SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

HOME EQUITY MORTGAGE TRUST SERIES 2006-1, HOME EQUITY MORTGAGE TRUST SERIES 2006-3, HOME EQUITY TRUST SERIES 2006-4, and HOME EQUITY MORTGAGE TRUST SERIES 2006-5, Plaintiffs-Respondents, -against- DLJ MORTGAGE CAPITAL, INC., Defendant-Appellant, -and- SELECT PORTFOLIO SERVICING, INC., Defendant.	Appeal Nos. 2019-619, 2019-620 N.Y. Sup. Ct. Index Nos. 156016/2012, 653787/2012

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT-APPELLANT'S MOTION FOR REARGUMENT AND LEAVE TO APPEAL TO THE COURT OF APPEALS

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules, and Regulations

Other Authorities

Defendant-Appellant DLJ Mortgage Capital, Inc. ("DLJ") respectfully submits this reply brief in further support of its motion for reargument of certain issues decided in this Court's September 17, 2019 Decision and Order (the "Decision") and for leave to appeal the Decision to the Court of Appeals.[1]

PRELIMINARY STATEMENT

Plaintiffs' untimely Opposition[2] is notable for what it does not say. On the relation back of untimely noticed breaches, Plaintiffs do not dispute that this issue arises frequently in RMBS repurchase litigation and is critical to the scope of trial in such matters. Plaintiffs rely on this Court's prior decisions in *Nomura* and *GreenPoint*, but they fail to acknowledge that this Court granted leave to appeal those decisions and that the Court of Appeals was never given the opportunity to address relation back in either case. *See* Mem. 2-3. Nor do they grapple with the complete absence of Court of Appeals precedent applying relation back to excuse

[1] Citations to "Mem. __" refer to DLJ's Memorandum of Law in Support of Defendant-Appellant's Motion for Reargument and Leave to Appeal to the Court of Appeals, dated October 17, 2019. Citations to "Opp. __" refer to Plaintiffs' Memorandum of Law in Opposition, dated October 25, 2019.

[2] The Opposition was electronically filed and served at 4:38 p.m. on October 25, 2019, in violation of the Court's Rules, which required it to be filed no later than 4:00 p.m. that day absent Court permission on a showing of good cause. *See* 22 NYCRR § 1250.4(a)(5); *id.* § 1245.7(a)(1). Plaintiffs have not attempted to demonstrate cause for their untimely filing. To the extent the Court treats the § 1250.4(a)(5) filing deadline as applicable to DLJ's reply, DLJ respectfully submits that there is good cause for permitting filing on the return date: It would have been impossible to file the reply by 4:00 p.m. on October 25, because Plaintiffs had not yet filed or served their answering papers at that point.

any party—let alone a sophisticated commercial party—from timely compliance with an agreed-upon contractual precondition to suit.

Because leave to appeal is warranted on the relation-back issue, this Court should certify a question, "in its usual generalized form," that asks the Court of Appeals to decide whether the Decision was "properly made." *Sharapata v. Town of Islip*, 56 N.Y.2d 332, 335 (1982) (citing CPLR 5602). There is no need for this Court to separately consider the Opposition's arguments on sampling and accrued interest. But should it do so, reargument or leave to appeal is warranted on those questions as well.

On sampling, Plaintiffs are wrong to contend that DLJ is forever bound by the two-sentence, 2013 Interim Order that DLJ lacked a fair opportunity to oppose. But even if Plaintiffs' procedural objections had merit, that would not change the fact that this Court resolved an identical sampling issue—a question of first impression in the Appellate Division—on the merits in *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 175 A.D.3d 1156, 1158-59 (1st Dep't 2019), and did so on reasoning that squarely contradicts the holdings of two New York federal courts.

Finally, the Opposition's response on accrued interest fails to engage with the contractual definition of Repurchase Price or the Decision's actual holding. For the same reasons this Court has certified questions to the Court of Appeals on

the interpretation of the sole remedy provision and other common RMBS contractual provisions, *Matter of Part 60 Put-Back Litig.*, Index No. 652877/2014, 2019 WL 2346512 (1st Dep't June 4, 2019), it should do so here as to whether the Repurchase Price can include interest that never actually accrued on loans that have been liquidated.

ARGUMENT

I. Leave To Appeal Should Be Granted On Whether The Relation-Back Doctrine Permits Claims On Untimely Noticed Loans.

This Court should again allow the Court of Appeals to address whether the pleading doctrine of relation back excuses an RMBS plaintiff's failure to comply with a contractual condition precedent in a sole remedy provision. Plaintiffs emphasize that this Court has applied relation back in *Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital Inc.*, 133 A.D.3d 96 (1st Dep't 2015), and several recent RMBS cases to permit claims on untimely post-suit notices. Opp. 9. But that is not an argument against granting DLJ leave to appeal here, just as the Court did in *Nomura* (where the defendants ultimately did not challenge this Court's application of relation back) and in *U.S. Bank National Association v. GreenPoint Mortgage Funding, Inc.*, 147 A.D.3d 79 (1st Dep't 2016) (where the case settled before argument in the Court of Appeals). That this Court continues to apply relation back, citing *Nomura* and *GreenPoint*, underscores the need for the Court of Appeals to decide the antecedent question

whether those cases were properly decided to the extent they endorsed relation back of untimely noticed breach claims.[3]

The Opposition makes no attempt to reconcile the application of relation back here with what the Court of Appeals has described as the doctrine's purpose: correcting "pleading error[s]." *Buran v. Coupal*, 87 N.Y.2d 173, 177 (1995). Plaintiffs have not cited any instance where that Court applied relation back to excuse a plaintiff from timely complying with a contractual pre-suit obligation.

Nor can Plaintiffs distinguish the situation here from the settled principle that relation back is unavailable when "the proposed causes of action" sought to be added "are based upon events that occurred after the filing of the initial claim." *E.g.*, *Johnson v. State*, 125 A.D.3d 1073, 1074 (3d Dep't 2015). Here, the untimely noticed breach claims are necessarily "based upon" Plaintiffs' post-complaint actions—Plaintiffs could not have pursued claims on those loans until they provided notice and allowed the contractual cure period to elapse.

Plaintiffs assert that the Court of Appeals "rejected" DLJ's relation-back arguments in *U.S. Bank National Association v. DLJ Mortgage Capital, Inc.* ("*ABSHE*") (Opp. 13), but *ABSHE* held no such thing. *ABSHE* turned on the

[3] This same question is presented in Countrywide's concurrently filed motion in *Ambac Assurance Corp. v. Countrywide Home Loans Inc.*, Appeal No. 2019-26, Index No. 651612/2010, Motion No. 7782 (1st Dep't Oct. 17, 2019), and will be raised in DLJ's forthcoming motion for leave to appeal in *U.S. Bank National Association v. DLJ Mortgage Capital, Inc.* ("*HEAT 2007-1*"), Appeal No. 2019-219, Index No. 650369/2013.

application of CPLR 205(a) and did not address the availability of relation back under CPLR 203(f). 33 N.Y.3d 72, 77 (2019). As the Court of Appeals has repeatedly recognized, those provisions address distinct issues and operate in different ways. *See Carrick v. Cent. Gen. Hosp.*, 51 N.Y.2d 242, 248 (1980); *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.* ("*HEAT 2006-5*"), 33 N.Y.3d 84, 90-91 (2019). U.S. Bank is pressing that very distinction in a pending appeal in this Court. *See* Br. for Appellant U.S. Bank, *Fed. Hous. Fin. Agency v. UBS Real Estate Sec.*, Appeal No. 2018-5371, Index No. 651282/2012, Dkt. No. 5, at 34 (1st Dep't July 8, 2019) ("The IAS Court erred in disregarding the distinct inquiries called for by CPLR 203(f) and 205(a)…."). The Decision properly disregarded Plaintiffs' invocation of CPLR 205(a) as a reason to permit untimely claims relating to the HEMT 2006-1 Trust loans to relate back, *see* Resp. Br. 25-26 & n.8,[4] and the Opposition's repetition of that argument does not diminish the need for leave to appeal.

[4] Plaintiffs appear to take issue with the Decision's conclusion that "no 'timely' or 'ripe' breach notices were sent" for loans in the HEMT 2006-1 Trust, maintaining that the parties' tolling agreement rendered those claims timely. Opp. 4. Plaintiffs have waived any argument about the timeliness of claims arising from the 2006-1 Trust: They did not refer to the tolling agreement (or otherwise defend their 2006-1 breach claims as timely) in either their summary judgment briefing or their brief on appeal, even though DLJ has consistently argued that there were no timely breach notices with respect to the 2006-1 Trust and that by the time the tolling agreement was entered, any 2006-1 Trust claims were already untimely. Def.'s Mem. of Law in Support of Mot. for Partial Summary Judgment, Index No. 156016/2012, Dkt. No. 1391, at 11 & n.32; App. Br. 10-11, 26 n.16. At any rate, the tolling agreement does not save Plaintiffs' 2006-1 claims. When Plaintiffs failed to provide any breach notice by November 1, 2011, it became impossible for them to comply with the notice-and-cure provision of the repurchase

The Opposition addresses only one of the Court of Appeals' relation-back cases cited in DLJ's Motion, *Greater New York Health Care Facilities v. DeBuono*, 91 N.Y.2d 716 (1988), and misses the point of DLJ's argument. Plaintiffs contend timely breach notices here "provided highly specific warning that claims based on additional breaching loans may follow." Opp. 11-12. But as *DeBuono* explains, "claims of injury are based on different, not identical, transactions"—and therefore cannot support relation back—when the untimely claims involve "an individualized reimbursement rate" and variations in the injury alleged, regardless of whether one claim purports to provide "notice" of claims based on other transactions. 91 N.Y.2d at 721.

That is why the Delaware Chancery Court in the *Central Mortgage* RMBS case held that "each alleged breach of contract due to a breach of representation ... as to each individual loan constitutes a separate transaction or occurrence" for relation-back purposes. *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, Civ. No. 5140-CS, 2012 WL 3201139, at *18 (Del. Ch. Aug. 7, 2012). Plaintiffs reflexively discount *Central Mortgage* because that decision is

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protocol within the limitations period. The parties' February 22, 2012 tolling agreement suspended not only the limitations period, but also any other "similar time-related defense or claim, whether statutory, contractual or otherwise and whether at law, in equity or otherwise." A1395-96. The tolling agreement thus stopped the clock on *both* the limitations period *and* the contractual cure period; it did not change the fact that Plaintiffs failed to provide notice in time for the cure period to elapse before the limitations period expired.

"trial-level" and "out-of-state," Opp. 12 n.2, but they have no response to its reasoning, which accords with *DeBuono* and is contrary to the premise of this Court's RMBS relation-back holdings.[5]

Plaintiffs display a similar misunderstanding in their discussion of *Koch v. Acker, Merrall & Condit Co.,* 114 A.D.3d 596 (1st Dep't 2014). Again, the question is not whether the timely letters here "warned that [an] investigation was continuing." Opp. 10. The plaintiff in *Koch* was not bound by a mandatory contractual prerequisite to suit, so the case says nothing about whether relation back excuses the failure to comply with contractual requirements. *See* Mem. 17.

Plaintiffs also err in their attempt to present this Court's various RMBS relation-back holdings as applying a uniform standard. To the contrary, some of this Court's cases emphasize that timely breach notices must "put [the defendant] on notice that the breaches plaintiffs were investigating might uncover additional defective loans for which claims would be made," as the Decision here held, 175 A.D.3d 1175, 1176 (1st Dep't 2019), whereas another recent decision confined its relation-back discussion to whether *any* timely pre-suit notices have been filed,

[5] Echoing an error in Plaintiffs' brief on appeal (Resp. Br. 23-24 n.7), the Opposition attempts to distinguish *Central Mortgage* as involving a plaintiff that "expressly disclaimed that it would bring additional claims." Opp. 12 n.2. As DLJ's reply brief explained (at 10 n.7), that disclaimer applied only to one set of untimely noticed loans (the "Private Loans"). No such disclaimer applied to another set of untimely noticed loans (the "New Agency Loans"), and *Central Mortgage* rejected the plaintiff's invocation of relation back as to *both* sets of loans, on the ground that new breach claims did not arise out of the transactions or occurrences pleaded in the initial complaint. 2012 WL 3201139, at *18-20.

without assessing the content of those notices, s*ee HSBC Bank USA v. Merrill Lynch Mortg. Lending, Inc.*, 175 A.D.3d 1149, 1150 (1st Dep't 2019) (allowing relation back where the plaintiff sent "two timely notices" each identifying a single breaching loan).

Finally, far from "reaffirm[ing] the relation-back principles set forth in *Nomura*" (Opp. 11), this Court's *GreenPoint* decision repudiated those principles. *GreenPoint* held that notice-based claims could *not* relate back even though there were some timely claims in that case—namely, claims based on allegations that the defendant independently discovered breaching loans. *See* 147 A.D.3d at 86. Justice Acosta noted the contradiction in his dissenting opinion: "The implication of the majority's ruling is that *Nomura* was wrongly decided with respect to its application of the relation-back doctrine." *Id.* at 92. The tensions among this Court's holdings have only become more pronounced in the years following *GreenPoint*. The Court should allow the Court of Appeals to resolve the issue.

II. Reargument Or Leave To Appeal Should Be Granted On Whether RMBS Plaintiffs Can Use Sampling To Prove Liability And Damages.

Plaintiffs maintain that Justice Schweitzer's two-sentence, 2013 Interim Order conclusively determined that sampling is consistent with the loan-specific

provisions of the PSAs' sole remedy.[6] Opp. 14-15. But neither Plaintiffs nor the Decision acknowledge that Justice Schweitzer entered that order over DLJ's objection that the sampling issue should be decided after formal briefing, and that he failed to consider at all DLJ's letter brief in opposition. Plaintiffs attempt to minimize the significance of the fact that they brought their own summary judgment motion seeking a ruling that sampling was consistent with the terms of the PSAs, Opp. 14, but they cannot explain why they would need an affirmative summary judgment ruling if the 2013 order already operated as law of the case.

Even if this Court were to agree that the procedural history here "present[s] an insurmountable hurdle to further merits review of the issue" *in this case*, Opp. 14, that is not true of the sampling issue as presented in *Ambac*.[7] It cannot seriously be disputed that *Ambac* resolved a question that is both "novel" and "of public importance," 22 NYCRR 500.22(b)(4), in that it affects the scope of numerous pending RMBS cases with billions of dollars at stake. *See* Oral Argument Webcast at 2:49:16-22, 2:52:37-55, *Ambac*, 175 A.D.3d 1156 (Justices

[6] Plaintiffs accuse DLJ of "misstat[ing] the record" and "mischaracterizing [the] 2013 order" by describing it as a "preliminary, advisory ruling." Opp. 14. But the 2013 order was plainly preliminary in that it was entered in the earliest stages of the case, while DLJ's motion to dismiss was still pending, and advisory in that Plaintiffs had yet to propose the manner in which they intended to use sampling to prove liability and damages.

[7] If the Court of Appeals were to disagree with this Court on the merits of sampling in *Ambac*, that decision would govern further proceedings in this case, notwithstanding the trial court's holding that it was bound by the 2013 Interim Order. *See Carmona v. Mathisson*, 92 A.D.3d 492, 492-93 (1st Dep't 2012) (law of the case inapplicable when "change of law" occurs).

of this Court describing the permissibility of sampling in RMBS cases as "new territory for us" and "an issue of first impression").

Plaintiffs' sole response is to contend that a conflict between Appellate Division decisions and federal district courts applying New York law is unfit for review by the Court of Appeals. Opp. 15. But until that Court speaks on the matter, federal courts applying New York law will be free to disregard this Court's decisions based on their prediction of what the Court of Appeals would hold. *See, e.g.*, *Michalski v. Home Depot, Inc.*, 225 F.3d 113, 116-17 (2d Cir. 2000) (holding that federal courts need not follow Appellate Division decisions, especially where the law is "unsettled," but should "essay[] a prediction" on how the "New York Court of Appeals would rule"); *see also* Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 Fordham L. Rev. 373, 419 (2000) (recognizing value of "eliminating federal court guesswork" by "allowing state high courts to settle state law authoritatively"). Accordingly, this Court should grant leave to appeal the sampling issue here and in *Ambac*.

III. Reargument Or Leave To Appeal Should Be Granted On Whether The Contractual Repurchase Price Includes Interest That Never Accrued On Loans Because They Had Already Been Liquidated.

Reargument is warranted on whether the Repurchase Price can include interest that never actually accrued on liquidated loans. The Decision's only

reasoning was a point that DLJ does not dispute: that the Repurchase Price definition "applies to liquidated and non liquidated loans." 175 A.D.3d at 1177. Instead, DLJ's argument is that under the contractual definition of Repurchase Price, no further interest can "accrue" on loans once they are liquidated. App. Br. 46-49; Mem. 27-30. Plaintiffs make no attempt to defend the Decision's stated reasoning; they instead assume, without any basis in the Decision, that the Court implicitly adopted Plaintiffs' "compelling reasons" for reaching that conclusion. Opp. 16. But Plaintiffs cite no authority for the proposition that interest can continue to "accrue" once a mortgage loan has been liquidated. Even if foreclosure can give rise to a separate remedy such as a deficiency judgment under some states' laws, a deficiency judgment is not the same thing as interest that "accrues" on the loan itself. *See, e.g.*, 2 Mary Anne Foran & Marvin R. Baum, *Mortgages and Mortgage Foreclosure in New York* § 38:1 (a deficiency is a "remedy [that] is primarily equitable in nature," the right to which "rests entirely on statutory provisions"). The contractual Repurchase Price definition could have been written to account for deficiency judgments, but it instead refers only to interest that has "accrued" on a loan itself, not hypothetical interest calculated as running on a loan that no longer exists. *E.g.*, A926.

Leave to appeal is also warranted to the extent the Decision applied *Nomura* to override the contractual definition of Repurchase Price. Plaintiffs do

not dispute that this issue arises frequently in RMBS litigation. Though Plaintiffs attempt to downplay the similarity to the questions resolved in *Matter of Part 60 Put-Back Litigation*, 169 A.D.3d 217 (1st Dep't 2019), *leave to appeal granted*, Index No. 652877/2014 (1st Dep't June 4, 2019), their arguments miss the mark. Plaintiffs incorrectly state that this case does not involve a "'contractual provision … limiting liability,'" Opp. 17; they overlook that the *Part 60* Court used that phrase to describe RMBS sole remedy clauses, 169 A.D.3d at 223, the same type of provision that is present in this case and relevant to the damages question.

Moreover, the *Part 60* Court's grant of leave to appeal was not confined to the gross negligence/sole remedy issue; it also encompassed additional holdings on the availability of punitive damages and attorneys' fees. The Decision here is strikingly similar, in that it resolves both a liability question upon which this Court previously granted leave to appeal in a case that settled before the Court of Appeals could resolve it, *cf. Morgan Stanley Mortg. Loan Tr. 2006-13ARX v. Morgan Stanley Mortg. Capital Holdings LLC*, Index No. 653429/2012 (1st Dep't Dec. 13, 2016), and also raises a significant damages issue that arises frequently in RMBS litigation and independently warrants leave to appeal.

CONCLUSION

For the foregoing reasons, DLJ respectfully requests that this Court grant reargument or leave to appeal to the Court of Appeals.

Dated: New York, New York
October 28, 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