COURT OF APPEALS
STATE OF NEW YORK

BANK OF NEW YORK MELLON, Plaintiffs-Appellants, -against- WMC MORTGAGE, LLC, *et al.* Defendants-Respondents.	:	Index No. APL-2016-0014 New York County Clerk's Index No. 654464/12 **NOTICE OF MOTION FOR PERMISSION TO FILE AS *AMICUS CURIAE***

PLEASE TAKE NOTICE that upon the annexed Affirmation of David J. Kahne, and the proposed submission attached thereto, the Securities Industry and Financial Markets Association ("SIFMA"), by its counsel Kevin M. Carroll and Stroock & Stroock & Lavan LLP, will move this Court at 20 Eagle Street, Albany, New York, on August 1, 2016, at 10:00 a.m., or as soon thereafter as counsel may be heard, for an order granting leave to SIFMA to appear as amicus curiae in the above-captioned action.

Dated: July 29, 2016
New York, New York

Respectfully Submitted,
STROOCK & STROOCK & LAVAN LLP
By:

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COURT OF APPEALS
STATE OF NEW YORK

BANK OF NEW YORK MELLON,	:	Index No. APL-2016-0014
Plaintiffs-Appellants,	:	New York County Clerk's Index No. 654464/12
-against-	:	**AFFIRMATION OF DAVID J. KAHNE**
WMC MORTGAGE, LLC, *et al.*	:	
Defendants-Respondents.	:	

David J. Kahne, an attorney duly licensed to practice law in the State of New York, affirms the following under penalty of perjury:

1. I am an associate in the firm of Stroock & Stroock & Lavan LLP, attorneys for the proposed amicus curiae, the Securities Industry and Financial markets Association ("SIFMA"). I submit this affirmation in support of SIFMA's motion for permission to file a submission as amicus curiae in this appeal.

2. SIFMA is an industry trade group that represents broker-dealers, banks, asset managers, and other members of the securities industry within the United States. SIFMA's mission is to support policies and practices that foster a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIMFA frequently appears as amicus curiae in cases that raise important policy

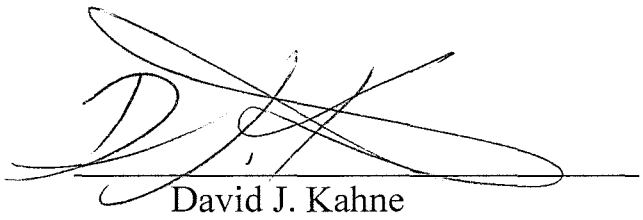
issues that impact the markets represented by SIFMA or otherwise affect common practices in the financial services industry.

4. SIFMA proposes that it be permitted, as amicus curiae, to file the attached letter brief submission (Exhibit A), which identifies arguments concerning "gap" or "bring down" representations – and the public policy implications thereof – that particularly merit the Court's consideration and that may not be otherwise be brought to the Court's attention by the parties.

6. No previous application has been made for the relief sought herein.

WHEREFORE, it is respectfully requested that this Court grant leave for SIFMA to join this action as amicus curiae and to file the attached submission.

Dated: July 29, 2016



David J. Kahne

Exhibit A

sifma

Invested in America

August 1, 2016

The Honorable John P. Asiello
Chief Clerk and Legal Counsel to the Court
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: *Bank of New York Mellon v. WMC Mortgage, LLC, et al.*, APL-2016-00114

Dear Mr. Asiello:

Pursuant to Rule 500.23(a)(2) of the Rules of this Court, Rule 500.11 governing alternative procedure review, and in support of the annexed Motion for Leave to Appear and File a Brief as *Amicus Curiae*, we submit this letter brief on behalf of proposed *amicus curiae* The Securities Industry and Financial Markets Association (SIFMA)[1] to urge this Court to reverse the Opinion and Order of the First Department entered on December 1, 2015, which threatens to upend the industry practice of granting "gap" or "bring down" warranties in residential

[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $20 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

mortgage-backed security transactions (RMBS) and other securitization transactions.

i. Rule 26.1 Corporate Disclosure Statement

Proposed *amicus curiae* SIFMA is a non-profit corporation. It has no parent corporation and no publicly-held corporation owns 10% or more of its stock.

ii. Statement of Identity and Interest of *Amicus Curiae*

SIFMA's members represent both sides of the securities industry – those who sell securities (issuers and sponsors) and those who purchase them (institutional investors and asset managers). SIFMA's mission is to support policies and practices that foster a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets.

One of SIFMA's most important functions is the representation of its members' interests in cases addressing issues of widespread concern in the securities and financial markets. In this vein, SIFMA frequently appears as *amicus curiae* in cases that raise important policy issues that impact the markets represented by SIFMA or otherwise affect common

practices in the financial services industry. The case at bar presents such a case.

This appeal presents the question of whether a securitization sponsor's "gap" or "bring down" warranties should be interpreted and enforced as the temporally limited warranties that industry participants understand and intend them to be or are somehow blanket warranties unlimited in time and scope, despite contractual language to the contrary. The Court's resolution of this issue could have far-reaching, multibillion-dollar ramifications for the securities and financial industries including SIFMA's members, and more generally, could affect the enforcement and drafting of all types of complex business contracts under New York law. The decision below, if allowed to stand, could impose expansive liability on similarly-situated securitization sponsors in the RMBS space and beyond. SIFMA accordingly files this brief *amicus curiae* to present its position on this issue, provide the Court with larger contextual information about the RMBS marketplace and illuminate the practical consequences to the securitization industry of affirming the Appellate Division's consequential decision below. Reversal by the Court of Appeals would

restore the *status quo ante* as to the shared understanding of a common contractual structure in the industry and provide important commercial certainty as to the distribution of liabilities for securitization.

BACKGROUND

The financial crisis that began in 2007 has produced a flood of litigation of various kinds. One area of financial-crisis litigation involved "put back" RMBS litigation, cases in which the relief sought is the forced repurchase of the loan as a remedy for the alleged breach of a representation and warranty. When the crisis peaked in 2008, the prices of these securities declined precipitously, as mortgage delinquencies rose and rating agencies downgraded RMBS. RMBS litigation proliferated. Yet, despite criticism during and after the crisis, mortgage-backed (and other asset-backed) securities serve a valuable function in our economy. Securitization enables lenders to sell mortgage loans and replenish their capital for use in making new mortgages. It allows banks to limit the credit and interest rate risk of holding a loan portfolio; lowers borrowing costs for consumers and businesses; redistributes mortgage risks to entities best fit to take on such risk; facilitates more lending and releases additional

capital for expansion or reinvestment in opportunities in the larger economy.

The RMBS securitization process consists of a carefully coordinated and documented chain of transfers—from mortgage brokers to loan originators, to investment bank sponsors, to depositors and to trustees. In a typical RBMS transaction, a mortgage lender, or loan originator, first identifies mortgages to securitize. The originator then selects a sponsor and a depositor. The depositor receives the pool of mortgages collected by the sponsor and transfers them to the RMBS issuing entity. The depositor typically creates this issuing entity, which is in the form of a trust. The trust is the ultimate recipient of the mortgage pool and holds the mortgages for the benefit of and on behalf of the RMBS investors. All along the chain, RMBS are the creature of private contracts and transfers among highly sophisticated parties. Many, if not all, of the transfers require transferors to make certain representations and warranties. In a "back-to-back" structured transaction, a sponsor makes independent warranties for the benefit of the trust through separate contracts and the trustee has no direct recourse against the originator for breaching loans. In a "pass

through" arrangement, like here, the sponsor passes through the originator's warranties to the trustee and the trustee then has direct recourse against the originator for breaching loans.

The series of interlocking agreements entered into and representations and warranties made for the RMBS transaction in this case are unremarkable. As is fairly common in the industry, the originator of the mortgage loans, here WMC Mortgage, LLC (WMC), made more than 60 specific representations and warranties concerning the nature and quality of the underlying mortgage loans in a Mortgage Loan Sale and Interim Servicing Agreement (MLSA) to the securitization sponsor, here J.P. Morgan Mortgage Acquisition Corporation (JPMMAC). JPMMAC, based in part on reliance on those representations and warranties, then securitized the loans by transferring them to a JPMMAC affiliate. The affiliate acted as a depositor that then transferred the loans to a securitization trust, the J.P. Mortgage Acquisition Trust 2006-WMC4 (the Trust), which issued certificates to sophisticated investors. The transfer between JPMMAC and the Trust was governed by an industry standard Pooling and Serving Agreement (PSA). Most of the initial warranties by

WMC about the nature, characteristics, history and quality of the loans in the MLSA – matters uniquely within WMC's knowledge as originator of the loans – were directly "passed through" to the Trust, made by WMC as of the closing of the MLSA, and provided investors with direct recourse against WMC. There was a temporal gap, however, of approximately two months between WMC's closing of the MLSA with JPMMAC and JPMMAC's closing of the PSA with the trustee. Therefore, where WMC's representations and warranties about the loan pool were made as of earlier dates before the closing of the PSA, JPMMAC filled the temporal "gap" in warranty coverage by making the following representation in the PSA:

> With respect to the period from [the] Whole Sale Loan Date to and including the Closing Date, [JPMMAC] hereby makes the representations and warranties contained in paragraph (a) ... of Schedule 4 annexed hereto...[that] [t]he information set forth in the Mortgage Loan Schedule and the tape delivered by [WMC] to [JPMMAC] is true, correct and complete in all material respects.

The purpose of this temporally limited representation in industry practice is to ensure continuous, but not duplicative coverage. Certain loan characteristics can change after the origination of the loans, such as, for

example, whether borrowers are current on their payments or whether the mortgaged property is protected by enforceable hazard insurance. In RMBS reflecting this "gap" structure, it is this warranty "gap" – *and only this limited "gap"* – that JPMMAC and other securitization sponsors fill in order to provide end-to-end, but not overlapping or redundant warranty coverage to RMBS investors. "Gap" warranty provisions can appear with different language in RMBS contracts, but they are a common feature of RMBS transactions and are both accepted and understood by participants in the securitization industry as serving this temporally limited gap-filling role.

The First Department recognized that "bring down" or "gap" representations are "a common enough feature in financial contracts." 136 A.D.3d 1, 8 (1st Dep't 2015). Despite this recognition, however, the Court ignored the clear temporal limitation on JPMMAC's bring down representations. By doing so, the First Department massively expanded the scope of potential liability for RMBS sponsors—and other "gap" or "bring down" warrantors with similar provisions—disrupting the carefully bargained-for and balanced allocation of risk among highly sophisticated

parties, thereby upsetting and frustrating the reasonable commercial expectations of the parties. Since many RMBS contracts contain obligations to repurchase individual mortgages from the RMBS trust at par value in the event certain representations and warranties are breached, this multibillion dollar expansion of risk is no mere bagatelle. This Court should reverse this unexpected and unintended expansion of contractual liability.

ARGUMENT

I. The Language Of The "Gap" Or "Bring Down" Representation and Warranty Is Clear And Should Be Construed In The Context Of The Entire RMBS Transaction

While not all "gap" warranty provisions are formulated in the same manner or use the same words, they all aim to limit the temporal period of liability. Here, the plain language of Section 2.06 contains an unmistakable temporal limitation on JPMMAC's warranty liability. Indeed, the First Department recognized the provision contains "a stated time period," but opined that JPMMAC warranted the truth of the information in the pool of mortgages "between the two dates *without regard to when the defects arose*[]." The reading renders superfluous the

clear intent of the parties to include specific temporal boundaries on JPMMAC's exposure. The parties would not have included the qualifying date language if it was to have no impact on JPMMAC's potential liability at all. *Laba v. Carey,* 29 N.Y.2d 302, 308 (1971) ("a court should not adopt an interpretation[] which will operate to leave a provision of a contract without force and effect.")

Moreover, reading JPMMAC's warranty in this case as a more limited "gap" or "bring down" warranty comports with axiomatic principles of New York contract law. It is well-settled that a contract should be read "as a whole to determine its purpose and intent." *W.W.W. Assocs. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). A reading of a contract should not render any portion meaningless and "particular words should be considered, not as if isolated from the text, but in the light of the obligation as a whole and the intention of the parties manifested thereby." *Riverside South Planning Corp. v. CRP/Extell Riverside, L.P.*, 13 N.Y.3d 398, 404 (2009). At bottom, "form should not prevail over substance and a sensible meaning of words should be sought." *Id.*

JPMMAC's construction gives meaning to the agreement as a whole, and, indeed, the entire transactional structure. The sensible reading of the representation and the one that follows standard industry practice reads the provision as covering only the temporal "gap" period between JPMMAC's acquisition of the loan pool and the date that JPMMAC deposits the loan pool into the trust. It would make little commercial sense for JPMMAC to duplicate loan-level representations about WMC's loan origination process which had already been made by WMC.

Further, this construction of JPMMAC's warranty is consistent with the notion that the securitization process is a means of allocating risk among the various parties to such transactions. Representations and warranties that define and limit the scope of contractual liability are almost universal in securitizations and are enforceable in New York. New York law has long recognized that contracting parties are free to allocate or limit risk, "which the courts should honor." *Metropolitan Life Ins. Co. v. Noble Lowndes Intl.*, 84 N.Y.2d 430, 436 (1994). This is particularly true when, as here, the ease and efficiency of the securitization process

depends upon the proper, contractually negotiated alignment of economic incentives, access to information and the obligations of the parties. For the securitization of mortgages, when an RMBS PSA (a standard industry agreement) sets forth an express risk allocation and certain representations of parties, courts are bound to honor that contractual risk allocation. *Assured Guaranty Municipal Corp., v. Credit Suisse Boston Mortgage Securities Corp.,* 44 Misc.3d 1206(A) (Sup. Ct. N.Y. Cty. 2014) (Kornreich, J) (finding Credit Suisse, as an RMBS sponsor, had "neither the duty nor the incentive to thoroughly vet the loan pool.").

Here, WMC, as the loan originator, was in the best position to make representations and warranties regarding the characteristics of the loans that it originated as of the loan origination dates and dates prior to the transfer of the loans to JPMMAC. JPMMAC, by contrast, was in the best position to make representations and warranties as to certain loan characteristics that could have changed during the time that JPMMAC owned the loans. The most harmonious reading of the provision is not that JPMMAC duplicated WMC's specific and detailed representations and warranties in such a blanket fashion. Rather, it is that JPMMAC and

the Bank of New York Mellon, in its capacity as Securities Administrator for the Trust (BONY), merely intended for JPMMAC to fill the limited temporal "gap" between the Whole Loan Sale Date or Servicing Transfer Date until the Closing Date. In other words, JPMMAC's warranties are entirely dependent on the timing of WMC's warranties – where there was a gap, JPMMAC filled the gap; where there was no gap, JPMMAC made no warranty. There is nothing unusual or unreasonable about this bargained-for contractual securitization structure.

II. Imposing More Expansive Liability On A Securitization Sponsor Could Have Far-Reaching And Disruptive Implications For The RMBS Industry, And Securitizations More Generally

If allowed to stand, the Appellate Division ruling would undermine well-settled expectations in RMBS securitization transactions in a prominent way. Despite the already breathtaking scope of litigation that has resulted from the financial crisis (according to at least one estimate, between January 2007 and November 2014, there were 1,120 financial crisis-related RMBS suits),[2] this precedent could engender more. Investors

[2] *See* Faten Sabry, Sungi Lee, Joseph Mani & Linh Nguyen, NERA Economic Consulting,

heretofore precluded from seeking relief from deep pocketed entities with plainly articulated and time-limited "gap" warranty exposure could bring suit under more sprawling theories of liability at odds with the securitization parties' contractual intent.

Perhaps worse, going forward, without the certainty attaching to the enforcement of similarly-worded "gap" warranties, market participants and securitization sponsors in particular would be unable to properly assess and limit their exposure to breach of representation and warranty suits. Is it not difficult to foresee future market hesitancy in sponsoring RMBS and other securitization transactions if such carefully constructed and time-specific representations and warranties are construed so broadly as to place the sponsor in the position of, in essence, insuring all of the loan originator's representations – representations that the loan originator, and not the sponsor, is best positioned to make. The carefully negotiated allocation of liability among parties in the chain of the mortgage

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Credit Crisis Litigation Update: Significant Settlement Activity in 2014 and New Cases against RMBS Trustees and Mortgage Lenders 4 (Feb. 19, 2015), *available at* http://bit.ly/1ButXL9.

securitization process would be utterly vitiated.[3]

Beyond that, a holding affirming the First Department's decision would have ramifications that go beyond RMBS and securitization litigation. In virtually any complex business contract negotiated in New York today, there are representations and warranties. Accepting BONY's position would undermine settled expectations in the law that the language that sophisticated parties choose in their contracts is purposeful and will be enforced.

That is no small matter to the State of New York. As the Chief

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[3] Utilization of "bring down" or "gap" warranties is not limited to the RMBS securitization context or even other types of asset-backed securitizations. For example, "bring down" representations are frequently used in mergers and acquisitions (M&A) to protect each party from the other's business changing or unforeseen risks before closing. Typically, the "bring down" warranty will state that the representations made when the agreement was signed about the condition of the seller and its business are still true at the time the parties are otherwise ready to consummate the transaction. Lou R. Kling, Eileen Nugent Simon, and Michael Goldman, Summary of Acquisition Agreements, 51 U. MIAMI L. REV. 779 (April 1997). Thus, the "bring down" warranty in mergers, like here, is for a discrete, non-overlapping period of time. The "bring down" warranty is actionable only for material changes between the signing of the agreement and the deal's close, not beyond that period. Michelle Shenker Garrett, Efficiency and Certainty in Uncertain Times: The Material Adverse Change Clause Revisited, 43 COLUM. J.L. & SOC. PROBS. 333, 335 n.9 (Spring 2010). If the "gap" or "bring down" warranty is expanded in the RMBS securitization context, it could potentially call into question the time-limited "bring down" warranty in the M&A context as well.

Judge's Task Force on Commercial Litigation in the 21st Century observed, "the rule of law is a key element in helping 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."[4] New York is a preeminent commercial economic center and a critical lending jurisdiction in no small part because parties can rely on dependability and the predictability of its respected law of contracts. If this Court is to uphold that venerable principle here, it should reverse the decision below.

Please let us know if the Court would like a more formal or extensive brief on the policy concerns and market impacts of these issues. If you have any questions, please do not hesitate to contact the undersigned at 202-962-7382.

Respectfully submitted,

Kevin M. Carroll

Kevin M. Carroll
Managing Director and
Associate General Counsel
- and -

[4] The 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://bit.ly/16gNUTG

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STATE OF NEW YORK
COURT OF APPEALS

BANK OF NEW YORK MELLON,	:	APL-2016-0014
Plaintiffs-Appellants,	:	N.Y. County Clerk's Index No. 654464/12
-against-	:	**AFFIDAVIT OF SERVICE**
WMC MORTGAGE, LLC, *et al.*	:	
Defendants-Respondents.	:	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

GARY W. MALPELI, being duly sworn, deposes and says:

1. I am over eighteen years of age and not a party to this action and am employed by Stroock & Stroock & Lavan LLP, 180 Maiden Lane, New York, New York 10038.

2. On July 29, 2016, I served one copy of Notice of Motion for Permission to File as *Amicus Curiae*, Affirmation of David J. Kahne, and Letter Brief of the Proposed *Amicus Curiae* Securities Industry and Financial Markets Association by Federal Express for overnight delivery on:

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Gary W. Malpeli

Sworn to before me this
29th day of July, 2016

NOTARY PUBLIC

VICTOR A. RIVERA
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No. 01RI6314744
Qualified in Bronx County
Commission Expires Nov. 17, 2018