To be Argued by:
KATHLEEN M. SULLIVAN
(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 Inside Cover)

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Date Completed: May 4, 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 Rules 500.1(f) and 500.13(a) of the Rules of Practice of the Court of Appeals, U.S. Bank National Association, solely in its capacity as trustee of Plaintiffs-Respondents Home Equity Mortgage Trust Series 2006-1, Home Equity Mortgage Trust Series 2006-3, Home Equity Mortgage Trust Series 2006-4, and Home Equity Mortgage Trust Series 2006-5 (collectively the "Trusts"), hereby states that it is a wholly owned subsidiary of U.S. Bancorp, and that it has the following subsidiaries and affiliates:

111 Tower Investors, Inc.
C'est La Vie, Inc.
Daimler Title Co.
DSL Service Company
Eclipse Funding LLC
Elavon, Inc.
First Bank LaCrosse Building Corp.
Forecom Properties, Inc.
FSV Payment Systems, Inc.
Galaxy Funding, Inc.
HTD Leasing LLC
HVT, Inc.
Integrated Logistics, LLC
Mercantile Mortgage Financial Company
MMCA Lease Services, Inc.
NILT, Inc.
Northwest Boulevard, Inc.
Pomona Financial Services, Inc.
Red Sky Risk Services, LLC (*fka* USB Lending Support Services, LLC)
RTRT, Inc.
SA California Group, Inc.
SA Challenger, Inc.
SA Group Properties, Inc.
SCBD, LLC

SCDA, LLC
SCFD LLC
Telluride Financial Center Owners' Association, Inc.
TI Fleet Co.
TLT Leasing Corp.
TMTT, Inc.
USB Americas Holdings Company
USB European Holdings Company

U.S. Bank National Association further states that it is acting solely in its capacity as trustee of the Trusts and does not have any financial interest in the outcome of this litigation.

STATEMENT OF RELATED LITIGATION

Defendant-Appellant DLJ Mortgage Capital, Inc. has identified *U.S. Bank National Association v. DLJ Mortgage Capital, Inc.*, APL-2020-00018, and *Ambac Assurance Corp. v. Countrywide Home Loans Inc.*, Index No. 511512/10, 179 A.D.3d 518 (1st Dep't 2020), *motion for leave to appeal pending* (1st Dep't Mot. No. 2020-661), as related litigation. Plaintiffs-Respondents state that they are not aware of any other related proceedings in this Court or related motions for leave to appeal pending in the Appellate Division.

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PRELIMINARY STATEMENT

This appeal represents an effort by DLJ Mortgage Capital, Inc. ("DLJ") to limit its damages liability for transferring tens of thousands of shoddy residential mortgages into four residential mortgage-backed securities ("RMBS") trusts in breach of representations and warranties ("R&Ws") underlying those transactions. The First Department (Friedman, J.P., Richter, Tom, Oing, Moulton, JJ.), affirming the motion court (Scarpulla, J.S.C.), correctly rejected DLJ's baseless arguments, and held that the Trustee[1] could pursue damages for loans not specifically identified in pre-suit notices; could use statistical sampling to prove liability and damages; and was entitled to receive, as part of its damages, "accrued interest" on the unpaid balances of all breaching loans. All three rulings were correct, and this Court should affirm.

First, the Trustee's pre-suit notices and timely original complaints incorporating them were more than adequate to alert DLJ to its massive breaches of its R&Ws as to loans beyond those specifically identified in the notices and complaints. The Trustee's pre-suit notices identified over a thousand breaching loans, stated that these were just the "tip of the iceberg" as the Trustee's investigation

[1] U.S. Bank, National Association, solely in its capacity as trustee (the "Trustee"), acts for Plaintiffs-Respondents Home Equity Mortgage Trust Series 2006-1 (the "2006-1 Trust"), Home Equity Mortgage Trust Series 2006-3 (the "2006-3 Trust"), Home Equity Mortgage Trust Series 2006-4 (the "2006-4 Trust"), and Home Equity Mortgage Trust Series 2006-5 (the "2006-5 Trust") (together, the "Trusts").

was ongoing and likely would identify further breaches, and demanded repurchase of all breaching loans. Under well-established New York law, the Trustee's claims as to additional breaching loans relate back to the Trustee's timely complaints. The First Department correctly so held.

The governing agreements nowhere require the Trustee, after filing timely complaints based on broad pre-suit notices, to specifically identify—as a predicate for relation back—each additional breaching loan determined through discovery. DLJ's contrary argument reflects an incorrect reading of the notice provision in the part of the governing agreements that specifies a sole remedy of cure or repurchase—a provision that this Court held in *U.S. Bank National Association v. DLJ Mortgage Capital, Inc.*, 33 N.Y.3d 72 (2019) ("*ABSHE*"), is entirely procedural and not a substantive part of the Trustee's cause of action. Here, moreover, as DLJ concedes (Br. 70), that sole remedy of repurchase has been supplanted under settled New York law by an equitable damages remedy because the overwhelming majority of the loans at issue were liquidated long ago (many presumably as a result of DLJ's breaches) and specific performance is no longer possible. DLJ's proposed additional notice requirement thus would serve no purpose here.

Second, sampling is an appropriate evidentiary methodology for proving liability and damages in RMBS putback cases against securitization sponsors. Like other forms of circumstantial evidence, sampling is a long-accepted means of

proving facts by reliable inference, and here it provides the same result that would be achieved through loan-by-loan review. Notwithstanding DLJ's repeated references to "loan-specific" notice and proof, nothing in the parties' agreements precludes the use of sampling to adjudicate a trustee's RMBS putback claims or limits the extrapolation of sampling results only to loans that have been identified by loan number in a pre-suit notice. And every New York court to consider sampling in an RMBS putback case against a sponsor, such as DLJ, has accepted sampling as an appropriate, reliable, and contractually-permissible means of establishing breaches of R&Ws and quantifying damages for such breaches. Any prohibition on the use of sampling, with a resultant requirement of loan-by-loan review of each and every one of tens of thousands of loans at issue here and in other pending cases, would impose a tremendous burden that could overwhelm the already busy Commercial Division. The motion court was therefore correct in its 2013 order permitting the parties to use sampling, and correct in its 2019 order declining to revisit that ruling after DLJ waived any appellate challenge and the parties spent years of discovery in reliance on it. The First Department was well within its discretion to affirm that ruling.

Third, DLJ's contractual obligation to pay "accrued interest" applies to all breaching loans, as the First Department correctly held. Nothing in the parties' agreements provides that interest should stop accruing for purposes of calculating

the loan repurchase price when a loan is foreclosed or liquidated. Refusing to include accrued interest as part of the damages for liquidated loans would give DLJ a perverse and extraordinary windfall for those breaching loans that liquidated in the shortest time after being originated.

For these reasons, the First Department's decision should be affirmed.

COUNTER-QUESTIONS PRESENTED

1. May a trustee rely on the relation-back doctrine to pursue breach of contract claims seeking damages as to all breaching loans in an RMBS trust, based on pre-suit notices and timely complaints that notified a sponsor of its systemic breaches and demanded repurchase of all breaching loans?

2. Is statistical sampling a permissible evidentiary methodology to prove liability and damages in an RMBS putback case?

3. Does an RMBS contractual provision requiring payment of "accrued … interest" apply both to liquidated and non-liquidated loans?

COUNTERSTATEMENT OF THE CASE

A. DLJ's Securitization Of The Loans And The Repurchase Protocol

The RMBS at issue here were created when DLJ transferred more than 42,000 mortgage loans to be deposited into the four Trusts. RA169; A15. As sponsor, DLJ orchestrated every aspect of the securitization process: it aggregated the loans by acquiring them from many sellers and/or originators, including originators that it controlled; it created the Trusts and selected and deposited the loans into the Trusts

pursuant to four Pooling and Servicing Agreements ("PSAs") that closed between February and October 2006 (*see* A287-88); and it assisted in the marketing and sale of certificates to investors ("Certificateholders"). A15.[2]

Because investors had no access to loan files, nor any ability to conduct due diligence on the loans, investors paid for and received strong R&Ws from DLJ, as Seller, in Section 2.03 and Schedule IV of the PSAs. *See, e.g.*, A638; A1020-24. These R&Ws concerned the loans' qualities and characteristics, and the processes by which they were scrutinized before being fed into the Trusts. *See, e.g.*, A1020-24.[3]

To give force and effect to its R&Ws, DLJ agreed in Section 2.03 of the PSAs that, upon discovering or receiving notice of a breach of the R&Ws that "materially and adversely affects the value of the related Mortgage Loan or the interests of the Certificateholders," DLJ would cure the breach within 120 days or repurchase the loan for the "Repurchase Price":

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[2] DLJ mischaracterizes (Br. 31) the directing certificateholder, Fir Tree Partners, as a "vulture fund" that invested in the Trusts "in search of violations of representations and warranties." Fir Tree manages assets on behalf of, and is a fiduciary for, university endowments, foundations, pension funds, sovereign wealth funds, and non-profits. *See, e.g.*, RA46. It owned certificates in the Trusts for years before this litigation and has been involved in the RMBS market for over fourteen years. *See* RA47.

[3] DLJ also issued Prospectuses and Prospectus Supplements ("ProSupps") in which it offered assurances to investors about the quality of the loans and the income the Trusts would produce. A305-555.

> 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 (a "Deleted Mortgage Loan") from the Trust Fund and substitute in its place a Qualified Substitute Mortgage Loan, in the manner and subject to the conditions set forth in this Section; or (ii) repurchase the affected Mortgage Loan from the Trustee at the Repurchase Price in the manner set forth below ….

See, e.g., A638 (the "Repurchase Protocol"). The PSAs provide a formula to calculate the Repurchase Price, defining it as "100% of the unpaid principal balance of the Mortgage Loan on the date of such purchase" plus "accrued unpaid interest thereon at the applicable Mortgage Rate from the date through which interest was last paid by the Mortgagor to the Due Date in the month in which the Repurchase Price is to be distributed to Certificateholders." *See, e.g.*, A615. And, as DLJ acknowledges (Br. 70), New York law provides that "damages can be awarded where the equitable specific performance remedy of cure or repurchase is impossible." *See, e.g., Nomura Home Equity Loan, Inc. v. Nomura Credit & Cap., Inc.*, 133 A.D.3d 96, 105 (1st Dep't 2015), *aff'd as mod.*, 30 N.Y.3d 572 (2017).

B. DLJ's Refusal To Engage In The Repurchase Process After The Trustee's Pre-Suit Notices

In a November 2011 letter, certain Certificateholders notified DLJ that an investigation of samples of loans had revealed that DLJ "placed defective loans into

the Trusts on a massive scale." A1029. This notice identified: (i) 288 breaching loans from a sample of 406 loans in the 2006-1 Trust (a 70.9% breach rate); (ii) 522 breaching loans from a sample of 721 loans in the 2006-3 Trust (a 72.4% breach rate); (iii) 359 breaching loans from a sample of 553 loans in the 2006-4 Trust (a 65% breach rate); and (iv) 284 breaching loans from a sample of 395 loans in the 2006-5 Trust (a 72% breach rate). A1029.

This notice also warned that "[t]he sample represents *just the tip of the iceberg*. [We are] confident that additional investigation … will reveal *substantial additional evidence of breaches*." A1030 (emphasis added). The notice further stated that the public record confirmed Certificateholders' investigation, showing "*pervasive breaches of underwriting standards*," and referred to DLJ's "long-standing knowledge of the pervasive breaches in the loan pools." A1030 (emphasis added); A1034. The notice "demand[ed] that DLJ … promptly repurchase *each of the Defective Mortgage Loans in the Trusts*." A1028 (emphasis added).

By letter dated December 7, 2011, the Trustee incorporated the November 2011 letter and demanded that DLJ repurchase each breaching loan in the Trusts. A1026. From April 2012 through May 2014, the Trustee sent six additional notices identifying additional breaching loans. *See* A1098-1113; A1116-24; A1125-28; A1129-33; A1134-1214; A1215-71.

Despite receiving these notices identifying thousands of specific breaching loans and showing high breach rates for sampled loans, DLJ refused to repurchase, or pay damages for, *even a single loan*. *See* A93. DLJ and its affiliate co-defendant, Select Portfolio Servicing, Inc. ("SPS"), instead frustrated the Trustee's attempts to identify additional breaching loans before filing suit. For example, DLJ asserted that the Trustee was not authorized to investigate DLJ's breaches of its R&Ws. A125-26. DLJ separately maintained that it could not respond to any notices until the Trustee gave it the underlying loan files. A117. Yet these files were in affiliate SPS's possession, and SPS refused the Trustee's requests for reasonable access. A122-26. DLJ similarly refused to provide the Trustee with the underwriting guidelines that DLJ used to ensure the loans were—as DLJ had warranted—properly underwritten. A125. And DLJ refused to respond to several of the Trustee's notices because they were purportedly were barred by the statute of limitations (RA171; RA173; RA175)—a position this Court has since rejected, *see ABSHE*, 33 N.Y.3d at 82. These efforts prevented the Trustee from issuing further or more detailed pre-suit notices. A171-73.

DLJ has since revealed that it never intended to respond to the Trustee's notices outside of litigation. During discovery, DLJ advised the motion court that it never had a business unit charged with responding to trustee notices, and that it had

directed all of the Trustee's attempts to implement the Repurchase Protocol to outside counsel "in anticipation of litigation." RA34-38.

C. The Proceedings Below

1. The Trustee's Timely Complaints

Because DLJ refused to comply with its obligations, the Trustee timely commenced two coordinated actions by summons filed on August 31, 2012 (for the 2006-1, 2006-3, and 2006-4 Trusts) (A83-88) and October 30, 2012 (for the 2006-5 Trust) (A137-42). The parties had entered into a tolling agreement on February 22, 2012 (before the six-year limitations period for any Trust expired), that extended the limitations deadlines for the 2006-1, 2006-3 and 2006-4 Trusts until at least September 1, 2012. *See* A1082-93. The untolled limitations deadline for the 2006-5 Trust was October 31, 2012. *See* RA168-69.

The Trustee's complaints, which were filed in January 2013 (for the 2006-1, 2006-3, and 2006-4 Trusts) and April 2013 (for the 2006-5 Trust), allege breach of contract through systemic material violations of R&Ws and demand that DLJ honor its repurchase obligations for breaching loans or pay equivalent damages. *E.g.*, A89-95; A143-48. The notices, summons, and complaints reference the Trustee's ongoing investigation and warn that further breaching loans were likely to be uncovered. *See, e.g.*, A85; A89-90; A118; *see also* A18 (motion court observing same).

The vast majority of the unpaid loans for which the Trustee seeks damages—more than 22,000 as of March 2016—are liquidated.[4] The parties agree (Br. 5) that liquidated loans "no longer exist[]" and it is impossible for DLJ to cure or repurchase them. *See* A35. The Trustee does not seek specific performance of the Repurchase Protocol for these liquidated loans—which account for more than 99.99% of the Trustee's damages (A1284)—and instead seeks damages equivalent to the Repurchase Price. A71. The complaints seek such damages as "to *all* Mortgage Loans for which DLJ's representations and warranties have been breached." A135, A180 (emphasis added).[5]

2. The Motion Court's 2013 Sampling Order

In November 2013, early in discovery, the Trustee sought approval from the motion court (then Justice Schweitzer) to "use … statistical sampling to prove liability and damages." A181. Specifically, the Trustee sought "to use a statistically significant sample of loans drawn from each of the … Trusts … and to extrapolate those results to prove [its] claims." A181. The Trustee explained that "a statistically significant, random sample of loans would conserve the resources of the parties and

[4] As the motion court explained, "liquidated loans" are "loans that left the Trusts with a loss and that DLJ cannot repurchase" and that "can no longer be returned … or substituted." A35.

[5] For the few unliquidated breaching loans that could be repurchased, the Trustee seeks to recover only for those loans it has specifically identified. *See* A1284.

the Court, streamline the trial, and promote judicial economy and efficiency, without compromising the quality or reliability of the evidence adduced to prove [the Trustee's] claims," citing multiple precedents in support. A182. DLJ argued that sampling was "incompatible" with the Repurchase Protocol's "sole remedy" of repurchase—a remedy which, according to DLJ, requires "loan-specific" notice and proof for each breaching loan. A193. The motion court approved the Trustee's request:

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

A82. DLJ noticed an appeal in December 2013 (RA1-10), but failed either to withdraw or perfect it.

Pursuant to the sampling order, the Trustee's expert statistician, Dr. Karl Snow, used accepted statistical methods to calculate DLJ's repurchase damages from more than 22,000 liquidated loans. RA66-67. Dr. Snow first drew a representative sample of 400 loans from each of the Trusts (a total sample of 1,600 loans). *See* A1291. The sampled loans were subjected to time-consuming, costly, and detailed expert analysis of whether, as DLJ warranted, the loans were made in

conformity with applicable underwriting and appraisal standards. *See* A1293-95. The Trustee's re-underwriting expert, Richard Payne, and the Trustee's other experts, reviewed the sample loans and concluded that 688 of 1,600 (43%) demonstrated breach findings for one or more of DLJ's R&Ws in ways that materially and adversely affected the loan's value and Certificateholders' interests. RA186-87.[6] Dr. Snow extrapolated the breach rates from each Trust's sample population to only the liquidated loans in each Trust. RA74-77. On this basis, the Trustee provided estimated breach rates and damages with a high statistical degree of accuracy across all liquidated loans in each Trust. *Id.*

Specifically, Dr. Snow used the "Repurchase Price" and other "loan-specific" terms of the PSAs to calculate damages for each liquidated and materially breaching loan in each Trust. If, for example, the 400-loan sample for a Trust demonstrated a material breach rate of 45%, Dr. Snow would randomly select 45% of the unsampled liquidated loans in that Trust and calculate and total the Repurchase Price for those randomly selected loans. *See* RA75-76. He would then repeat this process 10,000 times, each time randomly selecting a different group of 45% of the liquidated loans in that Trust. *See id*. This process—a well-established method known as a "Monte Carlo" simulation—allows Dr. Snow to estimate, with 95% statistical confidence,

[6] Mr. Payne initially identified 709 breaching loans in the sample, *see, e.g.*, RA-130, but has conservatively identified 688 loans as breaching for purposes of trial.

the range of damages for all materially breaching liquidated loans in each Trust, with the median of that range as the most likely outcome. *See id*. DLJ has not suggested that damages calculations would differ if, instead of reliably drawing inferences from a properly-drawn representative sample, the parties and the court were forced to review each individual loan.

3. The Motion Court's 2019 Summary Judgment Orders

After Justice Schweitzer retired, these actions were assigned to Justice Scarpulla. In January 2019, after years of discovery and expert analysis of the sampled loans, Justice Scarpulla ruled on the parties' cross-motions for partial summary judgment. A13-46. Three rulings are at issue here.

Notice, Relation Back, & Discovery: DLJ moved to limit its liability to only the 34 loans that were both specifically identified in the Trustee's pre-suit notices *and* were part of the 1,600-loan sample, arguing that the Trustee had not given, and could not give, valid notice for any other loans. *See* A20-21. The Trustee also moved for summary judgment on notice, seeking a ruling that DLJ had received sufficient notice to trigger the Repurchase Protocol for all breaching loans. *See* A20.

The motion court ruled—as to each of the four Trusts—that the "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." A23. The court concluded that, because the Trustee's pre-suit notices identified specific breaching loans and stated that the Trustee's investigation would reveal more, the Trustee was entitled to assert those additional breaches—including as noticed through the Trustee's expert's report on sampling and extrapolation—under the relation-back doctrine. A21-23.[7]

The motion court also ruled that "sufficient evidence has been presented to raise an issue of fact as to whether … based upon DLJ's own due diligence or quality control, it discovered the loan breaches," thereby independently triggering the Repurchase Protocol. A23-24; *see, e.g.*, A638 (Repurchase Protocol triggered by DLJ's "discovery or its receipt of written notice" of R&W breaches). The court explained that the Trustee will "have the opportunity at trial to establish that … [DLJ] discovered the loan breaches, triggering the mechanism under the repurchase protocol." A23-24.

[7] The motion court necessarily rejected DLJ's assertion that the December 2011 notice for the 2006-1 Trust was untimely (A23), just as it had done before in 2014 (*see* RA21-22 (rejecting DLJ's argument that notice for the 2006-1 Trust was untimely because, even based on the trustee's *third* repurchase demand, dated August 22, 2012, "DLJ's 120-day repurchase window closed … more than one month before the complaint was filed," and in any event there is "no authority … that a ripe claim in the operative pleading (the complaint) must be dismissed simply because it may have been unripe at the time a now-superseded summons with notice was filed")).

Sampling: The parties cross-moved for summary judgment as to whether the Trustee may use sampling to prove liability and damages at trial. *See* A35-36. The motion court did not revisit the merits of sampling because it ruled that the 2013 order permitting sampling was binding law of the case. A37-38. The court explained that "Justice Schweitzer ruled on the issue of plaintiffs' use of sampling at trial to establish liability and damages, which is squarely before me on these motions for partial summary judgment," and that DLJ had not pursued an appeal of that order. A37. The court also found that "the parties had a full opportunity to litigate the issue before Justice Schweitzer and did so," including because DLJ's argument to Justice Schweitzer in 2013 was "approximately the same length," and was "the same argument," as that presented on summary judgment. A37. And the court noted that "the parties have engaged in more than four years of discovery, both fact and expert, under Justice Schweitzer's mandate that plaintiffs may use sampling at trial." A37-38. The court stated that any "[i]ssues concerning the sufficiency of the sample itself will be addressed pre-trial in motions in *limine*." A38.[8]

Accrued Interest: DLJ moved for summary judgment that the contractual requirement that "accrued … interest" be paid on breaching loans does not apply to

[8] The motion court subsequently stated that, if sampling were precluded, it would "almost certainly" permit the reopening of discovery so that the Trustee could re-underwrite unsampled loans to avoid unfair prejudice. *E.g.*, RA293.

liquidated loans. *See* A43. The motion court denied this portion of DLJ's motion, concluding that "the repurchase price for liquidated loans remains the same as for non-liquidated loans" because "there is no language in the PSAs supporting an alternative calculation." A44.

4. The First Department's Decision

The First Department unanimously affirmed. A6-11.

Notice, Relation Back, & Discovery: The First Department affirmed the ruling that the Trustee could seek to recover damages for loans beyond those specifically identified in timely pre-suit notices. A7-8.

As to the 2006-3, 2006-4, and 2006-5 Trusts, the First Department held that the Trustee's pre-suit letters "put DLJ on notice that the breaches plaintiffs were investigating might uncover additional defective loans for which claims would be made," and that "plaintiffs' timely complaints [therefore] may be amended to add [such additional defective loans], as they relate back to the original complaints." A7 (citing *Nomura*, 133 A.D.3d at 108; *Koch v Acker, Merrall & Condit Co.*, 114 A.D.3d 596, 597 (1st Dep't 2014)).

As to the 2006-1 Trust, the First Department repeated DLJ's incorrect assertion that the Trustee had sent "no timely or 'ripe' breach notices,"[9] but

[9] DLJ conceded that the Trustee sent a notice letter for the 2006-1 Trust more than two months before the six-year anniversary of that Trust's closing date but argued,

nonetheless affirmed the motion court's denial of summary judgment based on the "alternative ruling that sufficient evidence was presented to raise an issue of fact as to whether [DLJ] independently discovered material breaches." A8. As the First Department explained, such discovery "provides a separate ground for finding that the repurchase protocol was triggered for the breaching loans, without regard to the issue of relation back or the issue of whether the Trustee sent a timely breach notice for [the] 2006-1 [Trust]." A8.

Sampling: The First Department affirmed the ruling that the Trustee could continue to use sampling to prove liability and damages. *See* A8-9. The First Department did not reach the merits of sampling. Instead, it recounted this case's lengthy history of sampling, explaining that the motion court had approved it in 2013; that DLJ had "noticed an appeal from this order, but failed to withdraw or perfect" it; and that "[t]hereafter, the parties spent four years agreeing on the correct loan files and underwriting guidelines for the sample loans, and engaged in extensive expert discovery." A8. The First Department then stated that, "[i]n light of DLJ's failure to pursue an appeal from the court's November 18, 2013 order, and given the extensive discovery already taken place on this issue, we find no reason in this case to disturb the court's decision to permit the use of statistical sampling to prove

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incorrectly, that the notice was not "timely" because it was not sent more than 120 days before the untolled statute-of-limitations deadline.

liability and damages." A8-9. "[T]o the extent [DLJ] challenges the sample size or the particular loans chosen to be included within the sample, [DLJ] will have a further opportunity to raise those arguments" before trial. A9.

Accrued Interest: The First Department held that the motion court had "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." A10-11 (citing *Nomura*, 133 A.D.3d at 107).

ARGUMENT

I. THE FIRST DEPARTMENT CORRECTLY DECLINED TO LIMIT THE TRUSTEE'S CLAIMS TO LOANS IDENTIFIED BY LOAN NUMBER IN PRE-SUIT NOTICES

This Court should reject DLJ's argument (Br. 25-47) that the Trustee's entire breach case is limited to a mere 34 loans that were both individually listed in the Trustee's "timely pre-suit notices" and part of the Trustee's expert's sample (Br. 17). The Trustee's pre-suit notices—which were incorporated into its complaints—more than satisfied the Repurchase Protocol's procedural prerequisite to suit by specifically identifying over a thousand breaching loans, documenting high breach rates among sampled loans, alerting DLJ to its systemic R&W breaches "on a massive scale," advising that the Trustee's investigations were ongoing, and demanding repurchase of *all* breaching loans. As the First Department correctly held as a matter of long-settled New York relation-back law, the Trustee's broad,

timely complaints filed on the basis of these pre-suit notices were more than adequate to place DLJ on notice of its high breach rates and systemic breaches and thus to allow the Trustee "to add the claims at issue, as they relate back to the original complaints." A7.

DLJ attempts to avoid this result by misapplying settled relation-back principles; by incorrectly treating pre-suit notice as a substantive element of the Trustee's claim; and by reading into the Repurchase Protocol additional notice requirements that are not there and have no application where, as here, the breaching loans are almost exclusively liquidated loans that cannot be repurchased. DLJ's arguments are unpersuasive.[10]

A. The Trustee's Claims Relate Back To Its Timely Complaints

It is undisputed that the Trustee timely commenced these actions within the six-year statute of limitations, as extended by a tolling agreement. *See supra*, at 9. The Trustee's claims for damages as to all breaching loans, including loans for which breach was shown in discovery through sampling, relate back to the timely complaints. A7-8; *see* A22-24. DLJ's contrary arguments are meritless.

[10] Whether the Repurchase Protocol was independently triggered by DLJ's "discovery" of the massive problems in its loan pools is not at issue on this appeal.

1. The Trustee's Complaints Gave Ample Notice Of Its Claims

This Court has long held that, "when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the Statute of Limitations do not exist, and … a liberal rule should be applied." *Abrams v. Md. Casualty Co.*, 300 N.Y. 80, 86 (1949) (quoting *N.Y. Cent. & H.R.R. Co. v. Kinney*, 260 U.S. 340, 346 (1922)). CPLR 203(f) reflects that liberal rule by providing that "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." CPLR 203(f); *see Buran v. Coupal*, 87 N.Y.2d 173, 178 (1995) (relation-back doctrine is "[a]imed at liberalizing … strict, formalistic pleading requirements").

New York courts are, accordingly, given "room for the exercise of sound judicial discretion to determine whether, on the facts, there is any operative prejudice precluding a retroactive amendment." *Duffy v. Horton Memorial Hosp.*, 66 N.Y.2d 473, 477 (1985); *see, e.g.*, *Caffaro v. Trayna*, 35 N.Y.2d 245, 251 (1974) (applying relation-back doctrine because amendment had not "prejudiced [defendant] in the assembly or introduction of evidence in support of his defense as to such additional elements of damage").

Under these principles, the First Department properly concluded that the Trustee's claims as to additional breaching loans not identified by loan number in the pre-suit notices relate back for purposes of CPLR 203(f) to the complaints, which were themselves premised on the pre-suit notices of high breach rates in sampled loans and systemic breach. The Trustee's complaints incorporated broadly worded pre-suit notices, which identified over a thousand breaching loans by loan number, advised DLJ that the Trustee's investigation was continuing, and made clear that the Trustee expected to seek relief for large numbers of loans beyond those specifically identified in the notices. *See* A116-18; A165-67; *see also* A1027-36 (pre-suit notice). The complaints, moreover, stated that the Trustee was seeking damages as to "*all* Mortgage Loans for which DLJ's representations and warranties have been breached." A135 (emphasis added); A180 (emphasis added).

Unsurprisingly, every New York decision to consider the issue has concluded that relation back is available in such a circumstance.[11] For example, the First Department in *Nomura* relied on settled relation-back principles to hold that the doctrine applied because "[p]laintiffs' presuit letters *put defendant on notice* that the

[11] *E.g.*, A7-8; A22-23; *U.S. Bank N.A. v. DLJ Mortg. Cap., Inc.*, 176 A.D.3d 466 (1st Dep't 2019), *leave granted*; *HSBC Bank USA v. Merrill Lynch Mortg. Lending, Inc.*, 175 A.D.3d 1149 (1st Dep't 2019); *Nomura*, 133 A.D.3d 96; *In re Part 60 RMBS Putback Litig.*, No. 777000/2015, Doc. No. 402, at 6-9 (Sup. Ct. N.Y. Cnty. Dec. 2, 2019); *see U.S. Bank N.A. v. GreenPoint Mortg. Funding, Inc.*, 147 A.D.3d 79, 88-89 (1st Dep't 2016) (reaffirming and factually distinguishing *Nomura*).

certificateholders … were investigating the mortgage loans and might uncover additional defective loans for which claims might be made." 133 A.D.3d at 108 (emphasis added). Likewise, the First Department stated here, "[t]he trustee's timely presuit letters … *put DLJ on notice* that the breaches plaintiffs were investigating might uncover additional defective loans for which claims would be made." A7 (emphasis added).[12] The decision below thus falls squarely within a well-developed body of First Department decisions applying settled New York law.[13]

DLJ, moreover, has never argued that its ability to defend these actions would be prejudiced by applying the relation-back doctrine. Nor could it, as DLJ has long been on notice of its breaches with respect to all breaching loans in each of the Trusts and the Trustee's intent to pursue these breaches. *See supra*, at 6-8. And DLJ's delegation of all pre-suit notices to outside counsel "in anticipation of litigation"

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[12] DLJ incorrectly suggests (Br. 33-35) that these cases reflect an RMBS-only rule. *Nomura*, for example, cited the First Department's decision in *Koch*, 114 A.D.3d 596, which held that a complaint alleging that *some wine bottles* were frauds gave fair notice of later claims that *additional bottles* were fraudulent. *See* 133 A.D.3d at 108.

[13] DLJ wrongly asserts (Br. 32-33) that *GreenPoint*, 147 A.D.3d 79, supports the proposition that a trustee that has given pre-suit notice similar to the Trustee's notice here cannot later seek recovery on additional loans not specifically identified in that notice. *GreenPoint* held that the relation-back doctrine did not apply where, unlike here, the trustee had not provided *any* pre-suit notice. *Id.* at 88. In so holding, the court distinguished *Nomura* because the trustees there, like here, had sent pre-suit notices that "identified some, but not all, of the nonconforming mortgages for which the trustees ultimately sought relief" and thereby "complied with the condition precedent of providing that defendant with notice of its default." *Id.*

shows that DLJ never intended to repurchase any loans, regardless of when and how it received additional notice. *See id.*

2. DLJ's Arguments Disregard Settled New York Law

DLJ asks this Court to reverse the First Department's ruling based on a series of arguments that reflect a fundamental misapprehension of this Court's precedents and other settled New York law.

First, contrary to DLJ's assertion (Br. 30), the relation-back doctrine is not narrowly limited to correction of "an erroneously drafted pleading" and instead is available wherever an amended pleading involves the same "transactions, occurrences, or series of transactions or occurrences" as the original pleading. CPLR 203(f); *see, e.g.*, *Caffaro*, 35 N.Y.2d at 252 (wrongful death claim, which was based on death that post-dated original complaint, related back to medical malpractice claim); *Koch*, 114 A.D.3d at 596-97 (original complaint alleging that "at least" five bottles of wine were counterfeit gave defendant "notice of the transactions or series of transactions," and allowed relation back of claims as to 211 additionally discovered counterfeit bottles).

Here, the relevant "transaction" or "occurrence" under CPLR 203(f) is each of the four securitizations into which DLJ bundled the loans, and DLJ's defective securitization process, which infected all breaching loans. DLJ errs in arguing (Br. 37-41) that the relevant "transaction or "occurrence" is instead the origination of

each of the more than 42,000 loans in the Trusts. CPLR 203(f), moreover, applies equally where an original complaint provides notice of the "*series* of transactions or occurrences, to be proved pursuant to the amended pleading." CPLR 203(f) (emphasis added). At the very least, the Trustee's complaints allege that DLJ's systemic and Trusts-wide disregard of the applicable underwriting standards caused a "series" of breaches in loans, thereby putting DLJ on notice of *all* breaching loans. A116-18; A165-67.[14]

Second, contrary to DLJ's extreme position (Br. 13; *see, e.g.*, *id*. 31-36), *ACE Securities Corp. v. DB Structured Products, Inc.*, 25 N.Y.3d 581 (2015), does not preclude the Trustee from recovering damages on a breaching loan absent specific notice of that loan at least 120 days before the six-year limitations period expired. *ACE* held that an RMBS plaintiff must comply with the contractual condition precedent to suit of providing notice and an opportunity to cure breaching loans. *Id.* at 589. Unlike the *ACE* plaintiff, the Trustee satisfied the condition precedent to suit in these actions by providing pre-suit notice of *over 1,300* breaching loans.

[14] For that reason, DLJ is unpersuasive in arguing (Br. 38) that "notice that … the borrower for a loan originated by Originator A in California may have misrepresented his income does not put DLJ on notice that a loan originated by Originator B in Florida may have failed to disclose the full extent of his outstanding debt." In that scenario, DLJ would be on notice of the "same series of transactions or occurrences" as to breaches in loans A and B, *and* loans "C", "D", "E", and "F" *etc*.

Moreover, this Court held in *ACE* and again in *ABSHE*, 33 N.Y.3d 72, that the Repurchase Protocol's notice provision is merely a *procedural* condition precedent to suit—not a substantive element of a trustee's cause of action—and thus can be satisfied even after suit has been filed and after the limitations period has expired.

DLJ remarkably repeats here (Br. 36), virtually verbatim, the characterization of *ACE* that it presented—and this Court rejected—in *ABSHE*. There, this Court held that a trustee whose timely-filed complaint was dismissed for failure to provide *any* pre-suit notice to the primary defendant—a "non-merits dismissal," 33 N.Y.3d at 76[15]—was permitted to refile its complaint under New York's savings statute, CPLR 205(a), and to rely on notice given *after* the suit was filed and *after* the statute of limitations had expired. *Id.* at 80. In so holding, this Court repudiated DLJ's misreading of *ACE*, which it again advances here, that a trustee must "have complied with the notice and sole remedy provision—including affording [the defendant the requisite time] in which to cure—before filing a complaint within the six-year statute of limitations." *Id.* at 79; *see id.* ("We did not expressly hold [in *ACE*], and it is not implicit in our analysis, that failure to comply with those provisions before the statute of limitations rendered the trustee's action untimely."). Because the Trustee

[15] The trustee had provided pre-suit notice to the secondary, backstop defendant, but that notice was insufficient to satisfy the condition precedent to suit. *See ABSHE*, 33 N.Y.3d at 77, 81-82.

here filed timely complaints, it could provide additional "procedural" notices as to additional breaching loans, and thereby satisfy any remaining procedural prerequisites to its claims for such loans, post-suit. *See id.* at 82 (explaining that "the notice and cure or repurchase condition precedent contain[s] no such 'time restriction'").[16]

ABSHE turned on CPLR 205(a)—rather than CPLR 203(f)—but it provides strong reinforcement to the First Department's decision applying the latter: If the *ABSHE* plaintiff could preserve a timely-filed claim by providing contractual notice to the primary defendant for the first time *after* filing suit and *after* the statute of limitations expired, it follows that the Trustee—which *did* satisfy the condition precedent to suit—may also pursue claims based on post-suit notices through the relation-back doctrine. The Trustee sent pre-suit notices identifying 1,351 breaching loans, documenting high breach rates in sampled loans, notifying DLJ that its investigation would continue, and stating that it was seeking relief as to all breaching

[16] DLJ identifies no New York decision holding that the relation-back doctrine is unavailable where a *procedural* prerequisite to suit remained unsatisfied when a timely complaint was filed, provided there is a valid pre-existing cause of action. DLJ wrongly relies (Br. 35) on *U.S. Bank N.A. v. DLJ Mortgage Capital, Inc.*, 33 N.Y.3d 84 (2019) ("*HEAT 2006-5*"). In that case, the trustee concededly filed its complaint outside the six-year limitations period. *Id.* at 91. *Southern Wine & Spirits of Am., Inc. v. Impact Environmental Engineering, PPLC*, 80 A.D.3d 505 (1st Dep't 2011) (cited in Br. 33), is similarly distinguishable. Here, unlike in *Southern Wine*, there indisputably is a valid preexisting action given the Trustee's pre-suit notices and timely complaints.

loans. A1027. Surely, the Trustee cannot be worse off than the *ABSHE* plaintiff because the Trustee *did* provide pre-suit notice to DLJ.[17]

Third, DLJ is incorrect in asserting (Br. 31-32) that the First Department applied relation back here "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). All of the Trustee's claims concern DLJ's breaches of R&Ws, which accrued before suit on each Trust's closing date. *See, e.g., ACE*, 25 N.Y.3d at 591 (any breaches of R&Ws occur at closing). That the Trustee may not have discovered or provided notice of the full extent of those pre-suit breaches until after the original complaints were filed is irrelevant, so long as the original complaints provided DLJ with notice of the transactions or occurrences at issue—which they did. *See, e.g., 17 E. 96th Owners Corp. v. Madison 96th Assocs., LLC*, 60 A.D.3d 480, 481 (1st Dep't 2009) (reversing denial of motion to amend complaint in trespass action, where original complaint "envisioned the possibility of other" physical encroachments and thus was "sufficiently broad to encompass the encroachment subsequently discovered" after

[17] Contrary to DLJ's assertion (Br. 44-45), the Trustee does not ask this Court to apply CPLR 205(a) now, and cannot have forfeited any such argument because it would be unripe before any claims for which the Trustee seeks damages has been dismissed. This Court's decision in *HEAT 2006-5* is thus again inapposite because there the trustee failed to invoke CPLR 205(a) despite facing a motion to dismiss its complaint with prejudice, which was ultimately granted. *See* 33 N.Y.3d at 89.

commencement of the action); *supra*, at 23 (discussing *Koch*, 114 A.D.3d at 597, and *Caffaro*, 35 N.Y.2d at 252).[18]

Finally, DLJ's other authority is inapposite. DLJ misplaces reliance (Br. 40-41) on *Greater New York Health Care Facilities Association v. DeBuono*, 91 N.Y.2d 716 (1998). There, this Court declined to hold that the third-party intervenors' proposed claims related back to the plaintiffs' claims because the defendants "had no notice of proposed intervenors' particularized claims when they entered into negotiations with the [plaintiffs]," including because the intervenors were "not closely related parties" to plaintiffs, and instead were "entirely separate claimants whose claims were otherwise time barred." *Id.* at 721. By contrast, all breach claims here are brought by the *same* party, that party has at least some claims that would *not* "otherwise [be] time barred," and that party *expressly gave notice* in its complaints that further—similar, or even identical—breach claims would follow. A116-18; A165-67; A1027-36. The complaints here are thus more than a sufficient

[18] In contrast, *Johnson* and the other cases upon which DLJ misplaces reliance (Br. 32) involved attempts to bring additional claims based on a *defendant's post-suit conduct*. *See, e.g.*, *Johnson*, 125 A.D.3d 1073 (malicious prosecution claim did not relate back because prosecution occurred after action was commenced); *Cooper v. Sleepy's, LLC*, 126 A.D.3d 664 (2d Dep't 2015) (wrongful termination claim did not relate back because termination occurred after action was commenced); *Clairol Development, LLC v. Vill. of Spencerport*, 100 A.D.3d 1546 (4th Dep't 2012) (claims did not relate back where alleged misconduct occurred after petition was filed).

anchor for the relation-back doctrine. *See, e.g.*, *Giambrone v. Kings Harbor Multicare Ctr.*, 104 A.D.3d 546, 547 (1st Dep't 2013) (*DeBuono* permits relation back where defendant has "notice of the proposed specific claim"); *Pendleton v. City of New York*, 44 A.D.3d 733, 736 (2d Dep't 2007) ("The sine qua non of the relation-back doctrine is notice."); *cf. Buran*, 87 N.Y.2d at 178 (relation back of claims against same party raises less serious policy concerns than addition of parties).

DLJ also misplaces reliance (Br. 38-39) on dicta in *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 2012 WL 3201139 (Del. Ch. Aug. 7, 2012). No New York court has followed this decision, which applied *Delaware's* stricter relation-back standard. *See* Del. Ch. R. 15(c) (allowing relation back only where amended complaint "arose out of" the specific "transaction or occurrence" pled in original complaint). DLJ, moreover, omits that the Delaware court first rejected relation back because the new claims arose under as many as *26* separate contracts. *See* 2012 WL 3201139, at *18 ("[E]ach sale of loan servicing rights constitutes a separate and independent transaction."). Here, in contrast, the Trustee seeks to relate back claims under a *single* contract for each Trust—*i.e.*, the PSA. Moreover, unlike here, *Central Mortgage* did not involve loans that had been securitized together in structured transactions, and the plaintiff had expressly *disclaimed* the later-added claims. *See id.*

3. Relation Back Applies Equally To The 2006-1 Trust

This Court should also affirm the denial of summary judgment as to the 2006-1 Trust, not only on the First Department's ground that issues of fact remain as to whether DLJ "independently discovered material breaches" (A8), but also on the ground that relation back applies to the Trustee's claims for the 2006-1 Trust, just as it does for the other Trusts. The First Department was incorrect to state that "no timely or 'ripe' breach notices were sent" as to that trust (A8), because the undisputed timeline belies DLJ's assertion (Br. 41-43) that it did not receive "timely" notice before the 2006-1 Action was filed.

Specifically, on December 7, 2011, the Trustee sent a notice identifying hundreds of breaching loans in the 2006-1 Trust. A1026-28. Some 268 days later, on August 31, 2012, the Trustee filed a summons with notice as to the 2006-1 Trust. A83-88. And on September 1, 2012, the statute of limitations for the 2006-1 Trust expired under the tolling agreement. A1083-85; *see supra*, at 9. Thus, although the Trustee sent its pre-suit notice less than 120 days before the *untolled* statute of limitations would have expired for the 2006-1 Trust, the limitations period was extended by a tolling agreement *before* the statute expired, and the Trustee did not file the 2006-1 Action until *268 days after* sending notice—a notice period much longer than the 120 days required under the PSAs.

DLJ's argument (Br. 43) that it did not receive "timely" notice before the 2006-1 Action was filed ignores this undisputed timeline. To the extent DLJ contends that the 120-day cure period shortened the limitations period, that argument is foreclosed by this Court's decisions holding that RMBS notice-and-cure requirements are entirely procedural and thus do not affect an action's timeliness. *See ABSHE*, 33 N.Y.3d at 79; *ACE*, 25 N.Y.3d at 599; *see also supra*, at 25. And to the extent DLJ contends that the tolling agreement came too late because it was executed less than 120 days before the untolled statute of limitations would have expired, that argument fails for at least three reasons.

First, it requires this Court to ignore that DLJ *actually* had 268 days in which to exercise what DLJ characterizes (Br. 32-33) as the very "purpose of the repurchase protocol": the opportunity "to cure or repurchase defective loans before being sued on an alleged breach." *Second*, it conflicts with the text of the Repurchase Protocol, which provides that DLJ will cure or repurchase a loan "within 120 days of … its receipt of written notice," and nowhere states that such notice period must fully run before an untolled limitations deadline. A638. *Third*, it conflicts with this Court's directive in *ACE* that "complying with the contractual condition precedent to suit" requires only "affording [the requisite number of] days to repurchase from the date of notice." 25 N.Y.3d at 589.

DLJ wrongly suggests (Br. 42) that this Court may not even reach applicability of the relation-back doctrine to the 2006-1 Trust because the Trustee did not cross-move for leave to appeal. The Trustee had no basis to do so because the First Department fully affirmed the motion court's orders that allowed the Trustee to seek damages for all breaching loans (A6), the very result the Trustee had sought. *See* CPLR 5611 (only "aggrieved party" may appeal). And though the Trustee disagrees with the First Department's unsupported statement that "no timely or 'ripe' breach notices were sent" for the 2006-1 Trust (A8), it is court orders that are subject to appeal, not particular language in those orders. *See, e.g.*, *Pa. Gen. Ins. Co. v. Austin Powder Co.*, 68 N.Y.2d 465, 472-73 (1986) ("That the Appellate Division's memorandum may contain language or reasoning which [a] part[y] deem[s] adverse to [its] interests does not furnish [it] with a basis for standing to take an appeal."). Indeed, that statement was not necessary to the decision and thus was dicta—another reason no cross-motion for leave to appeal was needed. *See, e.g.*, *Doe v. Rensselaer Polytechnic Inst.*, 172 A.D.3d 1691, 1692, (3d Dep't 2019) ("disagreement with dicta does not provide a basis to take an appeal").[19]

Nor, finally, is DLJ correct to suggest (Br. 42) that the Trustee somehow forfeited this argument. The Trustee always has maintained that it may pursue

[19] DLJ recognizes (Br. 42) that the First Department merely "noted" the supposed absence of "timely" notices for the 2006-1 Trust.

damages for all breaching loans in the 2006-1 Trust, just as it can for the other Trusts. And since the motion court's 2014 rejection of DLJ's argument that the Trustee's notice was untimely for that Trust (RA21-22), the parties have been vigorously litigating over the number of breaching loans in that Trust. The parties' unambiguous tolling agreement simply provides additional support for the Trustee's and motion court's long-held position.[20]

B. Additional Loan-Specific Post-Suit Notice Is Not Needed To Support The Trustee's Breach Claims

In affirming the First Department's relation-back ruling, this Court should decline DLJ's invitation (Br. 25-28) 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. DLJ's construction of the Repurchase Protocol not only would effectively preclude the use of sampling to prove liability and damages, which has long been authorized in this case and numerous other cases (*see infra*, Part II), but it would read into the Repurchase Protocol requirements and prohibitions that simply are not there. Nor would they have any application at trial

[20] *Bingham v. New York City Transit Authority*, 99 N.Y.2d 355 (2003) (cited in Br. 43), is inapposite. There, the defendants argued for the first time in this Court that a hundred-year-old common law rule should be abandoned—an entirely "new issue"—and thereby deprived this Court of the developed record necessary for resolution of that issue of statewide importance. *See id.* at 359. All facts pertaining to the timeliness of the notice for the 2006-1 Trust—including the tolling agreement (A1083-97)—are in the record.

where, as here, the Repurchase Protocol's sole remedy of specific performance is impossible and has been supplanted by an equitable damages remedy.

1. The PSAs Do Not Require Additional Loan-Specific Breach Notices

The Trustee's breach notices identified over a thousand specific breaching loans across the Trusts, documenting high breach rates in sampled loans, and provided detailed notice of DLJ's "systemic breaches," its "disregard for underwriting standards across all of the Trusts," and its securitization of "defective loans on a massive scale." A1029. The pre-suit notices further warned that the specific loans identified therein were "just the tip of the iceberg" and that "additional investigation … will reveal substantial additional evidence of breaches," and demanded that DLJ "promptly repurchase all of the defective Mortgage Loans from the Trusts." A1028, A1030. These detailed notices were more than sufficient under the PSAs to permit the Trustee to seek recovery for all breaching loans.[21]

DLJ's contrary argument rests (Br. 26) on the Repurchase Protocol's supposedly "plain terms" requiring the Trustee to provide notice "on a loan-specific basis." But, as a textual matter, the phrase "loan-specific" does not appear in the

[21] Contrary to DLJ's assertions (Br. 27-28), there is nothing remarkable about U.S. Bank's position in other cases that RMBS trustees are subject to less rigorous obligations than RMBS sponsors or sellers in respect of the repurchase remedy. As U.S. Bank explained in the briefs that DLJ cites, the PSAs themselves contain this distinction. *See* A1353; C31-32; *infra*, Part II.B.1.

Repurchase Protocol, which conditions the repurchase obligations of DLJ, as the securitization sponsor, on "notice" or "discovery" of a "breach"—without specifying the manner in which notice or discovery shall be shown. DLJ's argument, therefore, turns on language that is not there and reads far too much into the use of certain singular words in the Repurchase Protocol.[22] And here, of course, the Trustee provided pre-suit notice of high breach rates, over a thousand specifically-identified breaching loans, and systemic breaches—none of which led to a single repurchase or caused DLJ to do anything other than prepare for litigation. *See supra*, at 6-9.

Nor, contrary to DLJ's argument (Br. 36), does the Repurchase Protocol provide any specific direction as to if, or how, a trustee must provide additional notice where, as here, the trustee provided adequate pre-suit notice of high breach rates in sampled loans, over a thousand specifically-identified breaching loans, and systemic breaches. DLJ would have this Court read the Repurchase Protocol's procedural prerequisite as requiring additional loan-by-loan *post-suit* notice in such circumstances as to every loan for which the Trustee seeks damages. But, again, the PSAs do not, by their terms, impose any such formalistic requirement on a trustee

[22] The Repurchase Protocol, for example, refers to "a breach of a representation or warranty made pursuant to Section 2.03(f) that materially and adversely affects the interests of the Certificateholders in any Mortgage Loan," where the "Loan" can be "*any* Mortgage Loan," and is not referred to by the definite article "the." A638 (emphasis added).

that has brought a timely action based on notices and complaints comparable to those employed by the Trustee here.

Likewise there is no textual basis for DLJ's suggestion (Br. 25) that the use of singular words like "*the* affected Mortgage Loan" (A638 (emphasis added)) implies that a trustee pursuing a timely-commenced lawsuit based on such pre-suit notices must, as the case proceeds, individually identify and provide additional notice as to every loan for which it seeks damages. Whatever application this provision might have pre-suit, nothing in the text of the provision imposes any further requirement once, as here, sufficient notice has been given to trigger the Repurchase Protocol and suit has been filed.

For these reasons, several New York state and federal courts have ruled that a pre-suit repurchase demand delivered to an RMBS securitization sponsor—similar to those provided here—provides sufficient notice for *all* breaching loans in an RMBS trust if, as here, it identifies a large number of breaching loans and requests repurchase of all breaching loans.[23] In those circumstances, a sponsor defendant—

[23] *See, e.g.*, *Nomura Asset Acceptance Corp. Alternative Loan Trust v. Nomura Credit & Cap., Inc.*, 2014 WL 2890341, *15 (Sup. Ct. N.Y. Cnty. June 26, 2014) (breach notice "request[ed] that [defendant] repurchase not only the specifically identified loans but 'any loans that did not comply with the representations and warranties made by' it"); *SACO I Trust 2006-5 v. EMC Mortg. LLC*, 2014 N.Y. Misc. LEXIS 2494, *6-7 (Sup. Ct. N.Y. Cnty. May 29, 2014) (breach notice "referenced statistical sampling of the pools and requested repurchase of all breaching loans"); *Home Equity Mortg. Trust Series 2006-5 v DLJ Mortg. Cap., Inc.*,

like DLJ here (*see supra*, Part I.A)—has, at a minimum, constructive notice of all breaching loans in the trusts. *See, e.g.*, *MSST 2007-1*, 289 F. Supp. 3d at 505; *Assured*, 920 F. Supp. 2d at 512-13.

DLJ wrongly suggests (Br. 26-27) that its proposed loan-specific notice requirement is compelled by this Court's recent decisions in *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572 (2017), and *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569 (2018). Neither case addresses the Repurchase Protocol's notice provision or has any bearing on the notice issue presented here.

In *Nomura*, this Court rejected a trustee's attempt to claim "general contract damages" not tied to the formula in the Repurchase Protocol. 30 N.Y.3d at 584. The trustee had sought those "general contract damages" by alleging that certain "loan-level" breaches of loan-specific warranties also constituted "transaction-wide"

2014 WL 317838, * 5-6 (Sup. Ct. N.Y. Cnty. Jan. 27, 2014) (notice identified specific loans, notified seller of pervasive breaches, and demanded that seller repurchase all breaching loans); *Morgan Stanley Mortg. Loan Trust 2006-14SL v. Morgan Stanley Mortg. Cap. Holdings, LLC*, 2013 WL 4488367, *3 (Sup. Ct. N.Y. Cnty. Aug. 16, 2013) (notice referenced allegedly breaching sampled loans and requested defendant repurchase "every other Defective Loan"); *MSST 2007-1*, 289 F. Supp. 3d at 505-06 ("notice" of large number of breaching loans within a representative sample); *Deutsche Bank Nat'l Trust Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 97 F. Supp. 3d 548, 552 (S.D.N.Y. 2015) ("Plaintiff's letter gave adequate notice with respect to breaching loans beyond the 1,620 specifically mentioned"); *Assured Guar. Mun. Corp. v. Flagstar Bank, FSB*, 920 F. Supp. 2d 475, 512-13 (S.D.N.Y. 2013) (notice of pervasive breaches).

breaches under a separate set of warranties, and thus were not subject to the Repurchase Protocol's sole remedy of cure or repurchase. *Id.* at 577-78. In *Ambac*, this Court applied *Nomura* and rejected a monoline insurer's argument that the sole remedy provision did not apply to "transaction-level" representations about a defendant's operations and financial condition. 31 N.Y.3d at 581-83. This Court instead held that the sole remedy provision applied because "the factual allegations underpinning Ambac's transaction-level breaches are the same as those for the loan-level breaches." *Id*. at 582.

Here, unlike in *Nomura* and *Ambac*, the Trustee seeks damages only as measured by the Repurchase Protocol formula, and not "general contract damages" for "transaction-level" breaches. *See* RA74-75 (Trustee's expert's report). DLJ's attempt to use these cases to bolster its textual notice argument is thus unavailing.

2. Additional Breach Notices Would Serve No Purpose For Liquidated Loans

DLJ's attempt to read an ongoing post-suit loan-specific notice requirement into the contract is even more strained with respect to liquidated loans, which it acknowledges (Br. 5) "no longer exist[]" and are not available for repurchase. DLJ concedes (Br. 70) that New York law provides an equitable remedy of damages where the contractual sole remedy of cure or repurchase is impossible. *See Nomura*, 133 A.D.3d at 105-06. DLJ seeks to apply procedural aspects of the sole remedy provision to the Trustee's claims for equitable damages, but it identifies nothing in

the PSAs reflecting the parties' intent to require additional "loan-specific" post-suit notices as a prerequisite to the pursuit of that alternative remedy.

For breaching loans that still exist, for which a breach "is continuing" (A638-40 (§ 2.03(g)), and for which the cure or repurchase remedy remains possible, additional loan-specific notice could at least theoretically, as DLJ maintains (Br. 33), facilitate the exercise of a "contractual right to cure or repurchase defective loans" or a court judgment ordering specific performance. But for the remaining 99.99% of the breaching loans that have been liquidated and as to which the Trustee can only seek equitable damages, not specific performance, damages can be properly quantified and awarded—without regard to whether there was loan-specific notice—through an appropriate sampling analysis.[24] Additional post-suit loan-specific notice therefore serves no salutary purpose. Indeed, this was the conclusion reached in the most recent case in the line of cases on which DLJ relies involving certificateholders' claims against trustees. *See Royal Park Inv. SA/NV v. Bank of N.Y. Mellon*, 2019 WL 6117533, *5 (S.D.N.Y. Nov. 18, 2019) (where plaintiff "seeks monetary damage, not specific performance of the repurchase remedy," defendant "is not

[24] If DLJ had wanted to require post-suit "loan-specific" notice for loans where it admits (Br. 68) that specific performance is now impossible, it could have negotiated to include specific language to that effect. It did not. *See, e.g.*, *Vt. Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004) ("[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.").

entitled to insist that [plaintiff] prove its entitlement to damages with loan-by-loan precision based on a sole remedy clause that does not directly apply"). DLJ does not argue to the contrary.

II. THE FIRST DEPARTMENT CORRECTLY HELD THAT THE TRUSTEE MAY USE SAMPLING TO PROVE LIABILITY AND DAMAGES

Presented with timely-filed complaints seeking damages as to more than a thousand specifically-identified breaching loans and all other breaching loans in the Trusts, the motion court early on determined that the case would not be tried only as to the loans that the Trustee had identified by loan number in its pre-suit notices, or on a loan-by-loan basis. Instead, the motion court permitted the Trustee to prove its claims and quantify its damages based on sampling—a mode of proof that is expressly designed to avoid identification and consideration of each and every loan on an individual basis, as DLJ contends is required.

This Court has approved using sampling to prove breach of warranty since at least 1856, *see Muller v. Eno*, 14 N.Y. 597, 603-04 (1856) (jury could properly infer breach rate as to 14 bales of cloth from experts' examination of several such bales), and today "[s]ampling is a widely accepted method of proof in cases brought under New York law, including in cases relating to RMBS and involving repurchase claims," *Assured*, 920 F. Supp. 2d at 512. Indeed, every New York state court that has considered the use of sampling to provide liability and damages in RMBS

putback cases against originators or sponsors has approved it—including in numerous pending cases.[25]

DLJ does not dispute that for decades sampling has been widely adopted in complex litigation to draw reliable inferences about the factual characteristics of sizable, unwieldy, populations. Nor are DLJ's anti-sampling arguments grounded in any criticism of the specific sampling and extrapolation techniques used by the Trustee's expert. Instead, in a corollary to its notice argument, DLJ wrongly asserts (Br. 47-60) that the Repurchase Protocol requires that each and every breaching loan not only be specifically noticed, but also be individually examined, and thus bars sampling as a matter of law. The ruling that DLJ seeks here is incorrect and would create case-management chaos.

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[25] *See Ambac Assurance Corp. v. Countrywide Home Loans Inc.*, 179 A.D.3d 518, 521 (1st Dep't 2020); *In re Part 60 RMBS Putback Litig.*, No. 777000/2015, Doc. No. 402, at 2-3; *Morgan Stanley Mortg. Loan Trust 2006-14SL v. Morgan Stanley Mortg. Cap. Holdings, LLC*, No. 652763/2012, Doc. No. 241, at 49:15-51:8 (Sup. Ct. N.Y. Cnty. June 30, 2017); *In re Part 60 RMBS Putback Litig.*, No. 777000/2015, Dkt. No. 96 (Sup. Ct. N.Y. Cnty. Mar. 24, 2016); *SACO I Trust 2006-5 v. EMC Mortg. LLC*, No. 651820/2012, Doc. No. 564, at 16-17 (Sup. Ct. N.Y. Cnty. Dec. 2, 2015); *MBIA Ins. Corp. v. Credit Suisse Secs.*, No. 603751/2009, Doc. No. 655, at 1 (Sup. Ct. N.Y. Cnty. June 24, 2014); *Assured Guar. Mun. Corp. v. DB Structured Prods., Inc.*, 44 Misc. 3d 1206(A), *6 (Sup. Ct. N.Y. Cnty. July 3, 2014); *ACE Secs. Corp. [2007-HE1] v. DB Structured Prods., Inc.*, 41 Misc. 3d 1229(A), *2 n.3 (Sup. Ct. N.Y. Cnty. Nov. 21, 2013); *ACE Secs. Corp. [2006-SL2] v. DB Structured Prods., Inc.*, 40 Misc. 3d 562, 570 (Sup. Ct. N.Y. Cnty. 2013), *rev'd on other grounds*, 112 A.D.3d 522 (1st Dep't 2013), *reversal aff'd*, 25 N.Y.3d 581 (2015); *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 30 Misc. 3d 1201(A), *4 (Sup. Ct. N.Y. Cnty. Dec. 22, 2010).

This Court need not, however, reach the merits of DLJ's arguments against sampling because, as explained below (*infra*, Part II.A), the First Department was well within its discretion to hold that DLJ forfeited its ability to challenge sampling, such that no further review is permitted. A8-9. This Court's inquiry into DLJ's sampling arguments can end there. *See, e.g.*, *Matter of Pollock*, 64 N.Y.2d 1156, 1158 (1985) ("Where the jurisdictional predicate for an appeal to this court is a certified question, the appeal brings up for review 'only the question or questions so certified.'"); *Patrician Plastic Corp. v. Bernadel Realty Corp.*, 25 N.Y.2d 599, 604 (1970) (construing certified questions that ask whether an order was "properly made," "as posing the question of law decided by that court").

A. DLJ Waived Its Challenge To Sampling

The First Department was well within its broad discretion in declining to permit DLJ to re-litigate sampling after it abandoned an appeal of that issue years ago. *See, e.g.*, *Rubeo v. Nat'l Grange Mut. Ins. Co.*, 93 N.Y.2d 750, 755-56 (1999) (recognizing Appellate Division's discretion to decline to consider second appeal after party allowed first appeal on same issue to "die on the vine"); *cf. Theophilova v. Dentchev*, 117 A.D.3d 531, 533 (1st Dep't 2014) (declining to address argument because "Plaintiff waived this issue by failing to raise it in the prior appeal."). Contrary to DLJ's arguments (Br. 64), its present appeal raises the same issue as the appeal it failed to perfect in 2013: whether the Repurchase Protocol precludes the

Trustee from using sampling to prove liability and damages. *Compare* Br. 47-54 *with* RA7-10. The parties invested substantial time and resources through fact and expert discovery pursuing sampling after DLJ abandoned its initial appeal. *See* A8-9; A37-38; *supra*, at 11-13. Any supposed general "develop[ments]" or "clarifi[cations]" in the law (Br. 64) are not helpful to DLJ's anti-sampling position and do not give DLJ license to resurrect these abandoned issues, let alone call into question the motion court's original determination that the PSAs do not preclude sampling.

Nor, contrary to DLJ's assertion (Br. 64), was there anything "advisory" about the motion court's 2013 decision that would open sampling to renewed challenge. Rather, the motion court definitively "ORDERED that plaintiffs may use a statistical sampling to prove liability and damages on all of their claims," and "ORDERED that the parties shall meet and confer as to the sample to be used." A82. The parties then relied upon those orders for years.

DLJ also wrongly contends (Br. 61) that the very "procedural objections" that the First Department addressed are beyond this Court's review. The First Department's boilerplate statement that its "determination was made as a matter of law and not in the exercise of discretion" (A5), is not dispositive. *See, e.g.*, *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 551-52 (2015). The decision below leaves no doubt that the First Department exercised its own discretion or, at

the very least, declined to disturb the motion court's exercise of discretion. A9. That discretionary determination is properly before this Court, and should be affirmed on highly deferential review. *See, e.g.*, *Matter of Von Bulow*, 63 N.Y.2d 221, 224-26 (1984) (this Court reviews discretionary decisions of the Appellate Division for abuse of discretion as a matter of law and thus affirms unless "the result reached by the exercise of … discretion is so outrageous as to shock the conscience").

B. Sampling Is An Appropriate Means Of Proving Liability And Damages In RMBS Putback Cases

If the Court reaches the merits of sampling, it should still affirm. In allowing sampling evidence to prove liability and damages, the motion court below was well within its "wide discretion in making evidentiary rulings." *Mazella v. Beals*, 27 N.Y.3d 694, 709 (2016). The weight of sampling evidence can be determined later by the fact-finder.

1. The PSAs Do Not Prohibit Sampling

This Court should reject DLJ's argument (Br. 48-49) that the Repurchase Protocol prohibits, expressly or impliedly, sampling. Every New York state court that has considered the use of sampling in RMBS putback cases has approved it—including in cases involving repurchase protocols identical to those in the PSAs. *See supra*, at 21 n.11. And for good reason: nothing in the Repurchase Protocol specifies the means of proof available to the parties when litigating breaches of R&Ws. *E.g.*, A638.

Accordingly, DLJ's repeated recitation (*e.g.*, Br. 1, 2, 3, 5, 25, 47, 51) of the phrases "loan-by-loan" and "loan-specific" provides no basis for rejecting sampling or preventing the extrapolated percentage of specific breaching loans and associated damages from relating back to the original complaints. As a textual matter, these words do not appear *anywhere* in the PSAs; indeed, the PSAs are *silent* on the evidence that is admissible to prove DLJ's contractual breach. *See, e.g.*, *MSST 2007-1*, 289 F. Supp. 3d at 505. Instead, DLJ seeks to draw inferences from the Repurchase Protocol's use of words like "such," "the," or "a" in conjunction with the term "Mortgage Loan." But that again "reads far too much into the fact that the Repurchase Protocol contains certain singular phrases." *Id.* at 507.[26] Having failed to negotiate for and include language requiring "loan-specific" or "loan-by-loan" proof, or to preclude the use of standard evidentiary and case-management tools like sampling to inoculate itself from large-scale liability and damages, DLJ cannot now ask this Court to re-write the Repurchase Protocol to achieve its desired result. *See Vt. Teddy Bear*, 1 N.Y.3d at 475.

[26] DLJ misreads the First Department's decision in *Ambac* when it suggests (Br. 55-56) that the court approved sampling only by adding or excising terms from the repurchase protocol. The court's use of the phrase "despite the language of the repurchase protocol" reflects its *rejection* of the defendant's textual arguments, not a revision of the parties' agreements. *Ambac*, 179 A.D.3d at 521.

The unspoken premises of DLJ's argument are that sampling cannot supply loan-specific proof and that the breaching loans identified through sampling thus do not relate back to the original complaints. Those premises are false. Sampling is simply one means by which to prove liability on a loan-by-loan basis. *See MSST 2007-1*, 289 F. Supp. 3d at 504-05 ("statistical sampling is consistent with [plaintiff's] obligations under the Repurchase Protocol" … because "it is a well-established and scientifically sound method of inferring (to varying degrees of certainty) how many individual loans in the pool contain material breaches") (emphasis in original).[27] "The very purpose of creating a representative sample of sufficient size is so that, despite the unique characteristics of the individual members populating the underlying pool, the sample is nonetheless reflective of the proportion of the individual members in the entire pool exhibiting any given characteristic." *Assured*, 920 F. Supp. 2d at 512.[28]

Thus, though DLJ asserts (Br. 51) that the Trustee's proof presents "only a statistical, poolwide view of the out-of-sample loans," DLJ ignores that the Trustee's

[27] DLJ wrongly suggests (Br. 57) that the court allowed sampling in *MSST 2007-1* because it concluded that the repurchase protocol was voidable due to allegations of gross negligence. These were separate rulings. *See* 289 F. Supp. 3d at 498-501; *id* at 504-05.

[28] Contrary to DLJ's suggestion (Br. 58), the court in *Assured* did not overlook that the repurchase protocol requires proof that breaching loans have a material and adverse effect. *See* 920 F. Supp. 2d at 512.

expert's methodology provides a loan-specific quantification and does not purport to award poolwide damages. *See supra*, at 12-13.[29] Nor is DLJ's blanket objection to sampling grounded in any concern that the expert's methodology misrepresents the percentage of materially breaching loans, or that his extrapolation of damages figures causes them to be inaccurate or inflated.

DLJ misplaces reliance (Br. 51-53) on federal and out-of-state cases that reject sampling for claims *by certificateholders against trustees*. Those cases are inapposite because RMBS trustees, unlike originators and sponsors, generally are contractually exempt from investigating the accuracy of warranties. *See, e.g.*, *Commerce Bank v. Bank of N.Y. Mellon*, 141 A.D.3d 413, 415-16 (1st Dep't 2016) ("the trustee of an RMBS … trust does not have a duty to 'nose to the source'" of misconduct); *Royal Park Investments SA/NV v. U.S. Bank N.A.*, 2018 WL 3350323, *3 (S.D.N.Y. July 8, 2018) ("[t]he distinction is important" because "the contractual language governing the trustee is couched in terms of loan-by-loan evaluation and remedy; and, unlike a trustee, an RMBS issuer or sponsor securitizes the loans, conducts due diligence on the loans (or at least is in a position to do so), and makes

[29] DLJ incorrectly asserts (Br. 54-55) that sampling is tantamount to seeking general contract damages. The Trustee's expert uses the loan-specific Repurchase Price to determine the total damages owed in lieu of repurchase for liquidated loans that are materially breaching. RA74-75.

representations and warranties about the loans"). A Trustee's obligations—unlike a sponsor's—simply cannot be triggered without loan-specific information.

Thus, in contrast to the Trustee's claims here that DLJ breached its underlying R&Ws (*see* A126-28), certificateholders' claims against trustees allege that trustees *failed to notify* their counterparties that they had become aware of potential R&W breaches by those counterparties.[30] For those failure-to-notify claims, sampling is not appropriate because it does not identify specific breaching loans in the larger out-of-sample population, does not identify when the trustee learned of the particular breaches, and thus is not probative of whether a trustee breached the governing agreements by failing to notify the counterparties as to particular loans. But that is far different than claims against sponsors, where the mere presence of materially breaching loans in a trust is proof of breach.[31]

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[30] *See Royal Park Investments SA/NV v. Deutsche Bank Nat'l Trust Co*., 2018 WL 4682220, *12 (S.D.N.Y. Sept. 28, 2018); *BlackRock Balanced Cap. Portfolio (FI) v. Deutsche Bank Nat'l Trust Co.*, 2018 WL 3120971, *1-2 (S.D.N.Y. May 17, 2018); *BlackRock Allocation Target Shares v. Wells Fargo Bank, N.A.*, 2017 WL 953550, *6 (S.D.N.Y. Mar. 10, 2017); *W. & S. Life Ins. Co. v. Bank of N.Y. Mellon*, 2017 WL 3392855, *10 (Ohio Ct. Com. Pl. Aug 4, 2017), *aff'd*, 129 N.E. 1085 (Ohio Ct. App. Feb. 8, 2019).

[31] DLJ improperly disregards these distinctions in noting (Br. 53-54) that U.S. Bank opposed the use of sampling when it was sued for breach of the repurchase protocol in *Royal Park*. These distinctions were the very basis for U.S. Bank's position. *See* C-81; C-61. DLJ also ignores that trustees have a very limited role and thus lack the extensive knowledge of breaching loans or access to the loan files that originators and sponsors (like DLJ) have, due to their central role in the securitization process—

2. Sampling Is Particularly Appropriate To Prove Liability And Damages For Liquidated Loans

DLJ's arguments against sampling are especially unpersuasive in the context of this case, where the vast majority of the loans (including the *entire* population of loans to which sampling results are being extrapolated) have been liquidated and cannot be repurchased. In this circumstance, as DLJ concedes (Br. 70), the Trustee may recover an equitable damages remedy, as measured by the Repurchase Price formula, *see Nomura*, 133 A.D.3d at 105-06; *supra*, at 5-6,[32] and the question for decision at trial will be the amount of damages to which the Trustee is entitled.

Sampling satisfies any applicable proof requirements in this circumstance because damages in the form of the "Repurchase Price" of materially nonconforming loans are "completely fungible." *MSST 2007-1*, 289 F. Supp. 3d at 502; *see id.* at n.8. Although sampling does not pinpoint which specific loans in the larger pool had material and adverse breaches, *see Royal Park*, 2018 WL 4682220, at *12, sampling can reach the same result as a loan-by-loan review and is sufficient for the

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a distinction that the most recent federal case involving claims by certificateholders against trustees noted in *rejecting* the same assertion as made by DLJ that the PSAs' sole remedy clause "precludes the use of sampling, particularly to establish damages." *Royal Park*, 2019 WL 6117533, at *3; *see id*. at *5-6. DLJ conspicuously fails to cite that decision.

[32] Because the Trustee can obtain only damages for these liquidated loans, the Repurchase Protocol is relevant post-suit only to determine the amount of those damages. *MSST 2007-1*, 289 F. Supp. 3d at 502-03; *Wells Fargo Bank, N.A. v. Bank of Am., N.A.*, 2013 WL 1285289, *11 (S.D.N.Y. Mar. 28, 2013).

fact-finder to award damages for liquidated loans, *see Royal Park*, 2019 WL 6117533, at *5. DLJ identifies no adjudicative purpose or benefit for prohibiting sampling as to liquidated loans.[33]

3. A Prohibition On Sampling Would Be Impracticable

Finally, DLJ fails to explain why the parties could have sensibly intended to preclude the use of sampling and instead require the Herculean task of loan-by-loan review and adjudication for systemic breaches affecting hundreds of thousands of loans in this and other cases. As the motion court recognized, the only alternative to sampling here would be to reopen discovery so that the Trustee could re-underwrite loans that were not in the sample. *E.g.*, RA293. The end result would be the same. But the minority federal cases that eschewed a trustee's use of sampling for claims against a sponsor or originator show that such a process is impracticable.

For example, in *MARM*, 2015 WL 764665 (cited in Br. 48, 51), because the federal court forbade sampling as a method of proof, the parties were required to undertake a staggering loan-by-loan underwriting of approximately 12,000 loans and

[33] This distinction also renders inapposite the outlier federal decisions against sponsors (Br. 53) that rejected sampling. *E.g.*, *Homeward Residential, Inc. v. Sand Canyon Corp.*, 2017 WL 5256760, *7-9 (S.D.N.Y. Nov. 13, 2017); *MASTR Adjustable Rate Mortg. Trust 2006-OA2 v. UBS Real Estate Secs. Inc.*, 2015 WL 764665, *10-11 (S.D.N.Y. Jan. 9, 2015) ("*MARM*"). DLJ's other federal authority, *Retirement Board of Policemen's Annuity & Benefit Fund v. Bank of N.Y. Mellon*, 775 F.3d 154 (2d Cir. 2014), is inapposite because it concerned the test for class standing.

to hire a special master who spent many months and countless hours reviewing one loan after another, at a cost of millions of dollars. *See MSST 2007-1*, 289 F. Supp. 3d at 502 (describing *MARM* approach as "demonstrably impracticable," with "the final cost, both in terms of time and resources expended, … extraordinary"); *Law Debenture Tr. Co. of N.Y. v. WMC Mortg., LLC*, 2017 WL 3401254, *13 n.6 (D. Conn. Aug. 8, 2017) (noting same); *cf. Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. __, 136 S. Ct. 1036, 1046 (2016) ("In many cases, a representative sample is 'the only practicable means to collect and present relevant data' establishing a defendant's liability.").

This expensive, time-consuming, and wasteful process would be magnified here were this Court to preclude sampling. *MARM* involved 17,000 loans. *See* 2015 WL 764665, at *1. This case alone involves as many as 42,000 loans—more than twice as many as *MARM*—and the use of special masters is not readily available in the New York court system. DLJ's proposed interpretation of the PSAs thus would result in this eight-year-old dispute taking not months, but years, longer to resolve, at a cost of tens of millions of dollars to achieve a result that would be no different than that which will result from a proper sampling analysis.

Nor would this impracticable result be limited to this case. As noted, there are numerous other RMBS putback cases against originators or sponsors that have proceeded in New York courts for years under orders authorizing sampling.

Interpreting the PSAs in this case to prohibit sampling would upend these cases too, and create a logjam of deeply time- and resource-consuming inefficiencies. The process would impose an impossible strain not just on the parties but on the court system.[34]

III. THE FIRST DEPARTMENT CORRECTLY INTERPRETED THE TERM "ACCRUED INTEREST" TO APPLY BOTH TO LIQUIDATED AND NON-LIQUIDATED LOANS

The motion court (A43-45) and the First Department (A10-11) faithfully interpreted the term "accrued interest" to apply to the calculation of the Repurchase Price owed to the Trustee irrespective of whether a given loan has liquidated. For any materially breaching loan, the PSAs provide that DLJ shall pay the "Repurchase Price," which is defined as "an amount equal to the sum of (i) 100% of the unpaid principal balance of the Mortgage Loan on the date of such purchase, *[and] (ii) accrued 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." A615 (emphasis added). This formula provides no exception for liquidated loans, and thus requires

[34] DLJ's new due-process argument (Br. 60) is frivolous. The Trustee's expert uses Monte Carlo simulations, a widely-accepted method of proof that is routinely admitted in a wide variety of cases. *See supra*, at 12-13; *Lyondell Chem. Co. v. Occidental Chem. Co.*, 608 F.3d 284, 293 (5th Cir. 2010) (affirming admission of Monte Carlo simulations, which "certainly assisted the district court in its decisionmaking"). Though DLJ quotes snippets from several due process cases, none of them involves circumstances remotely analogous to this case.

DLJ to pay interest "at the applicable Mortgage Rate"—on the "unpaid principal balance" of *all* breaching loans—until "the Repurchase Price is to be distributed to Certificateholders." *Id*.

DLJ objects to the First Department's plain and sensible interpretation, contending that (Br. 69) "accrued interest" must be read to mean "interest that *actually* 'accrued'" on the loan itself, and that (Br. 66) this is impossible for liquidated loans because "there is nothing left upon which interest can accumulate." (Emphasis added.) The Repurchase Protocol, however, provides that interest will accrue on "the *unpaid principal balance* of the Mortgage Loan"—not the loan itself. A615 (emphasis added). It is therefore irrelevant whether a loan ceases to exist upon liquidation. Although a materially breaching loan may liquidate and thus cease to exist, the unpaid principal balance it leaves behind represents a real and ongoing loss for investors. A311 (2006-1 ProSupp, outlining principal payments investors can expect to receive).

DLJ's attempt to rewrite the "Repurchase Price" formula is also foreclosed by other provisions in the relevant trust documents. Where the parties agreed that interest or principal payments must be calculated by reference to what "actually" accrued or was "actually" received on a loan, they said so. The ProSupps, for example, contain no fewer than three references to interest or principal that was "actually collected," "actually received," or "actually achieved" when determining

the parties' obligations to make or receive payments.[35] Similarly, the PSAs' definition of "Prepayment Interest Shortfall" distinguishes between "one full month's interest at the applicable Mortgage Rate" (*i.e.*, interest calculated by a formula) and "the amount of interest *actually* received that accrued during the month." (*i.e.*, interest calculated by what was actually received). A603-04 (emphasis added). The absence of any such language in the Repurchase Price formula conclusively establishes the parties' intent that DLJ be liable for interest that continues to accrue on a breaching loan's unpaid principal balance for purposes of calculating the Repurchase Price, irrespective of whether the underlying loan has liquidated and "actually" received such interest. *See, e.g.*, *Quadrant Structured Prods. Co. v. Vertin*, 23 N.Y.3d 549, 560 (2014) ("[I]f parties to a contract omit terms—particularly, terms that are readily found in other, similar contracts—the inescapable conclusion is that the parties intended the omission. The maxim *expressio unius est exclusio alterius*, as used in the interpretation of contracts, supports precisely this conclusion.").

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[35] *See* A336 (2006-1 ProSupp, stating that servicer will take its aggregate servicing fee "from interest *actually* collected on each mortgage loan") (emphasis added); A311 (2006-1 ProSupp, stating that amount of principal distributed to certificateholders will be determined by "funds *actually* received or advanced") (emphasis added); A993 (ISDA credit support annex to 2006-1 ProSupp, referring to "the interest rate" as "the annualized rate of return *actually* achieved on Posted Collateral") (emphasis added).

Likewise, where DLJ intended that interest would *not* accrue upon the occurrence of a certain event, the relevant trust documents say so. *See, e.g.*, A486 (2006-1 Prospectus, providing that if PSA is terminated and trust assets are sold, "the certificates *will no longer accrue interest*, and the only obligation of the trust fund thereafter will be to pay … accrued interest that was available … on the date of termination") (emphasis added). If the parties had intended that the unpaid principal balance component of the Repurchase Price would cease accruing interest before the date of repurchase for liquidated loans, the Repurchase Price formula would have used such language.

Finally, DLJ wrongly relies (Br. 67-68) on portions of the ProSupps advising investors that loans "may be liquidated, and liquidated [] loans will no longer be outstanding and generating interest." A314. DLJ disregards that the Repurchase Price formula applies only to loans where DLJ has materially breached its R&Ws. A615. Nowhere do the Prospectus Supplements warn certificateholders that they might receive less interest because *DLJ materially breached its R&Ws and thereby increased a loan's risk of liquidation*. *See* A317 (2006-1 ProSupp section entitled "Risk Factors," which "describe … the material risk factors related to [investors'] certificates," but nowhere reference DLJ's potential breach of its R&Ws). Allowing DLJ to pay investors less interest than it promised for breaching liquidated loans undoubtedly "would create a perverse incentive for a sponsor to fill the trust with

junk mortgages that would expeditiously default so that they could be released, charged off, or liquidated before a repurchase claim is made." *Nomura*, 133 A.D.3d at 106 (equitable damages available where specific performance is impossible) (internal quotation marks and alterations omitted).[36]

CONCLUSION

The First Department's Decision and Order should be affirmed, and the certified question should be answered in the affirmative.

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[36] Contrary to DLJ's suggestion (Br. 71), the First Department's interpretation creates no "risk that RMBS plaintiffs will run out the clock on litigation ... simply to rack up 'accrued' interest.'" The amount of "accrued interest" the Trustee is due under the "Repurchase Price" formula is triggered by the date of notice or discovery (which in this case, were pre-suit) (*see* A615); the length of litigation is irrelevant.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals, I hereby certify that the total word count for all printed text in the body of the brief is 13,925 words, excluding parts identified as common requirements by Rule 500.13(c)(3).

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