**SUPREME COURT OF THE STATE OF NEW YORK**
**APPELLATE DIVISION, FIRST DEPARTMENT**

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| HOME EQUITY MORTGAGE TRUST SERIES 2006-1, HOME EQUITY MORTGAGE TRUST SERIES 2006-3, and HOME EQUITY TRUST SERIES 2006-4, solely in its capacity as Trustee,<br><br>Plaintiffs-Respondents,<br><br>-against-<br><br>DLJ MORTGAGE CAPITAL, INC.,<br><br>Defendant-Appellant,<br><br>-and-<br><br>SELECT PORTFOLIO SERVICING, INC.,<br><br>Defendant. | Appeal Nos. 2019-619, 2019-620<br><br>N.Y. Sup. Ct. Index Nos. 156016/2012, 653787/2012 |

# MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT-APPELLANT'S MOTION FOR REARGUMENT AND LEAVE TO APPEAL TO THE COURT OF APPEALS

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Plaintiffs-Respondents Home Equity Mortgage Trust 2006-1, Home Equity Mortgage Trust 2006-3, Home Equity Mortgage Trust 2006-4, and Home Equity Mortgage Trust 2006-5 (the "Trusts"), through U.S. Bank National Association, solely in its capacity as Trustee (the "Trustee"), respectfully submit this memorandum of law in opposition to the motion by Defendant-Appellant DLJ Mortgage Capital, Inc. ("DLJ") that seeks reargument or leave to appeal the Decision and Order of this Court, dated September 17, 2019, *Home Equity Mortgage Trust Series 2006-1 v. DLJ Mortgage Capital, Inc.*, 175 A.D.3d 1175 (1st Dep't 2019) (Friedman, J.P., Richter, Tom, Oing & Moulton, JJ.) (the "Decision"), which unanimously affirmed the order of Supreme Court, New York County.

## INTRODUCTION

DLJ's motion for leave to appeal and reargument relies heavily on arguments repeatedly rejected by this Court and other New York courts and pays little attention to the rigorous standards applicable to its request for further interlocutory review. This Court neither overlooked nor misapprehended any relevant precedent or fact in its unanimous, well-reasoned, and correct Decision. Nor does the Decision raise any novel question of law, implicate any issue of public importance, or conflict with any decision of the Court of Appeals, this

Court, or another Department of the Appellate Division that could possibly warrant disrupting the imminent trial in this long-running case.

DLJ strains to argue otherwise in pressing relation-back arguments that nearly every Justice of this Court has already rejected, seeking further merits review of a sampling issue that DLJ long ago abandoned its opportunity to challenge, and attempting to convert a standard disagreement over contract interpretation (as to the term "accrued unpaid interest") into a supposed issue of statewide importance. It is time for trial to commence and this case to proceed to final judgment. The motion should be denied.

## COUNTERSTATEMENT

### A. The Securitizations

The four residential mortgage backed securities ("RMBS") at issue in this appeal were created when DLJ and its affiliates deposited more than 36,000 residential mortgage loans into the four Trusts. A144, A225. As sponsor, DLJ orchestrated the securitization process: it aggregated the loans by acquiring them from numerous sellers and/or originators, including originators that it owned and controlled; it created the Trusts, including by diligencing the loans, and deposited them into the Trusts pursuant to four Pooling and Servicing Agreements ("PSAs") (A144, A218); it marketed and sold certificates for the Trusts to investors (the "Certificateholders"); and it made numerous contractual representations and

warranties ("R&Ws") to the Trustee. These R&Ws concerned the loans' qualities, characteristics, and the processes by which they were scrutinized before being fed into the Trusts. A949. To give force and effect to its R&Ws, DLJ agreed that, upon "discover[ing]" or receiving "notice" of a material breach of the R&Ws, DLJ would cure the breach within 120 days or repurchase the loan for the "Repurchase Price." A949. The PSAs define the Repurchase Price as "100% of the unpaid principal balance of the Mortgage Loan" plus "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." A926.

**B. The Repurchase Demands**

In November 2011, certain Certificateholders notified DLJ that an investigation of samples of the loans had revealed that DLJ "placed defective loans into the Trusts on a massive scale" and specifically identified 1,453 defective loans. A329; *see* A48-50. This notice warned that "[t]he sample represents *just the tip of the iceberg*. [We are] confident that additional investigation, including a re-underwriting of the loan files themselves, will reveal *substantial additional evidence of breaches*." A330 (emphasis added). The notice also stated that the public record confirmed the Certificateholders' investigation, showing "*pervasive breaches of underwriting standards*," and referred to DLJ's "long-standing

knowledge of the pervasive breaches in the loan pools." A330, A334 (emphasis added). The notice "demand[ed] that DLJ Mortgage … promptly repurchase *each of the Defective Mortgage Loans in the Trusts*." A328 (emphasis added).

By letter to DLJ dated December 7, 2011, the Trustee incorporated the Certificateholders' November 2011 letter by reference and demanded that DLJ repurchase each defective loan. A1337-1392. The Trustee sent additional repurchase demands of specific breaching loans in 2012 and 2013. *See* A1410-1424, A1428-1435, A1437-1439, A1441-1444.

At least some of the Trustee's repurchase demands were made more than 120 days before the expiration of the limitations period for each Trust, including the 2006-1 Trust (*contra* Mem. 7). As to that trust, the Trustee sent its first repurchase notice on December 7, 2011 (A1337-1392)—about 100 days prior to the expiration of the *untolled* six-year statute of limitations for the 2006-1 Trust on February 28, 2012. On February 22, 2012, the parties *agreed to toll* that limitations period for more than six months, until September 1, 2012. A1394-1408. The Trustee then timely commenced the 2006-1 Trust proceeding on August 31, 2012 (A137-42), by which time more than *260 days* had passed since the Trustee's December 7, 2011 repurchase notice, far more than the 120 days required under the parties' contract.

### C. The Prior Proceedings

Because DLJ refused to comply with its contractual obligations to cure or repurchase the breaching loans, the Trustee timely commenced these two coordinated actions by summons filed in 2012 (A137-42, A218-23), and complaints filed in 2013 (A143-90, A224-61). The complaints allege breach of contract through pervasive R&W violations affecting loans in the Trusts (A145-47, A170, A226-27, A246-48) and demand that DLJ honor its repurchase remedy for loans impacted by the breaches, or else pay equivalent damages (*e.g.*, A181).

In November 2013, during the early part of fact discovery, the IAS Court (Schweitzer, J.S.C.) approved the Trustee's request, over DLJ's opposition, to "use a statistical sampling to prove liability and damages on all of [its] claims" because it would "streamline the trial, promote judicial economy, and conserve the resources of the parties and the court." A120. DLJ noticed an appeal of this order, *see* N.Y. Cnty. Index No. 156016/12, Dkt. 241, but then failed either to withdraw or perfect it. Over the next four years and following several meets and confers, the parties implemented the sampling order, with the Trustee drawing a valid and representative sample of 1,600 loans from across the four Trusts (*see* A2745, A2749). The Trustee's reunderwriting expert subsequently reviewed these sample loans and concluded that 783 were materially affected by one or more R&W breaches (A2909, A3002-03, A3445-46), and the Trustee's damages expert then

statistically extrapolated this defect rate from the sample population to the Trusts as a whole (A2952-53, A2963-64).

When discovery closed, the parties filed cross-motions for partial summary judgment. In January 2019, the IAS Court (Scarpulla, J.S.C.) resolved those motions, rendering three rulings relevant here. *First*, the IAS Court denied DLJ's request to limit its liability to only the loans specifically identified in the Trustee's pre-suit notices, ruling that the "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." A19. *Second*, the IAS Court denied DLJ's request to preclude the Trustee from using statistical sampling to prove liability and damages, ruling that Justice Schweitzer's 2013 order permitting the use of sampling was binding law of the case. A33-34. *Third*, the IAS Court denied DLJ's motion for summary judgment that the repurchase protocol requirement that "accrued unpaid interest" be paid on any repurchased loans did not apply to liquidated loans, instead ruling that all loans, liquidated or not, are subject to the repurchase protocol. A39-40.

### D. This Court's Decision

On September 17, 2019, this Court unanimously affirmed the IAS Court's rulings. *First*, this Court held that the Trustee's pre-suit letters "put DLJ on notice that the breaches plaintiffs were investigating might uncover additional defective loans for which claims would be made," and that "plaintiffs' timely complaints [therefore] may be amended to add [such additional defective loans], as they relate back to the original complaints." Op. 2 (citing *Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc.*, 133 A.D.3d 96, 108 (1st Dep't 2015), *aff'd as mod* 30 N.Y.3d 572 (2017); *Koch v Acker, Merrall & Condit Co.*, 114 A.D.3d 596, 597 (1st Dep't 2014)).[1]

*Second*, this Court affirmed the IAS Court's approval of the Trustee's use of statistical sampling to prove liability and damages. This Court stated that, "[i]n light of DLJ's failure to pursue an appeal from the court's November 18, 2013 order, and given the extensive discovery already taken place on this issue, we find no reason in this case to disturb the court's decision to permit the use of statistical sampling to prove liability and damages." Op. 3-4.

*Third*, this Court held that the IAS Court "correctly concluded that the repurchase price, as defined in the PSAs, applies to liquidated and non liquidated

[1] Contrary to DLJ's assertion (Mem. 11), this Court did not decide whether the Trustee's notices were timely as to the 2006-1 Trust because it resolved timeliness as to that trust on the alternate ground of discovery. Op. 48.

loans, and thus, includes accrued interest on loans after they have been liquidated." Op. 5-6 (citing *Nomura*, 133 A.D.3d at 107).

**REASONS FOR DENYING REARGUMENT AND LEAVE TO APPEAL**

Leave to appeal to the Court of Appeals is appropriate only where a case presents "issues [that] are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." 22 N.Y.C.R.R. § 500.22(b)(4).

A motion for reargument must identify "matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." CPLR 2221(d)(2). Such a motion "shall not include any matters of fact not offered on the prior motion." *Id.* "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." *Setters v. AI Props. & Devs. (USA) Corp.*, 139 A.D.3d 492, 492 (1st Dep't 2016) (quoting *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dep't 1992)).

DLJ falls far short of identifying any novel issue, any issue of public importance, any conflict among New York courts, or any fact or law that this Court overlooked or misapprehended. This Court's unanimous five-Justice decision does not warrant reargument or further review. DLJ's motion should be denied.

## I. THE RELATION-BACK ISSUE DOES NOT WARRANT REVIEW BY THE COURT OF APPEALS

DLJ's request (Mem. 13) for leave to appeal the Decision's "application of the relation-back doctrine" disregards that over the past four years—including in two other cases within the past two months alone—fully *sixteen* Justices of this Court have joined decisions squarely holding that claims based on post-suit notices relate back to timely claims based on pre-suit notices in the RMBS context. *See, e.g.*, *U.S. Bank N.A. v. DLJ Mortg. Capital, Inc.*, ___ A.D.3d ___, 2019 WL 5073847, *1 (1st Dep't Oct. 10, 2019) (Manzanet-Daniels, J.P., Kern, Oing & Singh, JJ.); Op. 47 (Friedman, J.P., Richter, Tom, Oing & Moulton, JJ.); *HSBC Bank USA v. Merrill Lynch Mortg. Lending, Inc.*, 175 A.D.3d 1149, 1150 (1st Dep't 2019) (Acosta, P.J., Richter, Kapnick, Kahn & Kern, JJ.); *Nomura*, 133 A.D.3d at 108 (Sweeny, J., joined by Mazzarelli, J.P., Acosta & Kapnick, JJ.); *see also U.S. Bank N.A. v. GreenPoint Mortg. Funding, Inc.*, 147 A.D.3d 79, 88 (1st Dep't 2016) (Gische, J., joined by Renwick, Saxe & Richter, JJ.) (reaffirming relation-back doctrine while distinguishing *Nomura* on facts). DLJ does not—and cannot—identify a single conflicting decision from the Court of Appeals or any other Department of the Appellate Division that could support leave to appeal on this issue.

DLJ wrongly criticizes (Mem. 16-17) this Court's decision in *Nomura* for purportedly having failed to "offer[] [an] explanation for why the presence of

'some timely claims' might excuse a plaintiff from all further compliance with a contractual precondition to invoking the repurchase remedy." (Emphasis omitted.) This Court, however, was clear in *Nomura* that the relation-back doctrine applied both because the plaintiffs' timely notices "put defendant on notice that the certificateholders whom plaintiffs … represented were investigating the mortgage loans and might uncover additional defective loans for which claims would be made," *and* because the notices "allege[d] that defendant already knew, based on its own due diligence, that certain loans in the trusts at issue breached its representations and warranties." 133 A.D.3d at 108. DLJ does not—and cannot—dispute that the Trustee's pre-suit notices in this case provide exactly the same type of warnings and notice as in *Nomura*. *See, e.g.*, A330 ("The sample represents just the tip of the iceberg. … [A]dditional investigation, including a re-underwriting of the loan files themselves, will reveal substantial additional evidence of breaches."); *see supra*, at 3-4.

DLJ fares no better in questioning (Mem. 17) this Court's reliance—both in *Nomura* and the Decision—on *Koch v. Acker, Merrall & Condit Company*, 114 A.D.3d 596 (1st Dep't 2014). In *Koch*, the plaintiff gave the defendant timely notice that the defendant had sold him "at least" five bottles of counterfeit wine and warned that his investigation was continuing. *Id.* at 597. This Court held that the plaintiff's later assertion of claims regarding *211* bottles of counterfeit wine

related back to the initial complaint, which "gave defendant notice of the transactions or series of transactions to be proved" by plaintiff's later notices. *Id.* So too in this case: the Trustee's original complaints were based on its provision of timely pre-suit notice that DLJ had securitized some defective loans and its warnings to DLJ that the Trustee's investigation was continuing. A328-30.

DLJ's attempt (Mem. 17-18) to manufacture a conflict with this Court's decision in *GreenPoint*, 147 A.D.3d 79, is also baseless. *GreenPoint* reaffirmed the relation-back principles set forth in *Nomura* and upheld the dismissal of a repurchase claim based on notice only because, unlike here (*see supra*, at 3), the plaintiffs had *not* provided timely pre-suit notices of any defective loans. *See* 147 A.D.3d at 87. *GreenPoint* also observed that the pre-suit notices in *Nomura* "put the defendant on notice that … plaintiffs … were investigating the mortgage loans and might uncover additional defective loans for which claims would be made." *Id.* at 88. As shown, the Trustee's pre-suit notices here contain almost precisely the same language. *E.g.*, A330

DLJ also rehashes (Mem. 20-21) its arguments about *Greater New York Health Care Facilities Association v. DeBuono*, 91 N.Y.2d 716 (1988), without accounting for the Trustee's prior explanation (Resp. Br. 23) that the Court of Appeals in that case merely declined relation back as to a third-party intervenors' proposed claims because the defendants had no notice of the proposed intervenors'

claims. 91 N.Y.2d at 721. Here, by contrast, all claims were based on notices that came from the same plaintiff—the Trustee—and provided highly specific warning that claims based on additional breaching loans may follow. *See, e.g., Giambrone v. Kings Harbor Multicare Ctr.*, 104 A.D.3d 546, 547 (1st Dep't 2013) (holding that *DeBuono* permits relation back if defendant has "notice of the proposed specific claim").[2]

Nor is DLJ correct (Mem. 15-16) that the Decision conflicts with decisions of other Departments that hold relation-back inapplicable where it is "based upon events that occurred after the filing of the initial claim." *Johnson v. State of New York*, 125 A.D.3d 1073, 1074 (3d Dep't 2015). All of the Trustee's notices—whether pre-suit or post-suit—concern DLJ's breaches of contractual R&Ws, which indisputably accrued on the closing date of each RMBS trust. *See, e.g.*, *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 25 N.Y.3d 581, 591 (2015); *see also Nomura Asset Acceptance Corp. Alternative Loan Trust v. Nomura Credit &*

[2] DLJ also rehashes its arguments regarding the Delaware Chancery Court decision in *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, Civ. No. 5140-CS, 2012 WL 3201139 (Del. Ch. Aug. 7, 2012). That trial-level, out-of-state decision provides no basis for further review. It is also inapposite because, as the Trustee has explained (Resp. Br. 23 n.7), the plaintiff there expressly disclaimed that it would bring additional claims, 2012 WL 3201139, at *19-20, whereas the Trustee here all but promised that more material breaches would be uncovered (A330).

*Capital, Inc.*, 139 A.D.3d 519, 520 (1st Dep't 2016). Those closing dates occurred *years* before the Trustee filed its complaints. A218.

The Court of Appeals has already rejected DLJ's related argument (Mem. 16) that "[a]t the time [the Trustee] filed [its] original complaints, [it] could not have properly included claims for the untimely noticed loans, because [the Trustee] had not yet satisfied a contractual precondition to asserting such claims." In *U.S. Bank National Association v. DLJ Mortgage Capital, Inc.* ("*ABSHE*"), 33 N.Y.3d 72 (2019), the plaintiff timely provided the secondary "backstop" defendant with pre-suit notice of breaching loans and then timely filed a complaint, but did not serve contractually-required notice on the primary defendant until after the statute of limitations expired. *Id.* at 82. The Court of Appeals held there that because breach notices are merely "a procedural prerequisite" to suit, not a substantive element of the cause of action, the plaintiff could invoke CPLR 205(a) to preserve a timely contract claim by providing notice after expiration of the limitations period. *Id.* at 80 (citing *ACE Secs.*, 25 N.Y.3d 581). If the *ABSHE* plaintiff could invoke CPLR 205(a) to preserve a timely contract claim by providing post-suit notices after expiration of the statute of limitations, it follows that the Trustee may also pursue claims based on post-suit notices in this action through the doctrine of relation back. *See Nomura*, 133 A.D.3d at 108.

## II. THE SAMPLING ISSUE DOES NOT WARRANT REARGUMENT OR REVIEW BY THE COURT OF APPEALS

DLJ fails (Mem. 23-25) to identify any facts or law that this Court overlooked or misapprehended in affirming the IAS's Court's ruling that DLJ was procedurally barred from objecting to the use of statistical sampling. *First*, DLJ alters its position—and misstates the record—by mischaracterizing (Mem. 24) Justice Schweitzer's 2013 order permitting sampling as a "preliminary, advisory ruling." *See* App. Br. 14, 16 (correctly stating that order was "interim"); *see also* A33. *Second*, DLJ's continued reliance (Mem. 24) on the Trustee's 2018 cross-motion on sampling ignores that the Trustee's motion sought approval of sampling *as law of the case* given Justice Schweitzer's 2013 Order, and so sought merely to confirm that binding ruling. *See, e.g.*, Index No. 156016/2012, Dkt. 1338, at 29. Nor, *third*, is DLJ correct that it could have participated in four years of sampling-related discovery, yet somehow preserved its right to object to the 2013 decision. Both the IAS Court and this Court recognized that DLJ preserved its right to object to the specific sample that Plaintiffs have drawn (*see* A34; Op. 49), but, as this Court correctly held, DLJ is procedurally barred from objecting to sampling in general (*see* Op. 48-49).

DLJ also identifies (Mem. 23-27) no basis for granting leave to appeal the sampling issue. Not only does this Court's procedural, case-specific holding present an insurmountable hurdle to further merits review of this issue, but the

Court of Appeals' intervention is simply not necessary. Contrary to DLJ's assertion (Mem. 26) that "[c]ourts are openly divided on this question," as the Trustee already explained (Resp. Br. 29-30 & n.9), every New York *state* court to have considered this question—including this Court in its recent decision in *Ambac Assurance Corporation v. Countrywide Home Loans, Inc.*, 175 A.D.3d 1156 (1st Dep't 2019) (Sweeny, J.P., Richter, Oing & Singh, JJ.)—has held that sampling is an acceptable method of proof in breach of warranty actions brought against an RMBS sponsor.[3] DLJ's reliance on decisions of *federal district courts* provides no basis for review by the Court of Appeals. *See* 22 N.Y.C.R.R. § 500.22(b)(4).

## III. THE ACCRUED-INTEREST ISSUE DOES NOT WARRANT REARGUMENT OR REVIEW BY THE COURT OF APPEALS

In seeking reargument of the accrued-interest issue, DLJ again just rehashes (Mem. 27-29) its failed appellate arguments without identifying any fact or law that this Court overlooked or misapprehended. DLJ repeats (Mem. 27-28) its unsupported assertion that it is "axiomatic" that liquidated loans no longer accrue interest," which it previously made to the IAS Court (*see* Index No. 156016/2012,

[3] *See, e.g.*, *MSMLT 2006-14SL v. Morgan Stanley Mortg. Capital Holdings, LLC*, No. 652763/2012, Doc. No. 241, at 49:15-51:8 (Sup. Ct. N.Y. Cnty. June 30, 2017); *SACO I Trust 2006-5 v. EMC Mortg. LLC*, No. 651820/2012, Doc. No. 564, at 16-17 (Sup. Ct. N.Y. Cnty. Dec. 2, 2015); *ACE Secs. Corp. v. DB Structured Prods., Inc.*, 41 Misc. 3d 1229(A), *2 n.3 (Sup. Ct. N.Y. Cnty. 2013); *ACE Secs. Corp. v. DB Structured Prods., Inc.*, 40 Misc. 3d 562, 570 (Sup. Ct. N.Y. Cnty. 2013); *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 30 Misc. 3d 1201(A), *4 (Sup. Ct. N.Y. Cnty. 2010); *MBIA Ins. Corp. v. Credit Suisse Sec. (USA) LLC*, No. 603751/2009, Doc. No. 655, at 1 (Sup. Ct. N.Y. Cnty. June 24, 2014).

Dkt. 1338, 30) and to this Court (*see* App. Br. 46) and which the Trustee refuted both times (*see* Index No. 156016/2012, Dkt. 1429, 31; Resp. Br. 42). Nothing suggests this Court overlooked or misapprehended DLJ's argument, rather than accepting the Trustee's compelling reasons for why the Repurchase Price should include interest calculated at the note rate on liquidated loans. *See* Resp. Br. 42 (explaining, for example, that interest *does* continue to accrue on liquidated loans for purposes of a deficiency judgment, which DLJ would be entitled to pursue in most states).

Nor does the Decision's citation to this Court's decision in *Nomura* provide any basis for reargument, as the parties addressed that decision in their appellate briefs (*see* App. Br. 47; Resp. Br. 41-42), with DLJ making the same strained effort to distinguish that case as it does now (*see* Mem. 29). This Court rightly rejected that argument in favor of the Trustee's arguments that DLJ's interpretation of "accrued interest" would provide DLJ with a windfall, incentivize DLJ to prolong resolution of the Trustee's claims as long as possible, and wrongly disregard the absence of any contractual language limiting the Trustee's remedies where a loan has been liquidated (*see* Resp. Br. 40-41).

Finally, DLJ's request (Mem. 29-30) for leave to appeal the accrued-interest issue is meritless. DLJ does not even attempt (*id.*) to identify conflicting New York decisions on this issue, and its suggestion (Mem. 29) that this Court's plain-

language interpretation of the term "accrued unpaid interest" "violates fundamental tenets of New York contract law" is simply wrong. Nor, contrary to DLJ's suggestion (Mem. 30), does this Court's recent decision in *Matter of Part 60 Put-Back Litigation*, 169 A.D.3d 217 (1st Dep't 2019), come close to touching on issues relevant here. It concerned whether a court could decline to apply a "contractual provision … limiting liability" (absent here) in light of allegations of gross negligence (also absent here). *Id.* at 223-225.

## CONCLUSION

The motion for reargument and leave to appeal should be denied.

Dated: October 25, 2019

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