To Be Argued By:
RICHARD A. JACOBSEN
(Time Requested: 30 Minutes)

APL 2019-00247
New York County Clerk's Index Nos. 156016/12 and 653787/12

Court of Appeals
of the
State 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-Respondents,

– against –

DLJ MORTGAGE CAPITAL, INC.,

Defendant-Appellant,

– and –

SELECT PORTFOLIO SERVICING, INC.,

Defendant.

(For Continuation of Caption See Reverse Side of Cover)

BRIEF FOR DEFENDANT-APPELLANT

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Dated March 10, 2020

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

Plaintiff-Respondent,

– against –

DLJ MORTGAGE CAPITAL, INC.,

Defendant-Appellant,

– and –

SELECT PORTFOLIO SERVICING, INC.,

Defendant.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rules 500.1(f) and 500.13(a), Defendant-Appellant DLJ Mortgage Capital, Inc. ("DLJ") hereby states that it is a wholly owned subsidiary of Credit Suisse (USA) Inc., which in turn is a wholly owned subsidiary of Credit Suisse Holdings (USA) Inc., which in turn is a jointly owned subsidiary of: (1) Credit Suisse AG, Cayman Islands Branch, which is a branch of Credit Suisse AG, and (2) Credit Suisse AG, which in turn is a wholly owned subsidiary of Credit Suisse Group AG, which is a corporation organized under the laws of Switzerland whose shares are publicly traded on the Swiss Stock Exchange and are also listed on the New York Stock Exchange in the form of American Depositary Shares. No publicly held company owns 10% or more of Credit Suisse Group AG.

STATEMENT OF RELATED LITIGATION

As set forth in DLJ's letter to the Clerk of the Court dated January 31, 2020, DLJ identifies the following proceedings as related to this case:

- *U.S. Bank National Association v. DLJ Mortgage Capital Inc.*, APL-2020-00018.
- *Ambac Assurance Corp. v. Countrywide Home Loans Inc.*, Index No. 651612/10, 2020 WL 236714 (1st Dep't Jan. 16, 2020), *motion for leave to appeal pending* (1st Dep't Mot. No. 661).

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PRELIMINARY STATEMENT

This appeal involves yet another attempt by sophisticated trustees of residential mortgage-backed securities ("RMBS") trusts to disregard the sole remedy provision they agreed to in their contracts and circumvent the six-year statute of limitations. As is typical in RMBS transactions, the parties here crafted an exclusive contractual remedy for breaches of representations and warranties relating to the mortgage loans underlying the securities. That remedy operates on a loan-specific basis at every step. First, unless the trustee can prove that DLJ (the sponsor of these transactions) independently discovered a material breach, the trustee must provide DLJ timely notice identifying each allegedly breaching loan. Then, if the trustee's breach allegations are disputed, the trustee must prove the existence of a material breach in that loan that has a material and adverse effect on investors' interests in that loan. If DLJ does not cure that breach, the trustee may obtain repurchase at a contractually specified repurchase price, calculated based on characteristics of the breaching loan.

As this Court has already recognized, RMBS sole remedy provisions like these mean what they say and must be enforced by their terms: "[C]ourts must 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." *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 581 (2017). Even if the parties "'may later regret their assumption of the risks of non-performance in this manner[,] … the courts let them lie on the bed they made.'" *Id.* Under these settled principles, an RMBS sole remedy provision's loan-specific requirements cannot be disregarded by a plaintiff merely because it later determines that compliance would be inconvenient.

Yet Plaintiffs here, acting at the direction of affiliated hedge fund investors, seek to change the terms of their bargain. They demand over $1.1 billion in damages arising from DLJ's alleged representation-and-warranty breaches pertaining to mortgage loans in four RMBS trusts, while simultaneously disavowing any obligation to comply with the agreed-upon repurchase protocol. Although Plaintiffs allege "pervasive" breaches throughout the four trusts, they provided timely pre-suit notice for only 1,351 of the 42,670 loans in the four trusts—and, indeed, no timely notice whatsoever for loans in one of the trusts. With six years to timely assert their claims, Plaintiffs have offered no explanation for why they could not have provided the requisite pre-suit notice of any breach claims they wished to pursue in litigation. Instead, they invoke the doctrine of relation back, which they claim permits them to ignore the contractual requirements and instead provide belated "notice" at any time, for any loan in the trusts.

Moreover, Plaintiffs seek to prove their claims not through loan-by-loan proof, but by re-underwriting a small fraction of the total loan population. Plaintiffs would then extrapolate the alleged breach rates from this limited sample to the pools of loans for which they seek repurchase, without ever attempting to demonstrate breaches in loans outside the sample. Plaintiffs have not advanced any plausible account of how their sampling approach can be reconciled with the repurchase protocol's loan-specific requirements.

Indeed, Plaintiffs know precisely what these contracts require: When Plaintiffs have been sued in RMBS-related litigation, they have taken the exact same position DLJ advocates for here, arguing that the sole remedy provision must be enforced as written. Plaintiffs should be held both to the terms of their agreements and to the legal consequences of their failure to timely pursue their remedies.

In affirming the motion court's summary judgment rulings, the Appellate Division misapplied the relation-back doctrine and disregarded the bargain the parties struck for how loan-level breaches could be remedied. *First*, the Appellate Division erred in applying the relation-back doctrine to excuse Plaintiffs from the requirement of loan-specific pre-suit notice. This Court has never endorsed an application of relation back that would relieve a party of its obligation to comply with a contractual requirement within the limitations period, and should not do so here. The relation-back doctrine exists to correct pleading errors, not to allow parties to shed their contractual obligations. Contrary to the Appellate Division's view, the existence of "some timely claims" as to *any* specified loan—even a single loan in a single trust—does not give Plaintiffs carte blanche to disregard the repurchase protocol for every other loan. And relation back is unavailable here for still another reason: Plaintiffs' newfound allegations of distinct breaches pertaining to distinct loans do not arise from the same "transactions" or "occurrences" identified in the initial pleadings. *See* CPLR 203(f).

Second, the Appellate Division again disregarded the parties' agreed-upon loan-specific sole remedy in allowing Plaintiffs to prove their claims through sampling. The agreements here require loan-specific proof of not just notice, but also breach, materiality, and damages. Sampling, by contrast, would allow Plaintiffs to proceed to trial on thousands upon thousands of loans as to which they will present no individualized evidence. For every breach that Plaintiffs actually attempt to prove, they ask the court to rule, without any loan-specific review, that another 19 loans are automatically in breach. Again, the Appellate Division had no basis to excuse Plaintiffs from the plain terms of their remedial bargain.

Third, the Appellate Division incorrectly construed the term "accrued unpaid interest" in the contractual formula for calculating repurchase damages as applied to loans that have been liquidated. Contrary to the Appellate Division's atextual holding, that term refers only to unpaid interest that actually accrued on a loan. Once a loan has been liquidated, it no longer exists and does not accrue further interest. The contractually defined repurchase price does not permit recovery of interest that never in fact accrued.

This Court should reverse these holdings and enforce the sole remedy the parties agreed to when entering into their contracts.

QUESTIONS PRESENTED

1. Did the Appellate Division err by applying the doctrine of relation back to permit Plaintiffs to pursue otherwise untimely breach claims for thousands of loans in the four trusts at issue, and thereby excuse Plaintiffs' failure to comply with the repurchase protocol's notice-and-cure requirement for those alleged breaches, merely because Plaintiffs had sent timely repurchase demands relating to different loans?

2. Where RMBS sole remedy provisions require loan-specific proof of breach, materiality, and damages, did the Appellate Division err in permitting Plaintiffs to rely on statistical sampling to prove liability and damages for loans outside the sample?

3. Where RMBS contracts provide for the payment of "accrued" interest as part of the repurchase remedy, did the Appellate Division err in holding that repurchase damages on liquidated loans include interest that did not, in fact, accrue?

JURISDICTIONAL STATEMENT

The Court has jurisdiction over this appeal from a nonfinal Order of the Appellate Division under CPLR 5602(b)(1). The Appellate Division certified, pursuant to CPLR 5713, the following question of law to this Court: "Was the order of this Court, which affirmed the orders of the Supreme Court, properly made?" A-4-5.[1] The questions presented have been preserved for the Court's review. NYSCEF Doc. No. 1391 at 9-19 (notice/relation back), 30-31 (liquidated loans); NYSCEF Doc. No. 1430 at 30-32 (sampling).

STATEMENT OF THE CASE

I. Background

A. The parties execute Pooling and Servicing Agreements to create the securitizations at issue.

These cases concern four distinct RMBS trusts known as Home Equity Mortgage Trust Series ("HEMT") 2006-1, HEMT 2006-3, HEMT 2006-4, and HEMT 2006-5, which closed between February and October

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[1] Citations to "A-__" refer to the Appendix; citations to "C-__" refer to the Compendium of Cited Materials; and citations to "NYSECF Doc. __" refer to Index No. 156016/12 (Sup. Ct. N.Y. Cty.) unless otherwise noted.

2006. A-287-288.[2] DLJ sponsored the four trusts, each of which contains between approximately 7,000 and 14,000 loans, totaling over 42,000 mortgage loans across the four trusts. Most of the trust loans are second-lien loans (*i.e.*, loans that are junior in priority to a first-lien mortgage loan), made to borrowers on a "stated income" basis—that is, without verifying the borrower's income—a feature that made these loans riskier than more traditional mortgages. A-1316.1, 1316.4-1316-5, 1316.6, 1316.7-1316.8. These mortgage loans are the collateral for certificates issued by the trusts and sold to investors (the "certificateholders"). *See, e.g.*, A-326.[3] The certificateholders receive payments from the trusts based on loan payments made on the underlying mortgages.

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[2] The HEMT 2006-1 transaction closed on February 28, 2006; HEMT 2006-3 closed on June 30, 2006; HEMT 2006-4 closed on August 30, 2006; and HEMT 2006-5 closed on October 21, 2006. A-287-288.

[3] In the two underlying Supreme Court actions, U.S. Bank National Association, as Trustee of the trusts, seeks identical relief from the same defendants. *See* A-89-136, A-143-180. When citing to documents or allegations that do not materially differ among the different cases or trusts, this brief cites only to the 2006-1 Trust document or case.

Each trust was created and governed by a separate Pooling and Servicing Agreement ("PSA") entered into by, *inter alia*, DLJ, as Seller, and U.S. Bank National Association ("U.S. Bank"), as Trustee. The PSAs include schedules setting forth representations and warranties about the mortgage loans contained in each trust. *See, e.g.*, A-1020-1024.[4] And as explained below, the parties to the PSAs agreed that a repurchase protocol, set forth in Sections 2.03(f) and (g) of the agreements, would serve as the "sole remedy" for any breach of a loan-related representation or warranty. *See, e.g.*, A-638.

B. The parties agree to a loan-specific sole remedy for representation and warranty breaches.

The repurchase protocol is drafted in loan-specific terms and requires proof of three elements.[5] First, there must be "a breach of a

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[4] Certificates for each Trust were sold to investors through separate offerings by way of trust-specific Prospectus Supplements, which describe the different groups of mortgage loans underlying each trust and certificate. *See, e.g.*, A-306-555.

[5] The 2006-1 Trust repurchase protocol, which is representative, provides as follows:

> Upon discovery by any of the parties hereto of a breach of a [loan-related] representation or warranty … that materially and adversely affects the interests of the Certificateholders in any Mortgage Loan, the party discovering such breach shall

representation or warranty" relating to the identified nonconforming loan. *Id.* Second, that breach must "materially and adversely affect[] the interests of the Certificateholders in any Mortgage Loan." *Id.* Third, a party to the PSA must notify DLJ of, or DLJ must discover, "such breach." *Id.* DLJ then has 120 days to "cure such breach in all material respects." *Id.*

The repurchase protocol further provides that if, after notice or discovery, DLJ cannot cure a breach that has the requisite material and adverse effect, DLJ shall "repurchase the affected Mortgage Loan from the Trustee" at a contractually defined "Repurchase Price." *Id.* That

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> give prompt notice thereof to the other parties. 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 sold by the Seller to the Depositor, it shall cure such breach in all material respects, and if such breach is not so cured, shall, (i) if such 120-day period expires prior to the second anniversary of the Closing Date, remove such Mortgage Loan … from the Trust Fund and substitute in its place a Qualified Substitute Mortgage Loan …; or (ii) repurchase the affected Mortgage Loan from the Trustee at the Repurchase Price in the manner set forth below….

A-638.

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." A-615.

C. Plaintiffs fail to comply with the timely notice element of the sole remedy for every loan in one trust and almost every loan in the other three trusts.

On November 22, 2011, nearly six years after the first of the four trusts at issue closed, four affiliated certificateholders—Euphrates G1, LLC, Euphrates G2, LLC, Euphrates G3, LLC, and Euphrates G4, LLC (collectively, "Euphrates")—sent a letter to DLJ and U.S. Bank demanding that DLJ repurchase allegedly breaching loans in all four trusts. A-1027-1028. Although Euphrates' letter alleged "pervasive" and "systemic" breaches of representations and warranties, it identified only a small subset of loans in each trust as allegedly breaching. A-1028-1029, 1033.[6] The letter predicted that "additional investigation,

[6] The November 22, 2011 letter identified 522 defective loans from the 2006-3 Trust; 359 defective loans from the 2006-4 Trust; and 284

including a re-underwriting of the loan files themselves, will reveal substantial additional evidence of breaches." A-1030.

On December 7, 2011, U.S. Bank, in its capacity as trustee for each trust, sent DLJ a letter that enclosed Euphrates' November 22, 2011 letter, cited the repurchase protocol, and demanded that DLJ cure or repurchase "the identified loans." A-1026. In the ensuing months, U.S. Bank sent several further letters demanding repurchase of additional specified loans from the trusts. A-1099-1113, 1117-1124, 1126-1128, 1130-1133, 1135-1214, 1216-1271.

Meanwhile, on February 22, 2012—shortly before the six-year anniversary of the 2006-1 Trust's closing date—DLJ entered into a tolling agreement with U.S. Bank as Trustee for the 2006-1, 2006-3, and 2006-4 Trusts. That agreement tolled the "statute of limitations"—as well as all "other similar time-related defense[s] or claim[s], whether statutory, contractual or otherwise"—pertaining to those trusts, only to the extent any such time periods had not yet expired. A-1083-1085. On

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defective loans from the 2006-5 Trust. A-1029. Although this letter also identified 288 defective loans from the 2006-1 Trust, as discussed below (at 13-14), this letter came too late to provide timely notice for any loans in that Trust.

July 12, 2012, DLJ provided written notice that it would terminate the tolling agreement, *see* A-1115; that termination became effective on August 26, 2012, A-1086.

As a result of this chronology, most of Plaintiffs' repurchase demands were untimely under New York's six-year statute of limitations. Under controlling New York law, DLJ's obligation to repurchase a loan in a given trust expires if DLJ has not received notice of, or discovered, a breach in time for the specified cure period (here, 120 days) to elapse within six years of that trust's closing. *See ACE Sec. Corp. v. DB Structured Prods., Inc.*, 25 N.Y.3d 581, 595-97 (2015). Here, many of Plaintiffs' demands came too late for the cure period to elapse before that limitations period expired. As set forth below, DLJ received *no* timely breach notices for loans in the 2006-1 Trust, and timely breach notices for only 1,351[7] identified loans in the 2006-3, 2006-4, and 2006-5 Trusts:

[7] Some loans were identified in more than one letter.

Trust Name	Closing Date	Timely Demand Expiration Date[8]	Timely Demands	Untimely Demands
HEMT 2006-1	February 28, 2006	October 31, 2011	None	2,237 loans in letters dated December 7, 2011, and April 27, 2012.[9]
HEMT 2006-3	June 3, 2006	August 26, 2012[10]	766 loans in letters dated December 7, 2011 and August 22, 2012.[11]	None
HEMT 2006-4	August 30, 2006	August 26, 2012	401 loans in letters dated December 7, 2011 and August 22, 2012.[12]	2,563 loans in a letter dated on November 19, 2013.[13]

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[8] This date is calculated as six years after each Trust's closing date, minus the 120-day contractual cure period.

[9] *See* A-1026, 1099.

[10] For the loans in the 2006-3 and 2006-4 Trusts, the tolling agreement operated to extend the statute of limitations, which was set to expire on March 3, 2012 (HEMT 2006-3), and May 4, 2012 (HEMT 2006-4), until DLJ's termination of the tolling agreement effective August 26, 2012.

[11] *See* A-1026, 1117.

[12] *See* A-1026, 1117.

[13] *See* A-1135.

Trust Name	**Closing Date**	**Timely Demand Expiration Date**[8]	**Timely Demands**	**Untimely Demands**
HEMT 2006-5	October 31, 2006	July 3, 2012	284 loans in a letter dated December 7, 2011.[14]	6,429 loans in letters dated December 14, 2012, February 27, 2013, and May 28, 2014.[15]

II. The Proceedings Below

In 2012, Plaintiffs commenced these actions alleging breaches of the PSAs' representations and warranties concerning mortgage loans in these four trusts. On August 31, 2012, U.S. Bank, as trustee, commenced a suit concerning breaches in the 2006-1, 2006-3, and 2006-4 Trusts. A-83. On October 30, 2012, U.S. Bank commenced a separate suit concerning the 2006-5 Trust. A-137. 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. A-91-92, 112-113, 145-146, 162-163. Plaintiffs sought damages under the repurchase protocol for these nonconforming

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[14] *See* A-1026.

[15] *See* A-1126, 1130, 1216.

loans, "and also all other Mortgage Loans with such breaches." A-127, 174.

A. Plaintiffs seek to use sampling and extrapolation to recover more than $1 billion in damages relating to loans for which they will present no loan-specific proof of material breach.

In November 2013, Plaintiffs filed a three-page letter with the motion court requesting "approval for the use of statistical sampling to prove liability and damages on all of Plaintiffs' claims." A-181. In that letter, Plaintiffs asserted that sampling would save time and money for the parties and the court and, citing federal cases, suggested the same approach would be appropriate in this case. *Id.* DLJ's responsive letter argued that the request was premature, as there was a pending motion to dismiss that would dispose of all Plaintiffs' claims and the parties had not even begun expert discovery. A-192. DLJ also requested that, in the event the court were to reach the merits of sampling, "the gravity of the issue and fundamental fairness require that it be done on full briefing and motion." *Id.*

Three days later, on November 18, 2013, the court (Schweitzer, J.) issued a two-sentence Interim Order:

> After review of plaintiffs' … correspondence, the 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.

A-82.

Following the Interim Order, Plaintiffs opted to present their evidence of breaches through sampling, selecting 1,600 loans out of the 42,670 loans underlying these transactions. A-1273. Plaintiffs chose those sample loans without regard to whether any notice—timely or otherwise—had been provided to DLJ with respect to any loan in the sample. A-1278.1. Plaintiffs' re-underwriting expert reviewed the sample loans and initially opined that 709 of them breached representations or warranties. A-1280, 1299-1300, 1313-1314. Only 34 of those loans fall within the set of 1,351 loans for which Plaintiffs had sent DLJ timely notices of a breach. A-1326, 1330-1331. Without identifying specific loans (let alone specific breaches of representations and warranties), Plaintiffs' sampling expert "extrapolat[ed]" a "defect rate" from the sample population to estimate purported damages in excess of $1 billion. A-1282-1284, 1293-1294.

B. The motion court issues summary judgment rulings in Plaintiffs' favor on relation back, sampling, and damages.

In 2015, following Justice Schweitzer's retirement, these actions were reassigned to Justice Saliann Scarpulla. After the close of discovery, the parties filed cross-motions for partial summary judgment. The motion court granted Plaintiffs' motion in part and denied it in part, and denied DLJ's motion. A-45-46. As relevant to this appeal, the motion court ruled in Plaintiffs' favor on three issues:

Notice, relation back, and discovery. DLJ moved for a summary judgment ruling that Plaintiffs may seek damages for only the 34 loans in Plaintiffs' samples that were included in timely pre-suit notices. NYSCEF Doc. No. 1391 at 2. 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 22, 2011 demand letter, which alleged "pervasive breaches" throughout the four trusts. NYSCEF Doc. No. 1338 at 1-2, 10.[16]

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[16] Although Plaintiffs disagreed with DLJ's arguments that the PSAs require loan-specific notice of alleged breaches, Plaintiffs did not dispute that there were no timely repurchase demands filed with respect to the 2006-1 Trust. NYSCEF Doc. No. 1391 at 11. Instead, in

Plaintiffs also sought a ruling on the legal standard for proving that DLJ independently discovered breaching loans. DLJ disagreed with Plaintiffs' account of that legal standard, and noted that Plaintiffs did not seek a summary ruling that DLJ in fact discovered breaches relating to the at-issue loans. DLJ did not dispute that Plaintiffs could have the opportunity at trial to prove independent discovery as to any allegedly breaching loan.

The motion court ruled partially in Plaintiffs' favor, grounding its reasoning on the relation-back doctrine rather than Plaintiffs' "pervasive breach" theory of notice. The 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." A-23.

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opposition to DLJ's motion, Plaintiffs argued that their November 2011 letter satisfied the notice requirement by alleging "pervasive breaches" across all four trusts (without explaining how that letter could have provided timely notice for loans in the 2006-1 Trust), and contended, in the alternative, that any untimely breach notices should "relate back" to timely notices. NYSCEF Doc. No. 1429 at 8-13, 16-18.

Citing the Appellate Division's decision in *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 133 A.D.3d 96 (1st Dep't 2015), *aff'd as modified*, 30 N.Y.3d 572 (2017), the court concluded that because timely notices identified some allegedly breaching loans and reported that certificateholders were continuing their investigation, the doctrine of relation back permitted Plaintiffs to proceed to trial on any loan for which Plaintiffs provided DLJ notice of an alleged breach, even if the loan was not identified until Plaintiffs' post-suit notice letters or expert reports. A-21-23.

In addition, the motion court noted that "the repurchase protocol could alternatively be triggered by DLJ's independent discovery of a material breach." Without elaborating on the legal standard for proving independent discovery, the court concluded that "sufficient evidence has been presented to raise an issue of fact" as to whether DLJ independently discovered breaches, and that Plaintiffs would "have the opportunity at trial" to present evidence in support of that theory. A-23-24.

Sampling. The parties cross-moved for summary judgment on the use of statistical sampling to satisfy elements of the repurchase protocol. DLJ sought a ruling that the PSAs' loan-specific repurchase remedy may not be circumvented through sampling and extrapolation. Plaintiffs sought a ruling that the PSAs allow liability and damages for out-of-sample loans to be proven through sampling. Plaintiffs further maintained that Justice Schweitzer's prior ruling on sampling was law of the case.

The motion court agreed with Plaintiffs' law-of-the-case argument and viewed itself as bound by Justice Schweitzer's 2013 Interim Order, which it interpreted as permitting Plaintiffs to use sampling to prove breaches and resulting damages. A-35-38.

Accrued interest on liquidated loans. DLJ sought a summary judgment ruling that, under the terms of the PSAs, the contractual provision for "accrued unpaid interest" as part of the repurchase price is limited to interest that in fact accrued on the loan. Plaintiffs' damages expert, however, had included interest on allegedly breaching loans through a specified "repurchase date" regardless of whether that interest accrued on the loan. For many loans that have been foreclosed upon or otherwise "liquidated," Plaintiffs' damages expert therefore included as part of the damages calculation supposed “interest” amounts that did not, in fact, accrue while the loan was outstanding.

The motion court rejected this aspect of DLJ’s motion. Again relying on the Appellate Division’s decision in *Nomura*, the 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 even as to loans that had been liquidated. A-44.

C. The Appellate Division affirms the motion court’s rulings and grants leave to appeal to this Court.

Notice, relation back, and discovery. On appeal, DLJ again argued that the Trustee provided timely pre-suit notice only as to 1,351 loans in the 2006-3, 2006-4, and 2006-5 Trusts, only 34 of which were alleged to be breaching by Plaintiffs’ re-underwriting expert. DLJ’s App. Div. Br. 18-32. Plaintiffs again contended that their repurchase demands provided sufficient notice for every breaching loan in the trusts and, in the alternative, maintained that their post-suit notices should relate back to the timely pre-suit notices. Pls.’ App. Div. Br. 13-26 & n.8.

In affirming the motion court’s rulings in this regard, the Appellate Division distinguished between the 2006-1 Trust and the other three at-issue trusts. For the 2006-1 Trust, the Appellate

Division recognized that "no timely or 'ripe' breach notices were sent," but agreed with the motion court that—as DLJ has not disputed on appeal—allegations that DLJ independently discovered breaching loans could present a separate basis for triggering the repurchase obligation and raise "issue[s] of fact." 175 A.D.3d 1175, 1176 (1st Dep't 2019). For the remaining three trusts, the Appellate Division held that the relation-back doctrine allows Plaintiffs to proceed on claims based on subsequently noticed loans that were not included in timely pre-suit demand letters. The court observed that those letters "put DLJ on notice that the breaches plaintiffs were investigating might uncover additional defective loans for which claims would be made." *Id.* Citing its decision in *Nomura*, the Appellate Division concluded that the "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.*

Sampling. The Appellate Division also affirmed the motion court's decision to grant Plaintiffs' summary judgment motion and deny DLJ's summary judgment motion on sampling. After mentioning DLJ's failure to pursue an appeal from the interim order on sampling and the sampling-related discovery the parties had conducted since, the Appellate Division stated that it found "no reason in this case to disturb the court's decision to permit the use of statistical sampling to prove liability and damages." *Id.* at 1177.

Accrued interest on liquidated loans. The Appellate Division addressed this issue in a single sentence, holding that "[t]he 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." *Id.* (citing *Nomura*, 133 A.D.3d at 107).

Leave to appeal. DLJ timely moved for reargument and, in the alternative, leave to appeal from the Appellate Division's decision, specifically identifying the issues of relation back, sampling, and accrued interest on liquidated loans as questions for this Court's review. Plaintiffs did not cross-move for reargument or leave to appeal. The Appellate Division granted DLJ's motion for leave to appeal and certified the following question for review: "Was the Order of this Court, which affirmed the orders of the Supreme Court, properly made?" A-5.

ARGUMENT

I. The PSAs Require Timely Notice As To Every Loan For Which Plaintiffs Assert A Claim.

A. The parties agreed to a loan-specific sole remedy that requires timely, loan-specific breach notices.

Under the repurchase protocol, which represents the parties' negotiated sole remedy for any loan that breaches a representation or warranty, DLJ is required to cure any material breach or, if it cannot cure, to repurchase the defective loan. The cure-or-repurchase remedy, however, is triggered only when DLJ discovers or receives written notice from any party of a breach that materially and adversely affects the interests of certificateholders. DLJ then has 120 days to "cure *such breach* in all material respects." A-638 (emphasis added). If "such breach is not so cured," then DLJ "shall … substitute … [or] repurchase the affected Mortgage Loan from the Trustee." *Id.* The repurchase protocol thus requires a breach notice to identify the particular loan or loans that are allegedly nonconforming. Without loan-specific notice, DLJ cannot cure "such breach," remove "such Mortgage Loan" from the trust, or repurchase "the affected Mortgage Loan." *Id.*

In the motion court, Plaintiffs sought a summary judgment ruling that DLJ received notice of "all defective loans" through Plaintiffs'

November 22, 2011 letter. Plaintiffs maintained that their references in that letter to "pervasive breaches" throughout the trusts were enough to provide DLJ with the requisite notice as to any breaching loan in the pool. NYSCEF Doc. No. 1338 at 22-24. The motion court correctly rejected that argument, noting that the parties' contracts require proof of either "loan-by-loan notice" or discovery of "a breach" in "certain loans" they allege are nonconforming. A-23.

Plaintiffs may again argue here, as they did in the Appellate Division, that the PSAs do not in fact "require loan-specific notice." Pls.' App. Div. Br. 14. But Plaintiffs' "pervasive breach" theory cannot be reconciled with the repurchase protocol's plain terms, which require notice to be provided on a loan-specific basis. As this Court has already held, the sole remedy provision cannot "be nullified by allegations of multiple, systemic breaches." *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569, 582 (2018) (internal quotation marks and brackets omitted). Calling breaches "pervasive" does not change what the contract requires; there is no "carve-out from the Sole Remedy Provision" merely because "a certain threshold number of loan breaches are alleged." *Nomura Home Equity Loan, Inc. v. Nomura Credit &*

Capital, Inc., 30 N.Y.3d 572, 585 (2017). Plaintiffs agreed to a sole remedy provision requiring loan-specific notice, and under New York law, courts must "honor[] the exclusive remedy that these sophisticated parties fashioned." *Id.* at 584 (internal quotation marks and brackets omitted). Yet the Trustee has advocated in this case to have those words effectively read out of the contract.

Remarkably, in other cases where the same Trustee (U.S. Bank) is a defendant rather than a plaintiff, it has cited language identical to the repurchase protocol in this case to argue that pervasive breach allegations are *not* enough to trigger the repurchase remedy. In particular, U.S. Bank has contended that "when a trustee seeks a repurchase" from a seller, it must prove "each alleged breach for each loan because the PSAs provide[] for … an individualized, loan-specific obligation to cure, replace or repurchase a breached loan." A-1353 (internal quotation marks, brackets, and emphases omitted); *accord* U.S. Bank's Mem. of Law, *Phoenix Light SF DAC v. U.S. Bank Nat'l Ass'n*, No. 14-CV-10116 (VSB) (DCF), Doc. No. 244 (S.D.N.Y. Mar. 30, 2018) (arguing that U.S. Bank's obligations under RMBS governing agreements are triggered by the Trustee's "knowledge of specific breaches as to specific loans" because the repurchase remedy is itself "loan-specific"), *available at* C-31. Noting that the repurchase protocol is phrased in singular terms ("cure *such breach*"), U.S. Bank has emphasized the "*loan-specific*" nature of the remedy as a reason why pervasive breach allegations are insufficient to trigger the repurchase protocol. A-1353. Now that the shoe is on the other foot, U.S. Bank argues the exact opposite. Its inconsistent arguments, however, provide no basis for departing from the plain terms of its contracts.

B. Relation back cannot be used to excuse timely compliance with contractual requirements.

Although the Appellate Division correctly declined to accept Plaintiffs' "pervasive breach" arguments, it erred in holding that Plaintiffs may nevertheless proceed to trial on any loan breach that was alleged at any point in this litigation, on the theory that all belatedly noticed breaches "relate back" to Plaintiffs' initial notices. A-57-58. The relation-back doctrine does not permit Plaintiffs to excuse themselves from express conditions the repurchase protocol places on their ability to pursue a contractual remedy.

As a 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"); *ACE*, 25 N.Y.3d at 593 ("Our statutes of limitation serve the same objectives of finality, certainty and predictability that New York's contract law endorses.").

To be sure, allowing relation back "does not conflict with these policies" when the amendment to the pleading "merely adds a new theory of recovery or defense arising out of a transaction or occurrence already in litigation." *Duffy*, 66 N.Y.2d at 477. But relation back neither addresses nor remedies a party's failure to comply with agreed-upon preconditions to a contractual remedy. 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). The ability to correct an erroneously drafted pleading, however, does not endorse the expansion of the doctrine to excuse a plaintiff's real-world failure to heed contractual pre-suit requirements.

Here, Plaintiffs—with the imprimatur of the Appellate Division—are using relation back to do far more than fix a pleading error or introduce a new cause of action. They seek an application of the doctrine that would reward their lack of diligence in bringing timely claims—an outcome that would dishonor the "important policies inherent in statutory repose." *Id.* The problem is not with the sufficiency of Plaintiffs' initial pleading, but with their failure to timely comply with the sole remedy provision—a contractually agreed upon "procedural prerequisite" to their ability to pursue the repurchase remedy. *ACE*, 25 N.Y.3d at 598. Plaintiffs were entirely capable of investigating their breach claims and complying with the repurchase protocol within New York's generous six-year statute of limitations for contract actions. It bears noting that this litigation is being directed by affiliates of a hedge fund that "has made large post-crisis profits by picking apart and scrutinizing legacy RMBS pools in search of violations of representations and warranties."[17] Vulture funds, like other sophisticated plaintiffs, can be expected to investigate and pursue potential claims within the limitations period. There is no reason to distort pleading doctrines in order to relieve them of that obligation.

Apart from the line of cases spawned by the First Department's *Nomura* decision, no decision from this Court or any other appellate body supports applying CPLR 203(f) to excuse a party from the consequences of failing to comply with mandatory contractual dispute resolution provisions until after the limitations period elapses. 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

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[17] Adam Tempkin, *Fund Targets Legally Entangled RMBS*, Reuters (Jan. 31, 2014), https://www.reuters.com/article/rmbs-hedge-fund/update-1-fund-targets-legally-entangled-rmbs-idUSL2N0L51KD20140131, *available at* C-2.

filing of the initial claim, rather than upon the events giving rise to the cause of action in the initial claim." *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 pleadings, however, 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; *U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc.*, 147 A.D.3d 79, 87-88 (1st Dep't 2016). Claims based on loans that were not timely identified are necessarily "based upon events that occurred after the filing of the initial claim." *Johnson*, 125 A.D.3d at 1074. These claims did not become ripe until Plaintiffs satisfied the contractual precondition to the repurchase remedy—which occurred *after* "the filing of the initial claim."

In sum, allowing relation back in these circumstances would defeat the purpose of the repurchase protocol: to serve as "a procedural prerequisite" to pursing a remedy for any alleged breach of a loan-related representation or warranty. *ACE*, 25 N.Y.3d at 598. As *ACE* recognized, the repurchase protocol affords RMBS sellers the contractual right to cure or repurchase defective loans before being sued on an alleged breach. Thus, under the clear terms of the repurchase protocol, claims based on Plaintiffs' untimely breach notices should not have been allowed to proceed. *See GreenPoint*, 147 A.D.3d at 87-88; *S. Wine & Spirits of Am., Inc. v. Impact Envtl. Eng'g, PLLC*, 80 A.D.3d 505, 505 (1st Dep't 2011) (relation back does not apply when "plaintiffs failed to comply with the express, bargained-for condition precedent to [the] right to bring an action against defendants").

C. The First Department's RMBS-specific relation-back holdings are unsound.

Beginning with its *Nomura* decision, the First Department has endorsed an ever-broadening application of relation back in favor of RMBS plaintiffs,[18] including in the decision below, 175 A.D.3d at 1176.

[18] *See Nomura*, 133 A.D.3d at 108; *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 176 A.D.3d 466, 466 (1st Dep't 2019) ("*HEAT 2007-1*"), *appeal pending*, APL-2020-00018; *HSBC Bank USA v. Merrill Lynch Mortg. Lending, Inc.*, 175 A.D.3d 1149, 1150 (1st Dep't 2019).

That court, however, has never attempted to explain how its authorization of relation back is consistent with the above principles. Its justifications for applying the doctrine not only fail on their own terms, but also permit blatant circumvention of the parties' negotiated sole remedy provision. In addition, the Appellate Division has erred in implicitly concluding that untimely noticed breaches arise from the same transactions and occurrences pleaded in the original pleadings, as required under CPLR 203(f) for relation back to apply.

1. The presence of "some timely claims" does not nullify contractual preconditions to additional claims.

In allowing Plaintiffs to "relate back" their untimely breach notices in this case, the Appellate Division relied principally on its prior decision in *Nomura*, where it 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.[19] *Nomura*, for

[19] On appeal to this Court, the *Nomura* parties did not challenge or address the First Department's relation-back holding. *See Nomura*, 30 N.Y.3d 572.

its part, emphasized that there were "some timely claims" pertaining to timely breach notices, as distinguished from a situation where no timely notices were sent pre-suit. *Id.* But *Nomura* offered no explanation for why the presence of "some timely claims" might excuse a plaintiff from timely compliance with a contractual precondition to pursing the repurchase remedy as to other loans, nor did it cite any decision from this Court to support that proposition. The First Department's distinction was unfounded, and this Court should not endorse it here.

As an initial matter, it is beyond dispute that "CPLR 203(f) applies only in those cases where a *valid* preexisting action has been filed." *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 33 N.Y.3d 84, 90 (2019) ("*HEAT 2006-5*") (emphasis added). In so holding in *HEAT 2006-5*, this Court rejected a similar attempt by a 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. That rule is entirely consistent with the principle described above: that relation back does not excuse plaintiff from timely compliance with a contractual condition precedent.

It does not follow, however, that as long as there are "*some* timely claims," the need for timely compliance with remedial prerequisites goes out the window. The repurchase protocol here is not just a precondition to *suit*; it is the sole means by which Plaintiffs may recover for any alleged "breach" of a loan-related representation or warranty. There is simply no basis in the parties' contracts—or New York law—to treat timely compliance with the repurchase protocol for a single breaching loan as excusing Plaintiffs from that obligation for all other loans in a trust.

The effect of the Appellate Division's rule is to all but nullify the contractual notice requirement. As this Court recognized in *ACE* and as discussed above, timely compliance with that requirement is no mere formality. The repurchase protocol serves important purposes, and this "procedural prerequisite" must be satisfied within the six-year limitations period in order to "serve the … objectives of finality, certainty and predictability." 25 N.Y.3d at 593-94. As the Appellate Division has applied *Nomura*, however, RMBS plaintiffs may now file a timely notice limited to a *single breaching loan* and then enjoy carte blanche to proceed on otherwise untimely notices as to hundreds (or thousands) of loans. That rule enables near-total circumvention of the notice-and-cure requirement—an outcome that is by no means hypothetical. *See HSBC Bank USA*, 175 A.D.3d at 1150 (allowing relation back of "untimely breach notices" because the plaintiff sent "two timely notices"), *modifying* Index No. 652793/2016, 2018 WL 2722870, at *11 (Sup. Ct. N.Y. Cty. June 6, 2018) (explaining that each of the two timely notices identified only one loan as breaching, and the "vast majority" of loans (at least 973) were identified for the first time in untimely notices served years later).

2. Alleged breaches involving different loans do not arise from the same transaction or occurrence.

New York law allows additional claims to "relate back" to the filing of the original pleading only if the untimely claims "arose out of [the] same conduct, transaction or occurrence." *Buran*, 87 N.Y.2d at 178. The Appellate Division has not expressly addressed how that requirement applies in RMBS repurchase suits, but in holding that untimely noticed claims relate back to "timely complaints that identified certain breaching loans" in the same trust, 175 A.D.3d at 1176, that court implicitly treats each securitization as the relevant "transaction" or "occurrence."

That is error. The origination of each individual mortgage loan is a separate event—loans are obtained by different borrowers, secured by different homes in different parts of the country, and often underwritten by different originators using different guidelines. Claims as to the breach of a representation regarding one loan therefore do not arise out of the same "conduct, transaction or occurrence" as a different breach relating to another loan. A-1278.2 ("Every mortgage loan is different, and every combination of defects affects each mortgage loan differently."). Providing DLJ with notice that, for example, the borrower for a loan originated by Originator A in California may have misrepresented his income does not put DLJ on notice that the borrower for a loan originated by Originator B in Florida may have failed to disclose the full extent of his outstanding debt.

Although the Appellate Division's RMBS relation-back holdings have never grappled with this question, the Delaware Court of Chancery addressed it 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.

In *Central Mortgage*, the court considered whether, for relation-back purposes, claims pertaining to loans beyond those identified in timely breach notices relate to the same "transaction or occurrence" as the claims in the original pleading. 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." *Id.* 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* correctly balances the remedial purpose of relation back with the parties' bargained-for contractual expectations and the statute of limitations.

In analogous contexts, this Court has found relation back inapplicable to "claims of injury [] based on different, not identical, transactions," noting that the individual claims at issue were subject to "an individualized reimbursement rate" that varied from claim to claim. *Greater N.Y. Health Care Facilities Ass'n v. DeBuono*, 91 N.Y.2d 716, 721 (1998). In *DeBuono*, the plaintiffs, an association of nursing homes along with eight individual nursing homes, timely filed an Article 78 proceeding challenging Department of Health regulations establishing Medicaid reimbursement rates. *Id.* at 718. Other similarly affected nursing homes attempted to intervene in the plaintiffs' suit and assert additional claims. *Id.* at 719. The Court 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." Plaintiffs' repurchase claims are also subject to a repurchase protocol that operates on an "individualized" basis, and the "injury claimed"—the specific alleged breaches—also must be determined loan by loan.

D. The decision below correctly held that no timely breach notices were sent for loans in the 2006-1 Trust.

The decision below permits RMBS plaintiffs to "relate back" untimely breach notices for a given trust only when they have sent some timely breach notices for that trust and alerted the defendant to a likelihood of further claims. In so holding, the Appellate Division correctly recognized that Plaintiffs failed to provide even a single timely breach notice for loans in the 2006-1 Trust. Plaintiffs are nonetheless likely to argue here, as they did in opposing DLJ's motion for leave to appeal in the Appellate Division, *see* Pls.' Leave Opp. 4, that they in fact provided timely notice for loans in the 2006-1 Trust, relying on a tolling agreement that they failed to mention in their Appellate Division brief. Those arguments are procedurally improper and without merit.

Although the Appellate Division expressly noted that "no timely or 'ripe' breach notices were sent" for the 2006-1 Trust, 175 A.D.3d at 1176, Plaintiffs did not seek leave for reargument or to appeal on this issue. Plaintiffs' reliance on the tolling agreement (which is groundless in any event) does not change the fact that a cross-appeal was required to pursue that argument in this Court. *See, e.g.*, *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151 n.3 (2002) (issue "beyond this Court's review" because "plaintiffs failed to cross-move for leave to appeal"). This argument is also forfeited. Plaintiffs did not refer to the tolling agreement (or otherwise defend their breach claims pertaining to 2006-1 Trust loans as timely) in either their summary judgment briefing or their Appellate Division brief, even though DLJ has consistently argued that there were no timely breach notices with respect to the 2006-1 Trust and that by the time the tolling agreement was entered, any 2006-1 Trust claims were already untimely. NYSCEF Doc. No. 1391, at 11 & n.32; DLJ's App. Div. Br. 10-11, 26 n.16; *see Bingham v. N.Y.C. Transit Auth.*, 99 N.Y.2d 355, 359 (2003) ("[T]his Court with rare exception does not review questions raised for the first time on appeal.").

At any rate, Plaintiffs' belated arguments about the effect of the tolling agreement are meritless. When Plaintiffs failed to provide any breach notice for the 2006-1 Trust by November 1, 2011, it became impossible for them to timely comply with the notice-and-cure provision of the repurchase protocol. The parties' February 22, 2012 tolling agreement suspended not only the limitations period, but also any other "similar time-related defense or claim, whether statutory, contractual or otherwise and whether at law, in equity or otherwise," to the extent any such time periods had not already expired. A-1084-85. When Plaintiffs failed to send DLJ breach notice by November 1, 2011, it was already too late for them to bring timely claims on loans in the 2006-1 Trust. The tolling agreement executed months later did nothing to change that. Thus, as the Appellate Division correctly determined, Plaintiffs cannot satisfy the repurchase protocol's notice requirement for any allegedly breaching loans in the 2006-1 Trust.

E. Plaintiffs' untimely invocation of CPLR 205(a) has no bearing on relation back here.

In responding to DLJ's relation-back arguments, Plaintiffs are likely to invoke this Court's decision in *U.S. Bank National Association v. DLJ Mortgage Capital, Inc.*, 33 N.Y.3d 72 (2019) ("*ABSHE*"), where a repurchase action was dismissed for failure to comply with the sole remedy provision, but that dismissal was entered without prejudice to refiling under CPLR 205(a).[20] This Court need not reach that issue, however, because Plaintiffs have failed to preserve an argument that CPLR 205(a)'s hypothetical availability should inform the application of relation back in this case. Plaintiffs' summary judgment briefing did not mention CPLR 205(a)—or the 2016 Appellate Division decision in *ABSHE* that this Court later affirmed, 141 A.D.3d 431 (1st Dep't 2016), *see* NYSCEF Doc. Nos. 1338, 1429, 1608—and the motion court thus did not mention CPLR 205(a) in its summary judgment decision, A-14-46. Nor did the Appellate Division address CPLR 205(a) or *ABSHE* in

[20] CPLR 205(a) provides that within six months after an "action … is terminated," under specified circumstances, the plaintiff may "commence a new action upon the same transaction or occurrence or series of transactions or occurrences."

affirming the motion court's relation-back ruling. 175 A.D.3d at 1175-76.

Indeed, this Court recently declined to address an unpreserved CPLR 205(a) argument asserted by the same trustee here, where U.S. Bank failed to raise "the specific argument in Supreme Court and ask the court to conduct that analysis in the first instance." *HEAT 2006-5*, 33 N.Y.3d at 89 (internal quotation marks and brackets omitted). That restraint is especially sensible in the CPLR 205(a) context, where "it would seem that the propriety of an action based on CPLR 205(a) should be decided in the subsequent action, and not the action that is dismissed." David D. Siegel, New York Practice § 49 (6th ed.). And that is particularly so when the lower courts in this case have never even addressed the potential availability of refiling under CPLR 205(a) or its significance to the relation-back issue.

In any event, even if the Court were to consider it, *ABSHE*'s discussion of CPLR 205(a) does not justify relation back in this case. *ABSHE* held that dismissal without prejudice to refiling was appropriate on facts quite different than the ones here, where the trustee failed to provide contractually required pre-suit notice of breaching loans to the mortgage originator, and instead provided pre-suit notice only to DLJ, which was liable as a "backstop" to the originator's repurchase obligation. 33 N.Y.3d at 76-77. *ABSHE*'s ruling on the potential availability of CPLR 205(a) expressed no view on the viability of claims as to loans for which the trustee fails to provide *any* party with contractually required pre-suit notice and an opportunity to cure.

ABSHE is distinguishable for a further reason. There, it was undisputed that the prior dismissal disposed of the entire "action," 33 N.Y.3d at 77, whereas here, DLJ is not seeking the dismissal of an action or even a claim, but rather to limit the population of loans upon which Plaintiffs can pursue notice-based claims at trial. By its terms, CPLR 205(a) applies only where, *inter alia*, an "action" is terminated, and the termination is in a manner other than a "final judgment upon the merits." That has not happened yet in this case, and there is no indication that it ever will. Quite to the contrary, this case will proceed to a final judgment, one way or the other, on the merits.

The bottom line is that CPLR 203(f) and 205(a) address distinct issues and operate in different ways. *See Carrick v. Cent. Gen. Hosp.*, 51 N.Y.2d 242, 248-49 (1980) (drawing a "sharp distinction" between the operation of relation back and CPLR 205(a)); *accord HEAT 2006-5*, 33 N.Y.3d at 90-91. Whether, and how, CPLR 205(a) might apply to a hypothetical refiled action is a question for another day.

II. The PSAs Require The Liability And Damages Elements Of The Repurchase Protocol To Be Proved On A Loan-Specific Basis.

A. Statistical sampling is fundamentally inconsistent with the parties' agreed-upon loan-by-loan sole remedy.

Plaintiffs' proposed methodology for "proving" their claims involves evaluating only a small subset of the loans in each trust for purported breaches and then extrapolating from the alleged breach rate in the sample to demonstrate breaches and damages across each trust. This statistical sampling approach is flatly inconsistent with the contractual terms the parties agreed to, which require that Plaintiffs prove breach, materiality, and damages on a loan-by-loan basis, just as they require that Plaintiffs afford loan-specific notice of breaches in the first instance.

Under the clear terms of the PSAs, Plaintiffs agreed to identify any alleged breaches on a loan-by-loan basis and are entitled to only loan-specific remedies. *See, e.g.*, *MASTR Adjustable Rate Mortg. Tr. 2006-OA2 v. UBS Real Estate Sec. Inc.*, No. 12-CV-7322 (PKC), 2015 WL 764665, at *11 (S.D.N.Y. Jan. 9, 2015) ("*MARM*") ("[T]he repurchase mechanism established by the parties is targeted to a specific loan, and not to a group or category of loans."). Several features of the repurchase protocol confirm that liability and damages must be proven separately for each individual loan.

As an initial matter, the representations and warranties that trigger the repurchase protocol operate at a loan-specific level, referring to "*the* Mortgage," "*the* Mortgage Note," "*the* Mortgaged Property," "*the* Mortgage Loan," "*each* Mortgage Loan," and "*such* Mortgage Loan" in singular form throughout. A-1020-1024 (emphases added). Moreover, the repurchase protocol itself necessarily involves a series of loan-specific steps. This remedial mechanism is triggered by the discovery by any party of "*a* breach of a representation or warranty" in "*any* Mortgage Loan" where the specified breach has a "material[] and adverse[] [e]ffect[]" upon the interests of the certificateholders in the particular loan. A-638 (emphases added).

Next, upon DLJ's discovery or receipt of written notice of "*a* breach," DLJ has 120 days to cure "*such* breach," again requiring action at a breach- and loan-specific level. *Id.* (emphases added). If that 120-day period expires without cure of the material breach with respect to the loan in question, DLJ has the option to "remove *such* Mortgage Loan" from the trust and "substitute in *its* place *a* Qualified Substitute Mortgage Loan"—defined as a loan having similar attributes—or "repurchase *the affected Mortgage Loan* [or Mortgage Loans] from the Trustee" at the contractually defined Repurchase Price. *Id.* (emphases added). Determination of the Repurchase Price, in turn, requires a loan-specific calculation involving the "unpaid principal balance of *the* Mortgage Loan" and "accrued unpaid interest" "at *the* applicable Mortgage Rate." A-615 (emphases added).

Despite the repurchase protocol's plain terms, Plaintiffs seek to prove the requisite contractual elements of their breach claims for only a small fraction of the trust loans and then simply extrapolate—for purposes of both liability and damages—across the entire pool of loans at issue. Plaintiffs have attempted to develop loan-specific proof for fewer than 5% of the loans at issue in this case. They selected a sample of 400 loans from each trust, for a total of 1,600 loans, and evaluated only those loans to identify purported breaches. Plaintiffs thus seek liability and damages for thousands upon thousands of loans that they neither reviewed nor subjected to the agreed-upon remedial mechanism.

This sampling process impermissibly circumvents the parties' sole remedy provision because it cannot identify actual, loan-specific breaches for most of the loans upon which Plaintiffs predicate their claims. Sampling does not offer *any* of the requisite information about out-of-sample loans. It does not permit the trier of fact to determine when DLJ received notice of, or otherwise discovered, a purported breach in an out-of-sample loan and thus the point at which the cure period for that loan began to run. It establishes nothing about which representation or warranty any out-of-sample loan may have breached. It fails entirely to address whether a specific breach "materially increased the risk of loss" for any unsampled loan. A-70. And proof of Plaintiffs' damages under the Repurchase Price requires a calculation based on the outstanding principal and accrued interest on a given breaching loan, but sampling does not identify which out-of-sample loans include breaches and thus need to be repurchased.

In short, sampling offers only a statistical, poolwide view of out-of-sample loans, making it insufficient to prove Plaintiffs' claims under the clear loan-specific terms of the PSAs. The "product of [the] proposed sampling exercise" is "a probability that a loan is in breach," which does not prove whether the defendant had notice of a specific breach and whether that breach materially and adversely affected the loan's value. *Homeward Residential, Inc. v. Sand Canyon Corp.*, No. 12 CIV. 5067 (JFK), 2017 WL 5256760, at *8 (S.D.N.Y. Nov. 13, 2017).[21] Because of the repurchase protocol's loan-specific requirements, "there is no benefit to sampling beyond what it reveals about the loans within the sample." *Blackrock Balanced Capital Portfolio (FI) v. Deutsche Bank Nat'l Tr.*

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[21] *Accord Royal Park Invs. SA/NV v. Deutsche Bank Nat'l Tr. Co.*, No. 14-CV-4394 (AJN) (BCM), 2018 WL 4682220, at *12 (S.D.N.Y. Sept. 28, 2018) ("Where, as here, the sole remedy available to the Trustee under the express terms of the PSAs is inherently loan-specific, both liability and damages must be established 'loan by loan,' making sampling unhelpful."); *BlackRock Allocation Target Shares v. Wells Fargo Bank, Nat'l Ass'n*, No. 14-CV-9371 (KPF) (SN), 2017 WL 953550, at *5 (S.D.N.Y. Mar. 10, 2017) ("Sampling may fail to capture whether the nature of the breach had a material and adverse effect at the time a repurchase obligation, if any, was triggered…."); *MARM*, 2015 WL 764665, at *10 ("[T]he proposed statistical sampling does not adequately distinguish between breaches that are material and adverse as to a particular loan and those that are not.").

Co., No. 14-CV-9367 (JMF), 2018 WL 3120971, at *2 (S.D.N.Y. May 17, 2018). "The problem is not what sampling *can* do; it is what sampling *cannot* do: it cannot tell the fact-finder *which* loans in the larger pool had material and adverse [representation and warranty] breaches …. Nor can it establish the damages, if any, flowing from the … failure to put back any specific loan outside of the sample set." *Royal Park Invs.*, 2018 WL 4682220, at *12. As Plaintiffs' damages expert acknowledged, his sampling method "d[id] not lead [him] to opine that any specific loan outside of the sampled population [was] in fact a breaching loan." A-1308.

For these reasons, in recent years, numerous courts have rejected the argument that sampling can be reconciled with the sole remedy provision in RMBS contracts. As a New York federal district court recently held in an action against a warrantor, the repurchase protocol—a bargained-for remedial process with "[p]recisely defin[ed]" terms calling for "proof of breach on a loan-by-loan basis"—would "make[] little sense" if plaintiffs could "use statistical means to 'prove' that a loan is in breach without actually identifying the specific loan (and specific breach)." *Homeward Residential*, 2017 WL 5256760, at *7.

This is because, as the Second Circuit has recognized in considering the terms of sole remedy provisions, a sampling approach does not reveal "which loans, in which trusts, were in breach of the representations and warranties." *Ret. Bd. of the Policemen's Annuity & Benefit Fund v. Bank of N.Y. Mellon*, 775 F.3d 154, 162 (2d Cir. 2014) ("[A]lleged misconduct must be proved loan-by-loan and trust-by-trust."). Thus, courts have found that where "plaintiffs must prove their case 'loan by loan,' the use of sampling to prove breaches … is impermissible: a breach in one loan says nothing about a breach in another, much less whether that breach has a 'material and adverse effect' on Certificateholders." *W. & S. Life Ins. Co. v. Bank of N.Y. Mellon*, No. A1302490, 2017 WL 3392855, at *10 (Ohio Ct. Com. Pl. Aug. 4, 2017).

Tellingly, in other RMBS actions where U.S. Bank is the defendant, it has argued against sampling on precisely this basis. U.S. Bank has maintained, for example, that the "sole remedy provided to an RMBS trustee with regard to breaching loans is to seek repurchase of them on a loan-by-loan, trust-by-trust basis." U.S. Bank's Mem. of Law at 11, *Royal Park Invs. SA/NV v. U.S. Bank Nat'l Ass'n*, No. 14-CV-2590 (VM) (RWL), 2018 WL 7254169 (S.D.N.Y. Aug. 6, 2018), *available* *at* C-81. Thus, U.S. Bank persuaded a federal district court to enter a protective order precluding sampling-related discovery on the ground that "the sole remedy provisions of the Governing Agreements … require loan-specific proof" of liability and damages. U.S. Bank's Am. Letter Mot. for Conference at 4, *Royal Park Invs.*, No. 14-CV-2590 (VM) (RWL), Doc. No. 221, *available at* C-61; *see Royal Park Invs. SA/NV v. U.S. Bank Nat'l Ass'n*, No. 14-CV-2590 (VM) (RWL), 2018 WL 3350323, at *2 (S.D.N.Y. July 9, 2018) ("Sampling … cannot identify which specific loans were in breach (other than those in the sample itself), cannot determine what would have happened had the trustee attempted to seek repurchase of the loans, and cannot determine the damages associated with any specific loan."). U.S. Bank's arguments turned on the language of the repurchase protocol, and had nothing to do with the fact that the claims under the repurchase protocol in that case were asserted against the trustee, rather than by it. Simply put, there is no way to reconcile U.S. Bank's prior submissions with its position in this case.

At bottom, sampling reflects just another attempt by RMBS plaintiffs to obtain general contract damages despite their agreement to subject breach claims to a loan-specific sole remedy provision. In *Nomura*, this Court made clear that "general contract damages" are unavailable on claims "grounded in alleged breaches of the mortgage loan-specific representations and warranties to which the limited remedy fashioned by the sophisticated parties applies." 30 N.Y.3d at 577. Because the effect of sampling is to "nullify the Sole Remedy Provision" that the parties agreed to, *id.* at 585, its use cannot be reconciled with fundamental principles of New York contract law.

B. The Appellate Division had no basis to disregard the parties' agreed-upon loan-by-loan sole remedy in allowing sampling.

Although the Appellate Division's decision in this case did not expressly address the conflict between sampling and the terms of the repurchase protocol, *see infra* 62-63, the Appellate Division reached that question in a related decision issued the same day. In *Ambac v. Countrywide*, the Appellate Division concluded for the first time "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." 179 A.D.3d 518, 521 (1st Dep't 2020). That conclusion was mistaken.

The Appellate Division's recognition in *Ambac* that sampling can proceed only "despite the repurchase protocol" should have been the end of the matter. New York courts do not "by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties," especially when those parties are sophisticated entities who have simply come to regret the terms they negotiated. *2138747 Ontario, Inc. v. Samsung C&T Corp.*, 31 N.Y.3d 372, 381 (2018) (internal quotation marks omitted). Plaintiffs "must live with the consequences of their agreement," *Eujoy Realty Corp. v. Van Wagner Commc'ns, LLC*, 22 N.Y.3d 413, 424 (2013), however inconvenient, and their after-the-fact dissatisfaction with the bargain they struck is no basis for a court to rewrite their contracts.

That sampling may be an accepted method of proof in other contexts, *see, e.g.*, *Mercy Hosp. v. N.Y. State Dep't of Soc. Servs.*, 79 N.Y.2d 197, 205 (1992), does not make it permissible here. The question here is not whether statistical sampling can be used to "draw reliable conclusions about the characteristics of large populations." *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, Index No. 651612/2010, 2019 WL 162495, at *10 (Sup. Ct. N.Y. Cty. Jan. 2, 2019).

Rather, the problem with sampling is what it "cannot do." *Royal Park Invs.*, 2018 WL 4682220, at *12. Sampling indisputably cannot establish the damages flowing from breaches for loans resting outside of the sample set. *Id.* As a result, Plaintiffs' sampling approach is foreclosed for a reason independent of its asserted reliability: The parties here bargained for an exclusive contractual remedy that operates on a loan-by-loan basis, and Plaintiffs therefore gave up the right to seek liability and damages by other means.

In *Ambac*, the Appellate Division relied on three federal court decisions to authorize sampling as a method of proof, but none of those cases justifies disregarding the terms of the contracts giving rise to the plaintiff's claims. In *Deutsche Bank National Trust Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 289 F. Supp. 3d 484, 497, 501 (S.D.N.Y. 2018), a federal district court allowed sampling after concluding that the repurchase protocol was voidable based on the trustee's allegations of gross negligence. The premise that gross negligence can void a sole remedy provision is presently on review in this Court, *Matter of Part 60 Put-Back Litig.,* APL-2019-00127, and is irrelevant anyway because Plaintiffs here have not advanced a gross negligence theory. In *Assured Guaranty Municipal Corp. v. Flagstar Bank, FSB*, 920 F. Supp. 2d 475, 512 (S.D.N.Y. 2013), the court permitted sampling to prove "material defects" without addressing the argument that the repurchase protocol requires a material and adverse effect to be proven for each allegedly breaching loan. And the Second Circuit's decision in *FHFA v. Nomura Holding America, Inc.*, 873 F.3d 85, 131 (2d Cir. 2017), did not address the relationship between sampling and the sole remedy provision because the plaintiff there (a certificateholder) brought claims under the federal Securities Act. Those claims did not sound in contract and were not conditioned on compliance with a repurchase protocol.

Plaintiffs here and in *Ambac* have also attempted to justify sampling as necessary to avoid the expense and inconvenience of proving liability and damages on a loan-specific basis for thousands of allegedly breaching loans. Those protestations ring hollow given Plaintiffs' agreement to channel all breach claims through a contractual remedial protocol that requires loan-specific proof. And these concerns about cost and efficiency did not deter U.S. Bank from contending that materially identical repurchase protocols required loan-by-loan proof of liability and damages when U.S. Bank was sued as trustee.

Proving claims on a loan-by-loan basis may be inconvenient for RMBS plaintiffs, but it would hardly be unprecedented. One major RMBS action involving tens of thousands of alleged breaches proceeded to trial and final resolution under rulings that precluded U.S. Bank from using statistical sampling. *See U.S. Bank Nat'l Ass'n v. UBS Real Estate Sec. Inc.*, 205 F. Supp. 3d 386, 525-26 (S.D.N.Y. 2016) (appointing masters to conform court's findings on exemplar loans to broader pools of loans). And in another repurchase action against DLJ now pending in this Court, U.S. Bank has been content to proceed to trial on several hundred allegedly breaching loans without using sampling. *See HEAT 2007-1*, 176 A.D.3d 466. Requiring loan-by-loan proof (which, after all, is what Plaintiffs agreed to) is hardly commercially unreasonable when viewed in the context of the massive damages claim Plaintiffs are asserting here. *Cf. In re Lehman Bros. Holdings Inc.*, No. 08-13555 (SCC), Doc. No. 57785-1, at 7 (Bankr. S.D.N.Y. Mar. 18, 2018) (RMBS trustees were able to re-underwrite 171,000 loan files in a 16-month period), *available at* C-9. There is no reason to assume RMBS plaintiffs are incapable of litigating repurchase cases without resorting to procedures that distort the sole remedy provision.

To permit sampling to prove liability for out-of-sample loans not only rewrites the parties' contracts, but also offends bedrock due process principles. Due process protects a defendant's "right to litigate the issues raised," *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971), and "'requires that there be an opportunity to present every available defense,'" *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). Those due process rights cannot be safeguarded through a "Trial by Formula" based on sampling and extrapolation. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011). When a plaintiff fails to provide evidence establishing liability for claims "outside the sample group," it violates due process to "deprive [the defendant] of the ability to litigate its … defense[s]" to such claims. *Duran v. U.S. Bank Nat'l Ass'n*, 325 P.3d 916, 935 (Cal. 2014). That is exactly what the Appellate Division has done here by endorsing the use of sampling.

C. The merits of sampling are properly before this Court.

The sampling issue before this Court is whether RMBS plaintiffs whose claims are subject to a sole remedy provision can use sampling to prove liability and damages at trial. Plaintiffs sought and obtained a summary judgment ruling on that question. The Appellate Division affirmed that ruling, and then certified to this Court the question of whether its order (including the sampling ruling) was properly made. The Appellate Division further specified that its "determination was made as a matter of law and not in the exercise of discretion," and that questions of law were "decisive of the correctness of its determination." A-5. This Court should take the Appellate Division at its word and address the availability of sampling on the merits—an issue that has divided New York state and federal courts and is now ripe for resolution.

To be clear, Plaintiffs raised procedural objections to DLJ's sampling arguments below and in opposition to DLJ's motion for leave to appeal. In particular, Plaintiffs argued in the Appellate Division that DLJ's sampling arguments were barred by law of the case and DLJ's failure to perfect or withdraw its appeal of the 2013 Interim Order permitting the use of statistical sampling. Pls.' Leave Opp. 14. Plaintiffs will no doubt repeat those contentions here. But those objections need not detain this Court: They are beyond the scope of the decisive question of law that the Appellate Division certified for this Court's review over Plaintiffs' objections and, in any event, lack merit.

As an initial matter, law of the case and preclusion based on the dismissal of a prior appeal are both flexible doctrines that may be relaxed as a matter of a court's discretion. *People v. Cummings*, 31 N.Y.3d 204, 208 (2018) (law of the case); *Faricelli v. TSS Seedman's, Inc.*, 94 N.Y.2d 772, 774 (1999) (preclusion based on dismissal of prior appeal). Here, the Appellate Division's order certainly discussed this cases' procedural history, including the Interim Order and the parties' sampling-related discovery. But the Appellate Division's bottom-line ruling on sampling was to affirm the motion court's summary judgment rulings and, in particular, that court's "decision to permit the use of statistical sampling to prove liability and damages." 175 A.D.3d at 1177. The Appellate Division's order did not state that DLJ's sampling arguments were barred by law of the case or precluded by DLJ's failure to pursue a prior appeal, nor did it cite any cases applying those doctrines.

To determine the basis of the Appellate Division's sampling holding, this Court need not ignore the relevant context. In granting leave to appeal, the Appellate Division clarified that its determination rested on a question of law and did *not* involve the "exercise of discretion," as would have been necessary if the Appellate Division had accepted Plaintiffs' procedural objections. The Appellate Division's certification order did not in any way limit this Court's review of sampling, even though Plaintiffs pressed their procedural objections in opposing leave to appeal.

Even if this Court were to treat Plaintiffs' procedural objections as within the scope of its review, it should reject them as a matter of law. Plaintiffs' first objection—that Justice Schweitzer's 2013 interim determination on sampling operated as law of the case such that Justice Scarpulla could not revisit the permissibility of sampling on summary judgment—is plainly irrelevant to the appellate proceedings in this case. Law of the case does not bind an appellate court reviewing the decision of a lower court. *See, e.g.*, *People v. Evans*, 94 N.Y.2d 499, 503 n.3 (2000); *Martin v. City of Cohoes*, 37 N.Y.2d 162, 165 (1975).

Plaintiffs' appellate waiver arguments fare no better. When this Court has applied that doctrine as a discretionary matter, it has limited the preclusive effect of a dismissed prior appeal to subsequent appeals raising the "same issue." *E.g.*, *Rubeo v. Nat'l Grange Mut. Ins. Co.*, 93 N.Y.2d 750, 755 (1999) (failure to perfect appeal from summary judgment ruling precluded later appeal from order following reargument of that motion). The situation here is entirely different. DLJ appeals a summary judgment ruling that came more than six years after Justice Schweitzer's two-sentence advisory determination, which he entered before Plaintiffs had even proposed how they wished to use sampling to prove their case at trial. In the interim, the applicable law on sampling has developed, *see supra* 51-54, and this Court has clarified that RMBS repurchase protocols must be enforced by their terms, *see Ambac*, 31 N.Y.3d at 582; *Nomura*, 30 N.Y.3d at 585. Given the changes in the legal landscape and procedural posture since the 2013 appeal, the sampling arguments in this appeal do not present the "same issue," *Rubeo*, 93 N.Y.2d at 755, as that resolved in the Interim Order.

For these reasons, even if this Court were to construe the Appellate Division's ruling as resting on law of the case or appellate waiver doctrines, those rulings would reflect errors of law that are within this Court's power to correct. *See Varkonyi v. Varig*, 22 N.Y.2d 333, 337 (1968).

III. The PSAs' Specified Remedy Does Not Include Interest That Never Actually "Accrued" On A Loan.

The repurchase protocol in the PSAs establishes the exclusive remedy for the material breach of any loan-related representation or warranty. That remedy incorporates a contractual formula for calculating the "Repurchase Price" DLJ must pay to repurchase a breaching loan. The Repurchase Price is defined, in relevant part, to include "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." A-615 (emphasis added). DLJ does not dispute that its obligation to pay the specified Repurchase Price extends to breaching loans that have been liquidated. The parties disagree, however, on how the "accrued unpaid interest" component of the Repurchase Price is to be calculated for liquidated loans. As explained below, interest does not accrue on loans that have been liquidated, and the Repurchase Price should be calculated accordingly.

A. The PSAs' Repurchase Price limits Plaintiffs' recovery for liquidated loans to unpaid interest that actually "accrued" before the loan was extinguished through liquidation.

The Appellate Division erred in holding that the Repurchase Price includes "accrued interest on loans after they have been liquidated." 175 A.D.3d at 1177. The proper analysis begins—and should end—with the terms of the contract. *See 159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353, 356 (2019) ("[A]greements negotiated at arm's length by sophisticated, counseled parties are generally enforced according to their plain language….").

The contractual term "accrued unpaid interest" is unambiguous. When referring to interest connected to a financial instrument, "accrued" means "[a]ccumulated or increased by growth." *Accrued*, Oxford English Dictionary (3d ed. 2011). "Accrued interest" therefore refers to "[i]nterest that is earned but not yet paid." *Interest – Accrued Interest*, Black's Law Dictionary (11th ed. 2019).

Once a loan has been liquidated, however, interest no longer accrues, because there is nothing left upon which interest can "accumulate[] or increase[]." That follows, again, from the terms of the contract. Although the PSAs do not define "liquidation," they specify that a loan is treated as liquidated only when it has "defaulted" and its servicer has "received all amounts it expects to receive in connection with the [loan's] liquidation." A-592. The PSA definition of "Liquidation Proceeds," in turn, refers to "[a]mounts … received in connection with the partial or complete liquidation of defaulted Mortgage Loans, whether through trustee's sale, foreclosure sale or similar disposition." A-592.

As a matter of state law, "a foreclosure decree operates to merge the interests of mortgagor and mortgagee, and vest in the purchaser the entire interest and estate as it existed at the date of the mortgage." *MASTR Asset Backed Sec. Tr. 2006-HE3 ex rel. U.S. Bank Nat'l Ass'n v. WMC Mortg. Corp.*, No. 11-CV-2542, 2012 WL 4511065, at *4 (D. Minn. Oct. 1, 2012). Thus, under New York law, for example, "[o]rdinarily the note and mortgage would be extinguished by their *merger* into the foreclosure judgment." 35 Jenean Taranto, Mortgage Liens in New York § 20:1 (2d ed.). Similar principles apply under the laws of other states.[22] That is why the Prospectus Supplements for the trusts at

[22] *See, e.g.¸ CitiMortgage, Inc. v. Equity Bank, N.A.*, 942 F.3d 861, 866 (8th Cir. 2019) ("[S]ometimes residential-mortgage loans cease to exist

issue specifically warned investors that "[d]efaulted mortgage loans may be liquidated, and liquidated mortgage loans will no longer be outstanding and generating interest." *E.g.*, A-314. And that is why Plaintiffs stated in their prior briefing that liquidated loans "no longer exist[]." Pls.' App. Div. Br. 17. Accordingly, the "accrued unpaid interest" on a liquidated loan refers only to the interest that accrued before liquidation.

Nor does the potential availability of a deficiency judgment *after* foreclosure mean that the underlying loan continues to exist and accrue interest after liquidation. A deficiency judgment is not the same as the original debt or the interest that accrues thereon. In addition, some states do not permit deficiency judgments at all, and others impose various restrictions on a lender's ability to pursue that remedy. *See,*

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after foreclosure, such as by operation of state law[.]" (citing Texas law)); *First Place Bank v. Skyline Funding, Inc.*, No. 10-CV-2044, 2011 WL 3273071, at *4 (N.D. Ill. July 27, 2011) ("[A] default order or foreclosure decree merges the real estate mortgage and the mortgage indebtedness into a judgment[.]"); *Esoimeme v. Wells Fargo Bank*, No. 10-CV-2259 (JAM) (EFB) (PS), 2011 WL 3875881, at *7 (E.D. Cal. Sept. 1, 2011) (under California law, "non-judicial foreclosure sale extinguish[es] the note and deed of trust"); *Peterson v. Metro. Life Ins. Co.*, 248 N.W. 667, 668 (Minn. 1933) ("The mortgage, both as contract and security, [is] exhausted by the foreclosure….").

e.g., 2 Law of Distressed Real Estate App'x 19A (identifying restrictions under laws of different states). The PSAs calculate damages based on interest that actually "accrued" on the mortgage loan at issue, not on an additional state-law remedy that might be available with respect to some (but not all) liquidated loans in the trusts.

B. The lower courts' reasons for disregarding the plain meaning of "accrued unpaid interest" lack merit.

The Appellate Division's reasoning on this issue was confined to a single sentence and citation: "The [motion] 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)." 175 A.D.3d at 1177. That statement misapprehended DLJ's argument. As explained, DLJ agrees that the Repurchase Price definition applies to all loans (including loans that have been liquidated). The Appellate Division 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 ignores the plain meaning of Repurchase Price, which, as explained above, is limited to interest that "accrue[s]" on a loan in existence.

Nor does the Appellate Division's citation to its earlier decision in *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 of cure or repurchase is impossible. The question is solely whether "accrued interest" can be awarded for the period after a loan was liquidated. And the Appellate Division failed to engage with the contractual definition, which does not authorize the recovery of further interest after a loan has been liquidated.

In allowing Plaintiffs to recover damages that go beyond those authorized by the PSAs, the motion court appears to have been motivated by a concern that adherence to the contractual definition would encourage opportunistic behavior by RMBS sponsors. A-44 (noting the risk that a sponsor might "seek to fill a trust with junk mortgages that would expeditiously default so they can be liquidated before a repurchase claim is made" (internal quotations marks omitted) (quoting *Nomura*, 133 A.D.3d at 106)). But the motion court identified no evidence to ground that speculative concern in the real world or the facts of these transactions. If anything, the rule adopted below creates a competing perverse incentive: the risk that RMBS plaintiffs will run out the clock on litigation and waste judicial resources simply to rack up "accrued" interest on nonexistent loans.

In any event, New York law does not permit a court to substitute a damages formula it believes to be socially optimal for the one that sophisticated, counseled parties incorporated into their contract. *See 159 MP Corp.*, 33 N.Y.3d at 367-68. To the contrary, this Court has emphasized the need to "honor [RMBS] 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." *Nomura*, 30 N.Y.3d at 581. Here, the plain meaning of those provisions rules out an award of "accrued unpaid interest" with respect to loans no longer in existence.

CONCLUSION

For the foregoing reasons, the Appellate Division's decision should be reversed.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), I hereby certify that the total word count for all printed text in the body of the brief is 13,776 words, excluding parts identified as common requirements by § 500.13(c)(3).

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