To be Argued by:
WILLIAM B. ADAMS
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

Appellate Case Nos.: 2019-619 2019-620

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

Plaintiffs-Respondents,

– against –

Index No. 156016/12

DLJ MORTGAGE CAPITAL, INC.,

Defendant-Appellant,

– and –

SELECT PORTFOLIO SERVICING, INC.,

Defendant.

(For Continuation of Caption See Inside Cover)

BRIEF FOR PLAINTIFFS-RESPONDENTS

KATHLEEN M. SULLIVAN
RICHARD I. WERDER, JR.
WILLIAM B. ADAMS
TOBY E. FUTTER
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
(212) 849-7000
kathleensullivan@quinnemanuel.com

Attorneys for Plaintiffs-Respondents

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

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

Plaintiff-Respondent,

– against –

Index No. 653787/12

DLJ MORTGAGE CAPITAL, INC.,

Defendant-Appellant,

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PRELIMINARY STATEMENT

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"), allege that Defendant-Appellant DLJ Mortgage Capital, Inc. ("DLJ") breached representations and warranties ("R&Ws") it made in connection with the deposit of thousands of residential mortgages into the Trusts and that—upon notice or discovery—DLJ failed to satisfy its contractual obligation to repurchase those breaching loans. The Trustee has asserted claims as to all breaching loans in the Trusts based on a sample of 878 specific breaching loans drawn from the four Trusts. The IAS Court (Scarpulla, J.S.C.) resolved the parties' cross-motions for partial summary judgment in a comprehensive and well-reasoned 33-page Decision and Order. DLJ has appealed four of the IAS Court's rulings, each of which should be affirmed.

First, the IAS Court correctly followed this Court's decision on notice and relation back in *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital Inc*., 133 A.D.3d 96 (1st Dep't 2015), *modified on other grounds*, 30 N.Y.3d 572 (2017). A17-19. *Nomura* held that an RMBS plaintiff satisfies the procedural notice requirement for all breaching loans if it provides timely notice of at least some breach claims—which the Trustee indisputably did here—and that any subsequent claims will then relate back to the original filing date of the complaint.

DLJ cannot credibly distinguish *Nomura* from this case. Moreover, the governing contracts do not require that the pre-suit or post-suit notice be loan specific, as the IAS Court correctly recognized in ruling that the Trustee may proceed to trial on any loans noticed pre-suit or during discovery, including through the Trustee's expert's report on sampling and extrapolation.

Second, the IAS Court correctly ruled that DLJ's efforts to preclude the Trustee's use of statistical sampling to prove liability and damages are contrary to the law-of-the-case doctrine. A32-34. In 2013, the IAS Court (Schweitzer, J.S.C.) ruled that the Trustee may "use a statistical sampling to prove liability and damages on all of [its] claims." A120. DLJ noticed, but then abandoned, an appeal—neither withdrawing nor perfecting it—from that 2013 decision, thereby waiving any right to appeal the sampling issue. DLJ's substantive challenges to sampling are equally meritless. No New York state court has ever ruled that an RMBS repurchase protocol precludes a trustee from introducing sampling-related evidence to prove liability and damages in connection with a repurchase claim. This Court should not be the first.

Third, the IAS Court correctly interpreted the repurchase protocol's requirement that DLJ repurchase a loan where a breach "materially and adversely affects" that loan. The IAS Court ruled that this phrase requires only that a breach have "materially increased the risk of loss" on a loan, and not that the loan also be

in default. A31. This straight-forward and easily-administrable interpretation follows this Court's precedent and accords with the decisions of multiple New York state and federal courts.

Finally, the IAS Court correctly ruled that DLJ's contractual requirement to pay "accrued … interest" on repurchased loans applies to both liquidated and non-liquidated loans. A39-41. DLJ identifies nothing in the operative contracts that warrants departing from the IAS Court's plain reading of the relevant contractual language. And far from offering a reasonable interpretation itself, DLJ's interpretation would allow it to escape liability for those loans where it is most likely to have breached its obligations—creating precisely the "perverse incentive" that this Court has previously sought to avoid in interpreting materially identical provisions.

For all these reasons, the Decision and Orders should be affirmed.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. May the Trustee pursue breach of contract claims against DLJ for all breaching loans in the Trusts based on the Trustee's notices of DLJ's systemic and pervasive breaches, coupled with a demand that DLJ repurchase all defective loans?

Answer of the IAS Court: The IAS Court correctly answered "yes."

2. May the Trustee use statistical sampling to prove DLJ's liability and damages for breach of contract?

Answer of the IAS Court: The IAS Court correctly answered "yes."

3. Does the contractual requirement that a breach "materially and adversely affect[]" a loan require only that the breach have materially increased the risk of loss, not that the loan have defaulted?

Answer of the IAS Court: The IAS Court correctly answered "yes."

4. Does the contractual requirement that "accrued … interest" be paid on repurchased loans apply to both liquidated and non-liquidated loans?

Answer of the IAS Court: The IAS Court correctly answered "yes."

COUNTERSTATEMENT OF THE CASE

A. DLJ's Securitization Of The Loans, Warranties As To Their Quality, And Promise To Repurchase Defective Loans

The four residential mortgage backed securities ("RMBS") at issue in this case were created when DLJ and its affiliates deposited more than 36,000 residential mortgage loans (the "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 and deposited the Loans into the Trusts pursuant to four Pooling and Servicing Agreements ("PSAs") dated as of February 1, 2006; June 1, 2006; August 1, 2006; and October 1, 2006, A144, A218; and it marketed and sold certificates for the Trusts to investors (the "Certificateholders").

Because investors had no access to the loan files for the Loans, nor any ability to conduct due diligence or quality control on the Loans before they were securitized, DLJ—as seller—made numerous representations and warranties ("R&Ws") to the Trustee in Section 2.03(f) of the PSAs.[1] These R&Ws concerned the Loans' qualities, characteristics, and the processes by which they were scrutinized before being fed into the Trusts:

> The Seller hereby makes the representations and warranties set forth in Schedule IV as applicable hereto, and by this reference incorporated herein, to the Trustee, as of the Closing Date, or the Subsequent Transfer Date, as applicable, or if so specified therein, as of the Cut-off Date or such other date as may be specified.

A949. To give force and effect to its R&Ws, DLJ agreed that, upon discovering or receiving notice of a breach of the R&Ws that "materially and adversely affects the value of the related Mortgage Loan or the interests of the Certificateholders," DLJ would cure the breach within 120 days or repurchase the Loan for the "Repurchase Price":

> The Seller hereby covenants that within 120 days of the earlier of its discovery or its receipt of written notice from any party of a breach of any representation or warranty made by it pursuant to Section 2.03(f) which materially and adversely affects the interests of the Certificateholders in any Mortgage Loan … it shall cure such breach in all material respects, and if such breach is not so cured, shall, … repurchase the affected Mortgage

[1] The relevant provision in the 2006-4 and 2006-5 PSAs is Section 2.03(e).

> Loan from the Trustee at the Repurchase Price in the manner set forth below[.]

A949 (the "Repurchase Protocol"). 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 (emphasis added).

Given its central role in the securitization process, DLJ bears the burden of implementing the Repurchase Protocol in the event that it receives notice or becomes aware of breaching loans. The PSAs, for example, provide that "[t]he Seller [DLJ] shall promptly reimburse the Trustee for any actual out-of-pocket expenses reasonably incurred by the Trustee in respect of enforcing the remedies for such breach." A949.

B. The Trustee's Provision Of Notice To DLJ As To Every Breaching Loan In The Trust

By letter dated November 22, 2011, certain Certificateholders notified DLJ that an investigation of samples of Loans had revealed that DLJ "placed defective loans into the Trusts on a massive scale." A329. The letter identified: (i) 288 defective Loans from a sample of 406 Loans in the 2006-1 Trust (a 70% breach rate); (ii) 522 defective Loans from a sample of 721 Loans in the 2006-3 Trust (a 72% breach rate); (iii) 359 defective Loans from a sample of 553 Loans in the

2006-4 Trust (a 65% breach rate); and (iv) 284 defective Loans from a sample of 395 Loans in the 2006-5 Trust (a 72% breach rate). A329; *see* A48-50.

This notice from the Certificateholders 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, U.S. Bank, as Trustee, incorporated the Certificateholders' November 22, 2011 letter by reference and demanded that DLJ repurchase each defective Loan. A1337. The Trustee sent additional repurchase demands of specific breaching Loans on April 27, 2012, August 22, 2012, December 14, 2012, and February 27, 2013. *See* A1410, A1428, A1437, A1441.

Despite receiving these multiple notices, together identifying thousands of specific breaching Loans, DLJ has refused to repurchase even a single noticed loan from the Trusts.

C. The Trustee's Lawsuits Against DLJ For Failure To Repurchase Any Breaching Loan

1. The Complaints

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 on August 31, 2012 (2006-1 Proceeding) (A137-42), and October 30, 2012 (2006-5 Proceeding) (A218-23), and by complaints filed on January 29, 2013 (2006-1 Proceeding) (A143-90), and April 8, 2013 (2006-5 Proceeding) (A224-61). The complaints allege breach of contract through pervasive material R&W violations affecting Loans in the Trusts (A145-47, A170, A226-27, A246-48) and unjust enrichment with respect to other misconduct by DLJ—including that DLJ took settlement payments from the originators of defective Loans in the Trusts, but then failed either to repurchase those Loans from, or to provide the settlement payments to, the Trusts (A172-75, A248-52). The complaints demand that DLJ honor its repurchase remedy for Loans impacted by the breaches, or else pay equivalent damages. *E.g.*, A181.

2. The IAS Court's 2013 Order Permitting The Trustee To Use Statistical Sampling

In November 2013, during the early part of fact discovery, the Trustee sought approval from the IAS Court (at the time, Justice Schweitzer) to "use … statistical sampling to prove liability and damages." A121. The Trustee explained that "a statistically significant, random sample of Loans would conserve the resources of the parties and the Court, streamline the trial, and promote judicial economy and efficiency, without compromising the quality or reliability of the evidence adduced to prove Plaintiffs' claims." A122. DLJ opposed the request, arguing that sampling wis inconsistent with the terms of the PSAs. A133. Justice Schweitzer approved the Trustee's request, stating:

> [T]he court agrees that plaintiffs' use of statistical sampling to prove liability and damages would streamline the trial, promote judicial economy, and conserve the resources of the parties and the court. Accordingly, it is hereby ORDERED that plaintiffs may use a statistical sampling to prove liability and damages on all of their claims; and it is further ORDERED that the parties shall meet and confer as to the sample to be used.

A120. DLJ noticed an appeal of this sampling order (2006-1 Proceeding, Index No 156016/2012, Sup. Ct. Dkt. 241), but then failed either to withdraw or perfect it.

Pursuant to the sampling order, and following meet and confers with DLJ, the Trustee drew a valid and representative sample of 400 loans from each of the four Trusts (for a total sample of 1,600 loans). *See* A2745, A2749. The Trustee's reunderwriting expert, Richard Payne, and the Trustee's other experts then

reviewed the sample loans and together concluded that 783 of them were materially affected by one or more warranty breaches. A2909, A3002-03, A3445-46. Plaintiffs' damages expert, Dr. Karl Snow, then statistically extrapolated this defect rate from the sample population to the Trusts as a whole, and on this basis provided estimated breach rates and damages with a high statistical degree of accuracy across all of the Loans in the four Trusts. A2952-53, A2963-64.

3. The IAS Court's 2019 Summary Judgment Order

After Justice Schweitzer retired in 2015, these actions were assigned to Justice Scarpulla. When discovery closed, the parties filed cross-motions for partial summary judgment. DLJ challenges four of Justice Scarpulla's rulings on those motions:

(a) Notice And Relation Back: DLJ moved for summary judgment to limit its liability to only Loans specifically identified in the Trustee's pre-suit demand letters, arguing that the Trustee had not given valid notice for any other loans. A16-17. The Trustee also moved for summary judgment on notice, seeking a ruling that DLJ had received sufficient notice of material breaches to trigger the Repurchase Protocol for all breaching Loans in the Trusts. A16. The IAS Court ruled that the Trustee's pre-suit "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. Applying this Court's decision in *Nomura*, 133 A.D.3d 96, the IAS Court concluded that because the Trustee's pre-suit letters notified DLJ of specific loan breaches and provided notice that the Trustee's ongoing investigation would likely reveal more, the Trustee was entitled to assert those additional breaches—including as noticed though the Trustee's expert's report on sampling and extrapolation—under the doctrine of relation back. A17-19. The IAS Court rejected DLJ's contention that the Trustee had to send contractual notice of a material breach under the Repurchase Protocol before the six-year statute of limitations had expired. A18-19.

(b) Sampling: The parties cross-moved for summary judgment as to whether statistical sampling is a permissible method to prove DLJ's liability and damages. The Trustee argued in favor of sampling; DLJ argued against it. The IAS Court did not need to reach the merits, however, because it ruled that Justice Schweitzer's 2013 order permitting the use of sampling was binding law of the case. A33-34. The court explained that that 2013 order "plainly stated that 'plaintiffs' use of statistical sampling to prove liability and damages would streamline the trial, promote judicial economy, and conserve the resources of the parties and the court.'" A33. The IAS Court further ruled that "[i]ssues concerning the sufficiency of the sample itself will be addressed pre-trial in motions in *limine*." A34.

(c) "Materially And Adversely Affects The Interests Of The Certificateholders In Any Mortgage Loan": The Trustee moved for summary judgment on the meaning of the Repurchase Protocol requirement that DLJ repurchase breaching loans only where the breach "materially and adversely affects the interests of the certificateholders." In particular, the Trustee sought a ruling that the phrase "materially and adversely affect[]" requires only that a breach "significantly increased a loan's risk of loss," and not, as DLJ has argued, that the loan be in default. The IAS Court agreed with the Trustee, ruling:

> Because the PSAs do not require a default for there to be a breach of a warranty made in the PSAs, Home Equity's motion is granted to the extent that I interpret "material and adverse," consistent with the PSAs and the relevant New York State cases, as requiring only a showing that the alleged breach of a warranty materially increased the risk of loss.

A31.

(d) Accrued Interest On Liquidated Loans: DLJ moved for summary judgment that the Repurchase Protocol requirement that "accrued … interest" be paid on any repurchased loans does not apply to liquidated loans. A39. The IAS Court denied this aspect of DLJ's motion, ruling that all Loans, liquidated or not, are subject to the terms of the Repurchase Protocol. The court explained that this Court's decision in *Nomura* requires DLJ to pay monetary damages for liquidated loans, *see* 133 A.D.3d at 105-07, and concluded that "the repurchase price for

liquidated loans remains the same as for non-liquidated loans" because "there is no language in the PSAs supporting an alternative calculation." A40.

DLJ's appeal followed.

ARGUMENT

I. THE IAS COURT CORRECTLY DENIED DLJ'S MOTION TO LIMIT THE ACTION TO LOANS SPECIFICALLY IDENTIFIED IN THE TRUSTEE'S PRE-SUIT NOTICES

A. The Trustee Provided DLJ With Pre-Suit Notice As To Every Breaching Loan In The Trusts

This Court should affirm the IAS Court's decision that the Trustee's notices entitle it to prove liability and damages as to *all* breaching loans in the Trusts, including as noticed through Trustee's expert's report on sampling and extrapolation. A18-19. The Trustee's pre-suit notices to DLJ identified over a thousand specific breaching loans across the four Trusts, and provided detailed notice of DLJ's "systemic breaches," its "disregard for underwriting standards across all of the Trusts," and its securitization of "defective loans on a massive scale." A328-33. The pre-suit notices further warned that the specific loans identified therein were "just the tip of the iceberg," and that "additional investigation … will reveal substantial additional evidence of breaches," and demanded that DLJ "promptly repurchase each of the defective Mortgage Loans in the Trusts." A328, A330.

DLJ errs in arguing (Br. 21) that the PSAs require loan-specific notice for every breaching loan. Rather, as one court has explained in construing similar contracts, "[n]otably absent" from the contractual text "is any requirement that the notifying party provide … 'loan-by-loan' notice of breach in particular loans." *Deutsche Bank Nat'l Tr. Co. for Morgan Stanley Structured Tr. I 2007-1 v. Morgan Stanley Mortg. Capital Holdings LLC*, 289 F. Supp. 3d 484, 505 (S.D.N.Y. 2018) ("*MSST 2007-1*").

Indeed, the contracts at issue here expressly condition DLJ's repurchase obligations on "notice" or "discovery" of a "breach." *E.g.*, A949 (PSA § 2.03(g)). For example, the Repurchase Protocol in the PSAs refers to "a breach of a representation or warranty made pursuant to Section 2.03(f) that materially and adversely affects the interests of the Certificateholders in any Mortgage Loan," A949, where the "Loan" can be "*any* Mortgage Loan" (emphasis added), and is not referred to by the definite article. Similarly, one of the key R&Ws underlying the Trustee's breach allegations provides that the "information set forth in the Mortgage Loan Schedule … is complete, true and correct in all material respects," A1331, where that schedule contains information for *all Loans* in the Trusts, and can thus be breached either by individual or aggregate inaccuracies. And another of the key R&Ws underlying the Trustee's allegations provides that "No Mortgage Loan had a combined loan-to-value ratio at the time of origination of more than

100%," A1335, where again the representation refers to *all* Loans in the Trusts, not to an individual loan specified by the definite article.

Given the lack of any loan-specific "notice" requirement in the PSAs, several New York state and federal courts have ruled that a repurchase demand provides sufficient notice for *all* breaching loans in an RMBS trust if, as here, it identifies a large number of breaching loans and requests repurchase of all breaching loans. *See, e.g., SACO I Trust 2006-5 v. EMC Mortg. LLC*, No. 651820/2012, 2014 N.Y. Misc. LEXIS 2494, *16-17 (Sup. Ct. N.Y. Cnty. May 29, 2014) (ruling that breach notice that "referenced statistical sampling of the pools and requested repurchase of all breaching loans" provided sufficient "notice"); *Nomura Asset Acceptance Corp. Alternative Loan Trust [2006-S4] v. Nomura Credit & Capital, Inc.*, No. 653390/2012, 2014 WL 2890341, *15 (Sup. Ct. June 26, 2014) (ruling that plaintiff provided effective notice of all breaching loans with notice that "request[ed] that [defendant] repurchase not only the specifically identified loans but 'any loans that did not comply with the representations and warranties made by' it"); *MSST 2007-1*, 289 F. Supp. 3d at 505 ("notice" of large number of breaching loans within a representative sample extend to all breaching loans—not just those specifically identified); *Deutsche Bank Nat'l Trust Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 97 F. Supp. 3d 548, 552 (S.D.N.Y. 2015) ("Plaintiff's letter gave adequate notice with respect to breaching loans

beyond the 1,620 specifically mentioned"); *Assured Guar. Mun. Corp. v. Flagstar Bank*, 920 F. Supp. 2d 475, 512-513 (S.D.N.Y. 2013) (ruling that plaintiff's notice of pervasive breaches "rendered [defendant] constructively 'aware'—or, at minimum, put [defendant] on inquiry notice—of the substantial likelihood that these breaches extended … into the broader loan portfolio").

DLJ wrongly relies on (Br. 19) *Retirement Board of Policeman's Annuity & Benefit Fund of Chicago v. Bank of N.Y. Mellon*, 775 F.3d 154 (2d Cir. 2014), for the proposition that an RMBS plaintiff must provide loan-specific notice. That decision held that investors suing an RMBS trustee could not use sampling to establish *class standing* in trusts in which they did not invest. *See id*. at 162-63. It did not address *notice requirements* in a suit, such as this, brought by a trustee against a seller or sponsor.

DLJ fares no better in contending (Br. 28-29) that, without loan-specific notice of breach, it is deprived of the "opportunity to cure, substitute, or repurchase allegedly defective loans." DLJ's proposed interpretation is belied entirely by its conduct: of the 1,351 loans for which DLJ concedes that the Trustee provided timely notice (A17), and the thousands more breaching sample loans that the Trustee has noticed in the intervening years (A327, A383, A454, A478, A539, A1410, A1428, A1437, A1441, A1447, A1531), DLJ does not deny that it *has not repurchased a single loan to date* (*see* A15).

DLJ's argument also disregards that for the vast majority of breaching loans, this contractual language will not actually be applied. As DLJ appropriately does not dispute, A31-32, most of the breaching loans at issue have defaulted and been liquidated from the Trusts, and therefore no longer exist. There is thus nothing, in fact, to be "cure[d]," "substitute[d]," or "repurchase[d]." But, as this Court held in *Nomura*, in such circumstances a plaintiff "may pursue monetary damages" against a sponsor like DLJ "*in lieu* of" repurchase. 133 A.D.3d at 106 (emphasis added) (citing and quoting *Bank of N.Y. Mellon v. WMC Mortg., LLC*, 2015 WL 2449313, *2 (S.D.N.Y. May 22, 2015)). For those loans, the Repurchase Protocol will be used only to determine the amount of damages that DLJ owes to the Trustee.[2] As explained *infra*, Part II.B, this is an exercise for which neither loan-specific notice nor loan-specific proof of breach is necessary.

DLJ also errs (Br. 37 n.18; *see also* Br. 19-20) in relying on cases in which trustees are defendants. Those cases concern *trustees'* duties, which, in high contrast to the duties of sellers and sponsors—such as DLJ—are narrowly circumscribed. *See, e.g., Royal Park Invs. SA/NV v. U.S. Bank Nat'l Ass'n,* 2018 U.S. Dist. LEXIS 113600, *8 (S.D.N.Y. July 9, 2018) ("[U]nlike a trustee, an

[2] DLJ relies on the canon (Br. 29) that a contract "should not be interpreted so as to render any clause meaningless," but it was for precisely this reason—and to deny sponsors like DLJ the "perverse incentive" of benefiting from contractual interpretations that allowed them to escape liability for "junk mortgages"—that this Court held in *Nomura* that the literal wording of the repurchase protocol will *not* apply to liquidated loans. *See* 133 A.D.3d at 106.

RMBS issuer or sponsor securitizes the loans, conducts due diligence on the loans (or at least is in a position to do so), and makes representations and warranties about the loans."); *Royal Park Invs. SA/NV v. HSBC Bank USA, N.A.*, 2018 U.S. Dist LEXIS 31157, *37 (S.D.N.Y. Feb. 23, 2018) ("[T]he duty of an originator or sponsor to underwrite each loan before issuing or purchasing it is not comparable to the limited and loan-specific nature of the trustee's duties under the PSAs. Originators and sponsors review each loan file and make R&Ws as to each loan. Therefore, if any loan turns out to be defective, it is fair to assume that the originator or sponsor is liable."); *see also* A1024 (PSA §8.01) (describing Trustee's limited duties).

Given the contractual language and the weight of decisions interpreting it, this Court should hold that the Trustee provided proper pre-suit notice of all breaching loans.

B. The Trustee In All Events Satisfied The Condition Precedent To Suit And Its Post-Suit Notices Relate Back

DLJ further errs (Br. 21-32) in arguing against application of the doctrine of relation back. The IAS Court correctly held that the notices entitle the Trustee to prove liability and damages as to *all* breaching loans in the Trusts, including as noticed through Trustee's expert's report on sampling and extrapolation, under this Court's settled precedent in *Nomura*. A18-19. The reasoning in *Nomura* was subsequently reinforced by *U.S. Bank N.A. v. GreenPoint Mortgage Funding, Inc.*,

147 A.D.3d 79 (1st Dep't 2016), and the Court of Appeals' decision on a related issue in *U.S. Bank National Ass'n v. DLJ Mortgage Capital, Inc*., __ N.Y.3d __, 2019 WL 659355 (Feb. 19, 2019) ("*ABSHE*"). These cases make clear, as the IAS Court ruled, that a "plaintiff need not identify every breaching loan for which it seeks recovery in a pre-suit breach notice." A17. Rather, a plaintiff need only provide pre-suit notice and an opportunity to cure as to "some" loans. *Nomura*, 133 A.D.3d at 108. That is precisely what the Trustee did here.

In *Nomura*, plaintiffs sent a number of loan-specific repurchase demands to the defendant more than ninety days before filing a timely suit, and warned that plaintiffs "were investigating the mortgage loans and might uncover additional defective loans for which claims would be made." *Id.* Plaintiffs then sent a number of additional demands after filing suit. *See id*. at 103. This Court rejected defendants' effort to limit plaintiffs' claim to those loans for which pre-suit notices were sent. *See id.* at 108. To the contrary, it affirmed the motion court's decision to allow plaintiffs' claims to proceed, even as to loans that "were mentioned in breach notices sent less than 90 days before plaintiffs commenced their actions," as well as "loans that plaintiffs failed to mention in their breach notices" at all. *Id.* This Court reasoned that because "there were some timely claims in these cases" based on the pre-suit notices, those "presuit letters put defendant on notice" of an ongoing investigation of additional breaches. *Id.* This Court thus concluded,

applying ordinary statute-of-limitations principles, that "a complaint amended to add the claims at issue"—including claims based on post-suit notices—"would have related back to the original complaints." *Id*.; *see* CPLR 203(f) (providing for relation back).

In *GreenPoint*, this Court reaffirmed the principles set forth in *Nomura* and upheld the dismissal of a repurchase claim based on notice because the *GreenPoint* plaintiffs had not sent any pre-suit repurchase notices. 147 A.D.3d at 87. *GreenPoint* distinguished the facts of *Nomura*, expressly noting that the plaintiffs in *Nomura*—unlike the plaintiffs in *GreenPoint*—had "actually sent pre-suit breach notices to the defendant," and thus had "complied with the condition precedent of providing that defendant with notice" under *ACE Securities*. *Id.* at 88.[3] *GreenPoint* also observed that the pre-suit notices in *Nomura* had "expressly stated that the trustees were still investigating the matter and that further nonconforming mortgages might be discovered." *Id*.

The Trustee's situation is identical to that in *Nomura* and entirely unlike the situation presented in *GreenPoint.* Here, as in *Nomura*, the Trustee provided DLJ with numerous loan-specific pre-suit notice of breaches, and ample opportunity to cure them. A1410, A1428, A1441, A1447, A1531; *see also* A327, A383, A454,

[3] In *ACE Securities*, the plaintiff similarly had not sent the defendant any repurchase demands at least ninety days prior to commencing suit. *See ACE Sec. Corp. v. DB Structured Prod., Inc.*, 25 N.Y.3d 581, 591–93 (2015).

A478, A539; A48-50. Here, as in *Nomura*, the Trustee's pre-suit notices informed DLJ that it was still investigating (*i.e.*, that the pre-suit noticed loans were "just the tip of the iceberg") and that many more material breaches were likely. A330, A333-34.[4] And here, as in *Nomura*, the Trustee then filed timely actions based upon the pre-suit notices. A143, A224. Accordingly here, as in *Nomura*, the Trustee satisfied the condition precedent to suit recognized in *ACE Securities*, and to the extent the Trustee's pre-suit notices standing alone are deemed insufficient to put DLJ on notice as to all breaching Loans, the Trustee's claims based on post-suit notices relate back to its timely-filed claims based on the pre-suit notices. Thus, given the exactly analogous facts, the IAS Court correctly applied *Nomura* to hold that the Trustee's "breach notices need not all be sent pre-suit." A17-18.[5]

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[4] Indeed, in its first pre-suit notice, the Trustee informed DLJ of "systemic breaches of representations and warranties," including a material breach rate of between 65% and 72.4% (inferred from a valid statistical sample) across *all* of the loans in the four Trusts. A328-30 (notifying DLJ that "additional investigation, including a re-underwriting of the loan files themselves, will reveal substantial additional evidence of breaches").

[5] DLJ does not challenge (*see* Br. 22 n.15), the IAS Court's separate ruling that there are triable issues as to whether DLJ discovered the alleged breaches (A19-20). This "discovery" portion of the Repurchase Protocol provides a separate basis—not reliant on notice or the doctrine of relation back—for the Trustee to recover on all breaching loans, including those noticed post-suit. *See, e.g., Natixis Real Estate Capital Tr. 2007-HE2 v. Natixis Real Estate Holdings, LLC*, 149 A.D.3d 127, 139 (1st Dep't 2017); *GreenPoint*, 147 A.D.3d at 85. A defendant discovers breaches when it "knew or should have known" of them. *GreenPoint*, 147 A.D.3d at 86; *see also Fixed Income Shares: Series M v. Citibank*, N.A., 157 A.D.3d 541, 542 (1st Dep't 2018) ("discovery" is less stringent standard than "actual knowledge").

DLJ's arguments that the IAS Court improperly applied *Nomura* and the doctrine of relation back are entirely unavailing. For example, DLJ wrongly argues (Br. 21-27) that relation back does not apply here because the claims based on the Trustee's post-suit notices do not arise "'out of [the] same conduct, transaction or occurrence[]'" as the claims based on the Trustee's pre-suit notices. (Quoting *Buran v. Coupal*, 87 N.Y.2d 173, 178 (1995)). DLJ ignores that the Trustee's pre-suit notices plainly stated that DLJ had engaged in "*pervasive[] and systemic[] disregard[]*" for underwriting standards; that this disregard had resulted in "*systemic breaches*" and the placement of "*defective loans into the Trusts on a massive scale*"; and that statistical sampling showed breach rates of between 65% and 72% across the Trusts. A328-33. The pre-suit notices further warned that ongoing investigation "will reveal substantial additional evidence of breaches." A330. These pre-suit notices—and the detailed allegations regarding DLJ's faulty origination and securitizations processes in the timely-filed complaints based upon them (A151-75, A233-52)—"g[a]ve [DLJ] notice of the transactions, occurrences, or series of transactions or occurrences, to be proved" as to the breaches identified in any post-suit notices. CPLR 203(f).[6]

[6] DLJ wrongly argues (Br. 23) that "notice that … the borrower for a loan originated by Originator A in California may have misrepresented his income does not put DLJ on notice that a loan originated by Originator B in Florida may be missing a child support agreement." To the contrary—in that scenario DLJ would be on notice of the "same series of transactions or occurrences" because the

DLJ likewise misplaces reliance (Br. 24-25) on *Greater New York Health Care Facilities Ass'n v. DeBuono*, 91 N.Y.2d 716 (1998). There, the Court of Appeals declined to relate back the third-party intervenors' proposed claims to the plaintiffs' claims because the defendants "had no notice of proposed intervenors' particularized claims when they entered into negotiations with the [plaintiffs]," including because the third party intervenors and plaintiffs "[we]re not closely related parties." *Id.* at 721 ("a stranger could not intervene in a pending proceeding to interpose an otherwise time-barred claim"). By contrast however, the post-suit notices and pre-suit notices here came from the same party, and those pre-suit notices *expressly warned* DLJ that further—similar, or even identical—breach claims would follow. A328-334, A385, A456, A479-480, A540-541. The pre-suit notices here are thus more than a sufficient anchor for application of the relation-back doctrine. *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 where defendant has "notice of the proposed specific claim").[7]

Trustee's pre-suit notices clearly allege that DLJ's systemic and trusts-wide disregard of the applicable underwriting standards is the *reason* both loan A and loan B are in breach. A328-33; *see* A48-50. DLJ's argument is thus akin to admitting it was on notice that its widespread misconduct had started a forest fire, but denying it was on notice that any trees might be burning beyond those specifically identified.

[7] DLJ's reliance (Br. 23-24) on *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 2012 WL 3201139 (Del. Ch. Aug. 7, 2012), is even farther afield. That decision addressed *Delaware* law, and ruled relation back

Nor is DLJ correct that relation back is inapplicable in RMBS breach of contract actions. As explained above, in *Nomura*, this Court held in the RMBS context that pre-suit notice of specific breaching loans and the plaintiff's continuing investigation is sufficient for relation back of any post-suit notices. *See* 133 A.D.3d at 108. *Nomura*, moreover, is in accord with this Court's relation-back decisions outside the RMBS context, which turn on whether defendant received fair notice of the plaintiffs' subsequent claims. *See, e.g., Koch v. Acker, Merrall & Condit Co.*, 114 A.D.3d 596, 597 (1st Dep't 2014) (claims regarding 211 bottles of counterfeit wine related back to complaint regarding "at least" five bottles of counterfeit wine, because defendant was "on notice that, as a result of 'further research' on the 'numerous bottles' of wine that defendant had sold him …, plaintiff might assert additional claims relating to other bottles"). And contrary to DLJ's suggestions (Br. 26-27), nothing in *Nomura* indicates that its application of the relation-back doctrine was limited to the pleading stage, and, even if *GreenPoint* had limited *Nomura* to its facts, the facts here are materially identical (*see supra*, at 16).

Finally, DLJ's argument that the Trustee cannot proceed upon its post-suit notices is particularly untenable after the Court of Appeals' recent decision in *ABSHE*. There, the trustee timely provided DLJ, as the secondarily liable

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was inapplicable where, unlike here, the plaintiff expressly *disclaimed* that it would bring additional claims. *See id.* at *19-20.

"backstop" defendant, with pre-suit notice of breaching loans, and then timely filed suit against DLJ. The trustee, however, did not provide the primary defendant with pre-suit notice of any breaching loans. 2019 WL 659355, at *1. DLJ, as backstop defendant in that case, argued that the trustee was required to meet a condition precedent of providing timely notice to the *primary* defendant before bringing suit against DLJ as *backstop* defendant. DLJ also argued, as it does here, that *ACE Securities* bars claims where a procedural prerequisite is not met prior to filing suit and within six years of the relevant R&Ws. *Id*. at *2-3. The Court of Appeals rejected these arguments, holding that the trustee's obligation to give notice to the primary defendant before bringing a suit against the backstop defendant is not a substantive element of the cause of action, and so does not affect the merits or timeliness of the claim. *Id*. at *3. Thus, because the trustee filed a timely claim against DLJ as the backstop defendant, it could provide the "procedural" notice to the primary defendant, and thus satisfy all procedural prerequisites to its claim against DLJ, later. *Id*.

ABSHE turned on the application of CPLR 205(a)—rather than CPLR 203(f)—but it provides strong reinforcement to this Court's decisions in *Nomura* and *GreenPoint.* If the *ABSHE* plaintiff could preserve a timely contract claim by providing notice after the expiration of the statute of limitations, it follows that the

Trustee may also pursue claims based on post-suit notices through the doctrine of relation-back. *See Nomura*, 133 A.D.3d at 108.[8]

For all these reasons, this Court should affirm the IAS Court's order permitting Plaintiffs to proceed to trial on all breaching Loans in the Trusts.

II. THE IAS COURT CORRECTLY DENIED DLJ'S MOTION TO PRECLUDE STATISTICAL SAMPLING

DLJ also shows no error in the IAS Court's denial of DLJ's motion to preclude the Trustee's use of statistical sampling to prove liability and damages. A32-34. That motion fails both procedurally and on the merits.

A. DLJ's Motion Is Barred By Law Of The Case And Appellate Waiver

DLJ's sampling arguments are barred by both the law of the case and DLJ's failure to perfect or withdraw its appeal of a 2013 order permitting the Trustee to use statistical sampling. In November 2013, the Trustee sought approval from the

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[8] *ABSHE* also refutes DLJ's footnoted argument (Br. 26 n.16) that the Trustee may not obtain relief for breaching loans in the 2006-1 Trust. As in *ABSHE*, even if the Trustee's claim was not ripe as to the 2006-1 Trust because it had not satisfied its condition precedent of providing 120 days' notice when it sued in 2012, the Trustee has certainly since satisfied that condition, such that its claim is ripe *now*. It should therefore be permitted to recover. Moreover, DLJ concedes (Br. 11-12) that the Trustee did satisfy its condition precedents as to the 2006-3, 2006-4 and 2006-5 Trusts, and that the Trustee provided simultaneous notice of pervasive breaches *across all four Trusts*, where two of the Trusts (2006-3 and 2006-4) are *part of the same complaint and in the same proceeding* as the 2006-1 Trust. Any untimely claims as to the 2006-1 Trust should therefore relate back—at a minimum—to the timely claims as to the 2006-3 and 2006-4 Trusts in the same action.

IAS Court "for the use of statistical sampling to prove liability and damages." A121. DLJ opposed this request, arguing—as it does again now—that sampling is inconsistent with the terms of the PSAs. A133. The IAS Court (Schweitzer, J.S.C) rejected DLJ's argument and approved the Trustee's request; the court ordered that "plaintiffs may use a statistical sampling to prove liability and damages on all of their claims," and that "the parties shall meet and confer as to the sample to be used." A120.

Relying upon this order, and following meet and confers with DLJ, the Trustee selected a statistically valid sample of 400 loans from each of the four Trusts (for a 1,600 loan sample). *See* A2745, A2749. The parties then spent the next four years agreeing on the correct loan files and underwriting guidelines for the sample loans, and engaging in extensive expert discovery centered on DLJ's liability and the Trustee's damages as arising from the sample, including through statistical extrapolation.

"The doctrine of law of the case … precludes parties or their privies from relitigating an issue that has already been decided[.]" *Chanice v. Fed. Exp. Corp.*, 118 A.D.3d 634, 635 (1st Dep't 2014). This is just such an issue, as the IAS Court correctly ruled in holding that "the parties had a full opportunity to litigate the issue before Justice Schweitzer and did so," and in noting that DLJ "sets forth the same argument before me as before Justice Schweitzer." A33.

DLJ has also waived its right to appeal the use of statistical sampling in this case. DLJ noticed an appeal of Justice Schweitzer's 2013 order, but then failed either to withdraw or perfect that appeal. (2006-1 Proceeding, Index No 156016/2012, Sup. Ct. Dkt. 241). DLJ may not repeat the same arguments now in an attempt to revive an issue that it lost—then began to appeal but abandoned—more than five years ago. *See, e.g., Pier 59 Studios, L.P. v. Chelsea Piers, L.P.*, 40 A.D.3d 363, 366 (1st Dep't 2007) (precluding appeal of issue that was also subject of a prior order from which appeal was noticed but never perfected or withdrawn).

The IAS Court correctly ruled that DLJ remains free to challenge at trial the weight or validity of the specific sample that the Trustee puts forward. A34. But under the law of the case, DLJ was foreclosed from making a generalized challenge to the use of statistical sampling at summary judgment, and it is now doubly barred from raising that challenge on appeal.

B. The Contractual Repurchase Protocol In Any Event Permits Sampling

If the Court reaches the merits of the sampling motion, it should affirm. Statistical sampling is a well-established method of proof that comports with the parties' contracts and is permitted by all relevant judicial precedent. The IAS Court was well within its "broad authority," *Messinger v. Mount Sinai Med. Ctr.*, 15 A.D.3d 189, 189 (1st Dep't 2005) (internal quotation marks and citation omitted), to allow sampling evidence to prove liability and damages. DLJ errs in

suggesting any judicial trend against sampling in a case—like this one—against a sponsor and originator. No New York state court has ever held that an RMBS repurchase protocol precludes an RMBS plaintiff from introducing sampling-related evidence to prove liability and damages in connection with a repurchase claim against a sponsor or originator, and this Court should not be the first.

Contrary to DLJ's assertions (Br. 36-37), the clear judicial trend has been to permit statistical sampling in breach-of-warranty cases that, like this one, are brought against an RMBS *sponsor* and *originator*. The Southern District of New York recently summarized the state of the law, explaining that "[c]ourts applying New York law have repeatedly approved the use of statistical sampling as a means of proving liability and damages in RMBS cases." *MSST 2007-1*, 289 F. Supp. 3d at 496-97 (collecting cases).[9] As these decisions have reasoned, "statistical

[9] *See also 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); *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); *Deutsche Bank Nat'l Trust Co v. WMC Mortg., LLC*, 2014 WL 3824333, *9 (D. Conn. 2014); *Assured Guar. Mun. Corp. v. DB Structured Prods., Inc*., 44 Misc. 3d 1206(A), *6 (Sup. Ct. N.Y. Cnty. July 3, 2014); *ACE Secs. Corp. [2007-HE1] v. DB Structured Prods., Inc*., 41 Misc. 3d 1229(A), at *2 n.3 (Sup. Ct. N.Y. Cnty. Nov. 21, 2013); *Flagstar*, 920 F. Supp. 2d at 512; *ACE Secs. Corp. [2006-SL2] v. DB Structured Prods., Inc.*, 40 Misc. 3d 562, 570 (Sup. Ct. N.Y. Cnty. 2013); *Home Equity Mortgage Trust Series 2006-1 [HEMT 2006-1] v. DLJ Mortgage Capital, Inc.*, No. 156016/2012, Doc. No. 236, at 1 (Sup. Ct. N.Y. Cnty. Nov. 18, 2013); *MBIA*, 30 Misc. 3d 1201(A), at *4; *Syncora Guarantee Inc. v. EMC Mortg. Corp.*, 2011 WL 1135007, *4 (S.D.N.Y. Mar. 25, 2011).

sampling is consistent with … the Repurchase Protocol" because "it is a well-established and scientifically sound method of inferring (to varying degrees of certainty) how many individual loans in the pool contain material breaches." *Id*. at 505; *see MBIA*, 30 Misc. 3d 1201(A), at *5 ("the validity of properly conducted sampling is not a question for debate").

DLJ's argument to the contrary (Br. 34-35) rests on the erroneous premise that the Repurchase Protocol requires loan-specific proof. But sampling allows a factfinder to reliably determine liability and assess damages to a reasonable degree of certainty, even to the extent the "sole remedy" of repurchase applies. *See, e.g.*, *MSST 2007- 1*, 289 F. Supp. 3d at 504; *see also, e.g.*, A2955-2965.

DLJ's argument (Br. 36-37) that the judicial trend disfavors sampling rests on inapposite (and non-binding) federal and out-of-state cases that investors brought against RMBS *trustees*—not against RMBS *sponsors and originators* like DLJ—for allegedly discovering defective loans but not pursuing breach-of-warranty claims on the trusts' behalves.[10] These cases are inapposite because RMBS trustees, unlike originators and sponsors such as DLJ, generally are

[10] *Royal Park Investments SA/NV v. Deutsche Bank Nat'l Trust Co*., 2018 WL 4682220, *12 (S.D.N.Y. Sept. 28, 2018); *BlackRock Balanced Capital Portfolio (FI) v. Deutsche Bank Nat'l Tr. Co.*, 2018 WL 3120971, *1-2 (S.D.N.Y. May 17, 2018); *BlackRock Allocation Target Shares v. Wells Fargo Bank, N.A.*, 2017 WL 953550, *6 (S.D.N.Y. Mar. 10, 2017); *W. & S. Life Ins. Co. v. Bank of N.Y. Mellon*, 2017 WL 3392855, *10 (Ohio Ct. Com. Pl. Aug 4, 2017), aff'd 2019 WL 495581 (Ohio Ct. App. Feb. 8, 2019).

contractually exempt from investigating the accuracy of warranties. *See, e.g.*, *Commerce Bank v. Bank of N.Y. Mellon*, 141 A.D.3d 413, 415-16 (1st Dep't 2016) ("the trustee of an RMBS ... trust does not have a duty to nose to the source") (internal quotation marks omitted). In suits against trustees, therefore, requiring proof that the trustee "ha[d] information on a loan-by-loan basis to trigger its duties comports with the structure of [the trust contract] and the limited duties it imposes on the trustee." *Royal Park*, 2018 WL 4682220, at *6 (internal citation, quotation marks, and alterations omitted). Here, in contrast, DLJ had a duty to investigate the accuracy of the R&Ws and, in any event, as the Trustee will prove, it was intimately aware of its own breaches of R&Ws with respect to the loans it originated, securitized, and serviced. *See id*. at *10 (observing that "every judge has distinguished cases brought against trustees … from cases brought directly against … warrantors"); *id*. ("[T]he duty of an originator or sponsor to underwrite each loan before issuing or purchasing it is not comparable to the limited and loan-specific nature of the trustee's duties under the PSAs.") (quoting *Royal Park Invs. SA/NV v. HSBC Bank USA Nat'l Ass'n*, 2018 U.S. Dist. LEXIS 31157 (S.D.N.Y. Feb. 23, 2018)).

DLJ cites (Br. 32, 36) just two cases that considered sampling in the context of claims made against a sponsor or originator, *MARM v. UBS Real Estate Secs. Inc*., 2015 WL 764665 (S.D.N.Y. Jan. 9, 2015), and *Homeward Residential, Inc. v.*

Sand Canyon Corp., 2017 WL 5256760 (S.D.N.Y. Nov. 13, 2017). These cases are outliers, and they rejected sampling after misinterpreting the contracts at issue to preclude this method of proof. *See Homeward*, 2017 WL 5256760, at *7-8; *MARM*, 2015 WL 764665, at *10-11.[11] They also show why reading the PSAs to place a prohibition on statistical sampling is commercially unrealistic, and unworkable in practice. In *MARM*, for example, because Judge Castel forbade sampling as a method of proof, the parties were required to undertake a staggering loan-by-loan underwriting of approximately 12,000 individual loans and to hire a special master who spent many months and countless hours reviewing one loan after another, at a cost of (easily) millions of dollars. *See Law Debenture Tr. Co. of N.Y. v. WMC Mortg.*, LLC, 2017 WL 3401254, *13 n.6 (D. Conn. Aug. 8, 2017) (describing *MARM*). Another Southern District judge described the *MARM* result as "demonstrably impracticable." *MSST 2007-1*, 289 F. Supp. 3d at 502; *see id.* ("the final cost, both in terms of time and resources expended, will be extraordinary").

[11] As with its arguments on notice, DLJ wrongly cites (Br. 36-37) the Second Circuit's decision in *Retirement Board*, 775 F.3d 154, for the proposition that a RMBS plaintiff can prove loan defects only on a loan-by-loan basis. That decision is inapposite for the reasons discussed above. *See supra*, at 16. Moreover, in that case, the Second Circuit recognized that courts have "permitted plaintiffs to use statistical sampling to prove the incidence of defects within individual trusts" in cases like *Flagstar*. *Id*. at 162 n.6.

This expensive, time-consuming, and wasteful process would only be magnified here should this Court now disturb the law of the case and preclude sampling. *MARM* involved approximately 17,000 loans. *See* 2015 WL 764665, at *1. This case involves approximately 36,000 loans—more than twice as many. DLJ's proposed interpretation of the PSA thus would result in the parties' contractual dispute taking not months, but years more to resolve, at a cost of tens of millions of dollars—an enormous effort that DLJ does not even suggest would make any material difference to the ultimate judgment. This result cannot be how the parties intended their contract to operate. Moreover, it would be a perverse result indeed if DLJ, through the sheer magnitude of its misconduct and refusal to comply with its contractual repurchase obligations, were able to frustrate and delay the Trustee's access to a judicial remedy.

This grossly impracticable result would not be limited to this case. There are least two other trial-ready RMBS proceedings in the Commercial Division, together involving multiple trusts with hundreds of thousands of loans, in which the courts have allowed the plaintiffs to use sampling to prove liability and damages. *See MBIA Ins. Corp. v. Credit Suisse Secs. (USA),* No. 603751/2009, Doc. No. 1706, at 28 (Sup. Ct. N.Y. Cnty. Feb. 7, 2019); *Ambac Assurance Corp. v. Countrywide Home Loans, Inc*. 651612/10 (NYSCEF No. 532, at 18-21), *appeal pending* No. 2019-26 (1st Dep't). And there are dozens more RMBS cases before

Justice Friedman that have proceeded for years under a coordinated case management order contemplating the use of sampling for repurchase claims. *See In re Part 60 RMBS Put-Back & Monoline Insurer Litig.*, No. 777000/2015, Doc. No. 96, at 1 (Mar. 25, Sup. Ct. N.Y. Cnty. 2016). Interpreting the PSAs in this case to prohibit sampling would upend these management orders, and create a logjam of deeply time- and resource-consuming inefficiencies across an industry of RMBS cases. The parties cannot sensibly have intended the PSAs to be read in this way. The IAS Court's sampling ruling should be affirmed.

III. THE IAS COURT CORRECTLY INTERPRETED THE PHRASE "MATERIAL[] AND ADVERSE[]" IN THE OPERATIVE CONTRACTS

The IAS Court also correctly interpreted the Repurchase Protocol's requirement that a breach "materially and adversely affect[]" a loan, *first*, by ruling that it "at a minimum" *does not* require that the loan have defaulted, A30, and, *second*, by ruling that it requires only that the breach have "materially increased the risk of loss" of a loan, A31. Both rulings should be affirmed because they represent "[a] growing consensus among New York courts … that [material and adverse] repurchase conditions are triggered when the plaintiff's risk of loss increases and not just when that risk actualizes." *Wells Fargo Bank, N.A. v. JPMorgan Chase Bank, N.A.*, 2014 WL 1259630, *4 (S.D.N.Y. Mar. 27, 2014), *aff'd*, 643 F. App'x 44, 46-47 (2d Cir. 2016) (contrary interpretation would mean breach of warranty claim would accrue when loss occurs, conflicting with New

York law that such a claim accrues at time of breach); *Homeward Residential, Inc. v. Sand Canyon Corp.*, 298 F.R.D. 116, 131 (S.D.N.Y. 2014) (plaintiff can prove material and adverse effect by showing "increased credit risk"); *Wells Fargo Bank, N.A. v. Bank of Am., N.A.*, 2013 WL 1285289, *10 (S.D.N.Y. Mar. 28, 2013) (to prove material and adverse effect, "the breach need only cause harm, though not necessarily default"), *vacated and remanded on other grounds*, 627 Fed. App'x 27 (2d Cir. 2015); *MARM*, 2015 WL 764665, at *15 (S.D.N.Y. Jan. 9, 2015) (to prove material and adverse effect, "[plaintiffs] may rely upon proof that as to a specific loan, there is a material or significant increase in the risk of loss").

In seeking reversal of the IAS Court's first ruling—that a breach can be "material and adverse" without a default—DLJ fails to identify any textual hook for its effort to graft an additional default requirement into the Repurchase Protocol. As the IAS Court explained and DLJ fails to rebut, "[n]owhere in the PSAs … does it say that the loan must be in default for it to be repurchased." A31.

DLJ also disregards that this Court addressed this precise issue in *MBIA Insurance Corp. v. Countrywide Home Loans, Inc.*, 105 A.D.3d. 412, 413 (1st Dep't 2013). There, this Court reversed the denial of a motion seeking summary judgment regarding the meaning of the phrase "material and adverse" in the operative PSAs, holding MBIA was "entitled to a finding that [a] loan need not be

in default to trigger defendants' obligation to repurchase it." *Id.* at 413. DLJ offers no basis to depart from that precedent.

Nor, contrary to DLJ's assertion (Br. 40), was the IAS Court below "the first trial court in New York state to interpret 'material and adverse' effect in an RMBS contract as a matter of law." As recently as last December, the motion court in *U.S. Bank National Ass'n v DLJ Mortg. Capital, Inc.* ("*HEAT 2007-1*"), No. 650369/2013, 2018 WL 6809404, *14 (N.Y. Sup. Ct. Dec. 27, 2018), ruled, as the IAS Court later did here, that "[P]laintiff is entitled to a finding that the loan need not be in default to trigger defendants' obligation to repurchase it [under the 'material and adverse' clause]. There is simply nothing in the contractual language which limits defendants' repurchase obligations in such a manner." The IAS Court below was likewise correct to follow this Court's decision in *MBIA*. A30.

DLJ also errs (Br. 42) in resisting the IAS Court's second ruling that a "material[] and adverse[] affect[]" is one that "materially increase[s] the risk of loss" of a loan. A30-31. This interpretation reflects the standard dictionary definitions of the terms "material" and "adverse." *See, e.g.*, *Assured Guar. Mun. Corp. v. Flagstar Bank, FSB*, 892 F. Supp. 2d 596, 602 (S.D.N.Y. 2012) ("According to their dictionary definitions, 'material' means 'of such a nature that knowledge of the item would affect a person's decision-making; significant; essential,' and 'adverse' means 'opposed to one's interests.'") (quoting Black's

Law Dictionary (7th ed. 1999) & Merriam–Webster's Collegiate Dictionary 19 (11th ed. 2003)). And it is subject to the same "growing consensus among New York courts," *Wells Fargo*, 2014 WL 1259630, at *4, as the IAS Court's ruling on the first issue, *see supra*, at 34-35.

Moreover, the authorities on which DLJ relies are inapposite. For example, as DLJ acknowledges (Br. 42), the Trustee here sought a ruling on the meaning of the phrase "material and adverse" *as a matter of law*, and not "summary judgment on whether specific breaches of representations or warranties in specific loans" met that standard *as a matter of fact*. By contrast, in most of the cases DLJ cites, the plaintiffs *were* seeking application of the "material and adverse" standard *as a matter of fact*, and summary judgment was denied, at least in part, on that basis. *See, e.g., U.S. Bank, Nat'l Ass'n v. UBS Real Estate Sec. Inc*., 205 F. Supp. 3d 386, 477 (S.D.N.Y. 2016) (denying summary judgment where asked to consider "evidence relating to a loan in making [factual] findings on any specific [factual] issue relating to that loan"); *HEAT 2007-1* (Sup. Ct. N.Y. Cnty. Dec. 27, 2018), appeal pending, No. 2019-219 (1st Dep't) (denying summary judgment when asked to consider whether "[t]he materiality of a[] … breach [as a matter of fact] is loan-specific … with respect to a particular loan"); *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 39 Misc. 3d 1220(A) (Sup. Ct. N.Y. Cnty. 2013) (summary judgment denied where Plaintiffs sought application of the "material

and adverse" standard as a matter of fact as to specific loans in "five categories of breaches, found in 56% of the loans reviewed"); *MBIA Ins. Corp. v. Credit Suisse Sec. (USA) LLC*, 55 Misc. 3d 1204(A) (Sup. Ct. N.Y. Cnty. 2017) (denying plaintiffs' motion for summary judgment on a specific "portion of its random loan sample") *aff'd, as modified,* 165 A.D.3d 108 (1st Dep't 2018).

Nor does the IAS Court's ruling conflict with DLJ's remaining authorities, which addressed aspects of the "material and adverse" standard that were not raised or decided below. For example, in *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, Index No. 651612/2010, 2015 WL 6471943, *11 (Sup Ct. N.Y. Cnty. Oct. 22, 2015), *aff'd, as modified on other grounds,* 151 A.D.3d 83, *aff'd*, 31 N.Y.3d 569 (2018), the motion court declined to resolve on summary judgment whether the materiality of a breach should be assessed at the time the parties entered their contract, or at the time of the breach. *Id*. The parties here did not contest that issue, and the IAS Court did not rule on it. Similarly, in *Syncora Guarantee Inc. v. Countrywide Home Loans, Inc.*, 36 Misc. 3d 328, 332-3 (Sup. Ct. N.Y. Cnty 2012), the motion court denied summary judgment as to the meaning of a clause requiring that a breach "materially and adversely affects the interest of the Trust." But it did so only because the insurer-plaintiff there sought to apply that condition to a group of loans "in the aggregate," and the court was unclear whether or how the "interest of the Trust" overlapped with plaintiff's

interest as an insurer. *Id.* at 336 (denying summary judgment because there were "varying interpretations regarding 'interest' and affect [*sic*] on interest, as well as … of how the 'aggregate' … must be defined"). That issue was not raised or decided in this case. Both decisions are thus inapposite.

DLJ also incorrectly asserts (Br. 41) that this Court has announced a "broad[] instruction" that "terms in RMBS contracts" should not be "define[d] … as a matter of law." But, like every other contract, RMBS contracts must be construed as a matter of law, according to the intent evident from their plain terms, unless they are ambiguous. *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004) ("In the absence of any ambiguity, we look solely to the language used by the parties to discern the contract's meaning."). DLJ has not presented any credible ambiguity that would preclude the IAS Court's straight-forward and reasonable interpretation of the relevant phrase.[12]

Finally, DLJ incorrectly contends (Br. 42) that the IAS Court's ruling is "untethered" from the trial evidence that the Trustee will present to prove liability and damages and does not provide the parties with sufficient "guidance" for trial. As DLJ is well aware, the Trustee has relied on the "increased risk of loss"

[12] DLJ wrongly criticizes (Br. 45) the IAS Court for not "rely[ing] on discovery evidence that sheds light on the parties' definitive intent in using the term 'material and adverse.'" DLJ did not submit any such evidence to the IAS Court, *see* A30-31; and, even if it had, the IAS Court could not have considered that evidence to create an ambiguity that it found absent in the plain language.

standard throughout its hundreds of pages of expert testimony in this case, including because that standard has long been applied and is well understood in the mortgage industry. *See, e.g.*, A2746, A3008, A3444-3445. And the IAS Court's adoption of a standard dictionary definition of a plain English phrase provides a clear and precise interpretation that sets out a highly workable path toward trial. This ruling should be affirmed so the parties may proceed to trial on that basis.

IV. THE IAS COURT CORRECTLY INTERPRETED THE TERM "ACCRUED INTEREST" IN THE OPERATIVE CONTRACTS TO APPLY TO BOTH LIQUIDATED AND NON-LIQUIDATED LOANS

The IAS Court also correctly ruled that "the remedy for all loans, liquidated or not, is subject to the terms of the repurchase protocol," and thus that DLJ is required to pay accrued interest on all loans purchased under that protocol. A40-41. This ruling reflects a plain and sensible interpretation of the Repurchase Protocol, which requires DLJ to repurchase all materially breaching loans at the contractually defined "Repurchase Price." A949 (PSA § 2.03(g)). The PSA defines "Repurchase Price," in relevant part, as follows:

> Repurchase Price: With respect to any Mortgage Loan required to be purchased by the Seller pursuant to this Agreement … an amount equal to the sum of (i) 100% of the unpaid principal balance of the Mortgage Loan on the date of such purchase, (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 (definition of "Repurchase Price").

Under this provision, DLJ assumed the risk of loss for any Loan that breached its R&Ws and agreed to pay the full value of such Loans. The provision therefore unambiguously provides, as the IAS Court correctly ruled, that interest continues to accrue on the Loans until the Repurchase Price is distributed to the Certificateholders. A40-41. Nothing in the relevant contractual language suggests that interest should stop accruing at some earlier time, such as when a loan is foreclosed or "liquidated."

As the IAS Court also correctly ruled (A40), this conclusion is reinforced by this Court's decision in *Nomura*, 133 A.D.3d at 105-107. There, this Court rejected a similar argument that the trustee had no remedy for a liquidated loan because once a loan has been liquidated, it cannot be repurchased. This Court held that interpreting the Repurchase Protocol in this way "would leave plaintiffs without a remedy," which cannot have been within the contemplation of the parties when they entered into the applicable agreements. And this Court further observed that such an interpretation would create "a perverse incentive for a sponsor to fill the trust with junk mortgages that would expeditiously default so that they could be released, charged off, or liquidated before a repurchase claim is made." *Id.* at 106 (internal citations omitted). So too here: DLJ's interpretation would provide it with a windfall by denying the Trustee its remedy of continuing accrued interest on loans that liquidated with balances outstanding. Denying continuing interest

would, moreover, incentivize DLJ to prolong resolution of the Trustee's claims as long as possible. And DLJ's attempt (Br. 47-48) to distinguish *Nomura* ignores the rationale underlying that decision—namely, that there is nothing in the Repurchase Protocol or the definition of Repurchase Price that limits the Trustee's remedies based on whether a loan has been liquidated. *Id.*, at 105.

DLJ also wrongly contends (Br.463) that interest must cease accruing when a loan liquidates, because "[o]nce a loan is liquidated and charged off from a trust, that loan ceases to exist." New York law, as well as that of most other states, permits a lender to recover a deficiency judgment from the mortgagor following the foreclosure of a mortgage. *See* N.Y. Real Property Actions and Proceedings L. § 1371 (providing for deficiency judgments in foreclosure proceedings); *Law of Distressed Real Estate* § 16:46; Appendix 19A (2018) (multi-state survey demonstrating that, with few exceptions, deficiency judgments are generally available to mortgage lenders). And the PSAs' definition of "Liquidated Mortgage Loan" specifically contemplates that the servicer will determine it has "received all amounts it expects to receive in connection with the liquidation of such Mortgage Loan," where such amounts may include a deficiency judgment collected after a loan is "liquidated." A903, A978. Accordingly the PSAs provide that, notwithstanding the liquidation of a mortgage, the underlying debt remains in existence and continues to accrue interest after foreclosure and liquidation.

Finally, DLJ misplaces reliance (Br. 46) on *MASTR Asset Backed Sec. Tr. 2006-HE3 ex rel. U.S. Bank Nat'l Ass'n v. WMC Mortg. Corp.*, 2012 WL 4511065 (D. Minn. Oct. 1, 2012). There, unlike here, the trustee had "admitted that specific performance is 'not available … where a loan has been liquidated and is no longer available for repurchase.'" *Id.* at *4. And, in any event, *WMC*'s ruling that a trustee is not entitled to *any* remedy for the breach of a liquidated loan is inconsistent with this Court's decision in *Nomura*, *see* 133 A.D.3d at 105-107, as well as numerous other New York decisions, *see, e.g.*, *Nomura Asset Acceptance Corp. Alternative Loan Trust,* 2014 WL 2890341, *9-10 (NY. Sup., June 26, 2014) (collecting cases).

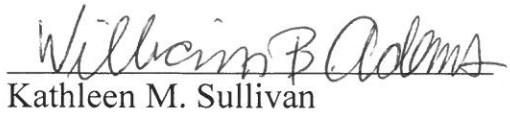
For all these reasons, the IAS Court properly ruled, under the express provisions of the parties' contracts, that interest continues to accrue on a breaching loan until the Repurchase Price is distributed to the Certificateholders, regardless of whether that loan has been liquidated. *See* A30-32.

CONCLUSION

The Decision and Orders should be affirmed.

Dated: April 17, 2019

Respectfully submitted,



Kathleen M. Sullivan
Richard I. Werder, Jr.
William B. Adams
Toby E. Futter

QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
(212) 849-7000
williamadams@quinnemanuel.com

Attorneys for Plaintiffs-Respondents

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Type: A proportionally spaced typeface was used, as follows:

(i) Name of Typeface: Times New Roman

(ii) Point Size: 14

(iii) Line Spacing: Double

Word Count: The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service and this Statement, is 10,807.

William B Adams

William B. Adams
Attorney for Plaintiffs-Respondents