FILED: APPELLATE DIVISION - 1ST DEPT 11/01/2019 05:29 PM
NYSCEF DOC. NO. 17

RECEIVED NYSCEF: 11/01/2019

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

NOTICE OF DEFENDANT-APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE that, upon the accompanying affirmation of Daniel A. Rubens and the exhibit annexed thereto, the memorandum of law in support, and all prior pleadings and proceedings had herein, Defendant-Appellant DLJ Mortgage Capital, Inc. will move this Court, at the Courthouse located at 27 Madison Avenue, New York, New York 10010, on November 12, 2019 at 10:00 in the forenoon, or as soon thereafter as counsel can be heard, for an order granting leave to appeal to the Court of Appeals from the Decision and Order of this Court dated October 10, 2019.

Dated: New York, New York
November 1, 2019

Respectfully submitted,

Barry S. Levin
John Ansbro
Richard A. Jacobsen
Paul F. Rugani
Daniel A. Rubens
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, New York 10019
(212) 506-5000

Darren S. Teshima
(of the bar of the State of California)
By Permission of the Court
ORRICK, HERRINGTON &
SUTCLIFFE LLP
405 Howard Street
San Francisco, California 94105
(415) 773-5700

Robert M. Loeb
(of the bar of the District of Columbia)
By Permission of the Court
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street N.W.
Washington, D.C. 20005
(202) 339-8475

Attorneys for Defendant-Appellant

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

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

DARREN S. TESHIMA
(of the bar of the State of California)
By Permission of the Court
ORRICK, HERRINGTON
& SUTCLIFFE LLP
405 Howard Street
San Francisco, California 94105
(415) 773-5700

BARRY S. LEVIN
JOHN ANSBRO
RICHARD A. JACOBSEN
PAUL F. RUGANI
DANIEL A. RUBENS
ORRICK, HERRINGTON
& SUTCLIFFE LLP
51 West 52nd Street
New York, New York 10019
(212) 506-5000

ROBERT M. LOEB
(of the bar of the District of Columbia)
By Permission of the Court
ORRICK, HERRINGTON
& SUTCLIFFE LLP
1152 15th Street N.W.
Washington, D.C. 20005
(202) 339-8475

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

QUESTIONS OF LAW TO BE CERTIFIED TO THE COURT OF APPEALS 4

STATEMENT 4

ARGUMENT 10

I. Leave To Appeal Should Be Granted On The Decision's Application Of The Relation-Back Doctrine To Permit Claims On Untimely Noticed Loans. 11

A. The relation-back doctrine should not excuse Plaintiff from timely compliance with contractual requirements. 12

B. Even if relation back can sometimes excuse timely compliance with contractual requirements, each allegedly breaching loan in the Trust constitutes a separate transaction, such that relation back is not warranted here. 17

C. The Decision deepens a conflict among this Court's own RMBS holdings as to the content required for a timely repurchase demand to support relation back of subsequent breach claims. 20

D. The relation-back issue warrants leave to appeal. 25

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. 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases

159 MP Corp. v. Redbridge Bedford, LLC,
33 N.Y.3d 353 (2019) 17

ACE Sec. Corp. v. DB Structured Prods., Inc.,
25 N.Y.3d 581 (2015) 13, 14, 17

Ambac Assurance Corp. v. Countrywide Home Loans, Inc.,
27 N.Y.3d 616 (2016) 1

Ambac Assurance Corp. v. Countrywide Home Loans, Inc.,
31 N.Y.3d 569 (2018) 1

Ambac Assurance Corp. v. Countrywide Home Loans, Inc.,
151 A.D.3d 83 (1st Dep't 2017) 19

Buran v. Coupal,
87 N.Y.2d 173 (1995) 13

Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC,
Civ. No. 5140-CS, 2012 WL 3201139 (Del. Ch. Aug. 7, 2012) 19, 20

Clairol Dev., LLC v. Vill. of Spencerport,
100 A.D.3d 1546 (4th Dep't 2012) 14

Cooper v. Sleepy's, LLC,
126 A.D.3d 664 (2d Dep't 2015) 14

Deutsche Bank Nat'l Tr. Co. v. Morgan Stanley Mortg. Capital Holdings LLC, 289 F. Supp. 3d 484 (S.D.N.Y. 2018) 29

Duffy v. Horton Mem. Hosp.,
66 N.Y.2d 473 (1985) 13

Greater N.Y. Health Care Facilities Ass'n v. DeBuono,
91 N.Y.2d 716 (1998) 18, 19

Home Equity Mortg. Tr. Series 2006-1 v. DLJ Mortg. Capital, Inc.,
175 A.D.3d 1175 (1st Dep't 2019) 10, 23, 26, 27, 28

HSBC Bank USA v. Merrill Lynch Mortgage Lending, Inc.,
175 A.D.3d 1149 (1st Dep't 2019) 24, 26

HSBC Bank USA v. Merrill Lynch Mortg. Lending, Inc.,
Index No. 652793/2016, 2018 WL 2722870
(Sup. Ct. N.Y. Cty. June 6, 2018)..24

Johnson v. State,
125 A.D.3d 1073 (3d Dep't 2015)..14

Koch v. Acker, Merrall & Condit Co.,
114 A.D.3d 596 (1st Dep't 2014) 15

MASTR Adjustable Rate Mortgs. Tr. 2006-OA2 v. UBS Real Estate Sec. Inc., No. 12-CV-7322 (PKC), 2015 WL 764665
(S.D.N.Y. Jan. 9, 2015) 29

MASTR Adjustable Rate Mortgs. Tr. 2006-OA2 v. UBS Real Estate Sec. Inc., No. 12-CV-7322 (PKC), 2016 WL 1449751
(S.D.N.Y. Apr. 12, 2016)..26

Matter of Miller,
257 N.Y. 349 (1931) 11

Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc.,
30 N.Y.3d 572 (2017) 1, 17, 18, 25, 28

Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc., 133 A.D.3d 96
(1st Dep't 2015) 8, 10, 15, 21, 22, 26, 27

Matter of Part 60 Put-Back Litig.,
169 A.D.3d 217 (1st Dep't 2019) 29

Torchlight Loan Servs., LLC v. Column Fin., Inc.,
No. 11-CV-7426 (RWS), 2012 WL 3065929
(S.D.N.Y. July 25, 2012) 29

U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.,
33 N.Y.3d 84 (2019) 17

U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc,
Index No. 650369/2013, 2015 WL 5915285 (Sup. Ct. N.Y. Cty. Oct. 8, 2015) 7, 8

U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc.,
147 A.D.3d 79 (1st Dep't 2016) 3, 10, 14, 16, 22, 26

Wells Fargo Bank, N.A. v. Bank of Am., N.A., No. 10-CV-9584 (JPO),
2013 WL 1285289 (S.D.N.Y. Mar. 28, 2013) 29

Statutes, Rules, and Regulations

22 N.Y.C.R.R. § 500.22(b)(4) 11

CPLR 203(a) 12

CPLR 203(f) 12, 13, 17, 18

Other Authorities

Arthur Karger, *The Powers of the New York Court of Appeals* § 10:6
(3d ed. 2005) 11

Richard C. Reilly, Practice Commentary, *McKinney's Cons. Laws of N.Y.*, Book 7B, CPLR 5602 11

Defendant-Appellant DLJ Mortgage Capital, Inc. ("DLJ") respectfully submits this memorandum of law in 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

The Decision addressed two important issues that arise frequently in RMBS put-back litigation: (1) the extent to which the relation-back doctrine permits RMBS plaintiffs to proceed on allegedly breaching loans not identified in a timely repurchase demand, and (2) whether the contractually specified repurchase damages for liquidated loans include interest that never actually accrued on those loans. This Court routinely grants leave to appeal from nonfinal orders that resolve significant and recurring issues in RMBS repurchase cases,[2] and it should do so here as well. Permitting the Court of Appeals to resolve these questions now will clarify the proper scope of trial in this case as well as in many

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[1] A copy of the Decision, together with the Notice of Entry served by the Plaintiff-Respondent on October 10, 2019, is annexed as Exhibit A to the accompanying Affirmation of Daniel A. Rubens in Support of Defendant-Appellant's Motion for Leave to Appeal to the Court of Appeals, dated November 1, 2019. Citations to "A__" refer to DLJ's Appendix filed in this appeal.

[2] *See, e.g.*, *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569, 578 (2018); *Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 581 (2017); *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 623 (2016); *Deutsche Bank Nat'l Tr. Co. v. Morgan Stanley ABS Capital I Inc.* (*2007-NC4*), Index No. 652877/2014 (1st Dep't June 4, 2019); *U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc.*, Index No. 651954/2013 (1st Dep't Apr. 13, 2017); *Morgan Stanley Mortg. Loan Tr. 2006-13ARX v. Morgan Stanley Mortg. Capital Holdings LLC*, Index No. 653429/2012 (1st Dep't Dec. 13, 2016).

other pending RMBS cases, while minimizing disruption in the event that the Court of Appeals ultimately disagrees with this Court's determinations.

The Court should grant leave to appeal its relation-back holding, which is also the subject of pending motions for reargument and leave to appeal in *Home Equity Mortgage Trust Series 2006-1 v. DLJ Mortgage Capital, Inc.* (*HEMT 2006-1*), Appeal Nos. 2019-619, 2019-620, Motion No. 7802, and *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, Appeal No. 2019-26, Motion No. 7782. Relying on this Court's RMBS relation-back precedents, the Decision allowed Plaintiff's claims on "subsequently identified loans" to proceed because Plaintiff had submitted timely pre-suit notices identifying another set of loans as breaching. But the Court of Appeals has previously described relation back as a doctrine that permits the correction of flaws in the plaintiff's *pleading*; that Court has never addressed or endorsed the application of relation back in RMBS cases—or in any other context—to excuse a plaintiff from timely compliance with a contractual requirement. Moreover, this Court's recent decisions have provided conflicting guidance as to whether timely breach notices must include language alerting defendants to an ongoing investigation or a likelihood of future claims in order to support application of relation back—language that is lacking from the timely repurchase demands in this case.

Leave to appeal should be granted here so that the Court of Appeals can definitively resolve when relation back is available to salvage untimely noticed breaches in RMBS repurchase cases. Although this Court granted leave to appeal in *Nomura*, the defendants there elected not to address relation back in the Court of Appeals. Thereafter, in *U.S. Bank National Association v. GreenPoint Mortgage Funding, Inc.*, 147 A.D.3d 79 (1st Dep't 2016), this Court granted leave to appeal on a similar relation-back question, but an intervening settlement deprived the Court of Appeals of the opportunity to address the issue. The proper application of relation back is critical to many pending RMBS repurchase cases—including the *HEMT 2006-1* and *Ambac* cases mentioned above—because it defines the population of allegedly breaching loans that can proceed to trial absent proof that a defendant independently discovered a material breach.

In addition, the Decision resolved an important question regarding the damages available for the repurchase of liquidated loans, holding that Plaintiff may recover damages associated with those loans beyond what the contract permits. That holding contradicts the plain language of the contract's definition of "Repurchase Price," which limits the interest component of Plaintiff's recovery to interest that has "accrued" on a loan. As the offering documents here disclose to investors, once a loan is liquidated, it no longer exists, and interest no longer accrues on it. To the extent the Decision relied on this Court's *Nomura* holding

to craft an equitable remedy that departs from the terms of the contract, that deviation from fundamental New York contract law warrants leave to appeal. DLJ has raised this same issue in its pending motion for reargument and leave to appeal in *HEMT 2006-1*.

QUESTIONS OF LAW TO BE CERTIFIED TO THE COURT OF APPEALS

Question 1: Does the doctrine of relation back permit an RMBS plaintiff to assert otherwise untimely notice-based claims for any loan in an RMBS trust, and thereby excuse the plaintiff's failure to comply with a contractual precondition to invoking the repurchase remedy, as long as the plaintiff provided timely pre-suit repurchase demands relating to some specified loans in the trust, even where that notice fails to inform the defendant of an ongoing investigation or a likelihood of additional breach allegations?

Question 2: Where an RMBS contractual provision provides for the payment of "accrued" interest as part of the repurchase remedy, is the plaintiff entitled to recover as damages interest that did not, in fact, accrue?

STATEMENT

I. This appeal arises from an RMBS trust known as the Home Equity Asset Trust Series 2007-1 (the "Trust"), which closed on February 1, 2007. A139, 147. DLJ sponsored the Trust and originated or acquired the approximately 5,153 residential mortgage loans underlying it. A79.

The Trust was created and governed by a Pooling and Servicing Agreement ("PSA") entered into by, *inter alia*, DLJ, as Seller, and U.S. Bank, as Trustee. A400. As is typical in RMBS transactions, the PSA includes a schedule setting forth representations and warranties about the mortgage loans underlying the Trust. The PSA contains a repurchase protocol that serves as the "sole remedy" for any breach of a loan-related representation or warranty that has a material effect on the certificateholders' interests. A470. The repurchase protocol provides that if DLJ is notified of or independently discovers a breach of a representation or warranty that has the requisite material and adverse effect, DLJ then has 90 days to cure the breach. *Id.* If DLJ fails to cure within that period, DLJ shall "repurchase the affected Mortgage Loan from the Trustee" at a contractually defined "Repurchase Price." *Id.* 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 … 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." A450.

Plaintiff sent DLJ two timely pre-suit breach notices, which together identified less than 25% of the Trust loans as allegedly breaching. In a December 6, 2011 notice, Plaintiff sent DLJ a letter stating that a certificateholder, the

Federal Housing Finance Agency ("FHFA"), had requested that DLJ repurchase specified loans, in addition to "any others that did not comply with the representations and warranties." A732. Plaintiff's letter attached two letters from FHFA identifying 304 specific loans as breaching. Plaintiff's letter further "demand[ed] that DLJ repurchase all loans that breached representations and warranties." A732. On March 30, 2012, Plaintiff sent DLJ 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 specifically identified. A745.

Although Plaintiff's December 6, 2011 letter stated that FHFA had requested the repurchase of "any other[]" loans in the Trust that did not comply with representations and warranties, FHFA's own letters did not in fact include such a demand. Instead, those letters requested only that the Plaintiff "enforce the Seller's obligation to repurchase *the Subject Loans*," A734-735, 739-740 (emphasis added)—that is, the specifically identified loans. FHFA's letters also "reserve[d] [FHFA's] rights to identify other Mortgage Loans with respect to which [DLJ] may have breached one or more of the representations and warranties contained in the PSA," but did not assert that DLJ had engaged in systemic breaches or alert DLJ that FHFA intended to assert additional breach claims. A735, 740.

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.

II. Plaintiff initiated this action in 2013. A50. Plaintiff's operative complaint alleges that FHFA's review of the loan files identified 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" 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 claims as to 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. *See 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).

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. In 2016, Plaintiff's underwriting expert 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 timely 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.

In calculating damages, Plaintiff's damages expert included interest on all allegedly breaching loans, including after certain loans had been liquidated and therefore ceased to exist. He used March 5, 2012, as the applicable repurchase date for all loans. A775.

III. 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 that Plaintiff had failed to provide timely notice of breaches for the 480 loans not identified in Plaintiff's demand letters. 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). Then, 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.

Accrued interest on liquidated loans: DLJ sought a summary judgment ruling that, under the definition of "Repurchase Price" in the PSA, the term "accrued and unpaid interest" is limited to interest that actually accrued on the loan and therefore cannot include interest that purportedly "accrued" on a loan that had already been liquidated. The court denied the request and held that "interest should continue to accrue on the loans despite their liquidation." *Id.*

Repurchase Date: DLJ sought a summary judgment ruling that the proper repurchase date for a given loan is 90 days after DLJ first received notice of a material breach of a loan-related representation or warranty in a particular loan. The trial court held that the applicable repurchase date for *every* breaching loan in the Trust "can reasonably be set as March 5, 2012," which is 90 days from the date of Plaintiff's December 2011 breach notice. A37.

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

IV. This Court's Decision affirmed the trial court's summary judgment rulings. The Decision concluded that Plaintiff's December 6, 2011 letter "informed [DLJ] 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." Decision 20. Accordingly, this Court held, "subsequently identified loans, including the 480 identified by plaintiff's expert during discovery, related back to the time of the initial notice." *Id.* (citing *Home Equity Mortg. Tr. Series 2006-1 v. DLJ Mortg. Capital, Inc.* (*HEMT 2006-1*), 175 A.D.3d 1175, 1176 (1st Dep't 2019); *GreenPoint*, 147 A.D.3d at 88-89; and *Nomura*, 133 A.D.3d 96). As to the contractually defined repurchase date, this Court agreed with the trial court that because DLJ "was placed on written notice of breach as to all loans on December 6, 2011, it follows that March 5, 2012 … is likewise the appropriate date of repurchase." *Id.* The Decision further held that the trial court "properly ruled that interest could be calculated on liquidated loans, at the applicable mortgage rate, up until the repurchase date." *Id.* (citing *Nomura*, 133 A.D.3d at 107, and *HEMT 2006-1*, 175 A.D.3d at 1176).

ARGUMENT[3]

Leave to appeal is warranted in the "interest of substantial justice," a standard that is satisfied where permitting the decision below to go unchallenged would implicate "[t]he public interest and the interest of jurisprudence." *Matter*

[3] Points I.A, I.B, and II of DLJ's argument in this memorandum of law are substantially similar to the corresponding sections of DLJ's argument in its memorandum of law in support of its pending motion for reargument or leave to appeal in *HEMT 2006-1*. *See* Appeal Nos. 2019-619, 620, Index No. 156016/2012, NYSCEF Doc. No. 27, Motion No. 7802, at 13-23 (1st Dep't Oct. 17, 2019) ("*HEMT 2006-1* Leave Mem.").

of Miller, 257 N.Y. 349, 357 (1931); *see also* Richard C. Reilly, Practice Commentary, *McKinney's Cons. Laws of N.Y.*, Book 7B, CPLR 5602 (leave to appeal is appropriate where the decision presents a "question of law important enough to warrant the immediate attention of the Court of Appeals"). The functions of the Court of Appeals include "the duty uniformly to settle the law for the entire State and finally to determine its principles." *Miller*, 257 N.Y. at 357-58. Under the Court of Appeals' rules of practice, "issues [that] are novel or of public importance [or] present a conflict with prior decisions" of that Court are nonexclusive examples of categories of cases warranting review. 22 N.Y.C.R.R. § 500.22(b)(4); *see also* Arthur Karger, *The Powers of the New York Court of Appeals* § 10:6 (3d ed. 2005).

I. Leave To Appeal Should Be Granted On The Decision's Application Of The Relation-Back Doctrine To Permit Claims On Untimely Noticed Loans.

It is undisputed that the timely breach notices in this case identified only 1,204 specific loans in the Trust as breaching. The Decision nonetheless held that Plaintiff could proceed with claims on "subsequently identified loans, including the 480 identified by plaintiff's expert during discovery," because all such claims "relate[] back to the time of the initial notice." Decision 20-21. That relation-back holding warrants the Court of Appeals' review for multiple reasons: First, as a threshold matter, that Court's precedent does not support applying the relation-

back doctrine to excuse a plaintiff from a contractual remedial protocol requiring notice and an opportunity to cure. Second, even if relation back provided the appropriate framework for considering this question, the untimely noticed loans do not constitute the same "transaction" or "occurrence" as the timely noticed loans. Third, the Decision exacerbates a conflict among this Court's own RMBS decisions as to what (if anything) a timely repurchase demand must say about the potential for additional claims in order to support the relation back of subsequent breach allegations. For each of these reasons, leave to appeal should be granted.

A. The relation-back doctrine should not excuse Plaintiff from timely compliance with contractual requirements.

As a general rule, causes of action are untimely if they are interposed after the limitations period expires. *See* CPLR 203(a). CPLR 203(f) codifies a limited exception, known as the relation-back doctrine, for amended pleadings that raise new claims: If the original pleading "give[s] notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading," then the claims in the amended pleading are "deemed to have been interposed at the time the claims in the original pleading were interposed."

The doctrine thus strikes a balance between, on the one hand, "liberalizing … strict, formalistic pleading requirements," and, on the other, "respecting the important policies inherent in statutory repose." *Buran v. Coupal*, 87 N.Y.2d 173, 177 (1995); *see also Duffy v. Horton Mem. Hosp.*, 66 N.Y.2d

473, 476-77 (1985) (emphasizing "the need to protect the judicial system from the burden of adjudicating stale and groundless claims"). The point of the doctrine is to "enable[] a plaintiff to *correct a pleading error*—by adding either a new claim or a new party—after the statutory limitations period has expired." *Buran*, 87 N.Y.2d at 177 (emphasis added). "An amendment *which merely adds a new theory of recovery or defense* arising out of a transaction or occurrence already in litigation clearly does not conflict with these policies." *Duffy*, 66 N.Y.2d at 477 (emphasis added).

Here, Plaintiff is using relation back to do far more than correct a pleading error or introduce a new theory of recovery. The problem is not with the sufficiency of Plaintiff's initial pleading, but with its failure to comply with the sole remedy provision—a "procedural prerequisite" to its ability to pursue repurchase claims, *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 25 N.Y.3d 581, 598 (2015)—at the time these actions were commenced. No decision of the Court of Appeals—or of this Court in non-RMBS cases—supports applying CPLR 203(f) to excuse a party from the consequences of disregarding an agreed-upon remedial protocol until after the limitations period expires. Indeed, outside the RMBS context, every Appellate Division Department to consider the question has held the relation-back doctrine inapplicable where "the proposed causes of action are based upon events that occurred after the filing of the initial claim,

rather than upon the events giving rise to the cause of action in the initial claim." *E.g.*, *Johnson v. State*, 125 A.D.3d 1073, 1074 (3d Dep't 2015); *accord Cooper v. Sleepy's, LLC*, 126 A.D.3d 664, 665-66 (2d Dep't 2015); *Clairol Dev., LLC v. Vill. of Spencerport*, 100 A.D.3d 1546, 1547 (4th Dep't 2012).

At the time Plaintiff filed its original pleading, it could not have properly included claims for the untimely noticed loans, because Plaintiff had not yet satisfied a contractual precondition to asserting such claims—namely, giving DLJ timely notice of and an opportunity to cure alleged breaches. *See ACE*, 25 N.Y.3d at 599. To the extent that Plaintiff now asserts claims of breach for loans that had never been the subject of timely contractual notices, those claims would have been invalid at the time of the initial complaint, because Plaintiff had "no right" to pursue repurchase of a loan until it afforded DLJ notice and an opportunity to cure that alleged breach. *GreenPoint*, 147 A.D.3d at 87. As a doctrine focused on pleading mistakes, relation back does not authorize Plaintiff to avoid the consequences of its failure to adhere to the sole remedy provision and proceed on untimely repurchase demands.

In concluding otherwise, the Decision relied on *Nomura*, where this Court allowed relation back for "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." 133 A.D.3d at 108. *Nomura*,

for its part, emphasized the fact that there were "some timely claims" pertaining to timely breach notices. *Id.* But *Nomura* offered no 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, nor did it cite any decision from the Court of Appeals to support that proposition.

The sole case *Nomura* cited on this point concerned claims of deceptive trade practices and false advertising in connection with alleged counterfeit wine sales, not a breach of contract claim stemming from an agreement that contains a sole remedy provision. *See Koch v. Acker, Merrall & Condit Co.*, 114 A.D.3d 596 (1st Dep't 2014). In other words, the parties in *Koch* did not bargain for a contract requiring notice and an opportunity to cure before the purchaser could obtain relief as to any counterfeit bottle of wine. *Koch*, to be sure, is consistent with the use of relation back that the Court of Appeals has endorsed: namely, to correct pleading mistakes (there, the failure to identify additional bottles of wine that defendant sold to plaintiff as counterfeit). But *Koch* in no way supports invocations of relation back that allow sophisticated commercial parties to flout contractual preconditions to invoking the agreed-upon sole remedy.

The Decision also, without explanation, supported its relation-back holding with a citation to this Court's decision in *GreenPoint*. *GreenPoint* does not support the use of relation back here; instead, that holding calls into question

whether the presence of "some timely claims" is sufficient for relation back to apply. In *GreenPoint*, the Court concluded that there *were* some timely claims, insofar as the plaintiff alleged that the defendant's "obligation to cure was triggered by its own discovery of nonconforming mortgages." 147 A.D.3d at 85. The Court nonetheless held that "[t]he doctrine of relation back cannot render these otherwise untimely breach notices timely." *Id.* at 86. In so holding, the Court distinguished the "contractual requirement of a breach notice," which triggers the cure-or-repurchase obligation, from the "concept of relation back in a pleading context." *Id.* at 88. The Court thus declined to "extend[]" *Nomura* to allow relation back, even though, as noted, there were timely claims—namely, discovery-based claims—in *GreenPoint*. Accordingly, as Justice Acosta correctly observed in dissent, "The implication of the [*GreenPoint*] majority's ruling is that *Nomura* was wrongly decided with respect to its application of the relation-back doctrine." *Id.* at 92 (Acosta, J.P., dissenting in part).

Nor did the Decision (or *Nomura*) attempt to reconcile the application of relation back with New York's "strong public policy favoring freedom of contract," especially when it comes to "agreements negotiated at arm's length by sophisticated, counseled parties." *159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353, 356, 363 (2019) (enforcing waiver of commercial tenant's right to seek declaratory relief). When considering RMBS sole remedy provisions similar

to the ones at issue here, the Court of Appeals has emphasized the importance of "honoring the exclusive remedy that these sophisticated parties fashioned." *Nomura*, 30 N.Y.3d at 584 (internal quotation marks and brackets omitted). In particular, that Court rejected an attempt by an RMBS trustee (the same plaintiff here) to invoke relation back to override its failure to comply with the sole remedy provision within the limitations period. *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 33 N.Y.3d 84, 90 (2019) (CPLR 203(f) requires a "valid pre-existing action"). And *ACE* itself, in enforcing an RMBS sole remedy provision as a "procedural prerequisite to suit," emphasized the importance of the six-year statute of limitations in "serv[ing] the … objectives of finality, certainty and predictability." 25 N.Y.3d at 593-94. By excusing RMBS plaintiffs from compliance with these carefully negotiated remedial provisions, the Decision contravenes these important policies, without any good reason for doing so.

B. Even if relation back can sometimes excuse timely compliance with contractual requirements, each allegedly breaching loan in the Trust constitutes a separate transaction, such that relation back is not warranted here.

Even if relation back could apply to excuse parties from their contractual obligations as a general matter, the Decision's application of the doctrine warrants leave to appeal for another reason: Under CPLR 203(f), relation back is appropriate only where the original pleading and amended pleading arise out of the same "transactions, occurrences, or series of transactions or occurrences."

Here, the Decision—in accord with *Nomura*—implicitly treated every alleged breaching loan in each trust as being part of the same "transaction," such that a single timely noticed breach could open the door for any untimely noticed breach to relate back. That was error under the Court of Appeals' decision in *Greater New York Health Care Facilities Association v. DeBuono*, 91 N.Y.2d 716 (1998), a holding the Decision failed to address.

DeBuono arose from an Article 78 proceeding brought by eight nursing homes and a nursing home association challenging Department of Health regulations that established Medicaid reimbursement rates. *Id.* at 718. Several other nursing homes sought to intervene and assert additional claims. *Id.* at 719. The Court of Appeals held that the otherwise untimely claims of proposed intervenors could not relate back. Some of the Court's reasoning turned on the fact that the proposed intervenors were new parties not closely related to the original challengers. *Id.* at 721. But the Court's critical holding revolved entirely on how to define the relevant "transaction"—the same question at issue here. *Id.* In that regard, the Court held that the proposed intervenors' claims of injury "are based on different, not identical, transactions." *Id.* That was so, the Court explained, because "each nursing home has an individualized reimbursement rate and the injury claimed varies from facility to facility and from year to year." *Id.* That reasoning is fatal to relation back here, where the question of whether a

given loan in the trust materially breached representations and warranties is necessarily "individualized."

Although Plaintiff has identified no reasoned New York decision analyzing the relevant "transaction" for the relation back of untimely noticed RMBS repurchase claims, the Delaware Chancery Court grappled with that precise question at length in *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, Civ. No. 5140-CS, 2012 WL 3201139, at *18-19 (Del. Ch. Aug. 7, 2012). That carefully reasoned decision, authored by then-Chancellor Strine, is instructive. *Cf. Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 151 A.D.3d 83, 89 (1st Dep't 2017) (following Delaware Chancery Court's reasoning as to the proper interpretation of RMBS loan-related representations and warranties).

In *Central Mortgage*, the Delaware Chancery Court considered whether, for relation-back purposes, untimely noticed breach allegations relate to the same "transaction or occurrence" as the claims in the complaint. The court concluded that those late claims could not relate back, because "each alleged breach of contract due to a breach of 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." 2012 WL 3201139, at *18. As that court explained, "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," as "evaluating the accuracy of … representations as to Loan A is an independent inquiry from that evaluation as to Loan B." *Id.* That result also follows from the fact that the sole remedy provision required "loan-specific" notice and an opportunity to cure. *Id.* at *19. Further, a contrary rule would turn relation back "into a license for sloth" and "undermine the finality of contracts by subjecting sellers to a series of late-filed claims brought by amended pleadings based on stale records." *Id.* at *20. The sound reasoning of *Central Mortgage* is thus diametrically opposed to *Nomura* and subsequent decisions of this Court that permit relation back for every untimely noticed breaching loan in a given RMBS trust.

C. The Decision deepens a conflict among this Court's own RMBS holdings as to the content required for a timely repurchase demand to support relation back of subsequent breach claims.

As set forth above, leave to appeal is warranted here and in *HEMT 2006-1* on (1) whether relation back can excuse plaintiffs from complying with contractual requirements and (2) whether, in the RMBS context, the entire securitization is properly treated as the relevant "transaction" or "occurrence." But yet another aspect of the Decision merits review: Even assuming the answer to those first two questions is "yes," can a timely breach notice support the relation back of later-identified breaching loans without alerting the defendant to

an ongoing future investigation or the likelihood of additional claims? Because this Court's own precedents are now conflicted on that question, the Court of Appeals should be given the opportunity to resolve it.

In the appeals resolved in *Nomura*, this Court noted that the presence of "some timely claims" supported the relation back of later claims, 133 A.D.3d at 108, but its analysis did not stop there. Instead, the Court proceeded to note 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.* Indeed, the timely notices in those cases identified breaches that were "systemic" in nature and demanded the "repurchase of all loans" in the respective trusts. *Id.* at 103-04.

GreenPoint understood *Nomura*'s holding in exactly that way. In summarizing *Nomura*, *GreenPoint* did not treat relation back as triggered merely by the presence of "some timely claims" arising from timely breach notices. Instead, *GreenPoint* emphasized that "although the precommencement breach notices in *Nomura* did not specifically identify every alleged nonconforming mortgage, the trustees' presuit demands put the defendant on notice that the certificate holders whom the plaintiffs (as trustees) represented were investigating the mortgage loans and might uncover additional defective loans for which claims

would be made." 147 A.D.3d at 88. *GreenPoint* declined to "extend[]" *Nomura* to allow for relation back when such notice was *not* provided, *id.* at 89, even though Justice Acosta's dissent characterized the absence of that language as "a distinction without a difference," *id.* at 91 (Acosta, J.P., dissenting in part).

This Court's recent decision in *HEMT 2006-1* is similar to *Nomura* and *GreenPoint* in this regard. The reasoning the Court gave for allowing relation back in *HEMT 2006-1* turned entirely on the contents of the "trustee's timely presuit letters, which stated that DLJ had placed defective loans into the trusts 'on a massive scale,' cited breach rates between 65% and 72% in the trusts, cautioned that the specified defective loans were 'just the tip of the iceberg,' and stated that its investigation into loans in the trusts was ongoing." *HEMT 2006-1*, 175 A.D.3d at 1176. Based on those statements, the Court concluded that the timely letters "put DLJ on notice that the breaches plaintiffs were investigating might uncover additional defective loans for which claims would be made." *Id.*

Here, the Decision cited *HEMT 2006-1*, *GreenPoint*, and *Nomura* in support of its relation-back holding. But it failed to acknowledge critical distinctions between the timely pre-suit letters in this case and those in the cases the Decision cited. Plaintiff's timely letters here said nothing about systemic breaches, high breach rates, or an ongoing investigation into the loans in the Trust. The only aspect of the notice that might have alerted DLJ to "the

possibility that additional nonconforming loans might be identified," Decision 20, was FHFA's reservation of the right "to identify other Mortgage Loans with respect to which [DLJ] may have breached one or more of the representations and warranties in the PSA." A740. But a boilerplate reservation of rights is different from the notice of an actual, ongoing investigation likely to result in further breach claims that *Nomura*, *GreenPoint*, and *HEMT 2006-1* treated as essential to the application of relation back. The Decision failed to acknowledge that distinction or explain its departure from the Court's prior holdings.

The need for review is further underscored by this Court's decision in *HSBC Bank USA v. Merrill Lynch Mortgage Lending, Inc.*, 175 A.D.3d 1149 (1st Dep't 2019), which was issued the same day as *HEMT 2006-1*, but which appears to have applied yet another test for relation back. In *HSBC*, the Court allowed the relation back of untimely breach notices relating to hundreds of loans because there were "two timely notices." *Id.* at 1149. The timely notice letters in *HSBC* each identified only a single loan as breaching; neither of them said anything about an ongoing investigation, systemic breaches, or even the possibility of asserting claims relating to additional mortgage loans. *See* Joint Record on Appeal 352-64, *HSBC*, Appeal No. 2018-3126, NYSCEF Doc. No. 5 (Feb. 1, 2019). The trial court in *HSBC* had relied on precisely that fact to hold that the two single-loan notices were insufficient to support relation back. *HSBC Bank*

USA v. Merrill Lynch Mortg. Lending, Inc., Index No. 652793/2016, 2018 WL 2722870, at *11 (Sup. Ct. N.Y. Cty. June 6, 2018) ("[N]either of the Initial Breach Notices informed defendant that an investigation of the [l]oans was in process and that further breaches might be discovered."). In reversing and allowing relation back, this Court did not acknowledge that reasoning or attempt to reconcile its holding with *Nomura*.[4]

The result of these various holdings is a lack of clarity as to what, if anything, timely RMBS pre-suit notices must say in order to support relation back of later-noticed breaches. *Nomura*, *GreenPoint*, and *HEMT 2006-1* have relied at least in part on language that provides notice of an ongoing investigation. The Decision here suggests that a mere reservation of rights is enough, at least where a "substantial number" of loans have been timely identified as breaching. And *HSBC* entirely failed to analyze the issue the Decision treated as critical: whether the timely notice informed the defendant of "the possibility that additional nonconforming loans might be identified." Decision 20. Without the Court of Appeals' review, litigants and lower courts will be left guessing as to which approach to apply.

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[4] The defendants in *HSBC* have not moved for reargument or leave to appeal.

D. The relation-back issue warrants leave to appeal.

As explained above, the Decision's relation-back holding goes well beyond any application of the relation-back doctrine that the Court of Appeals has ever endorsed; conflicts with the Delaware Chancery Court's decision in *Central Mortgage*; and cannot be reconciled with this Court's decisions in *HEMT-1*, *GreenPoint*, or *Nomura* itself. This Court previously granted leave to appeal in *Nomura* and *GreenPoint*, but the defendants in *Nomura* did not address the relation-back holding in the Court of Appeals, *see* 30 N.Y.3d at 577, and *GreenPoint* settled before argument, 32 N.Y.3d 1123 (2018). Meanwhile, relation-back questions continue to arise frequently in New York RMBS litigation, including in federal courts applying New York law,[5] and are the subject of two pending motions in this Court for reargument and leave to appeal. *HEMT 2006-1* Leave Mem., at 13-23; *Ambac Assurance Corp.*, Index No. 651612/2010, NYSCEF Doc. No. 32, Motion No. 7782, at 20-26 (1st Dep't Oct. 17, 2019). For all these reasons, the issue warrants certification to the Court of Appeals for definitive resolution.[6]

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[5] *See, e.g.*, *MASTR Adjustable Rate Mortgs. Tr. 2006-OA2 v. UBS Real Estate Sec. Inc.*, No. 12-CV-7322 (PKC), 2016 WL 1449751, at *2-4 (S.D.N.Y. Apr. 12, 2016); *GreenPoint*, 147 A.D.3d at 86-89; *Nomura*, 133 A.D.3d at 108; *HSBC Bank USA*, 175 A.D.3d at 1149; *HEMT 2006-1*, 175 A.D.3d at 1176.

[6] After holding that Plaintiff's subsequently identified loans could relate back to the December 6, 2011 breach notice, the Decision concluded that "March 5, 2012 … is likewise the appropriate date of repurchase," i.e., 90 days after the initial breach notice, for *every* loan

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.

A. The Repurchase Price provides for "accrued and unpaid interest" as part of the payment due upon repurchase of a nonconforming loan. A450. It is axiomatic that once a mortgage loan has been liquidated, interest no longer accrues on that loan. Indeed, the offering documents for these Trusts warn investors of exactly that risk. *E.g.*, A274 ("Defaulted mortgage loans may be liquidated, and liquidated mortgage loans will no longer be outstanding and generating interest."). Plaintiff has pointed to state-law *remedies* that may remain available after a mortgage loan has been liquidated (e.g., a deficiency judgment), *see* Resp. Br. 29-30, but it has cited nothing in support of the proposition that interest *continues to accrue* on a loan that no longer exists.

The trial court recognized that DLJ's emphasis on the contractual definition "has some logic to it," but ultimately declined to enforce the contractual definition because of the undisputed fact that repurchase damages are available on liquidated loans, coupled with policy concerns about creating "perverse incentives" for sponsors. A36. This Court's Decision affirmed, disposing of the damages question in a single sentence: "The [trial] court properly ruled that

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Plaintiff contends is breaching, including subsequently identified loans. Decision 21. Although DLJ does not rely on that repurchase-date holding as an independent basis for requesting leave to appeal, to the extent the Decision's relation-back holding is modified, the applicable repurchase date should be reconsidered as well.

interest could be calculated on liquidated loans, at the applicable mortgage rate, up until the repurchase date (*see* [*HEMT 2006-1*]; *Nomura*, 133 A.D.3d at 107)." Decision 21.

The Decision's citations to *Nomura* and *HEMT 2006-1* do not justify a departure from the contractual language. The cited portion of *Nomura* allowed RMBS plaintiffs to "pursue monetary damages with respect to any defective mortgage loan in those instances where cure or repurchase is impossible," such as when a loan has been liquidated. 133 A.D.3d at 105, 107. And the *HEMT 2006-1* decision merely invoked the same section in *Nomura* in reaching the conclusion that "the repurchase price, as defined in the PSAs, applies to liquidated and non liquidated loans, and thus, includes accrued interest on loans after they have been liquidated." 175 A.D.3d at 1177. But that was not the issue before this Court or the *HEMT 2006-1* panel. No one disputes that damages can be awarded where the equitable specific performance remedy is impossible. Indeed, DLJ and Plaintiff agree that (1) plaintiffs can pursue monetary damages as to nonconforming loans that have been liquidated, and (2) those damages must be calculated pursuant to the contractual Repurchase Price. The Decision failed to engage with that contractual definition, which, as just explained, does not authorize the recovery of interest that never accrued on loans after they were liquidated.

To the extent that the Decision altered the contractual remedy based on the Court's view of the equities, that approach violates fundamental tenets of New York contract law. In *Nomura* itself, the Court of Appeals emphasized the need to "honor contractual provisions that limit liability or damages because those provisions represent the parties' agreement on the allocation of the risk of economic loss in certain eventualities." 30 N.Y.3d at 581. That rule is an application of the broader principle that "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms." *Id.*

Notably, this Court recently addressed a similar question in *Matter of Part 60 Put-Back Litigation*, which likewise involves potential exceptions to the "general principle of enforceability of contractual provisions limiting liability." 169 A.D.3d 217, 223 (1st Dep't 2019). The Court concluded that sufficient allegations of gross negligence justify a departure from that principle so as to permit damages that go beyond the sole remedy clause, but still granted leave to appeal so that the Court of Appeals could resolve that significant question, along with separate questions relating to the availability of punitive damages and attorneys' fees. *2007-NC4*, Index No. 652877/2014 (1st Dep't June 4, 2019). The Court should follow a similar course here and grant leave to appeal,

especially given that many RMBS contracts include similar definitions of Repurchase Price.[7]

CONCLUSION

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

[7] *See, e.g.*, *Deutsche Bank Nat'l Tr. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 289 F. Supp. 3d 484, 490 (S.D.N.Y. 2018); *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); *Wells Fargo Bank, N.A. v. Bank of Am., N.A.*, No. 10-CV-9584 (JPO), 2013 WL 1285289, at *9 (S.D.N.Y. Mar. 28, 2013), *vacated and remanded*, 627 F. App'x 27 (2d Cir. 2015); *Torchlight Loan Servs., LLC v. Column Fin., Inc.*, No. 11-CV-7426 (RWS), 2012 WL 3065929, at *13 (S.D.N.Y. July 25, 2012).

Dated: New York, New York
November 1, 2019

Respectfully submitted,

Barry S. Levin
John Ansbro
Richard A. Jacobsen
Paul F. Rugani
Daniel A. Rubens
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, New York 10019
(212) 506-5000

Darren S. Teshima
(of the bar of the State of California)
By Permission of the Court
ORRICK, HERRINGTON &
SUTCLIFFE LLP
405 Howard Street
San Francisco, California 94105
(415) 773-5700

Robert M. Loeb
(of the bar of the District of Columbia)
By Permission of the Court
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street N.W.
Washington, D.C. 20005
(202) 339-8475

Attorneys for Defendant-Appellant

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

AFFIRMATION OF DANIEL A. RUBENS IN SUPPORT OF DEFENDANT-APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

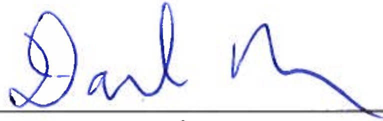
Daniel A. Rubens, an attorney duly admitted to practice law in the Courts of the State of New York, hereby affirms the truth of the following upon information and belief, under penalty of perjury and says:

1. I am a member of the bar of this Court and a partner at the law firm of Orrick, Herrington & Sutcliffe LLP, counsel to Defendant-Appellant DLJ Mortgage Capital, Inc. ("DLJ") in the above-captioned action. I make this affirmation in support of DLJ's motion for leave to appeal to the Court of Appeals.

2. A true and correct copy of the Court's October 10, 2019 Decision, together with the Notice of Entry served upon DLJ on October 10, 2019, is attached as Exhibit A.

Dated: New York, New York
November 1, 2019

Respectfully submitted,



Darren S. Teshima
(of the bar of the State of California)
By Permission of the Court
ORRICK, HERRINGTON &
SUTCLIFFE LLP
405 Howard Street
San Francisco, California 94105
(415) 773-5700

Barry S. Levin
John Ansbro
Richard A. Jacobsen
Paul F. Rugani
Daniel A. Rubens
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, New York 10019
(212) 506-5000

Robert M. Loeb
(of the bar of the District of Columbia)
By Permission of the Court
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street N.W.
Washington, D.C. 20005
(202) 339-8475

Attorneys for Defendant-Appellant

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

U.S. BANK NATIONAL ASSOCIATION, solely in its capacity as Trustee of the HOME EQUITY ASSET TRUST 2007-1 (HEAT 2007-1),	Index No. 650369/2013
Plaintiff,	(Cohen, J.)
-against-	IAS Part 3
DLJ MORTGAGE CAPITAL, INC.,	**NOTICE OF ENTRY**
Defendant.	

PLEASE TAKE NOTICE that the attached Exhibit A is a true and correct copy of the Decision and Order of the Appellate Division, First Department dated October 10, 2019, which was duly entered in the Office of the Clerk of the Appellate Division, First Department on October 10, 2019.

Dated: New York, New York
October 10, 2019

KASOWITZ BENSON TORRES LLP

By: /s/ David J. Abrams
Hector Torres (htorres@kasowitz.com)
David J. Abrams (dabrams@kasowitz.com)
David J. Mark (dmark@kasowitz.com)
Jonah M. Block (jmblock@kasowitz.com)

1633 Broadway
New York, New York 10019
(212) 506-1700

Attorneys for Plaintiff U.S. Bank N.A., solely in its capacity as trustee of the Home Equity Asset Trust 2007-1 (HEAT 2007-1)

TO: All Counsel of Record (via NYSCEF)

EXHIBIT A

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10036 U.S. Bank National Association, etc., Index 650369/13
Plaintiff-Respondent,

-against-

DLJ Mortgage Capital, Inc.,
Defendant-Appellant.

____

Orrick, Herrington & Sutcliffe LLP, New York (Daniel A. Rubens of counsel), for appellant.

Kasowitz Benson Torres LLP, New York (David J. Abrams of counsel), for respondent.

____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 27, 2018, which, insofar as appealed from, denied defendant’s motion for summary judgment, unanimously affirmed, with costs.

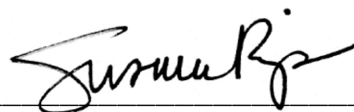
The written notice sent from plaintiff to defendant dated December 6, 2011, made within the statutory limitations period and well in advance of any lawsuit, informed defendant that a substantial number of identified loans were in breach, and that the pool of loans remained under scrutiny, with the possibility that additional nonconforming loans might be identified. The notice complied with the contractual condition precedent of notifying defendant of its default, such that subsequently identified loans, including the 480 identified by plaintiff’s expert during discovery, related back to the time of the initial

notice (*see Home Equity Mtge. Trust Series 2006-1 v DLJ Mtge. Cap., Inc.* ["*HEMT 2006-1*"], 2019 NY Slip Op 06576, *2, ___ AD3d ___ [1st Dept 2019]; *U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.*, 147 AD3d 79, 88-89 [1st Dept 2016]; *Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Cred. & Cap., Inc.*, 133 AD3d 96 [1st Dept 2015], *mod on other grounds* 30 NY3d 572 [2017]). Since defendant was placed on written notice of breach as to all loans on December 6, 2011, it follows that March 5, 2012 — under the applicable contractual repurchase protocol, the end of the applicable 90-day cure period, at which point defendant was required to repurchase any uncured, nonconforming loans — is likewise the appropriate date of repurchase.

The motion court properly ruled that interest could be calculated on liquidated loans, at the applicable mortgage rate, up until the repurchase date (*see* "*HEMT 2006-1*," 2019 NY Slip Op 06576, *5, ___ AD3d ___; *Nomura*, 133 AD3d at 106-107).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 10, 2019



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