To Be Argued By:
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(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)

REPLY BRIEF FOR DEFENDANT-APPELLANT

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Dated May 28, 2020

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by U.S. BANK NATIONAL ASSOCIATION, solely in its Capacity as trustee,

Plaintiff-Respondent,

– against –

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Defendant-Appellant,

– and –

SELECT PORTFOLIO SERVICING, INC.,

Defendant.

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 Nat'l Ass'n v. DLJ Mortgage Capital Inc.* ("*HEAT 2007-1*"), 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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

This is a contract dispute. Yet Plaintiffs, who supposedly brought this action to enforce contractual obligations, want to be excused from complying with contractual provisions that they no longer like. But neither the twisting of inapplicable legal principles—often in direct contradiction to positions U.S. Bank advocates in other RMBS lawsuits—nor various policy-based "equitable" arguments justify setting aside the terms of the bargain Plaintiffs struck. The sophisticated parties here agreed to a sole remedy provision that operates on a loan-by-loan basis; that Plaintiffs now wish they had bargained for different terms does not license them to rewrite their contracts.

First, Plaintiffs should not be allowed to proceed to trial on loans they failed to identify in timely breach notices. Their arguments to the contrary attempt to rewrite the contractual repurchase protocol, which plainly requires that notice, breach, and damages be proven on a loan-by-loan basis. A pre-suit letter accusing DLJ of "pervasive" and

"systemic" breaches in loans throughout the Trusts, A-1028, 1033,[1] but failing to identify all loans supposedly in breach, does not satisfy the contractual notice requirement. Nor does the pleading doctrine of relation back provide an end-run around the sole remedy. A single timely noticed breach cannot open the door for Plaintiffs to pursue liability and damages for each of the several thousand loans in the Trusts.

Second, and for similar reasons, the PSAs do not allow Plaintiffs to prove their claims through sampling. Plaintiffs assert various procedural barriers, but the Appellate Division already rejected those objections in certifying questions of law for this Court's review. On the merits, Plaintiffs' proposed sampling approach is foreclosed by the repurchase protocol, and Plaintiffs should not be permitted to circumvent the contractual sole remedy they agreed to by complaining that compliance with its terms would be burdensome.

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[1] This brief refers to DLJ's opening brief as "OB," to Plaintiffs-Respondents' brief as "RB," and to DLJ's Reply Compendium of Cited Materials as "RC." Citations to "NYSCEF Doc. __" refer to Index No. 156016/12 (Sup. Ct. N.Y. Cty.).

Third, Plaintiffs still offer no viable basis to ignore the language of the PSA limiting the contractual Repurchase Price to interest that has "accrued." As the PSAs and offering documents make clear, interest stops accruing once a loan is liquidated. This Court should hold the parties to their agreement to limit repurchase damages to interest that has in fact "accrued."

ARGUMENT

I. Plaintiffs Cannot Recover Damages On Loans For Which They Failed To Provide Timely Notice Of A Breach.

A. The Repurchase Protocol Requires Timely Notices That Identify Allegedly Breaching Loans.

The repurchase protocol is initiated by notices that identify mortgage loans as breaching. *See* OB25. For DLJ to cure or repurchase any nonconforming loans, it must know which loans are allegedly in breach. Both the motion court and the Appellate Division correctly recognized that the repurchase protocol requires as much. A-21-22; 175 A.D.3d 1175, 1176 (1st Dep't 2019). Indeed, the entire premise of the Appellate Division's application of relation back was Plaintiffs' "fail[ure] to specifically identify [certain loans] in timely breach notices." 175 A.D.3d at 1176.

Plaintiffs now try to rewrite history (and their contracts), accusing DLJ of seeking to "impose a requirement that the Trustee provide additional, loan-specific, notice as a prerequisite to recovering damages for the thousands of breaching loans in the Trusts." RB33. DLJ does not seek any extra-contractual notice, "post-suit" or otherwise.[2] Instead, DLJ asks that the repurchase protocol be applied as written, such that the obligation to repurchase a mortgage loan depends on timely notice of a breach affecting that loan.

1. In challenging the premise that they must "provide … notice as to every loan for which [they] seek[] damages," Plaintiffs lead off with a purportedly textual argument, emphasizing that the PSAs do not include the term "loan-specific." RB34-36. But Plaintiffs do not explain how DLJ can be expected to cure "such breach" or repurchase the

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[2] Plaintiffs repeatedly distort DLJ's position as demanding loan-specific "*post-suit*" notices. *E.g.*, RB35. That formulation obscures the notice issue in dispute: whether the repurchase protocol requires Plaintiffs to provide pre-suit notice identifying the loans in the Trusts that are allegedly breaching, which Plaintiffs concededly did not do for over 40,000 loans. DLJ does not insist on "[a]dditional post-suit loan-specific notice," RB39, but rather that the trial be limited to loans identified in *timely* pre-suit notices. Plaintiffs' decision to sue on the last day before the limitations period expired is the reason why any post-suit notices here would be untimely—but that is irrelevant to the issues on appeal.

"affected Mortgage Loan" without any identification of the loans Plaintiffs think are breaching, and why they are allegedly in breach. As U.S. Bank itself has asserted in prior litigation, repurchase protocols like these provide "an *individualized, loan-specific obligation* to cure, replace or repurchase a breached loan." A-1353; *see also* C-31 (""The [contractual] repurchase remedy … rests on the ability of an RMBS trustee to undertake defined, concrete measures' as 'to a specific defect, in a specific loan.'").[3]

Plaintiffs also observe that the breach giving rise to the repurchase obligation can relate to "any Mortgage Loan" in a securitization. RB35 n.22. That may be so, but the syntax of the repurchase protocol makes clear that the "affected Mortgage Loan" eligible for repurchase is the same loan identified as breaching. Again, without an identification of each loan that is allegedly in breach, the repurchase protocol cannot operate.

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[3] Plaintiffs strain to reconcile U.S. Bank's prior submissions by emphasizing that RMBS trustees have only limited duties to investigate and respond to suspected breaches. RB34 n.21. But the quoted language has no relation to the trustee's duty to investigate; it instead describes how the repurchase protocol operates. There is no getting around U.S. Bank's inconsistent positions on this question.

2. Unable to sustain their textual argument, Plaintiffs argue that their "detailed notices" referring to "systemic breaches" across the Trusts were sufficient "to permit the Trustee to seek recovery for all breaching loans." RB34. In other words, they believe that once DLJ is put on notice that numerous (but unspecified) loans are allegedly breaching, the burden shifts to DLJ to reexamine each of the tens of thousands of loans in the Trusts and determine for itself which ones are in material breach. As other courts rejecting similar pervasive breach theories have recognized, that is not the remedy the Plaintiffs agreed to in the PSAs. *See, e.g.*, *MASTR Adjustable Rate Mortgs. Tr. 2006-OA2 v. UBS Real Estate Sec. Inc.*, 2015 WL 797972, at *4 (S.D.N.Y. Feb. 25, 2015) ("The parties could have, but did not, bargain for an obligation that if the aggregate number of loans in breach exceeded a certain threshold, a duty to reexamine all loans would be triggered. Instead, the specified remedies are the 'sole remedies.'"). Indeed, when taken to its logical conclusion and combined with the sampling approach Plaintiffs propose here, this pervasive breach theory would mean that RMBS plaintiffs could prove liability and recover damages without *ever*

identifying the specific loans that are allegedly in breach. That absurd result cannot be reconciled with the contractual notice requirement.

In fact, this Court has already rejected the idea that the RMBS sole remedy provision can be nullified by allegations of "pervasive" or "systemic" breaches. In *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 585 (2017), this Court rebuffed an RMBS trustee's attempt to plead around the repurchase protocol by alleging "pervasive" and "systemic" breaches of representations and warranties across the loan pool. In ruling against the trustee, this Court noted that the transaction agreements there (like the ones here) "do not provide a carve-out from the Sole Remedy Provision where a certain threshold number of loan breaches are alleged." *Id.* Accordingly, the plaintiff is "expressly limited" to the sole remedy provision, "however many defective loans there may be." *Id.*; *accord Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569, 581 (2018) (rejecting RMBS plaintiff's assertion that allegations of "'broader' or numerous violations of representations and warranties" exempt claims from the sole remedy provision).

Plaintiffs attempt to distinguish *Nomura* and *Ambac* because the plaintiffs there sought "general contract damages" for "transaction-level" breaches, whereas here, Plaintiffs supposedly "seek[] damages only as measured by the Repurchase Protocol formula." RB37-38. That distinction fails because Plaintiffs, despite paying lip service to the repurchase protocol, are in fact using pervasive breach allegations to circumvent the repurchase protocol altogether. *Nomura* and *Ambac* reaffirmed the important proposition that the "systemic" nature of alleged breaches does not change the meaning of the sole remedy provision. That proposition forecloses the pervasive breach theory that Plaintiffs assert here: No matter how many breaches are alleged, the sole remedy provision still operates loan-by-loan.

Plaintiffs also cite several federal and lower-court cases that regarded pervasive breach allegations as providing sufficient notice (RB36-37 n.23), but nearly all of those decisions pre-dated this Court's guidance in *Nomura* and *Ambac*. Many of those decisions are further distinguishable because they addressed the sufficiency of the pleadings on a motion to dismiss, where courts have been more inclined to accept "theories of generalized wrongdoing." *BlackRock Allocation Target*

Shares v. Wells Fargo Bank, Nat'l Ass'n, 2017 WL 953550, at *4 (S.D.N.Y. Mar. 10, 2017). As U.S. Bank has itself acknowledged in other RMBS cases, "at summary judgment, plaintiffs' proof must be loan-specific." C-31. And Plaintiffs' reliance on a pervasive breach theory in this litigation again flatly contradicts U.S. Bank's positions in other cases as to how the RMBS sole remedy provision operates. *See* Def.'s Mem. of Law in Supp. of Mot. to Dismiss, *Blackrock Allocation Target Shares v. U.S. Bank Nat'l Ass'n*, No. 14-CV-9401, Doc. No. 78, at 13-14 (S.D.N.Y. Aug. 14, 2015) ("A trustee can only putback a specific loan; it may not obtain recovery based on … allegations of trust-wide violations."), *available at* RC-49-50; Def.'s Reply Mem. in Support of Mot. to Dismiss, *Blackrock*, Doc. No. 65, at 17 (S.D.N.Y. Mar. 31, 2015) ("[A] trustee's putback rights on behalf of certificateholders are contractually directed to particular loans and not to loan pools, groups, or entire trusts."), *available at* RC-25.

3. Grasping at straws, Plaintiffs maintain that the contractual notice requirement should not be enforced because loan-specific notice would "serve[] no salutary purpose" for loans in the Trusts that have been liquidated. RB39. But as this Court has made clear, "courts 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*, 30 N.Y.3d at 581. New York law does not permit a party to exempt itself from its agreement merely because it later decides certain contract terms no longer serve a "salutary purpose." Nor does the fact that most loans in the Trusts have by now been liquidated suggest that notice of alleged breaches would have been meaningless had Plaintiffs timely provided it.

Further, Plaintiffs' newfound emphasis on liquidated loans lacks any support in the repurchase protocol's text, which does not distinguish between liquidated and unliquidated loans. Instead, it sets forth a requirement of notice or discovery as a precondition to DLJ's obligation to repurchase "any Mortgage Loan." A-638. The undisputed availability of monetary damages when cure or repurchase is impossible does not mean that every word of the repurchase protocol is null and void for liquidated loans.[4] Plaintiffs, not DLJ, are asking this Court "'by

[4] Plaintiffs' lone citation for this point, *Royal Park Investments SA/NV v. Bank of New York Mellon*, 2019 WL 6117533, at *5 (S.D.N.Y. Nov. 18,

construction [to] … excise terms'" from the sole remedy provision by carving out liquidated loans from the notice requirement. RB39 n.24.

B. The Relation-Back Doctrine Does Not Permit Plaintiffs To Salvage Their Untimely Claims.

1. Relation back applies to excuse parties from pleading mistakes, not to nullify contractual requirements.

Plaintiffs' brief fails to grapple with the overarching legal flaw in their relation-back theory: The doctrine does not serve to relieve parties from contractual requirements. Plaintiffs are suing to enforce a contractual obligation that arises (as relevant) only upon provision of notice within the limitations period. But when Plaintiffs filed their original pleadings, it was already too late to comply with those provisions for loans other than the 1,351 identified in pre-suit notices as breaching. Whether those pleadings gave DLJ "ample notice of [the] claims" Plaintiffs now seek to assert at trial, RB20 (capitalization altered), is beside the point.

2019), addressed the distinct issue of sampling, and ultimately denied an RMBS plaintiff's motion for sampling-related discovery.

Plaintiffs fail to identify a single non-RMBS case where a court applied relation back to excuse a party from timely compliance with contractual remedy provisions.[5] Their silence is unsurprising, because the relation-back statute (CPLR 203(f)) addresses the relationship between claims in an amended pleading and those in the original pleading. Relation back does not change the facts as they existed when the limitations period expired. Plaintiffs' emphasis on concepts of notice and prejudice, RB20-23, 28-29, therefore cannot not justify the unprecedented application of the doctrine sought here.[6]

To the limited extent Plaintiffs actually confront DLJ's position, their arguments are meritless. Plaintiffs are wrong to suggest that *Caffaro v. Trayna*, 35 N.Y.2d 245, 252 (1974), supports applying

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[5] Plaintiffs incorrectly suggest that the First Department's decision in *Koch v. Acker, Merrall & Condit Co.*, 114 A.D.3d 596 (1st Dep't 2014), is such a case. *Koch* did not involve a contractual sole remedy provision or a notice requirement. *Id.* at 596-97. All the plaintiff had to do there was *amend* his complaint to add *pre-suit* facts about additional counterfeit wine bottles. *Id.* at 597.

[6] Throughout their brief, Plaintiffs disparage the steps DLJ took in response to pre-suit repurchase demands. *See* RB6-9, 22-23. DLJ disagrees with Plaintiffs' account of its supposed "refusal to engage in the repurchase process," RB6 (capitalization altered), which relies on disputed allegations from Plaintiffs' complaints. In any event, Plaintiffs' contested assertions on this point are irrelevant to the rulings below and issues on appeal.

relation back on these facts. *Caffaro* was a medical malpractice case that relied on a statute (EPTL 11-3.3) that expressly permits a decedent's representative to add wrongful death claims in an existing personal injury action if the decedent later dies because of the malpractice. In treating that death as "an additional consequence of defendant's conduct" rather than a "subsequent transaction[]," *id.*, this Court was not addressing a breach of contract claim or excusing a party from timely compliance with a remedial provision in its contract.

For similar reasons, Plaintiffs' position is foreclosed by the rule that relation back is inapplicable when "proposed causes of action are based upon events that occurred after the filing of the initial claim." *Johnson v. State*, 125 A.D.3d 1073, 1074 (3d Dep't 2015). To be sure, Plaintiffs' claims here for representation and warranty breaches accrued when these transactions closed. *See ACE Sec. Corp. v. DB Structured Prods., Inc.*, 25 N.Y.3d 581, 597-99 (2015). But in attempting to proceed on loans beyond those identified in pre-suit notices, Plaintiffs necessarily bring claims that turn on post-filing events. That is so because the PSAs condition the repurchase obligation on DLJ's receipt of timely notice as to each allegedly breaching loan.

Here, at the time Plaintiffs filed their complaints, they had provided timely notice only as to a small subset of the loans in the Trusts, so the requisite notices for any other loans were by definition provided post-filing.[7]

DLJ's opening brief explained (at 36-37) that to apply relation back here would nullify the contractual notice requirement that *ACE* considered a "procedural prerequisite" for relief. Yet Plaintiffs maintain that providing timely notice for a single breaching loan, alleging pervasive breaches, and then filing a complaint on the last day of the limitations period is sufficient to allow an RMBS plaintiff to proceed to trial on *any* loan. Plaintiffs emphasize that here, unlike in *ACE*, Plaintiffs sent *some* timely pre-suit breach notices. RB24-26 & n.16. But the notice requirement is not just a "condition precedent to suit," RB25; it is also—by its terms—a precondition to DLJ's contractual obligation to repurchase any allegedly breaching loan. Unless there is

[7] Plaintiffs suggest that *Johnson* and similar cases are distinguishable because the proposed amended claims depended on the *defendant*'s post-suit conduct. RB28 n.18. But the reasoning of those cases did not turn on which party's post-suit conduct was implicated. In any event, Plaintiffs' claims on untimely noticed loans likewise implicate DLJ's post-suit conduct: These claims turn on DLJ's failure to cure or repurchase loans identified as breaching.

some basis to apply relation back (and here there is not), it is simply nonsensical for Plaintiffs to claim that the notice requirement "can be satisfied even after suit has been filed and after the limitations period has expired." RB25.

2. *ABSHE*'s application of CPLR 205(a) to a different set of facts has no bearing on the relation-back issue presented here.

Instead of accepting the holding of *ACE* and the consequences of failing to provide timely pre-suit notice, Plaintiffs twist this Court's holding in *U.S. Bank National Association v. DLJ Mortgage Capital, Inc.*, 33 N.Y.3d 72 (2019) ("*ABSHE*"), about the application of New York's savings provision, CPLR 205(a), following an action's dismissal. Neither *ABSHE* nor CPLR 205(a) has any relevance to the application of relation back to Plaintiffs' claims here. Plaintiffs *concede* that they have not invoked CPLR 205(a) in this case and that CPLR 205(a)'s potential application to these proceedings is not "ripe" for this Court's consideration. RB27 n.17; *see also* RB26 (recognizing that "*ABSHE* turned on CPLR 205(a)—rather than CPLR 203(f)"). This Court should take Plaintiffs at their word and decline to "apply CPLR 205(a) now," RB27 n.17, rather than engage with speculation that an adverse

relation-back ruling would ultimately leave Plaintiffs here "worse off than the *ABSHE* plaintiff," RB27.

Plaintiffs are in any event wrong to suggest that *ABSHE* "provides strong reinforcement" for the First Department's relation-back holding. RB26. As Plaintiffs concede, the notice defect in *ABSHE* was different: There, the trustee sent pre-suit notice of specific breaching loans to the "secondary, backstop defendant" but failed to provide such notice to the loan originator. RB25 n.15. Critically, *ABSHE* was a 205(a) case that considered the consequences of an action's *dismissal*. It in no way "follows" from *ABSHE*, RB26, that Plaintiffs should be able to rely on a different doctrine (relation back) to *proceed to trial* on loans for which they did not timely comply with the sole remedy. OB44-47.

In arguing otherwise, Plaintiffs never address this Court's critical holding in *Greater New York Health Care Facilities Ass'n v. DeBuono*, 91 N.Y.2d 716 (1998), regarding how to define the relevant "transaction" (or "series of transactions") for relation-back purposes. *See* RB28. As *DeBuono* explained, even though all of the plaintiff nursing homes' injuries flowed from the same change in Medicaid

reimbursement rates, relation back was unavailable because "each nursing home has an individualized reimbursement rate and the injury claimed varies from facility to facility and from year to year." 91 N.Y.2d at 721. The same reasoning applies here: Even though Plaintiffs allege multiple breach claims stemming from representations and warranties set forth in the same PSAs, the repurchase claim for each allegedly breaching loan represents a "different, not identical, transaction," *id.*, involving loan-specific questions as to which representation or warranty was breached and whether that breach was material.

Nor can Plaintiffs explain away the Delaware Court of Chancery's persuasive treatment of this issue in *Central Mortgage*, where then-Chancellor Strine concluded that each alleged representation-and-warranty breach "as to each individual loan constitutes a separate transaction or occurrence [for relation-back purposes], regardless of the fact that the loans might have been part of the same loan pool." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 2012 WL 3201139, at *18 (Del. Ch. Aug. 7, 2012). As the opinion makes clear, the quoted language is an independent alternative holding, not "dicta," RB29, and considered a repurchase protocol materially identical to the

one here, even though relation back was unavailable for the further reason that distinct loan sale agreements were involved.[8]

3. No timely breach notices were sent for loans in the 2006-1 Trust.

The Appellate Division properly recognized that the relation-back doctrine could not apply to breach claims arising from 2006-1 Trust loans because Plaintiffs failed to provide even a single timely breach notice for loans in that Trust. 175 A.D.3d at 1176. Despite Plaintiffs' failure to pursue a cross appeal on this issue, Plaintiffs rely on arguments they never made below to maintain that this Court should overrule the Appellate Division on this point. This Court should decline that invitation.

When a party fails to cross-move for leave to appeal on a given issue, that issue is "beyond this Court's review" because this Court

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[8] Plaintiffs cite nothing to support their assertion that relation back under Delaware law, which looks to whether the new claims arise from the "*conduct*, transaction or occurrence set forth *or attempted to be set forth* in the original pleading," Del. Ch. R. 15(c) (emphasis added), is more stringent than New York's standard. Plaintiffs also inaccurately state that the plaintiff in *Central Mortgage* "had expressly *disclaimed* the later-added claims," RB29, but that disclaimer applied to only a subset of the proposed new claims that were held not to qualify for relation back. *See* 2012 WL 3201139, at *12, *19.

"generally den[ies] affirmative relief to a nonmoving party" subject to exceptions not relevant here. *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151 n.3 (2002). Plaintiffs claim that they were prohibited from cross-appealing on this issue because they were not "aggrieved" by the Appellate Division's "dicta." RB32. But the Appellate Division's conclusion that "no timely or 'ripe' breach notices were sent" as to the 2006-1 Trust is not dictum—it is a controlling holding that Plaintiffs failed to provide timely breach notices for any loans in the 2006-1 Trust. 175 A.D.3d at 1176. This holding means that Plaintiffs will need to prove an additional element at trial for claims involving loans in that Trust (i.e., that DLJ independently discovered breaches). The decision below therefore prevented Plaintiffs from obtaining the "complete relief [they] sought." *T.D. v. N.Y. State Office of Mental Health*, 91 N.Y.2d 860, 862 (1997); *cf.* NYSCEF Doc. 1338, at 22 (requesting summary judgment ruling that "DLJ received notice of all defective loans [in the four Trusts] on November 22, 2011").

Separately, Plaintiffs forfeited these arguments by not raising them below. In the motion court, Plaintiffs did not respond to DLJ's contention that no timely breach notices were sent in relation to the

2006-1 Trust. *See* NYSCEF Doc. 1391, at 11. Neither Plaintiffs' summary judgment papers nor their Appellate Division merits brief addressed the tolling agreement that they now invoke to defend their 2006-1 Trust claims as timely. By failing to give the lower courts an opportunity to consider the tolling agreement's application, Plaintiffs failed to preserve their ability to do so here. *See, e.g.*, *Wilson v. Galicia Contracting & Restoration Corp.*, 10 N.Y.3d 827, 829-30 (2008).

Plaintiffs' belated invocation of the tolling agreement also fails on the merits. For a breach notice to be timely, it must be provided with sufficient time for the cure period to elapse within the limitations period. *See ACE*, 25 N.Y.3d at 598-99. Plaintiffs' failure to provide any breach notice for the 2006-1 Trust by November 1, 2011—120 days before the expiration of the limitations period—meant that Plaintiffs had failed to timely comply with the repurchase protocol's notice-and-cure requirements for any claims in that Trust. Thus, before entering into the tolling agreement, Plaintiffs already could not have provided timely notice for claims relating to loans in that trust. *See ACE*, 25 N.Y.3d at 598-99; *U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc.*, 147 A.D.3d 79, 87-88 (1st Dep't 2016).

Plaintiffs nonetheless submit that by executing the tolling agreement in February 2012, the parties revived claims for breaches in the 2006-1 Trust that were already untimely. That notion runs counter to the plain terms of the agreement, which specifies that claims are tolled only "to the extent they have not already expired." A-1084-1085. The tolling agreement suspended the running of both the limitations period *and* the notice-and-cure period, and therefore could not resuscitate claims that were already untimely when that agreement was executed. *See* OB43.

II. The PSAs Require Loan-By-Loan Proof And Do Not Permit Sampling As A Substitute For That Proof.

A. The Sampling Issue Is Properly Before This Court.

The Appellate Division certified to this Court the legal question of whether its order was properly made. This Court should thus consider and decide whether Plaintiffs' sampling approach can be squared with the repurchase protocol.

Plaintiffs' procedural objections to this Court's review are irrelevant and meritless. Although this Court may not be "bound by" the Appellate Division's statement in the certification order that its decision was made as a matter of law and not in the exercise of

discretion, *Andon v. 302-304 Mott Street Assocs.*, 94 N.Y.2d 740, 745 (2000), Plaintiffs overreach by urging that statement to be disregarded as "boilerplate," RB43. Plaintiffs raised the same procedural objections they assert here in opposing DLJ's motion for leave to appeal, Pls.' Leave Opp. 14, but the Appellate Division did nothing to limit the scope of review in its certification order. Plaintiffs' position improperly assumes that the Appellate Division was incapable of crafting an order reflecting its acceptance of Plaintiffs' waiver argument. The Appellate Division was entitled to certify the sampling issue to this Court on its merits, when that is how DLJ framed the issue on appeal and Plaintiffs themselves had sought a summary judgment ruling on that precise question. *See* NYSCEF Doc. 1338, at 2.

If the Court is inclined to treat the Appellate Division's sampling ruling as resting on a discretionary determination (despite that court's express provision to the contrary), it should still reverse. There is no defensible reason to treat DLJ's unperfected appeal of a two-sentence 2013 interim order as precluding appellate review of sampling on summary judgment six years later. Contrary to Plaintiffs' assertion (RB43), intervening decisions of this Court (*Nomura* and *Ambac*)

clarified that RMBS plaintiffs may not circumvent the loan-specific terms of sole remedy provisions. *See* OB64. Further, any notion that the 2013 order definitively resolved the issue is belied by Plaintiffs' own actions, including seeking a summary judgment ruling permitting them to use sampling. This Court should not countenance Plaintiffs' efforts to insulate a ruling they sought from further appellate review.

B. The Plain Language Of The Repurchase Protocol Does Not Permit Sampling.

1. In purporting to defend sampling as permitted under the PSAs' sole remedy provisions, Plaintiffs again refuse to engage with the language of the contracts. The issue is not whether "sampling has been widely adopted in complex litigation" or is a "well-established and scientifically sound method" in the abstract. RB41, 46. Instead, the question is whether using sampling in this breach of contract case to prove liability and damages for out-of-sample loans—in Plaintiffs' words, to use "a mode of proof that is expressly designed to avoid identification and consideration of each and every loan on an individual

basis," RB40—is consistent with the loan-specific repurchase protocol. It is not.[9]

Instead of offering their own interpretation of the text, Plaintiffs criticize DLJ's analysis of the contractual language, emphasizing that the repurchase protocol does not use the terms "loan-specific" or "loan-by-loan." RB45. But as set forth in DLJ's opening brief, at 47-49, and above, at 3-5—and as U.S. Bank has itself asserted in prior litigation, *see, e.g.*, C-61—the repurchase protocol necessarily operates on a loan-by-loan basis.

Contrary to Plaintiffs' assertion, then, it is irrelevant whether sampling might be used to "draw reliable inferences" about the loan population at issue. RB41. The "product of [the] proposed sampling exercise" is only 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."

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[9] Plaintiffs emphasize that DLJ's sampling arguments in this appeal are not "grounded in any criticism of the specific sampling and extrapolation techniques" they propose to use. RB41, 47. That is because the validity of the proposed sampling methodology has yet to be litigated before the motion court. If this Court affirms on sampling, DLJ will have the opportunity to challenge Plaintiffs' methodology on remand.

Homeward Residential, Inc. v. Sand Canyon Corp., 2017 WL 5256760, at *8 (S.D.N.Y. Nov. 13, 2017). Sampling cannot "tell the fact-finder *which* loans in the larger pool had material and adverse [representation and warranty] breaches" or "establish the damages, if any, flowing from the … failure to put back any specific loan outside of the sample set." *Royal Park Invs. SA/NV v. Deutsche Bank Nat'l Tr. Co.*, 2018 WL 4682220, at *12 (S.D.N.Y. Sept. 28, 2018).

Thus, when Plaintiffs declare that they intend to use sampling as a "means by which to prove liability on a loan-by-loan basis," RB46, they are engaging in sophistry. Elsewhere in their brief, Plaintiffs correctly recognize that "sampling does not pinpoint which specific loans in the larger pool had material and adverse breaches." RB49. Regardless, this argument is circular: It assumes that a methodology proposed as a *substitute* for loan-specific proof is *itself* loan-specific proof. As U.S. Bank has successfully maintained in previous litigation, sampling is inconsistent with "the sole remedy provided to an RMBS trustee with regard to breaching loans": namely, "to seek repurchase of them on a loan-by-loan, trust-by-trust basis." C-81.

Plaintiffs again strain to justify that inconsistency by highlighting an RMBS trustee's lack of duty to "investigat[e] the accuracy of warranties." RB47-48. But not all of U.S. Bank's prior arguments against sampling implicate that distinction; some of them turned on the nature of the sole remedy of repurchase and the loan-specific requirements for proving a material breach, which are the same contractual provisions at issue here. U.S. Bank thus persuaded a federal district court to bar sampling discovery for exactly the reasons DLJ asserts here: Because the sole remedy operates on a loan-by-loan-basis, "whether and to what extent a trustee can obtain repurchase of breaching loans must be determined separately for each specific loan." *Royal Park Invs. SA/NV v. U.S. Bank Nat'l Ass'n*, 2018 WL 3350323, at *2 (S.D.N.Y. July 9, 2018), *aff'd*, 349 F. Supp. 3d 282 (S.D.N.Y. 2018). And for the same reasons, other federal courts have likewise prohibited the use of sampling in cases by RMBS trustees against originators and sponsors. *See Homeward*, 2017 WL 5256760, at *8; *MASTR Adjustable Rate Mortgs. Tr. 2006-OA2 v. UBS Real Estate Sec. Inc.* ("*MARM*"), 2015 WL 764665, at *10-11 (S.D.N.Y. Jan. 9, 2015).

2. As with their notice argument, Plaintiffs again emphasize that most loans in the Trusts have been liquidated and maintain that sampling is particularly appropriate for such loans because they "cannot be repurchased." RB49. But as discussed above, at 9-11, the availability of monetary damages does not exempt Plaintiffs from complying with the repurchase protocol altogether. *See also Homeward*, 2017 WL 5256760, at *7.

Indeed, the fact that "an equitable damages remedy" may be available for breaching liquidated loans does nothing to change the fact that Plaintiffs must first prove that a particular liquidated loan is in breach in the first place. What is more, DLJ's obligation to repurchase any loan depends on proof that a breach has a "material[] and adverse[]" effect on certificateholders' interests in that loan. A-638. For the reasons explained, sampling "does not adequately distinguish between breaches that are material and adverse as to a particular loan and those that are not." *MARM*, 2015 WL 764665, at *10; *accord Homeward*, 2017 WL 5256760, at *8; *see also* C-61 (U.S. Bank's argument that "proof of materiality and the sole remedy provisions of the Governing Agreements … require loan-specific proof"); Def.'s Mem.

of Law in Support of Phasing, *Blackrock*, Doc. No. 244, at 8 (S.D.N.Y. Nov. 21, 2017) ("Sampling cannot establish that any individual loan outside the sample breached R&Ws or that the breach 'materially and adversely' affected the loan's value or investors' interest."), *available at* RC-75.[10] As U.S. Bank has explained previously, the same is true of the repurchase damages calculation: Because "all the components of the [Repurchase] Price are specific to a particular loan, the repurchase remedy necessarily is loan specific," and "sampling does not work [to prove damages] either." *Id.* at 9, *available at* RC-76.

Plaintiffs now contend that there is "no adjudicative purpose or benefit for prohibiting sampling as to liquidated loans," RB50, but this

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[10] Contrary to Plaintiffs' suggestion (RB50 & n.33), liquidated loans were at issue in both *Homeward* and *MARM*. *See Homeward Residential, Inc. v. Sand Canyon Corp.*, 2014 WL 12791757, at *3 n.3 (S.D.N.Y. Mar. 31, 2014); *MARM*, 2015 WL 764665, at *12. Plaintiffs now describe those cases as outliers, but in 2017, U.S. Bank invoked those decisions to declare that "even in put back litigation, the tide has turned against sampling." *Blackrock*, No 14-CV-9401, Doc. No. 244, at 12, *available at* RC-79. And although Plaintiffs now assert the Second Circuit's *Retirement Board* decision "is inapposite because it concerned the test for class standing," U.S. Bank previously touted that case's relevance in determining whether sampling is permissible in RMBS actions. *See* C-79 (citing *Ret. Bd. of the Policeman's Annuity & Benefit Fund of the City of Chicago v. Bank of N.Y. Mellon*, 775 F.3d 154 (2d Cir. 2014)).

is incorrect. The purpose is the same as that of any other contract law principle: respecting and enforcing the sophisticated parties' expectations when they entered the contract as a means of upholding the predictability and stability of commercial transactions. *See, e.g.*, *159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353, 356 (2019).

3. Finally, this Court should reject Plaintiffs' attempt to circumvent the terms of the contract they agreed to by complaining of the practical challenges they expect to face if they must prove their claims loan-by-loan, as the PSAs require. *See* RB50-52. Given that Plaintiffs seek damages in excess of $1 billion, their complaints about expense ring hollow.

In any event, those objections are irrelevant. Sampling might well be a less costly method of proof from Plaintiffs' perspective, but that contention "misses the ultimate[] point" that "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. Co.*, 2018 WL 3120971, at *2 (S.D.N.Y. May 17, 2018). If Plaintiffs thought loan-by-loan proof of liability and damages would be impracticable, the time to address that concern was when the parties

were bargaining over the PSAs. *See, e.g.*, *MARM*, 2015 WL 764665, at *11.

Moreover, Plaintiffs' argument that loan-by-loan proof is "impracticable" fails on its own terms. There are any number of potential tools for litigating complex commercial cases, such as bellwether trials, that could be used to manage RMBS repurchase litigation without sampling and that would not require rewriting the terms of the parties' agreement. Far from being unworkable, loan-specific proof has been adduced on many previous occasions, including by U.S. Bank itself. *See U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital Inc.* ("*HEAT 2007-1*"), *appeal pending*, No. APL-2020-00018 (N.Y.).

III. Interest Does Not Accrue On Mortgage Loans That Have Been Liquidated.

The parties agree that the damages available for breaching loans are controlled by the PSAs' definition of "Repurchase Price," which includes "accrued unpaid interest" on the unpaid principal balance of any Mortgage Loan subject to repurchase. *See* OB65; A-615. Plaintiffs also admit that a loan ceases to exist upon liquidation. RB53 ("[A] materially breaching loan may liquidate and thus cease to exist ….").

As a matter of straightforward contract interpretation, because a loan

that no longer exists cannot accrue interest, the Repurchase Price does not include, and Plaintiffs cannot recover, interest for the period of time after a loan is liquidated. *See* OB65-71.

Plaintiffs attack a straw man by suggesting that DLJ seeks an "exception for liquidated loans." RB52. Plaintiffs are the ones seeking such an exception. DLJ agrees that the same Repurchase Price definition applies to liquidated and unliquidated loans alike, but that definition specifies that the recoverable unpaid interest must have "accrued" on the loan in question. A-615. As a matter of the English language and common sense, interest cannot "accrue" on an obligation once that obligation ceases to exist. Yet Plaintiffs interpret the Repurchase Price definition as affording them unpaid interest beyond what accrued on a loan, but only if that loan has been liquidated.

To resist this conclusion, Plaintiffs contend that the "*unpaid principal balance*" is the unit on which interest "accrue[s]," RB53, and claim that the balance remains after a loan is liquidated. But the Repurchase Price definition refers to the unpaid balance "of the Mortgage Loan." A-615. "Mortgage Loan," in turn, is defined under the PSAs to mean "[s]uch of the mortgage loans transferred and assigned to

the Trustee pursuant to the provisions hereof *as from time to time are held as a part of the Trust Fund* ….” A-594 (emphasis added). Plaintiffs acknowledge that a liquidated loan is no longer part of the Trust Fund, *see* RB10 n.4 (“‘[L]iquidated loans’ are ‘loans that left the Trusts….” (quoting A-35)), and therefore does not fall within the PSAs’ definition of a Mortgage Loan. So once there is no longer a Mortgage Loan, there is nothing left for interest to “accrue[] … thereon.” A-615.

Plaintiffs are wrong to ascribe significance to the fact that the Repurchase Price definition does not include the word “actually.” *See* RB53-54. That certain other references to principal and interest payments in the PSAs are modified with “actually” does nothing to support Plaintiffs’ position here. The passages that Plaintiffs quote do not address interest that “actually accrued,” but instead refer to interest or principal that was “actually collected,” “actually received,” or “actually achieved.” RB53-54 & n.35. Read in context, the language Plaintiffs cite makes clear that the PSAs use the word “actually” to refer to amounts that have been paid, as distinguished from amounts owed but not yet paid. *See id.* Consistent with that usage, there is no need to specify that the Repurchase Price formula is limited to interest

that "actually accrued": The formula refers to interest that has accrued on a loan but remains unpaid, and the word "accrued" already connotes accumulation of interest on an existing loan. *See* OB66-67.

Nor is it correct that "where DLJ intended that interest would *not* accrue upon the occurrence of a certain event, the relevant trust documents say so." RB55. To the contrary, the transaction documents use variations of "accrued unpaid interest"—without more—to indicate interest that accrues up to, but not, after liquidation. *See, e.g.*, A-312 (describing waterfall of losses "realized when the unpaid principal balance on a mortgage loan and accrued but unpaid interest on such mortgage loan exceeds the proceeds recovered upon liquidation"); A-363 (defining Realized Losses as, "[w]ith respect to a Liquidated Mortgage Loan, the amount by which the accrued and unpaid interest on, and the outstanding principal balance of the mortgage loan exceeds the amount of liquidation proceeds applied to the principal balance of the related mortgage loan"); A-494 (explaining that the amount of any claim on a primary mortgage insurance policy for a mortgage loan in the trust will include "the insured portion of the unpaid principal amount of the covered mortgage loan and accrued and unpaid interest thereon"). The

language Plaintiffs cite, which addresses whether RMBS certificates will stop generating interest if the PSA is terminated, RB55, is inapposite.

Whether the Prospectus Supplements ("ProSupps") "warn certificateholders that they might receive less interest because DLJ materially breaches its R&Ws," RB55, is beside the point. DLJ cited the ProSupps' disclosure that "liquidated mortgage loans will no longer be outstanding and generating interest," OB67-68 (quoting A-314), because it confirms, as Plaintiffs have admitted, that liquidated loans "cease to exist," RB53. Plaintiffs' premise is also incorrect; the ProSupps did warn of the risk that repurchases of breaching loans could affect certificate payments. *See, e.g.*, A-318-319 ("The rate of principal distributions and yield to maturity on your certificates … will be affected by, among other factors, … repurchases of mortgage loans as a result of defective documentation and breaches of representations and warranties.").

Nor does adherence to the contractual formula encourage opportunistic behavior by RMBS sponsors. *See* RB55-56. If an RMBS sponsor is required to repurchase a liquidated loan under the

repurchase protocol, the sponsor will still be responsible for "100% of the unpaid principal balance of the Mortgage Loan." A-615. In any event, New York law does not allow a court to rewrite a contractual damages formula between sophisticated, counseled parties based on its own notions of fairness. *159 MP Corp.*, 33 N.Y.3d at 367-68; *Nomura*, 30 N.Y.3d at 581.

CONCLUSION

For the foregoing reasons and those in DLJ's opening brief, the Appellate Division's decision should be reversed.

May 28, 2020

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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 6,823 words, excluding parts identified as common requirements by § 500.13(c)(3).

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