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, -against- DLJ MORTGAGE CAPITAL, INC., Defendant-Appellant.	Appeal No. 2019-219 N.Y. Sup. Ct. Index No. 650369/2013

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

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Defendant-Appellant DLJ Mortgage Capital, Inc. ("DLJ") respectfully submits this reply brief in further support of its motion for leave to appeal this Court's October 10, 2019 Decision and Order (the "Decision") to the Court of Appeals.[1]

PRELIMINARY STATEMENT

Plaintiff's untimely Opposition[2] makes no persuasive case against granting leave to appeal. On the relation back of breaches noticed long after the allotted time period, Plaintiff does not dispute that this issue arises frequently in RMBS repurchase litigation and is critical to the scope of trial in such matters. Plaintiff relies on this Court's prior decisions in *Nomura* and *GreenPoint* but fails to acknowledge that this Court granted leave to appeal those decisions and that the Court of Appeals was never given the opportunity to address this key relation-back issue in either case. *See* Mem. 3. Nor does Plaintiff grapple with the complete absence of Court of Appeals precedent applying relation back to excuse

[1] Citations to "Mem. __" refer to DLJ's Memorandum of Law in Support of Defendant-Appellant's Motion for Leave to Appeal to the Court of Appeals, dated November 1, 2019. Citations to "Opp. __" refer to Plaintiff's Memorandum of Law in Opposition, dated November 8, 2019.

[2] The Opposition was electronically filed and served at 11:35 p.m. on November 8, 2019, in violation of the Court's Rules, which required it to be filed no later than 4:00 p.m. that day absent Court permission on a showing of good cause. *See* 22 NYCRR § 1250.4(a)(5); *id.* § 1245.7(a)(1). Plaintiff has not attempted to demonstrate cause for its untimely filing. To the extent the Court treats the § 1250.4(a)(5) filing deadline as applicable to DLJ's reply, DLJ respectfully submits that there is good cause for permitting filing on the return date: It would have been impossible to file the reply by 4:00 p.m. on November 8, because Plaintiff had not yet filed or served its answering papers at that point.

any party—let alone a sophisticated commercial party—from timely compliance with an agreed-upon precondition to invoking a contractual remedy. And Plaintiff cannot reconcile this Court's divergent statements on whether a timely breach notice must do more than demand repurchase of some specified loans in order to support relation back for all further untimely breach notices—an important inconsistency that can be resolved only by the Court of Appeals.

Because leave to appeal is warranted on the relation-back issue, this Court should certify a question, "in its usual generalized form," that asks the Court of Appeals to determine whether the Decision was "properly made." *Sharapata v. Town of Islip*, 56 N.Y.2d 332, 335 (1982) (citing CPLR 5602). But to the extent this Court separately considers the Opposition's response regarding accrued interest, leave to appeal is warranted on that question as well, because Plaintiff fails to engage with the contractual definition of Repurchase Price or the Decision's actual holding. For the same reasons this Court has certified questions to the Court of Appeals on the interpretation of the sole remedy provision and other common RMBS contractual provisions, *Matter of Part 60 Put-Back Litig.*, Index No. 652877/2014, 2019 WL 2346512 (1st Dep't June 4, 2019), it should do so here as to whether the Repurchase Price can include interest that never actually accrued on loans that have been liquidated.

ARGUMENT

I. Leave To Appeal Should Be Granted On Whether The Relation-Back Doctrine Permits Claims On Untimely Noticed Loans.

This Court should again grant leave to permit the Court of Appeals to address whether the pleading doctrine of relation back excuses an RMBS plaintiff's failure to comply with a contractual condition precedent in a sole remedy provision. Plaintiff emphasizes that this Court has applied relation back in *Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital Inc.*, 133 A.D.3d 96 (1st Dep't 2015), and several recent RMBS cases to permit claims on untimely post-suit notices. Opp. 8-9.[3] But that is not an argument against granting the requested leave to appeal here, just as the Court did in *Nomura* (where the defendants ultimately did not challenge this Court's application of relation back) and in *U.S. Bank National Association v. GreenPoint Mortgage Funding, Inc.*, 147 A.D.3d 79 (1st Dep't 2016) (where the case settled before argument in the Court of Appeals). That this Court continues to apply relation back, citing *Nomura* and *GreenPoint*, underscores the need for the Court of Appeals to decide the antecedent question whether those cases were properly

[3] Motions for leave to appeal are pending with respect to two of those recent decisions: *Ambac Assurance Corp. v. Countrywide Home Loans Inc.*, Appeal No. 2019-26, Index No. 651612/2010, Motion No. 7782 (1st Dep't Oct. 17, 2019), and *Home Equity Mortgage Trust Series 2006-1 v. DLJ Mortgage Capital, Inc.* ("*HEMT 2006-1*"), Appeal Nos. 2019-619, -620, Index Nos. 156016/2012, 653787/2012, Motion No. 7802 (1st Dep't Oct. 17, 2019).

decided to the extent they endorsed relation back of untimely noticed breach claims.

The Opposition makes no attempt to reconcile the application of relation back here with what the Court of Appeals has described as the doctrine's purpose: correcting "pleading error[s]." *Buran v. Coupal*, 87 N.Y.2d 173, 177 (1995). Plaintiff has not cited any instance where that Court applied relation back to excuse a plaintiff from timely complying with a contractual pre-suit obligation.

Nor can Plaintiff distinguish the situation here from the settled principle that relation back is unavailable when "the proposed causes of action" sought to be added "are based upon events that occurred after the filing of the initial claim." *E.g.*, *Johnson v. State*, 125 A.D.3d 1073, 1074 (3d Dep't 2015). Here, the untimely noticed breach claims are necessarily "based upon" Plaintiff's post-complaint conduct, as Plaintiff could not have pursued claims on those loans until it provided notice and allowed the contractual cure period to elapse.

Plaintiff asserts that the Court of Appeals "rejected" DLJ's relation-back arguments in *U.S. Bank National Association v. DLJ Mortgage Capital, Inc.* ("*ABSHE*") (Opp. 13), but *ABSHE* held no such thing. *ABSHE* turned on the application of CPLR 205(a) and did not address the availability of relation back under CPLR 203(f). 33 N.Y.3d 72, 77 (2019). As the Court of Appeals has repeatedly recognized and as Plaintiff concedes (Opp. 14), those provisions

address distinct issues and operate in different ways. *See Carrick v. Cent. Gen. Hosp.*, 51 N.Y.2d 242, 248 (1980); *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.* ("*HEAT 2006-5*"), 33 N.Y.3d 84, 90-91 (2019). Without any support from the text of CPLR 205(a), Plaintiff wrongly assumes that it can be invoked at any point during the initial action to excuse noncompliance with the sole remedy provision. Not surprisingly, Plaintiff cites no authority for that proposition. And as Plaintiff has already conceded, the hypothetical application of CPLR 205(a) in this case "was neither argued nor addressed" by the trial court, Resp. Br. 24 n.9, nor was it mentioned in this Court's Decision. CPLR 205(a) is thus irrelevant to the relation-back question on which DLJ seeks leave to appeal.[4]

The Opposition addresses only one of the Court of Appeals' relation-back cases cited in DLJ's Motion, *Greater New York Health Care Facilities Association v. DeBuono*, 91 N.Y.2d 716 (1988), and misses the point of DLJ's argument. Plaintiff contends timely repurchase demands here provided the

[4] For similar reasons, Plaintiff's footnoted contention (at 14 n.4) that it could cure any deficiency in its pre-suit notices by merely filing a second action and invoking CPLR 205(a) is both misguided and premature. This argument echoes a point made in Justice Acosta's *GreenPoint* dissent, *see* 147 A.D.3d at 93 (suggesting that dismissed claims could be refiled under CPLR 205(a)), but the *GreenPoint* majority did not treat CPLR 205(a) as at all relevant to its relation-back analysis. In any event, Plaintiff's hypothetical scenario contemplates that this case will be litigated to judgment, but CPLR 205(a) by its terms has no application where the prior action is "terminated" through a "final judgment upon the merits." Finally, because CPLR 203(f) and 205(a) are independent provisions, questions regarding CPLR 205(a)'s potential application to a future re-filed action are not before this Court on this motion, and pose no barrier to the Court of Appeals' consideration of the relation-back issues presented for review.

requisite notice because they "made clear that claims based on additional breaching loans might follow." Opp. 14. But as *DeBuono* explains, "claims of injury are based on different, not identical, transactions"—and therefore cannot support relation back—when the untimely claims involve "an individualized reimbursement rate" and variations in the injury alleged, regardless of whether one claim purports to provide "notice" of claims based on other transactions. 91 N.Y.2d at 721. By asserting that "all the [representation and warranty] breaches relate to the same transaction and occurrence" "even though they involve different loans," Opp. 15, Plaintiff assumes the conclusion it is required to prove to qualify for relation back.

That is why the Delaware Chancery Court in the *Central Mortgage* RMBS case held that "each alleged breach of contract due to a breach of representation ... as to each individual loan constitutes a separate transaction or occurrence" for relation-back purposes. *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, Civ. No. 5140-CS, 2012 WL 3201139, at *18 (Del. Ch. Aug. 7, 2012). Plaintiff reflexively discounts *Central Mortgage* because it is "trial level" and "out-of-state," Opp. 15 n.5, but it has no response to the reasoning of that

decision, which accords with *DeBuono* and is contrary to the premise of this Court's RMBS relation-back holdings.[5]

Plaintiff displays a similar misunderstanding in its discussion of *Koch v. Acker, Merrall & Condit Co.,* 114 A.D.3d 596 (1st Dep't 2014). Again, the question is not whether the timely letters offered some sort of "warning" that put DLJ "on notice that the Trustee's investigation was continuing." Opp. 12. Of course, the demand letters here afforded DLJ no such warning of a continuing investigation, *see* Mem. 22-23, so DLJ had no "notice of the transactions or series of transactions to be proved." 114 A.D.3d at 597. But even if they had, the plaintiff in *Koch* was not bound by a mandatory contractual prerequisite to suit, so the case says nothing about whether relation back excuses the failure to comply with contractual requirements. *See* Mem. 17.

Plaintiff also attempts to present this Court's various RMBS relation-back holdings as "entirely consistent" in terms of what is required for a timely breach

[5] Echoing an error in Plaintiff's brief on appeal (Resp. Br. 21-22), the Opposition attempts to distinguish *Central Mortgage* as involving a plaintiff that "expressly disclaimed that it would bring additional claims." Opp. 15 n.5. As DLJ's reply brief explained (at 10 n.7), that disclaimer applied only to one set of untimely noticed loans (the "Private Loans"). No such disclaimer applied to another set of untimely noticed loans (the "New Agency Loans"), and *Central Mortgage* rejected the plaintiff's invocation of relation back as to *both* sets of loans, on the ground that new breach claims did not arise out of the transactions or occurrences pleaded in the initial complaint. 2012 WL 3201139, at *18-20. Plaintiff also emphasizes that *Central Mortgage* involved multiple pools of loans and more loans overall than the Trust here. Opp. 15 n.5. But neither the number of securitizations nor the number of loans had any bearing on the Chancery Court's reasoning, which concluded that the pertinent "transaction or occurrence" for relation-back purposes occurred at the loan, not the securitization, level.

notice to support the relation back of later claims. Opp. 15. According to Plaintiff, all of this Court's decisions follow the "same reasoning" in that "timely pre-suit breach notices" support relation back, "even without any 'continuing investigation' or request to repurchase every breaching loan language." Opp. 16. If that were the rule, the Court could have ended its analysis in *Nomura* upon observing that "there were some timely claims in these cases." 133 A.D.3d at 108. But *Nomura* did not stop there; it instead held that "Plaintiffs' 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." *Id.*; *see also GreenPoint*, 147 A.D.3d at 88 (emphasizing that the pre-suit demands in *Nomura* "expressly stated that the trustees were still investigating the matter and that further nonconforming mortgages might be discovered").[6]

Along similar lines, the relation-back holding in *Home Equity Mortgage Trust Series 2006-1 v. DLJ Mortgage Capital, Inc.* ("*HEMT 2006-1*") relied on allegations in "timely presuit letters" concerning high breach rates and the trustees' warnings of an ongoing investigation and a likelihood of future breach

[6] Although Plaintiff contends that the December 6 notice in this case constitutes "the same type of notice upheld in *Nomura*," Opp. 11, the December 6 notice said nothing about any ongoing investigation, nor did it allege breaches that were of a "systemic nature." *See Nomura*, 133 A.D.3d at 103-04.

claims. *See* 175 A.D.3d 1175, 1176 (1st Dep't 2019). Rather than treating the mere existence of "timely breach notices" as sufficient to allow relation back, *HEMT 2006-1* quoted or summarized four separate aspects of those letters to conclude that the letters "put DLJ on notice that the breaches plaintiffs were investigating might uncover additional defective loans for which claims would be made." *Id.* There is simply no way to reconcile that mode of analysis with a rule that treats the presence of timely breach notices as dispositive.

Finally, far from "reaffirm[ing] the relation-back principles set forth in *Nomura*" (Opp. 16), this Court's *GreenPoint* decision repudiated those principles. *GreenPoint* held that notice-based claims could *not* relate back even though there were some timely claims in that case—namely, claims based on allegations that the defendant independently discovered breaching loans. *See* 147 A.D.3d at 86; *id.* at 92 (Acosta, J., dissenting in part) ("The implication of the majority's ruling is that *Nomura* was wrongly decided with respect to its application of the relation-back doctrine.").[7] As described above, the tensions among this Court's holdings have only become more pronounced in light of *HEMT 2006-1*, *HSBC Bank USA v. Merill Lynch Mortgage Lending, Inc.*, 175 A.D.3d 1149 (1st Dep't 2019), and

[7] *GreenPoint* also forecloses Plaintiff's suggestion (Opp. 11-12) that the allegations in its initial complaint can make up for breach notices that are inadequate to support relation back. *See* 147 A.D.3d at 88 ("[A] pleading notice and a breach notice are not natural substitutes for one another.").

the Decision here. This Court should allow the Court of Appeals to resolve the issue.

II. Leave To Appeal Should Be Granted On Whether The Contractual Repurchase Price Includes Interest That Never Accrued On Loans Because They Had Already Been Liquidated.

Leave to appeal is also warranted on whether the Repurchase Price can include interest that never actually accrued on liquidated loans, a question that arises frequently in RMBS litigation. Plaintiff has yet to cite any authority for the proposition that interest can continue to "accrue" once a mortgage loan has been liquidated. Even if foreclosure can give rise to a separate remedy such as a deficiency judgment under some states' laws, a deficiency judgment is not the same thing as interest that "accrues" on the loan itself. *See, e.g.*, 2 Mary Anne Foran & Marvin R. Baum, *Mortgages and Mortgage Foreclosure in New York* § 38:1 (a deficiency is a "remedy [that] is primarily equitable in nature," the right to which "rests entirely on statutory provisions"). The contractual Repurchase Price definition could have been written to account for deficiency judgments, but it instead refers only to interest that has "accrued" on a loan itself. A450.

Leave to appeal is further warranted to the extent the Decision applied *Nomura* to override the contractual definition of Repurchase Price. Although Plaintiff attempts to downplay the similarity of that issue to the questions concerning sole remedy provisions in *Matter of Part 60 Put-Back Litigation*, 169

A.D.3d 217 (1st Dep't 2019), *leave to appeal granted*, Index No. 652877/2014 (1st Dep't June 4, 2019), its arguments miss the mark. Plaintiff incorrectly states that this case does not involve a "'contractual provision … limiting liability.'" Opp. 19. But the *Part 60* Court used that phrase to describe RMBS sole remedy clauses, 169 A.D.3d at 223, the same type of provision that serves as a predicate for repurchase damages here.

Moreover, the grant of leave to appeal in *Part 60* was not confined to the gross negligence/sole remedy issue; it also encompassed additional holdings on the availability of punitive damages and attorneys' fees. The Decision here is strikingly similar, in that it resolves both a liability question upon which this Court previously granted leave to appeal in a case that settled before the Court of Appeals could resolve it, *cf. Morgan Stanley Mortg. Loan Tr. 2006-13ARX v. Morgan Stanley Mortg. Capital Holdings LLC*, Index No. 653429/2012 (1st Dep't Dec. 13, 2016), and also raises a significant damages issue that arises frequently in RMBS litigation and independently warrants leave to appeal.

CONCLUSION

For the foregoing reasons, DLJ respectfully requests that this Court grant leave to appeal to the Court of Appeals.

Dated: New York, New York
November 12, 2019

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