APL 2019-00247 and APL 2020-00018
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Court of Appeals

of the

State of New York

HOME EQUITY MORTGAGE TRUST SERIES 2006-1, HOME EQUITY MORTGAGE TRUST SERIES 2006-3 and HOME EQUITY MORTGAGE TRUST SERIES 2006-4, by U.S. Bank National Association, solely in its capacity as trustee,

Plaintiffs-Respondents,

– against –

DLJ MORTGAGE CAPITAL, INC.,

Defendant-Appellant,

– and –

SELECT PORTFOLIO SERVICING, INC.,

Defendant.

(For Continuation of Caption See Inside Cover)

AMICUS BRIEF FOR SECURITIES INDUSTRY AND FINANCIAL MARKET ASSOCIATION

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Date Completed: March 12, 2021

HOME EQUITY MORTGAGE TRUST SERIES 2006-5,
by U.S. Bank National Association, solely in its Capacity as trustee,

Plaintiff-Respondent,

– against –

DLJ MORTGAGE CAPITAL, INC.,

Defendant-Appellant,

– and –

SELECT PORTFOLIO SERVICING, INC.,

Defendant.

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.

RULE 500.1(f) CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice for this Court, the undersigned counsel for *amicus curiae* the Securities Industry and Financial Markets Association ("SIFMA") states that it has no parents, subsidiaries or affiliates.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Others/ Miscellaneous

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" and "repurchase" provisions that define the remedies for breaches of contractual representations and warranties in issuances of residential mortgage-backed securities ("RMBS"). This Court's resolution of this appeal, which will address whether standard contractual terms commonly contained in RMBS contracts between sophisticated parties will be enforced as written pursuant to longstanding New York law, will likely have significant financial 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 decisions below.

PRELIMINARY STATEMENT

The Court, by this point, is quite familiar with the RMBS repurchase (or put-back) claims that have proliferated in the years following the 2008 financial crisis. As the Court noted just a few months ago, it has in recent years been repeatedly called upon to resolve questions relating to such claims, with the Court's decisions revolving around a simple underlying question: "does the contract mean what it says?" *In Matter of Part 60 Put-Back Litig.*, 2020 N.Y. Slip Op. 7687, at *1 (Dec. 22, 2020). This Court's answer has, unsurprisingly, been a resounding yes.

In particular, the Court has repeatedly found that the standardized "sole remedy" provisions found in RMBS issuances—which provide that, if there is a breach of representations and warranties made by the RMBS sponsor about any particular mortgage loan in a RMBS trust, the only available remedy is to require the sponsor to cure, replace, or repurchase the offending loan (after the sponsor is either notified, or independently discovers, the breach)—must be enforced as written.

The Court has repeatedly found this to be the case, even if a plaintiff alleges numerous loan-related breaches—a plaintiff cannot avoid the effect of the sole remedy provision by claiming systematic or "pervasive" breaches. *See id.,* at *5-6 (finding that plaintiffs could not avoid the sole remedy provision by claiming gross negligence based on pervasive loan-related breaches); *Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Cap., Inc.*, 30 N.Y.3d 572, 585 (2017) (finding that "there is no support in the governing agreements for the position of [plaintiff] that the Sole Remedy Provision applies only to occasional mortgage loan-specific breaches, whereas pervasive (or 'aggregate') breaches are addressed under" a separate provision not limited by the sole remedy provision, and that "[the trustee] is expressly limited to the more specific Sole Remedy Provision negotiated by the parties, however many defective loans there may be"); *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569, 581 (2018) (rejecting "argument that a sole remedy provision executed by sophisticated parties as part of a complex securitization process can be avoided by alleging 'broader' or numerous violations of representations and warranties contained in the governing contract").

But that is exactly what the Appellate Division allowed to happen in both orders at issue in *Home Equity Mortgage Trust Series 2006-1 et al. v. DLJ Mortgage Capital, Inc.*, No. APL-2019-00247 ("*HEMT*") and *U.S. Bank Nat'l Assoc. v. DLJ Mortgage Capital, Inc.*, No. APL-2020-00018 ("*HEAT 2007-1*"). In both cases, the Appellate Division, despite this Court's repeated directives, effectively allowed Plaintiffs to avoid the operation of the sole remedy provision by claiming that they are, in essence, challenging so many loans that it would be too costly or inconvenient to comply with the sole remedy provision.

First, in both *HEMT* and *HEAT 2007-1*, the Appellate Division found that Plaintiffs could proceed with untimely claims based on loans for which Plaintiffs admittedly did not comply with the sole remedy provision's notice-and-cure provisions. In each case, the Appellate Division found that it was permissible for Plaintiffs to notify Defendant of certain breaching loans, file lawsuits after those loans were not cured or repurchased, and then **years later** add claims based on loans which were never previously noticed to Defendant. Because these new claims based on previously unidentified loans would normally be time-barred under the six-year statute of limitations applicable to Plaintiffs' claims,[1] the Appellate Division found that the claims related back under CPLR 203(f) to Plaintiffs' initial complaints, under the theory that, before they filed those complaints, Plaintiffs had notified Defendant that "the specified defective loans were just the tip of the iceberg" because defective loans existed "on a massive scale," *Home Equity Mortg. Tr. Series 2006-1 v. DLJ Mortg. Cap., Inc.*, 175 A.D.3d 1175, 1176 (1st Dep't 2019), and therefore Defendant was on notice that Plaintiffs would be challenging additional loans.

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1. A six-year statute of limitations, accruing from the date of each of the challenged RMBS issuances, applies to Plaintiffs' claims. *See ACE Sec. Corp. v. DB Structured Prod., Inc.*, 25 N.Y.3d 581, 594 (2015).

Second, in *HEMT*, the Appellate Division found that Plaintiffs could employ statistical sampling to establish liability and damages, apparently accepting Plaintiffs' argument that it would be too time-consuming and costly to show liability and damages on a loan-by-loan basis because they are challenging "tens of thousands of loans." *HEMT* Pl. Br. at 3.[2]

Both of these conclusions improperly allow Plaintiffs to avoid the effect of the sole remedy provision—which requires Plaintiffs to (i) provide pre-suit notice of **each** breaching loan to Defendant in order to allow Defendant the opportunity to cure or repurchase that loan and (ii) to prove that **each** challenged loan was in material breach—by the simple expedient of claiming pervasive breaches. That is the exact approach this Court has rejected in *Ambac*, *Nomura* and *Part 60*. And with good cause: longstanding New York law requires that contractual limitations and remedy provisions must be enforced as written, and fundamental fairness requires that parties abide by the terms of their agreed-upon bargain.

In addition, the Appellate Division erroneously concluded in both cases (with virtually no analysis) that Plaintiffs are permitted to recover interest on the unpaid balance of a liquidated loan after that loan had been liquidated—*i.e.*, after the loan

2. "*HEMT* Pl. Br." refers to the Brief for Plaintiffs-Respondents, dated May 4, 2020, in *HEMT*. "*HEAT 2007-1* Pl. Br." refers to the Brief for Plaintiff-Respondent, dated May 28, 2020, in *HEAT 2007-1*.

no longer exists. That conclusion is entirely illogical and has no basis in the governing documents.

BACKGROUND

Residential mortgage loan securitization revolutionized housing finance when it was introduced in the 1970s. Prior to the creation of the RMBS structure (which is now ubiquitous across the industry and continues to play an important role in the housing market today[3]), 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 (often as long as 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, imposing significant transaction costs on homeowners seeking housing finance.

RMBS lowered these transaction costs associated with individual loans, providing individuals and families seeking financing with greater flexibility and lower costs.[4] Under the RMBS structure, a financial institution, usually called the

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3. *See* SIFMA, U.S. Mortgage Backed Securities Statistics (Mar. 3, 2021), *available at* https://www.sifma.org/resources/research/us-mortgage-backed-securities-statistics/.

4. *See* Jason H.P. Kravitt & Robert E. Gordon, *Securitization of Financial Assets*, § 16.01 (3d ed. 2014) (explaining that the high transaction costs and associated risks with loan originators

"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.[5] The purchasers of the certificates are typically sophisticated parties, including "banks, insurance companies, hedge funds, mutual funds, foreign central banks, and sovereign wealth funds, as well as Fannie Mae and Freddie Mac."[6]

The certificates are freely bought and sold because the terms of the contracts negotiated among the sponsor and trustee, defining the rights of the certificates and their purchasers, are fully disclosed and standardized across the industry. 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, but also contain a corresponding provision that

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maintaining individual loans on the bank's balance sheets are reduced by securitizing pools of mortgage loans and selling them in the secondary market).

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

6. 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.

establishes an 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 in respect of a material breach of a loan-related representation or warranty is the cure of the breach or repurchase of the particular loan that is the subject of the representation or warranty. If a breach cannot be cured, the trustee, acting on behalf of the certificate-holders, can require the sponsor to buy back a particular offending loan at a "purchase price" that is defined to include the unpaid principal balance plus applicable interest, and therefore makes the trust whole with respect to any breaching loan. The PSAs provide a specific mechanism for effectuating this remedy through defined repurchase protocols (which include notice-and-cure provisions). Here, as is typical, the repurchase protocols provide that (i) a party to the PSA must notify Defendant of a material breach of a representation and warranty with respect to a specific loan, and (ii) Defendant then has 120 days to either cure or repurchase the breaching loan. *See, e.g.*, Appellant Appendix in *HEMT* (Mar. 11, 2020) at A-638.

This structure provides a complete remedy for any proven breach. If a loan breaches the representations and warranties made in the PSA or MLPA and cannot be cured, that loan is repurchased or replaced 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" and provide liquidity to loan sellers for the benefit of borrowers.[7] Furthermore, it promotes judicial efficiency by encouraging the parties to resolve any dispute without resorting to litigation.

The enforceability of the sole remedy provision became increasingly important following 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 buy-back claims. Consistent with the profit-maximizing imperative of such entities, they have repeatedly sought ways to avoid the remedial provisions applicable to most RMBS issuances. This Court has consistently rejected such efforts as contrary to New York law and the structure of the governing RMBS securitization contracts to which the parties agreed. As discussed below, this case is no different.

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7. *See, e.g.*, Lemke et al., *supra* note 5, § 1.1.

ARGUMENT

I. The Appellate Division's Application of the Relation-Back Doctrine Improperly Thwarts the Purpose of the Sole Remedy and Repurchase Provisions.

New York's "statutes of limitation serve the same objectives of finality, certainty and predictability that New York's contract law endorses. Statutes of limitation not only save litigants from defending stale claims, but also express a societal interest or public policy of giving repose to human affairs." *ACE Sec. Corp.*, 25 N.Y.3d at 594; *see also Freedom Mortgage Corp. v. Engel*, 2021 WL 623869, at *1 (N.Y. Feb. 18, 2021) ("We have repeatedly recognized the important objectives of certainty and predictability served by our statutes of limitations and endorsed by our principles of contract law, particularly where the bargain struck between the parties involves real property."). The relation-back doctrine (as codified in CPLR 203(f)) "respect[s] the important policies inherent in statutory repose . . . [but] enables a plaintiff to correct a pleading error—by adding either a new claim or a new party—after the statutory limitations period has expired." *Buran v. Coupal*, 87 N.Y.2d 173, 177-78 (1995).

The relation-back doctrine cannot be used to salvage claims brought in violation of a contractual condition precedent—*i.e.*, a plaintiff cannot file a proceeding without complying with a contractual pre-suit requirement and then attempt to retroactively correct that failure by invoking the relation-back doctrine after the statute of limitations has expired. *See U.S. Bank Nat'l Ass'n v. Greenpoint Mortg. Funding, Inc.*, 147 A.D.3d 79, 86-89 (1st Dep't 2016) ("The breach notices were a contracted-for condition precedent to bringing this action. The doctrine of relation back cannot render these otherwise untimely breach notices timely."); *S. Wine & Spirits of Am., Inc. v. Impact Envtl. Eng'g, PLLC*, 80 A.D.3d 505, 505 (1st Dep't 2011) ("the original complaint was brought by plaintiffs in violation of the condition precedent, and plaintiffs cannot rely upon CPLR 203(f) to cure such failure to comply").

As this Court found in *ACE*, the PSA's notice-and-cure provisions clearly establish a contractual condition precedent to Plaintiffs' claims. *See* 25 N.Y.3d at 599; *see also U.S. Bank Nat'l Ass'n v. DLJ Mortg, Cap., Inc.*, 33 N.Y.3d 72 (2019) (RMBS notice and sole remedy provisions are prerequisites to suit). Plaintiffs were required to comply with those provisions by giving Defendant notice of specific breaching loans and providing Defendant with 120 days to either cure or replace those loans, **<u>before</u>** filing suit. Plaintiffs cannot satisfy this pre-suit requirement by identifying breaching loans after filing suit: "the breach notice cannot 'relate back' because the inherent nature of a condition precedent to bringing suit is that it actually precedes the action. Plaintiff had no right to bring the action unless and until this condition was fulfilled. Plaintiff's argument would simply eviscerate the condition precedent of serving a breach notice, as required by the contract, and defendant's right to effect a pre-action cure." *Greenpoint*, 147 A.D.3d at 86.

To hold otherwise would result in an application of CPLR 203(f) that would thwart the purpose of notice-and-cure provisions and upend the well-settled expectations of participants in the RMBS market. The pre-suit notice-and-cure requirement is a critical part of the bargain embodied in RMBS securitizations, as the Court recognized in *ACE*. *See* 25 N.Y.3d at 589. That requirement, like similar requirements in other commercial contracts, gives parties the 'opportunity to cure the defects . . . while a cure is possible" and to "avoid similar defects" in future transactions. 18 Williston on Contracts § 52:42 (4th ed. 2017). It also serves the critically important function of affording parties an opportunity to address breaches before litigation is filed "so [that] litigation [and its concomitant costs] can be avoided." *Greenpoint*, 147 A.D.3d at 85. Thus, the pre-suit notice-and-cure requirement plays an integral role in the design and implementation of RMBS contracts and their allocation of rights and obligations.

The Appellate Division's ruling, and Plaintiffs' position here, would completely negate this critical requirement. If RMBS plaintiffs are permitted to commence litigation challenging a multitude of allegedly breaching loans without giving defendants the requisite pre-suit notice of those breaches and an opportunity to cure, the pre-suit notice-and-cure requirement would be rendered meaningless. This would upset the careful balance of rights and obligations embodied in the contracts' remedial framework and would alter key terms of the bargain the parties struck.

This disruption is exacerbated by the Appellate Division's application of CPLR 203(f), which allows RMBS plaintiffs to evade the notice requirement and then, years later, expand the number of loans being challenged without ever giving defendants the chance to remedy any deficiencies in those loans. By leaving RMBS sponsors and originators exposed to unknown, open-ended liability, this expansive use of the relation back doctrine would directly undermine "the primary purpose of a limitations period"—"fairness to a defendant." *Duffy v. Horton Mem. Hosp.*, 66 N.Y.2d 473, 476 (1985) ("a defendant should be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations"); *Freedom Mortgage Corp.*, 2021 WL 623869, at *1 ("This Court has emphasized the need for reliable and objective rules permitting consistent application of the statute of limitations to claims arising from commercial relationships.").

There is absolutely no reason to do so. The six-year statute of limitations applicable to Plaintiffs' claims is a "generous" limitations period. *In re R.M. Kliment*

& Frances Halsband, Architects, 3 N.Y. 3d 538, 539 (2004). It provided Plaintiffs with ample time to investigate and discover any breaches. Indeed, numerous plaintiffs have brought timely lawsuits asserting similar claims relating to RMBS securitizations, some of which have resulted in enormous settlements. *See, e.g.*, *In re Bank of New York Mellon*, 127 A.D.3d 120, 125-28 (1st Dep't 2015 (approving $8.5 billion settlement to resolve claims involving 530 RMBS trusts). In short, the six-year statute of limitations period gave Plaintiffs plenty of time to assert their claims.

Plaintiffs do not contend otherwise; they provide no explanation as to why the six years they had to assert their claims was insufficient. There is none. As noted, Plaintiffs take direction from "vulture funds," highly sophisticated investors with significant resources at their disposal, who purchased steeply discounted RMBS after the 2007 financial crisis specifically in order to pursue repurchase litigation against RMBS sellers and sponsors.[8] They are, and were, well aware of the law governing their rights, and clearly had the deep pockets necessary to pursue their claims in a timely manner.

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8. Asset-Backed Alert, *MBS 'Putback' Investors Target Big Issuers* (Feb. 24, 2012), *available at* http://bit.ly/14Z088H.

Plaintiffs' primary arguments are that the notice-and-cure provisions do not require loan-specific notices, and that they satisfied these provisions by identifying numerous breaching loans and, in *HEMT*, stating that they were continuing to investigate whether additional loans were in breach. Neither argument has any merit.

First, as addressed at length in Defendant's briefing, the repurchase provision requires the repurchase of the specific loan as to which there is a breach if that breach materially and adversely affects loan value. Thus, breaches can only occur on a loan-by-loan basis as to particular loans. Likewise, the defined remedy—the repurchase or cure of a breaching loan—can only be achieved on an individualized basis. The remedy for breach is to cure the breach or to remove the individual loans by repurchasing them: if a loan is in material breach, **<u>that</u>** loan must be repurchased. The notion that the repurchase protocol does not operate on a loan-specific basis because it does not contain the words "loan-specific" or "loan-by-loan notice" (*HEAT 2007-1* Pl. Br. at 14) is frivolous—the structure of the repurchase protocol simply does not work without the identification of specific breaching loans.[9]

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9. *See, e.g.*, *Ret. Bd. of the Policemen's Annuity & Benefit Fund of the City of Chicago v. Bank of New York Mellon*, 775 F.3d 154, 162 (2d Cir. 2014) ("Whether [sponsor] was obligated to repurchase a given loan requires examining which loans, in which trusts, were in breach of the representations and warranties. And whether a loan's documentation was deficient requires looking at individual loans and documents."); *MASTR Adjustable Rate Mortg. Tr. 2006-OA2*

Second, the contention that the notice-and-cure provisions could be satisfied by identifying a subset of loans, (and in one case claiming that there were likely "substantial" additional breaching loans subject to repurchase) (*HEAT 2007-1* Pl. Br. at 13-14; *HEMT* Pl. Br. at 21, 34), is simply a repackaging of a tactic that this Court has repeatedly rejected in recent years—arguing that the breaching loans are so numerous or so pervasive that the sole remedy and associated provisions do not have to be adhered to.

As this Court clarified in *Ambac* and *Nomura*, the enforceability of a sole remedy provision cannot "be avoided by alleging 'broader' or numerous violations of representations and warranties contained in the governing contract." *Ambac*, 31 N.Y.3d at 581-83. There is no "carve-out from the Sole Remedy Provision where a certain threshold number of loan breaches are alleged. . . . [The trustee] is expressly limited to the . . . Sole Remedy Provision negotiated by the parties, **however many defective loans there may be**." *Nomura*, 30 N.Y.3d at 585 (emphasis added). The Court was even clearer in *Part 60*: "Plaintiff's contention that the pervasive nature of the breaches will make it impossible for plaintiff to prove its case on a loan-by-

v. UBS Real Estate Sec. Inc., 2015 WL 764665, at *11 (S.D.N.Y. Jan. 9, 2015) ("[T]he repurchase mechanism established by the parties is targeted to a specific loan, and not to a group or category of loans.").

loan basis has previously been considered and rejected by this Court as a basis to render the sole remedy provision unenforceable." 2020 N.Y. Slip Op. 7687, at *5.

The Appellate Division's holdings, and Plaintiffs' arguments, are in clear contravention of that directive—they would permit RMBS plaintiffs to avoid the requirement that they identify specific breaching loans prior to filing suit, and later fill in the missing information. The Court has recognized that, particularly in cases "involving interpretation of documents drafted by sophisticated, counseled parties," "[i]t is the role of the courts to enforce the agreement" the parties made. *NML Cap. v. Republic of Argentina*, 17 N.Y.3d 250, 259-60 (2011). The Court has consistently done so in the RMBS context, enforcing the express terms of these complex securitization contracts even where the consequence is that a plaintiff's claims are barred. *See, e.g.*, *Ambac*, 31 N.Y.3d at 581-84; *Nomura*, 30 N.Y.3d at 584; *ACE*, 25 N.Y.3d at 594, 596. It should do so again here and reject Plaintiffs' invitation to apply CPLR 203(f) in a way that would nullify the pre-suit notice-and-cure requirement and undermine the essential purposes it serves.

II. Permitting Trustees to Prove Their Claims Using a Sampling Approach Would Undermine the Loan-Specific Sole Remedy Provisions.

Once again, "Plaintiff's contention that the pervasive nature of the breaches will make it impossible for plaintiff to prove its case on a loan-by-loan basis has previously been considered and rejected by this Court as a basis to render the sole remedy provision unenforceable." *Part 60*, 2020 N.Y. Slip Op. 7687, at *5; *see also Ambac*, 31 N.Y.3d at 581 (rejecting "argument that a sole remedy provision executed by sophisticated parties as part of a complex securitization process can be avoided by alleging 'broader' or numerous violations of representations and warranties contained in the governing contract"). This principle, most recently articulated by the Court less than three months ago, is dispositive of the bulk of the *HEMT* Plaintiffs' argument in support of a sampling approach: that it is more "practicable" than a loan-by-loan approach because a loan-by-loan approach would be "expensive, time-consuming and wasteful." *HEMT* Pl. Br. at 51.

The Court's finding in *Part 60* is entirely consistent with black-letter New York law holding that contractual provisions restricting available remedies are binding and enforceable, contracting parties are free to delineate remedies in the event of a breach, and courts must enforce such provisions. *See Metro. Life Ins. Co. v. Noble Lowndes Int'l, Inc.*, 84 N.Y.2d 430, 436 (1994) ("[T]he courts should honor" such provisions, even though the parties "may later regret their assumption of the risks of non-performance in this manner; but the courts let them lie on the bed they made.”). “Parties to a contract have the power to specifically delineate the scope of their liability at the time the contract is formed. Thus, there is nothing unfair in defining a contracting party’s liability by the scope of its promise as reflected by the agreement of the parties. Indeed, this is required by the very nature of contract law, where potential liability is determined in advance by the parties.” *Bd. of Educ. of Hudson City Sch. Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 29 (1987).

Or as the Court put it in *Nomura* in the same context presented here:

> It is fundamental that, “when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms.” . . . Courts may not, through their interpretation of a contract, add or excise terms or distort the meaning of any particular words or phrases, thereby creating a new contract under the guise of interpreting the parties’ own agreements. . . .
>
> In accordance with these principles, courts must honor contractual provisions that limit liability or damages because those provisions represent the parties’ agreement on the allocation of the risk of economic loss in certain eventualities. Contract terms providing for a “sole remedy” are sufficiently clear to establish that no other remedy was contemplated by the parties at the time the contract was formed, for purposes of that portion of the transaction especially when entered into at arm’s length by sophisticated contracting parties.

30 N.Y.3d at 581-82 (citations omitted).

Simply put, the possibility—or even certainty—that proving their case on a loan-specific basis will be costly for Plaintiffs does not justify ignoring the agreed-upon sole remedy and repurchase provisions.

Plaintiffs' contention that those provisions do not require a loan-specific analysis (*HEMT* Pl. Br. at 44-47) is meritless. As noted (*supra* at 9), the PSA's remedy provisions require Defendant to cure or repurchase each breaching loan identified by Plaintiffs; this can only be done on an individual, loan-by-loan basis. *See, e.g.*, *MASTR*, 2015 WL 764665, at *11 ("[T]he repurchase mechanism established by the parties is targeted to a specific loan, and not to a group or category of loans."); *Royal Park Invs. SA/NV v. Deutsche Bank Nat'l Tr. Co.*, 2018 WL 4682220, at *12 (S.D.N.Y. Sept. 28, 2018) ("[W]hether [a Warrantor] was obligated to repurchase a given loan requires examining which loans, in which trusts, were in breach of the representations and warranties. Similarly, whether a loan's documentation was deficient requires looking at individual loans and documents." (internal quotations marks and citation omitted)); *Homeward Residential, Inc. v. Sand Canyon Corp.*, 2017 WL 5256760, at *7 (S.D.N.Y. Nov. 13, 2017) ("The structure of these provisions—and the nature of the defined terms therein—leads to the conclusion that the parties agreed upon a remedial process that generally calls for proof of breach on a loan-by-loan basis.").

Statistical sampling, by its very nature, cannot establish liability on a loan-by-loan basis because it cannot (and does not seek to) establish whether a specific loan is in breach of any representation or warranty, whether such a breach is material, or whether Defendant was aware of a material breach in a specific loan—all it can do is determine the probability that a loan in a specific mortgage pool is a breaching loan. *See, e.g., Homeward Residential, Inc.*, 2017 WL 5256760, at *8. That is insufficient: "[b]ecause Plaintiffs need to prove liability and damages on a trust-by-trust and loan-by-loan basis, there is no benefit to sampling beyond what it reveals about the loans within the sample." *Blackrock Balanced Cap. Portfolio (FI) v. Deutsche Bank Nat'l Tr.*, 2018 WL 3120971, at *2 (S.D.N.Y. May 17, 2018); *see also Royal Park Invs.*, 2018 WL 4682220, at *12 ("Where, as here, the sole remedy available to the Trustee under the express terms of the PSAs is inherently loan-specific, both liability and damages must be established 'loan by loan,' making sampling unhelpful.").

III. Interest Cannot Accrue on Mortgage Loans That Have Been Liquidated.

The PSAs' repurchase protocol defines the "Repurchase Price" for breaching loans as "(i) an amount equal to the sum of (i) 100% of the unpaid principal balance of the Mortgage Loan on the date of such purchase, [and] (ii) accrued unpaid interest thereon at the applicable Mortgage Rate." Appellant Appendix in *HEMT* (Mar. 11,

2020) at A-615; Appellant Appendix in *HEAT 2007-1* (Mar. 30, 2020) at A-425. The Appellate Division improperly construed the term "accrued unpaid interest" to include interest on liquidated loans that would **hypothetically** have accrued **after** the loan was liquidated. Hypothetically, because once a loan is liquidated, it no longer exists—and interest cannot accrue on a non-existent loan.[10] Put another way, liquidation, by definition, means that the loan stops accruing interest. Therefore, the repurchase price cannot include interest on a loan that had not accrued before the loan was liquidated.

The Appellate Division did not provide any explanation for its conclusion, other than a cursory citation to its prior decision in *Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 133 A.D.3d 96, 107 (2015), *aff'd as modified sub nom. Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, National Ass'n v. Nomura Credit & Capital, Inc., 30 N.Y.3d 572 (2017)*. *See Home*

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10. Black's Law Dictionary provides that "liquidation" means "[t]he act of determining by agreement or by litigation the exact amount of something (as a debt or damages) that before was uncertain." LIQUIDATION, Black's Law Dictionary (11th ed. 2019). If the loan were to continue to accrue interest after it had been liquidated, the amount owed on the loan would remain uncertain, which is contrary to the very nature of liquidation. New York courts have acknowledged this concept, albeit in different contexts. *See, e.g.*, *Fed. Nat'l Mortg. Ass'n (Fannie Mae) v. Tortora*, 131 N.Y.S.3d 763, 769 (4th Dep't 2020) ("[A]ccrued interest, 'being . . . [a] mere incident [of the mortgage debt], cannot exist without the debt . . . .") (quoting *Ajdler v. Province of Mendoza*, 33 N.Y.3d 120, 126 (2019)), *reargument denied sub nom. Fed. Nat'l Mortg. Ass'n ("Fannie Mae") v. Tortora*, 134 N.Y.S.3d 921 (4th Dep't 2020) (where claims for payment of principal were time-barred, there could be no claim for accrued interest).

Equity Mortg. Tr. Series 2006-1, 175 A.D.3d at 1177; *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Cap., Inc.*, 176 A.D.3d 466, 467 (1st Dep't 2019). *Nomura* simply states that plaintiffs can pursue money damages when cure or repurchase under the terms of the repurchase protocol is not possible. *See* 133 A.D.3d at 107. It has no bearing here, where the parties do not dispute that the repurchase protocol applies to liquidated loans—the question here is the correct interpretation of the repurchase protocol, specifically whether the phrase "accrued unpaid interest" can include interest on liquidated loans that had not accrued at the time the loan was liquidated. As discussed above, a plain English reading dictates that it does not. *See, e.g.*, *Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239, 244 (2014) ("The words and phrases used by the parties must, as in all cases involving contract interpretation, be given their plain meaning[.]" (*quoting Brooke Group v. JCH Syndicate 488*, 87 N.Y.2d 530, 534 (1996)).

CONCLUSION

For the foregoing reasons, SIFMA respectfully submits that this Court should reverse the Appellate Division's Orders.

Dated: March 12, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCR § 500.13(c) that the foregoing brief was prepared on a computer.

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AFFIDAVIT OF SERVICE BY OVERNIGHT FEDERAL EXPRESS NEXT DAY AIR

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above.

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