To be Argued by:
DAVID J. ABRAMS
(Time Requested: 15 Minutes)

New York Supreme Court

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.

Appellate Case No.: 2019-219

BRIEF FOR PLAINTIFF-RESPONDENT

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Plaintiff-Respondent U.S. Bank National Association, solely in its capacity as Trustee (the "Trustee") of the Home Equity Asset Trust 2007-1 (the "Trust"), respectfully submits this brief in opposition to the appeal of Defendant-Appellant DLJ Mortgage Capital, Inc. ("DLJ") from the December 26, 2019 Decision and Order of the Supreme Court, New York County, denying DLJ's motion for summary judgment.

STATEMENT OF RELATED CASES

The Trustee does not object to calendaring argument in this case on the same day as the argument in *Home Equity Mortgage Trust Series 2006-1 et al. v. DLJ Mortgage Capital, Inc. et al.*, Appeal Nos. 2019-619 & 2019-620 (1st Dep't) ("*HEMT 2006-1*"), which addresses certain related issues. The appeal in *Ambac Assurance Corp. et al. v. Countrywide Home Loans, Inc. et al.*, Appeal No. 2019-26 (1st Dep't) ("*Ambac*") also addresses certain issues relating to this appeal and the HEMT 2006-1 appeal, but the *Ambac* appeal has been perfected for the May 2019 term. This appeal and the *HEMT 2006-1* appeal have been perfected for the June 2019 term.

PRELIMINARY STATEMENT

The arguments raised by DLJ on this appeal have been previously rejected by this Court and other New York courts in similar RMBS actions, and should be rejected here as well. Stated simply, this appeal is nothing more than a misguided

attempt to further delay trial of this more than six-year-old case. The Trustee alleges that DLJ breached representations and warranties ("R&Ws") made by DLJ in connection with the deposit of thousands of residential mortgages into the Trust, and that, upon notice or discovery, DLJ is required to repurchase those breaching loans at the "Repurchase Price," as defined in the parties' governing agreement. The Trustee asserts claims concerning 783 specific loans in the Trust as to which material breaches of R&Ws have been identified by the Trustee's underwriting expert. Cross-motions for partial summary judgment were denied by the IAS Court (Bransten, J.S.C.) on December 26, 2018 in a comprehensive and well-reasoned 34-page ruling (the "Decision and Order"). DLJ now appeals three of the IAS Court's rulings in the Decision and Order, each of which should be affirmed.

First, the IAS Court correctly followed this Court's decision on notice and relation back in *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital Inc., Series 2006-FM2*, 133 A.D. 3d 96 (1st Dep't 2015), *modified on other grounds,* 30 N.Y. 3d 572 (2017) ("*Nomura"*). *Nomura* held that an RMBS trustee satisfies the procedural notice requirement for all breaching loans if it provides timely notice of at least some breach claims, as the Trustee indisputably did here, and any subsequent breach claims will then relate back to the original filing date of the Complaint. DLJ cannot credibly distinguish *Nomura* from this case. Moreover, the governing contract does not require that the pre-suit or post-suit repurchase

notice to DLJ be loan-specific, as the IAS Court correctly recognized in ruling that DLJ received sufficient notice of the claims at issue and that the Trustee may proceed to trial on any loan breaches noticed pre-suit or during discovery, including breaches identified in the Trustee's expert reports.

Second, the IAS Court correctly determined that the repurchase notice from the Trustee to DLJ on December 6, 2011 adequately advised DLJ of its obligation to repurchase all loans in the Trust that materially breach DLJ's representations and warranties. Accordingly, as the IAS Court recognized, March 5, 2012 (90 days after December 6, 2011) is the applicable repurchase date for all of the breaching loans for which the Trustee seeks recovery.

Third, the IAS Court correctly ruled that DLJ's contractual requirement to pay "accrued … interest" on repurchased loans applies to both liquidated and non-liquidated loans. DLJ identifies nothing in the operative agreement that warrants departing from the IAS Court's plain reading of the relevant contractual language. And far from offering a reasonable interpretation itself, DLJ's interpretation would allow it to escape liability for those loans where it is most likely to have breached its obligations—creating precisely the "perverse incentive" that this Court has previously sought to avoid in interpreting materially identical provisions.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Can the Trustee pursue breach of contract claims against DLJ as to all breaching loans in the Trust identified by the Trustee based on the repurchase notices the Trustee has provided?

   Answer of the IAS Court: The IAS Court correctly answered "yes."

2. Can the Trustee calculate its damages as of a date tied to a repurchase notice to DLJ that sought the repurchase of all breaching loans in the Trust?

   Answer of the IAS Court: The IAS Court correctly answered "yes."

3. Does the contractual requirement that "accrued . . . interest" be paid on repurchased loans apply to both liquidated and non-liquidated loans?

   Answer of the IAS Court: The IAS Court correctly answered "yes."

COUNTERSTATEMENT OF THE CASE

A. DLJ's Securitization Of The Loans, Warranties As To Their Quality, And Promise To Repurchase Breaching Loans

At the inception of the securitization, DLJ and its affiliates deposited 5,153 residential mortgage loans (the "Loans") into the Trust. R. 79 (Second Amended Complaint (the "SAC"), ¶1). As the sponsor of the securitization, DLJ orchestrated the securitization process: it aggregated the Loans by acquiring them from numerous sellers and/or originators, including originators it owned or controlled; it created the Trust and deposited the Loans into the Trust pursuant to a Pooling and Servicing Agreement dated as of January 1, 2007, R. 399-730 (the

"PSA"); and it marketed and sold Trust certificates to investors (the "Certificateholders").

Because investors had no access to the loan files for the Loans, nor any ability to conduct due diligence or quality control on the Loans before they were securitized, DLJ—as seller—made numerous R&Ws to the Trustee concerning the Loans' qualities and characteristics, and the processes by which the Loans were evaluated before being deposited into the Trust. R. 470, 723-729 (PSA §2.03(b), Schedule III).

To give force and effect to its R&Ws, DLJ agreed that, upon discovering or receiving notice of a breach of the R&Ws that "materially and adversely affects the value of the related Mortgage Loan or the interests of the Certificateholders," DLJ would cure the breach within 90 days, or repurchase the 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 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." R. 450 (PSA §1.01, definition of "Repurchase Price").[1]

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

Given its central role in the securitization process, DLJ bears the burden of implementing the Repurchase Protocol if DLJ receives notice or becomes aware of breaching loans in the Trust. Accordingly, the PSA provides that "[t]he Seller [DLJ] shall promptly reimburse the . . . Trustee for any actual out-of-pocket expenses reasonably incurred by the . . . Trustee in respect of enforcing the remedies for such breach." R. 471.

B. The Trustee Provided Notice To DLJ As To Every Breaching Loan In The Trust

On December 6, 2011, the Trustee sent its first breach notice to DLJ, which specifically identified 304 Loans that materially breached at least one R&W and demanded 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 placed DLJ on notice 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, the "Repurchase Demands"). Accompanying each notice was a CD that provided detailed information regarding each breach claim. R. 738, 742, 746. Despite receiving the Repurchase Demands for 1,204 breaching Loans, DLJ has only repurchased 40 loans from the Trust to date. Br. 9.

C. The Trustee's Lawsuit Against DLJ For Failure To Repurchase The Breaching Loans

Because DLJ refused to comply with its contractual obligations to cure or repurchase all the breaching Loans, the Trustee timely commenced this action on February 1, 2013, seeking a judgment requiring DLJ to repurchase all breaching Loans in the Trust.[2] On August 7, 2014, the Trustee filed the operative SAC. On August 18, 2014, DLJ moved for dismissal of 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 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.

[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 v. DLJ Mtge. Capital, Inc.*, 121 A.D. 3d 535, 536 (1st Dep't. 2014).

D. 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 breaching Loans.

Mr. Hunter reviewed the voluminous files for each Loan to determine whether the 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, which analyzed whether the identified breaches materially impaired the value of the Loans or the interests of the Certificateholders in such Loans. 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*.[3]

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 report, February 8, 2017, the Repurchase Price, including accrued and pre-judgment interest, for the breaching Loans 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 on December 6, 2011, Dr. Snow made his

[3] DLJ admits that at least 303 of the 783 breaching Loans are explicitly referenced in the Trustee's pre-filing notices. Br. 11.

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 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.

E. The IAS Court's Summary Judgment Order

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

First, the IAS Court denied DLJ's request to dismiss the Trustee's breach claims as to loans that it had not specifically identified in its pre-suit repurchase notices. R. 33-35. In addition to relying on its previous ruling on DLJ's motion to dismiss, 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 (S.D.N.Y. 2018) ("*MSST 2007-1*") and *Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2006-S4 v. Nomura Credit & Capital, Inc.*, No. 653390/2012, 2014 WL 2890341, at *15 (N.Y. Sup. Ct. N.Y. Cty. June 26, 2014)*, as modified on other grounds* by *Nomura*. The IAS Court also cited this Court's *Nomura* decision in holding, in the alternative, that

repurchase notices that were subsequently provided by the Trustee relate back to the original filing date of the Complaint. *Id.*

Second, the IAS Court agreed that the Trustee's expert properly used March 5, 2012 as the "Repurchase Date" for the purpose of calculating the Repurchase Price, as that date was 90 days from the December 6 Notice, which put DLJ on notice of all breaching Loans in the Trust. R. 37.

Third, the IAS Court held that interest should continue to accrue on breaching Loans, even if liquidated as a result of the foreclosure of the underlying mortgage, based 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.

ARGUMENT

I. THE IAS COURT CORRECTLY DENIED DLJ'S MOTION TO LIMIT THE ACTION TO LOANS SPECIFICALLY IDENTIFIED IN THE TRUSTEE'S PRE-SUIT NOTICES

A. The IAS Court Correctly Determined That DLJ Received Pre-Suit Notice As To Every Breaching Loan In The Trust

This Court should affirm the IAS Court's decision on notice and relation back. The IAS Court correctly ruled that the Trustee's pre-suit repurchase notices, which notified DLJ of breaches of DLJ's R&Ws in certain Loans and expressly placed DLJ on notice that it was under an obligation to "repurchase every loan that did not comply with a [R&W]," provided DLJ with notice as to all breaching

Loans in the Trust. R. 33-35. Contrary to DLJ's assertions, Br. 14-21, the PSA does not require loan-specific notice for each and every breaching loan in the Trust. Rather, the PSA triggers DLJ's repurchase obligations based on "notice" or "discovery" of a breaching loan. R. 470 (PSA § 2.03(d)). As one court has recently explained in interpreting a similar PSA provision, "[n]otably absent" from the contractual text "is any requirement that the notifying party provide . . . 'loan-by-loan' notice of breach of particular loans." *MSST 2007-1,* 289 F. Supp. 3d at 505.

A review of the relevant contractual language makes this clear. *First*, the contractual provision governing repurchase refers to "a breach of a representation or warranty . . . that materially and adversely affects the interest of the Certificateholder in any Mortgage Loan." R. 470. The breaching Loan can be "any Mortgage Loan" in the Trust and is not referred to by the definite article, and therefore does not refer back to a Loan that was the subject of an individual notice from the Trustee. *Second*, one of DLJ's core representations and warranties for which the Trustee alleges breaches provides that the "information set forth in the Mortgage Loan Schedule ["MLS"]. . . is complete, true and correct in all material respects." R. 723. The MLS contains detailed information as to *all loans* in the Trust, and can therefore be breached either by individual or aggregate inaccuracies in the MLS.

DLJ complains that without loan-specific notice of a breach, it is deprived of the "opportunity to cure, substitute, or repurchase allegedly defective loans." Br. 26. DLJ is incorrect, as its argument conflates the notice to DLJ that is required to trigger the Repurchase Protocol with what is required for DLJ to fulfill its cure or repurchase obligation. *See MSST 2007-1,* 289 F. Supp. 3d at 505. Moreover, DLJ's complaint that it needs loan-specific notice rings hollow. Here, of the 1,204 loans for which DLJ concedes that the Trustee gave timely notice, Br. 8, and the 480 additional breaching loans noticed by the Trustee in its expert reports, Br. 11, DLJ has agreed to repurchase only 40 loans. Br. 9. Given its repurchase of such a paucity of allegedly breaching loans in the Trust, DLJ's proposed interpretation of the Repurchase Protocol is belied entirely by its conduct, and should be disregarded.

Given the lack of any loan-specific "notice" requirement in the PSA, many New York courts, in addition to the IAS Court, have ruled that a repurchase demand provides sufficient notice for *all* breaching loans in an RMBS trust if it identifies a large number of breaching loans and requests repurchase of all breaching loans. *MSST 2007-1*, 289 F. Supp. 3d at 505-07 ("notice" of large number of breaching loans within a representative sample extends to all breaching loans—not just those that were specifically identified); *Deutsche Bank Nat'l Tr. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 97 F. Supp. 3d 548, 552

(S.D.N.Y. 2015) ("Plaintiff's letter gave adequate notice with respect to breaching loans beyond the 1,620 specifically mentioned"); *Nomura Asset Acceptance Corp.*, 2014 WL 2890341, at *15 (Sup. Ct. June 26, 2014) (plaintiff provided effective notice of all breaching loans with notice that "request[ed] that [defendant] repurchase not only the specifically identified loans but 'any loans that did not comply with the representations and warranties made by' it"); *SACO I Tr. 2006-5 v. EMC Mortg. LLC*, No. 651820/2012, 2014 WL 2451356, at *6 (Sup. Ct. N.Y. Cty. May 29, 2014) (breach notice that "referenced statistical sampling of the pools and requested repurchase of all breaching loans" provided sufficient "notice"); *Assured Guar. Mun. Corp. v. Flagstar Bank, FSB*, 920 F. Supp. 2d 475, 512-513 (S.D.N.Y. 2013) (plaintiff's notice of pervasive breaches "rendered [defendant] constructively 'aware'—or, at minimum, put [defendant] on inquiry notice—of the substantial likelihood that these breaches extended … into the broader loan portfolio") (internal quotation marks omitted).

DLJ wrongly relies, Br. 15, on *Ret. Bd. Of the Policeman's Annuity & Benefit Fund of Chi. v. Bank of N.Y. Mellon*, 775 F. 3d 154, 162 (2d Cir. 2014) for the proposition that an RMBS plaintiff must provide loan-by-loan notice of R&W breaches. That decision simply held that investors suing an RMBS trustee could not use sampling to establish class standing in trusts in which they did not invest.

Id. at 163. It did not address notice requirements in a suit, such as here, brought by a trustee against a seller or sponsor for breaches of R&Ws.

For the same reasons, DLJ's citation to briefs filed by RMBS trustees in cases in which the trustees (rather than the sellers or sponsors) are defendants, Br. 15-16, misses the mark. The cases cited by DLJ center on the *trustees'* duties, which, in stark contrast to the duties of sellers and sponsors such as DLJ, are narrowly circumscribed in the applicable agreements, as the cases demonstrate. *See, e.g., Commerce Bank v. Bank of N.Y. Mellon*, 141 A.D.3d 413, 415-16 (1st Dep't 2016) ("the trustee of an RMBS . . . trust does not have a duty to nose to the source") (internal quotation marks omitted); *Royal Park Invs. SA/NV v. U.S. Bank Nat'l Ass'n*, 2018 WL 3350323, at *3 (S.D.N.Y. July 9, 2018) ("[U]nlike a trustee, an RMBS issuer or sponsor securitizes the loans, conducts due diligence on the loans (or at least is in a position to do so), and makes representations and warranties about the loans."); *Royal Park Invs. SA/NV v. HSBC Bank USA, N.A.*, 2018 U.S. Dist LEXIS 31157, at *37 (S.D.N.Y. Feb. 23, 2018) ("[T]he duty of an originator or sponsor to underwrite each loan before issuing or purchasing it is not comparable to the limited and loan-specific nature of the trustee's duties under the PSAs. Originators and sponsors review each loan file and make R&Ws as to each loan. Therefore, if any loan turns out to be defective, it is fair to assume that the

originator or sponsor is liable."). *See also* R. 549-550 (PSA §8.01) (describing the Trustee's limited duties).[4]

Here, the Trustee plainly provided the required pre-suit notice. Its first pre-suit notice demanded that DLJ repurchase 304 loans and "any others that did not comply with the representations and warranties." R. 732. The Trustee's subsequent pre-suit notice demanded that DLJ repurchase an additional 900 loans. R. 745. Given the lack of contractual language requiring loan-specific notice and the weight of decisions interpreting similar language consistent with the IAS Court's ruling, the Court should affirm that Court's ruling that the Trustee has "clearly provided notice to DLJ of its obligation to repurchase all loans that breach representations and warranties." R. 33.

[4] Contrary to DLJ's contention, Br. 20, the decision of the Court of Appeals in *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 585 (2017), has no bearing on the notice issue facing this Court. The Court of Appeals held in *Nomura* that a sole remedy provision barred the plaintiff from seeking general contract damages for breach of loan-specific representations and warranties, but did not address any issues regarding the sufficiency of notice. Similarly, in *Bank of N.Y. Mellon v. WMC Mortg., LLC*, 151 A.D.3d 72, 79 (1st Dep't 2017), plaintiff did not provide *any* timely pre-suit repurchase notices so the Court had no occasion to address their sufficiency. *Bank of N.Y. Mellon Tr. Co. v. Morgan Stanley Capital, Inc.*, No. 11-cv-0505 (CM) (GWG), 2017 WL 737344, at *4-8 (S.D.N.Y. Feb. 10, 2017) is distinguishable because it addresses the materially different notice requirements relating to a commercial loan, rather than a residential loan in a mortgage-backed securitization trust.

B. The Trustee Satisfied the Procedural Condition Precedent To Suit and Its Post-Suit Identification of Additional Breaches Relates Back To The Original Filing Date

As discussed above, the Trustee's pre-suit notices to DLJ identified 1,204 breaching Loans in the Trust as well as "any others that did not comply with the representations and warranties." R. 732, 745. As an alternative to its holding that the pre-suit notices fulfilled the contractual notice requirement for all breaching loans, the IAS Court correctly held that the Trustee's subsequent identification of breaching loans in its expert reports relate back to the Trustee's timely complaint under this Court's settled precedent in *Nomura.* This Court's reasoning in *Nomura* was subsequently reinforced by *U.S. Bank N.A. v. GreenPoint Mortgage Funding, Inc.*, 147 A.D.3d 79, 88-89 (1st Dep't 2016). These cases make clear, as the IAS Court correctly ruled, that a plaintiff need not identify every breaching loan for which it seeks recovery in a pre-suit breach notice. Rather, a plaintiff need only provide pre-suit notice and an opportunity to cure as to "some" loans. *Nomura*, 133 A.D.3d at 108-09.

In *Nomura*, the plaintiff trustees sent loan-specific repurchase demands to the seller/sponsor defendant more than ninety days before filing a timely suit, and noted that plaintiffs "were investigating the mortgage loans and might uncover additional defective loans for which claims would be made." *Id*. at 108. Plaintiffs then sent additional repurchase demands after filing suit. *See id*. at 103-04. This

Court rejected defendant's effort to limit plaintiff's claim to those loans for which pre-suit notices were sent. *See id.* at 108. In so doing, this Court affirmed the motion court's decision to allow plaintiffs' claims to proceed, even as to loans that "were mentioned in breach notices sent less than 90 days before plaintiffs commenced their actions," as well as "loans that plaintiffs failed to mention in their breach notices" at all. *Id*. This Court reasoned that because "there were some timely claims in these cases" based on the pre-suit notices, those "presuit letters put defendant on notice" of an ongoing investigation of additional breaches. *Id*. Applying ordinary statute-of-limitations principles, this Court thus concluded that "a complaint amended to add the claims at issue"—including claims based on post-suit notices—"would have related back to the original complaints." *Id*.; *see* CPLR 203(f) (providing for relation back).

In *GreenPoint*, this Court reaffirmed the principles set forth in *Nomura* when it upheld the dismissal of a repurchase claim based on notice because the *GreenPoint* plaintiffs had not sent any pre-suit repurchase notices. 147 A.D.3d at 87. *GreenPoint* distinguished the facts of *Nomura*, expressly noting that the plaintiffs in *Nomura* —unlike the plaintiffs in *Greenpoint*—had "actually sent pre-suit breach notices to the defendant," and thus had "complied with the condition

precedent of providing that defendant with notice" under *ACE Securities*. *Id.* at 88.[5]

The Trustee's situation is identical to that in *Nomura*, and entirely unlike the scenario presented in *GreenPoint.* Here, as in *Nomura*, the Trustee provided DLJ with loan-specific, pre-suit notice as to numerous breaches, and ample opportunity to cure them, and also put DLJ on notice of additional breaches by requesting the repurchase of "every loan" that did not comply with DLJ's R&Ws. R. 732-745. And here, as in *Nomura*, the Trustee then filed a timely action based upon the pre-suit notices. As in *Nomura*, the Trustee satisfied the condition precedent to suit recognized in *ACE Securities* and should be allowed to proceed with its claims on all breaching Loans included in both pre-suit and post-suit notices to DLJ.[6]

In short, given the exactly analogous facts here, the IAS Court correctly applied *Nomura* to hold that "because the repurchase letters identified some timely

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[5] In *ACE Securities*, plaintiff similarly had not sent defendant any repurchase demands at least ninety days prior to commencing suit. *See ACE Secs. Corp. v. DB Structured Prods., Inc.*, 25 N.Y.3d 581, 591-93 (2015).

[6] *See also Home Equity Mtge. Trust Series 2006-1 v. DLJ Mtge. Capital, Inc*., 2019 WL 138634, at *4 (N.Y. Sup. Ct. N.Y. Cty. January 9. 2019) *("HEMT Decision")*. ("where a party provide[s] timely loan by loan pre-suit notice of the non-conforming loans, together with notice that further investigation was being conducted into potentially defective loans, that party c[an] later, after commencement of the action, provide loan by loan notice of additional breaches revealed, because they w[ill] relate back.")

claims, the later identified claims relate back to the original filing" and are timely. R. 34.

C. The IAS Court Properly Applied the Relation Back Holding In *Nomura*

DLJ's argument that the IAS Court did not properly apply *Nomura* and the doctrine of relation back is without merit. DLJ wrongly argues, Br. 21-27, that relation back does not apply here because the claims based on the Trustee's post-suit notices through its expert reports do not arise "'out of [the] same conduct, transaction or occurrence[ ]'" as the claims based on the Trustee's pre-suit notices. (*quoting Buran v. Coupal*, 87 N.Y.2d 173, 178 (1995)). In making this argument, DLJ contends that each loan origination is a "separate event." Br. 21. But DLJ is incorrect, as the Trustee's claims are not predicated on the origination of the Loans. Rather, the "transaction" or "occurrence" that gives rise to this action is the securitization of the Loans by DLJ. In connection with the securitization, DLJ deposited the Loans into the Trust and made the R&Ws at issue, as to which DLJ is indisputably on notice for purposes of relation back. *See Giambrone v. Kings Harbor Multicare Ctr.*, 104 A.D.3d 546, 548 (1st Dep't 2013) ("salient inquiry" in deciding whether a claim in an amended pleading relates back to a timely commenced action "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'").

DLJ's argument also ignores that the Trustee's pre-suit notices plainly notified DLJ that it had breached underwriting standards in over twelve hundred loans in the Trust, provided detailed information concerning those breaches, and requested that DLJ repurchase the specifically referenced Loans as well as all other breaching Loans in the Trust. These notices—and the detailed allegations regarding DLJ's faulty origination and securitization processes in the timely-filed complaint based upon the pre-suit notices, "g[a]ve [DLJ] notice of the transactions, occurrences, or series of transactions or occurrences, to be proved" in respect of the breaches identified in any post-suit notices. CPLR 203.[7] Thus, relation back is entirely appropriate here.

DLJ likewise misplaces reliance on *Matter of Greater N.Y. Health Care Facilities Ass'n v. DeBuono*, 91 N.Y.2d 718 (1998). *See* Br. 23. In *DuBuono*, the Court of Appeals declined to relate back the third-party intervenors' proposed claims to the plaintiffs' claims because the defendants "had no notice of proposed

[7] DLJ also argues that "notice that . . . a loan originated by Originator A in Florida was missing a verification of rent does not put DLJ on notice that a borrower [of a loan] originated by Originator B in California may have misrepresented his debt obligations." Br. 22. To the contrary, in this scenario DLJ would be on notice in respect of the "same series of transactions or occurrences" because the Trustee's pre-suit notices make clear that the *reason* both loan A and loan B are in breach is because DLJ engaged in a systemic and trust-wide disregard of the applicable underwriting standards as to which it gave the applicable R&Ws. DLJ's argument is thus akin to admitting it was on notice that its widespread misconduct had started a forest fire, but denying it was on notice that any trees might be burning beyond those specifically identified.

intervenors' particularized claims when they entered into negotiations with the [plaintiffs]," including because the third party intervenors and plaintiffs "[we]re not closely related parties." *Id.* at 592 ("a stranger could not intervene in a pending proceeding to interpose an otherwise time-barred claim"). By contrast, the post-suit notices at issue here did not come from a different party to the pre-suit notices (let alone from a "stranger"), and DLJ cannot contend the pre-suit notices—and the extensive complaints based upon them—constituted "no notice" as to the claims in the post-suit notices that followed. Indeed, this Court has held that *DeBuono* permits relation back where defendant has "notice of the proposed specific claim," *Giambrone,* 104 A.D.3d 546, 547 (1st Dep't 2013), and here, the case for relation back is even stronger because the Trustee's pre-suit notice demanded that DLJ repurchase all breaching Loans in the Trust. R. 732.

Nor can DLJ override this Court's precedents by citing, Br. 22, the older unreported decision of the Delaware Chancery Court in *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC,* Civ. No. 5140-CS, 2012 WL 3201139 (Del. Ch. Aug. 7, 2012). While the above precedents directly address relation back under New York law, *Central Mortgage* addresses Delaware's standard for an amended pleading to relate back to an original pleading. In any event, *Central Mortgage* is inapplicable because the plaintiff in that case expressly

disclaimed that it would bring additional claims. *Id.* at *19-20. Here, the opposite is true -- the Trustee's pre-suit notices sought repurchase of all breaching loans.

Nor is DLJ correct, Br. 21-22, that relation back is inapplicable in RMBS breach of contact actions. As explained above, in *Nomura,* this Court held in the RMBS context that pre-suit notice of specific breaching loans and the plaintiff's continuing investigation are plainly sufficient for any post-suit notices to relate back. *See* 133 A.D.3d at 101, 108. Moreover, *Nomura* is in accord with this Court's relation-back decisions outside the RMBS context, which turn on whether defendant received fair notice of plaintiffs' subsequent claims. *See, e.g., Koch v. Acker, Merrall & Condit Co.*, 114 A.D.3d 596, 596-597 (1st Dep't 2014) (claims regarding 211 bottles of counterfeit wine related back to complaint regarding "at least" five bottles of counterfeit wine, because defendant was "on notice that, as a result of 'further research' on the 'numerous bottles' of wine that defendant had sold him …, plaintiff might assert additional claims relating to other bottles"). And contrary to DLJ's suggestions, Br. 24, nothing in *Nomura* indicates that its application of the relation-back doctrine was limited to the pleading stage.[8]

[8] DLJ argues that *Nomura* "addressed only the standard for adequate notice pleading" for a motion to dismiss, Br. 24, but does not explain why that makes any difference. DLJ concedes, Br. 24, that *Greenpoint* accepted *Nomura* on its facts, which, as discussed above, are materially identical to this case. Further, DLJ's position directly conflicts with how other courts have applied *Nomura* by not limiting its holding to the motion to dismiss context. *See, e.g., MASTR Adjustable*

Finally, DLJ cannot take any comfort from the Court of Appeals' recent decision in *U.S. Bank National Ass'n v. DLJ Mortgage Capital, Inc*., __ N.Y.3d __, 2019 WL 659355, at *3 (Feb. 19, 2019) ("*ABSHE*"). Br. 27. In *ABSHE*, the trustee timely provided DLJ, as backstop obligor, with pre-suit notice of breaching loans but did not provide such pre-suit notice to the primary obligor. 2019 WL 659355, at *1. DLJ asserted that the trustee was required to satisfy a condition precedent of providing timely notice to the primary obligor before bringing suit against DLJ, as backstop obligor. DLJ argued, as it does here, that *ACE* bars claims where a procedural condition precedent is not satisfied prior to filing suit and within six years of the relevant R&Ws. *Id*. at *2-3. The Court of Appeals rejected this argument, holding that because the notice requirement is merely a procedural prerequisite to suit—not a substantive element of the cause of action—it does not affect the merits or timeliness of the claim. *Id*. at *3. Thus, because the plaintiff filed a timely claim, it could provide the "procedural" notice after the expiration of the statute of limitations. *Id*. Although *ABSHE* addressed the application of CPLR 205(a), rather than CPLR 203(f), it is nonetheless consistent with this Court's decisions in *Nomura* and *GreenPoint*, and demonstrates that a

Rate Mortgs. Trust 2006-OA2 v. UBS Real Estate Secs., Inc., 205 F. Supp. 3d 386, 421 (S.D.N.Y. 2016).

plaintiff may preserve a timely RMBS contract claim by providing notice after the expiration of the statute of limitations.[9]

D. The Repurchase Notices Here Are Indistinguishable From The Notices At Issue in *Nomura*

DLJ cannot distinguish *Nomura* on the basis that the Trustee's pre-suit notices did not explicitly describe the breaches as "systematic" or "pervasive." Br. 29-31. *Nomura* did not turn on the use of any special language in the notice, but rather on the existence of a significant number of timely breach claims. Here, the Trustee supplied two breach notices which provided specific notice as to 1,204 specific breaching Loans out of a total of 5,153 Loans in the Trust, and further advised DLJ that it was providing notice as to all other breaching loans. *Cf. Koch,*

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[9] DLJ's contention, without citation to any authority, Br. 27, that CPLR 205(a) "has no application to this case whatsoever unless and until this 'action' is terminated in a manner other than a judgment on the merits" is not properly before this Court. The effect of CPLR 205(a) on a decision dismissing some but not all claims based on the sufficiency of notice was neither argued nor addressed by the Court below. In any event, CPLR 205(a) operates claim-by-claim where a single "action" contains multiple "claims." *See, e.g, Weksler v. Weksler,* 140 A.D. 3d 491, 493 (1st Dep't 2016) (upholding refiling under CPLR 205(a) of a dismissed cause of action , as opposed to a complaint dismissed in its entirety); *Cook v. Deloitte & Touche USA,* 13 Misc. 3d 1203(A), 2006 N.Y. Misc. LEXIS 2310 at 16 (N.Y. Sup. Ct. N.Y. Cty. Aug. 7, 2006) ("the term 'claim' has been used interchangeably with 'action' when determining whether CPLR 205(a) is invoked.") As a practical matter, it also makes no sense that a plaintiff with multiple claims, some subject to dismissal and some not subject to dismissal for failure to satisfy a condition precedent, would have to wait until the entire action is dismissed before reasserting the dismissed claims. This result would have the effect of penalizing a plaintiff who asserts claims for which the condition precedent is satisfied.

114 A.D. 3d at 596 (claims based on 211 bottles of counterfeit wine related back to complaint alleging sale of "at least" five counterfeit bottles, which "placed defendant on notice that as a result of 'further research', on the 'numerous bottles' of wine that defendant sold him . . . plaintiff might assert additional claims relating to other bottles"); *MSST 2007-1*, 289 F. Supp. 3d at 506 (notices covering one-third of the loan pool put defendant on notice "of the substantial likelihood that these breaches extended into the broader loan portfolio").

As noted above, this case is thus readily distinguishable from *GreenPoint*, where the Trustee provided *no* pre-suit notice of breaches. 147 A.D. 3d 79, 88 (distinguishing *Nomura* on the ground that "the trustees in that case complied with the condition precedent of providing that defendant with notice of its default. Here, no such pre-commencement breach notice was ever sent. . ."). Because this case is indistinguishable from *Nomura*, the Trustee's post-suit identification of additional breaches relates back to the original filing date of this action and is timely as to breach claims identified post-suit.

II. THE IAS COURT CORRECTLY HELD THAT THE TRUSTEE MAY CALCULATE DAMAGES WITH REFERENCE TO THE REPURCHASE NOTICE THAT SOUGHT THE REPURCHASE OF ALL BREACHING LOANS

There can be no dispute that the reference date for calculating the Repurchase Price is the date 90 days following the date of DLJ's receipt of "written notice" from the Trustee of its breach of R&Ws. R. 470 (PSA §2.03(b));

Br. 31-32. As discussed in Point I, *supra,* and as recognized by the IAS Court, the December 6 Notice gave DLJ sufficient and appropriate notice of its obligation to repurchase all breaching Loans in the Trust. Accordingly, as the IAS Court held, R. 37, March 5, 2012 – the date 90 days after December 6, 2011 – is the applicable repurchase date for the 783 breaching Loans in the Trust for which Plaintiff seeks recovery.

DLJ complains that use of March 5, 2012 as the reference date could enable the Trustee to recover more interest on breaching Loans than the use of any later date. Br. 32.[10] However, as the party responsible for depositing the breaching loans into the Trust on the closing date in 2007, DLJ is in no position to complain that it may be required to pay the interest necessary to make the Trust and its investors whole as a result of its R&W breaches.

[10] Although DLJ does not explain why the repurchase date matters in its view, its argument assumes that interest should stop running upon liquidation of the Loan, and that prejudgment interest would begin to accrue when DLJ failed to repurchase the Loan on the repurchase date, but not before that date. However, the issue of when prejudgment interest begins to accrue on a breaching Loan was not addressed below and is not properly before the Court. In any event, there is a strong argument that prejudgment interest should run from the date of breach, which in this case is the closing date of the Trust, when the R&Ws were made. *See Spodek v. Park Prop. Dev. Assocs*, 96 N.Y. 2d 577, 579 (2001) ("[P]laintiff is entitled to prejudgment interest from accrual of the cause of action on both the unpaid interest and the principal payment to the date liability is fixed").

III. THE IAS COURT CORRECTLY INTERPRETED THE TERM "ACCRUED INTEREST" IN THE PSA TO APPLY TO BOTH LIQUIDATED AND NON-LIQUIDATED LOANS

It is undisputed that DLJ is required to repurchase all materially breaching loans at the contractually defined "Repurchase Price. Br. 7 (*quoting* PSA § 2.03(b), R. 470). The PSA defines "Repurchase Price," in relevant part, as follows:

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

Under this provision, DLJ assumed the risk of loss for any Loan that breached its R&Ws and agreed to pay the full value of such Loans. The provision therefore unambiguously provides, as the IAS Court held, R. 35-37,[11] that interest continues to accrue on the Loans until the Repurchase Price is distributed to the Certificateholders. Nothing in the relevant contractual language provides or

[11] *See also HEMT Decision*, 2019 WL 138634 at *14 (under the plain language of the applicable PSAs, interest continues to accrue on "liquidated" loans).

suggests that interest should stop accruing at some earlier time, such as when a loan is foreclosed or "liquidated."

This conclusion is reinforced by this Court's decision in *Nomura,* 133 A.D. 3d at 105-107. In *Nomura*, the Court rejected a similar argument that the trustee had no remedy for a liquidated loan because once a loan has been liquidated, it cannot be repurchased. The Court held that interpreting the Repurchase Protocol in this way "would leave plaintiffs without a remedy" for liquidated loans, which cannot have been within the contemplation of the parties when they entered into the governing agreement. *Id.* at 105. The Court further observed that such an interpretation would create a "perverse incentive for a sponsor to fill the trust with junk mortgages that would expeditiously default so that they could be released, charged off, or liquidated before a repurchase claim is made." *Id.* at 106. So too, here, DLJ's interpretation would provide it with a windfall by denying the Trustee its remedy of continuing accrued interest on loans that liquidated with balances outstanding. Moreover, denying interest following liquidation would further incentivize DLJ to prolong resolution of the Trustee's claims as long as possible. And DLJ's attempt, Br. 34-35, to distinguish *Nomura* ignores the rationale underlying that decision—namely, that there is nothing in the Repurchase Protocol or the definition of Repurchase Price that limits the Trustee's remedies based on whether a loan has been liquidated.

DLJ contends that interest must cease accruing when a loan liquidates, because "[o]nce a loan is liquidated and charged off from the trust, that loan ceases to exist." Br. 33. In support, DLJ principally relies on *MASTR Asset Backed Secs. Tr. 2006-HE3 ex rel. U.S. Bank Nat'l Ass'n v. WMC Mortg. Corp.*, No. 11-CV-2542 (JRT) (TNL), 2012 WL 4511065, at *6 & n.9 (D. Minn. Oct. 1, 2012) ("*WMC*"). This contention is both irrelevant and ill-founded. In *WMC*, the Trustee had "admitted that specific performance is 'not available . . . where a loan has been liquidated and is no longer available for repurchase.'" *Id.* at *4. Moreover, the Minnesota federal court's *WMC* holding, that a trustee is not entitled to any remedy for the breach of a liquidated loan, has been explicitly rejected by *Nomura*, as well as numerous other New York cases cited in *Nomura*.[12]

DLJ's argument is based on the mistaken premise that interest cannot accrue on a loan that has been foreclosed on the ground the debt no longer exists. This cannot be true. New York law, as well as that of most other states, permits a lender to recover a deficiency judgment from the mortgagor following the foreclosure of a mortgage, which deficiency continues to accrue until paid. *See* N.Y. Real Prop. Acts. L. § 1371 (providing for deficiency judgments in foreclosure proceedings to be determined by reference to the judgment of foreclosure, "with

[12] *See also Nomura Asset Acceptance Corp.,* 2014 WL 2890341, at *9 (collecting cases).

interest"); 2 L. *Distressed Real Estate* § 16:46; App. 19A (2018) (multi-state survey demonstrating that, with few exceptions, deficiency judgments are generally available to mortgage lenders). Because the debt is collectible even after foreclosure, the debt survives any foreclosure and continues to accrue interest.

Moreover, DLJ does not cite to any provision in the PSA indicating that a "liquidated" loan ceases to be an asset of the Trust for which the Trustee would be entitled to continued interest. To the contrary, the PSA contains a definition of "Liquidation Mortgage Loan," R. 434, that specifically contemplates that a deficiency judgment may be collected after a loan is "liquidated." Moreover, the defined term "Liquidation Mortgage Loan" is not used in the definition of "Purchase Price" to limit the Trustee's right to recover interest.[13] Accordingly, notwithstanding the liquidation of a mortgage, the underlying debt remains in

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[13] The full definition of Liquidation Mortgage Loan is as follows:

Liquidation Mortgage Loan: With respect to any Distribution Date, a defaulted Mortgage Loan (including any REO Property) which was liquidated (or in the case of a second lien Mortgage Loan, charged-off by the related Servicer in accordance with Accepted Servicing Practices) in the calendar month preceding the month of such Distribution Date as to which the related Servicer has determined (in accordance with this Agreement) that it has received all amounts it expects to receive in connection with the liquidation of such Mortgage Loan, including the final disposition of the related REO Property *(exclusive of any possibility of a deficiency judgment)*.

R. 434 (emphasis added). This provision serves an accounting purpose to allocate distributions among certificateholders but does not affect the legal rights of the Trust. *See e.g.* R. 448 (definition of "Realized Loss.")

existence and continues to accrue interest even after foreclosure.

For all these reasons, the IAS Court properly ruled, under the express provisions of the parties' agreement, interest continues to accrue on a breaching loan until the Repurchase Price is distributed to the Certificateholders, regardless of whether that loan has been liquidated.

CONCLUSION

The Decision and Order should be affirmed.

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Respectfully submitted,

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