*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.*

# REPLY BRIEF FOR DEFENDANT-APPELLANT

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## PRELIMINARY STATEMENT

DLJ's opening brief identified three erroneous summary judgment rulings that would authorize Plaintiff to proceed to trial on loans that were never the subject of a timely breach notice, and to seek damages in excess of what the governing contracts allow. Plaintiff's responses would eviscerate the contractual "sole remedy"—the repurchase protocol—by enabling Plaintiff to pursue claims on loans that it never identified in timely breach notices, thus depriving DLJ of the opportunity to cure, substitute, or repurchase prior to suit. Plaintiff should not be permitted to disregard the remedial bargain it struck.

*First*, Plaintiff should not be allowed to proceed to trial on loans it failed to identify in timely breach notices. Its arguments to the contrary attempt to rewrite the terms of the parties' contracts, which plainly require that notice, breach, and damages be proven on a loan-by-loan basis. A boilerplate request to repurchase "any" nonconforming loans fails to meet that contractual standard. Nor does the doctrine of relation back provide an end-run around these contractual requirements. There is no basis in existing law to treat a single timely noticed breach as the proverbial camel's nose under the tent, allowing the plaintiff to pursue liability and damages on every loan in the securitization. Moreover, Plaintiff wrongly attempts to equate its breach notices with the ones at issue in *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital Inc.*, 133 A.D.3d 96 (1st Dep't 2015), but the

notices here failed to put DLJ on notice of a continuing investigation that could uncover additional allegedly defective loans.

*Second*, and for related reasons, the Court erred by treating March 5, 2012, as the uniform "repurchase date" for every breaching loan. Because Plaintiff's initial breach notices were effective only for the loans specified therein, it was error to use those notices as a basis to calculate repurchase damages for loans outside their scope.

*Third*, Plaintiff still cannot come up with a viable contractual basis to treat liquidated loans as continuing to accrue interest for damages purposes. As the PSA and the offering documents make clear, interest stops accruing once a loan is liquidated. This Court should hold the parties to their agreement to limit repurchase damages to interest that has in fact "accrued."

## ARGUMENT

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

The repurchase protocol requires loan-by-loan notice of alleged material loan-related breaches. *See* OB14-21.[1] It is undisputed, moreover, that Plaintiff's timely breach notices covered fewer than half of the loans that Plaintiff intends to pursue at trial. Plaintiff nonetheless asserts it is entitled to seek liability and

[1] "OB" refers to DLJ's opening brief, and "RB" refers to Plaintiff-Respondent's brief.

damages even on the 480 loans it failed to identify in timely notices. Its arguments for doing so are flawed and offer no basis to excuse Plaintiff from the repurchase protocol's loan-specific notice requirement.

### A. The Repurchase Protocol Requires Timely, Loan-Specific Breach Notices.

The repurchase protocol requires identification of individual allegedly nonconforming loans. Plaintiff claims, however, that a repurchase demand "provides sufficient notice for *all* breaching loans in an RMBS trust" as long as the notice "identifies a large number of breaching loans and requests repurchase of all breaching loans." RB12. That supposed exception has no grounding in the parties' contracts and should not be followed here.

Plaintiff's arguments to the contrary falter on the plain terms of the repurchase protocol, every step of which requires identifying specific breaches for particular loans. Notice is linked to "*a* breach of *a* representation or warranty," and provides an opportunity to cure "such breach." A470 (emphasis added). Plaintiff fixates on an isolated phrase in the repurchase protocol that it claims permits aggregated notice—that "*any* mortgage loan" can be identified as breaching. RB11. But parsing the repurchase protocol in that way is inconsistent with New York law, which requires contracts to be "read as a whole, and every part … interpreted with reference to the whole; and if possible … so interpreted as

to give effect to its general purpose." *Westmoreland Coal v. Entech, Inc.*, 100 N.Y.2d 352, 358 (2003).

The repurchase protocol sets forth the "sole remedy" for breach of any loan-related representation and warranty. This remedy is triggered only if the alleged breach "materially and adversely affects the interests of the Certificateholders in any Mortgage Loan." A470. If so, DLJ is obligated to cure "such breach in all material respects, and if such breach is not so cured," to remove "such Mortgage Loan" and replace it with a substitute, or repurchase "the affected Mortgage Loan." A470. And the damages DLJ must pay to repurchase any materially breaching loan are themselves predicated on a loan-specific Repurchase Price. A450. For these reasons, "the repurchase mechanism established by the parties is targeted to a specific loan, and not to a group or category of loans." *MASTR Adjustable Rate Mortgs. Tr. 2006-OA2 v. UBS Real Estate Sec. Inc.* (*MARM I*), No. 12-CV-7322 (PKC), 2015 WL 764665, at *11 (S.D.N.Y. Jan. 9, 2015); *see Home Equity Mortg. Tr. Series 2006-1 v. DLJ Mortg. Capital, Inc.* (*HEMT 2006-1*), 62 Misc. 3d 1206(A), 2019 WL 138634, at *4 (Sup. Ct. N.Y. Cty. 2019) (recognizing that, "consistent with the structure of the repurchase protocol," breach notices "must reference specific loans"), *appeal pending*, No. 2019-619 (1st Dep't). Absent notice that identifies particular breaches in specified loans, there is no way to

assess whether a breach had a material and adverse effect or for DLJ to comply with its remedial obligations.[2]

That many loans in the Trust have been liquidated does not change the analysis. If notice had been provided promptly for the allegedly breaching loans, DLJ would have been obligated to cure, substitute, or repurchase while those loans still existed. And the Repurchase Price specified in the PSA itself cannot be calculated without reference to particular identified loans.

Thus, a blunderbuss demand for the repurchase of "every loan that did not comply," RB18, is not the type of notice contemplated under the PSA. Such a demand does no more than restate DLJ's general contractual obligation and is no substitute for the loan-specific notice that the repurchase protocol requires. Nor can allegations concerning "a large number of breaching loans," RB12, change the plain meaning of the repurchase protocol. There is no "carve-out from the Sole Remedy Provision" merely because "a certain threshold number of loan breaches are alleged." *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 585 (2017); *see also, e.g.*, *MASTR Adjustable Rate Mortgs. Tr. 2006-OA2 v. UBS Real Estate Sec. Inc.* (*MARM II*), No. 12-CV-7322 (PKC), 2015

[2] Plaintiff emphasizes that some of the representations and warranties at issue relate to "*all loans* in the Trust." RB11. But that does not respond to the repurchase protocol's requirement that a breach have a material adverse effect on a mortgage loan, and it does not alter the loan-specific nature of the cure-or-repurchase remedy.

WL 797972, at *4 (S.D.N.Y. Feb. 25, 2015) ("The parties could have, but did not, bargain for an obligation that if the aggregate number of loans in breach exceeded a certain threshold, a duty to reexamine all loans would be triggered. Instead, the specified remedies are the 'sole remedies.'").

Plaintiff's contrary authority largely arises from the distinct procedural context of rulings on motions to dismiss.[3] Although some courts have accepted "theories of generalized wrongdoing" at the pleading stage, they have rightly "affirmed that more specific proof will be needed at summary judgment or trial," when plaintiffs may no longer "ride the coattails" of pleading-stage inferences. *BlackRock Allocation Target Shares v. Wells Fargo Bank, Nat'l Ass'n*, No. 14-CV-09371 (KPF) (SN), 2017 WL 953550, at *4 (S.D.N.Y. Mar. 10, 2017).[4] This Court

[3] *See Deutsche Bank Nat'l Tr. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 97 F. Supp. 3d 548, 552 (S.D.N.Y. 2015); *SACO I Tr. 2006-5 v. EMC Mortg. LLC*, No. 651820/2012, 2014 N.Y. Misc. LEXIS 2494, at *16-17 (Sup. Ct. N.Y. Cty. May 29, 2014); *Nomura Asset Acceptance Corp. Alt. Loan Tr. v. Nomura Credit & Capital, Inc.*, No. 653390/2012, 2014 WL 2890341, at *15 (Sup. Ct. N.Y. Cty. June 26, 2014), *aff'd as modified on other grounds*, 167 A.D.3d 432 (1st Dep't 2018). Plaintiff's other citations either fail to apprehend the loan-specific nature of the repurchase protocol, *see Deutsche Bank Nat'l Tr. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 289 F. Supp. 3d 484, 505-06 (S.D.N.Y. 2018), or rely on distinct contractual remedial provisions not at issue here, *see Assured Guar. Mun. Corp. v. Flagstar Bank, FSB*, No. 11-CV-2375 (JSR), 2011 WL 5335566, at *3, 7 (S.D.N.Y. Oct. 31, 2011) (in contrast to PSA with a sole remedy provision, agreement permitted insurer of securities to "'take whatever action at law or in equity that may appear necessary or desirable in its judgment to enforce performance'").

[4] *See also, e.g.*, *Royal Park Inv. SA/NV v. HSBC Bank USA Nat'l Ass'n*, No. 14-CV-08175 (LGS) (SN), 2017 WL 945099, at *4 (S.D.N.Y. Mar. 10, 2017) ("Courts in this District have dismissed theories of generalized wrongdoing after the pleading stage."); *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, No. 651612/2010, 2015 WL 6471943, at *12 (Sup. Ct. N.Y. Cty. Oct. 22, 2015), *aff'd as modified*, 151 A.D.3d 83 (1st Dep't 2017), *aff'd*, 31 N.Y.3d 569

has itself emphasized the distinction between the notice required for pleading purposes and the contractual notice required to trigger the repurchase obligation. *U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc.*, 147 A.D.3d 79, 88 (1st Dep't 2016) ("[A] pleading notice and a breach notice are not natural substitutes for one another.").

U.S. Bank has advanced a diametrically inconsistent position when it has been the defendant in RMBS cases. *See* OB15-17. In that posture, it has contended that similar repurchase protocols require loan-by-loan notice or discovery. U.S. Bank attempts to minimize this inconsistency by pointing to differences between trustees' and sponsors' duties with respect to RMBS securitizations. RB14-15. But any such difference is irrelevant to the notice issue here, which turns on the words in the repurchase protocol. On that point, U.S. Bank has been crystal clear: These remedial provisions require notice or discovery "on a loan-by-loan level because such information is essential to 'enforce' the … 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) (available at Appendix 2316, *HEMT 2006-1*, Appeal No. 2019-619). Accordingly, U.S. Bank has maintained, "when a

(2018) (rejecting plaintiff's summary judgment argument that "loan-by-loan notice is not required," and distinguishing cases decided on motions to dismiss); *Royal Park Inv. SA/NV v. HSBC Bank USA, Nat'l Ass'n*, 109 F. Supp. 3d 587, 603 (S.D.N.Y. 2015).

trustee seeks a repurchase" from an RMBS 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 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) (internal quotation marks omitted). Those propositions had nothing to do with the nature of the trustee's duties, and everything to do with the contractual mechanism at issue. That the shoe is now on the other foot does not change what the repurchase protocol requires.[5]

### B. The Relation-Back Doctrine Does Not Authorize Plaintiff To Proceed To Trial On Every Securitized Loan.

On Plaintiff's logic, as long as it sent a timely notice identifying a single breaching loan, the doctrine of relation back permits it to proceed on any of the

[5] Plaintiff incorrectly seeks to distinguish the Second Circuit's decision in *Retirement Board of the Policemen's Annuity & Benefit Fund of Chicago v. Bank of New York Mellon*, 775 F.3d 154, 162 (2d Cir. 2014), as confined to the issue of class standing. The relevant discussion, however, is about the same point in dispute here: whether a RMBS repurchase protocol requires loan-by-loan notice and proof of breaches. The Second Circuit explained that it does: "[W]hether Countrywide [the RMBS seller] breached its obligations under the governing agreements (thus triggering [the trustee's] duty to act) requires examining its conduct with respect to each trust. Whether it was obligated to repurchase a given loan requires examining which loans, in which trusts, were in breach of the representations and warranties. And whether a loan's documentation was deficient requires looking at individual loans and documents." *Id.*

5,100-plus loans in the HEAT 2007-1 Trust.[6] That contention stretches the law of relation back beyond its breaking point and would shrink to insignificance the Court of Appeals' landmark holding that compliance with the repurchase protocol is a "procedural prerequisite to suit." *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 25 N.Y.3d 581, 598 (2015). Consistent with the terms of the repurchase protocol, the relevant unit for considering relation back should be the individual allegedly breaching loan.

No case supports applying relation back on facts like these. Plaintiff again overlooks the inherently loan-specific nature of its claims. As then-Chancellor, now Chief Justice Strine explained, "each alleged breach of contract due to a breach of representation made by [an RMBS seller] 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." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, No. 5140-CS, 2012 WL 3201139, at *18 (Del. Ch. Aug. 7, 2012). Thus, "evaluating the accuracy of [an RMBS sponsor's] representations as to Loan A is an independent inquiry from that evaluation as to

[6] This tactic is not hypothetical. RMBS trustees have adopted precisely this stratagem, sending timely breach notices identifying just one loan and then attempting to use that loan as an anchor to support untimely claims based on hundreds of other alleged nonconforming loans. *See HSBC Bank USA v Merrill Lynch Mortg. Lending, Inc.*, No. 652793/2016, 2018 WL 2722870, at *11 (Sup. Ct. N.Y. Cty. June 6, 2018) (timely post-suit breach notices "mentioned only one loan," and were followed by an untimely notice that identified 973 loans).

Loan B." *Id.* To allow a single breach notice to preserve claims for every loan in the deal "would end run this clear contractual loan-by-loan requirement and [the] statute of limitations." *Id.* at *3.[7]

Plaintiff correctly notes that relation back under CPLR 203(f) requires the new claims to arise from the same transactions and occurrences described in the original pleading, but it errs by treating the "securitization of the Loans" as the relevant unit. RB19. Plaintiff's claims here do not attack the fact that loans were deposited into a trust, but rather take issue with whether those loans complied with DLJ's representations and warranties. The answer to that question depends on individual characteristics of each loan.

In *Greater New York Health Care Facilities v. DeBuono*, the Court of Appeals held that the relation-back inquiry turns on whether the original pleading gave notice of "particularized claims." 91 N.Y.2d 716, 721 (1998). The Court of Appeals refused to permit relation back in that case to add challenges from new nursing homes to applicable Medicaid reimbursement rates, where "[e]ach nursing

[7] Plaintiff seeks to distinguish *Central Mortgage* because it involved Delaware law, RB21-22, but the decision there noted that the Delaware standard is similar to the federal standard, *see* 2012 WL 3201139, at *18, which in turn closely resembles CPLR 203(f), *see Fleming v. Verizon N.Y., Inc.*, 419 F. Supp. 2d 455, 467 n.5 (S.D.N.Y. 2005). And even if the complaint in *Central Mortgage* disclaimed an intention to bring certain additional claims, that disclaimer covered only one category of loans that the plaintiff belatedly asserted. *See* 2012 WL 3201139, at *12, *19 (disclaimer applied to "Private Loans," but plaintiff also sought to assert additional "Agency Loans"). The Chancery Court thus considered and rejected the precise theory Plaintiff asserts here. *See id.* at *20.

home has an individualized reimbursement rate and the injury claimed varies from facility to facility and from year to year." *Id.*; *see* OB22-25. It is true, as Plaintiff emphasizes (RB20-21), that the Court of Appeals based its holding in part on the fact that the new claims were brought by proposed intervenors that were not parties to the original action. But the Court's reasoning was not confined to the new-party context. The key point is that the "individualized reimbursement rate" meant that the new "claims of injury" were "based on different, not identical transactions." 91 N.Y.2d at 721. The trial court's application of relation back here cannot be reconciled with that holding.

Plaintiff's allusions to "systemic and trust-wide disregard of the applicable underwriting standards" (RB20 n.7) also miss the mark. For the same reasons that allegations of pervasive breaches fail to provide loan-specific notice, *see supra* at 5-6, such allegations do not warrant treating every characteristic of every securitized loan as somehow forming part of the same "transaction."[8]

[8] Plaintiff's analogy to a forest fire is inapt. The claims here are not based on tortious physical damage to an indistinguishable group of objects, but rather require individualized proof as to whether specified mortgage loans complied with contractual, loan-specific representations and warranties. Plaintiff fares no better by invoking *Koch v. Acker, Merrall & Condit Co.*, 114 A.D.3d 596 (1st Dep't 2014), a case involving counterfeit wine bottles. The claim in *Koch* was for deceptive practices under the General Business Law, *see* 18 N.Y.3d 940, 941 (2012), not for breaches of the seller's contractual representations concerning individual characteristics of the bottles in question, and did not involve a pre-suit contractual notice requirement. Moreover, in *Koch*, unlike here, the initial complaint put the defendant on notice that the plaintiff was conducting "further research" to determine if it had additional claims." *See infra* at 14-16.

Plaintiff thus relies principally on this Court's decision in *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 133 A.D.3d 96 (1st Dep't 2015), as setting forth a rule that pre-suit notices as to "some" loans entitle the Trustee to "proceed with its claims on *all* breaching Loans," even loans that were first identified in an expert report filed years after the limitations period had expired. RB16-19 (emphasis added). *Nomura*'s holding was far more circumscribed; it simply allowed such claims to survive a motion to dismiss. *Nomura*, 133 A.D.3d at 108. Although *Nomura*'s lone paragraph discussing relation back did not disclose the Court's rationale for treating the presence of "some timely claims" in that case as dispositive, it may have been relying on inferences unique to the pleadings stage. *See supra* at 6-7.[9] Thus, in *GreenPoint*, this Court emphasized the distinction between the "concept of relation back in a pleading context," which "concerns the adequacy of the notice given," and the "contractual requirement of a breach notice," which "triggers the defendant's right/obligation to cure a claimed default and avoid a lawsuit." 147 A.D.3d at 88.

To the extent that *Nomura* supports applying relation back to untimely noticed loans under a sole remedy provision, it conflicts with Court of Appeals

[9] *Nomura*'s relation-back holding also appeared to rely on the plaintiffs' allegations that the defendants independently discovered breaching loans. *See* 133 A.D.3d at 108. As the trial court decision here makes clear, generalized allegations of independent discovery are not sufficient to carry Plaintiff's burden to prove independent discovery at trial.

precedent and should not be followed. There is no way to reconcile such an application of relation back with *DeBuono*'s holding: 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. Moreover, to apply *Nomura* here would undermine the Court of Appeals' approach to statutes of limitations, which favors "objective, reliable, predictable" rules. *ACE*, 25 N.Y.3d at 594.

This Court should disregard Plaintiff's suggestion that *U.S. Bank National Ass'n v. DLJ Mortgage Capital, Inc.* (*ABSHE*), __ N.Y.3d __, 2019 WL 659355, at *3 (Feb. 19, 2019), supports the decision below. That holding revolved entirely around the application of CPLR 205(a), and, as Plaintiff concedes, the potential application of that provision to this case "is not properly before this Court." RB24 n.9.[10] Unless and until there is a properly refiled action under CPLR 205(a), "the inherent nature of a condition precedent to bringing suit is that it actually precedes the action." *GreenPoint*, 147 A.D.3d at 87. The relation-back rule urged here would turn the notion of a condition precedent on its head by permitting after-the-

[10] Plaintiff overlooks authority that CPLR 205(a)'s reference to the termination of an "action" means what it says, and refers to the action as a whole rather than subsidiary claims within that action. *See* CPLR 304 ("An action is commenced by filing a summons and complaint or summons with notice…."); *Farnitano v. Gaydos*, 198 N.Y.S.2d 795, 797 (Sup. Ct. Suffolk Cty. 1960) (statutory predecessor to CPLR 205(a) does not apply when there is a prior action pending); *Graziano v. Pennell*, 371 F.2d 761, 764 (2d Cir. 1967) (same).

fact notice for all but one of the allegedly breaching loans. If Plaintiff's position were accepted, the contractual pre-suit notice requirement would become a meaningless formality, contravening *ACE*'s holding that the repurchase protocol operates as a "procedural prerequisite to suit." 25 N.Y.3d at 598.

### C. Plaintiff's Timely Breach Notices Do Not Support Relation Back Under *Nomura*.

To the extent that *Nomura* controls the relation-back question here, it requires, at a minimum, that Plaintiff's "presuit letters put defendant on notice that the certificateholders whom plaintiffs (as trustees) represented were investigating the mortgage loans and might uncover additional defective loans for which claims would be made." 133 A.D.3d at 108. Plaintiff's timely pre-suit notices in this case failed to do that. *See* OB29-31. Instead, those notices identified specific loans that allegedly breached loan-related representations and warranties, and one of them reiterated DLJ's obligation to "repurchase every loan that did not comply with a representation and warranty." A732. Notably, the notices did not claim that the alleged breaches were "systemic," nor did they state that certificateholders "were investigating the mortgage loans and might uncover additional defective loans for which claims would be made." *Nomura*, 133 A.D.3d at 103, 108.

In response, Plaintiff asserts that "*Nomura* did not turn on the use of any special language in the notice, but rather on the existence of a significant number of timely breach claims." RB24. Not so. *Nomura* went out of its way to note that

the pre-suit letters there put the defendant "on notice" of the certificateholders' continuing investigation. *Id.* at 108. Moreover, as support for the proposition that relation back is available where there are "some timely claims," *id.*, *Nomura* cited this Court's decision in *Koch v. Acker, Merrall & Condit Co.*, 114 A.D.3d 567, on which Plaintiff likewise relies its brief here. *Koch*, in turn, held that an original complaint "gave … notice" of the possibility that additional counterfeit wine bottles would be uncovered because the complaint alleged that "'at least' five [bottles] were counterfeit, and that 'additional bottles [were] suspect, requiring further research.'" 114 A.D.3d at 596 (second alteration in original). Plaintiff's notices here contained nothing like that.

If there were any doubt as to whether the content of the notice matters under *Nomura*, *GreenPoint* resolved it. There, this Court again emphasized—twice—that the *Nomura* notices "expressly stated that the trustees were still investigating the matter and that further nonconforming mortgages might be discovered." 147 A.D.3d at 88; *see also id.* at 88-89.

Thus, contrary to Plaintiff's position here, *Nomura* "does not stand for the blanket proposition that where there are 'some timely claims,' a court should not 'dismiss claims relating to loans that plaintiffs failed to mention in their breach notices or that were mentioned in breach notices sent less than 90 days before plaintiffs commenced their actions.'" *HSBC Bank*, 2018 WL 2722870, at *10

(some internal quotation marks omitted). Accordingly, Justice Friedman recently and correctly applied *Nomura* and *Greenpoint* to hold that timely pre-suit notices failed to "put defendant on notice of breaches regarding loans mentioned in later breach notices" when those notices each mentioned only one loan, and neither of them "informed defendant that an investigation of the loans was in process and that further breaches might be discovered." *Id.* at *11.

Here, beyond identifying specific allegedly nonconforming loans, Plaintiff's pre-suit notices did not alert DLJ to the possibility of additional repurchase demands. Reminding DLJ of its obligation to repurchase *any* unspecified nonconforming loans adds nothing to the plain terms of the repurchase protocol, which already requires exactly that. Plaintiff's timely breach notices in this case thus cannot support relation back under *Nomura* and *GreenPoint*.

## II. The Repurchase Date For A Nonconforming Loan Is 90 Days After DLJ Received Notice Of Or Discovered A Material Breach In That Loan.

According to the PSA, the repurchase date for calculating the repurchase price for a particular nonconforming loan is 90 days after DLJ received notice of a material breach in that specific loan. A450, 470. Plaintiff does not dispute this. Its argument that the repurchase date for all nonconforming loans should be March 5, 2012, depends entirely on its mistaken view that the December 6, 2011 letter "gave DLJ sufficient and appropriate notice of its obligation to repurchase *all* breaching Loans in the Trust." RB26 (emphasis added). Because Plaintiff's notice

argument is flawed for the reasons explained above, *supra* at 3-16, its position on the repurchase date fails as well.[11]

## III. Interest Cannot Accrue On Liquidated Loans.

Because the repurchase protocol constitutes Plaintiff's sole remedy for any breach of a representation or warranty in a loan, Plaintiff is entitled to damages only to the extent provided for in the PSA. The PSA's definition of "Repurchase Price" includes "accrued and unpaid interest" on a Mortgage Loan, but does not extend to interest that "accrued" after a loan was liquidated and ceases to exist. *See* OB32-36.

Although Plaintiff suggests otherwise, RB27, DLJ does not dispute that the repurchase protocol provides the remedy for "all materially breaching loans." That is precisely DLJ's point—that damages must be calculated for any given nonconforming loan with reference to the principal balance and any "accrued and unpaid interest" remaining on the loan in question, for performing and liquidated loans alike. The difference between the two categories of loans is simply that once a loan is liquidated, it stops accruing interest, and the borrower's obligation to make interest payments ceases. Accordingly, the Repurchase Price of a liquidated loan becomes fixed at liquidation. Applying the repurchase protocol to exclude

[11] DLJ agrees that the issue of when prejudgment interest begins to accrue on a nonconforming loan is not before this Court. RB26 n.10. DLJ reserves all rights to litigate the date of accrual of prejudgment interest before the trial court if and when that issue becomes ripe for resolution.

interest that can no longer accrue is not a "windfall" to DLJ, *cf.* RB28; it merely follows the contractual terms.

As explained in DLJ's opening brief, OB34-35, Plaintiff's reliance on *Nomura* is again misplaced. RB28. Although Plaintiff claims the "rationale underlying" *Nomura* is "that there is nothing in the Repurchase Protocol or the definition of Repurchase Price that limits the Trustee's remedies based on whether a loan has been liquidated," RB28, Plaintiff points to nothing in *Nomura* supporting that "rationale." *Nomura* did not grant courts license to rewrite contracts at will; it instead addressed the situation where the "equitable remedy" of specific performance was impossible. 133 A.D.3d at 106. Here, by contrast, the dispute turns on the calculation of damages—a legal remedy. *Nomura* recognized that when equitable relief is not at issue, "contracting parties are generally free to limit their remedies." *Id.*

Plaintiff also takes issue with the proposition that "[o]nce a loan is liquidated and charged off from a trust, that loan ceases to exist." RB29. But U.S. Bank itself takes exactly this position in the pending *HEMT 2006-1* appeal; there, addressing a materially identical repurchase protocol, U.S. Bank contends that "most of the breaching loans at issue have defaulted and been liquidated from the Trusts, and therefore no longer exist." Br. for Pls.-Resps., *HEMT 2006-1*, No. 2019-619, Dkt. No. 20, at 17 (1st Dep't Apr. 17, 2019). And the Prospectus for

this securitization reflects precisely that common-sense understanding, warning investors that "[d]efaulted mortgage loans may be liquidated, and liquidated mortgage loans will no longer be outstanding and generating interest." A274.

Plaintiff's references to deficiency judgments are a red herring. While in some states a lender may be able to obtain a deficiency judgment from a mortgagor following foreclosure, *see, e.g.*, RPAPL 1371, a deficiency judgment that is entered after a foreclosure is not the same as the underlying debt itself, which is extinguished at foreclosure.[12] And the PSA calculates damages based on interest that actually "accrued" on the Mortgage Loan at issue, not on an additional state-law remedy that might be available with respect to some (but not all) loans in the Trust.

Nor does the potential availability of deficiency judgments show that mortgage loans should be treated as accruing interest even after they have been liquidated. A450. Plaintiff relies on the PSA's definition of a "Liquidated Mortgage Loan," but that definition does not suggest that liquidated loans have any ongoing existence; it instead defines the term in reference to a defaulted loan that

[12] Plaintiff acknowledges that not every state provides for deficiency judgments. *See* RB29-30. Indeed, the offering documents for the Trust specifically identify "laws limiting or prohibiting deficiency judgments" as a potential limitation on the recoveries available through the foreclosure process. A349; *see also* A153 (noting that significant percentages of the initial securitized loans were secured by California mortgages); A348 (noting that California law limits deficiency judgments).

"*was* liquidated." A434 (emphasis added); *see also* A448 (referring to "the date of such liquidation"). Nothing in that past-tense formulation suggests that the parties intended to endorse the fiction that liquidated loans continue to accrue interest. As noted, the Prospectus makes clear that the opposite is true: Once a loan is liquidated, it no longer "generat[es] interest." A274.

## CONCLUSION

The Court should reverse the trial court's summary judgment rulings as set forth above.

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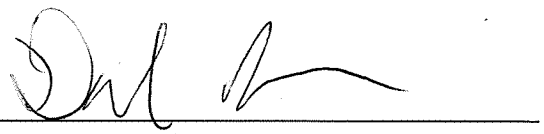
Respectfully submitted,



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