accrue interest for damages purposes. As the

PSAs and Prospectus Supplements make clear, interest stops accruing once a loan is liquidated. This Court should hold the parties to their agreement to limit repurchase damages to interest that has in fact "accrued."

ARGUMENT

I. Plaintiffs Cannot Recover On Loans For Which They Failed To Provide Timely Notice Of A Breach.

The repurchase protocol requires loan-by-loan notice of alleged material loan-related breaches. *See* OB18-22.[1] It is undisputed, moreover, that Plaintiffs' timely breach notices covered only 1,351 specifically identified loans out of the more than 40,000 loans across the four Trusts. Plaintiffs nonetheless assert they are entitled to proceed to trial on every loan in the combined loan pool. Their arguments for doing so are flawed and offer no basis to excuse them from the repurchase protocol's loan-specific notice requirement.

A. The Repurchase Protocol Requires Timely, Loan-Specific Breach Notices.

The repurchase protocol requires identification of individual allegedly nonconforming loans. Plaintiffs claim, however, that a repurchase demand "provides sufficient notice for *all* breaching loans in an RMBS trust" as long as the notice "identifies a large number of breaching loans and requests repurchase of all breaching loans." RB15. That supposed exception has no grounding in the

[1] "OB" refers to DLJ's opening brief, and "RB" refers to Plaintiffs-Respondents' brief.

parties' contracts, and the trial court here wisely did not embrace it, instead recognizing the "requirement of loan by loan notice." A17-18.

Plaintiffs' arguments to the contrary falter on the plain terms of the repurchase protocol, every step of which requires identifying specific breaches for particular loans. Notice is linked to "*a* breach of *a* representation or warranty," and provides an opportunity to cure "such breach." A949 (emphasis added). Plaintiffs fixate on an isolated phrase in the repurchase protocol that they claim permits aggregated notice—that "*any* mortgage loan" can be identified as breaching. RB14. But parsing the repurchase protocol in that way is inconsistent with New York law, which requires contracts to be "read as a whole, and every part … interpreted with reference to the whole; and if possible … so interpreted as to give effect to its general purpose." *Westmoreland Coal v. Entech, Inc.*, 100 N.Y.2d 352, 358 (2003).

The repurchase protocol sets forth the "sole remedy" for breach of any loan-related representation and warranty. This remedy is triggered only if the alleged breach "materially and adversely affects the interests of the Certificateholders in any Mortgage Loan." A949. If so, DLJ is obligated to cure "such breach in all material respects, and if such breach is not so cured," to remove "such Mortgage Loan" and replace it with a substitute, or repurchase "the affected Mortgage Loan." A949. And the damages DLJ must pay to repurchase any materially breaching

loan are themselves predicated on a loan-specific Repurchase Price. For these reasons, "the repurchase mechanism established by the parties is targeted to a specific loan, and not to a group or category of loans." *MASTR Adjustable Rate Mortgs. Tr. 2006-OA2 v. UBS Real Estate Sec. Inc.* (*MARM I*), No. 12-CV-7322 (PKC), 2015 WL 764665, at *11 (S.D.N.Y. Jan. 9, 2015). Absent notice that identifies particular breaches in specified loans, there is no way to assess whether a breach had a material and adverse effect or for DLJ to comply with its remedial obligations.[2]

That many loans in the Trusts have been liquidated does not change the analysis. Plaintiffs correctly concede that liquidated loans "no longer exist," RB17, but that does not excuse Plaintiffs from the loan-specific notice requirement. If notice had been provided promptly for the allegedly breaching loans, DLJ would have been obligated to cure, substitute, or repurchase while those loans still existed. And the Repurchase Price specified in the PSAs itself cannot be calculated without reference to particular identified loans.

Thus, a blunderbuss demand for the repurchase of "each of the Defective Mortgage Loans in the Trusts" is not the type of notice contemplated under the

[2] Plaintiffs emphasize that some of the representations and warranties at issue relate to "*all Loans* in the Trusts." RB14-15. But that does not respond to the repurchase protocol's requirement that a breach have a material adverse effect on a mortgage loan, and it does not alter the loan-specific nature of the cure-or-repurchase remedy.

PSAs. Such a demand does no more than restate DLJ's general contractual obligation and is no substitute for the loan-specific notice that the repurchase protocol requires. Nor can allegations concerning "pervasive" breaches change the plain meaning of the repurchase protocol. There is no "carve-out from the Sole Remedy Provision" merely because "a certain threshold number of loan breaches are alleged." *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 585 (2017); *see also, e.g.*, *MASTR Adjustable Rate Mortgs. Tr. 2006-OA2 v. UBS Real Estate Sec. Inc.* (*MARM II*), No. 12-CV-7322 (PKC), 2015 WL 797972, at *4 (S.D.N.Y. Feb. 25, 2015) ("The parties could have, but did not, bargain for an obligation that if the aggregate number of loans in breach exceeded a certain threshold, a duty to reexamine all loans would be triggered. Instead, the specified remedies are the 'sole remedies.'").

Plaintiffs' contrary authority largely arises from the distinct procedural context of rulings on motions to dismiss.[3] Although some courts have accepted

[3] *See Deutsche Bank Nat'l Tr. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 97 F. Supp. 3d 548, 552 (S.D.N.Y. 2015); *SACO I Tr. 2006-5 v. EMC Mortg. LLC*, No. 651820/2012, 2014 N.Y. Misc. LEXIS 2494, at *16-17 (Sup. Ct. N.Y. Cty. May 29, 2014); *Nomura Asset Acceptance Corp. Alt. Loan Tr. v. Nomura Credit & Capital, Inc.*, No. 653390/2012, 2014 WL 2890341, at *15 (Sup. Ct. N.Y. Cty. June 26, 2014), *aff'd as modified on other grounds*, 167 A.D.3d 432 (1st Dep't 2018). Plaintiffs' other citations either fail to apprehend the loan-specific nature of the repurchase protocol, *see Deutsche Bank Nat'l Tr. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 289 F. Supp. 3d 484, 505-06 (S.D.N.Y. 2018), or rely on distinct contractual remedial provisions not at issue here, *see Assured Guar. Mun. Corp. v. Flagstar Bank, FSB*, No. 11-CV-2375 (JSR), 2011 WL 5335566, at *3, 7 (S.D.N.Y. Oct. 31, 2011) (in contrast to PSA with a "sole remedies" provision, agreement permitted insurer of securities to

"theories of generalized wrongdoing" at the pleading stage, they have rightly "affirmed that more specific proof will be needed at summary judgment or trial," when plaintiffs may no longer "ride the coattails" of pleading-stage inferences. *BlackRock Allocation Target Shares v. Wells Fargo Bank, Nat'l Ass'n*, No. 14-CV-09371 (KPF) (SN), 2017 WL 953550, at *4 (S.D.N.Y. Mar. 10, 2017).[4] This Court has itself emphasized the distinction between the notice required for pleading purposes and the contractual notice required to trigger the repurchase obligation. *U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc.*, 147 A.D.3d 79, 88 (1st Dep't 2016) ("[A] pleading notice and a breach notice are not natural substitutes for one another.").

U.S. Bank has advanced a diametrically inconsistent position when it has been the defendant in RMBS cases. *See* OB19-20. In that posture, it has contended that similar repurchase protocols require loan-by-loan notice or discovery. U.S. Bank attempts to minimize this inconsistency by pointing to differences between trustees' and sponsors' duties with respect to RMBS

"'take whatever action at law or in equity that may appear necessary or desirable in its judgment to enforce performance'").

[4] *See also, e.g.*, *Royal Park Inv. SA/NV v. HSBC Bank USA Nat'l Ass'n*, No. 14-CV-08175 (LGS) (SN), 2017 WL 945099, at *4 (S.D.N.Y. Mar. 10, 2017); *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, No. 651612/2010, 2015 WL 6471943, at *12 (Sup. Ct. N.Y. Cty. Oct. 22, 2015), *aff'd as modified*, 151 A.D.3d 83 (1st Dep't 2017), *aff'd*, 31 N.Y.3d 569 (2018); *Royal Park Inv. SA/NV v. HSBC Bank USA, Nat'l Ass'n*, 109 F. Supp. 3d 587, 603 (S.D.N.Y. 2015).

securitizations. RB17-18. But any such difference is irrelevant to the notice issue here, which turns on the words in the repurchase protocol. On that point, U.S. Bank has been crystal clear: These remedial provisions require notice or discovery "on a loan-by-loan level because such information is essential to 'enforce' the … obligations to cure, repurchase, or substitute a breaching loan." A2316. Accordingly, U.S. Bank has maintained, "when a trustee seeks a repurchase" from an RMBS 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). Those propositions had nothing to do with the nature of the trustee's duties, and everything to do with the contractual mechanism at issue. That the shoe is now on the other foot does not change what the repurchase protocol requires.[5]

[5] Plaintiffs incorrectly seek to distinguish the Second Circuit's decision in *Retirement Board of the Policemen's Annuity & Benefit Fund of Chicago v. Bank of New York Mellon*, 775 F.3d 154, 162 (2d Cir. 2014), as confined to the issue of class standing. The relevant discussion, however, is about the same point in dispute here: whether a RMBS repurchase protocol requires loan-by-loan notice and proof of breaches. The Second Circuit explained that it does: "[W]hether Countrywide [the RMBS seller] breached its obligations under the governing agreements (thus triggering [the trustee's] duty to act) requires examining its conduct with respect to each trust. Whether it was obligated to repurchase a given loan requires examining which loans, in which trusts, were in breach of the representations and warranties. And whether a loan's documentation was deficient requires looking at individual loans and documents." *Id.*

B. The Relation-Back Doctrine Does Not Authorize Plaintiffs To Proceed To Trial On Every Securitized Loan.

On Plaintiffs' logic, as long as they sent a timely notice identifying a single breaching loan, the doctrine of relation back permits them to proceed on any of the 40,000-plus loans included in any of the four separate securitizations at issue.[6] That contention stretches the law of relation back beyond its breaking point and would shrink to insignificance the Court of Appeals' landmark holding that compliance with the repurchase protocol is a "procedural prerequisite to suit." *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 25 N.Y.3d 581, 598 (2015). Consistent with the terms of the repurchase protocol, the relevant unit for considering relation back should be the individual allegedly breaching loan.

No case supports applying relation back on facts like these. Plaintiffs again overlook the inherently loan-specific nature of their claims. As then-Chancellor, now Chief Justice Strine explained, "each alleged breach of contract due to a breach of representation made by [an RMBS seller] 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." *Cent. Mortg. Co. v. Morgan Stanley*

[6] This tactic is not hypothetical. RMBS trustees have adopted precisely this stratagem, sending timely breach notices identifying just one loan and then attempting to use that loan as an anchor to support untimely claims based on hundreds of other alleged nonconforming loans. *See HSBC Bank USA v Merrill Lynch Mortg. Lending, Inc.*, No. 652793/2016, 2018 WL 2722870, at *11 (Sup. Ct. N.Y. Cty. June 6, 2018) (timely post-suit breach notices "mentioned only one loan," and were followed by an untimely notice that identified 973 loans).

Mortg. Capital Holdings LLC, No. 5140-CS, 2012 WL 3201139, at *18 (Del. Ch. Aug. 7, 2012). Thus, "evaluating the accuracy of [an RMBS sponsor's] representations as to Loan A is an independent inquiry from that evaluation as to Loan B." *Id.* To allow a single breach notice to preserve claims for every loan in the deal "would end run this clear contractual loan-by-loan requirement and [the] statute of limitations." *Id.* at *3.[7]

Plaintiffs correctly note that relation back under CPLR 203(f) requires the new claims to arise from the same transactions and occurrences described in the original pleading, but they err by treating the securitization of the loans as the relevant unit. RB22. Plaintiffs' claims here do not attack the fact that loans were deposited into trusts, but rather take issue with whether those loans complied with DLJ's representations and warranties. The answer to that question depends on individual characteristics of each loan.

In *Greater New York Health Care Facilities v. DeBuono*, the Court of Appeals held that the relation-back inquiry turns on whether the original pleading

[7] Plaintiffs seek to distinguish *Central Mortgage* because it involved Delaware law, RB23-24 n.7 but the decision there noted that the Delaware standard is similar to the federal standard, *see* 2012 WL 3201139, at *18, which in turn closely resembles CPLR 203(f), *see Fleming v. Verizon N.Y., Inc.*, 419 F. Supp. 2d 455, 467 n.5 (S.D.N.Y. 2005). And even if the complaint in *Central Mortgage* disclaimed an intention to bring certain additional claims, that disclaimer covered only one category of loans that the plaintiff belatedly asserted. *See* 2012 WL 3201139, at *12, *19 (disclaimer applied to "Private Loans," but plaintiff also sought to assert additional "Agency Loans"). The Chancery Court thus considered and rejected the precise theory Plaintiffs assert here. *See id.* at *20.

gave notice of "particularized claims." 91 N.Y.2d 716, 721 (1998). The Court of Appeals refused to permit relation back in that case to add challenges from new nursing homes to applicable Medicaid reimbursement rates, where "[e]ach nursing home has an individualized reimbursement rate and the injury claimed varies from facility to facility and from year to year." *Id.*; *see* OB24-27. It is true, as Plaintiffs emphasize (RB23), that the Court of Appeals based its holding in part on the fact that the new claims were brought by proposed intervenors that were not parties to the original action. But the Court's reasoning was not confined to the new-party context. The key point is that the "individualized reimbursement rate" meant that the new "claims of injury" were "based on different, not identical transactions." 91 N.Y.2d at 721. The trial court's application of relation back here, which treats the four securitizations involving 40,000-plus distinct loans as the relevant "transaction," cannot be reconciled with that holding.

Plaintiffs' allusions to "systemic and trusts-wide disregard of the applicable underwriting standards" (RB23 n.6) also miss the mark. For the same reasons that "pervasive breach" allegations fail to provide loan-specific notice, *see supra* at 6, such allegations do not warrant treating every characteristic of every securitized loan as somehow forming part of the same "transaction."[8]

[8] Plaintiffs' analogy to a forest fire is inapt. The claims here are not based on tortious physical damage to an indistinguishable group of objects, but rather require individualized proof as to

Plaintiffs thus rely principally on this Court's decision in *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 133 A.D.3d 96 (1st Dep't 2015), as setting forth a rule that pre-suit notices as to "some" loans "entitle the Trustee to prove liability and damages as to *all* breaching loans in the Trusts," even loans that are first identified in an expert report filed years after the limitations period has expired. RB18-19. *Nomura*'s holding was far more circumscribed; it simply allowed such claims to survive a motion to dismiss. *Nomura*, 133 A.D.3d at 108. Although *Nomura*'s lone paragraph discussing relation back did not disclose the Court's rationale for treating the presence of "some timely claims" in that case as dispositive, it may have been relying on inferences unique to the pleadings stage. *See supra* at 6-7.[9] Thus, in *GreenPoint*, this Court emphasized the distinction between the "concept of relation back in a pleading context," which "concerns the adequacy of the notice given," and the "contractual requirement of a breach notice," which "triggers the defendant's right/obligation to cure a claimed default and avoid a lawsuit." 147 A.D.3d at 88.

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whether specified mortgage loans complied with contractual, loan-specific representations and warranties. Plaintiffs fare no better by invoking *Koch v. Acker, Merrall & Condit Co.*, 114 A.D.3d 596 (1st Dep't 2014), a case involving counterfeit wine bottles. The claim in *Koch* was for deceptive practices under the General Business Law, *see* 18 N.Y.3d 940, 941 (2012), not for breaches of the seller's contractual representations concerning individual characteristics of the bottles in question, and did not involve a pre-suit contractual notice requirement.

[9] *Nomura*'s relation-back holding also appeared to rely on the plaintiffs' allegations that the defendants independently discovered breaching loans. *See* 133 A.D.3d at 108. As the trial court decision here makes clear, generalized allegations of independent discovery are not sufficient to carry Plaintiffs' burden to prove independent discovery at trial.

To the extent that *Nomura* supports applying relation back to untimely noticed loans under a sole remedy provision, it conflicts with Court of Appeals precedent and should not be followed. There is no way to reconcile such an application of relation back with *DeBuono*'s holding: 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. Moreover, to apply *Nomura* here would undermine the Court of Appeals' approach to statutes of limitations, which favors "objective, reliable, predictable" rules. *ACE*, 25 N.Y.3d at 594.

This Court should disregard Plaintiffs' suggestion that *U.S. Bank National Ass'n v. DLJ Mortgage Capital, Inc.* (*ABSHE*), __ N.Y.3d __, 2019 WL 659355, at *3 (Feb. 19, 2019), supports the decision below. That holding revolved entirely around the application of CPLR 205(a).[10] Unless and until there is a properly refiled action under CPLR 205(a), "the inherent nature of a condition precedent to bringing suit is that it actually precedes the action." *GreenPoint*, 147 A.D.3d at 87. The relation-back rule urged here would turn the notion of a condition precedent

[10] Plaintiffs overlook authority that CPLR 205(a)'s reference to the termination of an "action" means what it says, and refers to the action as a whole rather than subsidiary claims within that action. *See* CPLR 304 ("An action is commenced by filing a summons and complaint or summons with notice…."); *Farnitano v. Gaydos*, 198 N.Y.S.2d 795, 797 (Sup. Ct. Suffolk Cty. 1960) (statutory predecessor to CPLR 205(a) does not apply when there is a prior action pending); *Graziano v. Pennell*, 371 F.2d 761, 764 (2d Cir. 1967) (same).

on its head by permitting after-the-fact notice for all but one of the allegedly breaching loans. If Plaintiffs' position were accepted, the contractual pre-suit notice requirement would become a meaningless formality, contravening *ACE*'s holding that the repurchase protocol operates as a "procedural prerequisite to suit." 25 N.Y.3d at 598.

At a minimum, the Court should hold that relation back is unavailable for loans in the HEMT 2006-1 Trust, with respect to which Plaintiffs failed to file *any* timely breach notices. *See* OB26 n.16. Plaintiffs contend (RB26 n.8) that pre-suit breach notices for *other* securitizations placed DLJ on notice that Plaintiffs intended to demand repurchase of loans in the 2006-1 Trust, which involved different loans and different agreements. Those other demands, even if sufficient to provide notice of potential claims, came too late to support relation back. *See ACE*, 25 N.Y.3d at 593 (repurchase claims must be dismissed when notice-and-cure period has not elapsed by the end of the six-year limitations period); *Bank of N.Y. Mellon v. WMC Mortg., LLC*, 151 A.D.3d 72, 79 (1st Dep't 2017) (same); *GreenPoint*, 147 A.D.3d at 86-87 ("The doctrine of relation back cannot render … otherwise untimely breach notices timely.").[11] Here, as in *GreenPoint*, Plaintiffs'

[11] Plaintiffs attempt to draw support from *ABSHE*, but that case did not involve relation back. In *ABSHE*, as noted, the Court of Appeals addressed the application of CPLR 205(a) to a refiled action in that case, while affirming the dismissal of the initial action for failure to comply with a repurchase protocol's notice requirements within the limitations period. *See* 2019 WL 659355,

argument "would simply eviscerate the condition precedent of serving a breach notice, as required by the contract, and defendant's right to effect a pre-action cure." 147 A.D.3d at 88. In any event, there is no basis to lump these distinct Trusts together and treat them as a single unit. *Cf. Policemen's Annuity*, 775 F.3d at 162 ("[W]hether [an RMBS defendant] breached its obligations under the governing agreements … requires examining its conduct with respect to each trust.").

II. The PSAs Require Loan-By-Loan Proof And Do Not Permit Sampling As A Substitute For That Proof.

A. The Sampling Issue Is Properly Before This Court.

In the proceedings below, DLJ sought a summary judgment ruling that Plaintiffs may not rely on sampling to prove liability and damages at trial. Viewing itself as bound by Justice Schweitzer's 2013 interim ruling on sampling, the trial court held that sampling was permitted as law of the case. A33-34. Plaintiffs assert two procedural barriers to this Court's review of that ruling. Neither has merit.

First, Plaintiffs assert that DLJ's sampling arguments are barred by law of the case. RB26-27. But that doctrine does not affect the scope of an appellate

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at *5. This appeal does not present issues under CPLR 205(a) because DLJ does not seek dismissal of these actions (or any causes of action asserted in the complaint); instead, DLJ requests a ruling that Plaintiffs cannot proceed to trial on loans that were not identified in timely breach notices.

court's review. OB39-40; *see Martin v. City of Cohoes*, 37 N.Y.2d 162, 165 (1975); *Sprecher v. Thibodeau*, 148 A.D.3d 654, 655 (1st Dep't 2017). Plaintiffs offer no response to those cases. In any event, Justice Schweitzer's interim ruling by its terms was based solely on "plaintiffs' … correspondence" and did not consider DLJ's responsive submission. A120. The order was thus rendered before DLJ had a "'full and fair' opportunity to litigate the initial determination," *People v. Evans*, 94 N.Y.2d 499, 502 (2000), as is necessary for law of the case to apply.

Second, Plaintiffs maintain that because DLJ noticed but did not proceed with an appeal of the interim sampling order in 2013, DLJ has forever lost the right to seek appellate review of the sampling issue. RB28. That draconian sanction finds no support in the sole case Plaintiffs cite on waiver, *Pier 59 Studios, L.P. v. Chelsea Piers, L.P.*, 40 A.D.3d 363, 366 (1st Dep't 2007). *Pier 59* arose on an appeal from an order denying plaintiff's motion to renew its contempt motion following the denial of the underlying contempt motion. The Appellate Division dismissed the appeal in relevant part because the plaintiff could not pursue "an appeal *from a motion for reargument or renewal*" because it had noticed an appeal from the denial of the contempt motion that was never perfected. *Id.* (emphasis added); *see also Rubeo v. Nat'l Grange Mut. Ins. Co.*, 93 N.Y.2d 750, 755 (1999); *Rios v. Reichardt*, 172 A.D.2d 396, 397 (1st Dep't 1991). The situation here, by contrast, does not involve a motion to renew or reargue: DLJ appeals a summary

judgment ruling that came more than six years after Justice Schweitzer's interim, prospective determination. During that time, the law on sampling has developed: New York courts have clarified that repurchase protocols must be enforced according to their loan-specific terms, *see Nomura*, 30 N.Y.3d 572; *WMC*, 151 A.D.3d 72. Given the changes in the legal landscape and procedural posture since the prior appeal, the sampling arguments in this appeal do not present the "same issue" as that resolved in Justice Schweitzer's order. *Rubeo*, 93 N.Y.2d at 755.

Even if this Court concludes that the appellate waiver doctrine applies—and it should not—it should exercise its discretion to consider the sampling issue on its merits. *See, e.g.*, *Faricelli v. TSS Seedman's, Inc.*, 94 N.Y.2d 772, 774 (1999). As already explained, the Interim Order was entered before DLJ had an adequate opportunity to litigate the issue, and DLJ has continually reserved its rights to challenge the appropriateness of sampling at a later time. In addition, resolving the question on this appeal would promote judicial economy. The appropriateness of sampling to prove liability and damages under a materially identical RMBS repurchase protocol is pending before this Court, *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, No. 2019-26 (to be argued May 2, 2019). DLJ will be entitled to the benefit of any ruling in that case undermining the trial court's decision here approving sampling. *See Carmona v. Mathisson*, 92 A.D.3d 492, 492-93 (1st Dep't 2012) (law of the case inapplicable when "change of law" has

occurred). Thus, if this Court were to treat the sampling issue as waived, that would only prolong and complicate the trial court proceedings.

B. The PSAs Do Not Permit Sampling.

Much of Plaintiffs' response to DLJ's sampling argument is an exercise in misdirection. The issue is not whether sampling is an "established and scientifically sound method" in the abstract. RB30. In this appeal, the question is whether sampling is consistent with the loan-specific repurchase protocol. It is not. *See* OB32-39.

Plaintiffs first take issue with the "premise that the Repurchase Protocol requires loan-specific proof," RB30, but they develop no argument in support of that contention. As set forth above, *supra* at 4-5, every step of the repurchase protocol demands a loan-specific inquiry. Contrary to Plaintiffs' assertion, then, sampling does *not* "allow[] a factfinder to reliably determine liability and assess damages to a reasonable degree of certainty." RB30. "The problem is not what sampling *can* do; it is what sampling *cannot* do: it cannot tell the fact-finder *which* loans in the larger pool had material and adverse R&W breaches …. Nor can it establish the damages, if any, flowing from the … failure to put back any specific loan outside of the sample set." *Royal Park Inv. SA/NV v. Deutsche Bank Nat'l Tr. Co.*, No. 14-CV-4394 (AJN) (BCM), 2018 WL 4682220, at *12 (S.D.N.Y. Sept. 28, 2018). Indeed, Plaintiffs' own expert effectively conceded as much,

acknowledging that sampling did not lead him to "opine that any specific loan outside of the sampled population is in fact a breaching loan." A3259.

Although some trial courts have permitted RMBS repurchase claims to be proven through sampling, the recent trend has gone in the other direction. Several courts have recently noted the incompatibility between the loan-specific repurchase protocol and the sampling method of proof: The "product of [the] proposed sampling exercise" is "a probability that a loan is in breach," which does not prove whether the defendant had notice of a specific breach and whether that breach materially and adversely affected the loan's value. *Homeward Residential, Inc. v. Sand Canyon Corp.*, No. 12-CV-5067 (JFK), 2017 WL 5256760, at *8 (S.D.N.Y. Nov. 13, 2017).[12] Plaintiffs emphasize that several of these cases involved suits against trustees instead of sponsors or originators, but that is a distinction without a

[12] *Accord Royal Park*, 2018 WL 4682220, at *5-6 ("Where, as here, the sole remedy available to the Trustee under the express terms of the PSAs is inherently loan-specific, both liability and damages must be established 'loan by loan,' making sampling unhelpful."); *Royal Park Inv. SA/NV v. U.S. Bank Nat'l Ass'n*, No. 14-CV-2590 (VM) (RWL), 2018 WL 3350323, at *2 (S.D.N.Y. July 9, 2018) ("Sampling … cannot identify which specific loans were in breach (other than those in the sample itself), cannot determine what would have happened had the trustee attempted to seek repurchase of the loans, and cannot determine the damages associated with any specific loan."); *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) ("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 Allocation Target Shares*, 2017 WL 953550, at *5 ("Sampling may fail to capture whether the nature of the breach had a material and adverse effect at the time a repurchase obligation, if any, was triggered[.]"); *MARM I*, 2015 WL 764665, at *10 ("[T]he proposed statistical sampling does not adequately distinguish between breaches that are material and adverse as to a particular loan and those that are not.").

difference. The rationale underlying these decisions is that the terms of the repurchase protocol require loan-by-loan proof, regardless of the identity of the defendant.

By contrast, the cases on which Plaintiffs rely that have permitted proof by sampling are meaningfully distinguishable. *See* OB37-38. Most are from prior to 2015, and therefore refute any notion that the recent trend is in Plaintiffs' favor. In several such cases, the repurchase protocol was not the "sole remedy" for breach of a representation or warranty, there were arguments that the repurchase protocol was voidable, or the sole remedy question remained open. *See, e.g.*, *Deutsche Bank*, 289 F. Supp. 3d at 501; *Syncora Guarantee Inc. v. EMC Mortg. Corp.*, No. 09-CV-3106 (PAC), 2011 WL 1135007, at *5-7 (S.D.N.Y. Mar. 25, 2011); *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 39 Misc. 3d 1220(A), 2013 WL 1845588, at *10 (Sup. Ct. N.Y. Cty. Apr. 29, 2013). Others were simply wrongly decided in that they failed to analyze the contractual language. *See* OB38 (discussing *Assured Guaranty Mun. Corp. v. DB Structured Prods., Inc.*, 44 Misc. 3d 1206(A), 2014 WL 3282310, at *6 (Sup. Ct. N.Y. Cty. 2014)). And the Second Circuit's *Policemen's Annuity* decision, far from endorsing sampling, emphatically confirmed that proof of liability in a RMBS repurchase action requires "examining which loans, in which trusts, were in breach of the representations and warranties." 775 F.3d at 162; *see also supra* at 8 n.5.

Instead of addressing the plain language of the repurchase protocol, Plaintiffs prefer to focus on the concern that precluding sampling would be "expensive, time-consuming, and wasteful." RB32-34. Given that Plaintiffs seek damages in excess of $1 billion, their complaints about the expenses of proving these cases ring hollow. In any event, those objections are irrelevant. Here, as in *Nomura*, "the agreements do not provide a carve-out from the [sole remedy] where a certain threshold number of loan breaches are alleged." 30 N.Y.3d at 585. It may be true that sampling would be a less costly method of proof from Plaintiffs' perspective, but that contention "misses the ultimate[] point: 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*, 2018 WL 3120971, at *2. If Plaintiffs thought loan-by-loan proof of liability and damages would be impracticable, the time to address that concern was when the parties were bargaining over the terms of the PSAs. *See, e.g.*, *MARM I*, 2015 WL 764665, at *11. Plaintiffs cannot rely on New York courts to renegotiate the PSAs' terms on their behalf after the fact.

Moreover, Plaintiffs' argument that reunderwriting on a loan-by-loan basis is "commercially unrealistic, and unworkable in practice" fails even on its own terms: Plaintiffs point to several cases against RMBS originators or sponsors, as well as numerous suits against RMBS trustees like themselves, in which courts

precluded proof of liability and damages by sampling that nonetheless proceeded to trial. RB30-34. Far from being "unworkable," loan-specific proof has been adduced on many previous occasions—including by U.S. Bank itself, *see U.S. Bank Ass'n v. DLJ Mortg. Capital Inc.* (*HEAT 2007-1*), No. 650369/2013, 2018 WL 6809404, at *4-7 (Sup. Ct. N.Y. Cty. Dec. 27, 2018) (proceeding to trial on a loan-by-loan basis without complaining of unworkability), *appeal pending*, No. 2019-219 (1st Dep't).

III. The Trial Court Should Not Have Interpreted "Material[] And Adverse[]" As A Matter Of Law.

Plaintiffs are not entitled to relief under the repurchase protocol unless they can show that a breach "materially and adversely affects the interest of the Certificateholders in any Mortgage Loans." The trial court held, as a matter of law, that this standard "requir[es] only a showing that the alleged breach of a warranty materially increased the risk of loss." A31. This contractual term should not have been interpreted as a matter of law.

Plaintiffs' arguments to the contrary primarily attack positions DLJ has not taken in this appeal. In particular, Plaintiffs insist the "material[] and adverse[]" standard does not require an actual default. RB35 (citing *MBIA Ins. v. Countrywide Home Loans, Inc.*, 105 A.D.3d. 412, 413 (1st Dep't 2013)). But DLJ's appeal does not challenge the trial court's ruling in that regard.

Instead, DLJ takes issue with the trial court's ruling to the extent it went further than this Court's decision in *MBIA* and expounded on the "material and adverse" standard as a matter of law. As with other ambiguous terms in RMBS contracts, "[t]he better course is to hold a trial to inquire into and develop the facts to clarify the relevant legal principles and their application." *MBIA Ins. Corp. v. Credit Suisse Sec. (USA) LLC*, 165 A.D.3d 108, 115 (1st Dep't 2018) (alteration in original).

Summary judgment is also unwarranted where, as here, "'[n]o time or effort of either the court or the litigants is spared by resort to it.'" OB42 (quoting *McMahon v. Pfister*, 49 A.D.2d 729, 730 (1st Dep't 1975)). Plaintiffs concede that the trial court's summary judgment ruling did not resolve whether specific alleged breaches in this case meet the "'material and adverse' standard" "*as a matter of fact*." RB37. Plaintiffs point to nothing that is to be gained by fleshing out the standard with dictionary definitions divorced from loan-specific proof.

Plaintiffs correctly note that the summary judgment record did not contain evidence regarding the meaning of "material and adverse." RB39 n.12. But they draw the wrong conclusion from that absence of evidence. It was Plaintiffs who sought summary judgment on the meaning of this term as a matter of law, and by failing to provide the trial court with "evidence adduced in discovery that definitively proves the parties' intended meaning of 'material and adverse,'" they

failed to meet their summary judgment burden. *MBIA Ins. Corp. v. Credit Suisse Sec. (USA) LLC,* 55 Misc. 3d 1204(A), 2017 WL 1201868, at *6 (Sup. Ct. N.Y. Cty. 2017*), aff'd as modified*, 165 A.D.3d 108.

Plaintiffs mistakenly present the trial court's summary judgment opinion in *HEAT 2007-1*, 2018 WL 6809404, as resolving the "material and adverse" question as a matter of law. RB36. The court there reiterated that "[a]s a general matter, the materiality of the breach of a contractual warranty creates a question for the trier of fact," and that courts "have indicated that it is a question best resolved at trial rather than on summary judgment." 2018 WL 6809404, at *11. Indeed, the court emphasized that "[t]he materiality of an R&W breach is loan-specific." *Id.* at *12 (ellipsis omitted).

The trial court here, by contrast, did more than that: It adopted an affirmative definition of the term on summary judgment. That determination was premature, as "ruling on the meaning of material and adverse [is] improper before trial." *MBIA*, 2017 WL 1201868, at *6.

IV. Interest Cannot Accrue On Liquidated Loans.

Because the repurchase protocol constitutes Plaintiffs' sole remedy for any breach of a representation or warranty in a loan, Plaintiffs are entitled to damages only to the extent provided for in the PSAs. The PSAs' definition of "Repurchase Price" includes "accrued unpaid interest" on a Mortgage Loan, but does not extend

to interest that "accrued" after a loan was liquidated and ceases to exist. *See* OB46-49.

Although Plaintiffs assert otherwise, RB40, DLJ does not dispute that "the remedy for all loans … is subject to the terms of the repurchase protocol." That is precisely DLJ's point—that damages must be calculated for any given nonconforming loan with reference to the principal balance and any "accrued unpaid interest" remaining on the loan in question, for performing and liquidated loans alike. The difference between the two categories of loans is that once a loan is liquidated, it stops accruing interest, and the borrower's obligation to make interest payments ceases. Accordingly, the Repurchase Price of a liquidated loan becomes fixed at liquidation. Applying the repurchase protocol to exclude interest that can no longer accrue is not a "windfall" to DLJ, *cf.* RB41; it merely follows the contractual terms.

Plaintiffs' reliance on *Nomura* is again misplaced. RB41-42; *see* OB47-48. Although Plaintiffs claim the "rationale underlying" *Nomura* is "that there is nothing in the Repurchase Protocol or the definition of Repurchase Price that limits the Trustee's remedies based on whether a loan has been liquidated," RB42, Plaintiffs point to nothing in *Nomura* supporting that "rationale." *Nomura* did not grant courts license to rewrite contracts at will; it instead addressed the situation where the "equitable remedy" of specific performance was impossible. 133

A.D.3d at 106. Here, by contrast, the dispute turns on the calculation of damages—a legal remedy. *Nomura* recognized that when equitable relief is not at issue, "contracting parties are generally free to limit their remedies." *Id.*

Plaintiffs also take issue with the proposition that "[o]nce a loan is liquidated and charged off from a trust, that loan ceases to exist." RB42. But Plaintiffs themselves take exactly that position elsewhere in their brief; in addressing the repurchase protocol, they contend that "most of the breaching loans at issue have defaulted and been liquidated from the Trusts, and therefore no longer exist." RB17. And the Prospectus Supplements for these securitizations reflect precisely that common-sense understanding, warning investors that "[d]efaulted mortgage loans may be liquidated, and liquidated mortgage loans will no longer be outstanding and generating interest." *E.g.*, A628.

Plaintiffs' references to deficiency judgments are a red herring. While in some states a lender may be able to obtain a deficiency judgment from a mortgagor following foreclosure, *see, e.g.*, RPAPL 1371, a deficiency judgment that is entered after a foreclosure is not the same as the underlying debt itself, which is extinguished at foreclosure.[13] And the PSAs calculate damages based on interest

[13] Plaintiffs acknowledge that not every state provides for deficiency judgments. *See* RB42. Indeed, the offering documents for the Trusts specifically identify "laws limiting or prohibiting deficiency judgments" as a potential limitation on the recoveries available through the foreclosure process. A818; *see also, e.g.*, A626 (noting that over 27% of the initial HEMT 2006-

that actually "accrued" on the Mortgage Loan at issue, not on an additional state-law remedy that might be available with respect to some (but not all) loans in the Trusts.

Nor does the potential availability of deficiency judgments show that mortgage loans should be treated as accruing interest even after they have been liquidated. A926. Plaintiffs rely on the PSAs' definition of a "Liquidated Mortgage Loan," but that definition does not mention deficiency judgments or suggest that liquidated loans have any ongoing existence, it instead defines the term in reference to a defaulted loan that "*was* liquidated." A903 (emphasis added); *see also* A917 (referring to "the date of such liquidation"). Nothing in that past-tense formulation suggests that the parties intended to endorse the fiction that liquidated loans continue to accrue interest. As noted, the Prospectus Supplements make clear that the opposite is true: Once a loan is liquidated, it no longer "generat[es] interest." A628.

CONCLUSION

The Court should reverse the trial court's summary judgment rulings as set forth above.

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1 Trust loans were secured by California mortgages); A818 (noting that California law limits deficiency judgments).

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