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

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| In the matter of the application of<br><br>WELLS FARGO BANK, NATIONAL ASSOCIATION, U.S. BANK NATIONAL ASSOCIATION, THE BANK OF NEW YORK MELLON, THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., WILMINGTON TRUST, NATIONAL ASSOCIATION, HSBC BANK USA, N.A., and DEUTSCHE BANK NATIONAL TRUST COMPANY (as Trustees, Indenture Trustees, Securities Administrators, Paying Agents, and/or Calculation Agents of Certain Residential Mortgage-Backed Securitization Trusts),<br><br>Petitioners,<br><br>For Judicial Instructions under CPLR Article 77 on the Administration and Distribution of a Settlement Payment. | Index No. 657387/2017 |

**STATEMENT OF GROUNDS FOR OBJECTION TO PETITION**

## I. PRELIMINARY STATEMENT

Respondents FT SOF IV Holdings, LLC, Fir Tree Capital Opportunity Master Fund, L.P., and Fir Tree Capital Opportunity Master Fund III, L.P. (collectively, "Objectors"), by and through their undersigned counsel, respectfully submit this Statement of Grounds for Objection, together with the Affidavit of David Proman ("Proman Aff."), to the Petition filed in the above-captioned matter by Petitioners, in their respective capacities as trustees, indenture trustees, successor trustees, securities administrators, paying agents, and/or calculation agents (the "Trustees" or "Petitioners") for the residential mortgage-backed securitization trusts at issue in this proceeding (the "Settlement Trusts"). S*ee* Petition, Ex. A. Objectors are holders of Class I-A and II-A Certificates issued by Bear Stearns Mortgage Funding Trust, Mortgage-Backed Certificates Series 2007-SL2 ("BSMF 2007-SL2") and of Class II-A Certificates issued by Bear

Stearns Mortgage Funding Trust, Mortgage-Backed Certificates Series 2006-SL5 ("BSMF 2006-SL5") (collectively, the "BSMF Trusts"), which are each deemed "Settlement Trusts" entitled to a portion of the $4.5 billion Settlement between JPMorgan Chase & Co. and its direct and indirect subsidiaries (collectively, "JPMC") and RMBS investors.

As set forth herein, to effectuate the clear terms of the BSMF Trusts' Pooling and Servicing Agreements (the "PSAs"[1] and, together with all other agreements governing the BSMF Trusts, the "Governing Agreements") and the unmistakable intent of the Settlement Agreement,[2] write-ups must be applied to the BSMF Trusts' Classes, to increase the Certificate Principal Balance ("CPB") of the Class of Certificates with the highest payment priority to which Realized Losses have been allocated, *before* each Trust's Allocable Share is distributed to Certificateholders (the "Write-Up First Method"), regardless of whether such Classes have a current CPB of zero. Reading the Governing Agreements otherwise would result in the artificial subordination of the most senior Group II Certificates, thereby disrupting the Governing Agreements' structure of parity between the two Loan Groups and resulting in windfall proceeds flowing to Certificates that were never intended to receive them under the Settlement Agreement.

*First*, as set forth in Section II, *infra*, the Write-Up First Method is consistent with the PSAs' requirement that the CPB—the metric that determines distributions—must be calculated "as of any Distribution Date" and must include any new Subsequent Recoveries (such as the Allocable Share of the Settlement Payment, which is deemed a Subsequent Recovery under the Settlement Agreement). Because the CPB is used to determine the amount of distributions on any Distribution Date, it must be calculated *prior* to those distributions, meaning the write-ups to account for new Subsequent Recoveries must necessarily occur *before* distributions are made.

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[1] The PSAs for the BSMF Trusts are attached as Exhibits A and B to the Proman Aff.

[2] Unless otherwise noted, capitalized terms herein have the same meaning as those terms are defined in the Petition or in the PSAs, as applicable.

*Second*, as set forth in Section III.A, *infra*, the PSAs' provisions governing write-ups are clear that the CPBs of Zero Balance Classes are, in fact, increased upon the Trusts' receipt of Subsequent Recoveries. The clear terms of the PSAs provide that Subsequent Recoveries shall be applied to the "Class of Certificates with the highest payment priority to which Realized Losses have been allocated," without regard to whether the CPB is zero. The definition of Class Principal Balance confirms that "*any* Certificate" shall have its CPB increased by the amount of Subsequent Recoveries so applied.

This conclusion is not altered by the so-called "Retired Class Provision," which is inapplicable to the Zero Balance Class II-A Certificates at issue. Indeed, under no reading of the process by which "retirement" is to occur under the PSAs could these Classes be considered "retired." As set forth in Section III.B, *infra*, the PSAs set forth several conditions that must be met before any Class can be considered "retired"—none of which are satisfied here. *See* PSAs § 10.02(i). Further, the placement of the "Retired Class Provision" within the "Distributions" section of the PSAs shows that that provision is only intended to be triggered where the CPB of a Class is reduced to zero due to full repayment of its principal balance—not where, as here, the CPB of the Class has been diminished by the application of losses. The PSAs' provision for reversal of losses through Subsequent Recoveries cannot be reconciled with the suggestion that Classes "retire" solely by virtue of absorbing losses. Nor can such argument be squared with the Trustee's conduct, as, for some of these Zero Balance Certificates, Realized Losses have been reversed, and payments made, even after their CPB was reduced to zero.

Importantly, the intended recipients of the Settlement Payment will receive nothing—while unintended recipients will receive windfalls—unless the Write-Up First Method is applied to all Certificates, regardless of CPB. The Settlement Payment is intended to compensate

Certificateholders for losses incurred due to breaches of Representations and Warranties ("R&Ws") made as to the Trusts' underlying mortgage loans. Where such losses have been so dramatic as to wipe out the most senior Classes, as is the case for Loan Group II of the BSMF Trusts, it would be absurd to prevent the Settlement Payment from remedying that harm. This is particularly so because the Settlement Agreement deems Loan Group II of each of the BSMF Trusts to be separate Trusts for purposes of the allocation and distribution of the Settlement Payment.

Indeed, despite the fact that the most senior Group II Certificates in the BSMF Trusts (and every junior bond beneath them) had Zero Balances, the Trustees' own experts, following the plain language of the Settlement Agreement, designated specific, separate Allocable Shares of the settlement funds to *each* of Group I and Group II of the BSMF Trusts.[3] Were funds to be distributed to Certificateholders prior to write-ups, the Group II Certificateholders would receive no share of these funds specifically allocated to them. Even the Group I Certificateholders, which are the last remaining in the Trust with a positive CPB Class, would not receive their full share of the funds allocated to them if distributions were made before write-ups. This is because, for the BSMF Trusts, the funds allocated to them *exceed the entire CPB of the BSMF Trusts themselves*. CPBs must be written up before funds are distributed to avoid incongruous results that even the Trustees acknowledge may not be permitted under the PSAs (*see* Pet. ¶39), such as funds being redirected from one loan group to the other, unrelated group; funds sitting "in limbo" and not being distributed to anyone; or funds "leaking" to residual or subordinate Certificateholders.

[3] *See* Trustees' Informational Notice, dated Dec. 19, 2017 Ex. B (the "Final Expert Calculation"), at http://www.rmbstrusteesettlement.com/docs/JPM%20Settlement%20--%20Notice%20re%20Allocable%20Shares%20(Compiled).pdf.

In short, it simply could not have been the intent of the parties to the Settlement Agreement to preclude Zero Balance Classes—the Classes that suffered the most harm in connection with R&W claims—from receiving any benefit from the Settlement of such claims. The only reasonable interpretation of the Settlement Agreement and the PSAs is to write up Zero Balance Classes to the extent of prior losses prior to distributing the Allocable Shares.

## II. THE WRITE-UP FIRST METHOD IS CONSISTENT WITH THE TERMS OF THE SETTLEMENT AGREEMENT AND THE INTENT OF THE PARTIES.

The terms of the PSAs and the unmistakable intent behind the Settlement Agreement call for the application of the Write-Up First Method. The Settlement Agreement directs that the distribution to Certificateholders shall be "***in accordance with the distribution provisions of the Governing Agreements*** . . . as though such Allocable Share was a 'subsequent recovery' relating to principal proceeds available for distribution on the immediately following distribution date." Pet., Ex. B § 3.06(a) (emphasis added).[4] The PSAs, in turn, require the implementation of the Write-Up First Method.

The PSAs (which are identical for the BSMF Trusts in all relevant respects) provide:

> with respect to any Subsequent Recoveries, the Master Servicer shall deposit such funds into the Protected Account pursuant to Section 4.01(b)(iii). If, after taking into account such Subsequent Recoveries, the amount of a Realized Loss is reduced, the amount of such Subsequent Recoveries will be ***applied to increase the Certificate Principal Balance of the Class of Certificates with the highest payment priority to which Realized Losses have been allocated***, but not by more

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[4] To the extent the Settlement Agreement suggests any order of operations, it is consistent with the PSAs:

> ***After*** the distribution of the Allocable Share ***to a Settlement Trust*** pursuant to Subsection 3.06(a), the Accepting Trustee for such Settlement Trust will apply . . . the amount of the Allocable Share for that Settlement Trust in the reverse order of previously allocated losses, ***to increase the balance of each class of securities*** (other than any class of REMIC residual interests) ***to which such losses have been previously allocated***, but in each case by not more than the amount of such losses previously allocated to that class of securities pursuant to the Governing Agreements.

Pet., Ex. B § 3.06(b) (emphasis added). The Settlement Agreement specifies that write ups are to be applied immediately following the distribution of the Allocable Share *to a Settlement Trust*, not after the distribution of such Allocable Share to certificateholders.

> than the amount of Realized Losses previously allocated to that Class of Certificates pursuant to Section 5.05. . . . PSAs § 5.04(b).

Thus, when the Master Servicer receives Subsequent Recoveries, it deposits them into a "Protected Account," and they are *not immediately distributed*. *Id*. A calculation is then applied to determine whether such Subsequent Recoveries would reduce the amount of Realized Losses to the Certificates. *Id.* ("If, after taking into account such Subsequent Recoveries, the amount of a Realized Loss is reduced…") If yes, the Certificates with the highest payment priority—here, the Class A bonds in each Loan Group (*see* PSAs § 5.04(a)(2))—are "written-up" and their CPBs are increased to reverse Realized Losses.

The PSAs' definition of "Certificate Principal Balance" further supports this reading:

> Certificate Principal Balance: As to any Certificate (other than any Class X, Class C and Class R Certificate) and ***as of any Distribution Date***, the Initial Certificate Principal Balance of such Certificate ***plus, in the case of a Class A, Class M or Class B Certificate, any Subsequent Recoveries added to the Certificate Principal Balance of such Certificate pursuant to Section 5.04(b)***, less the sum of (i) all amounts distributed with respect to such Certificate in reduction of the Certificate Principal Balance thereof ***on previous Distribution Dates*** pursuant to Section 5.04, and (ii) any Applied Realized Loss Amounts allocated to such Certificate ***on previous Distribution Dates***. . . .

PSAs § 1.01 (emphasis added).[5]

Distributions are made based on the CPB on a particular Distribution Date, and thus can be made only after the calculation of CPB, including any increase in CPB pursuant to the application of Subsequent Recoveries. To wit, the "Distribution Amount" for a particular certificate is based on "the aggregate Certificate Principal Balance of the Class A Certificates

[5] The "Subsequent Recoveries" in the definition of CPB are clearly *new* subsequent recoveries. When the drafters of the BSMF Trust PSAs intended to refer to amounts allocated previously, they did so explicitly (*i.e.*, referring to distributions made and Applied Realized Loss Amounts applied "on previous Distribution Dates"). The Prospectus Supplements for the BSMF Trusts ("ProSupps") are even more explicit in the definition of "Certificate Principal Balance," specifying that Subsequent Recoveries "***not previously allocated***" be applied to increase the CPB. Proman Aff. ¶11, Ex. C at 42; ¶12, Ex. D at 45. Here again, the definition distinguishes these *new* Subsequent Recoveries that increase the CPB from the distributions and Realized Losses accumulated from "previous distribution dates."

***immediately prior to such Distribution Date***" (*see, e.g.*, PSAs § 1.01, Definition of "Class A Distribution Amount"), and distributions are then made pursuant to the CPB as of such Distribution Date. Because a Class's CPB on any Distribution Date is calculated *prior* to distributions and those distributions depend on the CPB "as of" such Distribution Date, the write-ups to account for new Subsequent Recoveries must occur before distributions of CPB are made. Taken together, the only reasonable interpretation of these provisions is write-up first and distribute second. *See Brad H. v. City of New York*, 17 N.Y.3d 180, 185 (2011) ("A written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties.").

Further, the Write-Up First Method is the only method that would effectuate the clear intent of the Settlement Agreement. *Evans v. Famous Music Corp.*, 1 N.Y.3d 452, 458 (2004) (contracts should be enforced according to "the intention of the parties at the time they entered into the contract.") The unmistakable, overarching intent behind the Settlement Agreement was to compensate investors for losses incurred as a result of breaches of R&Ws. *See* Pet., Ex. B at 1-2 ("Recitals"). And, more specifically, the Settlement Agreement directs that the distributions to investors should be made "in accordance with the distribution provisions of the Governing Agreements (***taking into account the Expert's determination under Section 3.05***)." Pet., Ex. B § 3.06(a) (emphasis added). Section 3.05, in turn, states that:

> If the Mortgage loans held by any Trust are divided by the Governing Agreements into loan groups, so that ordinarily only certain classes of Investors benefit from the proceeds of particular loan groups, ***those loan groups shall be deemed to be separate Trusts for purposes of the allocation and distribution of the Settlement Payment.*** *Id* § 3.05 (emphasis added).

Thus, the Settlement Agreement requires the Settlement Payment to be allocated *and* distributed separately to each separate loan group in any particular Settlement Trust.

Accordingly, the Trustees' expert determined the distribution of the Allocable Shares to each Trust and, in turn, allocated a specific amount of the Settlement Payment to each of Groups I and II of the BSMF Trusts. *See generally,* Final Expert Calculation.

It would undermine the explicit terms and intent of the Settlement Agreement to ignore this loan group-specific allocation when distributing the Settlement Payment. Only the Write-Up First Method would allow the funds allocated for Group II of the BSMF Trusts to actually flow to the Group II Certificateholders. Conversely, if the Pay-First Method is applied, Group II Certificateholders, such as the Objectors, will receive no portion of the Settlement Payment, and thus no compensation for the significant losses they suffered as a result of breaches of R&Ws. Objectors own significant positions in Class II-A of each BSMF Trust, which currently have CPBs of zero. Indeed, *every Class of Certificates in the BSMF Trusts, except for Class I-A, are Zero Balance Classes*. Proman Aff. ¶¶13-14, Exs. E-F. These Zero Balance Classes not only realized significant losses as a result of breaches of R&Ws, but they realized additional losses due to Petitioners' use of Trust funds to negotiate tolling agreements, finalize the eventual Settlement Agreement with JPMC, and pursue approval of such Settlement by this Court. It would be both anomalous and unfair to deny the Class II-A Certificateholders any compensation for the Settlement it funded and which engendered their losses in the first place.[6]

The Pay-First Method is not only contrary to the intent of the Settlement, it would create significant uncertainty. Particularly for the BSMF Trusts, where virtually all Classes are Zero Balance Classes, if the Pay-First Method is applied, large portions of the funds specifically allocated pursuant to the Settlement Agreement to Groups I and II would be prevented from flowing to Certificateholders in those Groups, resulting in a large pool of "excess funds." The

[6] Even the Class I-A Certificates would not receive the full amount to which they are entitled under the Settlement Agreement if distributions were made prior to a write-up. This is because the BSMF Trusts' CPB have been reduced below the level of Subsequent Recoveries from their Allocable Share.

Trustees question the appropriate manner in which to deal with such excess funds. Pet. ¶38. Normally, excess principal would be distributed to the residual certificates,[7] but the Settlement Agreement specifically forbids this. *Id.*, Ex. B § 3.06(a) ("If distribution of a[n] . . . Allocable Share would become payable to a class of REMIC residual interests. . . such payment shall be maintained in the collection or distribution account for distribution on the next distribution date according to the provisions of this Subsection 3.06(a). . . ."). Thus, the Trustees have proposed several ad hoc approaches for dealing with the excess funds, but express doubts that these approaches are "permissible under the Governing Agreements." Pet. ¶39. The Trustees note that "[i]f the Write-Up First Method were used, this issue would not arise." *Id.* ¶40. In other words, if the write-up is conducted first, the "ceiling" of each Class of Certificates first would be raised to account for the incoming Subsequent Recoveries, and then the distribution would pay them down in order of seniority.

In sum, the clear terms of the PSAs, the undeniable intent of the Settlement Agreement, and simple logic all mandate that the BSMF Trust certificates be written up prior to the distribution of the Allocable Shares to Certificateholders.

## III. THERE IS NO PROHIBITION ON WRITING UP ZERO BALANCE CLASSES.

The Petition raises the question of whether Zero Balance Classes are entitled to write-ups and to distributions of the Settlement Funds. When the Governing Documents are considered

[7] As the Trustees recognize, it is possible that the Pay-First Method would result in artificial overcollateralization of the Trusts, causing Class C Certificates to receive payment in the form of "excess cashflow." Pet. ¶¶28-29, 33. But Class C holders are clearly *not* the intended recipients of the Settlement Funds. Under the PSAs, the Class C Certificates are akin to Residual Certificates. The Settlement Agreement prohibits Residual Certificates from receiving Settlement Funds. Pet., Ex. B, § 3.06(a). Under the PSAs, Class C certificates are expected to bear the brunt of Realized Losses, as they are the first Class of Certificates to be written-down as a result of Realized Losses (after Excess Spread) (PSAs § 5.05); and, at the same time, they are not entitled to distribution of CPB. *Id.* § 5.04(a). In fact, Class C Certificates are excluded from the definition of CPB. Obviously, any distribution method that would result in Class C recovery would be contrary to both the Settlement Agreement and the PSAs.

together, it is clear that they are. The so-called "Retired Class Provision" does not apply because Objectors' Zero Balance Classes have never been "retired."

### A. The PSAs Require the Application of Write-Ups to Certificates in Zero Balance Classes.

As Petitioners correctly point out, "[n]othing on the face of the Retired Class Provision or in the applicable [PSA or ProSupp] appears to expressly preclude Zero Balance Classes from being written up in connection with subsequent recoveries." Pet. ¶57. The "Retired Class Provision" only applies to distributions of principal and interest, and is found nowhere in the PSAs' provisions governing the application of write-ups as a result of Subsequent Recoveries. The provision governing the application of Subsequent Recoveries to increase the CPB of a certificate is Section 5.04(b)—an entirely different subsection of the PSAs—and provides that such write-ups occur, "***in addition to***," and thus separate from, "distributions." PSAs § 5.04(b). That is, a Certificate may still be written up, even if it was not previously receiving distributions.

Under Section 5.04(b) of the PSA, as long as Subsequent Recoveries are applied in the order of the "Class of Certificates with the highest payment priority to which Realized Losses have been allocated," even Zero Balance Classes are to be "written up" upon receipt of such Subsequent Recoveries. To be clear, Section 5.04(b) of the PSAs contains no limitation related to prior CPB (zero or otherwise) and no prohibition for (or even reference to) "retired" certificates. Section 3.06(b) of the Settlement Agreement mirrors this language, as the Accepting Trustee is directed to "apply the Allocable Share for that Settlement Trust in the reverse order of previously allocated losses, ***to increase the balance of each class of securities . . . to which such losses have been previously allocated***. . . ." Pet., Ex. B § 3.06(b) (emphasis added). If the parties to the PSAs had intended to preclude Zero Balance Classes from being written up, they

could have done so explicitly.[8] Rather than doing so, the parties explicitly permitted *all* Classes that had suffered Realized Losses to benefit from increases in CPB. Moreover, these Trusts are structured such that that the Classes with the highest priority should have the greatest opportunity to recover their principal investment in full, and thus the PSAs provide that Subsequent Recoveries should be applied to increase the CPB of the Classes with the highest priority first, whether or not they are Zero Balance Classes.

### B. Objectors' Certificates in Zero Balance Classes Have Never Been "Retired" and are Entitled to Distributions from the Allocable Share.

The provision defined by Petitioners as the "Retired Class Provision" does not alter this conclusion or apply to Objectors' Certificates. The PSAs set forth a specific procedure the Trustee must follow to retire certificates and the Trustee has never applied such procedure to the Objectors' Certificates—and, rightly so, because actions required to retire the Class II-A Certificates have never occurred. Though "retirement" is not a defined term in the applicable PSAs or ProSupps, and the concept is only discussed twice in the PSAs (outside of certain exhibits concerning the optional termination of the Trust)—these two provisions make it clear that the parties to the PSAs contemplated that a specific procedure was necessary in order to consider a certificate "retired." *See* PSAs §§ 5.04(a); 10.02(i).

The Retired Class Provision, which is the final paragraph of subsection (a) under "Distributions" following the "waterfall" description for all types distributions, provides that once the CPB of a Class A Certificate reaches zero, "that class of Certificates will be retired and will no longer be entitled to distributions. . . ." PSAs § 5.04(a). The Retired Class Provision is

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[8] Indeed, there are PSAs in the market that *do* explicitly preclude Zero Balance Classes from subsequent write-ups. *See, e.g.,* Proman Aff. ¶15, Ex. G (GE-WMC Mortgage Securities Trust 2006-1 PSA) §§ 1.01; 4.01(g) (providing that write-ups apply to the Certificates with the "Highest Priority," defined as the most senior applicable Class "then outstanding *with a Certificate Principal Balance greater than zero*") (emphasis added). The absence of such language here further confirms that the write-up of Zero Balance Classes is both permitted and required.

thus plainly intended to refer to Classes that have received their full complement of distributions—*i.e.*, their CPBs have been reduced to zero by virtue of having been paid down, not by virtue of having absorbed Realized Losses. The CPBs of Objectors' Certificates, to the contrary, have been substantially impaired by Realized Losses, which losses the PSA provides may be reversed through the application of Subsequent Recoveries. *See* Section II, *supra*.

This interpretation is further supported by Section 10.02(i), sub-clause (ii) of the PSAs, which lays out a specific process by which Certificates may be retired:

> [i]f on any Determination Date[9] . . . the Trustee determines that a Class of Certificates shall be retired ***after a final distribution*** on such Class, the Trustee shall notify the Certificateholders within five (5) Business Days after such Determination Date that the final distribution in retirement of such Class of Certificates is scheduled to be made on the immediately following Distribution Date. Any final distribution made pursuant to the immediately preceding sentence shall be made only upon presentation and surrender of the Certificates at the Corporate Office of the Trustee.

PSAs § 10.02(i) (emphasis added). The "retirement" of a certain Class of Certificates is clearly not an automatic occurrence—it happens only after 1) a Class of Certificates receives a "final distribution," 2) the Trustee takes the affirmative step of determining that such Certificates should be retired, *and* 3) the Trustee notifies the Certificateholder that the retired Certificates are to be surrendered to the Trustee. Objectors have not any received notices that their Certificates were to be retired or surrendered. *See* Proman Aff. ¶6. Further, the reference to "final distribution" again demonstrates that retirement occurs in conjunction with a bond receiving its full complement of distributions, not a bond that has taken losses, which are reversible.

Indeed, Objectors' Class II-A Certificates have been in Zero Balance Classes since mid-2013 and late 2014. *Id*. ¶5. Nevertheless, even *after* the Class II-A Class in BSMF 2006-SL5

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[9] "Determination Date" is defined in the PSAs as, "With respect to any Distribution Date, the 15th day of the month of such Distribution Date or, if such 15th day is not a business day, the immediately preceding Business Day." PSA § 1.01, definition of "Determination Date."

became a Zero Balance Class, Realized Losses have been reversed and distributions have been made to such Class.[10] These distributions are directly at odds with any notion that such Certificates are "retired" and no longer entitled to any future distributions.

Moreover, CPB of Objectors' Certificates were reduced to zero *after* JPMC began signing tolling agreements in 2012 related to the claims at issue in the Settlement Agreement and negotiations over the Settlement Agreement had begun—and, in the case of Objectors' Class II-A Certificates in BSMF 2006-SL5, *after* the JPMC Settlement was finalized.[11] Once the tolling agreements were signed and settlement negotiations began, senior certificates such as Objectors' could not have been considered "retired" by the Trustees engaging in such negotiations, as the very purpose of such negotiations was to obtain remedial recoveries for such holders. The fact that the Trustees did not provide Objectors' Classes with of any notice of retirement or surrender, and indeed continued to distribute funds to such Classes in some circumstances, confirms that the Trustees did not consider these Certificates "retired" and incapable of receiving future distributions.

### C. The Redirection Provision is Inapplicable and Its Application Here Would Be Inequitable.

As Objectors' certificates have never been retired or surrendered, Objectors' certificates are, by definition, "Outstanding" and the Class A Redirection Provision does not apply. Under the PSAs, all certificates, "as of any date of determination . . . theretofore executed and authenticated under this Agreement," are "Outstanding" except, "(a) Certificates theretofore canceled by the Trustee or delivered to the Trustee for cancellation; and (b) Certificates in

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[10] On December 26, 2014 and February 25, 2015, the Class II-A Certificates in BSMF 2006-SL5 received payments, following a reversal of Realized Losses. Proman Aff. ¶5 and ¶¶16-17, Exs. H and I.

[11] Objectors' Class A-2 Certificates in the BSMF 2006-SL5 Trust have been a Zero Balance Class since October 27, 2014. The JPMC Settlement was entered into as of November 15, 2013 and modified as of July 29, 2014. *See* Pet., Ex. B; Proman Aff. ¶7.

exchange for which or in lieu of which other Certificates have been executed and delivered by the Trustee pursuant to this Agreement." PSAs § 1.01, definition of "Outstanding." Again, Objectors have never received a notice from the Trustee that their certificates in the BSMF Trusts were cancelled or should be surrendered; thus, they remain "Outstanding." *See* Proman Aff. ¶6. The Class A Redirection Provision applies *only* to "Class A Certificates related to a Loan Group [that] are no longer outstanding. . . ." PSAs § 5.04(a)(3).

Furthermore, Objectors agree with Petitioners that if the Class A Redirection Provision applied here, it would cause proceeds specifically "designated for a particular loan group to be distributed to an entirely different loan group that either has its own designated Settlement Payment or is not subject to the Settlement Agreement." Pet. ¶60. This would contradict the entire purpose of the Settlement Agreement that seeks to "resolve all Rep and Warranty Claims" Pet., Ex. B at 2 alleged against JPMC and is meant to compensate parties that suffered Realized Losses. As Petitioners point out, using the Pay First Method and considering Zero Balance Classes "retired," "would leave the impacted loan groups . . . in a position where they could not receive any of the Settlement Payment and the Settlement Payment designated for such loan groups . . . would remain in limbo." This is not an acceptable result given the Parties' intent in entering into the Settlement Agreement.

## IV. CONCLUSION

The very purpose of this Settlement Agreement—to remedy Realized Losses—would be frustrated if the most senior Classes of Certificates were not permitted to receive their share of the Settlement Payment, simply because the losses they had suffered were so extreme as to reduce their Certificate Principal Balance to zero. Accordingly, the Settlement Agreement's purpose can only be effectuated by writing up Certificates, including Zero Balance Classes, to

the extent of losses incurred, *prior* to making distributions to entitled Certificateholders. The clear terms of the Settlement Agreement and the Governing Agreements compel this result.

**REQUEST FOR RELIEF**

Wherefore, pursuant to the provisions of CPLR Art. 77 and all other applicable law, the Objectors respectfully request that this Court:

1. Direct the Trustee to apply the Write-Up First Method in distributing the Settlement Payment from the JPMC Settlement;
2. Find that the Write-Up First Method may be applied to all certificates, regardless of Certificate Principal Balance, so as to write-up the Certificate Principal Balance of those Classes prior to distribution and find that such Certificates have not been "retired";
3. Grant any other, additional, and different relief this Court deems just and proper.

Dated: January 29, 2018
New York, New York

Respectfully Submitted,

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