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

In the matter of the application of 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), Petitioners, For Judicial Instructions under CPLR Article 77 on the Administration and Distribution of a Settlement Payment.	Index No. 657387/2017 IAS Part 60 Honorable Marcy S. Friedman **Respondent Tilden Park's Answer to the Petition**

Respondents Tilden Park Investment Master Fund LP, Tilden Park Management I LLC and Tilden Park Capital Management LP, on behalf of themselves and their advisory clients (collectively, "Tilden Park"), respectfully submit this Answer in response to the Petition for Judicial Instructions under CPLR Article 77 on the Administration and Distribution of a Settlement Payment (the "Petition"), dated December 15, 2017, filed by 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 (collectively, the "Trustees" or "Petitioners"), in their capacities as trustees, indenture trustees, successor trustees, securities administrators, paying agents, and/or calculation agents of the residential mortgage-backed

securitization trusts listed on Exhibit A to the Petition (each a "Settlement Trust" or "Trust"; collectively, the "Settlement Trusts").[1]

INTRODUCTION

The Trustees seek this Court's instruction as to the distribution of each Trust's Allocable Share of the $4.5 billion Settlement Payment to be transferred by JPMorgan Chase & Co. to the Trustees.[2] Most prominently, the Trustees ask the Court to determine which order of operations – the Write-Up First Method, the Pay First Method, or a different method – should be used to distribute the settlement proceeds to Certificateholders.

The Settlement Agreement does not specify the order of operations. Instead, it directs the Trustees to follow the distribution provisions in each Trust's Governing Agreement, which depend inherently on the order of operations, without overriding that order for any Trust.

For most of the Trusts in Exhibit 1 hereto, including each of the Trusts listed in Exhibit 2 hereto, the Governing Agreement unambiguously requires the Trustees to use the Write-up First Method to distribute the settlement proceeds – that is, it mandates that certificate balances be "written up" by the amount of the Settlement Payment before, rather than after, distributions are made to Certificateholders, so that distributions are made in accordance with the written-up balances. This is the clear import of several related provisions of the Governing Agreement for each of these Trusts: the definition of the term "Certificate Principal Balance," and the provisions addressing the allocation of subsequent recoveries and realized losses.

For a minority of the Trusts in Exhibit 1, including each Trust listed in Exhibit 3, the Governing Agreement requires use of the Pay First Method. As a result, for certain of these

[1] Tilden Park purchased and currently holds interests in certificates issued by each of the Settlement Trusts listed in Exhibit 1 hereto.

[2] Capitalized terms used in this Answer and not defined herein have the meanings given to such terms in the Petition.

Trusts – the so-called OC Trusts – receipt of the settlement proceeds can result in an "Overcollateralization Release" and the distribution of a portion of those proceeds as excess cashflow, rather than principal. This result is compelled by the unambiguous terms of the Governing Agreements, and the Court should instruct the Trustees to follow these Governing Agreements as written.

Finally, to the extent the Settlement Agreement conflicts with any particular Trust's Governing Agreement, the Court should order the Trustees to implement the Settlement's terms. In particular, Section 3.06(b) of the Settlement Agreement clearly sets forth the method (as opposed to the timing) governing the write-up of certificate balances on account of the settlement payment. All interested parties had ample notice and opportunity to object to the Settlement Agreement before it was court-ordered, and any belated challenge to the implementation of that Agreement is barred by *res judicata.*

1. The Governing Agreements Determine the Order of Operations For Writing-Up and Paying the Settlement Proceeds

The Petition recognizes that the Settlement Agreement left "unaddressed" the crucial issue of which order of operations (Write-Up First vs. Pay First) should be used to distribute the Settlement Payment to Certificateholders. (Petition ¶ 21). The seven Trustees accordingly understand that the unambiguous terms of the Governing Agreements dictate the order of operations: "**For Settlement Trusts with Governing Agreements that clearly specify a particular order of operations, . . . Petitioners are required and intend to follow the provisions of the Governing Agreements for such Settlement Trusts.**" (Petition ¶ 23 (emphasis added).) Indeed, the Trustees, all of whom were parties to the Settlement Agreement, have not sought judicial instruction as to Trusts for which they believe the Governing Agreements unambiguously indicate the order of operations. (*See Id.*)

The Trustees are correct that the Governing Agreements control the order of operations. As the Trustees note (Petition ¶ 21), the Settlement Agreement does not specify whether the Write-Up First Method or the Pay First Method should be used.[3] Rather, it mandates that the Trustees "distribut[e]" each Trust's "Allocable Share" to Certificateholders "pursuant to the terms of the Governing Agreements." (Settlement Agreement § 3.06(a).) Thus, the Governing Agreements dictate the order of operations.[4]

II. Most Governing Agreements Unambiguously Require Use Of the Write-Up First Method

As explained in the Petition, the Settlement Agreement requires that each Trust's Allocable Share be distributed to Certificateholders "in accordance with the distribution provisions of the Governing Agreements . . . as though such Allocable Share was a 'subsequent recovery.'" (Settlement Agreement § 3.06(a).) The funds are to be treated as available for distribution on the next distribution date. (*Id.*)

Under the Governing Agreements, the specifics of this distribution depend, in key respects, on when the outstanding certificate balances of each Settlement Trust are "written up" by the amount of any subsequent recovery or, in this case, the Allocable Share received by that Trust. The timing of this write-up – whether it occurs before or after the Settlement Payment is distributed to Certificateholders – is critical, because the outstanding certificate balance caps the amount of principal payments a Certificateholder can receive.[5]

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[3] The Settlement Agreement states that the write-up must occur "[a]fter the distribution of the Allocable Share to a Settlement Trust pursuant to Subsection 3.06(a)," but it does not specify whether the write-up should occur after the distribution of the Allocable Share to the Trust's accounts or instead after the further distributions to its Certificateholders, both of which distributions are required by Section 3.06(a). (Settlement Agreement § 3.06(a) and (b).)

[4] Indeed, the Governing Agreements dictate the order of operations even when these agreements are ambiguous and the Court must look to extrinsic evidence to determine the intent of their drafters.

[5] Under the waterfall provisions of the Governing Agreements, available funds are used to pay first interest and then principal. *See, e.g.*, BSABS 2005-AQ2 PSA § 5.04(a). When – as here – certain loss and delinquency triggers in

In what appears to be a surfeit of caution, the Trustees have asked the Court for guidance in determining whether the Governing Agreements for the Trusts listed on Exhibit D to the Petition call for the use of the Write-Up First Method or the Pay First Method. (*See* Petition ¶ 23.) In fact, the Governing Agreements for all the Trusts listed on Exhibit 1 hereto specify the use of just one of these Methods. Most of them – the ones listed on Exhibit 2 – unambiguously require that the Write-Up First Method be used. This is clear from several related provisions, which appear in substantially identical form in the Governing Agreements listed on Exhibit 2: (a) the definition of Certificate Principal Balance, and (b) the provisions addressing the allocation of subsequent recoveries and realized losses. These provisions distinguish between subsequent recoveries and realized losses, providing a different order of operations for each: Subsequent recoveries are added to certificate balances *before* the next distribution (*i.e.*, Write-Up First), whereas realized losses are subtracted from certificate balances *after* the next distribution. These unambiguous PSA provisions are dispositive and must be followed.[6]

A. Definition of Certificate Principal Balance

Under the Governing Agreements, the definition of Certificate Principal Balance includes all subsequent recoveries that are available for distribution on any given distribution date:

> Certificate Principal Balance: . . . [A]s of any Distribution Date, the Initial Certificate Principal Balance of such Certificate plus . . . **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

connection with the underlying mortgage loans have been reached, the principal waterfall requires that all principal payments be used to pay down each class of certificates, in order of seniority, "until the Certificate Principal Balance [of each such class] is reduced to zero." *Id.*

[6] Under New York law, which governs the Settlement Trusts (*see* Settlement Agreement § 7.19), "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Schron v. Troutman Sanders LLP*, 986 N.E.2d 430, 433 (N.Y. 2013) (quotations and citations omitted).

> Section 5.04, and (ii) any Applied Realized Loss Amounts allocated to such Certificate on *previous Distribution Dates*.

BSABS 2005-AQ2, Art. I (Definition of Certificate Principal Balance) (emphasis added).)[7]

From a timing perspective, this definition treats subsequent recoveries differently from principal distributions and Realized Loss Amounts. As indicated in the underlined text of the above definition, principal distributions and Realized Loss Amounts are allocated to (*i.e.*, subtracted from) certificate balances on a delayed basis – namely, only to the extent these distributions were made, or these Realized Loss Amounts were applied, "on previous Distribution Dates."

In contrast, the allocation of subsequent recoveries is subject to no such delay. Instead of limiting the subsequent recovery write-up to subsequent recoveries added *on previous Distribution Dates*, the definition provides for certificate balances to be written up by the amount of "*any* Subsequent Recoveries added to the Current Principal Amount of such Certificates pursuant to Section 5.04(b)." (*Id.*)[8]

Had the drafters of the Governing Agreements intended to delay the writing up of certificate balances on account of subsequent recoveries to a later distribution date, they would have said so explicitly, as they did with regard to principal amounts and realized losses in the same definition. But they did not do so, and this omission is dispositive.

"[W]hen reading contract clauses together," the established contract interpretation principle of *expressio unius est exclusio alterius* prohibits "reading into one clause language

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[7] The Governing Agreement for each of the Trusts listed on Exhibit 2 contains a definition of Certificate Principal Balance (or in some instances, Current Principal Amount, a synonymous term) that is substantially similar to the one quoted in the text above.

[8] In further confirmation of this instruction, as discussed in Point II.B below, §5.04(b) provides for subsequent recoveries to be added to certificate balances without delay – in contrast to the allocation of Realized Losses, which under §5.05(a) is delayed until after the next distribution.

specifically used in other clauses." 28 N.Y. Prac., Contract Law § 10:16 (June 2017); *see also, e.g., A-Pix, Inc. v. SGE Entm't Corp.*, 222 A.D.2d 387, 389, 635 N.Y.S.2d 638, 640 (App. Div. 1st Dep't 1995) ("If the parties had intended to exclude royalties or net revenues received from direct distribution of videos by SGE, they would have used the express language of exclusion as they did in that subdivision (b) which immediately follows (a) in issue herein."); *Sally v. Sally by Magee*, 225 A.D.2d 816, 819, 638 N.Y.S.2d 832, 835 (App. Div. 3rd Dep't 1996) ("Had the parties intended to limit plaintiff's obligation to provide health insurance to a specific number of years, they would have done so, as they did for the hospitalization insurance obligation."). This principle applies with particular force to agreements drafted by sophisticated parties. *See Flag Wharf, Inc. v. Merrill Lynch Capital Corp.*, 40 A.D.3d 506, 507, 836 N.Y.S.2d 406 (App. Div. 1st Dep't 2007) ("Courts will not rewrite contracts that have been negotiated between sophisticated, counseled commercial entities such as Mercann and defendant.").

Accordingly, for any given distribution date, certificate balances must be written up by the amount of any subsequent recoveries available for distribution on that date.

B. Allocation of Realized Losses and Subsequent Recoveries

The provisions of the PSAs addressing the allocation of realized losses and subsequent recoveries further confirm that the Governing Agreements require the Write-Up First Method to be used for subsequent recoveries for the Trusts listed on Exhibit 2. These allocation provisions, like the definition of Certificate Principal Balance, provide for write-downs on account of realized losses to be delayed until after the next distribution. *See* BSABS 2005-AQ2 PSA §5.05(a) ("[a]ll Realized Losses to be allocated to the Certificate Principal Balances of all Classes on any Distribution Date shall be so allocated *after* the actual distributions to be made on

such date as provided above") (emphasis added). In contrast, write-ups on account of subsequent recoveries are not subject to any delay. *See id.* § 5.04(b).[9]

As with the Certificate Principal Balance definition, this omission is dispositive. Had the PSAs' drafters intended subsequent recovery write-ups to be delayed until after the next distribution, they would have said so expressly in § 5.04(b), as they did with respect to realized loss write-downs in §5.05(a). *See, e.g., A-Pix, Inc.*, 222 A.D.2d at 389, 635 N.Y.S.2d at 640.

III. Some Governing Agreements Require Use Of the Pay First Method

In contrast, the Governing Agreements for a minority of the Settlement Trusts – including all of the Trusts listed on Exhibit 3 hereto – require use of the Pay First Method for one of four reasons:

1. Unlike the Governing Agreements discussed in Point II, certain PSAs expressly mandate that the Certificate Principal Balances as of any distribution date be written up to reflect only the Subsequent Recoveries allocated "on previous Distribution Dates." *See, e.g.*, BSABS 2005-SD2 PSA, Art. I (Definition of Certificate Principal Balance). For these Trusts, the Certificate Principal Balances cannot be written up to account for the Settlement Payment on the day it is distributed.

2. Some other PSAs similarly indicate that the Certificate Principal Balance used for distributions on any distribution date will be that of the previous distribution date. *See, e.g.*, JPALT 2007-A1 PSA Art. I (Definition of Certificate Principal Amount). Thus, there can be no write-up for Subsequent Recoveries received since then.

3. Other PSAs state that Certificate Principal Balances as of any distribution date are to be written up to account only for Subsequent Recoveries that have been "distributed." *See, e.g.*,

[9] The Governing Agreement for each of the Trusts listed on Exhibit 2, subject to one exception discussed therein, contains provisions that are substantially similar to Sections 5.04(b) and 5.05(a) quoted above.

JPALT 2006-A5 PSA Art I. (Definition of Certificate Principal Amount). For these trusts too, the Allocable Share must be distributed before the certificate balances can be written up.

4. Finally, some PSAs contain no express provision for writing up subsequent recoveries at all, *see, e.g.*, SAMI Series 2006-AR8 PSA § 6.02 (titled "Allocation of Losses and Subsequent Recoveries on Certificates" but expressly addressing only realized losses), even though any write-up is directed to occur only "pursuant" to such express provisions, *see id.* (Definition of Certificate Principal Balance). As a result, these agreements require use of what amounts to a Pay First Method: For certificate balances to increase due to subsequent recoveries, these recoveries must be treated as negative realized losses – and as discussed above, such losses are not allocated until after the next distribution date. *See id.* § 6.02(d) (realized losses, and thus also subsequent recoveries, "shall be allocated on the Distribution Date in the month following the month in which" they are received, "after giving effect to distributions made on such Distribution Date").[10]

IV. For Any OC Trusts That Are Required to Use the Pay First Method, the Court Should Apply the Governing Agreements' Plain Terms and Direct That Settlement Proceeds be Distributed Pursuant to the Excess Cashflow Waterfall

As just noted, the Governing Agreements for some Trusts require use of the Pay First Method. This will cause certain of these Trusts – the OC Trusts – to be overcollateralized, resulting in a potential "overcollateralization release" and the distribution of a portion of the settlement proceeds pursuant to the excess cashflow waterfall.[11] As the Trustees note, this result

[10] The Governing Agreement for each of the Trusts listed on Exhibit 3 contains provisions that are either identical or substantially similar to those discussed in paragraphs 1, 2, 3 or 4 above.

[11] As explained in the Petition, OC Trusts are trusts that are structured to have an aggregate mortgage loan balance in excess of the aggregate principal balance of all certificates, thereby providing a cushion to protect Certificateholders from losses. (Petition ¶ 25.) The amount by which the aggregate mortgage loan balances exceed the aggregate certificate balances is known as the "overcollateralization amount." *Id.*. Once the overcollateralization amount surpasses the "overcollateralization target," funds in excess of that target amount are

is compelled by the terms of those Trusts' Governing Agreements. *See* Petition ¶ 28 (under the Pay First Method, "any portion of the Settlement Payment (*i.e.*, overcollateralization amount) in excess of the overcollateralization target would constitute overcollateralization release amount and be distributed as excess cashflow.").

The Trustees are correct that the terms of the Governing Agreements dictate this result. Those agreements require the overcollateralization amount to be calculated "[w]ith respect to any Distribution Date." (*See, e.g.*, BSABS 2007-AC2 PSA, Art. I (Definition of Overcollateralization Amount).) The aggregate certificate balance used for the calculation must "tak[e] into account the payment of principal . . . on such Certificates" on that distribution date. (*Id.*)[12] This means that, when the overcollateralization amount is calculated for the distribution date that includes the Settlement Payment distribution, the aggregate certificate balance will be decreased by the amount of the Settlement Payment.[13] Consequently, the overcollateralization amount – the difference between the aggregate (unchanged) mortgage loan balances and the aggregate (lowered) certificate balances – will be raised and may exceed the overcollateralization target amount for a number of OC Trusts. (Petition ¶ 28.) The resulting overcollateralization release amount will be distributed through the excess cashflow waterfall, typically flowing first to Class A certificates to reimburse them for any interest shortfalls and then for unpaid realized loss amounts. (Petition ¶ 30.)

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considered the "overcollateralization release amount" and are distributed as excess cashflow – not to pay down the principal balance of the certificates, but instead to compensate certificates for unpaid realized losses. (Petition ¶ 26.)

[12] The Governing Agreement for each of the Trusts listed on Exhibit 4 contains provisions that are either identical or substantially similar to those quoted in the text above.

[13] Generally, as the Trustees note, "[t]he applicable Governing Agreements provide that in determining the amount of the aggregate certificate principal balances for this calculation, it should be assumed that all principal funds are being applied as principal amount to reduce such balances." (Petition ¶ 28.)

The Trustees do not ask the Court to disregard the overcollateralization provisions of the Governing Agreements. However, the Petition does identify this scenario as an outcome that could have "significant impacts" on the distribution of settlement proceeds (Petition ¶ 31), and the Trustees seek guidance on whether to use the "Pay First Method, the Write-Up First Method, or *a different method* authorized by this Court." (Petition at 34 (¶ 5(a) (Request For Relief)) (emphasis added)). Holders of senior certificates that have not suffered significant losses – and thus would not be entitled to receive excess cashflow that reimburses unpaid realized losses – may ask the Court to rewrite the Governing Agreements to avoid the overcollateralization release. Any such request should be rejected.

No legal basis exists to deviate from the PSAs' unambiguous terms, which are dispositive and must be followed. *Schron*, 986 N.E.2d at 433. As noted above, the definition of overcollateralization amount in the OC Trusts' Governing Agreements states that the aggregate certificate balance used to calculate the overcollateralization amount must "tak[e] into account the payment of principal . . . on such Certificates" on that distribution date. (*See, e.g.*, BSABS 2007-AC2 PSA, Art. I (Definition of Overcollateralization Amount).) The plain meaning of this language is that the aggregate certificate balance must be decreased to account for the forthcoming payment on a particular distribution date, and the overcollateralization amount should be calculated using the lowered balance.

Significantly, the overcollateralization amount definition does not state that the aggregate certificate balance should take into account any write-up that is to occur in the future, after the distribution; it refers only to "the *payment*." (*Id.*) (emphasis added.) Furthermore, increasing the certificate balances prior to the distribution of the Settlement Payment would be inconsistent with the Pay First Method. Nothing in the Governing Agreements permits the Trustees to write

up the certificate balances twice – once before distributing the Settlement Payment, for the purpose of the overcollateralization amount calculation, and a second time after the distribution.

In short, application of the Pay First Method would cause a number of the OC Trusts to be overcollateralized. For any Trusts where the Court requires the use of the Pay First Method, the Court should also clarify for the Trustees that no adjustments should be made to avoid use of the excess cashflow waterfall.

V. The Settlement Agreement Write-Up Instruction Should Be Implemented

Whereas the Settlement Agreement does not dictate the order of operations for writing up and paying the settlement proceeds, it provides a clear *method* for writing up certificate balances. (*See* Settlement Agreement § 3.06(b).) The Settlement Agreement Write-Up Instruction requires the Trustees to:

> 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.

(*Id.*; *see also* Petition ¶ 41.)

Section 3.06(b) is one of a number of instances where the Settlement Agreement expressly overrides conflicting provisions of the Governing Agreements with respect to implementation of the Settlement and treatment of the one-time Settlement Payment. (*See, e.g.*, Settlement Agreement § 3.06(a) (no payment will be due to "residual" bondholders, even if PSAs provide to the contrary); *id.* § 3.06(c) (Settlement Payment will not reduce a Trust's net

losses, regardless of any PSA's terms); *id.* § 3.03 (specified mortgage modifications are "permissible" even if PSAs provide to the contrary).)[14]

Any challenges to the Settlement Agreement's method for writing up bonds are barred by *res judicata*. At the conclusion of the previous Article 77 proceeding, the Court approved the Settlement Agreement after all interested parties had been provided with notice and a full opportunity to object to it. *U.S. Bank Nat. Ass'n et al. v. Federal Home Loan Bank of Boston et al.*, Decision, Index No. 652382/2014 [Doc. No. 594] (N.Y. Sup. Ct. Aug. 12, 2016); *U.S. Bank Nat. Ass'n et al. v. Federal Home Loan Bank of Boston et al.*, Final Order and Judgment, Index No. 652382/2014 [Doc. No. 598] (N.Y. Sup. Ct. Aug. 12, 2016). As a result, *res judicata* bars "not only [] claims actually litigated" in the prior Article 77 litigation, "but also [] claims that could have been raised in the prior litigation." *In re Hunter*, 4 N.Y.3d 260, 269 (N.Y. Ct. App. 2005); *see also In re Bank of New York Mellon*, 56 Misc. 3d 210, 217, 51 N.Y.S.3d 356, 361–62 (N.Y. Sup. Ct. 2017) (holding in identical circumstances that, "[b]ecause TIG had a full and fair opportunity to raise its objection to the settlement agreement's terms in the prior proceeding, TIG's objection in this proceeding is now barred by res judicata."). Any person could have appeared and objected to the Settlement Agreement's write-up terms in the prior Article 77 proceeding, but no one did so. The time to challenge the Settlement Agreement's clear terms is

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[14] As the Petition indicates (at ¶ 42), the Settlement Agreement provides that it "shall not be argued or deemed to constitute[] an amendment of any term of any Governing Agreement" (Settlement Agreement § 7.05), and some parties may ask the Court to read this no-amendment provision broadly to bar any Settlement Agreement modifications to Governing Agreements. But as just noted, such a reading would conflict with, and render without effect, the various Settlement Agreement provisions that unequivocally override inconsistent PSA provisions – a result contrary to basic canons of contract interpretation. *See Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, Nat'l Ass'n v. Nomura Credit & Capital, Inc.*, No. 39, 2017 WL 6327110, at *3 (N.Y. Ct. App. Dec. 12, 2017) ("[A] contract must be construed in a manner which gives effect to each and every part, so as not to render any provision 'meaningless or without force or effect.'").

The proper reading of § 7.05 – the interpretation that harmonizes it with the Settlement Agreement's other provisions – is that it merely confirms that the Agreement did not effect a formal amendment of the PSAs. *See, e.g.*, BSABS 2005-AQ2 §11.01 (specifying formal process for amending PSA).

thus long past, and the Trustees must follow the Settlement Agreement Write-up Instruction, rather than any conflicting write-up instructions in the Governing Agreements, such as provisions limiting subsequent recovery write-ups to subordinate classes. (*See* Petition ¶ 45.)[15]

REQUEST FOR RELIEF

For the foregoing reasons, Respondent Tilden Park respectfully requests that the Court:

a) find that the Governing Agreements govern the order of operations for the distribution of the Trusts' Allocable Shares to Certificateholders;

b) find that, for each of the Trusts listed on Exhibit 2 hereto, the Governing Agreement's terms require use of the Write-Up First Method;

c) find that, for each of the Trusts listed on Exhibit 3 hereto, the Governing Agreement's terms require use of the Pay First Method;

d) for each OC Trust that the Court determines should use the Pay First Method, require that Trust to distribute funds pursuant to the excess cashflow waterfall to the extent required by the Trust's Governing Agreement;

e) direct the Trustees to implement the method of writing up certificate balances set forth in Section 3.06(b) of the Settlement Agreement for all Trusts, including

[15] For the same reasons, Settlement Agreement § 3.06(b) overrides the Retired Class Provision contained in some Governing Agreements, to the extent the two conflict. It bears note, though, that these two provisions may not conflict at all. As the Petition observes, "[n]othing on the face of the Retired Class Provision or in the applicable Governing Agreements appears to expressly preclude Zero Balance Classes from being written up in connection with subsequent recoveries." (Petition ¶ 57.) Moreover, under the PSAs, certificates are still "outstanding" unless they are not merely "retired" but "canceled." *See, e.g.*, BSABS 2005-AQ2 PSA Art. I (Definition of "Outstanding" certificates); *cf. id.* §§ 6.02(a) (providing for "cancel[lation]" and "destr[uction]" of certificates upon surrender to the trustee for exchange), 6.03 ("cancel[lation]" of lost, mutilated, or destroyed certificates). Because the Retired Class Provisions say nothing about "canceling" bonds with zero balances, *cf. id.* § 5.04(a), such certificates are still outstanding and should have their balances increased in the same way as any other certificate.

In contrast, nothing in the Settlement Agreement precludes the application of any PSA's Class A Redirection Provision to redirect funds from one group of certificates to another.

writing up any classes with applied realized losses, even if their Governing Agreements include Subordinate Class Only or Retired Class Provisions;

f) direct the Trustees to respect Class A Redirection Provisions wherever they are applicable; and

g) grant Respondent such other relief as the Court deems just and proper.

New York, New York
January 29, 2018

RESPECTFULLY SUBMITTED,

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