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COURT OF APPEALS

STATE OF NEW YORK

NOMURA HOME EQUITY LOAN, INC., SERIES
2006-FM2, BY HSBC BANK USA, NATIONAL
ASSOCIATION,

Respondent,

-against-

NOMURA CREDIT & CAPITAL, INC.
(and three other actions),

Appellant.

20 Eagle Street
Albany, New York
November 14, 2017

Before:

ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN
ASSOCIATE JUDGE JOHN V. CENTRA
ASSOCIATE JUDGE RUTH BALKIN

Appearances:

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Gina Gattone
Official Court Transcriber



1 JUDGE RIVERA: Last appeal on today's calendar.
2 Number 39, a reargument, Namura Home Equity v. Namura
3 Credit & Capital.

4 Counsel?

5 MR. FRANK: May it please the court, Your Honor.
6 Joseph Frank, Shearman & Sterling, on behalf of the Namura
7 appellants.

8 Your Honor, this case comes down to whether or
9 not - - -

10 JUDGE RIVERA: Do you want to reserve any time,
11 counsel?

12 MR. FRANK: I am, Your Honor. Sorry. I'd like
13 to reserve eight minutes, please.

14 JUDGE RIVERA: Thank you.

15 MR. FRANK: This case comes down, at base, to
16 whether or not this Court should reaffirm its prior holding
17 in Westmoreland Coal. That is that a specific provision
18 which provides for a sole remedy cannot be trumped by an
19 allegation of a violation of a more general provision.

20 So we have two agreements and we have several
21 provisions, three provisions, that are at issue. The two
22 agreements are the pooling and servicing agreement. I'll
23 call it the PSA. And then the master loan purchase
24 agreement; the MLPA.

25 The parties, the trustee and the Nomura



1 defendants, have only one agreement between them in the
2 first instance. They were contractual counterparties to
3 the pooling and servicing agreement, the PSA. The
4 plaintiffs are assignees, limited, not general assignees;
5 assignees of the MLPA.

6 So what are the provisions that are at issue?
7 First, there is in the PSA, Section 203(c), which talks
8 about potential problems with the mortgage loans. And it
9 incorporates a list of potential problems. And if those
10 problems occur, then there is a sole remedy which is
11 triggered, and that sole remedy I'm going to refer to as
12 repurchase. It's technically cure, substitution, or
13 repurchase, but depending on where you are in the stage of
14 the proceeding, it boils down many times to just
15 repurchase.

16 So 203(c) says if there are problems with the
17 mortgage loans generally, then your sole remedy is
18 repurchase. The Master Loan Purchase Agreement has two
19 provisions: it has section 8, which has the same list of -
20 of problems, potential problems with the loans; and it has
21 section 7, which has a general series of representations
22 that the seller gives. I would encourage the Court to look
23 at the agreement. I'm sure the Court has. Section 7 is
24 entitled, "The Representations and Warranties of the
25 Sellers". By contrast, section 8 of the MLPA says,



1 "Representations and Warranties of the Seller as to the
2 Mortgage Loans". So even if one looks only at the titles
3 of the - - - of the - - -

4 JUDGE FEINMAN: Well, there's another section
5 somewhere. I think it section 29 that says pay no
6 attention to the headings; let's look at the substance, so
7 - - -

8 MR. FRANK: I understand, Your Honor.

9 JUDGE FEINMAN: Okay. So - - -

10 MR. FRANK: But - - - but the actual substance of
11 - - - and I think we should look at the substance - - - the
12 actual substance of section 7, none of the reps has to do
13 with the mortgage loans. By contrast, section 8, all of
14 the reps have to do with the mortgage loans. So I would
15 submit that the titles are reflective of the substance and
16 - - - and if one looks at the - - - at the two provisions,
17 one can see that one is general, the other specific. In
18 section - - -

19 JUDGE WILSON: And so let me just stop you for a
20 second - - -

21 MR. FRANK: Yes, Your Honor.

22 JUDGE WILSON: - - - to make sure that I have
23 this straight, which I'm not sure that I do. A purpose of
24 the sole remedy provision - - - and what you're referring
25 to as repurchase which also could include substitution and



1 so on - - -

2 MR. FRANK: Yes, Your Honor.

3 JUDGE WILSON: - - - is to qualify for,
4 essentially, pass-through tax status under 26 U.S.C.
5 860(f); is that correct?

6 MR. FRANK: That is absolutely correct, Your
7 Honor. And that's common - - -

8 JUDGE WILSON: And - - - and that there is some
9 danger that allowing a, let's say, fraud remedy for
10 collection of some other sort of income to the trust would
11 then blow up the tax status for the trust and actually
12 would require a hundred percent taxation of the trust?

13 MR. FRANK: That is absolutely correct, Your
14 Honor. What's - - - it's what's called a REMIC trust.
15 These are REMIC transactions. It's undisputed that these
16 transactions were put in place to have a tax-advantaged
17 treatment under the REMIC Statute.

18 The REMIC Statute in Section 860 of the REMIC
19 Statute, provides a safe harbor that does precisely that.
20 It says if you follow and have a sole remedy of cure
21 repurchase or substitution, the language that's used in the
22 contracts, then, and only then, are you within a safe
23 harbor that allows you to have the REMIC Statute. If you
24 don't have that sole remedy - - - in other words, if it's
25 not sold, but you have another remedy such as an unlimited



1 remedy for damages, then you would not come within that
2 safe harbor provision. Now you - - -

3 JUDGE BALKIN: But your adversary would argue
4 that this is contract drafting, and the way it was drafted,
5 you didn't create such a broad agreement so as to encompass
6 Section 7 in it.

7 MR. FRANK: Your Honor, that's - - - if I
8 understand Your Honor's question, that - - - this ins - - -
9 this - - -

10 JUDGE BALKIN: You could have used Ambac tech
11 language and referred to the total agreement.

12 MR. FRANK: And the answer is, Your Honor, we
13 did. If you look at section 203(c), 203(c) has as its - -
14 - as its operative language, the sole remedy directly from
15 Ambac. There is no difference of any kind. And it is
16 203(c) incorporates by reference the same list of factual
17 problems with the loan that are in Section 8 of the MLPA.

18 JUDGE CENTRA: Counselor, excuse me.

19 MR. FRANK: Yes, Your Honor.

20 JUDGE CENTRA: My - - - and you say it's the same
21 language. The - - - when I - - - when I look at it, it
22 appears that the overall substance is the same, but in the
23 court's decision, it's sole and exclusive remedy under this
24 agreement. And in the word "this agreement" I think is
25 the operative that was contained in the Ambac case in the



1 body of the - - - I think number 7, I think in that case it
2 might've been number 7.

3 MR. FRANK: Yes, Your Honor. If you look - - -
4 forgive my - - - my inability to see without my glasses.
5 But in Section 203(c) - - - and I'm reading from the LBF-2
6 agreement which is in the record. The citation numbering
7 can be off by one depending on which agreement you're
8 looking at, but this is 203(c). It says, "It is understood
9 and agreed that the obligations under this agreement",
10 okay, "of the sponsor to cure, repurchase, or replace any
11 mortgage loan as to which a breach has occurred or
12 continuing shall constitute the sole remedy." With
13 respect, Your Honor, that is the Ambac language.

14 And we think that the Appellate Division made a
15 distinction in Ambac by finding that that language is
16 broader than the language here. It did so only by
17 ignoring, and not dealing with, the PSA agreement; the
18 agreement between the parties that actually incorporated
19 the provisions of the language that is exactly the same as
20 in Ambac.

21 The amici make an argument, which we join, on the
22 assignability, or the nature, of the limited assignment.
23 There are two arguments there. The question is whether or
24 not Section 7 even is within the - - - the rights of the
25 plaintiff in this case.



1 JUDGE FEINMAN: But 201 says, "The trustee hereby
2 accepts such assignment and shall be entitled to exercise
3 all rights of the depositor under the mortgage loan
4 purchase agreement."

5 MR. FRANK: Correct, Your Honor.

6 JUDGE FEINMAN: And it goes on.

7 MR. FRANK: And - - -

8 JUDGE FEINMAN: And so I'm - - - I'm not sure I
9 understand that argument.

10 MR. FRANK: Well, Your Honor, the argument is - -
11 - is very straightforward. It says, the assignment is
12 limited to the extent of the mortgage loans. And then it
13 goes on to have the language to which Your Honor refers.
14 Basically, all rights of the depositor with respect to that
15 limited assignment, are transferred. In other words,
16 there's a limitation on the scope of the transfer and then
17 a limi - - - a not a limitation on the scope of the rights
18 within what is being transferred.

19 JUDGE STEIN: Did you raise this at all of the
20 courts below?

21 MR. FRANK: We did, Your Honor. The - - - in the
22 - - - in the record, the reply brief on the page 21, note
23 22, we talked about the assignment, which is the agreement
24 to which the plaintiff and respondent are - - -

25 JUDGE STEIN: I'm sorry. The reply brief in the



1 Appellate Division or in this court?

2 MR. FRANK: In the Appellate Division, Your
3 Honor, yes. It's also - - -

4 JUDGE STEIN: And was it raised in the trial
5 court?

6 MR. FRANK: It was. It was. This was in the two
7 - - - seven - - - 2007-1 - - - 3 case at page 54, note 22.
8 We talked about the interplay between the MLPA and the PSA
9 - - -

10 JUDGE BALKIN: Well, how - - - counsel, how do
11 you reconcile the "No Untrue Statement" provision in the
12 trustee; in other words, the amici, I would say, it doesn't
13 pass to them.

14 MR. FRANK: We agree.

15 JUDGE BALKIN: And yet you argue that there are
16 some warranties and representations outside of Section 8
17 that plaintiffs might have a remedy under that section. So
18 - - -

19 MR. FRANK: So Your Honor - - -

20 JUDGE BALKIN: - - - which is it?

21 MR. FRANK: - - - just to be very clear, it's
22 both. There are certain reps and warranties in Section 7
23 and elsewhere in the agreement. Things about title and the
24 transferability of title. Things like duly authorized
25 representatives executing the agreement. There are - - -



1 there is a list. And those rights are covered by section
2 7.5, which says No Untrue Statement as to them. That's why
3 all of those reps have nothing to do with the mortgage
4 loans, but are instead about the corporate mechanics of the
5 transfer.

6 Those, in the view of the amici, and in our view,
7 are not transferred. And they're not transferred for two
8 reasons. Because first, there is the argument we just had
9 a colloquy about in terms of to the extent of the mortgage
10 loans being the limiting factor. That's in the PSA. That
11 same structure is replicated in the text of the MLPA
12 itself. So the PSA is where the transfer occurs, the
13 assignment occurs. The MLPA is what is being transferred,
14 or parts - - -

15 JUDGE CENTRA: So if we were to buy your
16 argument, then Section 7, before we get to that, would be
17 inapplicable to the parties.

18 MR. FRANK: It is.

19 JUDGE CENTRA: Okay. So now if we go past
20 section 7 and if section 7 isn't included, you refer to
21 REMIC as part of your argument, correct?

22 MR. FRANK: Correct, Your Honor.

23 JUDGE CENTRA: Here's my question for you. That
24 if your concerned of the REMIC protection, you know, that
25 will lose it, and yet you - - - you don't dispute that



1 there are other situations such as a contract without
2 proper authority could be sued under Section 7.

3 MR. FRANK: Right.

4 JUDGE CENTRA: Well if that's the case, and
5 that's what No Untrue Statements refers to, how - - - how
6 does that not affect the REMIC protection?

7 MR. FRANK: Because Your Honor, the - - - the
8 representations at issue have to do with the real estate,
9 with a mortgage loans themselves.

10 JUDGE CENTRA: Well, I - - -

11 MR. FRANK: That section 8.

12 JUDGE CENTRA: - - - recog - - - I recognize what
13 that section is.

14 MR. FRANK: And that's the REMIC statute. That's
15 the purpose of the REMIC statute.

16 JUDGE CENTRA: Okay.

17 MR. FRANK: Whether or not Nomura was properly
18 organized, or whether it had due authorization to sign the
19 agreement, or any of the other list of general contractual
20 representations, those don't have anything to do with a
21 real estate contract, per se. They're in almost every
22 contract. And so very clearly, the parties said if you get
23 a remedy for noncomplying loans, in other words, the
24 corpus, the res of - - - of the contract that is a REMIC
25 contract, it must comply with the safe harbor provisions.

1 If, you know, Bob showed up who says I'm not
2 really - - - I'm the Nomura- Nomura executive vice
3 president, and he is a stranger who's forging a signature,
4 that's not having to do with the central purpose of the
5 REMIC statute.

6 JUDGE CENTRA: And that - - - and that's the
7 strength of your argument, that both 7 and 8 can coexist.

8 MR. FRANK: Correct. There are - - - there are a
9 whole host of things where there could be breaches of 7 and
10 breaches of 7.5 that don't have to do with the
11 characteristics of the mortgage loans.

12 The other point that I would make Your Honor - -
13 - I see my time is expired. That the - - - with respect to
14 the structure of the MLPA, remember that our argument is
15 that to the extent of the mortgage loans, which is the
16 language from the PSA, means 8 goes, but 7 doesn't. If you
17 look at 7 and 8, it says exactly that. In Section 8 there
18 is a provision that says the rights to Section 8 are being
19 assigned to the trustee. In Section 7, there is no such
20 language. And so that's entirely consistent with the
21 argument that we make.

22 JUDGE RIVERA: Thank you, counsel.

23 MR. FRANK: Thank you, Your Honor.

24 MR. SHUSTER: May it please the court, Michael
25 Shuster, for the trustee.



1 The First Department had no trouble finding that
2 the trustee should have been permitted to pursue a claim
3 for breach of contract damages under the Section 7" No
4 Untrue Statement" provision in the parties agreement, and
5 that it was error to precluded from doing so at the
6 pleading stage, which - - -

7 JUDGE STEIN: Counsel, are there - - -

8 MR. SHUSTER: - - - which is where we are.

9 JUDGE STEIN: Are there any allegations in the
10 complaint that don't relate in some way to the underlying
11 mortgage loans and - - - and the documents related to the
12 individual loans?

13 MR. SHUSTER: Yes. So there are allegations
14 going to the - - -

15 JUDGE STEIN: Before you tell me what they go to
16 - - -

17 MR. SHUSTER: Yes.

18 JUDGE STEIN: - - - can you tell me what - - -
19 where they are in the complaint, what numbered allegations
20 they are?

21 MR. SHUSTER: Yes. So let me pull out - - -

22 JUDGE STEIN: Because I know we had this
23 discussion previously, and I - - - and I'm not sure exactly
24 what you're talking about and - - -

25 MR. SHUSTER: Yeah. Let me just pull out the



1 complaints. So I'm looking at the complaint, for example,
2 in - - - in one of the four cases which is the Nomura Home
3 Equity Loan Series 2006-FM2 complaint, which is at page 67
4 et seq. of the record. And the - - - the - - - there is an
5 allegation there in paragraph 64 that expressly refers to
6 the fact that numerous documents assembled and furnished by
7 Nomura to the trust, including, among other things, the
8 mortgage loan files, the mortgage loan schedule, and the
9 prospectus supplement, are rife with material
10 misstatements, and omissions. The - - those misstatements
11 and/or omissions are not confined to the - - - to the
12 specific loan level representations that are set forth in
13 Section 8 of the parties' agreement. There's other
14 language in these complaints that broadly refers to - - -

15 JUDGE CENTRA: Counsel, do - - - do we have to
16 look at the underlying mortgages or the documents in the
17 ref - - - as a reference in order to come to the conclusion
18 that you're - - - that you're reaching that they don't rise
19 that level?

20 MR. SHUSTER: Not for purposes of - - - not for
21 purposes of the claim under the No Untrue Statement
22 provision. That claim goes to - - - Nomura promises,
23 Nomura says flatly and absolutely, there are no untrue
24 statements and no material omissions in any of the
25 documents prepared and furnished in connection with the



1 securitization.

2 JUDGE STEIN: But - - - but - - -

3 JUDGE WILSON: So just going back to - - -

4 MR. SHUSTER: That - - - look, that statement - -
5 -

6 JUDGE STEIN: But - - - but if we - - -

7 MR. SHUSTER: - - - picks up - - - that - - -

8 JUDGE STEIN: But - - - but if we - - - if we
9 take that to apply to the individual loan documents, then -
10 - - then what meaning does the sole remedy provision have?

11 MR. SHUSTER: Well, you - - - the - - - the
12 answer, Your Honor, is you don't have to do that because
13 there are broader statements, for example, in the offering
14 documents, the prospectus supplement, that Nomura prepared
15 and furnished in connection with the transaction. That's
16 the document pursuant to which the securities are marketed
17 to investors. That - - -

18 JUDGE BALKIN: The amici - - - the amici would
19 argue that those representations would really go to the
20 sponsor at the sponsor level and wouldn't inure to the
21 trustee.

22 MR. SHUSTER: Well, they are - - - they are at
23 the sponsor level. I absolutely agree with that. There
24 are representations by the sponsor about the origination
25 practices - - -



1 JUDGE BALKIN: But is that between the sponsor
2 and the depositor?

3 MR. SHUSTER: Well, I - - - I don't see how that
4 argument can be made given the express language that was
5 referred to that the trustee is entitled to exercise all
6 rights of the depositor under the - - - under the mortgage
7 loan purchase agreement. That is expressly said in Section
8 2.01, the fourth paragraph, of the - - - of the pooling and
9 services agreement. It - - - it expressly provides that
10 the trustee accepts the assignment and shall be entitled to
11 exercise all rights of the depositor under the - - -

12 JUDGE WILSON: Yeah, but Mr. Frank - - -

13 JUDGE BALKIN: And yet the preceding sentence
14 was, "Again, the rights to the extent of mortgage loans
15 sold under the mortgage loan purchase agreement." So is
16 there a bit of an inherent conflict?

17 MR. SHUSTER: There is there is a preceding
18 sentence that refers to the extent of the mortgage loan
19 sold. That goes to the fact that between the time of the
20 mortgage loan purchase agreement and the time of the
21 closing of the transaction, some of the loans in the trust
22 corpus may change. Some can come out. Some new ones can
23 come in. If - - - if loans - - - as simply as if loans pay
24 off, if - - - if defects are found in loans, if defects are
25 found in documentation between the time of the mortgage



1 loan purchase agreement, for example, and the closing of
2 the pooling and services agreement. So that language is
3 there to ensure - - -

4 JUDGE WILSON: Well, if that language weren't - -
5 -

6 MR. SHUSTER: - - - that rights aren't conveyed
7 in mortgage loans that weren't conveyed to the trust. But
8 the next sentence - - -

9 JUDGE WILSON: If that language - - - if that
10 language weren't there, would you still read the same way,
11 that is, it applies only to the loans that are actually in
12 the corpus?

13 MR. SHUSTER: Well, the - - - the-- the - - - I
14 wouldn't read the next sentence that way, because the next
15 sentence does not specifically address mortgage loans. The
16 next sentence is - - - is broader. So the whole purpose,
17 the - - - the - - - the first agreement, the mortgage loan
18 purchase agreement, is entered into between the sponsor,
19 effectively, and itself. It's a special-purpose entity
20 that the sponsor creates for the sole purpose of receiving
21 the mortgage loans and then transferring them to the
22 trustee.

23 All the substantive rights that are conveyed to
24 that special-purpose entity, which is an affiliate of the
25 sponsor, they are created for the purposes of transferring



1 those rights to the trustee. The depositor, which has no
2 assets, no real existence, is a shell entity, is a special
3 purpose entity, created by the sponsor for the purposes of
4 effectuating the securitization, doesn't need any rights
5 against Nomura, and isn't going to exercise any rights
6 against Nomura.

7 JUDGE FAHEY: Can I - - - can I point you in a
8 slightly different direction for a second? Am I correct
9 Nomura - - - or did you allege that Nomura credit had a
10 practice - - - an undisclosed practice of waiving
11 nonconforming loans into the pool?

12 MR. SHUSTER: That is alleged in - - - not in all
13 four complaints - - -

14 JUDGE FAHEY: Um-hum.

15 MR. SHUSTER: - - - but it is alleged. But let
16 me let me - - -

17 JUDGE FAHEY: No. Let me just ask you this - - -

18 MR. SHUSTER: Yes.

19 JUDGE FAHEY: - - - before we go off.

20 MR. SHUSTER: Yes.

21 JUDGE FAHEY: What you mean by nonconforming?

22 MR. SHUSTER: Well, nonconforming means that
23 Nomura it - - - itself had certain underwriting standards
24 and due diligence standards, and the loans didn't conform
25 to the standards. Those standards - - -



1 JUDGE FAHEY: So are those noncon - - -

2 MR. SHUSTER: - - - are not - - -

3 JUDGE FAHEY: Let me just ask this.

4 MR. SHUSTER: Yes.

5 JUDGE FAHEY: Are those nonconforming loans loans
6 that would violate Section 8 of the representation of
7 warranties - -

8 MR. SHUSTER: That - - - that's exactly where was
9 going. Not necessarily.

10 JUDGE FAHEY: Uh-huh.

11 MR. SHUSTER: They're different. The
12 underwriting - - - the - - - the - - - the descriptions in
13 the prospectus supplement - - -

14 JUDGE FAHEY: Okay.

15 MR. SHUSTER: - - - about the loan origination
16 practices and the nondisclosures that are made, the
17 omissions in the prospectus supplement, those are not
18 foursquare with the individual loan level representations
19 that are set forth in Section 8.

20 JUDGE FAHEY: So - - - so - - - so that's a - - -

21 MR. SHUSTER: Section 8 doesn't cover - - -

22 JUDGE FAHEY: So that - - - let me just - - -

23 MR. SHUSTER: Yes.

24 JUDGE FAHEY: It's an aggregate theory that you
25 are arguing.



1 MR. SHUSTER: Absolutely.

2 JUDGE FAHEY: In as it's right versus an
3 individual loan theory.

4 MR. SHUSTER: Correct.

5 JUDGE FAHEY: It's two separate theories.

6 MR. SHUSTER: Yes.

7 JUDGE FAHEY: So in the - - - in the aggregate
8 theory, basically, doesn't that reading of it, unless
9 you're pleading fraud or something like that, read out the
10 sole remedy provision entirely, if we read it your way?

11 MR. SHUSTER: I don't think so, Your Honor, bec -
12 - -

13 JUDGE FAHEY: How does a sole remedy provision
14 survive, then? Explain to me how it would survive.

15 MR. SHUSTER: The sole remedy provision survives
16 because there is got very, very specific - - - you've got
17 about five dozen very specific loan level representations
18 in section - - -

19 JUDGE FEINMAN: Sixty-two to be precise.

20 MR. SHUSTER: How many?

21 JUDGE FEINMAN: Sixty-two.

22 MR. SHUSTER: Right. Right, many. And some of
23 them are very narrow, and you know, specific to an
24 individual state, for example, and so forth. The - - - the
25 - - - to the extent that defects are asserted, that violate



1 one of those specific representations in Section 8, then
2 the remedy is provided for by Section 8, and that remedy is
3 not a not a breach of contract claim for damages. The
4 remedy is to you put the loan back - - - you advise Nomura
5 the breach. It can either cure the breach. If it doesn't
6 do so within sixty days, it must repurchase the loan and it
7 must do so at a specified purchase price formula.

8 JUDGE FAHEY: Well, here's my - - - where I
9 struggle with this. Is undisclosed nonconforming loans
10 brought - - - brought into the securitization pool would
11 seem to sound like fraud. That's what it sounds like to
12 me, you know. And - - - but there was no fraud claim
13 brought.

14 MR. SHUSTER: Well there - - - there is no need
15 for fraud claim because - - -

16 JUDGE FAHEY: Because it - - - well, why is this
17 simply not a backdoor approach to a fraud claim?

18 MR. SHUSTER: Because it it's a cont - - - it - -
19 -Nomura made the choice to provide a contractual
20 representation. It didn't have to do so. It chose to do
21 so. The contractual representation it made, it effectively
22 incorporates the federal securities law standard. No
23 material - - -

24 JUDGE CENTRA: Wasn't there a fraud action
25 originally, and the court found it was duplicative?



1 MR. SHUSTER: I don't believe that was the case
2 here.

3 JUDGE CENTRA: Okay.

4 MR. SHUSTER: There - - - so there can be. For
5 example, and - - - and - - - and this is something I very
6 much want to get out. A federal agency brought a - - -
7 brought a claim against Nomura relating to three of the
8 four of these deals and other deals where it asserted
9 federal securities law violations. So that is, you know,
10 sort of a fraud-type claim, except that it's predicated on
11 federal statutory law.

12 It was found there by Judge Denise Cote of the
13 Southern District of New York that these prospectus
14 supplements, three out of four that are at issue here, were
15 in that case, contained false statements and material
16 omissions. That finding was made.

17 Subsequent to the first argument, we had our
18 first argument in this in this appeal in March of this
19 year. In September of this year, the Second Circuit
20 reviewed Judge Cote's decision and found and affirmed it on
21 all grounds and expressly found there was no basis to
22 overturn Judge Cote's finding that there were false
23 statements in the offering documents. So it can sound like
24 fraud, but - - - but the fact is that Nomura chose to make
25 a contractual representation - - -



1 JUDGE FAHEY: Well, it's one of those - - -

2 MR. SHUSTER: - - - and that's all we need.

3 JUDGE FAHEY: - - - duck situations; does it look
4 like it, does it walk like it, does it talk like it. And -
5 - - and - - - and this - - - that's why I asked the
6 question.

7 Judge Stein asked the question before that I
8 thought last time was - - - was one of the key questions
9 that's come up again, and she just asked it the other - - -
10 a second ago. I just want to be sure I understand your
11 answer. If - - - if the plaintiff said they allege that
12 there's - - - if plaintiffs allege any breach of the No
13 Untrue Statement provision that's not ultimately also a
14 breach of Section 8, the Representation of Warranty
15 provision, and you had pointed to a particular paragraph in
16 the record, section 64. That's the only - - - that's the
17 spot that you say differentiate Section, I guess, 7 from
18 Section 8?

19 MR. SHUSTER: Well that - - - no. There are - -
20 - there are the - - - there are other allegations in the
21 complaints, so for - - -

22 JUDGE STEIN: Well, I mean I'm looking at - - - I
23 just - - -

24 MR. SHUSTER: In paragraph 3 at page 68 of the
25 record says the underwriting standards employed - - -



1 there's a reference to the fact that the underwriting
2 standards employed at origination, for example, were false.

3 JUDGE STEIN: Well - - -

4 MR. SHUSTER: That - - - that - - - that goes to
5 - - - that's a higher level breach.

6 JUDGE STEIN: But here's the question. So you
7 have that allegation, and - - - and - - - and as a result
8 of that allegation, some of the loans don't meet the
9 requirements, correct?

10 MR. SHUSTER: Well, not necessarily. There - - -
11 there - - - there are - - - it may be - - -

12 JUDGE STEIN: Well if - - - if the loans meet the
13 requirements, then what - - - what are the damages from the
14 breach of this representation?

15 MR. SHUSTER: Well, some - - - some of this goes
16 to - - - some of this is Nomura in the prospectus
17 supplement saying to potential investors, you can rely on
18 us. You can rely on securitizations that we put together
19 because we have the following un - - - you know, we have
20 the following due diligence practices. And the loan
21 originators have the following loan origination practices.
22 If those practices are deficient, broadly deficient, it
23 doesn't matter what the individual - - -

24 JUDGE STEIN: Sure it does - - -

25 MR. SHUSTER: No - - -



1 JUDGE STEIN: - - - because--

2 MR. SHUSTER: - - - because an investor will not
3 invest. An investor will not invest if it knows - - -

4 JUDGE STEIN: But if the - - - if the mortgages
5 are exactly what Nomura said the practices would result in,
6 or the types of - - - meet all the representations of - - -
7 of the end warranties of Section 8, let's say, then there
8 is no damage. They got what they paid for.

9 MR. SHUSTER: Not necessarily, Your Honor.
10 First, first, it - - -

11 JUDGE STEIN: Well if - - -

12 MR. SHUSTER: - - - the only - - - the only - - -

13 JUDGE STEIN: And - - - and that just brings me
14 for one second to - - - I just pulled one of the - - - part
15 of one of the complaints and it's at record 1145. And it
16 talks about the loan review file, many misrepresentations,
17 misstatements of other basic facts, and the mortgage loan
18 files. And then you go through a whole bunch of individual
19 mortgage loans and then you say these met representa - - -
20 "misrepresentations strongly suggest fraud by either the
21 mortgagor and the originator in the underwriting of the
22 loan in breach of MLPA Section 8", and - - - and - - - and
23 - - - and then you talk about how their systemic in nature,
24 but you're referring to individual loans when you say that.
25 MR. SHUSTER: But that's not all we referred to.



1 We refer to Nomura's underwriting standards and its
2 origination practices, and due diligence practices more
3 broadly. The only way - - -

4 JUDGE STEIN: I cut you off. Why don't you tell
5 me what your damages are if the mortgages or mortgage loans
6 are all fine.

7 MR. SHUSTER: Well fine - - - they can, the
8 mortgage loans can conform to - - - can conform to
9 individual loan level representations, but still sus - - -
10 still sustain losses. And if Nomura falsely represented
11 its overall practices whether it's due diligence,
12 underwriting, loan origination practices by it or others,
13 investors wouldn't purchase. They wouldn't be in this
14 securitization.

15 JUDGE RIVERA: So if - - - if - - - if I could
16 just clarify - - -

17 MR. SHUSTER: They would say, you - - - yes,
18 please.

19 JUDGE RIVERA: If I can just clarify for myself,
20 because I - - - from the last argument, I thought I
21 appreciated fully of what where you were going with this,
22 and I just - - -

23 MR. SHUSTER: I hope I haven't set myself back.

24 JUDGE RIVERA: No, no. I just want to make sure
25 that I I'm still understanding your point.



1 As I understood your point was that it may very
2 well be that there is a remedy for individual mortgage
3 loans. But there's a problem with these individual
4 mortgage loans. There may be many of them, but they're the
5 kind that, as you're arguing now, an investor would not be
6 so troubled by because they've got this relief; and they
7 can replace them, they can substitute them, whatever.

8 But you also claim you've got a basis to argue
9 that an investor would never have come to this table if
10 they had known that the process by which this entire deal
11 is put together is tainted. It's not following the kinds
12 of business practices that should be practiced, so what an
13 investor may see as the regular problematic individual
14 loans is not what's going to happen here. It's going to be
15 way above that.

16 MR. SHUSTER: Absolutely.

17 JUDGE RIVERA: And they would not have come to
18 the table knowing that. Have I - - - I just want to make
19 sure I've understood - - -

20 MR. SHUSTER: I couldn't have said it better
21 myself, and I don't think I did.

22 JUDGE RIVERA: - - - your argument. Well, I
23 don't know - - -

24 MR. SHUSTER: I agree.

25 JUDGE RIVERA: - - - that anyone else agrees with



1 it. I just want to make sure I understand your argument.

2 MR. SHUSTER: Well, I - - - I hope they do, but
3 that's - - - that's, you know, that - - that is correct.
4 You know, what investors look at is - - - the investors
5 aren't looking before they purchase at individual loans.
6 They're - - -

7 JUDGE RIVERA: And if I may - - - if I may, just
8 to clarify one more time. Your light is out, so of course,
9 you will be able to finish what - - - the point you wanted
10 to make that I just interrupted, but I just want to finish
11 this off. That given what I have already said, and said
12 yes, that that's the argument you're making, that your
13 point is also that the documents that you're complaining
14 about, these other documents that are about writ large the
15 way the deal is put together and whatever other promises
16 they have about their protocols and practices, are - - -
17 are what an investor usually relies on.

18 MR. SHUSTER: Correct.

19 JUDGE RIVERA: And absent that, right? You - - -
20 you can't have this deal, even if you have these other
21 promises about individual loans.

22 MR. SHUSTER: Correct. Because that - - - that -
23 - - it's those - - - that's what investors are relying
24 upon. And they are also relying upon broader
25 representations and statements in the prospectus supplement



1 concerning average and aggregate characteristics of the
2 pool. There are, for example, descriptions of average
3 credit scores, FICO scores. They stratify the various
4 groupings of FICO scores. There are tables in the
5 prospectus supplement. They actually come under a heading
6 - - -

7 JUDGE FAHEY: You mean, the descriptions of the
8 tranches, and is that what you're talking about - - -

9 MR. SHUSTER: No, it's not the descriptions of
10 the - - -

11 JUDGE FAHEY: No?

12 MR. SHUSTER: - - - investment tranches. They're
13 actually tables that say, you know, X number of loans come
14 within this range of FICO scores. And X number come within
15 this range. And they do the same for combined loan-to-
16 value ratios. And then there's - - - and those - - - and
17 that information is - - -

18 JUDGE FAHEY: So what - - - what you're - - -

19 MR. SHUSTER: - - - set forth under a heading
20 that is aggregate mortgage loan characteristics. That's
21 the kind of stuff that investors look at that that they run
22 through their models before deciding whether to purchase.

23 But I'll come back to the point. No way an
24 investor is investing in a securitization if it knows that
25 the sponsor routinely and systematically has shoddy,



1 unreasonable due diligence, and other practices that - - -
2 that are going to lead to, you know, deficient
3 securitizations across the board. They just would - - -
4 they wouldn't touch it with a ten-foot pole.

5 JUDGE WILSON: Prospectus also discloses the sole
6 remedy provision, correct?

7 MR. SHUSTER: It does. And actually, the - - -
8 the prospectus makes - - -

9 JUDGE WILSON: You're really saying that - - -
10 that a reasonable investor would understand the contracts
11 the way you read them; not the way Mr. Frank reads them.

12 MR. SHUSTER: Yes. Very much. But I - - - I
13 would just add the prospectus supplement not only has the
14 various representations that I've described concerning
15 Nomura's practices and the material omissions that I've
16 mentioned, and then the disclosures about aggregate
17 characteristics. It then separately says there will be
18 representations, loan-level representations. But it's
19 clearly making a distinction between the things it's
20 describing. Can I just address - - -

21 JUDGE RIVERA: So does - - - I'm sorry, so does
22 an investor, from the way you're arguing this case, from
23 what you would say is a reasonable investor, does the
24 investor go into this assuming that there will be
25 individual loans that have to get swapped out or have to



1 get otherwise replaced?

2 MR. SHUSTER: Well, they - - - they know that
3 there will be individual - - -

4 JUDGE RIVERA: Because - - - because of the
5 mortgage - - -

6 MR. SHUSTER: - - - individual loan-level
7 represen - - -

8 JUDGE RIVERA: - - - because of the mortgage - -
9 - because of the mortgage (indiscernible).

10 MR. SHUSTER: I will tell you that what no
11 investor did was buy into these securitizations thinking
12 there would be the massive numbers of - - -

13 JUDGE RIVERA: Well, sure. Okay.

14 MR. SHUSTER: - - - defective loans.

15 JUDGE RIVERA: Okay.

16 MR. SHUSTER: So a handful of loans, sure. But -
17 - - but - - - you know, but in wide-spread, you know,
18 massive numbers, no.

19 May I respectfully just quickly address the REMIC
20 issue?

21 JUDGE RIVERA: Thirty seconds, go. Go for it.

22 MR. SHUSTER: Okay. Very quickly. There is no
23 REMIC issue. First of all, it wasn't raised before.
24 Second of all, it's a lump-sum payment. Contract damages
25 go to the trust in a lump-sum payment. These investment



1 banks settle these cases all the time. And they make lump-
2 sum payments that are not based on each individual loan.
3 Those payments go into the trust fund. They're run through
4 the waterfall provisions that are set forth in the pooling
5 and services agreement, and they inure to the benefit of
6 investors.

7 It - - - some of those, you get tax - - - IRS
8 letters saying it's all good. But you know, it - - - it -
9 it - - the trustee should be concerned if there was a REMIC
10 issue here. We're not, because there isn't.

11 JUDGE RIVERA: Thank you, counselor.

12 MR. SHUSTER: Thank you.

13 MR. FRANK: May it please the court. Joseph
14 Frank. Several points in rebuttal, Your Honor.

15 First, the limitation on the assignment to the
16 extent of the mortgage loans is the language from the PSA.
17 Mr. Shuster says don't worry about that. What the mortgage
18 loan purchase agreement contemplates is that there would be
19 substitutions, or swaps, at the very end of the process
20 before the closing.

21 The problem - - - and that's their only reason
22 for that not applying. The problem is if you look at the
23 agreement, the term "to the extent of the Mortgage Loans"
24 uses the capital letters, capital M, capital L. And then
25 if one looks at the definitions, "Mortgage Loans", capital



1 M, capital L, is defined to be the pool of mortgage loans
2 after all that swapping is done. The final group of
3 mortgage loans that are contractually transferred. So
4 their argument has no bearing on the record, no bearing in
5 the contract, and doesn't make sense on its own terms.

6 The second point that I would make, if we look at
7 that same language - - - and this goes to the pro supp.
8 This is a breach of contract case. Mr. Shuster and his
9 clients seek breach of contract damages; much lower
10 standard burden of proof than fraud and all these other
11 things that - that we heard a lot about. This is not a
12 fraud case or an investor case. They have to live with the
13 agreement.

14 If one looks at the contractual remedy that they
15 base their entire argument on, it's Section 7.5. What does
16 7.5 say? It says, "This agreement does not contain any
17 untrue statement of material fact or omit to state a
18 material fact necessary to make the statements contained
19 therein not misleading." That's this agreement. That's
20 the PSA. And then it goes on to - - - and this is where
21 they attempt to bring in all this other stuff about
22 mortgage files and the prospectus supplement, which is all
23 the stuff that Mr. Schuster was talking about. It says,
24 "The written statements, reports, and other documents
25 prepared and furnished by the seller", so the seller is the



1 promisor in the PSA. The buyer is the promisee. It is
2 undisputed that the seller did not prepare the prospectus
3 supplement. It was the buyer.

4 JUDGE FEINMAN: So what about the mortgage loan
5 files in the mortgage loans schedule - - -

6 MR. FRANK: We'll get to that in a moment, Your
7 Honor. But just for the prospectus supplement, not a
8 concern.

9 JUDGE FEINMAN: I - - - I got that, but - - -

10 MR. FRANK: With respect to the mortgage files,
11 there is no dispute - - - and this is in our prior argument
12 as well - - - that the mortgage files are not prepared by
13 Nomura. They are prepared by third parties; they have
14 nothing to do with Nomura.

15 JUDGE FEINMAN: And the schedule?

16 MR. FRANK: And the schedule itself is in Section
17 8. In other words, Section - - - the accuracy of the
18 mortgage - the mortgage schedule is in - - - in two of the
19 agreements, an actual itemized item under Section 8. So it
20 can't - - - it is subject then even under Mr. Shuster's
21 interpretation of the agreement - - -

22 JUDGE RIVERA: So - - -

23 MR. FRANK: - - - to the sole remedy.

24 JUDGE RIVERA: So what - - - what promises did
25 Nomura make? What - - - what - - - what - - - what are we



1 here for?

2 MR. FRANK: Your Honor, we made a bunch of
3 promises. There were sixty-some promises. And if those
4 are violated, Mr. Schuster's client has the remedy that he
5 bargained for, repurchase. And he claims, and has said
6 that's many, many hundreds of millions of dollars. The
7 question is whether or not his client gets more. If he can
8 prove his case, which we don't believe he can, should he be
9 limited - - -

10 JUDGE RIVERA: So there are no promises made
11 about the protocols?

12 MR. FRANK: They are enumerated, Your Honor.

13 JUDGE RIVERA: And the practices and so forth - -
14 - there's not a single promise about that?

15 MR. FRANK: Not a single one.

16 JUDGE RIVERA: Not one?

17 MR. FRANK: They are enummer - - - the promises
18 about the mortgage loans are enumerated in that section.
19 Section 7, on its face, doesn't mention the mortgage loans
20 at all; not a single thing. Those are other promises about
21 due organization, about not being compliant to law - - -

22 JUDGE RIVERA: Who is making those promises?

23 MR. FRANK: Those promises are the promisor,
24 which is the seller, to the buyer. And it is those
25 promises which are expressly not transferred, because the



1 assignment is a limited one, to the extent of the mortgage
2 loans.

3 JUDGE RIVERA: We disagree with you on that.
4 Let's assume, we disagree with you on that.

5 MR. FRANK: If you disagree with me on that, we
6 still win.

7 JUDGE RIVERA: Okay.

8 MR. FRANK: Because then were back to
9 Westmoreland Coal, where you have a specific provision,
10 which is Section 8, that it cannot be circumvented by a
11 general provision. Section 8 says you get the sole
12 repurchase remedy. By allowing Section 7 - - - and you saw
13 Mr. Shuster - - -

14 JUDGE RIVERA: Let - - - no, I think his point
15 was they - - - they serve different purposes, right? One
16 is about these individual loans - - - you'll - - - you'll
17 correct me if I'm wrong about his argument - - -

18 MR. FRANK: with - - - with respect, Your Honor,
19 that's incorrect.

20 JUDGE RIVERA: - - - because he's not going to
21 get up and be able to argue it. But about the individual
22 loans, but he says sort of overall the promise about the
23 protocols and the practices is what he's, the trustee's,
24 trying to get to, and that may be very different than any
25 particular individual loan. Like, his argument are that



1 the investor's not coming to the table if you have shoddy
2 practices.

3 MR. FRANK: And the problem with that, Your
4 Honor, is that that's not a breach of contract claim. That
5 is an investor fraud claim, or securities claim.

6 JUDGE RIVERA: It can't be both?

7 MR. FRANK: It cannot be both. Because the
8 contract precludes it. Here - - -

9 JUDGE RIVERA: Where - - - well, I'm sorry.
10 Where does the contract preclude it?

11 MR. FRANK: Because it says that you're sole
12 remedy for problems with the mortgage loans in the PSA it
13 says it clearly, and it's the Ambac holding from the
14 Appellate Division, you don't get anything else.

15 JUDGE RIVERA: All right. Were sort of back to
16 that. Okay. So but - - -

17 MR. FRANK: Right, but - - - but - - - but my
18 point I guess, Your Honor, is that even if he's right, that
19 7 is transferred along with 8, the No More entities still
20 prevail because then you have a provision - - - and it was
21 very important that Mr. Shuster would not concede any
22 difference about this. So if this were a case with one
23 loan violation - - -

24 JUDGE RIVERA: Yes.

25 MR. FRANK: - - - one - - -



1 JUDGE RIVERA: Yes.

2 MR. FRANK: Not thousands, one.

3 JUDGE RIVERA: Yeah.

4 MR. FRANK: Or .1 percent, whatever the smallest
5 modicum one could say. The argument of plaintiffs is
6 necessarily that that would be a violation of both Section
7 8 and Section 7. And that you would end up with unlimited
8 damages and - - -

9 JUDGE RIVERA: How - - - how is that - - -

10 MR. FRANK: And never the sole resi - - -

11 JUDGE RIVERA: How - - - how is that, if your
12 practice is - - - or if the practices weren't shoddy? How
13 is that? I missed that.

14 MR. FRANK: There - - - this is the most
15 important point I will make, Your Honor.

16 JUDGE RIVERA: Yes, please.

17 MR. FRANK: It is entirely not the case that the
18 complaint includes a single allegation that is not a
19 violation of Section 8, not a single one. The trial court
20 found that. Mr. Shuster in our prior argument said oh that
21 was some form order that was adopted. In - - - in the
22 record the order that was entered in this case says the
23 factual allegations of the - of the case here are
24 indistinguishable from the factual allegations in another
25 case. And in that other case, they found not a single



1 allegation other than Section 8.

2 More to the point, Your Honor, if you look at
3 that - - - let's look at one of the ones that he just said,
4 for example. If you look at paragraph either 64 or -3, if
5 you look at paragraph 3 - - -

6 JUDGE FAHEY: There are the two where you said
7 there was a difference?

8 MR. FRANK: There was a difference.

9 JUDGE FAHEY: Mr. Shuster said there was a
10 difference.

11 MR. FRANK: Instead, we talked about mortgage
12 representations. That's the defined term. And they talk
13 about each of the individual things that violate Section 8.
14 So too, in section 64, we go down to "The investigation
15 revealed that numerous documents and assembled furnished
16 Nomura to the trust are rife with material misstatements,
17 omissions, et cetera." The only specified problem with
18 those documents, only one, in the complaint are the Section
19 8 violations. There is a laundry list of them, and then
20 there is a conclusion that violates Section 8 and it also
21 violates Section 7. And that just doesn't work.

22 The - - - the - - - in our prior argument, I made
23 a number of the same points. Mr. Shuster, for the first
24 time on appeal, talked about the - - - the penumbra or the
25 - - - you know, Nomura's statements taken as a whole that



1 they would somehow deliver a viable pool. This is the
2 macro point to which, Judge Rivera, you were referring.
3 That is not found in the complaint anywhere. There's not
4 even a citation to the complaint.

5 And then when they try to cite to the complaint
6 in their briefing as opposed to argument today, where we
7 hear new - new sections. But in their briefing you go to
8 those sections and one looks at them, and they are exactly
9 Section 8 violations. So it really comes back to
10 Westmoreland Coal. Whether or not if the parties - - -
11 super sophisticated, the most sophisticated parties,
12 decided to bargain for a specific remedy for violations of
13 problems with the mortgage loans which is what the language
14 of the PSA says - - -

15 JUDGE RIVERA: So if they wanted to bargain for
16 what he's complaining about, what would need - - - what - -
17 - what we need to see in this record?

18 MR. FRANK: One could imagine a whole host of
19 different things.

20 JUDGE RIVERA: Um-hum.

21 MR. FRANK: They could've done away with the
22 REMIC status entirely and said there is no sole remedy.
23 They could have provided, as I believe Your Honor pointed
24 out in the prior argument, some materiality threshold where
25 above which the - - - the pervasive breaches were



1 sufficient.

2 I mean, in this case, you know, their ranges from
3 thirty-some percent to, I believe, eighty-some percent,
4 depending on the case, and where this court would draw a
5 line is first entirely - - - would be an entire, with
6 respect, an act of kind of arbitrary judicial picking the
7 point rather than the parties themselves bargaining for.

8 In direct answer to Your Honor's question, the
9 parties could've said, you know these are for individual
10 loan problems, but if it gets really bad, and there's more
11 than fifty percent, all bets are off. Sole remedy doesn't
12 apply you can sue for the sun, moon, and the stars.

13 JUDGE RIVERA: Yeah, but that's different, isn't
14 it?

15 MR. FRANK: But they didn't.

16 JUDGE RIVERA: You could - - - no, but that's
17 different. Because you could have absolute - - - not have
18 shoddy practices. In the market being what it is, you have
19 more than fifty percent of these loans that are terrible.

20 MR. FRANK: With respect, Your Honor, the word
21 phrase shoddy practices is nowhere in the complaint.

22 JUDGE RIVERA: I understand, but I'm using it for
23 shorthand, so - - - so just go with me on this.

24 MR. FRANK: Well, with respect, therein lies the
25 (indiscernible) - - -



1 JUDGE RIVERA: But you understand my point that
2 you got sort of the market - - -- so my question is about
3 the market with respect to these mortgage-backed securities
4 and what - - - how that may work itself out different from
5 whatever Nomura or whoever is claiming are the practices by
6 which you - - -

7 MR. FRANK: If - - -

8 JUDGE RIVERA: - - - ensure anything about this
9 deal that's put together.

10 MR. FRANK: If there had been a material
11 misstatement of fact in the prospectus supplement, Nomura
12 could be sued under the securities laws.

13 This is a question of contract. The parties
14 specified - - -

15 JUDGE RIVERA: So you agree that it's not here.
16 I understand your argument, but that they - - - that there
17 could have been a bargain for that. Are you saying it's
18 foreclosed?

19 MR. FRANK: I'm saying that the bargain the
20 parties struck does not include that.

21 JUDGE RIVERA: No, no, no. You've just said it
22 would have then the securities issue, but I'm saying that
23 you - - - you agree that the parties could have bargained
24 for that. I understand you say they didn't.

25 MR. FRANK: There's no suggestion, not even from



1 Mr. Shuster, a suggestion that somehow the meaning of this
2 contractual - - - at least, I don't think there is, the
3 meaning of this contractual Section 7.5 is that somehow a
4 breach of contract action incorporates all of the full
5 panoply of a tort action, and that somehow you don't have
6 contractual remedies, you just have you know everything - -
7 -

8 JUDGE RIVERA: I know you're not answer - - -

9 MR. FRANK: - - - must be true.

10 JUDGE RIVERA: Yeah, I appreciate that, but you
11 have not answered my question.

12 MR. FRANK: I'm sorry, Your Honor. I'll try.

13 JUDGE RIVERA: And it may be that - - - it may be
14 because you may think it's irrelevant to the case, but
15 let's just get an answer.

16 MR. FRANK: Oh no, I want to answer question.

17 JUDGE RIVERA: As I - - - no, no, no. My - - -
18 my question was are you taking the position that because
19 there may very well be a securities violation, that the
20 parties couldn't also contract for remedy for a securities
21 violation?

22 MR. FRANK: I - - -

23 JUDGE RIVERA: I thought that was not your
24 position, but I just want to confirm.

25 MR. FRANK: What I am saying, Your Honor, is that



1 the parties could have envisioned a whole host of different
2 remedies for different conduct. The pa- the conduct they
3 chose here - - -

4 JUDGE RIVERA: Is that a yes?

5 MR. FRANK: I'm sorry, Your Honor?

6 JUDGE RIVERA: Is that a yes or no to the
7 question?

8 MR. FRANK: Yes, they could have envisioned other
9 remedies, sure, for other things.

10 JUDGE RIVERA: Including a securities violation?

11 MR. FRANK: Sure.

12 JUDGE RIVERA: Okay.

13 MR. FRANK: But they didn't.

14 JUDGE RIVERA: Thank you.

15 MR. FRANK: And there's no suggestion that they
16 did.

17 JUDGE RIVERA: Thank you, counsel.

18 MR. FRANK: Thank you, Your Honor.

19 (Court is adjourned)

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C E R T I F I C A T I O N

I, Gina Gattone, certify that the foregoing transcript of proceedings in the Court of Appeals of Nomura Home Equity Loan, Inc., v. Nomura Credit & Capital, Inc., No. 39 (Reargument), was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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