To be Argued by:
DANIEL A. RUBENS
(Time Requested: 15 Minutes)

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New York Supreme Court
Appellate Division – First Department

Appellate Case No.: 2019-219

U.S. BANK NATIONAL ASSOCIATION, solely in its capacity as Trustee of the HOME EQUITY ASSET TRUST 2007-1 (HEAT 2007-1),

Plaintiff-Respondent,

– against –

DLJ MORTGAGE CAPITAL, INC.,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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Defendant-Appellant DLJ Mortgage Capital, Inc. ("DLJ") respectfully submits this brief in support of its appeal from the trial court's December 26, 2018 Decision and Order (the "Decision") denying in part DLJ's motion for partial summary judgment.

STATEMENT OF RELATED CASES

Several of the issues presented in this appeal overlap with those raised in (1) DLJ's pending appeal in *Home Equity Mortgage Trust Series 2006-1 et al. v. DLJ Mortgage Capital, Inc. et al.*, Appeal Nos. 2019-619 & 2019-620 (1st Dep't) ("*HEMT 2006-1*"), perfected for the June 2019 Term, and (2) the pending appeal of Countrywide Securities Corp. and Countrywide Financial Corp. in *Ambac Assurance Corp. et al. v. Countrywide Home Loans, Inc. et al.*, Appeal No. 2019-26 (1st Dep't), perfected for the May 2019 Term. In particular, (i) all three appeals raise issues about how the relation-back doctrine applies in residential mortgage backed securities ("RMBS") repurchase actions where plaintiffs timely comply with contractual remedial requirements, but only for a subset of the mortgage loans upon which they seek liability and damages; and (ii) this appeal and the *HEMT 2006-1* appeal address the accrual of interest on liquidated loans under RMBS contractual damages provisions. DLJ respectfully submits that the Court's consideration of these issues would be aided by calendaring argument in all three appeals for the same date.

PRELIMINARY STATEMENT

Plaintiff, the trustee of an RMBS trust containing over 5,100 loans, alleges that DLJ breached representations and warranties relating to those loans set forth in the parties' Pooling and Servicing Agreement ("PSA"). In the proceedings below, Plaintiff intends to present evidence at trial suggesting that 783 loans breached those representations and warranties. But Plaintiff never provided timely pre-suit notice of a breach, as required under the PSA and New York law, for 480 of those loans. Instead, the first "notice" DLJ received as to those 480 loans came in a 2016 expert report, served *nine* years after the representations were made. DLJ moved for partial summary judgment as to claims for breaches in loans Plaintiff failed to identify in a timely breach notice, and to preclude Plaintiff from pursuing damages that exceeded those allowed by the formula set forth in the PSA. In denying DLJ's motion, the trial court disregarded clear contractual requirements for proving liability and damages. This Court should reverse those aspects of the summary judgment ruling and enforce the PSA as written.

First, the trial court erred by denying DLJ's motion for summary judgment on the 480 loans for which Plaintiff did not provide a timely breach notice. The trial court was wrong to treat boilerplate language demanding repurchase of "all loans that breached representations and warranties" as satisfying the PSA's requirement of loan-specific notice. Under that agreement, the "sole remedy" for

any breach of a loan-related representation and warranty is set forth in a contractual repurchase protocol. The repurchase protocol requires the trustee to provide notice of the breach and an opportunity to cure or repurchase the particular loan in question before a suit can be maintained. A generic breach notice as to all loans fails to satisfy that requirement for any loan not specifically listed.

The court compounded its error by applying the relation-back doctrine to excuse Plaintiff from the PSA's requirements. The relation-back doctrine is not available to resuscitate these untimely claims; each individual loan reflects a separate and independent transaction as to which pre-suit notice is required. The trial court's erroneous contrary holding misreads this Court's decision in *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital Inc.*, 133 A.D.3d 96 (1st Dep't 2015), and creates a roadmap for RMBS plaintiffs to nullify *ACE Securities Corp. v. DB Structured Products, Inc.*, 25 N.Y.3d 581 (2015), which held that timely compliance with the repurchase protocol is a precondition to suit.

Second, the trial court erred by allowing Plaintiff to seek damages for all breaching loans based on a uniform "repurchase date" of March 5, 2012. It is undisputed that the repurchase date for damages purposes is 90 days after DLJ received a repurchase demand for a specific loan. There is no factual or legal justification for treating Plaintiff's notice of alleged breaches as to only 304 loans as effective notice of breach for all 5,100 loans in the Trust.

Third, the trial court incorrectly ruled that Plaintiff is entitled to recover interest on breaching loans even for periods after a loan has been liquidated. The PSA's explicit damages provisions allow for recovery of only "accrued and unpaid interest" on breaching loans; when a loan has been liquidated, interest no longer accrues. The Court should hold that the contractually defined repurchase price cannot include interest after a breaching loan is liquidated.

STATEMENT OF QUESTIONS PRESENTED

Question 1: Whether Plaintiff may assert a repurchase claim under an RMBS PSA for individual loans as to which Plaintiff did not provide notice of an alleged breach of a representation or warranty and an opportunity for the seller to cure the breach in those specific loans prior to suit or prior to six years after the representation was made. The trial court permitted Plaintiff to assert such claims by holding that a boilerplate reference to unspecified breaching loans satisfied the PSA's notice requirement and, in the alternative, that untimely noticed breaches related back to Plaintiff's timely noticed breaches in connection with entirely distinct loans.

Question 2: Whether Plaintiff is entitled to calculate damages with reference to a single repurchase date for every alleged nonconforming loan based on a conclusory repurchase demand for "all" breaching loans, regardless of when Plaintiff specifically identified a loan in a breach notice. The trial court held that

the repurchase price for every allegedly breaching loan could be calculated based on the date that the Plaintiff demanded "all" nonconforming loans be repurchased.

Question 3: Whether a contractual provision providing for the payment of "accrued" interest allows Plaintiff to recover as damages interest amounts that never actually accrued on the relevant mortgage loans because those loans had been liquidated. The trial court allowed for recovery of such interest.

BACKGROUND

I. The Securitization At Issue

This case arises from an RMBS trust known as the Home Equity Asset Trust 2007-1 ("HEAT 07-1" or the "Trust"), which closed on February 1, 2007. A139. DLJ sponsored the Trust and originated or acquired approximately 5,153 residential mortgage loans in the Trust. A79. These mortgage loans represent the collateral for certificates issued by the Trust and sold to investors (the "certificateholders"). A139. The certificateholders receive payments from the Trust based on loan payments made on the underlying mortgages.

As disclosed in the transaction's offering documents, the Trust loans had features that created a high risk of default. *See* A152-156 (detailing risk factors). Over a third had been underwritten with reduced documentation, meaning that the borrower's income or assets (or both) were not verified at origination. A163, 168. Most of the loans had a combined loan-to-value ratio ("CLTV") of at least 90%,

meaning the borrowers had very little equity and were particularly vulnerable to housing price declines. A814. And most borrowers had low credit scores, with weighted averages of 630 and 640, respectively, for the two groups of loans in the Trust. A162, 167. Plaintiff's underwriting expert, Robert Hunter, testified that these characteristics presented a risk of loss "exponential[ly]" greater than that associated with conventional loans. A951-952.

The Trust was created and governed by a Pooling and Servicing Agreement entered into by, *inter alia*, DLJ, as Seller, and U.S. Bank, as Trustee. The PSA includes a schedule setting forth representations and warranties about the mortgage loans underlying the Trust. For purposes of this appeal, the key provision of the PSA is the repurchase protocol, set forth in Section 2.03 of the PSA, which serves as the "sole remedy" for any breach of a loan-related representation or warranty. A470-472 (§ 2.03(d)).

The repurchase protocol is written in loan-specific terms and requires proof of three elements for remedying a claimed nonconforming loan.[1] First, there must

[1] The repurchase protocol provides as follows:

> Upon discovery by any of the parties hereto of a breach of a representation or warranty made pursuant to Section 2.03(b) that materially and adversely affects the interests of the Certificateholders in any Mortgage Loan, the party discovering such breach shall give prompt notice thereof to the other parties. The Seller hereby covenants that within 90 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(b) which materially and adversely affects the value of the related Mortgage Loan or the interests of the Certificateholders, it shall cure such breach in all material respects, and, if such

be a material breach of a representation or warranty relating to the identified nonconforming loan. A470. Second, that breach must "materially and adversely affect[] the value of the related Mortgage Loan or the interests of the Certificateholders." *Id.* Third, DLJ must be notified of or independently discover "such breach." *Id.* DLJ then has 90 days to "cure such breach in all material respects." *Id.*

The repurchase protocol further provides that if, after notice or discovery, DLJ cannot cure a breach that has the requisite material and adverse effect, DLJ shall "repurchase the affected Mortgage Loan or Mortgage Loans from the Trustee" at a contractually defined "Repurchase Price." *Id.* That price includes, in relevant part, the sum of "(i) 100% of the unpaid principal balance of the Mortgage Loan on the date of such purchase" and "(ii) accrued and unpaid interest thereon at the applicable Mortgage Rate." A450.[2] A breach can be cured or repurchased

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> breach is not so cured, shall, (i) if such 90-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 … or (ii) repurchase the affected Mortgage Loan from the Trustee at the Repurchase Price in the manner … repurchase the affected Mortgage Loan or Mortgage Loans from the Trustee at the Repurchase Price in the manner set forth below ….

A470.

[2] The full definition of Repurchase Price is as follows:

> Repurchase Price: With respect to any Mortgage Loan required to be purchased by the Seller pursuant to this Agreement … an amount equal to the sum of (i) 100% of the unpaid principal balance of the Mortgage Loan on the date of such purchase, (ii) accrued and unpaid interest thereon at the applicable Mortgage Rate (reduced by the Servicing Fee Rate if the purchase of the Mortgage is also the Servicer thereof) from

only as to a specific loan that has been identified in a timely manner, as required by the repurchase protocol.

II. Plaintiff Provides Timely Breach Notices As To Only 1,204 Specific Loans

Plaintiff submitted only two timely pre-suit breach notices, which identified just a fraction of the Trust loans as allegedly breaching. Plaintiff's December 6, 2011 letter stated that a certificateholder, the Federal Housing Finance Agency ("FHFA"), had requested that DLJ repurchase 304 specified loans in addition to "any others that did not comply with the representations and warranties." A732. While the FHFA demand letters, which Plaintiff forwarded to DLJ, did not in fact say that, *see* A734-735, 739-740, Plaintiff's December 2011 letter "demand[ed] that DLJ repurchase all loans that breached representations and warranties, including the 112 and 192 of the loans that did not comply with the representation and warranty that the loans were underwritten in accordance with the underwriting guidelines," A732.

> 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 and (iii) in the case of a Mortgage Loan purchased by the Seller … (a) any unreimbursed Servicing Advances … and (b) any costs or damages (including without limitation, late fees) actually incurred or paid by or on behalf of the Trust in connection with any breach of the representation and warranty set forth in Schedule III (xxi) and (xxvii) as the result of a violation of a predatory or abusive lending law applicable to such Mortgage Loan.

A450.

On March 30, 2012, Plaintiff forwarded a second letter demanding repurchase of an additional 900 loans identified in an attached schedule, but that letter did not include a demand to purchase any further loans beyond those identified in the letter. A745. DLJ agreed to repurchase 40 of the loans identified in Plaintiff's pre-suit letters, but otherwise disputed Plaintiff's breach allegations. A755, 758, 1227. No other repurchase demands were made, timely or otherwise.

III. The Trial Court Proceedings

A. The Motion to Dismiss

Plaintiff initiated this action by filing a summons and complaint on February 1, 2013, A50, which it thereafter amended twice. Plaintiff's operative complaint alleges breaches of the PSA's representations and warranties in mortgage loans in the Trust. A79-114. Specifically, Plaintiff alleged that, based on FHFA's review of the loan files, it had discovered breaches in the 1,204 loans identified in its breach letters. A82-83. Plaintiff sought damages under the repurchase protocol for these nonconforming loans, "as well as all other Mortgage Loans in the Trust as to which DLJ breached its [representations and warranties]." A83.

In August 2014, DLJ moved to dismiss the second amended complaint for failure to state a claim. In support of that motion, DLJ argued, *inter alia*, that the court should dismiss Plaintiff's claim for breach of loan-related representations and warranties for the 3,949 loans in the Trust for which Plaintiff did not send DLJ a

timely breach notice. The trial court (Bransten, J.) denied the motion. In rejecting DLJ's argument that the complaint should be dismissed as to loans not identified in Plaintiff's pre-suit breach letters, the court held:

> The Trustee's December 6, 2011 breach letter clearly provided notice to DLJ of its obligation to repurchase "all loans that breached representations and warranties." The letter cited to two batches of 112 and 192 loans for which the Federal Housing Finance Authority sought repurchase but noted that DLJ's obligation under Section 2.03 of the PSA went beyond these loans to include "any others that did not comply with the representations and warranties" made by DLJ in the PSA. While DLJ now seeks to impose a more stringent notice requirement upon the Trustee, this is beyond what the PSA language requires.

U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc, Index No. 650369/2013, 2015 WL 5915285, at *2 (Sup. Ct. N.Y. Cty. Oct. 8, 2015) (citations omitted).

B. Plaintiff Pursues Repurchase Claims as to Hundreds of Loans That It Failed to Identify in Timely Breach Notices

As the case progressed, Plaintiff made clear that it would seek to prove liability and damages based on hundreds of loans not identified in the pre-suit notices. On December 1, 2015, Plaintiff informed DLJ that it would pursue repurchase claims as to, at most, 1,059 specific loans. A760, 1227. Of the loans DLJ identified, 622 were not listed in Plaintiff's 2011 and 2012 repurchase demand letters. A136, 1197-1209, 1228. In 2016, Plaintiff's underwriting expert, Robert Hunter, ultimately identified breaches in 783 loans out of the 1,059 he reviewed. A869, 901-902, 1228.

But out of those 783 loans, only 303 were specifically identified as breaching in Plaintiff's December 2011 and March 2012 breach letters. A136, 1210-19, 1228. In other words, out of the 1,204 Plaintiff initially alleged as breaching in its December 2011 and March 2012 breach letters, Plaintiff dropped its claims with respect to 901 of those loans. At the same time, it *added* claims for 480 loans for which DLJ had not received prior timely notice.

C. Plaintiff's Damages Expert Includes Interest on Liquidated Loans and Uses the Same Repurchase Date For Every Allegedly Breaching Loan

As noted, the PSA defines a Repurchase Price for any loan that DLJ is obligated to repurchase, and that price includes the sum of "(i) 100% of the unpaid principal balance of the Mortgage Loan on the date of such purchase" and "(ii) accrued and unpaid interest thereon at the applicable Mortgage Rate." Plaintiff's damages expert, Dr. Karl Snow, included interest on allegedly breaching loans for periods where the loans had been charged off and were not actually accruing interest. A775. Dr. Snow's damages calculations used March 5, 2012, as the repurchase date for all breaching loans. *Id.*

D. The Court Denies DLJ's Motion for Summary Judgment

After the close of discovery, the parties filed cross-motions for partial summary judgment. As relevant to this appeal, the trial court denied DLJ's motion in the following respects:

Notice and relation back: DLJ moved for summary judgment on the 480 loans for which Plaintiff did not provide a timely breach notice. The trial court denied the motion. Relying on its prior opinion denying DLJ's motion to dismiss, the court first held that Plaintiff's December 2011 letter "clearly provided notice to DLJ of its obligation to repurchase all loans that breach representations and warranties." A33 (quoting *U.S. Bank*, 2015 WL 5915285, at *2). In the alternative, citing this Court's decision in *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 133 A.D.3d 96 (1st Dep't 2015), *aff'd as modified*, 30 N.Y.3d 572 (2017), the court held that because the December 2011 letter identified some breaching loans and made a repurchase demand for all breaching loans, "the later-identified claims relate back to the initial filing." A34-35.

Repurchase Date: DLJ sought a summary judgment ruling that the proper repurchase date is 90 days after DLJ first received notice of a material breach of a specific loan-related representation or warranty. Because the trial court viewed Plaintiff's December 2011 letter as providing notice to DLJ of all breaching loans—even though it identified only 304 loans—the court held that the applicable repurchase date for *every* breaching loan in the Trust "can reasonably be set as March 5, 2012." A37.

Interest on liquidated loans: DLJ sought a summary judgment ruling that the calculation of the Repurchase Price for any breaching loan does not include

interest for the period after the loan was liquidated. The court denied the request and held that "interest should continue to accrue on the loans despite their liquidation." *Id.*

DLJ timely appealed from these aspects of the trial court's summary judgment order. A2-3.

ARGUMENT

The trial court erred in denying DLJ's motion for summary judgment on three key issues. First, it erred in holding Plaintiff can try its breach claims with respect to the 480 loans for which Plaintiff failed to provide timely notice and an opportunity to cure. § I. Second, the court erred in holding that the date by which Plaintiff's damages will be calculated for *every* breaching loan is 90 days after Plaintiff sent its first breach letter, regardless of when Plaintiff provided actual notice of a breach as to a loan for which it can prove its entitlement to damages. § II. Third, the court erred in holding that Plaintiff can recover interest for loans that purportedly "accrued" after those loans were liquidated and therefore no longer existed. § III.

I. Plaintiff Cannot Recover On Loans Where It Failed To Provide Timely Notice Of A Breach.

The trial court erred in not granting DLJ summary judgment on Plaintiff's claims on 480 loans for which Plaintiff did not notify DLJ of any breaches prior to commencing this suit.

A. The Repurchase Protocol Provides a Loan-Specific Remedy That Is Triggered by Timely, Loan-Specific Breach Notices.

Plaintiff seeks to nullify the specific terms of the agreement it negotiated with DLJ. For hundreds of loans for which it claims damages, Plaintiff failed to comply with the contractual repurchase protocol's requirement of timely notice of a breach to DLJ, depriving DLJ of the opportunity to cure before the Trustee can file suit. Accordingly, absent proof at trial of DLJ's independent discovery of a breach, Plaintiff cannot recover damages for loans where no timely notice was given.

Under the repurchase protocol, DLJ is required to cure any material breach of a representation or warranty in an individual loan, or, if it cannot cure, to repurchase the defective loan. The right to cure or repurchase as to a loan is established only if three preconditions are met. First, there must be a material breach of a representation or warranty of a claimed nonconforming loan. Second, that breach must have "materially and adversely" affected the interests of the certificateholders in that loan. Third, DLJ must have discovered or received written notice of that material breach in that loan. DLJ then has 90 days to "cure such breach in all material respects." *Id.* If "such breach is not so cured," then DLJ "shall … substitute [or] repurchase the affected Mortgage Loan from the Trustee." *Id.* Under the repurchase protocol, DLJ has no obligation to cure or repurchase any loan as to which notice was not timely provided.

The repurchase protocol thus unambiguously requires that, to be contractually valid as to an individual loan, a notice of breach specifically identify that loan. Without notice of a specific breach in a particular loan, DLJ cannot cure "such breach," remove "such Mortgage Loan" from the Trust, or repurchase "the affected Mortgage Loan." *Id.* Therefore, Plaintiff must prove either loan-by-loan notice or discovery of a breach in the specific loans it alleges are nonconforming. *See Ret. Bd. of the Policemen's Annuity & Benefit Fund of Chi. v. Bank of N.Y. Mellon*, 775 F.3d 154, 162 (2d Cir. 2014) ("[A]lleged misconduct must be proved loan-by-loan and trust-by-trust."), *cert. denied* 136 S. Ct. 796 (2016).

The Trustee here, U.S. Bank, has itself urged courts to conclude that the plain language of similar repurchase provisions requires loan-by-loan notice or discovery of a material breach of a representation or warranty. In defending against suits alleging that U.S. Bank failed to timely enforce repurchase obligations under materially similar trust agreements, U.S. Bank argued that "the parties intended that any 'discovery' of breaches of [representations and warranties] could only be on a loan-by-loan level because *such information is essential to 'enforce' the [sellers'] obligations to cure, repurchase, or substitute a breaching loan*." Letter of U.S. Bank at 3, *Royal Park Investments SA/NV v. U.S. Bank Nat'l Ass'n*, No. 14-CV-2590 (S.D.N.Y. July 28, 2014) (Dkt. No. 16) (emphasis added), *available at* Appendix 2316, *HEMT 2006-1*, Appeal No. 2019-619; *see also*, *e.g.*,

Letter of U.S. Bank at 2, *Commerzbank AG v. U.S. Bank Nat'l Ass'n*, No. 16-CV-4569 (S.D.N.Y. Aug. 14, 2017) (Dkt. No. 131) (arguing that trustees must have "actual knowledge" of specific breaches because "the contracts contemplate the trustee undertak[ing] defined, concrete measures … with respect to a specific defect, in a specific loan, and [a] trustee cannot [do so] without knowing the specific … breach" (alterations in original) (internal quotation marks omitted)), *available at* Appendix 1905, *HEMT 2006-1*, Appeal No. 2019-619. That is, U.S. Bank argued that its own discovery of any breaches was required to occur at a loan-specific level because it needed to provide that same information to a seller to satisfy the enforcement mechanism under the repurchase protocol. Indeed, U.S. Bank has cited language identical to the repurchase protocol in this case to advocate for loan-specific notice, arguing that "when a trustee seeks a repurchase" from a seller, it "bear[s] th[e] burden [of proof] with respect to *each* alleged breach for *each* loan because the PSAs provide[] for … an *individualized, loan-specific obligation* to cure, replace or repurchase a breached loan." Defs.' Joint Mem. of Law in Support of Mot. to Dismiss at 10, *IKB Int'l S.A. v. U.S. Bank Nat'l Ass'n et al.*, Index No. 654442/2015 (Sup. Ct. N.Y. Cty. Oct. 5, 2016) (NYSECF No. 44) (emphasis and alterations in original) (highlighting that the duties in a repurchase protocol are "*loan-specific*" in part because the seller is required to "'cure *such breach*' or 'repurchase *the affected Mortgage Loan* or Mortgage Loans'"

(emphasis in original)).[3]

There is no shortcut to this contractual remedial protocol. A repurchase demand is a demand for DLJ to repurchase specifically identified breaching loans, not entire swaths of loans contained within Trusts. *See, e.g.*, *MASTR Adjustable Rate Mortgs. Tr. 2006-OA2 v. UBS Real Estate Sec. Inc.*, No. 12-CV-7322 (PKC), 2015 WL 764665, at *11 (S.D.N.Y. Jan. 9, 2015) ("*MARM I*") ("[T]he repurchase remedy negotiated by the parties is loan specific … [and] is targeted to a specific loan, and not to a group or category of loans."); *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, Civ. No. 5140-CS, 2012 WL 3201139, at *18-19 (Del. Ch. Aug. 7, 2012). New York law has long recognized that it is imperative that a contractual remedial protocol bargained for between two sophisticated commercial parties be enforced according to its terms. *See, e.g.*, *Gen. Supply & Constr. Co. v. Goelet*, 241 N.Y. 28, 34 (1925) (holding termination of contract "without the required previous notice … in accordance with the terms

[3] *See also* U.S. Bank Mem. of Law in Support of Mot. to Dismiss at 16-17, *Blackrock Balanced Capital Portfolio (FI) v. U.S. Bank Nat'l Ass'n* ("*Blackrock Balanced*"), Index No. 652204/2015 (Sup. Ct. N.Y. Cty. Sept. 4, 2015) (NYSCEF No. 15) (citing a PSA provision "predicating response to representation and warranty breaches '[u]pon discovery or receipt of written notice of … the breach by the Seller of any representation, warranty or covenant … in respect of any Mortgage Loan'" as support for the proposition that trustee action is required only upon discovery or notice of a specific breach (alterations in original)); U.S. Bank Reply Mem. of Law in Support of Mot. to Dismiss at 6-7, *Blackrock Balanced* (Nov. 6, 2015) (NYSECF No. 97) ("[U]nder the express terms of the PSAs, a trustee can only putback a specific loan—it must first discover or receive written notice of breaches of specific representations and warranties that remain uncured after notice is sent to the seller, before it can putback the related loan.").

of the contract was wrongful").

Moreover, timely invocation and completion of the repurchase protocol's notice and cure procedures is a condition precedent to filing suit. *See ACE*, 25 N.Y.3d at 598-99 (notice is a "procedural prerequisite to suit"). An RMBS plaintiff like U.S. Bank here has "no right" to commence an action seeking the repurchase of a loan "unless and until" a sponsor like DLJ was either notified of the breaching loan or independently discovered a breach and the cure period under the relevant repurchase protocol has elapsed. *U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc.*, 147 A.D.3d 79, 87 (1st Dep't 2016).

Plaintiff commenced this action on February 1, 2013. But at the time it filed that suit, Plaintiff had sent breach notices with sufficient time to cure before the limitations period expired for only 1,204 loans. *See supra* at 8-9. Out of the 783 loans for which Plaintiff intends to prove repurchase damages at trial, only 303[4] of those loans were identified in timely breach notices. Plaintiff did not identify the remaining 480 loans as allegedly breaching until 2016, when those loans were included in the report of Plaintiff's underwriting expert, Mr. Hunter, over three *years* after the time to provide timely notice and an opportunity to cure had

[4] To avoid confusion, we note that Plaintiff identified *304* loans as allegedly nonconforming in its December 2011 breach letter; Plaintiff's expert, Mr. Payne, subsequently identified *303* loans as breaching from both the December 2011 and March 2012 breach letters.

expired. The "notice" provided in Mr. Hunter's report for these loans was therefore untimely under the repurchase protocol and under *ACE*.[5]

The trial court erred in holding that DLJ has received timely notice of every allegedly breaching loan in the Trust. Ignoring the repurchase protocol's requirement of loan-by-loan notice or discovery, the court held that Plaintiff's December 2011 letter, which in addition to identifying specific loans as breaching demanded repurchase of "all" nonconforming loans, provided DLJ with notice of purported breaches in every single nonconforming loan in the entire Trust—even though, except as to the specifically identified loans, the letter did nothing more than reiterate the requirements of the repurchase protocol. *See* A33-34. The court, relying on its earlier decision on DLJ's motion to dismiss, held that the December 2011 breach notice "clearly provided notice to DLJ of its obligation to repurchase all loans that breach representations and warranties." A34 (quoting *U.S. Bank*, 2015 WL 5915285, at *2).

That ruling is clearly inconsistent with the PSA's plain text, which provides that notice must be provided for "a breach" of a representation or warranty in "a loan," giving DLJ the opportunity to cure or repurchase "such breach" in "the

[5] The result is no different even considering Plaintiff's December 2015 communication, in which Plaintiff informed DLJ that it was pursuing claims as to only 1,059 selected loans. *See* A760. Even if that email had provided adequate notice to DLJ by identifying specific breaches in those loans, which it did not, that email was still *years* untimely under the repurchase protocol.

affected Mortgage Loan." A470. Moreover, the trial court ignored the Court of Appeals' decision in *Nomura*. There, the Court held that an RMBS plaintiff may not use assertions or evidence of "pervasive" breaches to escape the elements of proof under the repurchase protocol. *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 585 (2017). As the Court of Appeals explained, under the PSA, an RMBS plaintiff "is expressly limited to the more specific Sole Remedy Provision negotiated by the parties, however many defective loans there may be." *Id.* This Court has similarly held that satisfaction of a repurchase protocol like this one requires the plaintiff to provide timely notice "relating to specific loans." *Bank of N.Y. Mellon v. WMC Mortg., LLC*, 151 A.D.3d 72, 79 (1st Dep't 2017).

Indeed, to hold otherwise would read the notice provision out of the PSA. A plaintiff would need only provide a bare-bones notice demanding repurchase of every nonconforming loan in the trust, even if the plaintiff could identify only a single breaching loan in the initial notice. The RMBS sponsor, like DLJ here, would have no opportunity to cure the breach because it would have no idea which loans it was on notice to cure. *See, e.g.*, *Bank of N.Y. Mellon Tr. Co. v. Morgan Stanley Mortg. Capital, Inc.*, No. 11-CV-0505 (CM) (GWG), 2017 WL 737344, at *4-8 (S.D.N.Y. Feb. 10, 2017) ("A generic allegation that [a defendant] was aware of but failed to disclose unspecified but allegedly material [] conditions gives [the

defendant] no basis to determine (1) whether it had in fact breached its representation and warranty, or (2) if it had, what to do about it."). A plaintiff's mere assertion in a letter that it might find more breaches or that DLJ should perform its contractual obligations is not a substitute for what the repurchase protocol specifically requires: loan-by-loan notice. The trial court thus erred in holding that Plaintiff's timely December 2011 demand letter put DLJ on notice of every possible breach in the entirety of the HEAT 07-1 Trust.

B. The Relation-Back Doctrine Does Not Authorize Plaintiff to Proceed to Trial on Allegedly Breaching Loans It Failed to Identify in Timely Breach Notices.

In the alternative, the trial court held that Plaintiff's post-suit expert report, which identified breaches in an additional 480 loans, even if untimely, could relate back to Plaintiff's initial notices. A34-35. Here, too, the trial court erred. No procedural doctrine, including the relation-back doctrine codified at CPLR 203(f), can unwind the express terms of the repurchase protocol to save Plaintiff's untimely claims.

New York law allows additional claims to "relate back" to the filing of the complaint only if the untimely claims "arose out of [the] same conduct, transaction or occurrence." *Buran v. Coupal*, 87 N.Y.2d 173, 178 (1995). But the origination of each individual mortgage loan is a separate event—loans are obtained by different borrowers, on different homes in different parts of the country, from

different originators using different guidelines. Claims as to the breach of a representation regarding one loan therefore do not arise out of the same "conduct, transaction or occurrence" as another loan. Providing DLJ with notice that, for example, a loan originated by Originator A in Florida was missing a verification of rent does not put DLJ on notice that a borrower originated by Originator B in California may have misrepresented his debt obligations.

For this reason, in *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, the Delaware Chancery Court recognized that notice as to one group of loans did not open the door to later adding additional loans after the notice-and-cure period and statute of limitations expired. 2012 WL 3201139, at *18. The court properly reasoned that each alleged breach of a representation "as to each individual loan constitutes a separate transaction or occurrence, regardless of the fact that the loans might have been part of the same loan pool." *Id.* That "is because a separate independent violation of the same contract provision does not 'arise' out of the same conduct, transaction or occurrence as did the first, unrelated violation." *Id.* Breaches for unnoticed loans "are entirely separate instances of breach from those alleged" previously, "because they are based on different loans and distinct instances of misrepresentation." *Id.*

In analogous contexts, the New York Court of Appeals has found relation back inapplicable to "claims of injury [] based on different, not identical,

transactions," noting that the individual claims at issue were subject to "an individualized reimbursement rate" that varied from claim to claim. *Greater N.Y. Health Care Facilities Ass'n v. DeBuono*, 91 N.Y.2d 716, 721 (1998). In *DeBuono*, the plaintiffs, an association of nursing homes along with eight individual nursing homes, timely filed an Article 78 proceeding challenging the State's Medicaid rules and seeking an upward revision of their reimbursements for prior years. *Id.* at 718. Other, similarly affected nursing homes attempted to intervene in the plaintiffs' suit and relate their untimely claims back to the original complaint. *Id.* The Court of Appeals rejected the application of the relation-back doctrine, holding that even though the intervenors' claims were based on the same state Medicaid policies, the injuries to different nursing home facilities in different years "are based on different, not identical, transactions" such that the State was not fairly on notice of their claims. *Id.* at 721.

The relationship here between timely and untimely claims is similarly attenuated as it was in *DeBuono*. Plaintiff's repurchase claims are also subject to "an individualized" repurchase protocol, and the "injury claimed"—the specific alleged breaches—also must be determined loan by loan. Because each loan was originated under different circumstances, the breach of a representation or warranty in one loan does not put DLJ on notice of a breach in another loan.

The trial court nevertheless relied on this Court's decision in *Nomura Home*

Equity Loan, 133 A.D.3d at 108, to allow every loan breach that Plaintiff noticed at any point in this litigation to proceed to trial, reasoning that all such claims relate back to the timely pre-suit breach notices. A34-35. *Nomura* decided a distinct question in a different procedural posture and does not call for that illogical result. The appeals in *Nomura* were taken from rulings on motions to dismiss. As relevant, the Court held that, at the *pleading* stage, it was sufficient to allege that the plaintiff "might uncover additional defective loans for which claims would be made." 133 A.D.3d at 108. That decision addressed only the standard for adequate notice pleading, not what Plaintiff must prove at trial to establish the "notice" element of its claim under the contractual repurchase protocol.

Misreading *Nomura* to allow relation back here would be inconsistent with the Court of Appeals' decision in *DeBuono*, which held that individualized details concerning numerous claims regarding the same challenged regulation prevented the claims from being part of the "same transaction or occurrence." 91 N.Y.2d at 721; *accord GreenPoint*, 147 A.D.3d at 89 (refusing to "extend" Nomura beyond its facts). Here, each alleged breach, remedy, and associated Repurchase Price are all inherently loan-specific. Under *DeBuono*, a claim as to one loan would not relate back just because a plaintiff has a timely claim as to another loan. Accordingly, even if *Nomura* had any application to a summary judgment motion, which it does not, DLJ respectfully submits that it was wrongly decided and should

not be followed here. *See, e.g.*, *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 151 A.D.3d 83, 87 n.3 (1st Dep't 2017) ("declin[ing] to follow" part of First Department RMBS decision in *MBIA Insurance Corp. v. Countrywide Home Loans, Inc.*, 105 A.D.3d 412 (1st Dep't 2013)); *accord Sport Rock Int'l, Inc. v. Am. Cas. Co. of Reading, Pa.*, 65 A.D.3d 12, 27 (1st Dep't 2009) (declining to follow prior contrary First Department decision).

Moreover, to allow relation back here would permit blatant circumvention of the Court of Appeals' decision in *ACE*. As *ACE* recognized, the repurchase protocol affords RMBS sellers the contractual right to cure or repurchase defective loans before being sued. Giving the seller a meaningful opportunity to exercise that right is thus "a procedural prerequisite to suit." *ACE*, 25 N.Y.3d at 599. But here, Plaintiff did not provide its "notice" of the additional 480 breaching loans identified in Mr. Hunter's expert report until it served that report on DLJ, well into litigation, such that DLJ did not have notice or time to cure before the limitations period expired. *See supra* at 10-11. As a result, Plaintiff did not fulfill the procedural condition precedent of giving DLJ prompt notice and an opportunity to cure, substitute, or repurchase these allegedly defective loans. *See ACE*, 25 N.Y.3d at 598.

Thus, under the clear terms of the repurchase protocol, claims based on the untimely notice given for those 480 loans should not have been allowed to

proceed. *See GreenPoint*, 147 A.D.3d at 87 (holding that a plaintiff has "no right" to commence an action seeking the repurchase of a loan unless the plaintiff complies with the contractual protocol). By permitting "relation back" for this untimely notice, the trial court deprived DLJ of its contractual right to pre-suit notice and an opportunity to cure. Though Plaintiff undoubtedly prefers to circumvent the loan-level notice required, "parties must live with the consequences of their agreement," *Eujoy Realty Corp. v. Van Wagner Commc'ns, LLC*, 22 N.Y.3d 413, 424 (2013), and cannot rely on courts to relieve them of inconvenient duties and conditions. New York courts "enforce contracts and do not rewrite them" and will not "by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties." *Schmidt v. Magnetic Head Corp.*, 97 A.D.2d 151, 157 (2d Dep't 1983) (internal quotation marks omitted); *see also RM 14 FK Corp. v. Bank One Tr. Co. N.A.*, 37 A.D.3d 272, 274 (1st Dep't 2007) (rejecting one party's interpretation where it "vitiate[d] the principle that a contract should not be interpreted so as to render any clause meaningless"). This is especially true where, as here, the contract "was negotiated between sophisticated, counseled business people negotiating at arm's length." *2138747 Ontario, Inc. v. Samsung C&T Corp.*, 31 N.Y.3d 372, 381 (2018).

The trial court's holding cannot be squared with the limited purpose of the relation-back doctrine under CPLR 203(f), which serves to "enable[] a plaintiff to

correct a pleading error," *Buran*, 87 N.Y.2d at 177, not to alter contractual requirements or excuse a plaintiff's failure to comply with a precondition to suit. *See Thomas v. City of New York*, 154 A.D.3d 417, 418 (1st Dep't 2017) ("Application of the relation back doctrine is not warranted since plaintiff failed to comply with the condition precedent to suit by serving a timely notice of claim."); *S. Wine & Spirits of Am., Inc. v. Impact Envtl. Eng'g, PLLC*, 80 A.D.3d 505, 505 (1st Dep't 2011) (holding that relation back did not apply when "plaintiffs failed to comply with the express, bargained-for condition precedent to [the] right to bring an action against defendants").

The Court of Appeals' recent decision in *U.S. Bank National Association v. DLJ Mortgage Capital, Inc.*, No. 7, 2019 WL 659355 (N.Y. Feb. 19, 2019), is not to the contrary. There, the Court of Appeals simply held that if an action is commenced before the statute of limitations expires, the trustee's failure to provide timely notice under the repurchase protocol "does not foreclose the refiling of its action … pursuant to CPLR 205(a)" and the complaint was therefore properly dismissed without prejudice. *Id.* at *5. The Court's ruling on the procedural availability of CPLR 205(a), however, expressed no view on the merits of claims as to loans for which the trustee fails to provide contractually required pre-suit notice and an opportunity to cure. CPLR 205(a) has no application to this case whatsoever unless and until this "action" is terminated in a manner other than a

"final judgment upon the merits."

Moreover, applying relation back in these circumstances would render *ACE*'s procedural-prerequisite holding all but meaningless and would undermine the Court of Appeals' approach to statutes of limitations, which favors "objective, reliable, predictable" rules. *ACE*, 25 N.Y.3d at 594. The purpose of these predictable rules, the Court of Appeals has explained, is not only to "save litigants from defending stale claims, but also [to] express[] a societal interest or public policy of giving repose to human affairs," principles that require "reject[ing] accrual dates which cannot be ascertained with any degree of certainty, in favor of a bright line approach." *Id.* at 593-94 (second alteration in original) (internal quotation marks omitted); *accord Deutsche Bank Nat'l Tr. Co. v. Flagstar Capital Mkts. Corp.*, 32 N.Y.3d 139, 151-53 (2018) (holding that "public policy" undergirding the statute of limitations forbids parties to an RMBS agreement from delaying the accrual of a repurchase claim by contract).

But under the trial court's reasoning, a plaintiff would be free to make a timely repurchase demand identifying a single loan as breaching; reserve its rights by claiming it was "continuing to investigate" other breaches and demand repurchase of "all" nonconforming loans, however many there might be; file suit seeking repurchase of the single identified loan; and then use relation back to pursue any additional breaches it identified at any point during discovery.

Following that path would allow a plaintiff to sue without ever giving DLJ the opportunity to *avoid* litigation with respect to hundreds or thousands of allegedly breaching loans. That would defeat the very purpose of the cure period and repurchase protocol to which the parties agreed as the sole remedy for any loan-related breach. Plaintiff cannot escape what it bargained for in the PSA; if Plaintiff failed to give timely notice of an alleged breach in a specific loan, it cannot recover damages for those notice-based claims.

C. The Timely Breach Notices Here Are Not Analogous to the "Systemic" Breach Notices at Issue in *Nomura*.

Even if relation back were hypothetically available here, the trial court erred in allowing relation back under *Nomura* given the factual differences between the breach notices in *Nomura* and the notices here. A34 (citing *Nomura* and holding that "because the repurchase letters identified some timely claims, the later-identified claims relate back to the original filing"). The timely notice letters in *Nomura* referenced certificateholders' demands for repurchase of "all loans in the trust due to the 'systemic nature of the breaches.'" *Nomura*, 133 A.D.3d at 103-04. And they put defendants on notice that certificateholders were "investigating the mortgage loans and might uncover additional defective loans for which claims would be made." *Id.* at 108.

Unlike in *Nomura*, the demand letters here made no reference to "systemic" or "pervasive" breaches in the Trust, nor did they assert that there was a

continuing, ongoing investigation that could lead to more claims. *See* A731-752. In the December 2011 letter, Plaintiff attached two letters sent to it by a certificateholder, FHFA, and requested that DLJ repurchase 304 specifically identified loans and "any others that did not comply with the representations and warranties." A732. The same is true of the attached letters from FHFA, which do not identify "systemic" breaches but merely "reserve [FHFA's] rights … to identify other Mortgage Loans with respect to which the Seller *may have* breached one or more representations and warranties contained in the PSA." A735, 740 (emphasis added). The March 2012 letter from Plaintiff is even more cursory, merely demanding that DLJ cure or repurchase "the Subject Loans held in the Transaction collateral pool, based upon breach[es] … identified for each such loan on Schedule I." A745; *see also* A747-752 (listing specific loans in "Schedule I").

Plaintiff's add-on statement in one repurchase demand that DLJ should repurchase "any other" breaching loans cannot constitute actual notice for unidentified loans in the securitization, let alone provide a hook for relation back under *Nomura*. *See, e.g.*, *Bank of N.Y. Mellon Tr. Co.*, 2017 WL 737344, at *4-8. In this way, this case is identical to *GreenPoint*, which refused to allow relation back. There, this Court distinguished *Nomura* as allowing relation back where "the breach notices … *expressly stated*" that trustees or certificateholders "were still investigating the matter and that further nonconforming mortgages might be

discovered." *GreenPoint*, 147 A.D.3d at 88 (emphasis added). The *GreenPoint* court refused to "extend" *Nomura* beyond its facts where the defendant was warned of the pending investigation and likelihood of additional forthcoming claims. *Id.* at 89. For the same reasons, Plaintiff's untimely breach notices should not relate back to the breaches identified in the December 2011 letter.

II. The Date Of Repurchase For A Nonconforming Loan Runs From The Date When DLJ Was Given Notice Of Or Discovered A Breach In That Specific Loan.

The trial court also erred in holding that for *every* breaching loan in the Trust, the Repurchase Price must be calculated by using March 5, 2012, as the applicable repurchase date. A37. It is undisputed that, under the plain terms of the PSA, the repurchase date for damages purposes is 90 days after the DLJ received a repurchase demand for each specific loan. *See* A450 (definition of "Repurchase Price"). In approving Plaintiff's use of March 5, 2012, as the date for every breaching loan, the trial court violated this contract term and refused to enforce the bargain of the parties.

In ruling that the March 5, 2012 date could be used for all loans, the court relied on Plaintiff's December 6, 2011 breach notice, sent 90 days before, which specifically identified only 304 loans. The court held that was sufficient to put DLJ on notice as to every breaching loan in the Trust. Because that premise was faulty for the reasons described above, the trial court's adoption of a uniform

repurchase date must be reversed as well. The repurchase date for the loans specifically noticed in the March 30, 2012 letter, for example, must be June 28, 2012, 90 days after notice was given for those loans. And even if this Court holds that Plaintiff can seek repurchase for breaching loans that were not timely noticed, that determines only the timeliness of the claims as a procedural matter. The repurchase date for those loans—that is, the contractually defined *remedy* for a breach—cannot be calculated en masse based on this December 2011 breach notice.

The trial court's date calculation error has significant practical consequences. By deeming March 5, 2012, as the applicable repurchase date for *every* allegedly breaching loan in the Trust, the trial court created the potential for Plaintiff to recover interest starting months or years before Plaintiff ever identified a specific loan as breaching. The proper repurchase date for any breaching loan is 90 days from when DLJ received notice of a loan-specific breach, rather than a generalized demand that DLJ repurchase an unspecified group of breaching loans.

III. The Repurchase Price Should Not Include Interest That Never Actually "Accrued" On A Loan.

The trial court erred in concluding that the Repurchase Price for a breaching loan may include interest that never actually "accrued" on the loan. A35-37. As explained, the repurchase protocol in the PSA establishes the exclusive process for remedying the material breach of any representation or warranty, including the

formula for calculating the price for repurchasing a breaching loan. Specifically, upon DLJ's failure to timely cure the properly noticed material breach of a particular loan, DLJ must "repurchase the affected Mortgage Loan or Mortgage Loans from the Trustee" at a contractually determined "Repurchase Price." This Repurchase Price is defined, in relevant part, as "the sum of (i) 100% of the unpaid principal balance of the Mortgage Loan on the date of such purchase, [and] (ii) *accrued and unpaid interest thereon* at the applicable Mortgage Rate." A450 (emphasis added).[6]

It is plain from the contractual language that the repurchase price of a liquidated loan must be fixed at the time of liquidation. Once a loan is liquidated and charged off from a trust, that loan ceases to exist. *MASTR Asset Backed Sec. Tr. 2006-HE3 ex rel. U.S. Bank Nat'l Ass'n v. WMC Mortg. Corp.*, No. 11-CV-2542 (JRT) (TNL), 2012 WL 4511065, at *6 & n.9 (D. Minn. Oct. 1, 2012); *accord CitiMortgage, Inc. v. Equity Bank, N.A.*, 261 F. Supp. 3d 942, 960 (E.D. Mo. 2017). Upon the loan's liquidation, the borrower is no longer obligated to make interest payments, because the obligation has been discharged and interest is no longer accruing. Accordingly, the "accrued and unpaid interest" on a liquidated

[6] The repurchase protocol's damages calculation refers to "interest" that had accrued and remained unpaid on the underlying mortgage loan. This contractual interest provision is distinct from prejudgment interest, which may be recoverable in actions for breach of contract and which begins to accrue at the time of the breach. *See* CPLR 5001.

loan necessarily can refer only to the interest that accrued before the loan was charged off. Plaintiff's damages expert, Dr. Snow, therefore erred by calculating the repurchase price for liquidated loans to include interest that accrued for a period after the date of liquidation.

In holding that interest was available for breaching liquidated loans, the trial court relied on this Court's decision in *Nomura*, which held that plaintiffs could seek monetary damages for liquidated loans even though their PSAs stated that repurchase was the sole remedy for breaches of loan-related representations and warranties. 133 A.D.3d at 105. Noting that specific performance of the repurchase obligation is an "equitable remedy," this Court reasoned that "where the granting of equitable relief appears to be impossible or impracticable, equity may award damages in lieu of the desired equitable remedy." *Id.* at 106 (internal quotation marks omitted) (quoting *Bank of N.Y. Mellon v. WMC Mortg., LLC*, No. 12-CV-7096 (DLC), 2015 WL 2449313, at *2 (S.D.N.Y. May 22, 2015)). *Nomura* held that "plaintiffs may pursue monetary damages with respect to any defective mortgage loan in those instances where cure or repurchase is impossible." *Id.* at 107.

Nomura does not authorize awarding interest as part of the Repurchase Price for liquidated loans. In allowing monetary damages where equitable relief would otherwise be impossible, *Nomura* did not address a contractual provision that

specifies how repurchase damages are to be calculated. There is no argument here that Plaintiff is limited to seeking some form of "impossible" equitable relief: The parties do not dispute that liquidated loans are covered by the repurchase protocol, and DLJ does not contest that Plaintiff is entitled to seek *some* money damages if it can prove liability, regardless of whether those loans are liquidated or continue to exist. There is thus no risk that applying the contract as written would foreclose all equitable relief, which was the basis for crafting an equitable remedy in *Nomura*. The repurchase protocol need not be "extended" to the liquidated loans at issue here, because it already applies.

In allowing Plaintiff to recover damages that go beyond those authorized by the PSA, the trial court appears to have been motivated by a concern that the contractual definition would encourage opportunistic behavior by RMBS sponsors. A36 (noting the risk that a seller would be "perversely incentivized to fill the Trust will junk mortgages that would expeditiously default so that they could be released, charged off, or liquidated before a repurchase claim is made" (quoting *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 40 Misc. 3d 562, 569 (Sup. Ct. N.Y. Cty. 2013) and citing *Nomura Asset Acceptance Corp. Alternative Loan Tr. v. Nomura Credit & Capital, Inc.*, Index No. 653390/2012, 2014 WL 2890341, at *10 (Sup. Ct. N.Y. Cty. June 26, 2014), *aff'd on other grounds as modified*, 167 A.D.3d 432 (1st Dep't 2018))). But the trial court identified no evidence to ground

that speculative concern in the real world or the facts of these transactions. If anything, the trial court's damages ruling creates a competing set of perverse incentives: the risk that plaintiffs in cases such as this will run out the clock on litigation and waste judicial resources simply to rack up "accrued" interest on nonexistent loans. Thus, applying the PSA as written would appropriately encourage parties to assert their contractual rights promptly.

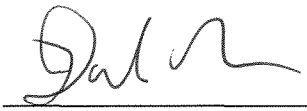
In any event, New York law does not permit a court to substitute a damages formula it believes to be socially optimal for the one the parties incorporated in their contract. *See Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002) ("[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms."). This Court should hold that repurchase damages cannot include interest after a breaching loan is liquidated.

CONCLUSION

For the reasons and upon the authorities set forth above, the Court should reverse the trial court's summary judgment rulings as set forth above.

Dated: New York, New York
March 18, 2019

Respectfully submitted,



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STATEMENT PURSUANT TO CPLR 5531

Supreme Court of the State of New York

APPELLATE DIVISION – FIRST DEPARTMENT

Appellate Case No. 2019-219

U.S. BANK NATIONAL ASSOCIATION, SOLELY IN ITS CAPACITY AS TRUSTEE OF THE HOME EQUITY ASSET TRUST 2007-1 (HEAT 2007-1),

Plaintiff-Respondent,

– against–

DLJ MORTGAGE CAPITAL, INC.,

Defendant-Appellant.

1. The index number for this action in the court below is New York County Clerk's Index No. 650369/2013.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The action was commenced in the New York Supreme Court, New York County.

4. The action was commenced on or about February 1, 2013, by the filing and serving of a summons and complaint. Defendant DLJ Mortgage Capital, Inc. filed and served a verified answer on or about February 6, 2014.

5. The nature and object of the action is a claim for breach of contract arising from loan-level representations and warranties in a Pooling and Servicing Agreement pertaining to a residential mortgage-backed securitization trust.

6. This appeal is from a decision and order of the Honorable Eileen Bransten, dated December 26, 2018, and entered on December 27, 2018.

7. This appeal is being perfected on the appendix method.