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New York County Clerk's Index Nos. 653783/12, 651124/13,
652614/12 and 650337/13

Court of Appeals

of the

State of New York

NOMURA HOME EQUITY LOAN, INC., SERIES 2006-FM2, by HSBC Bank USA, National Association, solely in its capacity as Trustee; NOMURA HOME EQUITY LOAN, INC., SERIES 2007-3, by HSBC Bank USA, National Association, solely in its capacity as Trustee; NOMURA ASSET ACCEPTANCE CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AF2, by HSBC Bank USA, National Association, as Trustee and NOMURA HOME EQUITY LOAN, INC., HOME EQUITY LOAN TRUST, SERIES 2007-2, by HSBC Bank USA, National Association, as Trustee,

Plaintiffs-Respondents,

– against –

NOMURA CREDIT & CAPITAL, INC.,

Defendant-Appellant.

BRIEF FOR *AMICUS CURIAE* THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT

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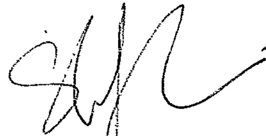
Dated: February 2, 2017

RULE 500.1(f) CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f), *amicus curiae* SIFMA states that it has no parents, subsidiaries, or affiliates.

Dated: February 1, 2017



By: __________________________

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1
PRELIMINARY STATEMENT 3
BACKGROUND 4
ARGUMENT 8
I. The Appellate Division's Order Is Contrary To Black-Letter New York Law 8
II. Affirmance of the Appellate Division's Order Would Upset the Carefully Structured Allocation of Risk in RMBS Contracts 11
CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

ACE Sec. Corp. Home Equity Loan Trust, Series 2007-HE3 v. DB Structured Prods., Inc.,
5 F. Supp. 3d 543 (S.D.N.Y. 2014) 11

Am. Tel & Tel. Co. v. N.Y. City Human Res. Admin.,
833 F. Supp. 962 (S.D.N.Y. 1993) 17

Ambac Assurance Corp. v. EMC Mortg. LLC,
121 A.D.3d 514 (1st Dep't 2014) 10, 14

Ambac Assurance Corp. v. Nomura Credit & Capital,
No. 651359/13 (Sup. Ct. N.Y. Cnty.) 15

Assured Guar. Corp. v. EMC Mortg., LLC,
No. 650805/2012, 2013 WL 1442177 (Sup. Ct. N.Y. Cnty. Apr. 4, 2013) 10

Baidu, Inc. v. Register.com, Inc.,
760 F. Supp. 2d 312 (S.D.N.Y. 2010 9

Bailey v. Fish & Neave,
8 N.Y.3d 523 (2007) 19

Bank of New York Mellon v. WMC Mortg., LLC,
No. 654464/12 (Sup. Ct. N.Y. Cnty.) 15

Bluebird Partners v. First Fid. Bank, N.A.,
94 N.Y.2d 726 (2000 .... 12, 16

Chelsea, LLC v. Seventh Chelsea Assocs., LLC,
304 A.D.2d 498 (1st Dep't 2003) 9

Deutsche Bank Nat'l Trust Co. v. Equifirst Corp.,
No. 651957/13 (Sup. Ct. N.Y. Cnty.) 15

Deutsche Bank Nat'l Trust Co. v. Quicken Loans, Inc.,
No. 563048/13 (Sup. Ct. N.Y. Cnty.) 15

TABLE OF AUTHORITIES
(continued)

Page(s)

Eisen v. Carlisle & Jacquelin,
479 F.2d 1005 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974) 17

Fed Hous. Fin. USA, Nat'l Ass'n, in its capacity as Trustee of Merrill Lynch Alternative Note Asset Trust, Series 2007-A3 v. Merrill Lynch Mortg. Lending, Inc.,
No. 652727/14 (Sup. Ct. N.Y. Cnty.) 15

Holy Props. Ltd., L.P. v. Kenneth Cole Prods.,
87 N.Y.2d 130 (1995) 17

J. Zeevi and Sons, Ltd. v. Grindlays Bank (Uganda) Ltd,
37 N.Y.2d 220 (1975) 18

Laidlaw Transp., Inc. v. Helena Chem. Co.,
255 A.D.2d 869 (4th Dep't 1998) 17

Metro. Life Ins. Co. v. Noble Lowndes Int'l, Inc.,
84 N.Y.2d 430 (1994) 9, 16

Moore v. Microsoft Corp.,
293 A.D.2d 587 (2d Dep't 2002) 9

Morgan Stanley Mortg. Loan Trust 2006-13ARX v. Morgan Stanley Mortg. Capital Holdings LLC,
143 A.D.3d 1, 7 (1st Dep't 2016) 15

Morgan Stanley Mortg. Loan Trust 2006-13ARX v. Morgan Stanley Mortg. Capital Holdings LLC,
No. 653429/12 (Sup. Ct. N.Y. Cnty.) 15, 16

Muzak Corp. v. Hotel Taft Corp.,
1 N.Y.2d 42 (1956) 9, 11

Nomura Asset Acceptance Corp. Alternative Loan Trust Series 2006-S3, by HSBC Bank USA, Nat'l Ass'n, in its capacity as Trustee v. Nomura Credit & Capital, Inc.,
No. 652619/12 (Sup. Ct. N.Y. Cnty.) 15

TABLE OF AUTHORITIES
(continued)

Page(s)

Peluso v. Tauscher Cronacher Prof'l Eng'rs, P.C.,
270 A.D.2d 325 (2d Dep't 2000) 9

RM 14 FK Corp. v. Bank One Trust Co., N.A.,
37 A.D.3d 272 (1st Dep't 2007) 10

Scott v. Palermo,
233 A.D.2d 869 (4th Dep't 1996) 17

Tunkl v. Regents of Univ. of Cal.,
383 P.2d 441 (Cal. 1963) 10

U.S. Bank Nat'l Ass'n v. Citigroup Global Markets Realty Corp.,
No. 653816/13 (Sup. Ct. N.Y. Cnty.) 15

U.S. Bank Nat'l Ass'n v. Citigroup Global Mkts. Realty Corp.,
No. 653919/14 (Sup. Ct. N.Y. Cnty.) 15

U.S. Bank Nat'l Ass'n v. Countrywide Home Loans, Inc.,
No. 652388/2011, 2014 WL 617548 (Sup. Ct. N.Y. Cnty. Feb. 13, 2014) 11

U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.,
No. 650369/2013, 2013 WL 6997183 (Sup. Ct. N.Y. Cnty. Jan. 14 2013), *aff'd*, 121 A.D.3d 535 (1st Dep't 2014) 10

U.S. Bank Nat'l Ass'n v. Morgan Stanley Mortg. Capital Holdings LLC,
No. 650339/13 (Sup. Ct. N.Y. Cnty.) 15

Xerox Corp. v. Graphic Mgmt. Servs. Inc.,
959 F. Supp. 2d 311 (W.D.N.Y. 2013) 17

STATUTES

6 Del. C. §2-719 10

26 U.S.C. § 860F 13

13 Pa. Cons. Stat. Ann. § 2719 10

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

Chief Judge's Task Force on Commercial Litigation In the 21st Century, Report and Recommendations to the Chief Judge of the State of New York (June 2012), *available at* http://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf 18

Final Report of the New York State Bar Association's Task Force on New York Law in International Matters (June 25, 2011), *available at* https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=49552................. 12

Office of Fed. Hous. Enter. Oversight, *A Primer on the Secondary Mortgage Market*, Mortgage Market Note 08-3 at 8 (July 21, 2008), *available at* http://1.usa.gov/18vinWn. 6

Robert T. Miller, *The RMBS Put-Back Litigations and the Efficient Allocation of Endogenous Risk Over Time*, 34 REV. BANKING & FIN. L. 255, 291 (2014) 7, 12, 13, 14

Theodore Eisenberg & Geoffry P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1479, 1485 (2009) 17-18

Thomas P. Lemke et al., Mortgage-Backed Securities § 1.1 (2014) 5, 7

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry while promoting investor knowledge, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA has offices in New York and Washington, D.C., and is the United States' regional member of the Global Financial Markets Association. Although it is judicious in its case selection, SIFMA regularly files *amicus curiae* briefs in cases that raise matters of vital concern to participants in the securities industry—cases that raise important policy issues that impact the markets represented by SIFMA, or that otherwise concern common practices in the financial services industry.

This case presents important issues regarding the application of "sole remedy" provisions created to limit the remedies available for breaches of contractual representations and warranties in issuances of residential mortgage-backed securities ("RMBS"). This appeal will determine whether standard contractual terms used across the securities industry in RMBS contracts between sophisticated parties will be enforced as written, or instead judicially rewritten to permit scores of potential litigants to seek economic damages far exceeding those contemplated in the original bargain. This Court's resolution of the issue will

likely have financially significant implications for SIFMA's members. SIFMA therefore respectfully submits this brief as *amicus curiae* to present the position of SIFMA's members on this important issue, and to provide the Court with information about the RMBS marketplace, as well as the practical consequences of affirming or reversing the Appellate Division's decision below.

PRELIMINARY STATEMENT

This case is one of the many currently pending complex cases involving RMBS repurchase (or put-back) claims that have proliferated in the years following the 2008 financial crisis. Issuances of RMBS—which, in a nutshell, are securities that provide their holders with the right to cash flows from pools of mortgage loans—are governed by standardized contracts such as the contracts at issue here.

These contracts—mortgage loan purchase agreements and pooling and servicing agreements—typically contain extensive representations and warranties made by the sponsor of the RMBS transaction (here, Defendant-Appellant Nomura Credit & Capital, Inc.) about the loan characteristics of the thousands of mortgage loans in each pool. The contracts also contain "sole remedy" provisions which, in the event there is a breach of loan-related representations, limit the aggrieved party's remedy to requiring the sponsor to repurchase the offending loan—no further remedy or redress is allowed.

Despite the plain language of the governing contracts, the Appellate Division inexplicably permitted Plaintiff the opportunity to pursue additional damages for alleged breaches of representations and warranties pertaining to characteristics of the underlying mortgage loan pools. The Appellate Division's decision is contrary to black-letter New York law requiring the enforcement of

contractual limitations and exclusive remedy provisions agreed to by sophisticated parties.[1] New York law likewise precludes courts from rendering a contractual provision ineffective, which is precisely what the Appellate Division's Order does. Indeed, recent cases before New York tribunals that have considered the precise provisions at issue here have universally enforced the contracts as drafted—prohibiting plaintiffs from recovering damages that were never part of the bargain.

Affirming the Appellate Division's contrary decision would have far-reaching consequences. Not only would it reshape RMBS litigation, it would create substantial uncertainty in other complex commercial transactions in which parties routinely make use of limitation of liability and exclusive remedy provisions to efficiently allocate risk and establish certainty. The Court should not allow such an outcome. Rather, it should reconfirm longstanding New York law providing that contracts will not be rewritten *ex post*, that contractual limitations and exclusive remedies will be upheld in contracts, and that fundamental fairness requires that parties abide by the terms of their agreed-upon bargain.

BACKGROUND

The securitization of residential mortgage loans has been the bedrock of housing finance for several decades. Prior to the creation of the RMBS structure

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[1] Every state in the nation permits private parties to—with certain exceptions for fraud, oppression, or intentionally harmful conduct—limit liability in contract.

that is now ubiquitous across the industry (nearly $9 trillion in RMBS were outstanding in 2014), a bank making a mortgage loan to a family for the purchase of a residential property had to consider the investment benefits and risks of keeping that single loan on the bank's balance sheet for the term of the mortgage (frequently, 30 years). Under this system, any bank or financial institution would require a substantial return on its investment in order to compensate it for committing its capital in this way for an extended period of time.

Residential mortgage loan securitization solved this economic dilemma. A product of private contracts between sophisticated parties, RMBS lowered transaction costs associated with individual loans, providing individuals and families seeking financing with greater flexibility and lower costs. Under the RMBS structure, a financial institution, usually called the "sponsor" or "seller," purchases, aggregates, and then sells thousands of residential mortgage loans to a depositor, which then conveys the mortgage loans to a trust. The trust then issues securities—or "certificates"—that entitle the purchaser of each certificate to cash flows generated by the loans in the trust.[2] The purchasers of the certificates are typically sophisticated parties, including "banks, insurance companies, hedge

[2] *See* Thomas P. Lemke et al., Mortgage-Backed Securities § 1.1 (2014).

funds, mutual funds, foreign central banks, and sovereign wealth funds, as well as Fannie Mae and Freddie Mac."[3]

The certificates are freely bought and sold because the terms of the contracts negotiated among the sponsor and trust, defining the rights of the certificates and their purchasers, are fully disclosed and standardized across the industry. As is the case here, the contracts typically include mortgage loan purchase agreements ("MLPAs") and pooling and servicing agreements ("PSAs"). The MLPAs and PSAs typically contain numerous representations and warranties regarding the mortgage loans securitizing the certificates. The MLPAs also typically contain general representations about the sponsor unrelated to the mortgage loans (*e.g.*, the sponsor's corporate standing and organization).

While the representations and warranties concerning the underlying loans in the mortgage pool are numerous, there is an important provision in the vast majority of—if not all—PSAs: a limited and exclusive remedy for a breach of representations or warranties regarding the loans. Specifically, the PSAs (including the one at issue here) provide that the sole remedy available if there is a breach of a loan-related representation or warranty is the repurchase of the particular loan that is the subject of the representation or warranty. Therefore, the

[3] Office of Fed. Hous. Enter. Oversight, *A Primer on the Secondary Mortgage Market*, Mortgage Market Note 08-3 at 8 (July 21, 2008), *available at* http://www.fhfa.gov/PolicyProgramsResearch/Research/PaperDocuments/20080721_MMNote_08-3_N508.pdf.

trustee, acting on behalf of the certificate-holder, can require the sponsor to buy back an offending loan, but the certificate-holder cannot rescind its purchase, seek general damages from the seller, or pursue any other remedies normally available for breach of contract.[4]

This structure carefully limits the sponsor's exposure by ensuring that sponsors do not bear open-ended liability for investors' damages or losses on the mortgage portfolio undergirding the certificates. If a loan breaches the representations and warranties made in the PSA or MLPA, that loan is repurchased and thereby removed from the mortgage pool, without disturbing the rest of the portfolio or the RMBS issuance as a whole. This is consistent with the fundamental structure of "[t]he mortgage securitization process," which is "designed to distribute risk."[5]

The enforceability of the sole remedy provision has become increasingly important since the financial crisis of 2008, which saw a rise in mortgage delinquencies and the collapse of the RMBS market. Unsurprisingly, this led to a wave of RMBS litigation, including actions brought by hedge funds specializing in distressed debt opportunities (so-called "vulture funds"), which—after purchasing RMBS at steeply discounted prices—have encouraged RMBS trustees to assert

[4] Robert T. Miller, *The RMBS Put-Back Litigations and the Efficient Allocation of Endogenous Risk Over Time*, 34 REV. BANKING & FIN. L. 255, 291 (2014).

[5] *See, e.g.*, Mortgage-Backed Securities §1.

buy-back claims. Consistent with the profit-maximizing imperative of these entities, they have sought ways to avoid the sole remedy provisions applicable to most RMBS issuances. As discussed below, those attempts were uniformly rejected by the courts of this state, until the Appellate Division's Order in this action.

ARGUMENT

I. The Appellate Division's Order Is Contrary To Black-Letter New York Law

The Appellate Division found that the sole remedy provisions contained in the MLPA and PSA do not bar Plaintiff from seeking damages for breaches of representations and warranties that clearly relate to perceived loan deficiencies.[6] In other words, the Appellate Division's Order permits Plaintiff to pursue remedies, other than a repurchase of specific loans or, potentially, the payment of the repurchase price in the case of liquidated loans, for alleged misstatements concerning those loans. Such a result cannot be reconciled with the governing New York law, or the terms of the governing contracts.

[6] Plaintiff's contention that its claims are not subject to the sole remedy provisions because they relate to the underlying transaction as a whole ignores the substance of Plaintiff's claims which, by its own admission, is that specific loans in the mortgage pools were deficient. The fact that Plaintiff is contending that a large number of these loans were deficient does not change the nature of its claim.

New York law is clear that contractual provisions limiting liability or restricting available remedies are binding and enforceable—contracting parties are free to delineate the scope of their liability and remedies in the event of a breach, and courts must enforce such liability-limiting provisions. As this Court has explained, "a limitation on liability provision in a contract represents the parties' [a]greement on the allocation of the risk of economic loss in the event that the contemplated transaction is not fully executed, which the courts should honor." *Metro. Life Ins. Co. v. Noble Lowndes Int'l, Inc.*, 84 N.Y.2d 430, 436 (1994); *see Moore v. Microsoft Corp.*, 293 A.D.2d 587, 588 (2d Dep't 2002) (enforcing waiver of liability clause); *Chelsea, LLC v. Seventh Chelsea Assocs., LLC*, 304 A.D.2d 498, 498 (1st Dep't 2003) ("The limitation of remedies clause in the parties' agreement, which restricted plaintiff buyer's remedies to cancellation of the contract, specific performance or closing without reduction or abatement in the purchase price, precluded plaintiff from closing and then seeking monetary damages for breach of contract[.]").[7]

The enforceability of such provisions is a necessary corollary to the equally fundamental tenet of New York contract law: contracts must be construed to give effect to each and every provision, and no provision should be rendered

[7] *See also, e.g., Baidu, Inc. v. Register.com, Inc.*, 760 F. Supp. 2d 312, 317 (S.D.N.Y. 2010) ("Contractual provisions that clearly, directly and absolutely limit liability . . . are enforceable, especially when entered into at arm's length by sophisticated contracting parties.") (internal quotation marks omitted).

meaningless. *See Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46 (1956) ("no provision of a contract should be left without force and effect"); *Peluso v. Tauscher Cronacher Prof'l Eng'rs, P.C.*, 270 A.D.2d 325 (2d Dep't 2000) (courts will not read ineffectual a provision limiting the liability of the parties); *RM 14 FK Corp. v. Bank One Trust Co., N.A.*, 37 A.D.3d 272, 274 (1st Dep't 2007) ("contract should not be interpreted so as to render any clause meaningless").[8]

These principles have been uniformly applied by New York courts in the RMBS context, including in numerous decisions finding that a plaintiff cannot circumvent a sole remedy provision by invoking a "no untrue statement" clause. *See, e.g.*, *Ambac Assurance Corp. v. EMC Mortg. LLC*, 121 A.D.3d 514, 520 (1st Dep't 2014) (rejecting plaintiff's attempt to pursue general damages for a no untrue statement provision as barred by the contract's sole remedy provision); *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, No. 650369/2013, 2013 WL 6997183 (Sup. Ct. N.Y. Cnty. Jan. 14 2013), *aff'd*, 121 A.D.3d 535 (1st Dep't 2014) (sole remedy provision agreed upon by the parties precludes compensatory, consequential and rescissory damages); *Assured Guar. Corp. v. EMC Mortg., LLC*,

[8] Every state in the country permits private parties to limit liability and/or limit the remedies available for a particular breach when entering into a contract. *See, e.g.*, 6 Del. C. §2-719 (upholding limitations of liability and limiting remedies absent unconscionability); 13 Pa. Cons. Stat. Ann. § 2719 (permitting limitation of liability clauses so long as provision is not unconscionable); *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 446 (Cal. 1963) ("no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party").

No. 650805/2012, 2013 WL 1442177, at *6 (Sup. Ct. N.Y. Cnty. Apr. 4, 2013) ("courts cannot, under the guise of interpretation, rewrite parties' agreements to impose additional terms or relieve parties from the consequences of their bargain") (internal citations omitted); *U.S. Bank Nat'l Ass'n v. Countrywide Home Loans, Inc.*, No. 652388/2011, 2014 WL 617548, at *6 (Sup. Ct. N.Y. Cnty. Feb. 13, 2014) (plaintiff's reading of the RMBS agreements to permit general damages for a violation of a "no untrue statement" provision in the contracts rendered the sole remedy provision of cure or repurchase "superfluous"); *see also ACE Sec. Corp. Home Equity Loan Trust, Series 2007-HE3 v. DB Structured Prods., Inc.*, 5 F. Supp. 3d 543, 553 (S.D.N.Y. 2014) (parties in RMBS contract may expressly limit the remedies available as a result of breach).[9]

II. Affirmance of the Appellate Division's Order Would Upset the Carefully Structured Allocation of Risk in RMBS Contracts

New York precedent is rooted in a recognition of the importance of maintaining predictability in contractual relations, efficiently allocating risk, and allowing sophisticated commercial actors to negotiate the terms of their business

[9] It is equally well-established that a specific contractual provision controls over a mere general provision. *See Muzak Corp.*, 1 N.Y.2d at 46 ("Even if there was an inconsistency between a specific provision and a general provision of a contract . . . , the specific provision controls."). Here, as detailed in Defendant-Appellant's briefing, that principle means that the sole remedy provision—which specifically governs the recourse available for loan-related deficiencies—controls over the more general "no untrue statement" and cumulative remedy provisions relied upon by the Appellate Division.

transactions without judicial intervention—concerns which are of particular importance to RMBS transactions, given their complexity and financial scope.[10]

First, limiting contractual liability provides each party with a predictable outcome in the event of breach. With regards to RMBS transactions, the sponsor, the trustee and the certificate-holders know exactly what is required in the event of a breach of the representations and warranties that materially and adversely affects the interests of the certificate-holders—cure or repurchase of the offending loan or loans.

Second, limiting the contractual remedies lowers the transaction cost of entering into the RMBS transaction.[11] Each RMBS transaction consists of a pool of thousands of loans that are aggregated together for purposes of the transaction. Calculating the damages associated with a particular breach would be time-consuming and inefficient.[12] Moreover, permitting damages claims for a breach in

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[10] *See, e.g.*, Final Report of the New York State Bar Association's Task Force on New York Law in International Matters 6 (June 25, 2011), *available at* https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=49552 ("The New York Legislature and its courts have developed New York law with the policy in mind of ensuring predictability in commercial transactions").

[11] *See* Miller, *The RMBS Put-Back Litigations and the Efficient Allocation of Endogenous Risk Over Time*, 34 REV. BANKING & FIN. L. at 291 (noting that determining the value of an individual loan in a pool of mortgages for purposes of calculating damages would incur substantial transaction costs).

[12] *See id.*

any individual loan out of thousands would drive up the costs of securitization and have the concomitant impact of increasing the costs of borrowing for consumers.

Third, the contractual mechanisms in RMBS transactions to limit liability and provide for a sole remedy for breach enable the efficient allocation of risk.[13] In the RMBS context, the sponsor selects the individual mortgage loans to be aggregated into the mortgage pools that are sold to the depositor and eventually conveyed to the trust. The sponsor then makes extensive representations and warranties about the loans and opens itself to liability for breach of contract if the loans do not, in fact, have the characteristics provided for in the representations and warranties. But no sponsor would be willing to do so if it would expose it to monetary damages claims that are unrestricted by the contractual sole remedy.

Fourth, the sole remedy effectuates the parties' intent to maintain a trust's status as a tax-exempt Real Estate Mortgage Investment Conduit or "REMIC." The PSAs provide for the substitution or repurchase of a defective loan because those remedies are designed to avoid jeopardizing that REMIC status. *See, e.g.*, 26 U.S.C. § 860F.

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[13] *See id.* at 293 ("To deal with [the highly inefficient allocation of risk], parties to securitization transactions have developed an elegant contractual mechanism that generates efficient incentives for the parties, as expectation damages normally would do, but that avoids the high transaction costs that such damages would occasion in the securitization context.").

It is in the joint interest of the parties to a RMBS transaction to contract for a predictable and cost efficient remedy that provides assurances to the purchaser regarding the underlying loans and expressly limits the sponsor's liability to cure or repurchase any offending loan(s).[14] The sole remedy provision achieves that goal: it excludes undefined liability for investors' damages or losses; limits the sponsor's liability while providing a fair remedy for injured purchasers; provides certainty regarding both the substance and mechanics of that remedy; and does so without disturbing the rest of the loans in the pool or jeopardizing the RMBS issuance as a whole.[15]

Failure to reverse the Appellate Division's Order would jeopardize this carefully constructed structure, not solely in the RMBS issuances in question in this case but across the RMBS market. The contractual language at issue is standard language that is found in nearly every RMBS transaction across the industry.[16] In fact, there are numerous RMBS actions currently pending in New

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[14] *See id.*

[15] *Id.* at 292-94.

[16] *See, e.g.*, 2006-FM2 PSA § 2.03(c) [R 181]; *Ambac Assurance Corp. v. EMC Mortg. LLC*, 121 A.D.3d at 516 (substantively similar sole remedy provision); *see* Miller, *The RMBS Put-Back Litigations and the Efficient Allocation of Endogenous Risk Over Time*, 34 REV. BANKING & FIN. L. at 276 (noting the general language of sole remedy provisions throughout the RMBS market).

York courts where provisions virtually identical to the sole remedy provisions at issue here are being litigated.[17]

Indeed, the Appellate Division further demonstrated its disregard for sole remedy provisions in *Morgan Stanley Mortgage Loan Trust 2006-13ARX v. Morgan Stanley Mortgage Capital Holdings LLC*. There, the Appellate Division left open the possibility that sole remedy provisions contained in a MLPA and PSA might not apply to breach of contract claims if the breach was committed through "gross negligence," where the allegations of "gross negligence" were based on the very same allegations of pervasive breaches in the loan pool.[18] Amongst other errors, the Appellate Division (i) treated the sole remedy provision, which provides a complete remedy by requiring the repurchase of any breaching loan (and which

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[17] *See, e.g.*, *Fed Hous. Fin. USA, Nat'l Ass'n, in its capacity as Trustee of Merrill Lynch Alternative Note Asset Trust, Series 2007-A3 v. Merrill Lynch Mortg. Lending, Inc.*, No. 652727/14 (Sup. Ct. N.Y. Cnty.); *Nomura Asset Acceptance Corp. Alternative Loan Trust Series 2006-S3, by HSBC Bank USA, Nat'l Ass'n, in its capacity as Trustee v. Nomura Credit & Capital, Inc.*, No. 652619/12 (Sup. Ct. N.Y. Cnty.); *Ambac Assurance Corp. v. Nomura Credit & Capital*, No. 651359/13 (Sup. Ct. N.Y. Cnty.); *Bank of New York Mellon v. WMC Mortg., LLC*, No. 654464/12 (Sup. Ct. N.Y. Cnty.); *Morgan Stanley Mortg. Loan Trust 2006-13ARX v. Morgan Stanley Mortg. Capital Holdings LLC*, No. 653429/12 (Sup. Ct. N.Y. Cnty.); *Deutsche Bank Nat'l Trust Co. v. Equifirst Corp.*, No. 651957/13 (Sup. Ct. N.Y. Cnty.); *U.S. Bank Nat'l Ass'n v. Citigroup Global Mkts. Realty Corp.*, No. 653816/13 (Sup. Ct. N.Y. Cnty.); *U.S. Bank Nat'l Ass'n v. Citigroup Global Mkts. Realty Corp.*, No. 653919/14 (Sup. Ct. N.Y. Cnty.); *U.S. Bank Nat'l Ass'n v. Morgan Stanley Mortg. Capital Holdings LLC*, No. 650339/13 (Sup. Ct. N.Y. Cnty.); *Deutsche Bank Nat'l Trust Co. v. Quicken Loans, Inc.*, No. 563048/13 (Sup. Ct. N.Y. Cnty.).

[18] 143 A.D.3d 1, 7 (1st Dep't 2016).

courts have repeatedly found to be enforceable), like the type of exculpatory clauses that violate New York public policy because they either fully or almost fully exonerate a party from liability for tortious misconduct; and (ii) ignored this Court's holding in *Metro. Life Ins. Co. v. Noble Lowndes Int'l, Inc.*, 84 N.Y.2d at 439 that even *intentional* breaches of contract do not invoke that public policy if there is no *tortious* intent to inflict harm on the other party at least in part through means of breaching the contract.[19] The Appellate Division's decision in *Morgan Stanley* further highlights that the Order—if left intact— may lead to a slippery slope where this industry standard provision designed by highly-sophisticated parties to provide a complete remedy to the Trust can be swallowed whole by artful legal pleadings made in hindsight.[20]

The ramifications of the Appellate Division's Order go well beyond RMBS litigation. The Order would "engender uncertainties [for] untold numbers of sophisticated business transactions—a not insignificant potentiality in the State that harbors the financial capital of the world." *Bluebird Partners v. First Fid. Bank, N.A.*, 94 N.Y.2d 726, 739 (2000). Sole remedy provisions and limitations of liability provisions can routinely be found in complex business contracts

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[19] The Appellate Division's decision in *Morgan Stanley Mortgage Loan Trust 2006-13ARX* is currently before this Court on appeal.

[20] *Morgan Stanley Mortgage Loan Trust 2006-13ARX*, 143 A.D.3d at 9.

negotiated in New York.[21] The purpose of those provisions is to promote efficiency and forestall litigation. If such provisions could be rendered superfluous through the careful crafting of breach of contract claims, the doors to liability in this state would be thrown open.[22]

Moreover, affirming the Appellate Division's Order would undermine settled expectations in the law of contracts dramatically.[23] That is no small matter

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[21] *See, e.g., Scott v. Palermo*, 233 A.D.2d 869 (4th Dep't 1996) (enforcing contractual provision limiting damages in a contract for the purchase and sale of perishable goods); *Am. Tel & Tel. Co. v. N.Y. City Human Res. Admin.*, 833 F. Supp. 962, 986 (S.D.N.Y. 1993) (contract for the sale of goods may contain express warranties limiting remedies to the repair or replacement of the equipment sold); *see also Laidlaw Transp., Inc. v. Helena Chem. Co.*, 255 A.D.2d 869, 870 (4th Dep't 1998) (contract for lawn services limited recovery to the purchase price and the court precluded recovery for consequential and incidental damages because "in cases involving transactions of a commercial nature, it is generally not unconscionable to allocate the risk to the buyer[.]"); *Xerox Corp. v. Graphic Mgmt. Servs. Inc.*, 959 F. Supp. 2d 311, 320-21 (W.D.N.Y. 2013) (enforcing exclusive remedy provision limiting damages in lease agreement).

[22] Affirmance of the Appellate Division's decision may create *in terrorem* effects similar to those encountered by defendants in securities class actions in the face of class certification. *See Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1019 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974) (noting that defendants in large class actions settle in the face of large damages "as the alternative to complete ruin and disaster, irrespective of the merits of the claim"). Permitting potential plaintiffs to seek recovery for damages beyond repurchase of the offending loans may create similar pressures on defendants to settle rather than face potentially staggering losses.

[23] *See, e.g., Holy Props. Ltd., L.P. v. Kenneth Cole Prods.*, 87 N.Y.2d 130, 134 (1995) ("Parties who engage in transactions based on prevailing [New York] law must be able to rely on the stability of such precedents"); *see also* Theodore Eisenberg & Geoffry P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies'*

to the State of New York. It "is a financial capital of the world, serving as an international clearinghouse and marketplace for a plethora of international transactions, such as to be so recognized by our decisional law. . . . In order to maintain its pre-eminent financial position, it is important that the justified expectations of the parties to the contract be protected." *J. Zeevi and Sons, Ltd. v. Grindlays Bank (Uganda) Ltd*, 37 N.Y.2d 220, 227 (1975) (citations omitted).

As the Chief Judge's Task Force on Commercial Litigation in the 21st Century recently observed, "[t]he rule of law [is a] key element[]" in "help[ing] our State retain its role as the preeminent financial and commercial center of the world," and "in keeping us competitive in today's global economy."[24] New York is a preeminent commercial center in substantial part because parties can rely on the dependability and predictability of its respected law of contracts. And the longstanding, essential principle underlying that dependability and predictability is a straightforward one, a corollary of the rule of law: New York "courts 'may not by construction add or excise terms, nor distort the meaning of those used and

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Contracts, 30 CARDOZO L. REV. 1479, 1485 (2009) ("Unpredictable courts would undermine New York's campaign to attract contracts.").

[24] Chief Judge's Task Force on Commercial Litigation In the 21st Century, Report and Recommendations to the Chief Judge of the State of New York 1 (June 2012), *available at* http://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf.

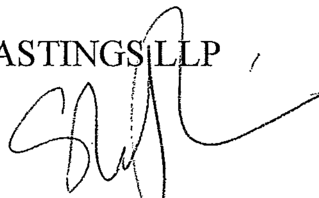
thereby make a new contract for the parties under the guise of interpreting the writing.'" *Bailey v. Fish & Neave*, 8 N.Y.3d 523, 528 (2007) (citations omitted). Upholding that venerable principle requires reversal of the Appellate Division's Order.

CONCLUSION

For the foregoing reasons, SIFMA respectfully submits that this Court should reverse the holdings in the Appellate Division's October 13, 2015 Decision and Order allowing Plaintiff to pursue monetary damages beyond the contractual sole remedy to which Plaintiff agreed.

DATED: New York, New York
February 2, 2017

PAUL HASTINGS LLP



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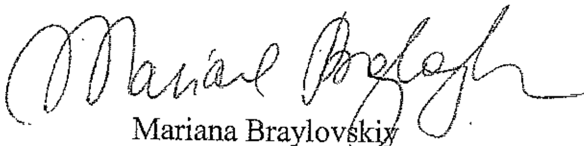

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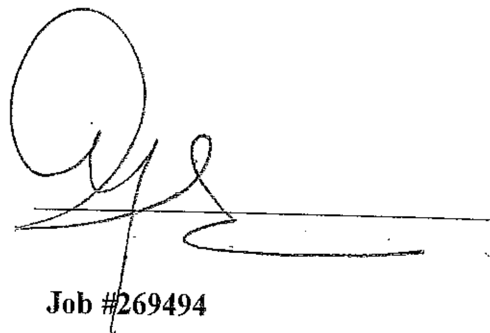

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