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

U.S. BANK NATIONAL ASSOCIATION, solely in its capacity as Trustee of the ASSET BACKED SECURITIES CORPORATION HOME EQUITY LOAN TRUST, SERIES AMQ 2006-HE7 (ABSHE 2006-HE7),

Plaintiff,

v.

DLJ MORTGAGE CAPITAL, INC., and AMERIQUEST MORTGAGE COMPANY,

Defendants.

Index No. _____

Date Purchased: August 19, 2019

**SUMMONS**

Plaintiff designates New York County as the place of trial.

The basis of venue is CPLR 503

**TO THE ABOVE-NAMED DEFENDANTS**:

**YOU ARE HEREBY SUMMONED** to answer the complaint in this action and serve a copy of your answer upon the undersigned attorneys within twenty (20) days after the service of this summons, exclusive of the day of service, or within thirty (30) days after service is complete if this summons is not personally delivered to you within the state of New York. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: New York, NY
August 19, 2019

Respectfully submitted,

SELENDY & GAY PLLC

By: /s/ *Philippe Z. Selendy*

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TO:

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Corporate Tax Dept.
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**COMPLAINT**

Plaintiff U.S. Bank National Association, solely in its capacity as trustee ("Trustee" or "Plaintiff") of the Asset Backed Securities Corporation Home Equity Loan Trust, Series AMQ 2006-HE7 (the "Trust"), by its attorneys, Selendy & Gay PLLC, for its Complaint against DLJ Mortgage Capital, Inc. ("DLJ") and Ameriquest Mortgage Company ("Ameriquest," and, together with DLJ, "Defendants"), alleges as follows:

## NATURE OF ACTION

1. This action arises out of Defendants' blatant failures to comply with their contractual obligations to repurchase mortgage loans that breach representations and warranties ("R&Ws") made by Ameriquest and DLJ for the benefit of the Trust. Ameriquest originated or acquired 4,534 residential mortgage loans, (the "Mortgage Loans"), comprising an aggregate principal balance of over $1.034 billion,

which it sold to DLJ. DLJ then securitized and sold these loans into the Trust, which issued certificates that were sold to investors ("Certificateholders"). The value of the investors' certificates depends on the value and credit quality of the securitized loans.

2. Ameriquest warranted to the Trustee that it had underwritten the securitized loans according to origination guidelines. Ameriquest and DLJ made dozens of other warranties as well, including that they had accurately disclosed the loans' credit characteristics, that the loans complied with all legal requirements, and that there were no material untrue statements of fact or omissions contained in the Mortgage Loan Documents. Ameriquest promised the Trustee that if it discovered or received notice of any breaches of any of its R&Ws, and if any of those breaches materially and adversely affected the value of the loans or the Certificateholders, then Ameriquest would cure or repurchase the loans. DLJ promised that if Ameriquest was unable to cure or repurchase any defective loan, then DLJ would do so. Any repurchase was to be at a contractually defined Purchase Price.

3. Ameriquest violated its R&Ws on a massive scale. Two forensic reviews conducted for Certificateholders revealed that at least 2,039 of the 4,534 loans are materially defective. Another forensic review conducted for the Federal Housing Finance Agency ("FHFA") in a separate litigation concerning the Trust also revealed widespread material defects. These reviews show that the Trust is riddled with pervasive breaches of Ameriquest's R&Ws. DLJ also violated the R&Ws it made for the benefit of the Trust.

4. Ameriquest and DLJ discovered the breaches. As an originator of the loans, Ameriquest had access to the underlying loan files and to public information from which it knew or should have known of the breaches. On information and belief, when DLJ purchased the loans from Ameriquest, DLJ had access to the same loan files and information, and conducted "due diligence" reviews, from which it too knew or should have known of the breaches.

5. Ameriquest and DLJ were also notified of the breaches. The Trustee notified Ameriquest of 1,124 material breaches on December 20, 2012 and of another 1,233 material breaches affecting 915 loans by letter dated May 17, 2019. DLJ received similar notices on March 28, 2012 and May 20, 2019. It was also served with a complaint by FHFA that revealed pervasive breaches in the Trust on June 28, 2012.

6. Ameriquest has been unable to repurchase any defective loans. This is perhaps not surprising, as it laid off all employees and shut down all operations in 2007, just months after the Trust closed. In an affidavit submitted in an earlier action, Ameriquest stated that "[any] demand for repurchase from Ameriquest is impossible because Ameriquest has no ongoing business operations[.]"

7. Not only can Ameriquest neither cure nor repurchase the defective loans, but DLJ has failed to fulfill its backstop obligation and repurchase them. DLJ has known for years that Ameriquest is insolvent, defunct, and unable to repurchase the loans, but DLJ has knowingly failed to meet its contractual responsibilities to do so. As a result of DLJ's failure to satisfy its repurchase obligations, the Trust has realized losses of over $374 million to date.

8. The Trustee brings this action to compel DLJ to comply with its contractual obligations and to repurchase all defective loans or, to the extent such loans have liquidated, to pay equitable damages. The Trustee maintains that any notice or demand to Ameriquest to repurchase the loans would have been futile, but it has nevertheless notified Ameriquest of pervasive breaches. The Trustee further maintains that any contractual limits imposed by the operative contracts' "sole remedy" provisions are unenforceable due to Ameriquest's and DLJ's gross negligence.

9. The Trustee originally commenced an action against Ameriquest and DLJ on November 29, 2012. Summons with Notice, *U.S. Bank National Association, solely in its capacity as Trustee of the Asset Backed Securities Corporation Home Equity Loan Trust, Series 2006-HE7 (ABSHE 2006-HE7) v. DLJ Mortgage Capital, Inc., et al.*, Index No. 654147/2012 (the "Original Action"), Dkt. No. 1. On March 24, 2015, this Court dismissed the Trustee's claims against DLJ for failure to comply with the contractual condition of first seeking repurchase from Ameriquest, without prejudice to the Trustee refiling under CPLR 205(a). Decision & Order on Motion, Original Action, Index No. 654147/2012, Dkt. No. 167. The Trustee agreed to voluntarily withdraw its claims against Ameriquest on the same basis. Endorsed Stipulation, Original Action, Index No. 654147/2012, Dkt. No. 268. On February 19, 2019, the Court of Appeals affirmed that this Court's dismissal order was without prejudice to a CPLR 205(a) refiling. *U.S. Bank National Association v. DLJ Mortg. Capital, Inc.*, 33 N.Y.3d 72, 82 (2019).

10. The Trustee brings this new action against Ameriquest and DLJ within six months of the New York Court of Appeals' February 19, 2019 decision. While an action the Trustee filed within six months of the Court's March 24, 2015 Order (on September 17, 2015) remains pending before this Court under Index No. 653140/2015, the Trustee brings this new action to preserve its right to file a new action pursuant to CPLR 205(a) within six months of the Court of Appeals' decision.

**THE PARTIES**

11. Plaintiff U.S. Bank National Association, which brings this action solely in its capacity as Trustee of the ABSHE 2006-HE7 Trust, is a national banking association with its principal place of business in Minneapolis, Minnesota.

12. Defendant DLJ is a Delaware corporation with its principal place of business in New York, New York.

13. Defendant Ameriquest is a Delaware corporation with its principal place of business in Anaheim Hills, California. Ameriquest's operations have ceased and it has been insolvent since 2007.

**JURISDICTION AND VENUE**

14. This Court has jurisdiction over the parties and this proceeding under CPLR 301 and 302 because DLJ's principal office is within the State, Ameriquest was authorized until recently to transact business within the State, loans sold by Ameriquest were deposited into a Trust formed under New York law, and Ameriquest's and DLJ's conduct that gave rise to this action was reasonably expected to have consequences within the State. Moreover, the contract at issue provides that it is governed by New York law.

15. Venue is proper in this County pursuant to CPLR 503(a) and (c) because DLJ is a resident of this County.

## STATEMENT OF FACTS

### I. The ABSHE 2006-HE7 Securitization

#### A. The Trust

16. In a Mortgage Loan Purchase and Interim Servicing Agreement—between DLJ and Ameriquest—dated October 23, 2006 (the "MLPA"), DLJ purchased from Ameriquest approximately 4,534 mortgage loans that Ameriquest had originated, or that Argent Mortgage Company L.L.C. had originated and then transferred to Ameriquest. In the MLPA, Ameriquest made several representations and warranties to DLJ about the credit quality of the Mortgage Loans and their origination in conformity with Ameriquest's underwriting guidelines.

17. The Trust was established in a Pooling and Servicing Agreement ("PSA")—among DLJ (as Seller), Asset Backed Securities Corporation ("ABSC") (as Depositor), Select Portfolio Servicing, Inc. ("SPS") (as Servicer), OfficeTiger Global Real Estate Services, Inc. (as Loan Performance Advisor), and U.S. Bank (as Trustee)—with a closing date of November 30, 2006. On that date, DLJ transferred the Mortgage Loans to the depositor, ABSC, through an Assignment and Assumption Agreement ("AAA"); ABSC then immediately conveyed the Mortgage Loans, and all its rights and obligations under the AAA, to the Trust through the PSA. The PSA also divided the Mortgage Loans into two subgroups ("Group 1" and "Group 2") and authorized Certificates in the Trust for sale to Certificateholders.

18. In a Reconstitution Agreement ("RA")—among Ameriquest, DLJ, and ABSC—Ameriquest made representations and warranties "to and for the benefit of" the Trustee, DLJ, ABSC, and SPS, as of November 30, 2006. RA at 1; § 2. The RA provided that Ameriquest's representations and warranties would survive the transfer of the loans from DLJ to ABSC and from ABSC to the Trust. RA at 2; § 5.

**B. Ameriquest's and DLJ's Representations and Warranties**

19. In the RA, Ameriquest made representations and warranties for the benefit of the Trustee, as of the closing date of November 30, 2006, regarding each Mortgage Loan in the Trust. They include:

a. The information set forth in the Mortgage Loan Schedule is complete, true and correct as of the Cut-off Date. RA, Sch. B at B-4; Rep. (a)(1).

b. As of the Closing Date, the Company has not advanced funds, or induced, solicited or knowingly received any advance of funds from a party other than the owner of the related Mortgaged Property, directly, for the payment of any amount required by the Mortgage Note or Mortgage, and no Mortgage Loan has been delinquent for more than 30 days in the prior 12 months. RA, Sch. B at B-4; Rep. (a)(3).

c. Any and all requirements of any federal, state or local law including, without limitation, usury, truth in lending, real estate settlement procedures, consumer credit protection, equal credit opportunity, disclosure laws and/or all predatory and abusive lending laws applicable to the origination and servicing of the Mortgage Loan have been complied with. Any and all disclosure statements required to be made by the Mortgagor relating to such requirements are and will remain in the Mortgage File. RA, Sch. B at B-5; Rep. (a)(8).

d. The Mortgage creates either a first or second lien or first or second priority ownership interest in the related Mortgaged Property, as reflected in the Mortgage Loan Schedule. RA, Sch. B at B-5; Rep. (a)(10).

e. The related Mortgage is a valid, existing and enforceable first or second lien on the related Mortgaged Property, including all improvements on the related Mortgaged Property subject only to (i) the lien of the related First Lien (if applicable), (ii) the lien of current real property taxes and assessments not yet due and payable, (iii) covenants, conditions and restrictions, rights of way, easements, mineral right reservations and other matters of the public record as of the date of recording of such Mortgage being acceptable to mortgage lending institutions generally and specifically referred to in the lender's title insurance policy delivered to the originator of the related Mortgage Loan and which do not adversely affect the Appraised Value of the related Mortgaged Property and (iv) other matters to which like properties are commonly subject which do not materially interfere with the benefits of the security intended to be provided by the related Mortgage or the use, enjoyment, value (as determined by Appraised Value) or marketability of the related Mortgaged Property. Any security agreement, chattel mortgage or equivalent document related to and delivered in connection with the Mortgage Loan establishes and creates a valid, subsisting, enforceable and perfected second lien and second priority security interest on the property described therein, and the Company has the full right to sell and assign the same to DLJMC. RA, Sch. B at B-5; Rep. (a)(11).

f. The Mortgage Note and the related Mortgage are genuine and each is the legal, valid and binding obligation of the maker thereof, enforceable in accordance with its terms. RA, Sch. B at B-5, Rep. (a)(12).

g. The Mortgage Loan is covered by an ALTA lender's title insurance policy and, in the case of an Adjustable Rate Mortgage Loan, with an adjustable rate mortgage endorsement, such endorsement substantially in the form of ALTA Form 6.0 or 6.1, issued by a title insurer and qualified to do business in the jurisdiction where the Mortgaged Property is located, insuring the Interim Servicer, its successors and assigns as to the first priority lien of the Mortgage in the original principal amount of the Mortgage Loan and, with respect to an Adjustable Rate Mortgage Loan, against any loss by reason of the invalidity or unenforceability of the lien resulting from the provisions of the Mortgage providing for adjustment in the Mortgage Interest Rate and Monthly Payment. Additionally, such lender's title insurance policy affirmatively ensures ingress and egress to and from the Mortgaged Property, and against encroachments by or upon the Mortgaged Property or any interest therein. The Originator and its successors and assigns is

the sole insured of such lender's title insurance policy, and such lender's title insurance policy is in full force and effect and will be in full force and effect upon the consummation of the transactions contemplated by this Agreement. Such lender's title insurance policy does not require the consent of or notification to the related insurer for assignment to DLJMC. RA, Sch. B at B-6, Rep. (a)(17).

h. As of the Closing Date, there is no default, breach, violation or event of acceleration existing under the Mortgage or the Mortgage Note and no event which, with the passage of time or with notice and the expiration of any grace or cure period, would constitute a default, breach, violation or event of acceleration; and as of such Closing Date and Reconstitution Date, the Company or the Interim Servicer has not waived any default, breach, violation or event of acceleration, except as otherwise provided in the Mortgage Loan Purchase Agreement. For purposes of the foregoing, a delinquent payment of less than 30 days on a Mortgage Loan in and of itself does not constitute a default, breach, violation or event of acceleration with respect to such Mortgage Loan. RA, Sch. B at B-7; Rep (a)(19).

i. The Mortgage Loan was (i) originated by the Company or its affiliates or by a savings and loan association, a savings bank, a commercial bank or similar banking institution which is supervised and examined by a federal or state authority, or by a mortgagee approved as such by the Secretary of HUD or (ii) acquired by the Company or its affiliates directly through loan brokers or correspondents such that (a) the Mortgage Loan was originated in conformity with the Company's or its affiliates' underwriting guidelines and (b) the Company or its affiliates approved the Mortgage Loan prior to funding; RA, Sch. B at B-7; Rep (a)(22).

j. Principal payments on the Mortgage Loan are scheduled to commence no more than sixty days after the proceeds of the Mortgage Loan are disbursed. The Mortgage Loan bears interest at the Mortgage Interest Rate. The Mortgage Note is payable on the first day of each month in Monthly Payments. Interest on the Mortgage Loan is calculated on the basis of a 360-day year consisting of twelve 30-day months. The Mortgage Note does not permit negative amortization. RA, Sch. B at B-7, Rep. (a)(23).

k. No Mortgage Loan contains provisions pursuant to which Monthly Payments are (i) paid or partially paid with funds deposited in any separate account established by the Company, the Mortgagor, or anyone on behalf of the Mortgagor, (ii) paid by any

source other than the Mortgagor or (iii) contains any other similar provisions which may constitute a "buydown" provision. The Mortgage Loan is not a graduated payment mortgage loan and the Mortgage Loan does not have a shared appreciation or other contingent interest feature. RA, Sch. B at B-8–B-9, Rep. (a)(31).

l. No statement, report or other document constituting a part of the Mortgage Loan Documents contains any material untrue statement of fact or omits to state a fact necessary to make the statements contained therein not misleading which would, either individually or in the aggregate, have a material adverse effect on the value of the Mortgage Loans. RA, Sch. B at B-9; Rep (a)(39).

m. As of the Closing Date, no Mortgage Loan has a Combined LTV of more than 100% or an LTV of more than 100%. RA, Sch. B at B-10; Rep (a)(41).

n. No Mortgage Loan is a "high-cost" mortgage loan, as defined under any applicable state, local or federal predatory and abusive lending laws, including, but not limited to, the Georgia Fair Lending Act and Section 6-L of the New York State Banking Law. RA, Sch. B at B-10; Rep (a)(42).

o. No material error, omission, misrepresentation, negligence, fraud or similar occurrence with respect to any Mortgage Loan has taken place by the Company, the Interim Servicer or the Mortgagor, or, on the part of any other party involved in the origination of the Mortgage Loan." RA, Sch. B at B-11–B-12; Rep (a)(57).

20. The RA provides that "any breach of the representations and warranties made in connection with 'high cost' home loans or any predatory or abusive lending laws in Schedule B hereto shall be deemed to materially and adversely affect the value of that Mortgage Loan and shall trigger the cure and repurchase obligations of the Company[.]" RA at 2; § 3.

21. Ameriquest also made additional representations and warranties for each Mortgage Loan that was a Freddie Mac eligible mortgage loan and each Mortgage Loan that was a Fannie Mae eligible mortgage loan. RA at B-12–B-15. The PSA

provides that "any breach by the Originator of the Fannie Mae Representations or the Freddie Mac Representations (as defined and set forth in the Reconstitution Agreement), if applicable, shall be deemed to materially and adversely affect the interests of the Certificateholders in that Mortgage Loan." PSA at 61; § 2.03(a)(i).

22. DLJ made its own representations and warranties for the benefit of the Trustee in the PSA, *see* PSA at 70; § 2.05(b)(ix), including that:

> a. As of the Closing Date, the Company has not advanced funds, or induced, solicited or knowingly received any advance of funds from a party other than the owner of the related Mortgaged Property, directly, for the payment of any amount required by the Mortgage Note or Mortgage, and no Mortgage Loan has been delinquent for more than 30 days in the prior 12 months." PSA, Sch. 3 at 2-1; Rep (3).

23. The PSA provides that "This Agreement shall be construed in accordance with the laws of the State of New York and the obligations, rights and remedies of the parties hereunder shall be determined in accordance with such laws." PSA at 164; § 11.04.

### C. Ameriquest's Repurchase Obligation and DLJ's Backstop Repurchase Obligation

24. Section 3 of the RA provides: "The provisions of the [MLPA] regarding the Company's obligations to cure or repurchase any Mortgage Loan as a result of a breach of a representation and warranty shall also apply to any breach of the respective representations and warranties made by the Company in Schedule B [of the RA.]" RA at 1-2; § 3. Section 7.04 of the MLPA provides:

> Within 90 days of the earlier of either discovery by or notice to the Company of any breach of a representation or warranty which materially and adversely affects the value of a Mortgage Loan or the Mortgage Loans, the Company shall

> use its best efforts promptly to cure such breach in all material respects and, if such breach cannot be cured, the Company shall, at the Purchaser's option, repurchase such Mortgage Loan at the Repurchase Price.

MLPA at 31; § 7.04.

25. Under Section 2.03 of the PSA, if any party discovers a breach of any Ameriquest R&W "that materially adversely affects the value of such Mortgage Loan or the Certificateholders," that party must notify the Trustee, which "shall promptly notify" Ameriquest and "cause [Ameriquest] … to cure such defect or breach" within 90 days:

> Upon discovery by any of the parties hereto or receipt of notice by a Responsible Officer in the Corporate Trust Office of the Trustee of any materially defective document in, or that a document is missing from, the Mortgage File or of the breach by the Originator of any representation, warranty or covenant under the Mortgage Loan Purchase Agreement or the Reconstitution Agreement in respect of any Mortgage Loan that materially adversely affects the value of such Mortgage Loan or the Certificateholders (in the case of any such representation or warranty made in the Mortgage Loan Purchase Agreement or the Reconstitution Agreement to the knowledge or the best of knowledge of the Originator as to which the Originator has no knowledge, without regard to the Originator's lack of knowledge with respect to the substance of such representation or warranty being inaccurate at the time it was made), the party discovering such breach shall notify a Responsible Officer in the Corporate Trust Office of the Trustee and the Trustee shall promptly notify the Seller and the Servicer of such defect, missing document or breach and cause the Originator to deliver such missing document or cure such defect or breach within 90 days from the date the Originator was notified of such missing document, defect or breach; provided that such missing document was not previously delivered to the Custodian by the Originator under the Mortgage Loan Purchase Agreement and the Reconstitution Agreement.

PSA at 61; § 2.03(a)(i).

26. If Ameriquest does not cure the breach "in all material respects" within 90 days, the Trustee "shall enforce the obligations of [Ameriquest] under the [MLPA] and the [RA] to repurchase such Mortgage Loan from the Trust Fund at the Purchase Price, to the extent that the Originator is obligated to do so under the [MLPA] and the [RA]." PSA at 61; § 2.03(a)(i).

27. If Ameriquest is "unable to cure the applicable breach or repurchase a related Mortgage Loan in accordance with the preceding sentence, [DLJ] shall do so." PSA at 61; § 2.03(a)(i).

28. The PSA also provides that the Trustee shall be reimbursed for the costs of enforcing the R&Ws. The definition of "Purchase Price" in the PSA provides, in relevant part:

> (v) in the case of a Mortgage Loan required to be purchased pursuant to Section 2.03, expenses reasonably incurred or to be incurred by the Servicer or the Trustee in respect of the breach or defect giving rise to the purchase obligation.

PSA at 31; § 1.01.

## II. Ameriquest's and DLJ's Breaches of Their Representations and Warranties

### A. Forensic Reviews Establish Extensive Breaches of Ameriquest's Representations and Warranties

29. Forensic reviews show that Ameriquest breached its R&Ws. These reviews included loan-level analysis, review of documents submitted by the borrowers in support of their loan applications, and analysis of external information such as

bankruptcy proceedings and other documentation relating to the borrowers' assets, and automated valuation model review.

30. An initial review revealed that 1,124 of the 1,337 Mortgage Loans reviewed—*approximately 84.07%*—breached one or more of Ameriquest's R&Ws. Further reviews identified an additional 1,233 breaches affecting 915 additional loans. Examples of breaches identified in these reviews that materially and adversely affect the value of the Mortgage Loans and the interests of the Certificateholders include the following:

**1. Misrepresented Borrower Income**

31. The applicable underwriting guidelines required that a borrower's debt-to-income ("DTI") ratio fall under a certain level to qualify for a loan. One component of a borrower's DTI ratio is the borrower's income, an accurate assessment of which is essential to determine his ability to repay the loan. The lower the income in relation to the loan balance, the less likely the borrower will be able to repay or to save money for adverse economic conditions. Accordingly, if the borrower's income was less than represented, then the originator never properly determined if the borrower could repay the loan, and the value of the loan was artificially inflated.

32. For stated income loans, the applicable underwriting guidelines required the underwriter to verify the employment listed by the borrower on his application and to assess whether the stated income was reasonable given the applicant's line of work. For multiple loans, the forensic reviews found no evidence that the underwriter ever tested the reasonableness of the borrower's stated income for the employment listed on the application—despite clear evidence that the borrower had

misrepresented that income—causing a miscalculation of the DTI ratio and violating the guidelines. Examples include:

- A Mortgage Loan that closed in August 2006 with a principal balance of $136,800 was originated under a full documentation loan program. On the loan application, the borrower stated occupation as a "Care Giver," earning $5,800 per month. There is no evidence in the file that the underwriter tested the reasonableness of the borrower's stated income. A reasonable investigation would have shown that the borrower misrepresented income. Payscale.com reported the average salary at the 75th percentile for a child-care worker in the same geographic region was $1,843 per month, less than a third of the borrower's stated income. Moreover, in a post-closing loan modification application, the borrower provided personal tax returns for 2007 showing annual income of $2,363, or $197 per month. A recalculation based on the borrower's verified income yields a DTI ratio of 993.61%, which exceeds the applicable guideline maximum of 50%.

- A Mortgage Loan that closed in August 2006 with a principal balance of $175,500 was originated under a stated income loan program. On the loan application, the borrower stated occupation as a customer service representative, earning $5,200 per month. There is no evidence in the file that the underwriter tested the reasonableness of the borrower's stated income. A reasonable investigation would have shown that the borrower misrepresented income. According to the borrower's Statement of Financial Affairs, associated with the borrower's November 16, 2007 Chapter 7 Bankruptcy in the United States Bankruptcy Court for the Northern District of Illinois, the borrower earned an annual income of $8,912, or $743 per month, in 2006. A recalculation based on the borrower's verified income yields a DTI ratio of 349.89%, which exceeds the applicable guideline maximum of 50%.

- A Mortgage Loan that closed in August 2006 with a principal balance of $171,000 was originated under a stated income loan program. On the loan application, the borrower stated occupation as a teacher's assistant, earning $5,000 per month. There is no evidence in the file that the underwriter tested the reasonableness of the borrower's stated income. A reasonable investigation would have shown that the borrower misrepresented income. An income ledger from the borrower's employer indicated that the borrower's average monthly income was $998. A recalculation based on the borrower's verified income yields a DTI ratio of 180.49%, which exceeds the applicable guideline maximum of 50%.

- A Mortgage Loan that closed in August 2006 with a principal balance of $165,000 was originated under a stated income loan program. On the loan application, the borrower stated employment as an imaging supervisor for

ten years, with monthly income of $6,500. There is no evidence in the file that the underwriter tested the reasonableness of the borrower's stated income. A reasonable investigation would have shown that the borrower misrepresented income. According to the borrower's Statement of Financial Affairs, associated with the borrower's August 10, 2007 Chapter 7 Bankruptcy in the United States Bankruptcy Court for the District of Michigan, the borrower earned an annual income of $48,337, or $4,027 per month, in 2006. A recalculation based on the borrower's verified income yields a DTI ratio of 76.78%, which exceeds the applicable guideline maximum of 50%.

**2. Misrepresented Borrower Debt**

33. Another component of a borrower's DTI ratio is the borrower's debt, an accurate assessment of which is essential to determine his ability to repay the loan. The greater the debts in relation to the loan balance, the less likely the borrower will be able to repay or to save money. Accordingly, if the borrower's debts were greater than represented, then the originator never properly determined if the borrower could repay the loan, and the value of the loan was artificially inflated.

34. Underwriters were required to reasonably investigate and accurately calculate an applicant's debts. For multiple loans, the forensic reviews found that the underwriter did not reasonably investigate the borrower's debts, causing a miscalculation of the borrower's DTI ratio and violating the guidelines. Examples include:

- A Mortgage Loan that closed in August 2006 with a principal balance of $308,000 was originated under a full documentation loan program. The underwriter failed to accurately calculate the borrower's debts and a reasonable investigation would have shown that the borrower misrepresented debt. The audit credit report for the borrower and MERS indicated that the borrower had two undisclosed mortgages obtained on July 31, 2006, in the amounts of $534,400 and $133,600, with monthly payments of $3,284 and $1,433, respectively. An Accurint search confirmed these undisclosed mortgages. A recalculation based on the borrower's undisclosed debt yields a DTI ratio of 109.06%, which exceeds the applicable guideline maximum of 50%.

- A Mortgage Loan that closed in August 2006 with a principal balance of $265,000 was originated under a full documentation loan program. The

underwriter failed to accurately calculate the borrower's debts and a reasonable investigation would have shown that the borrower misrepresented debt. According to MERS and an Accurint public records search, the borrower opened two undisclosed mortgages on June 1, 2006 to acquire a property in Henderson, Nevada. Further, the borrower's homeowner's association dues were not included in the origination PITI for the subject property. The inclusion of the undisclosed mortgages and the homeowner's association dues yields a DTI ratio of 82.47%, which exceeds the applicable guideline maximum of 50%.

- A Mortgage Loan that closed in September 2006 with a principal balance of $134,400 was originated under a stated income loan program. The underwriter failed to accurately calculate the borrower's debts and a reasonable investigation would have shown that the borrower misrepresented debt. According to MERS and the borrower's audit credit report, on September 8, 2006, three days before the subject loan closing, the borrower acquired an undisclosed mortgage of $314,500, with a monthly payment of $3,204, for a property located in Cherry Hill, New Jersey. Furthermore, the borrower's origination credit report, dated August 30, 2006, lists 22 inquiries from September 29, 2005 through August 30, 2006, which the underwriter did not address. A recalculation based on the borrower's undisclosed debt yields a DTI ratio of 95.05%, which exceeds the applicable guideline maximum of 50%.

- A Mortgage Loan that closed in August 2006 with a principal balance of $121,410 was originated under a full documentation loan program. The underwriter failed to accurately calculate the borrower's debts and a reasonable investigation would have shown that the borrower misrepresented debt. According to MERS and the borrower's audit credit report, the borrower obtained two undisclosed mortgages prior to the subject loan closing on August 17, 2006. On August 3, 2006, the borrower opened a first mortgage of $142,400, with a monthly payment of $940, and a second mortgage of $35,600, with a monthly payment of $380, to acquire a property in Richmond Heights, Ohio. A recalculation based on the borrower's undisclosed debt yields a DTI ratio of 74.57%, which exceeds the applicable guideline maximum of 50%.

### 3. Misrepresented Occupancy Status

35. Occupancy status is a critical factor in determining the likelihood that a borrower will repay a mortgage loan. Borrowers who live in mortgaged properties are less likely to default and are more likely to care for their primary residence than

are borrowers who purchase houses as second homes or as investment properties and live elsewhere. Accordingly, if a property's occupancy status was represented as owner-occupied but in truth was not, then the value of the loan was artificially inflated.

36. The applicable underwriting guidelines often required that a borrower occupy the subject property to qualify for a loan under certain programs or to receive certain interest rates. For multiple loans, the forensic reviews found that the underwriters did not adequately question the borrower's actual or intended occupancy of the subject property, despite indications that the borrower was misrepresenting occupancy status. Examples include:

- A Mortgage Loan that closed in August 2006 with a principal balance of $126,000 was originated under a stated income loan program. The applicable underwriting guidelines required that the borrower occupy the subject property and the borrower represented that the borrower occupied the subject property and was to occupy it after the closing. However, documentation in the loan file indicates that the borrower's primary residence in fact was a property which the borrower indicated as a rental property generating $1,600 per month on the loan application. The file contained a twelve-month mortgage history reflecting the borrower's mailing address as an address other than the subject property and the borrower's mortgage payoff statement also reflected a mailing address other than the subject property. Moreover, the forensic review revealed that the borrower's utility bills listed an address in Hartsville, South Carolina other than the subject property, for the period from February 2006 to November 2010.

- A Mortgage Loan that closed in August 2006 with a principal balance of $238,000 was originated under a full documentation loan program. The applicable underwriting guidelines required that the borrower occupy the subject property and the borrower represented that the borrower occupied the subject property and was to occupy it after the closing. However, the borrower's origination credit report does not list the subject property under the address information section. Moreover, in connection with the borrower's October 11, 2007 bankruptcy filing, the borrower indicated residing at a residence that was not the subject property for the three years preceding the bankruptcy filing.

- A Mortgage Loan that closed in August 2006 with a principal balance of $151,200 was originated under a full documentation loan program. The loan was a refinancing of a purportedly owner-occupied property. The applicable underwriting guidelines required that the borrower occupy the subject property, and the borrower represented that the borrower had occupied the subject property for thirteen years and was to occupy it after the subject loan closing. However, the borrower's bank statements, the borrower's driver's license, and the origination credit report each reflected an address that the borrower had listed as a rental property on the loan application. Further, the borrower's business license, the borrower's 2007 tax return, and results from a public records search confirmed that the borrower did not reside at the subject property, but rather at another address listed on the loan application.

37. The forensic reviews also included a separate analysis of loan-level data of a randomly selected sample of approximately 1,000 Mortgage Loans. The reviews indicated that 23.57% of the borrowers of Group 1 Loans did not occupy the mortgaged properties as their primary residences (as opposed to the 13.62% reported in the Trust's Prospectus Supplement), and that an additional 110 Group 2 Loans were misrepresented as being owner-occupied.

**4. Incorrect LTV and CLTV Ratios**

38. The loan-to-value ("LTV") and cumulative loan-to-value ("CLTV") ratios are among the most important measures of a mortgage's credit risk. The LTV ratio is the ratio of the balance of the mortgage loan to the value of the mortgaged property when the loan is made; the CLTV ratio compares the property value to the balance of all loans securing the property. The lower the LTV and CLTV ratios, the less likely that a decline in property value will wipe out the borrower's equity, and so the less likely the borrower will stop paying his mortgage and abandon the property. Also, the lower these ratios, the greater the likelihood that the proceeds of a foreclosure will cover the unpaid balance of the mortgage loan.

39. The applicable underwriting guidelines required that LTV and CLTV ratios meet certain levels to qualify for loans under certain programs or for certain interest rates. For multiple loans, the forensic reviews found that the LTV and CLTV ratios exceeded these levels. Examples include:

- A Mortgage Loan that closed in September 2006 with a principal balance of $90,900 was originated under a full documentation loan program. The applicable underwriting guidelines stated that the maximum LTV ratio for a purchase of a non-owner-occupied property is 85%; however, the subject loan was approved at a 90% LTV ratio.

- A Mortgage Loan that closed in August 2006 with a principal balance of $286,392 was originated under a stated income loan program. The applicable underwriting guidelines stated that the maximum LTV or CLTV ratio under an "80/20 combo loan" program is 80% and 100%, respectively. Due to excessive seller contributions in the form of 32 months of condo homeowner association dues in the amount of $8,768, the subject loan was approved at LTV/CLTV ratios of 82.47%/102.47%, which exceeds the applicable guideline maximum of 80%/100%.

- A Mortgage Loan that closed in August 2006 with a principal balance of $208,000 was originated under a full documentation loan program. The applicable underwriting guidelines stated that the maximum LTV/CLTV ratios under the "80/20 Combo Advantage Program" is 80%/100%. The subject loan was approved at LTV/CLTV ratios of 80%/100%, respectively; however, due to the seller contributions exceeding 3% of the sales price, the LTV/CLTV ratios should have been calculated at a reduced property price of $257,800. A recalculation using the reduced price results in LTV and CLTV ratios of 80.68% and 100.85%, respectively, which exceeds the applicable guideline maximum of 80%/100%.

- A Mortgage Loan that closed in August 2006 with a principal balance of $495,000 was originated under a stated income loan program. The applicable underwriting guidelines stated that the maximum LTV for a three-unit property loan approved under the Prime Advantage Stated Income Documentation Program is 85%; however, the subject loan was approved at 86.84% LTV.

40. Moreover, a loan-level data review demonstrated that the LTV ratios of the Mortgage Loans were greater than the LTV ratios represented, based on an

overstatement of property values. A review of approximately 1,000 Mortgage Loans in the Trust indicates that approximately 77.04% of the Group 1 Loans had LTV ratios greater than 80%, as compared to the 67.32% represented in the Prospectus Supplement. And, while the Prospectus Supplement indicated that none of the Mortgage Loans were to have LTV ratios over 100%, the reviews showed that 27.03% of the Group 1 Loans had LTVs greater than 100% and that another 231 Group 2 Loans had LTV ratios that exceeded the LTV ratios represented on the Mortgage Loan Schedule.

**5. "High Cost" Mortgage Loans**

41. A "high cost" mortgage loan is a mortgage with an excessively high interest rate and/or fees. All other things being equal, the borrower of a "high cost" mortgage is more likely to default on the loan because of these excessive charges. The federal government, states, and local governments define and regulate "high cost" mortgage loans and require additional protections for borrowers taking such loans.

42. The applicable underwriting guidelines often required all loans to comply with all applicable federal, state, and local regulations and stated that high cost loans (as defined in those regulations) were unacceptable. Ameriquest also warranted that no Mortgage Loan was a "high cost" loan. RA, Sch. B at B-10; Rep (a)(41). The forensic reviews found that multiple Mortgage Loans were "high cost" loans. Examples include:

- A Mortgage Loan that closed in August 2006 with a principal balance of $318,250 was originated under a full documentation loan program. The loan's fees of $14,957.55 exceed the New Jersey High Cost fee limit of $13,791.37 by $1,166.18.
- A Mortgage Loan that closed in June 2006 with a principal balance of $147,600 was originated under a full documentation loan program. The

loan's fees of $8,804.34 exceed the Chicago High Cost fee limit of $6,924.04 by $1,880.30.

- A Mortgage Loan that closed in September 2006 with a principal balance of $218,500 was originated under a full documentation loan program. The loan's fees of $12,138.00 exceed the New Jersey High Cost fee limit of $9,286.29 by $2,851.71.

- A Mortgage Loan that closed in August 2006 with a principal balance of $277,025 was originated under a full documentation loan program. The loan's fees of $16,008.81 exceed the Massachusetts High Cost fee limit of $13,851.25 by $2,157.56.

**6. Additional Defects**

43. The forensic reviews found many additional defects that breached one or more of Ameriquest's R&Ws. For example, the reviews found that: (1) advances were made for 125 Loans; (2) 23 Loans appear to lack a valid first lien; (3) six Loans were more than 30 days delinquent at the time of the Closing Date; (4) 319 Loans had no principal payment scheduled in the first 60 days; (5) 346 Loans had graduated payments; and (6) 73 Loans violated additional underwriting guidelines. Additional forensic reviews are likely to demonstrate additional breaches.

44. The Trustee will prove the full extent of Ameriquest's breaches of its R&Ws at trial.

**B. Forensic Reviews Establish Breaches of DLJ's Representations and Warranties**

45. Forensic reviews found that DLJ breached its R&Ws as well. For example, the review found 5 Group 2 Mortgage Loans with respect to which an advance of funds had been made by Ameriquest, in breach of Clause 3 of Schedule 3 of the PSA, in which DLJ specifically represented that, "[a]s of the Closing Date, [Ameriquest] has not advanced funds … for the payment of any amount required by the Mortgage

Note or Mortgage." PSA Sch. 3 at 2-1. Additional forensic reviews are likely to demonstrate additional breaches.

46. The Trustee will prove the full extent of DLJ's breaches of its R&Ws at trial.

### C. Ameriquest's and DLJ's Breaches of Their Representations and Warranties Materially and Adversely Affected the Value of the Loans and Certificateholders

47. Mortgage Loans that violated Ameriquest's and DLJ's R&Ws (whether as a result of borrower or originator fraud, negligence, mistake, or otherwise) are riskier than non-defective Mortgage Loans and more likely to default or be unenforceable. These defects materially and adversely affected the value of the Mortgage Loans: Riskier loans are less valuable and should have been issued at higher interest rates, sold at lower prices, or both. These defects also materially and adversely affected the Certificateholders: The Trust was overcharged for the Loans on the Trust's closing date and it now bears a higher risk of loss for the Loans than Ameriquest and DLJ warranted.

48. This severely increased credit risk has had devastating consequences. A significant percentage of the Mortgage Loans backing the Certificates have defaulted, been foreclosed upon, or are delinquent. As a result, the Trust has suffered losses of over $374 million, to date.

49. Moreover, defects that violate the underwriting guidelines' and the R&W's requirements that no Mortgage Loan be a "high cost" loan "shall be deemed to materially and adversely affect the value of that Mortgage Loan and shall trigger the cure and repurchase obligations of [Ameriquest]." RA at 2; § 3.

## III. Ameriquest and DLJ Discovered Ameriquest's and DLJ's Breaches But Failed to Notify the Trustee or to Repurchase the Defective Loans

50. When it entered into the RA, Ameriquest possessed loan files and had access to publicly available information that showed widespread defects in the Mortgage Loans. Moreover, during the underwriting process, Ameriquest was required to review and verify each loan applicant's sources of income, credit history, and debt-to-income ratio, and to verify compliance with all underwriting guidelines. Prospectus Supplement at S-65. Ameriquest warranted that it had approved all mortgage loans prior to funding. RA, Sch. B at B-7, Rep. (a)(22). Ameriquest, as an originator and acquirer of the Loans, thus knew, or should have known, of pervasive breaches of its R&Ws as of the RA's closing date of November 30, 2006.

51. Ameriquest's knowledge of pervasive breaches of its R&Ws in the Mortgage Loans at the time it sold those loans to DLJ in the MLPA and at the time it entered into the RA constitutes gross negligence.

52. Upon information and belief, when DLJ acquired the Mortgage Loans from Ameriquest, it had access to the same loan files and publicly available information available to Ameriquest. Upon information and belief, DLJ performed "due diligence" on the Loans, including thorough reviews of individual loan files. DLJ, as the seller of the Mortgage Loans, thus knew, or should have known, of pervasive breaches of Ameriquest's and DLJ's R&Ws as of the PSA's closing date of November 30, 2006. Bruce Kaiserman, a witness deposed as DLJ's corporate representative in another action, testified that at DLJ there was "a group that had responsibility to assess whether loans were originated in accordance with [the originator's] guidelines

prior to purchase of those loans," and that group's assessment included looking at the "credit, the compliance, the documents, the data and the valuation and the work done by the originator and determin[ing] whether or not the loan was consistent with what [DLJ] thought [it was] buying." Deposition of Bruce Kaiserman, Ex. 26 to Pl.'s Mem. of Law in Supp. of Mot. for Partial Summ. J., *Home Equity Mortgage Trust Series 2006-5 v. DLJ Mortgage Capital, Inc. et al.*, Index No. 653787/2012, Dkt. No. 1111, at 76:20-24, 77:8-12.

53. Upon information and belief, DLJ recklessly prioritized volume at the expense of fulfilling any meaningful gatekeeping function, privately abandoning the loan compliance oversight it articulated in public and in its contracts in order to garner more and more sales from originators and, ultimately, knowingly put investors in the securitizations at risk. Even when DLJ itself identified nonconforming loans and loans that were not originated in compliance with applicable guidelines, it routinely securitized them, referring internally to such loans as "crap" and "garbage." Press Release, Dep't of Justice, Credit Suisse Agrees to Pay $5.28 Billion in Connection with its Sale of Residential Mortgage-Backed Securities (Jan. 18, 2017), https://www.justice.gov/opa/pr/credit-suisse-agrees-pay-528-billion-connection-its-sale-residential-mortgage-backed. Gary Shev, an expert witness who reviewed DLJ's practices from 2005 to 2007—when DLJ bought and securitized the loans at issue—recently testified in another action that DLJ *admitted* that it "should be able to do a better job on [due diligence]. There's no real excuse for some of the crap we miss." Direct Test. of Gary Shev, *MBIA Ins. Corp. v. Credit Suisse Sec. (USA) LLC, et al.*,

Index No. 603751/2009, Dkt. No. 1754, ¶ 76. He concluded that DLJ knowingly failed to re-review loans when it knew defects existed, and knowingly failed to indicate in any way that such loans were defective. *Id.* ¶ 179. He further testified that DLJ "designed its practices to avoid reviewing loans where it knew it would find defects, hoping to evade its contractual obligations." *Id.* ¶ 217. Similarly, based on a review of documents produced by DLJ in yet another action concerning the same time period, plaintiffs asserted that "DLJ intentionally limited the scope of its post-securitization reviews because it believed additional reviews would yield evidence of Warranty breaches that would require DLJ to repurchase defective loans." Pl.'s Mem. Law in Supp. of Mot. for Partial Summ. J., *Home Equity Mortgage Trust Series 2006-5 v. DLJ Mortgage Capital, Inc. et al.*, Index No. 653787/2012, Dkt. No. 1226, at 9.

54. DLJ's knowledge of pervasive breaches of Ameriquest's and DLJ's R&Ws in the Mortgage Loans at the time it sold those loans into the Trust (via an intermediate and simultaneous sale to ABSC) constitutes gross negligence.

55. Alternatively, to the extent that DLJ did not discover breaches of Ameriquest's and DLJ's R&Ws earlier, on September 2, 2011, the FHFA, as Conservator for the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, filed a Complaint in the U.S. District Court for the Southern District of New York against DLJ (the "FHFA Action"), alleging, *inter alia*, violations of federal and state securities laws for 43 securitizations, including the ABSHE 2006-HE7 securitization. FHFA filed an Amended Complaint on June 28, 2012. Am. Compl., *Federal Housing Finance Agency, as Conservator for the Federal National*

*Mortgage Association and the Federal Home Loan Mortgage Corporation v. Credit Suisse Holdings (USA), Inc., et al.*, S.D.N.Y. Case No. 11 Civ. 6200, Dkt. No. 61.

56. FHFA alleged, among other things, misrepresentations in Prospectus Supplements for the Trust regarding the quality of the Mortgage Loans that also constitute breaches of Ameriquest's R&Ws. It alleged that a forensic review of a random sample of approximately 1,000 Group 1 Loans revealed that: (1) 23.57% of the mortgaged properties were not owner-occupied, whereas the Trust's Prospectus Supplement reported that only 13.62% were not; (2) 27.03% of the Loans had LTV ratios over 100%, whereas the Trust's Prospectus Supplement stated that no Loans had an LTV ratio over 100%; (3) only 22.96% of the Loans had LTV ratios at or below 80%, whereas the Prospectus Supplement stated that 32.68% did; (iv) as of March 2012, 32.9% of the Loans were delinquent, defaulted or foreclosed; and (v) on the date the Certificates were issued, the Moody's, S&P, and Fitch credit ratings for the Trust were Aaa, AAA and AAA, respectively; however, by April 30, 2012, those ratings had dropped to Caa3, CCC and C, respectively. *See id.* ¶¶ 115, 121, 188, 191.

57. As the seller of the Mortgage Loans, DLJ thus knew, or should have known, of pervasive breaches of Ameriquest's and DLJ's R&Ws on or around June 28, 2012.

58. Even though it discovered pervasive defects in the Mortgage Loans, DLJ did not notify the Trustee, or any other party to the PSA, of any breaches of any R&Ws. To the extent that any of the Trustee's claims against DLJ regarding any of the Mortgage Loans are held untimely, DLJ's failure to timely notify the Trustee of

breaches affecting those Loans prevented the Trustee from bringing timely claims, to the detriment of the Trust and the Certificateholders.

## IV. The Trustee Notified Ameriquest of Its Breaches

59. On December 20, 2012, the Trustee provided Ameriquest with written notice that Ameriquest had breached its R&Ws for 1,124 Mortgage Loans. Ex. A.

60. By letter sent on May 16, 2019, Certificateholders provided Ameriquest and DLJ with written notice that a forensic review revealed an additional 1,233 material breaches of Ameriquest's and DLJ's R&Ws affecting 915 loans. Ex. B. The Trustee provided this same notice to DLJ by letter sent May 17, 2019. *See id.* The Certificateholders advised Ameriquest and DLJ that they were "continuing their investigation of the Mortgage Loans" and "reserve[d] the right to supplement this notice with additional findings or send additional repurchase demands[.]" *See id.* at 10. The Certificateholders also stated:

> Moreover, given the substantial evidence of pervasive, systemic and unremedied breaches of representations and warranties, and the notice thereof contained in this letter, the Trustee's prior breach notices to Ameriquest and DLJ and likely independent discovery of such breaches by Ameriquest and DLJ, the Holders hereby demand that Ameriquest and DLJ comply with their respective obligations under the Repurchase Provisions and repurchase all Mortgage Loans in the Trust that breach any of the representations and warranties contained in the Mortgage Loan Purchase Agreement, the Reconstitution Agreement or the PSA, where such breaches materially and adversely affect the value of those Mortgage Loans or the interest therein of the Trust or the Certificateholders.

*See id.* at 10.

## V. Ameriquest Was Unable to Repurchase the Defective Loans

61. Ameriquest did not, and was unable to, cure or repurchase any defective Mortgage Loans at any time, and certainly not within 90 days of receiving written notice that it had breached its R&Ws.

62. The Trustee enforced Ameriquest's obligations to repurchase the defective Mortgage Loan by demanding repurchase of the defective Loans and by filing the Original Action on November 29, 2012. The Trustee continues that enforcement effort by bringing breach of warranty claims against Ameriquest in this action. Ameriquest has not, and is unable to, repurchase any defective Mortgage Loans.

63. The Trustee's and the Certificateholders' notices to Ameriquest, and the Trustee's enforcement efforts against Ameriquest, were and continue to be futile. In an affidavit filed with the Court in the Original Action, Denise Apicella, the Assistant Secretary of Ameriquest, stated that "[t]he collapse of the mortgage market, along with other factors, led to the demise of Ameriquest and the closing of its [] operations." *See* Apicella Aff., Original Action, Index No. 654147/2012, Dkt. No. 92, ¶ 3. She continued:

> [I]n 2005, Ameriquest began downsizing its operations through a series of layoffs and branch closures in California and across the country. On November 17, 2005, Ameriquest laid off approximately 1,000 employees and closed several retail branches across the country as part of a first reduction in force. On May 2, 2006, Ameriquest closed all of its remaining retail branches and laid off several thousand additional employees in a second reduction in force. On March 15, 2007, Ameriquest carried out a final reduction in force, laying off several hundred more employees and effectively shutting down its remaining lending [] operations. Since 2007, Ameriquest has not retained any of

> its employees and has been engaged in an orderly wind down of its business.

*Id.* at ¶ 4.

64. Apicella confirmed that the Trustee's notices to Ameriquest were futile, because Ameriquest could not cure or repurchase the defective Loans. She stated that, as of November 2012, "there were no employees at Ameriquest and Ameriquest's parent company, ACC Holdings Corporation [], employed less than five (5) employees to complete Ameriquest's wind down[.]" *Id.* at ¶ 5. Accordingly, "Plaintiff's demand for repurchase from Ameriquest is impossible because Ameriquest has no ongoing business operations." *Id.* at ¶ 17.

## VI. DLJ Failed to Repurchase the Defective Loans

65. DLJ knows that Ameriquest breached its R&Ws for the Mortgage Loans. On information and belief, DLJ, as the seller of the Mortgage Loans, knew or should have known of the breaches as of the PSA's closing date of November 30, 2006. On March 28, 2012, the Trustee provided DLJ with written notice that Ameriquest had breached its R&Ws for 1,124 Mortgage Loans. Ex. C. On June 28, 2012, DLJ was served with the Amended Complaint in the FHFA Action alleging that a forensic review identified widespread breaches in the Trust. Am. Compl., FHFA Action, Dkt. No. 61. On May 16, 2019, Certificateholders provided DLJ with written notice of an additional 1,233 material breaches of Ameriquest's and DLJ's R&Ws affecting 915 loans. Ex. B. That latter notice demanded that DLJ repurchase all defective Loans in the Trust. *Id.* at 9.

66. Upon information and belief, DLJ, as the seller, knew or should have known that Ameriquest was unable to repurchase any defective Mortgage Loans as early as March 15, 2007, when Ameriquest shut down its business operations. DLJ has certainly known that Ameriquest is unable to repurchase any defective Mortgage Loans since June 9, 2014, when Ameriquest filed Apicella's affidavit in the Original Action stating that "Plaintiff's demand for repurchase from Ameriquest is impossible because Ameriquest has no ongoing business operations." Apicella Aff. Original Action, Index No. 654147/2012, Dkt. No. 92, ¶ 17.

67. Even though it knows Ameriquest is unable to repurchase any defective Mortgage Loans, and despite its obligations to repurchase those loans, DLJ has not repurchased a single defective Mortgage Loan. Instead, in a letter dated August 15, 2019 addressed to the Trustee, DLJ reaffirmed its refusal to fulfill its repurchase obligations.

## VII. The Trustee Brings A New Action Under CPLR 205(a)

68. Under CLPR 205(a), after an action is terminated, a plaintiff may file a new action based "upon the same transaction or occurrence or series of transactions or occurrences" if (1) the original action was timely commenced; (2) the original action was terminated in a manner other than "a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute, or a final judgment upon the merits;" (3) the plaintiff files the new action within six months after the termination; and (4) the defendant is served with the new action within those same six months.

69. The Trustee properly brings its new claims against DLJ and Ameriquest under CPLR 205(a). *First*, its original claims against DLJ and Ameriquest were timely, commenced on November 29, 2012, Index No. 654147/2012, Dkt. No. 1, within six years of the Trust's closing date of November 30, 2006. *Second*, the Court dismissed its original claims not on the merits, but rather for failure to comply with a condition precedent to bringing those claims (seeking repurchase from Ameriquest), which dismissal was finally affirmed on February 19, 2019. Dkt. No. 167 at 14; *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 141 A.D.3d 431, 432 (1st Dep't 2016); *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 33 N.Y.3d 72, 82 (2019). *Third*, the Trustee brings its new claims within six months of the Court of Appeals' February 19, 2019 ruling. *Finally*, DLJ and Ameriquest were served within the same six-month period.

**FIRST CAUSE OF ACTION**
**(Breach of Contract Against Ameriquest)**

70. The Trustee incorporates Paragraphs 1 through 69 by reference.

71. The RA is a valid and enforceable contract, by and between Ameriquest, ABSC, and DLJ and enforceable by the Trustee.

72. Section 3 of the RA requires Ameriquest to cure or repurchase defective loans upon discovering or being notified of breaches of its R&Ws that materially and adversely affect the value of a Mortgage Loan or the Certificateholders.

73. Ameriquest breached this obligation. On December 20, 2012, the Trustee notified Ameriquest of breaches of R&Ws in 1,124 Mortgage Loans that materially and adversely affect the value of the Loans and the Certificateholders. By letters

dated May 16, 2019 and May 17, 2019, certain Certificateholders and the Trustee, respectively, notified Ameriquest of 1,233 additional breaches of R&Ws affecting 915 loans that materially and adversely affect the value of the Loans and the Certificateholders. Ameriquest was unable to cure the breaches or repurchase the loans within 90 days of being notified, breaching the RA.

74. Alternatively, to the extent the Court determines that the Trustee did not timely or adequately pursue repurchase from Ameriquest for any defective Mortgage Loan, the Trustee's performance was excused by futility, as Ameriquest has been defunct since 2007 and thus could not have cured or repurchased any defective Mortgage Loan.

75. Alternatively, to the extent the Court determines that the Trustee did not timely or adequately pursue repurchase from Ameriquest for any defective Mortgage Loan, the Trustee's performance was excused by Ameriquest's gross negligence.

76. The Trustee was damaged by Ameriquest's breaches. Under the RA, the Trust is entitled to the specific performance of Ameriquest repurchasing the defective loans at the Purchase Price defined in the RA. Where it is impossible or impractical for Ameriquest to repurchase the defective loans, the Trust is entitled to receive equitable damages.

77. Moreover, due to Ameriquest's gross negligence, the Trust is entitled to recover any and all compensatory and equitable damages in an amount to be determined at trial, for the losses caused by Ameriquest's breaches of its R&Ws and its

breach of its contractual obligation to comply with its repurchase obligation. The amounts of the Trustee's recovery shall be determined at trial.

**SECOND CAUSE OF ACTION**
**(Breach of Contract Against DLJ)**

78. The Trustee incorporates Paragraphs 1 through 77 by reference.

79. The PSA is a valid and enforceable contract, by and between ABSC, DLJ, SPS, OfficeTiger, and the Trustee.

80. The Trustee performed all of its obligations under the PSA.

81. In Section 2.05 and Schedule 3 of the PSA, DLJ made certain R&Ws. The PSA also requires DLJ to cure or repurchase defective loans upon discovering or being notified of breaches of its R&Ws that materially and adversely affect the value of a Mortgage Loan or the Certificateholders.

82. DLJ breached this obligation. By letters dated May 16, 2019 and May 17, 2019, certain Certificateholders and the Trustee, respectively, notified DLJ of 5 defective Loans that materially and adversely affect the value of the Loans and the Certificateholders. DLJ refused to cure the breaches or repurchase the loans, breaching the PSA. The Trustee was damaged by DLJ's breaches.

83. Moreover, due to DLJ's gross negligence, the Trust is entitled to recover any and all compensatory and equitable damages in an amount to be determined at trial, for the losses caused by DLJ's breaches of its R&Ws and its breach of its contractual obligation to comply with its repurchase obligation. The amounts of the Trustee's recovery shall be determined at trial.

**THIRD CAUSE OF ACTION**
**(Breach of Contract Against DLJ)**

84. The Trustee incorporates Paragraphs 1 through 83 by reference.

85. The PSA is a valid and enforceable contract, enforceable by the Trustee.

86. The Trustee performed all its obligations under the PSA.

87. Section 2.03 of the PSA requires DLJ to repurchase materially defective loans that Ameriquest does not. Specifically, the PSA provides that Ameriquest shall cure or repurchase any Mortgage Loan materially and adversely affected by a breach of any R&W made by Ameriquest in the RA. If Ameriquest is unable to cure the breach or repurchase the loan within 90 days of discovering or being notified of the breach, then the Trustee shall enforce Ameriquest's obligations. If Ameriquest is still unable to cure the breach or repurchase the loan, then DLJ must do so.

88. DLJ breached this obligation. On December 20, 2012, the Trustee notified Ameriquest of breaches of R&Ws in 1,124 Mortgage Loans that materially and adversely affect the value of those Loans and the interests of the Certificateholders. By letters dated May 16, 2019 and May 17, 2019, certain Certificateholders and the Trustee, respectively, notified Ameriquest and DLJ of 1,233 additional breaches of R&Ws affecting 915 loans that materially and adversely affect the value of the Loans and the Certificateholders. Ameriquest was unable to cure the breaches or repurchase the loans within 90 days of being notified. DLJ failed to cure or repurchase the affected loans after Ameriquest failed to do so, breaching the PSA.

89. Alternatively, to the extent the Court determines that the Trustee did not timely or adequately pursue repurchase from Ameriquest for any defective

Mortgage Loan, the Trustee's performance was excused by futility, as Ameriquest has been defunct since 2007 and thus could not have cured or repurchased any defective Mortgage Loan.

90. Alternatively, to the extent the Court determines that the Trustee did not timely or adequately pursue repurchase from Ameriquest for any defective Mortgage Loan, the Trustee's performance was excused by Ameriquest's gross negligence and/or by DLJ's gross negligence.

91. The Trustee was damaged by DLJ's breach. Under the PSA, the Trust is entitled to the specific performance of DLJ repurchasing the defective loans at the Purchase Price defined in the PSA. Where it is impossible or impractical for DLJ to repurchase the defective loans, the Trust is entitled to receive equitable damages. The amounts of the Trustee's recovery shall be determined at trial.

**FOURTH CAUSE OF ACTION**
**(Failure to Notify Against DLJ)**

92. The Trustee incorporates Paragraphs 1 through 91 by reference.

93. The PSA is a valid and enforceable contract, enforceable by the Trustee.

94. The Trustee performed all its obligations under the PSA.

95. Sections 2.03 and 2.05 of the PSA require DLJ to give prompt written notice to the Trustee upon discovering breaches of Ameriquest's and DLJ's R&Ws.

96. DLJ breached this obligation. Upon information and belief, DLJ discovered that the Mortgage Loans breached Ameriquest's and DLJ's R&Ws but failed to give prompt written notice of any breaches to the Trustee.

97. To the extent that any of its breach of contract claims are held untimely, the Trustee was damaged by DLJ's breach. Had DLJ promptly notified the Trustee and other transaction participants of the breaches, the Trustee could have brought timely claims.

98. The Trustee is entitled to damages for the losses caused to the Trust by DLJ's conduct. The amounts of the Trustee's recovery shall be determined at trial.

## PRAYER FOR RELIEF

**WHEREFORE**, Plaintiff demands judgment as follows:

A. Specific performance of Ameriquest's and DLJ's obligation to repurchase defective loans;

B. Equitable money damages, where it is impossible or impracticable for Ameriquest or DLJ to repurchase defective loans, in amounts to be determined at trial;

C. Costs, including attorneys' fees, in amounts to be determined following trial;

D. Pre-judgment interest;

E. Post-judgment interest; and

F. Such other and further relief as the Court deems just and proper.

Dated: New York, NY
August 19, 2019

Respectfully submitted,

SELENDY & GAY PLLC

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