SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

U.S. BANK NATIONAL ASSOCIATION, solely in its capacity as Trustee of the HOME EQUITY ASSET TRUST 2007-1 (HEAT 2007-1),	
Plaintiff–Respondent,	Appeal No. 2019-219
-against-	N.Y. Sup. Ct. Index No. 650369/2013
DLJ MORTGAGE CAPITAL, INC.,	
Defendant-Appellant.	

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT-APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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Plaintiff-Respondent U.S. Bank N.A., solely in its capacity as trustee (the "Trustee") of the Home Equity Asset Trust 2007-1 (the "Trust"), respectfully submits this memorandum of law in opposition to the motion of Defendant-Appellant DLJ Mortgage Capital, Inc. ("DLJ") for leave to appeal the Decision and Order of this Court, dated October 10, 2019, *U.S. Bank N.A. v. DLJ Mortg. Capital, Inc.*, 107 N.Y.S.3d 857 (1st Dep't 2019) (Manzanet-Daniels, J.P., Kern, Oing & Singh, JJ.) (the "Decision"), which unanimously affirmed the order of the Supreme Court, New York County.

INTRODUCTION

DLJ's motion for leave to appeal relies heavily on arguments repeatedly rejected by this Court and other New York courts and fails to demonstrate why further interlocutory review is appropriate. This Court's unanimous, well-reasoned and correct Decision does not raise any novel question of law, implicate any issue of public importance, or conflict with any decision of the Court of Appeals, this Court, or another Department of the Appellate Division.

DLJ strains to argue otherwise in pressing relation-back arguments that nearly every Justice of this Court has already rejected in numerous consistent rulings, as well as attempting to convert a standard disagreement over contract interpretation (as to the term "accrued unpaid interest") into a purported issue of

statewide significance. It is time for trial to commence and for this case to proceed to final judgment. The motion should be denied.

COUNTERSTATEMENT

A. The Trust

The residential mortgage backed security ("RMBS") Trust at issue in this appeal was created when DLJ and its affiliates deposited more than 5,153 residential mortgage loans (the "Loans") into the Trust. R. 79 (Second Amended Complaint (the "SAC"), ¶ 1). As sponsor, DLJ orchestrated the securitization process: it aggregated the loans by acquiring them from numerous sellers and/or originators, including originators that it owned and controlled; it created the Trust and deposited the loans into the Trust pursuant to a Pooling and Servicing Agreement ("PSA") (R. 399-730); it marketed and sold certificates for the Trust to investors (the "Certificateholders"); and it made numerous contractual representations and warranties ("R&Ws") to the Trustee. These R&Ws concerned the qualities and characteristics of the loans, and the processes by which the Loans were scrutinized before being deposited into the Trust. R. 470, 723-729 (PSA § 2.03(b), Sched. III). To give force and effect to its R&Ws, DLJ agreed that, upon discovering or receiving "notice" of a breach of its R&Ws, DLJ would cure the breach within 90 days or repurchase the breaching loan for the "Repurchase Price." R. 470 (PSA § 2.03(d), the "Repurchase Protocol").

The PSA defines the Repurchase Price as "100% of the unpaid principal balance of the Mortgage Loan" plus "accrued unpaid interest thereon at the applicable Mortgage Rate … *from* the date through which interest was last paid by the Mortgagor *to* the Due Date in the month in which the Repurchase Price is to be distributed to Certificateholders." R. 450 (PSA § 1.01, definition of "Repurchase Price").[1]

B. The Trustee's Repurchase Demands

On December 6, 2011, the Trustee sent its first breach notice to DLJ, specifically identifying 304 Loans that materially breached at least one R&W and demanding that DLJ repurchase all loans "that did not comply with" the R&Ws. R. 732-743 at 732 (the "December 6 Notice"). The December 6 Notice expressly informed DLJ that it was under an obligation to "repurchase every loan that did not comply with a [R&W]." *Id*. On March 30, 2012, the Trustee gave DLJ notice as to an additional 900 materially breaching Loans. R. 745-752 (collectively with the December 6 Notice, the "Repurchase Demands"). Accompanying each breach notice was a CD with detailed information regarding each breach claim. R. 738, 742, 746. To date, despite receiving the Repurchase Demands for 1,204 materially breaching Loans, DLJ has only repurchased 40 loans from the Trust. DLJ Mem. 7.

[1] All emphasis in this brief is supplied unless otherwise indicated.

C. The Trustee's Expert Reports Provided Detailed Findings Regarding the Breaching Loans and the Trustee's Damages

During discovery, the Trustee proffered two expert witnesses—an underwriting expert, Mr. Robert Hunter, and an economist and statistician, Dr. Karl Snow—to review 1,059 Loans identified by the Trustee and to calculate the contractual Repurchase Price of the materially breaching Loans.

Mr. Hunter reviewed the voluminous files for each Loan to determine whether each Loan materially breached any of DLJ's R&Ws. R. 866-904. Mr. Hunter set forth his detailed findings in two reports with multiple appendices, and for each breaching Loan analyzed whether the identified breaches materially increased the risk of loss on the Loan or otherwise impaired the interests of the Certificateholders in that Loan. Based on his comprehensive review, Mr. Hunter concluded that DLJ materially breached at least one of its R&Ws for 783 of the 1,059 Loans that he reviewed. *Id*.

For each of the 783 materially breaching Loans identified by Mr. Hunter, Dr. Snow calculated the Repurchase Price, and determined that, as of the date of his rebuttal expert report (February 8, 2017), the Repurchase Price for the materially breaching Loans, including accrued and pre-judgment interest, was $246,385,914.19. R. 906-932. Because the IAS Court determined that the Trustee provided sufficient notice to DLJ of all breaching Loans in the Trust in the December 6 Notice, Dr. Snow made his calculation as of the date following the

expiration of the 90-day repurchase period provided in the PSA—*i.e.*, March 5, 2012. R. 775. Specifically, Dr. Snow calculated interest on the unpaid principal balance of each materially breaching Loan at the "Mortgage Rate" through March 5, 2012 and at the statutory pre-judgment interest rate from that date forward. R. 775-778.

D. The Prior Proceedings

Because DLJ refused to comply with its contractual obligations to cure or repurchase the breaching Loans, the Trustee timely commenced this action on February 1, 2013, seeking a judgment requiring DLJ to repurchase all materially breaching Loans in the Trust.[2] R. 50-78. On August 7, 2014, the Trustee filed the operative SAC, and on August 18, 2014, DLJ moved to dismiss the SAC. DLJ argued that the only Loans as to which Plaintiff provided sufficient notice of an alleged breach of a specific R&W were the 1,204 Loans specifically identified in the Repurchase Demands.

On October 8, 2015, the IAS Court denied DLJ's motion in its entirety. R. 40-49. The Court held that the December 6 Notice "clearly provided notice to DLJ of its obligation to repurchase 'all loans that breach representations and warranties.'" R. 44. In so holding, the Court specifically rejected DLJ's argument

[2] DLJ's motion to dismiss the original complaint on timeliness grounds was denied by the IAS Court and affirmed by this Court. *See U.S. Bank N.A. v. DLJ Mortg. Capital, Inc.*, 121 A.D.3d 535, 536 (1st Dep't 2014).

that each breach must be individually itemized in the repurchase notice to satisfy the procedural notice requirement in the PSA. R. 45. DLJ did not appeal the IAS Court's decision denying its motion to dismiss.

After several years of discovery, the Trustee filed a Note of Issue in May 2017 and the parties filed cross-motions for summary judgment. The IAS Court denied both motions in the Decision and Order, R. 4-39, and made two rulings that are relevant here.

First, the IAS Court denied DLJ's request to dismiss the Trustee's breach claims as to loans that the Trustee had not specifically identified in its pre-suit repurchase notices. R. 33-35.[3] In addition to relying on its previous ruling on DLJ's motion to dismiss that the December 6 Notice "clearly provided notice to DLJ of its obligation to repurchase all loans that breach representations and warranties," the IAS Court cited two subsequent decisions that reached the same result: *Deutsche Bank Nat'l Tr. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 289 F. Supp. 3d 484, 505-506 (S.D.N.Y. 2018) and *Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2006-S4 v. Nomura Credit & Capital, Inc.*, No. 653390/2012, 2014 WL 2890341, at *16 (Sup. Ct. N.Y. Cty.

[3] DLJ admits that 303 of the 783 breaching Loans are explicitly referenced in the Trustee's pre-filing notices. DLJ Mem. 7-8. Accordingly, the Loans at issue for purposes of this motion for leave to appeal are the 480 breaching Loans addressed in the Trustee's expert reports that are not explicitly referenced in the Repurchase Demands.

June 26, 2014), *aff'd as modified on other grounds*, 133 A.D.3d 96 (1st Dep't 2015) ("*Nomura*"). The IAS Court also cited this Court's *Nomura* decision in holding, in the alternative, that post-suit repurchase notices that were provided by the Trustee relate back to the original filing date of the complaint. *Id.*

Second, the IAS Court held that interest should continue to accrue on breaching Loans, even if the Loans were liquidated as a result of the foreclosure of the underlying mortgage. It based its decision on the specific language in the PSA, which provides for the continued accrual of interest on such Loans until the principal is paid and the funds are actually distributed to Certificateholders. R. 35-37.

E. This Court's Decision

On October 10, 2019, this Court unanimously affirmed the IAS Court's rulings. *First*, this Court held that the December 6 Notice "informed defendant that a substantial number of identified loans were in breach, and that the pool of loans remained under scrutiny, with the possibility that additional nonconforming loans might be identified," and that the "subsequently identified loans, including the 480 identified by plaintiff's expert during discovery, related back to the time of the initial notice." Decision at 1 (citing *Home Equity Mortg. Trust Series 2006-1 v. DLJ Mortg. Capital, Inc.*, 175 A.D.3d 1175 (1st Dep't 2019) ("*HEMT*"); *Nomura*, 133 A.D.3d at 108). *Second*, this Court held that the IAS Court "properly ruled

that interest could be calculated on liquidated loans, at the applicable mortgage rate, up until the repurchase date." Decision at 2 (citing *HEMT*, 175 A.D.3d at 1176*; Nomura*, 133 A.D.3d at 106-107).

REASONS FOR DENYING LEAVE TO APPEAL

Leave to appeal to the Court of Appeals is appropriate only where a case presents "issues [that] are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." 22 N.Y.C.R.R. § 500.22(b)(4). DLJ falls far short of meeting any prong of this high standard for further review. This Court's unanimous Decision is entirely consistent with prior decisions of the Court of Appeals and this Court and does not raise any novel issue or issue of public importance. DLJ's motion should be denied.

I. THE RELATION-BACK ISSUE DOES NOT WARRANT REVIEW BY THE COURT OF APPEALS

DLJ's request (DLJ Mem. 11) for leave to appeal the Decision's "application of the relation-back doctrine" disregards that over the past four years—including in two other cases decided the day before this appeal was argued—sixteen Justices of this Court have now joined decisions squarely holding in the RMBS context that a timely pleading based on pre-suit breach notices will support the application of the relation-back doctrine to claims based on subsequent breach notices. *See* Decision (Manzanet-Daniels, J.P., Kern, Oing & Singh, JJ.)

HEMT, 175 A.D.3d 1175 (1st Dep't 2019) (Friedman, J.P., Richter, Tom, Oing & Moulton, JJ.); *HSBC Bank USA v. Merrill Lynch Mortg. Lending, Inc.*, 175 A.D.3d 1149, 1150 (1st Dep't 2019) (Acosta, P.J., Richter, Kapnick, Kahn & Kern, JJ.) (*"HSBC")*; *Nomura*, 133 A.D.3d at 108 (Sweeny, J., joined by Mazzarelli, J.P., Acosta & Kapnick, JJ.); *see also U.S. Bank N.A. v. GreenPoint Mortg. Funding, Inc.*, 147 A.D.3d 79, 88 (1st Dep't 2016) (Gische, J., joined by Renwick, Saxe & Richter, JJ.) (*"GreenPoint")* (reaffirming relation-back doctrine while distinguishing *Nomura* on its facts). DLJ does not—and cannot—identify a single conflicting decision from the Court of Appeals or any other Department of the Appellate Division that could support leave to appeal on this issue.

As a threshold matter, DLJ concedes (DLJ Mem. 12), as it must, that the claims in an amended pleading relate back to an original pleading, so long as the original pleading "give[s] notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading[.]" CPLR 203(f). Thus, the "salient inquiry" in applying the relation-back doctrine "is not whether defendant had notice of the claim, but whether, as the statute provides, the original pleading gives 'notice of the transactions [or] occurrences . . . to be proved pursuant to the amended pleading.'" *Giambrone v. Kings Harbor Multicare Ctr.*, 104 A.D.3d 546, 548 (1st Dep't 2013). Here, the original pleading gave notice of the transactions or occurrences that are the subject of the SAC—

namely, DLJ's securitization of the Trust with Loans that breach R&Ws. *See HSBC*, 175 A.D.3d at 1150 (later-noticed loans in post-suit breach notices "arose from the same transactions" as loans noticed in timely breach notices). The Decision does not warrant further review because it was a straightforward application of this basic standard, just as in *Nomura, GreenPoint, HEMT and HSBC*.

DLJ wrongly criticizes (DLJ Mem. 15) this Court's decision in *Nomura* for purportedly having failed to "offer[] [an] explanation of why the presence of 'some timely claims' should excuse a plaintiff from all further compliance with a contractual precondition to invoking the repurchase remedy." (Emphasis omitted.) This Court, however, clearly explained in *Nomura* that the presence of "some timely claims" distinguished the case from *ACE Securities Corp. v. DB Structured Products., Inc.*, 25 N.Y.3d 581, 591 (2015) ("*ACE*"), where the failure to fulfill the condition precedent as to *any* loan meant that the plaintiffs' action was not validly commenced. 133 A.D.3d at 108.

Thus, in *ACE*, the Court of Appeals did not apply the relation-back doctrine because there was simply no valid action to which the claims could relate back. *See id.* (citing 25 N.Y.3d at 589, 599). But in *Nomura*, the presence of "some timely claims" for which the condition precedent was satisfied established a valid original pleading to which later claims could relate back, provided they arose out of the

same transaction or occurrence. Nothing more was required for the relation-back doctrine to apply. This Court has noted that the point of the condition precedent was to give a defendant a "contractual opportunity to cure its default and thereby avoid [a] lawsuit[.]" *GreenPoint*, 147 A.D.3d at 86, 88. The defendant in *Nomura* had that opportunity (as DLJ did here) and failed to take it. At that point, a trustee was entitled to file suit, and the additional claims based on later breach notices would relate back to the original pleading without prejudicing the defendant because it was "already a party to litigation" concerning the same transaction. *O'Halloran v. Metro. Transp. Auth.*, 154 A.D.3d 83, 86-87 (1st Dep't 2017).

In addition, this Court noted in *Nomura* that plaintiffs' timely notices "put defendant on notice that the certificateholders whom plaintiffs … represented were investigating the mortgage loans and might uncover additional defective loans for which claims would be made," and because the complaints "allege[d] that defendant already knew, based on its own due diligence, that certain loans in the trusts at issue breached its representations and warranties." 133 A.D.3d at 108. Here, the December 6 Notice, in addition to specifically identifying 304 breaching Loans, provides that the Trustee seeks repurchase of every breaching Loan in the Trust—the same type of notice upheld in *Nomura*. *See, e.g.*, R. 732 (notifying DLJ of its "obligat[ion] to repurchase every loan that did not comply with a [R&W]"); *see supra* at 3. Similarly, the Trustee's original complaint alleged that "instead of

transferring a pool of loans that satisfied its R&Ws, DLJ conveyed to the Trust a loan pool that included many Defective Loans that breached DLJ's R&Ws" and that "given [the] high breach rates" in the pool of loans that were subject to pre-suit forensic analysis, "it is reasonable to infer that breaches of DLJ's R&Ws exist throughout the entire pool." R. 54 (¶¶ 4-5).

DLJ fares no better in questioning (DLJ Mem. 15) this Court's reliance in *Nomura* in *Koch v. Acker, Merrall & Condit Co.*, 114 A.D.3d 596 (1st Dep't 2014). In *Koch*, the plaintiff gave the defendant timely notice that the defendant had sold him "at least" five bottles of counterfeit wine and warned that his investigation was continuing. *Id*. at 597. This Court held that the plaintiff's later assertion of claims regarding 211 bottles of counterfeit wine related back to the initial complaint, which "gave defendant notice of the transactions or series of transactions to be proved" by plaintiff's later notices. *Id*. So too in this case: the Trustee's original complaint was based on its provision of timely pre-suit notice that DLJ had securitized some defective loans and its warning to DLJ that by seeking repurchase of "every" breaching loan, DLJ was sufficiently on notice that the Trustee's investigation was continuing. R. 52-55. *Nomura* does not require any further steps to invoke relation back, and the Decision is not in conflict with Court of Appeals relation-back principles.

Nor is DLJ correct (DLJ Mem. 13-14) that the Decision conflicts with

decisions of other Departments that hold relation back inapplicable where it is "based upon events that occurred after the filing of the initial claim." *Johnson v. State of New York*, 125 A.D.3d 1073, 1074 (3d Dep't 2015). Both of the Trustee's breach notices concern DLJ's breaches of contractual R&Ws, which indisputably accrued on the closing date of each RMBS trust. *See, e.g.*, *ACE*, 25 N.Y.3d at 591; *Nomura Asset Acceptance Corp. Alternative Loan Trust v. Nomura Credit & Capital, Inc.*, 139 A.D.3d 519, 520 (1st Dep't 2016). The 2007 closing date for the trust was well before the Trustee filed its complaint, R. 400, and the fact that the breaches may not have been noticed until the Trustee served its expert reports does not change the fact that they occurred before the timely filing of the initial claim.

The Court of Appeals has already rejected DLJ's related argument (DLJ Mem. 14) that "[a]t the time [the Trustee] filed its original pleading, it could not have properly included claims for the untimely noticed loans, because [the Trustee] had not yet satisfied a contractual precondition to asserting such claims." In *U.S. Bank N.A. v. DLJ Mortg. Capital, Inc.*, 33 N.Y.3d 72 (2019) ("*ABSHE*"), the plaintiff timely provided the secondary "backstop" defendant with pre-suit notice of breaching loans and then timely filed a complaint, but did not serve contractually required notice on the primary defendant until after the statute of limitations expired. *Id*. at 82. The Court of Appeals held there that because breach notices are merely "a procedural prerequisite" to suit, not a substantive element of

the cause of action, the plaintiff could invoke CPLR 205(a) to preserve a timely contract claim by providing notice after expiration of the limitations period. *Id*. at 80 (citing *ACE*, 25 N.Y.3d at 581). While CPLR 205(a) and relation back are distinct principles, courts have recognized the interplay between the provisions, and if the *ABSHE* plaintiff could invoke CPLR 205(a) to preserve a timely contract claim by providing post-suit notices after expiration of the statute of limitations, it follows logically that the Trustee may also pursue claims based on post-suit notices in this action through the doctrine of relation back.[4] *See Nomura*, 133 A.D.3d at 108.

DLJ also rehashes (DLJ Mem. 18-19) its same arguments regarding *Greater New York Health Care Facilities Ass'n v. DeBuono*, 91 N.Y.2d 716 (1988), without accounting for the Trustee's explanation (Resp. Br. 20-21) that the Court of Appeals in that case declined relation back as to third-party intervenors' proposed claims because the defendants had no notice of the proposed intervenors' claims. 91 N.Y.2d at 721. Here, by contrast, all claims were based on notices from the same plaintiff—the Trustee—which made clear that claims based on additional breaching loans might follow. *See, e.g., Giambrone v. Kings Harbor*

[4] At a minimum, the Court of Appeals decision in *ABSHE* is fatal to DLJ's argument that the Decision must be reviewed because it controls "the population of allegedly breaching loans that can proceed to trial absent proof that a defendant independently discovered a material breach." DLJ Mem. 3. Under *ABSHE*, the Trustee could simply refile the action pursuant to CPLR 205(a) and proceed to trial on claims for loans that were not specifically identified in the pre-suit notices.

Multicare Ctr., 104 A.D.3d 546, 547 (1st Dep't 2013) (*DeBuono* permits relation back if both claims are based on the same transaction and occurrence such that defendant has "notice of the proposed specific claim").[5] In *Giambrone*, the Court determined that relation back was permitted even though the additional claim was made by a different party. Here, even though they involve different loans, all the R&W breaches relate to the same transaction and occurrence, which is DLJ's securitization of the Trust, and the Decision's application of relation back is therefore entirely appropriate. *See also HSBC*, 175 A.D.3d at 1150 (holding that claims on loans in subsequent breach notices "arose from the same transactions" as loans in timely breach notices).

Similarly baseless is DLJ's attempt (DLJ Mem. 20-24) to manufacture a false conflict between the Decision and this Court's decisions in *GreenPoint*, *HEMT* and *HSBC* as to the requisite wording of the breach notice to place the defendant on notice that additional claims may be asserted. There is simply no conflict, and the Decision is entirely consistent with this Court's prior RMBS

[5] DLJ also rehashes its arguments regarding the Delaware Chancery Court's decision in *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, Civ. No. 5140-CS, 2012 WL 3201139 (Del. Ch. Aug. 7, 2012). That trial level, out-of-state decision provides no basis for further review. It is also inapposite because, as the Trustee has explained (Resp. Br. 21-22), the plaintiff there expressly disclaimed that it would bring additional claims, 2012 WL 3201139, at *19-20, where the opposite is true here—the December 6 Notice sought repurchase of *all* breaching loans (R. 732). Moreover, *Central Mortg.* dealt with over 12,000 loans purchased over a two-year period in 26 "separate transactions." That is a far cry from what is at issue in this case: the securitization of a single pool of loans in one trust on a single closing date.

jurisprudence applying relation-back principles. *GreenPoint* reaffirmed the relation-back principles set forth in *Nomura* and upheld the dismissal of a repurchase claim based on notice only because, unlike here (*see supra*, at 9-10)—a distinction essentially ignored by DLJ—the plaintiff had *not* provided *any* timely pre-suit notice as to *any* breaching loans. *GreenPoint*, 147 A.D.3d at 87. According to the Court, this was the "most important" and "critical distinction" between *GreenPoint* and *Nomura*. *Id.* at 88. Thus, *GreenPoint* did not turn on the wording of particular breach notices, but rather on the fact that *none* of the breach notices at issue were timely served. *Id.* at 83.

HSBC and *HEMT* simply follow this same reasoning. In *HSBC*, the plaintiff sent two timely pre-suit breach notices, which satisfied the condition precedent as to some loans in the trust. Given that fact, the Court properly held that loans identified in later, untimely breach notices relate back, even without any "continuing investigation" or request to repurchase every breaching loan language in the notice, as present here.

Similarly, in *HEMT*, the Court reached a decision consistent with *Nomura* and *GreenPoint* in finding that for three trusts for which the trustee had indisputably provided timely notice, loans included in the post-suit notices related back to the timely pre-suit notices. The Court also distinguished a fourth trust, HEMT 2006-1, as to which the Court stated that no timely notices were sent, in

finding that the trust could proceed with its claims based upon an issue of fact as to whether the defendant (also DLJ) independently discovered material breaches. *HEMT*, 175 A.D.3d at 1176.[6] In *HEMT*, although the Court noted that the breach notice indicated a continuing investigation, such language was not dispositive to the relation back holding, and certainly cannot be read to mean that the absence of such wording in a notice precludes relation back. To the contrary, *HSBC* has resolved that issue in the Trustee's favor. These decisions from the Court are therefore all completely consistent with the Decision's holding that the December 6 Notice was sufficient to place defendant "on written notice as to all loans." Decision at 2.

II. THE ACCRUED-INTEREST ISSUE DOES NOT WARRANT REVIEW BY THE COURT OF APPEALS

In seeking leave to appeal on the accrued-interest issue, DLJ again rehashes (DLJ Mem. 26-29) its failed appellate arguments without identifying any reason leave to appeal should be granted on this straightforward issue of contract interpretation. DLJ repeats (DLJ Mem. 26) its unsupported assertion that it is "axiomatic" that liquidated loans no longer accrue interest, which it previously made to the IAS Court (*see* Index No. 650369/2013, Dkt. 604, 28-29) and to this Court (*see* App. Br. 33) and which the Trustee refuted both times (*see* Index No.

[6] The trustee of the HEMT 2006-1 trust contends that there were timely notices issued for that trust.

650369/2013, Dkt. 704, 29-30; Resp. Br. 27-31). Nothing suggests this Court did anything other than accept the Trustee's compelling reasons for why the Repurchase Price should include interest calculated at the note rate on liquidated loans. *See* Resp. Br. 27-31 (explaining, for example, that interest does continue to accrue on liquidated loans for purposes of a deficiency judgment, which DLJ would be entitled to pursue in most states).

Nor does the Decision's citation to this Court's decision in *Nomura* provide any basis for leave to appeal, as the parties addressed that decision in their appellate briefs (*see* App. Br. 34-35; Resp. Br. 29), with DLJ making the same strained effort to distinguish that case as it does now (*see* DLJ Mem. 27-28). This Court here, as in *HEMT*, correctly rejected DLJ's argument in favor of the Trustee's arguments that DLJ's interpretation of "accrued interest" would provide DLJ with a windfall, incentivize DLJ to prolong resolution of the Trustee's claims as long as possible, and wrongly disregard the absence of any contractual language limiting the Trustee's remedies where a loan has been liquidated (*see* Resp. Br. 28).

DLJ does not even attempt to identify conflicting New York decisions on the accrued interest issue, and its suggestion (DLJ Mem. 28) that this Court's plain language interpretation of the term "accrued unpaid interest" "violates fundamental tenets of New York contract law" is simply wrong. Nor, contrary to DLJ's

suggestion (*Id.*), does this Court's recent decision in *Matter of Part 60 Put-Back Litigation*, 169 A.D.3d 217 (1st Dep't 2019), come close to touching on issues relevant here. That case concerned whether a court could decline to apply a "contractual provision ... limiting liability" (absent here) in light of allegations of gross negligence (also absent here). *Id.* at 223-225.

CONCLUSION

The motion for leave to appeal should be denied.

Dated: New York, New York
November 8, 2019

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