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

NOTICE OF DEFENDANT-APPELLANT'S MOTION FOR REARGUMENT AND LEAVE TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE that, upon the accompanying affirmation of Daniel A. Rubens and the exhibit annexed thereto, the memorandum of law in support, and all prior pleadings and proceedings had herein, Defendant-Appellant DLJ Mortgage Capital, Inc. will move this Court, at the Courthouse located at 27 Madison Avenue, New York, New York 10010, on October 28, 2019 at 10:00 in the forenoon, or as soon thereafter as counsel can be heard, for an order granting

reargument or leave to appeal to the Court of Appeals from the Decision and Order of this Court dated September 17, 2019.

Dated: New York, New York
October 17, 2019

Respectfully submitted,

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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

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

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Defendant-Appellant DLJ Mortgage Capital, Inc. ("DLJ") respectfully submits this memorandum of law in 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

The Decision addressed three important issues that arise frequently in RMBS put-back litigation: (1) the extent to which the relation-back doctrine permits RMBS plaintiffs to proceed on allegedly breaching loans not identified in a timely repurchase demand, (2) whether sampling is a permissible method of proving liability and damages under the terms of the parties' contractual repurchase protocol, and (3) whether the repurchase damages for liquidated loans include interest on those loans. This Court routinely grants leave to appeal from nonfinal orders that resolve significant and recurring issues in RMBS repurchase cases,[2] and it should do so here as well. Permitting the Court of Appeals to

[1] A copy of the Decision, together with the Notice of Entry served by the Plaintiffs-Appellants on September 17, 2019, is annexed as Exhibit A to the accompanying Affirmation of Daniel A. Rubens in Support of Defendant-Appellant's Motion for Reargument and Leave to Appeal to the Court of Appeals, dated October 17, 2019. Citations to "A__" refer to DLJ's Appendix filed in this appeal.

[2] *See, e.g.*, *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569, 578 (2018); *Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 581 (2017); *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 623 (2016); *Deutsche Bank Nat'l Tr. Co. v. Morgan Stanley ABS Capital I Inc.* (*2007-NC4*), Index No. 652877/2014 (1st Dep't June 4, 2019); *U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc.*, Index No. 651954/2013 (1st Dep't Apr. 13, 2017); *Morgan Stanley Mortg. Loan Tr. 2006-13ARX v. Morgan Stanley Mortg. Capital Holdings LLC*, Index No. 653429/2012 (1st Dep't Dec. 13, 2016).

resolve these questions now will clarify the proper scope of trial in this case as well as in many other pending RMBS cases, while minimizing disruption in the event that the Court of Appeals ultimately disagrees with this Court's determinations.

First, the Court should grant leave to appeal its relation-back holding. In allowing relation back, the Decision relied on the Court's prior holding in *Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital Inc.*, 133 A.D.3d 96 (1st Dep't 2015), *aff'd as modified*, 30 N.Y.3d 572 (2017), to conclude that relation back is permitted on untimely noticed breaches when there are "some timely claims" in a case. But the Court of Appeals has previously described relation back as a doctrine that permits the correction of flaws in the plaintiff's *pleading*; that Court has never addressed or endorsed the application of relation back in RMBS cases—or in any other context—to excuse a plaintiff from timely compliance with a contractual precondition to suit.

Although this Court granted leave to appeal in *Nomura*, the defendants there elected not to address relation back in the Court of Appeals. Thereafter, in *U.S. Bank National Association v. GreenPoint Mortgage Funding, Inc.*, 147 A.D.3d 79 (1st Dep't 2016), this Court granted leave to appeal on a similar relation-back question, but an intervening settlement deprived the Court of Appeals of the opportunity to address the issue. The proper application of

relation back is critical to many pending RMBS repurchase cases because it defines the population of allegedly breaching loans that can proceed to trial absent proof that a defendant independently discovered a material breach. Leave to appeal should be granted here so that the Court of Appeals can definitively resolve the question.

Second, New York state and federal courts have reached conflicting decisions on whether sampling can be used to prove liability and damages under RMBS agreements with sole remedy provisions like the ones here. Several RMBS repurchase cases in the Commercial Division are proceeding to trial on an assumption that sampling is authorized. Judicial economy would be promoted if the Court of Appeals were to address that question sooner rather than later. To the extent that the Court rejected DLJ's sampling arguments on procedural grounds, that holding misapprehended the relevant procedural history and applicable law, and reargument should be granted on that basis. In any event, this Court addressed sampling on the merits in a decision issued the same day in *Ambac Assurance Corp. v. Countrywide Home Loans Inc.*, Index No. 651612/2010, 2019 WL 4418885 (1st Dep't Sept. 17, 2019), where the Court specifically held that the sampling arguments were *not* "procedurally barred" and addressed them on the merits. At a minimum, the Court should grant leave to appeal on the sampling issue as presented in *Ambac*.

Third, the Decision resolved an important question regarding the damages available for the repurchase of liquidated loans, holding that Plaintiffs may recover damages associated with those loans beyond what the contracts permit. Reargument should be granted because that holding overlooked DLJ's arguments and failed to address the plain language of the contract's definition of "Repurchase Price," which limits the interest component of Plaintiffs' recovery to interest that has "accrued" on a loan. As the offering documents here disclose to investors, once a loan is liquidated, it no longer exists, and interest no longer accrues on it. In the alternative, to the extent the Decision relied on this Court's *Nomura* holding to craft an equitable remedy that departs from the terms of the contracts, that deviation from fundamental New York contract law warrants leave to appeal.

QUESTIONS OF LAW TO BE CERTIFIED TO THE COURT OF APPEALS

Question 1: Does the doctrine of relation back permit RMBS plaintiffs to assert otherwise untimely notice-based claims for any loan in an RMBS trust, and thereby excuse plaintiffs' failure to comply with a contractual precondition to invoking the repurchase remedy, as long as they provided timely pre-suit repurchase demands relating to some specified loans in the trust?

Question 2: Where an RMBS sole remedy provision requires loan-specific proof of breach, materiality, and damages, may Plaintiffs rely on statistical sampling to prove liability and damages for loans outside the sample?

Question 3: Where an RMBS contractual provision provides for the payment of "accrued" interest as part of the repurchase remedy, are plaintiffs entitled to recover as damages interest that did not, in fact, accrue?

STATEMENT

I. This appeal arises from four RMBS trusts known as Home Equity Mortgage Trust Series ("HEMT") 2006-1, HEMT 2006-3, HEMT 2006-4, and HEMT 2006-5 (together, the "Trusts"). DLJ sponsored the Trusts, which contain more than 40,000 mortgage loans. The Trusts all closed between February and October 2006. A1625-1626.

Each of the four Trusts was created and governed by a Pooling and Servicing Agreement ("PSA") entered into by, *inter alia*, DLJ, as Seller, and U.S. Bank, as Trustee for each respective Trust. As is typical in RMBS transactions, the PSAs include schedules setting forth representations and warranties about the mortgage loans contained in each Trust. *See, e.g.*, A1331-1335. Each of the PSAs contains a repurchase protocol that serves as the "sole remedy" for any breach of a loan-related representation or warranty that has a material effect on the certificateholders' interests. *E.g.*, A949. The repurchase protocol provides

that if DLJ is notified of or independently discovers a breach of a representation or warranty that has the requisite material and adverse effect, DLJ then has 120 days to cure the breach. *Id.* If DLJ fails to cure within that period, DLJ shall "repurchase the affected Mortgage Loan from the Trustee" at a contractually defined "Repurchase Price." *Id.* That price includes the sum of "(i) 100% of the unpaid principal balance of the Mortgage Loan on the date of such purchase," and "(ii) accrued unpaid interest thereon at the applicable Mortgage Rate 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.

On November 22, 2011, four affiliated certificateholders sent a letter to DLJ and U.S. Bank demanding that DLJ repurchase loans in all four Trusts. A1338-1339. That demand letter alleged that DLJ committed "systemic breaches of representations and warranties" and identified specific loans as breaching. A1339. Citing the repurchase protocol, on December 7, 2011, U.S. Bank forwarded the letter to DLJ and demanded that DLJ cure or repurchase "the identified loans." A1337. In the ensuing months, U.S. Bank sent several further letters demanding repurchase of additional specified loans from the Trusts.

Most of Plaintiffs' repurchase demands, however, were untimely. That is because the obligation to repurchase a loan expires if DLJ has not received notice

of, or independently discovered, a breach such that the specified cure period (here, 120 days) would elapse within six years of closing. *See ACE Sec. Corp. v. DB Structured Prods., Inc.*, 25 N.Y.3d 581, 595-97 (2015); *GreenPoint*, 147 A.D.3d at 86. DLJ received *no* timely demands with respect to the HEMT 2006-1 Trust. *See* A1337, 1410. With respect to the three other Trusts, DLJ received timely demands in letters dated December 7, 2011, and August 22, 2012, but received untimely demands in subsequent letters relating to thousands of other loans. In sum, DLJ received timely notices of alleged breaches for only 1,351 identified loans across the HEMT 2006-3, 2006-4, and 2006-5 trusts. *See* A1337, 1428.

II. In 2012, Plaintiffs filed two now-consolidated suits claiming breaches of the mortgage loan-related representations and warranties for these four Trusts. In their complaints, Plaintiffs alleged that based on their review of the loan files, they had discovered breaches of the representations and warranties in the loans identified in their breach notices. A145-146, 170, 226-227, 246-247. Plaintiffs sought damages under the repurchase protocol for these nonconforming loans, "and also all other Mortgage Loans with such breaches." A181, 255.

In November 2013, Plaintiff submitted a three-page letter to the trial court requesting its "approval for the use of statistical sampling to prove liability and damages on all of Plaintiffs' claims." A121. DLJ objected that the request was

premature and argued that, in the event the court ultimately reached the sampling question, "the gravity of the issue and fundamental fairness require that it be done on full briefing and motion." A132. Three days later, the trial court (Schweitzer, J.) issued a two-sentence Interim Order approving plaintiffs' use of sampling "to prove liability and damages on all of their claims." A120.

Following the Interim Order, Plaintiffs opted to present their evidence of breaches through sampling, selecting 1,600 loans out of the more than 40,000 loans in the Trusts. A2745. Plaintiffs chose those sample loans without regard to whether any notice—timely or otherwise—had been provided to DLJ with respect to any particular loan in the sample. A2895. Plaintiffs' re-underwriting expert, Richard Payne, reviewed the sample loans and, in a December 2016 expert report, opined that 709 of them breached representations or warranties. A2909, 3002-3003, 3445-3446. Only 34 of those loans fall within the population of 1,351 loans for which Plaintiffs had served timely notices of a breach. A1899, 2418.1-.2. Without identifying specific loans, Plaintiffs' damages expert, Dr. Karl Snow, "extrapolat[ed]" Mr. Payne's alleged "defect rate" from the sample population to the Trusts as a whole to calculate Plaintiffs' claimed damages. A2952-2953, 2963-2964.

III. In 2015, following Justice Schweitzer's retirement, these actions were reassigned to Justice Scarpulla. After the close of discovery, the parties filed

cross-motions for partial summary judgment. The trial court granted Plaintiffs' motion in part and denied it in part, and denied DLJ's motion. A76-77. As relevant to this motion, the trial court ruled in Plaintiffs' favor on three issues:

Notice and relation back: DLJ moved for a summary judgment ruling that under the plain terms of the PSAs, Plaintiffs must demonstrate either timely notice or independent discovery of a breach for each individual loan for which they seek relief and that Plaintiffs had provided timely notice of a breach as to only 1,351 loans in the Trusts. Plaintiffs, for their part, sought a summary judgment ruling that, as a matter of law, DLJ received notice of all defective loans in all four trusts though the November 11, 2012 demand letter, which alleged pervasive breaches. The trial court held that Plaintiffs' "November 22, 2011 and December 7, 2011 demand letters, timely notifying DLJ of specific breaches in the mortgage loans, satisfy the prongs of the repurchase protocol and set the stage for plaintiffs to establish liability as to any loans noticed as alleged breaches of the PSAs, whether pre-suit or post-commencement of this action." A19. Relying on this Court's decision in *Nomura*, the trial court concluded that because timely notices identified *some* allegedly breaching loans and alerted that certificateholders were continuing their investigation, the doctrine of relation back permitted plaintiffs to proceed to trial on any noticed loan in the Trusts (as well as any loans for which Plaintiffs could prove independent discovery of

breach by DLJ), even if such loans were not identified until plaintiffs' post-suit notice letters or expert reports. A17-19.

Sampling: DLJ moved for a summary judgment ruling that Plaintiffs cannot use sampling to circumvent the repurchase protocol's loan-specific requirements. Despite having secured the 2013 Interim Order permitting sampling, Plaintiffs nonetheless cross-moved for summary judgment on that issue, again seeking a ruling that the PSAs permit the use of sampling to prove liability and damages. The trial court held that it was bound by Justice Schweitzer's Interim Order as law of the case and noted that "[i]ssues concerning the sufficiency of the sample itself will be addressed pre-trial in motions *in limine*." A33-34.

Accrued interest on liquidated loans: DLJ sought a summary judgment ruling that, under the definition of "Repurchase Price" in the PSAs, the term "accrued unpaid interest" is limited to interest that actually accrued on the loan and therefore cannot include interest that purportedly "accrued" on a loan that had already been liquidated. Plaintiffs' damages expert, by contrast, had included interest on allegedly breaching loans regardless of whether the loan had been liquidated. Once more relying on this Court's holding in *Nomura*, the trial court held that "the remedy for all loans, liquidated or not, is subject to the terms of the

repurchase protocol," which it understood to provide for accrued interest on all breaching loans. A40.

IV. This Court's Decision affirmed the trial court's summary judgment rulings. *See Home Equity Mortgage Tr. Series 2006-1 v. DLJ Mortgage Capital, Inc.*, Index No. 156016/2012, 2019 WL 4418864, at *1 (1st Dep't Sept. 17, 2019). With respect to the HEMT 2006-3, 2006-4, and 2006-5 Trusts, the Decision concluded that Plaintiffs' timely pre-suit breach notices "put DLJ on notice that the breaches plaintiffs were investigating might uncover additional defective loans for which claims would be made" and that, therefore, "plaintiffs' timely complaints that identified certain breaching loans may be amended to add the claims at issue, as they relate back to the original complaints." *Id.* As for the loans in the HEMT 2006-1 Trust, the Court agreed that "no timely or 'ripe' breach notices were sent." *Id.* The Court noted, however, that DLJ's appeal did not "challenge the [trial court's] alternative ruling that sufficient evidence was presented to raise an issue of fact as to whether it independently discovered material breaches." *Id.* The Court viewed that theory as providing "a separate ground for finding that the repurchase protocol was triggered for the breaching loans." *Id.*

On the sampling issue, the Decision stated that "[i]n light of DLJ's failure to pursue an appeal from the [2013 Interim Order], and given the extensive

discovery already taken place on this issue," it found "no reason" to "disturb the court's decision to permit the use of statistical sampling to prove liability and damages." *Id.*

Finally, the Decision held that because the "repurchase price, as defined in the PSAs, applies to liquidated and non-liquidated loans," that definition "includes accrued interest on loans after they have been liquidated." *Id.* at *2 (citing *Nomura*, 133 A.D.3d at 107).

ARGUMENT

A motion for reargument should be granted when matters of fact or law have been "overlooked or misapprehended by the court," CPLR 2221(d)(2), or the court "'for some reason mistakenly arrived at its earlier decision.'" *Mendez v. Queens Plumbing Supply, Inc.*, 39 A.D.3d 260, 260 (1st Dep't 2007).

Leave to appeal is warranted in the "interest of substantial justice," a standard that is satisfied where permitting the decision below to go unchallenged would implicate "[t]he public interest and the interest of jurisprudence." *Matter of Miller*, 257 N.Y. 349, 357 (1931); *see also* Richard C. Reilly, Practice Commentary, *McKinney's Cons. Laws of N.Y.*, Book 7B, CPLR 5602 (leave to appeal is appropriate where the decision presents a "question of law important enough to warrant the immediate attention of the Court of Appeals"). The functions of the Court of Appeals include "the duty uniformly to settle the law for

the entire State and finally to determine its principles." *Miller*, 257 N.Y. at 357-58. Under the Court of Appeals' rules of practice, "issues [that] are novel or of public importance [or] present a conflict with prior decisions" of that Court are nonexclusive examples of categories of cases warranting review. 22 N.Y.C.R.R. § 500.22(b)(4); *see also* Arthur Karger, *The Powers of the New York Court of Appeals* § 10:6 (3d ed. 2005).

I. Leave To Appeal Should Be Granted On The Decision's Application Of The Relation-Back Doctrine To Permit Claims On Untimely Noticed Loans.

As the trial court correctly concluded, the plain language of the sole remedy provision in the PSAs requires "loan by loan notice" of any breach of representations and warranties. A17.[3] Plaintiffs did not appeal from that ruling, and the Decision did not disturb it. The Decision nonetheless held that for three of the four Trusts, Plaintiffs could proceed with claims based on untimely noticed breaches, because any asserted loan breach would "relate back to the original complaints." 2019 WL 4418864, at *1. This was error, both because the relation-back doctrine has no bearing on the contractually mandated protocol for

[3] As the trial court further noted, "the repurchase protocol could alternatively be triggered by DLJ's independent discovery of a material breach." A19. DLJ's appeal did not challenge Plaintiffs' right to attempt to prove independent discovery at trial for any loan in the Trusts. But the fact that discovery-based claims can proceed to trial does not preclude a summary judgment ruling limiting Plaintiffs' *notice*-based claims to loans that were the subject of a timely repurchase demand. *See GreenPoint,* 147 A.D.3d at 89 (affirming dismissal of notice-based claims on motion to dismiss, even though discovery-based claims were adequately pleaded).

providing timely notice and because, even if relation back provided the appropriate framework for considering this question, the untimely noticed loans do not arise from the same transaction or occurrence as the timely noticed loans. For each of those reasons, the Decision conflicts with binding Court of Appeals precedent, and leave to appeal is warranted.

A. The relation-back doctrine should not excuse Plaintiffs from timely compliance with contractual requirements.

As a general rule, causes of action are untimely if they are interposed after the limitations period expires. *See* CPLR 203(a). CPLR 203(f) codifies a limited exception, known as the relation-back doctrine, for amended pleadings that raise new claims: If the original pleading "give[s] notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading," then the claims in the amended pleading are "deemed to have been interposed at the time the claims in the original pleading were interposed."

The doctrine thus strikes a balance between, on the one hand, "liberalizing … strict, formalistic pleading requirements," and on the other, "respecting the important policies inherent in statutory repose." *Buran v. Coupal*, 87 N.Y.2d 173, 177 (1995); *see also Duffy v. Horton Mem. Hosp.*, 66 N.Y.2d 473, 476-77 (1985) (emphasizing "the need to protect the judicial system from the burden of adjudicating stale and groundless claims"). The point of the doctrine is to "enable[] a plaintiff to *correct a pleading error*—by adding either a new claim

or a new party—after the statutory limitations period has expired." *Buran*, 87 N.Y.2d at 177 (emphasis added). "An amendment *which merely adds a new theory of recovery or defense* arising out of a transaction or occurrence already in litigation clearly does not conflict with these policies." *Duffy*, 66 N.Y.2d at 477 (emphasis added).

Here, Plaintiffs are using relation back to do far more than correct a pleading error or introduce a new theory of recovery. The problem is not with the sufficiency of their initial pleading, but with their failure to comply with the sole remedy provision—a "procedural prerequisite" to their ability to pursue repurchase claims, *ACE*, 25 N.Y.3d at 581—at the time these actions were commenced. No decision of the Court of Appeals—or of this Court in non-RMBS cases—supports applying CPLR 203(f) to excuse a party from the consequences of disregarding an agreed-upon remedial protocol until after the limitations period expires. Indeed, outside the RMBS context, every Appellate Division Department to consider the question has held the relation-back doctrine inapplicable where "the proposed causes of action are based upon events that occurred after the filing of the initial claim, rather than upon the events giving rise to the cause of action in the initial claim." *See, e.g.*, *Johnson v. State*, 125 A.D.3d 1073, 1074 (3d Dep't 2015); *accord Cooper v. Sleepy's, LLC*, 126 A.D.3d 664,

665-66 (2d Dep't 2015); *Clairol Dev., LLC v. Vill. of Spencerport*, 100 A.D.3d 1546, 1547 (4th Dep't 2012).

At the time Plaintiffs filed their original complaints, they could not have properly included claims for the untimely noticed loans, because Plaintiffs had not yet satisfied a contractual precondition to asserting such claims—namely, giving DLJ timely notice of and an opportunity to cure alleged breaches. *See ACE*, 25 N.Y.3d at 599. To the extent that Plaintiffs now assert claims of breach for loans that had never been the subject of timely contractual notices, those claims would have been invalid at the time of the initial complaints, because Plaintiffs had "no right" to pursue repurchase of a loan until they afforded DLJ notice and an opportunity to cure that alleged breach. *GreenPoint*, 147 A.D.3d at 87. As a doctrine focused on pleading mistakes, relation back does not authorize Plaintiffs to avoid the consequences of their failure to adhere to the sole remedy provision and proceed on untimely repurchase demands.

In concluding otherwise, the Decision relied principally on *Nomura*, where this Court allowed relation back for "claims relating to loans that plaintiffs failed to mention in their breach notices or that were mentioned in breach notices sent less than 90 days before plaintiffs commenced their actions." 133 A.D.3d at 108. *Nomura*, for its part, emphasized the fact that there were "some timely claims" pertaining to timely breach notices. *Id.* But *Nomura* offered no 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, nor did it cite any decision from the Court of Appeals to support that proposition.

The sole case *Nomura* cited on this point (likewise cited in the Decision here) concerned claims of deceptive trade practices and false advertising in connection with alleged counterfeit wine sales, not a breach of contract claim stemming from an agreement that contains a sole remedy provision. *See Koch v. Acker, Merrall & Condit Co.*, 114 A.D.3d 596 (1st Dep't 2014). In other words, the parties in *Koch* did not bargain for a contract requiring notice and an opportunity to cure before the purchaser could obtain relief as to any counterfeit bottle of wine. *Koch*, to be sure, is consistent with the use of relation back that the Court of Appeals has endorsed: namely, to correct pleading mistakes (there, the failure to identify additional bottles of wine that defendant sold to plaintiff as counterfeit). But *Koch* in no way supports invocations of relation back that allow sophisticated commercial parties to flout contractual preconditions to suit, when they have asserted "some timely claims."

Moreover, the Decision failed to acknowledge this Court's relation-back holding in *GreenPoint*, which calls into question whether the presence of "some timely claims" is sufficient for relation back to apply. In *GreenPoint*, the Court

concluded that there *were* some timely claims, insofar as the plaintiff alleged that the defendant's "obligation to cure was triggered by its own discovery of nonconforming mortgages." 147 A.D.3d at 85. The Court nonetheless held that "[t]he doctrine of relation back cannot render these otherwise untimely breach notices timely." *Id.* at 86. In so holding, the Court drew a distinction between the "contractual requirement of a breach notice," which triggers the cure-or-repurchase obligation, and the "concept of relation back in a pleading context." *Id.* at 88. The Court thus declined to "extend[]" *Nomura* to allow relation back, even though, as noted, there were timely claims—namely, discovery-based claims—in *GreenPoint*. Accordingly, as Justice Acosta correctly observed in dissent, "[t]he implication of the [*GreenPoint*] majority's ruling is that *Nomura* was wrongly decided with respect to its application of the relation-back doctrine." *Id.* at 92 (Acosta, J.P., dissenting in part).

Nor did the Decision (or *Nomura*) attempt to reconcile the application of relation back with New York's "strong public policy favoring freedom of contract," especially when it comes to "agreements negotiated at arm's length by sophisticated, counseled parties." *159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353, 356, 363 (2019) (enforcing waiver of commercial tenant's right to seek declaratory relief). When considering RMBS sole remedy provisions similar to the ones at issue here, the Court of Appeals has emphasized the importance of

"honoring the exclusive remedy that these sophisticated parties fashioned." *Nomura*, 30 N.Y.3d at 584 (internal quotation marks and brackets omitted). In particular, that Court rejected an attempt by an RMBS trustee (the same plaintiff here) to invoke relation back to override its failure to comply with the sole remedy provision within the limitations period. *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 33 N.Y.3d 84, 90 (2019) (CPLR 203(f) requires a "valid pre-existing action"). And *ACE* itself, in enforcing an RMBS sole remedy provision as a "procedural prerequisite to suit," emphasized the importance of the six-year statute of limitations in "serv[ing] the … objectives of finality, certainty and predictability." 25 N.Y.3d at 593-94. By excusing RMBS plaintiffs from compliance with these carefully negotiated remedial provisions, the Decision contravenes these important policies, without any good reason for doing so.

B. Even if relation back can excuse timely compliance with contractual requirements, the complaints here fail to give notice of the relevant transactions.

Even if relation back could apply to excuse parties from their contractual obligations as a general matter, the Decision's application of the doctrine warrants leave to appeal for another reason: Under CPLR 203(f), relation back is appropriate only where the original pleading and amended pleading arise out of the same "transactions, occurrences, or series of transactions or occurrences." Here, the Decision—in accord with *Nomura*—implicitly treated every alleged

breaching loan in each trust as being part of the same "transaction," such that a single timely noticed breach could open the door for any untimely noticed breach to relate back. That was error under the Court of Appeals' decision in *Greater New York Health Care Facilities Association v. DeBuono*, 91 N.Y.2d 716 (1998), a holding the Decision failed to address.

DeBuono arose from an Article 78 proceeding brought by eight nursing homes and a nursing home association challenging Department of Health regulations that established Medicaid reimbursement rates. *Id.* at 718. Several other nursing homes sought to intervene and assert additional claims. *Id.* at 719. The Court of Appeals held that the otherwise untimely claims of proposed intervenors could not relate back. Some of the Court's reasoning turned on the fact that the proposed intervenors were new parties not closely related to the original challengers. *Id.* at 721. But the Court's critical holding revolved entirely on how to define the relevant "transaction"—the same question at issue here. *Id.* In that regard, the Court held that the proposed intervenors' claims of injury "are based on different, not identical, transactions." *Id.* That was so, the Court explained, because "each nursing home has an individualized reimbursement rate and the injury claimed varies from facility to facility and from year to year." *Id.* That reasoning is fatal to relation back here, where the question of whether a

given loan in the trust materially breached representations and warranties is necessarily "individualized."

Although Plaintiffs have identified no reasoned New York decision analyzing the relevant "transaction" for the relation back of untimely noticed RMBS repurchase claims, the Delaware Chancery Court grappled with that precise question at length in *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, Civ. No. 5140-CS, 2012 WL 3201139, at *18-19 (Del. Ch. Aug. 7, 2012). That carefully reasoned decision, authored by then-Chancellor Strine, is instructive. *Cf. Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 151 A.D.3d 83, 89 (1st Dep't 2017) (following Delaware Chancery Court's reasoning as to the proper interpretation of RMBS loan-related representations and warranties).

In *Central Mortgage*, the Delaware Chancery Court considered whether, for relation-back purposes, untimely noticed breach allegations relate to the same "transaction or occurrence" as the claims in the complaint. The court concluded that those late claims could not relate back, because "each alleged breach of contract due to a breach of representation … as to each individual loan constitutes a separate transaction or occurrence, regardless of the fact that the loans might have been part of the same loan pool." 2012 WL 3201139, at *18. As that court explained, "a separate independent violation of the same contract provision does

not 'arise' out of the same conduct, transaction or occurrence as did the first, unrelated violation," as "evaluating the accuracy of … representations as to Loan A is an independent inquiry from that evaluation as to Loan B." *Id.* That result also follows from the fact that the sole remedy provision required "loan-specific" notice and an opportunity to cure. *Id.* at *19. Further, a contrary rule would turn relation back "into a license for sloth" and "undermine the finality of contracts by subjecting sellers to a series of late-filed claims brought by amended pleadings based on stale records." *Id.* at *20. The sound reasoning of *Central Mortgage* is thus diametrically opposed to *Nomura* and subsequent decisions of this Court that permit relation back for every loan in a given RMBS trust as long as there are some timely notice-based claims.

C. The relation-back issue warrants leave to appeal

At a minimum, the Court's relation-back holdings here and in *Nomura* are in tension with this Court's decision in *GreenPoint* and the Court of Appeals' decision in *DeBuono*, squarely contradict the Delaware Chancery Court's conclusion in *Central Mortgage*, and go well beyond any application of the relation-back doctrine that the Court of Appeals has ever endorsed. Notably, this Court has granted leave to appeal in each of its prior decisions applying relation back in the RMBS context, but the defendants in *Nomura* did not address the relation-back holding in the Court of Appeals, *see* 30 N.Y.3d at 577, and

GreenPoint settled before argument, 32 N.Y.3d 1123 (2018). Meanwhile, relation-back questions continue to arise frequently in New York RMBS litigation, including in federal courts applying New York law.[4] The issue thus warrants certification to the Court of Appeals for definitive resolution.

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

A. In upholding the trial court's summary judgment ruling permitting sampling, this Court did not address DLJ's contentions that sampling is inconsistent with the loan-specific nature of the sole remedy provision. Instead, the Decision referred to two aspects of this case's procedural history: "DLJ's failure to pursue an appeal from the [trial] court's November 18, 2013 order" and "the extensive discovery already taken place on this issue" during the four years between the 2013 Interim Ruling and the summary judgment motion. 2019 WL 4418864, at *1. Reargument should be granted because this Court overlooked important reasons why it should have addressed DLJ's sampling contentions on the merits.

[4] *See, e.g.*, *MASTR Adjustable Rate Mortgs. Tr. 2006-OA2 v. UBS Real Estate Sec. Inc.*, No. 12-CV-7322 (PKC), 2016 WL 1449751, at *2-4 (S.D.N.Y. Apr. 12, 2016); *GreenPoint*, 147 A.D.3d at 86-89; *Nomura*, 133 A.D.3d at 108; *HSBC Bank USA v. Merrill Lynch Mortg. Lending, Inc.*, Index No. 652793/2016, 2019 WL 4418904 (1st Dep't Sept. 17, 2019); *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, Index No. 650369/2013, 2019 WL 5073847, at *1 (1st Dep't Oct. 10, 2019).

First, the Decision erred to the extent that it treated the 2013 Interim Order—and DLJ's decision not to pursue an appeal therefrom—as preclusive of DLJ's ability to challenge the use of sampling on this appeal. As DLJ explained in its Reply Brief (at pp. 15-16), the Interim Order was a preliminary, advisory ruling entered before the parties had an adequate opportunity to brief whether and how sampling could be used to prove Plaintiffs' case. In response to Plaintiffs' letter seeking that advisory ruling, DLJ requested an opportunity to put in full briefing on the role sampling would play in this litigation, A132, but the two-sentence Interim Order did not acknowledge that request. Indeed, the Interim Order did not even address DLJ's opposition letter at all, noting only that the trial court had reviewed *Plaintiffs'* correspondence in support of sampling. A120. Tellingly, although the Plaintiffs have argued in their appellate brief that the Interim Order should be treated as resolving the sampling issue for all purposes in this case, *see* Resp. Br. 26-28, Plaintiffs sought an affirmative summary judgment ruling—above and beyond the Interim Order—"that, as a matter of law, the contracts allow them to use statistical sampling to prove liability and damages for liquidated Loans." *See* Index No. 156016/2012, Dkt. 1338, at 29. Having secured a favorable summary judgment ruling in that regard, Plaintiffs should not be heard to complain that the issue was conclusively resolved four years earlier.

Second, the Decision misunderstood the significance of the sampling-related discovery that took place between 2013 and 2017. That discovery related to Plaintiffs' sampling methodology and characteristics of the sample itself—questions that have yet to be resolved by the trial court. *See* A34 ("Issues concerning the sufficiency of the sample itself will be addressed pre-trial in motions *in limine*."). Nothing about DLJ's participation in that discovery suggests that an appeal from the Interim Order was the sole appropriate vehicle for this Court to consider the sampling issue on its merits. To the contrary, Plaintiffs themselves moved in 2014 for approval of a proposed sample, but then withdrew that motion based on Justice Schweitzer's view that the motion was "premature" and that the parties should "address the issues through expert reports and expert discovery." Index No. 156016/2012, Dkt. 398. In light of the conflicting indications from Justice Schweitzer, DLJ should not be faulted for holding off on seeking this Court's intervention until Plaintiffs obtained a non-"Interim" definitive ruling endorsing their intended use of sampling to prove liability and damages at trial.

For these reasons, the Court should grant reargument insofar as it declined to reach DLJ's sampling contentions on procedural grounds.

B. In any event, this Court should grant leave to appeal to the Court of Appeals on the merits question—*i.e.*, whether RMBS plaintiffs subject to sole

remedy provisions can use sampling to prove liability and damages—a question raised both in this appeal and in *Ambac*, 2019 WL 4418885, at *2, decided the same day.

Courts are openly divided on this question. Some courts have concluded that sampling is an acceptable method of proof in RMBS cases that the sole remedy provision permits. *See, e.g.*, *Deutsche Bank Nat'l Tr. Co v. Morgan Stanley Mortg. Capital Holdings LLC*, 289 F. Supp. 3d 484, 496-97 (S.D.N.Y. 2018) (collecting cases). Others have concluded that sampling is *not* an appropriate method of proof, because the repurchase protocol operates on a loan-by-loan basis and requires individualized proof of material breach and damages. *See, e.g.*, *MASTR Adjustable Rate Mortgs. Tr. 2006-OA2 v. UBS Real Estate Sec. Inc.*, No. 12-CV-7322 (PKC), 2015 WL 764665, at *10-11 (S.D.N.Y. Jan. 9, 2015) (finding sampling to be foreclosed by "the terms of the PSAs," including the "loan specific" repurchase remedy); *Homeward Residential, Inc. v. Sand Canyon Corp.*, No. 12-CV-5067 (JFK), 2017 WL 5256760, at *1, *7 (S.D.N.Y. Nov. 13, 2017) (declining to authorize sampling because the governing agreements "call for proof of breach on a loan-by-loan basis"). That stark division of authority on an important and recurring issue plainly merits the Court of Appeals' review.

In its September 17, 2019 *Ambac* decision, this Court concluded that the Countrywide's sampling challenge was "not procedurally barred" and, on the merits, held that "despite the language of the repurchase protocol, RMBS plaintiffs … are entitled to introduce sampling-related evidence to prove liability and damages in connection with repurchase claims." *Ambac*, 2019 WL 4418885, at *2. Thus, although DLJ respectfully disagrees with the Decision's refusal to address its sampling arguments, *see supra* 23-25, those case-specific findings posed no obstacle to this Court's review of the same question of law in *Ambac*, where the defendants are likewise seeking leave to appeal on that question. DLJ therefore requests that this Court grant leave to appeal on the sampling question (whether here or in *Ambac*), which closely relates to the issues of notice and relation-back raised here and in the *Ambac* defendants' leave motion, and independently merits the Court of Appeals' review.

III. Reargument Or Leave To Appeal Should Be Granted On Whether The Contractual Repurchase Price Includes Interest On Loans That Have Been Liquidated.

A. The Decision's damages holding warrants reargument because the Court misapprehended DLJ's arguments regarding the plain meaning of the contractually defined Repurchase Price. The Repurchase Price provides for "accrued unpaid interest" as part of the payment due upon repurchase of a nonconforming loan. A926. It is axiomatic that once a mortgage loan has been

liquidated, interest no longer accrues on that loan. Indeed, the offering documents for these Trusts warn investors of exactly that risk. *E.g.*, A628 ("Defaulted mortgage loans may be liquidated, and liquidated mortgage loans will no longer be outstanding and generating interest."). Plaintiffs have pointed to state-law *remedies* that may remain available after a mortgage loan has been liquidated (e.g., a deficiency judgment), *see* Resp. Br. 42, but they have cited nothing in support of the proposition that interest *continues to accrue* on a loan that no longer exists.

The Decision disposed of the damages in a single sentence and citation: "The [trial] court correctly concluded that the repurchase price, as defined in the PSAs, applies to liquidated and non liquidated loans, and thus, includes accrued interest on loans after they have been liquidated (*Nomura*, 133 A.D.3d at 107)." 2019 WL 4418864, at *2. That statement misapprehends DLJ's argument. DLJ agrees that the Repurchase Price definition applies to all loans (including loans that have been liquidated); the trial court erred, however, in concluding that interest continues to "accrue[]" on loans once they have been liquidated. By asserting that the Repurchase Price "thus includes accrued interest," the Decision simply skips over DLJ's arguments that the plain meaning of Repurchase Price excludes interest for liquidated loans.

Nor does the Decision's citation to *Nomura* justify its departure from the contractual language. The cited portion of *Nomura* allowed RMBS plaintiffs to "pursue monetary damages with respect to any defective mortgage loan in those instances where cure or repurchase is impossible," such as when a loan has been liquidated. 133 A.D.3d at 105, 107. Here, the question is different; no one is disputing that damages can be awarded where the equitable specific performance remedy is impossible. Indeed, DLJ and Plaintiffs agree that (1) plaintiffs can pursue monetary damages as to nonconforming loans that have been liquidated, and (2) those damages must be calculated pursuant to the contractual Repurchase Price. The Decision failed to engage with that contractual definition, which as just explained, does not authorize the recovery of further interest after a loan has been liquidated. Accordingly, the Court should grant reargument and apply the Repurchase Price definition by its terms.

B. In the alternative, the Court should grant leave to appeal on this question. To the extent that the Decision altered the contractual remedy based on the Court's view of the equities, that approach violates fundamental tenets of New York contract law. In *Nomura* itself, the Court of Appeals emphasized the need to "honor contractual provisions that limit liability or damages because those provisions represent the parties' agreement on the allocation of the risk of economic loss in certain eventualities." 30 N.Y.3d at 581. That rule is an

application of the broader principle that "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." *Id.*

Notably, this Court recently addressed a similar question in *Matter of Part 60 Put-Back Litigation*, which likewise involves potential exceptions to the "general principle of enforceability of contractual provisions limiting liability." 169 A.D.3d 217, 223 (1st Dep't 2019). The Court concluded that sufficient allegations of gross negligence justify a departure from that principle so as to permit damages that go beyond the sole remedy clause, but still granted leave to appeal so that the Court of Appeals could resolve that significant question. *2007-NC4*, Index No. 652877/2014 (1st Dep't June 4, 2019). Here, if reargument is denied, the Court should follow a similar course and grant leave to appeal, especially given that many RMBS contracts include similar definitions of Repurchase Price.[5]

CONCLUSION

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

[5] *See, e.g.*, *Deutsche Bank*, 289 F. Supp. 3d at 490; *MASTR Adjustable Rate Mortgs. Tr. 2006-OA2*, 2015 WL 764665, at *11; *Wells Fargo Bank, N.A. v. Bank of Am., N.A.*, No. 10-CV-9584 (JPO), 2013 WL 1285289, at *9 (S.D.N.Y. Mar. 28, 2013), *vacated and remanded*, 627 F. App'x 27 (2d Cir. 2015); *Torchlight Loan Servs., LLC v. Column Fin., Inc.*, No. 11-CV-7426 (RWS), 2012 WL 3065929, at *13 (S.D.N.Y. July 25, 2012).

Dated: New York, New York
October 17, 2019

Respectfully submitted,

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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

AFFIRMATION OF DANIEL A. RUBENS IN SUPPORT OF DEFENDANT-APPELLANT'S MOTION FOR REARGUMENT AND LEAVE TO APPEAL TO THE COURT OF APPEALS

Daniel A. Rubens, an attorney duly admitted to practice law in the Courts of the State of New York, hereby affirms the truth of the following upon information and belief, under penalty of perjury and says:

1. I am a member of the bar of this Court and a partner at the law firm of Orrick, Herrington & Sutcliffe LLP, counsel to Defendant-Appellant DLJ Mortgage Capital, Inc. ("DLJ") in the above-captioned actions. I make this

affirmation in support of DLJ's motion for reargument and for leave to appeal to the Court of Appeals.

2. A true and correct copy of the Court's September 17, 2019 Decision, together with the Notice of Entry served upon DLJ on September 17, 2019, is attached as Exhibit A.

Dated: New York, New York
October 17, 2019

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Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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, -against- DLJ MORTGAGE CAPITAL, INC., and SELECT PORTFOLIO SERVICING, INC., Defendants.	Index No. 156016/2012 Part 39 (Scarpulla, S.) Mot. Seq. No. 032, 033 **NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the attached Exhibit 1 is a true and correct copy of the Decision and Order of the Supreme Court, Appellate Division, First Department, dated September 17, 2019, and duly entered in the office of the County Clerk of New York County on September 17, 2019.

Dated: September 17, 2019

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EXHIBIT 1

Friedman, J.P., Richter, Tom, Oing, Moulton, JJ.

9865-
9866 Index 156016/12
653787/12

Home Equity Mortgage Trust
Series 2006-1, et al.,
Plaintiffs-Respondents,

-against-

DLJ Mortgage Capital, Inc.
Defendant-Appellant,

Select Portfolio Servicing, Inc.,
Defendant.

- - - - -

Home Equity Mortgage Trust
Series 2006-5, etc.,
Plaintiff-Respondent,

-against-

DLJ Mortgage Capital, Inc.
Defendant-Appellant,

Select Portfolio Servicing, Inc.,
Defendant.

_____

Orrick, Herrington & Sutcliffe LLP, New York (Daniel A. Rubens of counsel), for appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (William B. Adams of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Saliann Scarpulla, J.), entered January 9, 2019, which denied the motion of defendant DLJ Mortgage Capital, Inc. for partial summary judgment and granted plaintiffs' motion for partial summary judgment, unanimously affirmed, with costs.

Plaintiffs, four residential mortgage-backed securities trusts represented by the same trustee, allege breach of contract based on the "repurchase protocol" in the trusts' governing

pooling and service agreements (PSAs). The repurchase protocol states that within 120 days of the earlier of the discovery by defendant, DLJ Mortgage Capital Inc. (DLJ), as "Seller" of the mortgage loans in the trusts, or DLJ's receipt of written notice from any party of a breach of any representation or warranty in the PSAs which "materially and adversely affects" the interest of certificateholders in any mortgage loan, DLJ must cure, substitute, or repurchase that defective loan.

The court correctly denied DLJ's motion for summary judgment seeking dismissal of those claims relating to loans, other than those emanating from the HEMT 2006-1 Trust (HEMT 2006-1), that plaintiffs failed to specifically identify in timely breach notices. The trustee's timely presuit letters, which stated that DLJ had placed defective loans into the trusts "on a massive scale," cited breach rates between 65% and 72% in the trusts, cautioned that the specified defective loans were "just the tip of the iceberg," and stated that its investigation into loans in the trusts was ongoing, put DLJ on notice that the breaches plaintiffs were investigating might uncover additional defective loans for which claims would be made. Therefore, plaintiffs' timely complaints that identified certain breaching loans may be amended to add the claims at issue, as they relate back to the original complaints (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 133 AD3d 96, 108 [1st Dept 2015], *affd as mod* 30 NY3d 572 [2017]; *Koch v Acker, Merrall &*

Condit Co., 114 AD3d 596, 597 [1st Dept 2014]).

With regard to HEMT 2006-1, for which no timely or "ripe" breach notices were sent, DLJ does not challenge the court's alternative ruling that sufficient evidence was presented to raise an issue of fact as to whether it independently discovered material breaches. This provides a separate ground for finding that the repurchase protocol was triggered for the breaching loans, without regard to the issue of relation back or the issue of whether the Trustee sent a timely breach notice for HEMT 2006-1 (*see U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.*, 147 AD3d 79, 85 [1st Dept 2016]; *Nomura*, 133 AD3d at 108-109).

The court correctly granted plaintiffs' motion and denied defendant's motion regarding the use of statistical sampling to prove plaintiffs' breach of contract claims for both liability and damages. In 2013, the trustee sought approval from the court for the use of statistical sampling to prove liability and damages for its claims. On November 18, 2013, the court (Schweitzer, J.) ordered that the trustee may use statistical sampling to prove liability and damages, and ordered the parties to meet and confer as to the sample to be used. DLJ noticed an appeal from this order, but failed to withdraw or perfect the appeal. Thereafter, the parties spent four years agreeing on the correct loan files and underwriting guidelines for the sample loans, and engaged in extensive expert discovery. In 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.

To the extent defendant challenges the sample size or the particular loans chosen to be included within the sample, defendant will have a further opportunity to raise those arguments, as the motion court noted that "[i]ssues concerning the sufficiency of the sample itself will be addressed pre-trial in motions *in limine*."

The court correctly granted plaintiffs' motion for summary judgment to the extent that it sought a ruling that the phrase a breach that "materially and adversely" affected the interest of certificateholders, as stated in the repurchase protocol, is not limited to loans in default, and applies to any breach that "materially increased a loan's risk of loss." This Court has held at the summary judgment stage that a loan need not be in default for there to be a breach that "materially and adversely" affected the plaintiff's interest (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 105 AD3d 412, 413 [1st Dept 2013]). The motion court's further conclusion that a breach need only have "significantly increased a loan's risk of loss" is consistent with the plain meaning of the phrase, and still allows for a fact-specific determination at trial (*see Assured* Guar. *Mun. Corp. V Flagstar Bank, FSB*, 892 F Supp 2d 596, 602).

The court correctly concluded that the repurchase price, as defined in the PSAs, applies to liquidated and non liquidated

loans, and thus, includes accrued interest on loans after they have been liquidated (*Nomura*, 133 AD3d at 107).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 17, 2019

CLERK