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

In the matter of the application of	:	
WELLS FARGO BANK, NATIONAL ASSOCIATION, et al.,	:	Index No. 657387/2017
	:	Friedman, J.
Petitioners,	:	
	:	**BRIEF STATEMENT**
For Judicial Instructions under CPLR Article 77 on the Administration and Distribution of a Settlement Payment.	:	**OF CERTAIN INSTITUTIONAL INVESTORS CONCERNING THE PETITION**

Pursuant to the Court's December 19, 2017 Order to Show Cause (Docket No. 30) and January 22, 2018 Clarifying Order (Docket No. 53), the investors identified below (the "Institutional Investors") submit this brief statement addressing the issues raised in the Petition concerning the distribution of approximately $3.4 billion in settlement funds to 270 JPMorgan RMBS trusts.[1]

The Institutional Investors collectively hold, or act as authorized investment advisors for underlying funds and accounts that hold, over 950 unique certificates issued by 249 of the 270 trusts at issue in this proceeding—or 92 per cent of the trusts at issue here. The aggregate current unpaid balance of the certificates held by the Institutional Investors exceeds $11.8 billion.

A list of the 249 trusts in which the Institutional Investors hold certificates is attached hereto as Exhibit 1. The Institutional Investors submit this brief only with respect to the 249 trusts identified in Exhibit 1.

STANDARD OF REVIEW

Article 77 Proceedings are summary in nature. In an Article 77 proceeding, the Court must examine the Trustee's Petition (as well as any evidence filed), after which it "shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised."[2]

[1] Unless otherwise defined herein, all capitalized terms have the meaning given to them in the Petition.

[2] N.Y.C.P.L.R. 409.

BRIEF STATEMENT OF THE INSTITUTIONAL INVESTORS

I. Introduction.

All (or nearly all) of the alleged ambiguities and uncertainties cited by the Trustees' Petition are (and should be) resolved by the plain terms of the Settlement Agreement, all objections to which were "overruled" or "deemed waived" by this Court's Final Order and Judgment in the prior Article 77 Proceeding concerning the JPMorgan settlement ("JPM I").[3] In JPM I, this Court held that "[e]ach of the Trustees acted within the bounds of its discretion, reasonably, and in good faith with respect to its evaluation and acceptance of the Settlement Agreement, concerning the Accepting Trusts."[4] The Court's Final Order and Judgment bars all certificateholders from raising objections to the Trustees' implementation of the Settlement Agreement, "so long as such implementation is in accordance with the Settlement Agreement."[5]

Since the judgment in JPM I is final, and since the terms of the Settlement Agreement are clear and unambiguous, it is puzzling that the Trustees filed this action. Rather than debate that issue, the Institutional Investors file this response to lay out a road map that they hope will lead to a swift, consensual resolution that will permit distribution of the settlement funds to the investors entitled to receive them.

The procedure set out below was followed in a similar, follow-on Article 77 proceeding instituted by the Trustee concerning the distribution of $8.5 billion in settlement proceeds among 530 Countrywide trusts (Countrywide II).[6] In Countrywide II, Justice Scarpulla was able to swiftly

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[3] *See* Final Order and Judgment, *In the matter of the application of U.S. Bank National Association, et al.*, Index No. 652382-2014, Docket No. 598 (August 23, 2016), at ¶¶ 3-4.

[4] *Id.*

[5] *Id.* at ¶ 5.

[6] *See In the Matter of the Application of The Bank of New York Mellon*, Index. No. 150973-2016.

order the distribution of funds for 512 of the 530 trusts at issue, because there was no disagreement among investors with holdings in them concerning how they should be distributed.[7] The Institutional Investors respectfully submit that this proceeding should—as in Countrywide II—be narrowed to only those trusts as to which investors with relevant holdings disagree concerning the distribution issues raised in the Petition, with funds in all other, uncontroverted trusts being distributed immediately. The Institutional Investors join in the position of AIG that investors who lack holdings in trusts lack standing to dispute the distribution methodology for such trusts.

Consistent with this approach, and as contemplated by the Court's Clarifying Order, this filing is not intended to serve as an exhaustive merits brief on each issue raised in the Petition; instead, it is submitted as a brief statement of the positions the Institutional Investors intend to take concerning the issues raised, in order to assist the Court in identifying trusts for which there is not disagreement among investors with holdings in such trusts. Once trusts have been identified where investors with holdings disagree on the distribution methodology, the Institutional Investors will seek a more fulsome opportunity to brief the merits of each area of disagreement.

II. The Trustees should employ the Pay First Method because it is required by Settlement Agreement (Exhibit D Trusts).

The Petition attempts to suggest the Trustees and Paying Agents are uncertain whether the settlement funds should be distributed before the certificate balances are written up (the Pay First Method), or whether the settlement funds should be distributed after the certificate balances are written up (the Write-Up First Method).[8] There is no uncertainty: Paragraphs 3.06(a) and 3.06(b)

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[7] *See* Partial Severance Order and Partial Final Judgment, *In the Matter of the Application of The Bank of New York Mellon*, Index. No. 150973-2016, Docket No. 77 (May 12, 2016).

[8] *See* Petition at ¶¶ 21-23.

of the Settlement Agreement require the applicable Trustees and Paying Agents to employ the Pay First Method.

Paragraph 3.06(a) requires the Trustees or Paying Agents to "distribute each Settlement Trust's Allocable share" and further provides that the Allocable Share should be distributed "in accordance with the distribution provisions of the Governing Agreements" as though it were a subsequent recovery relating to principal proceeds. The next paragraph, Paragraph 3.06(b), states that "***[a]fter*** the distribution of the Allocable Share to a Settlement Trust pursuant to Subsection 3.06(a)," the Trustees or Paying Agents should write-up the certificate balances by the amount of such subsequent recoveries.[9]

There is no doubt the Settlement Agreement requires the Pay First Method, because the last sentence of Paragraph 3.06(b) (i.e., the "write-up" paragraph) states plainly that:

> For the avoidance of doubt, this Subsection 3.06(b) is intended ***only*** to increase the balance of the related classes of securities, as provided for herein, and ***shall not affect the distribution of the Settlement Payment provided for in Subsection 3.06(a).***

This final sentence confirms that the Settlement Agreement prohibits the certificate write-up contemplated in Paragraph 3.06(b) from altering or affecting the distribution of the Settlement Payment under Paragraph 3.06(a). The Write-Up First Method would, by definition, "affect the distribution" because it would increase certificate principal balances before the payment is made, thus shifting which certificates receive what portion of the Settlement Payment. Accordingly, employing the Write-Up First method would violate the Settlement Agreement.

[9] All emphasis is added, unless stated otherwise.

III. The Trustees and Paying Agents Should *Not* Recognize "Temporary" Overcollateralization *During* the Distribution (Exhibit D OC Trusts).

Certain of the Exhibit D trusts at issue in this proceeding have an overcollateralization structure (the "Exhibit D OC Trusts"), whereby the trusts' original collateral balances exceeded the trusts' aggregate original certificate balances. Overcollateralization is a form of "credit enhancement" meant to protect the senior certificates from the risk of loss. Because of the significant collateral losses the trusts have suffered since their original issuance, however, the original overcollateralization in the Exhibit D OC Trusts has been substantially or completely exhausted, leaving the trusts generally *not* overcollateralized.

The Petition suggests that the Pay First Method "may cause the [Exhibit D] OC Trusts to appear to be temporarily overcollateralized" at some moment *during* the distribution itself.[10] This concern is unfounded. The Settlement Agreement requires the Trustees and Paying Agents to distribute the Settlement Payment "in accordance with the distribution provisions of the Governing Agreements" as though it was a Subsequent Recovery relating to principal proceeds.[11] The Exhibit D OC Trusts are not overcollateralized before the Settlement Payment is made, and they will not be overcollateralized after the Settlement Payment is made. The Trustees point to no language in the Settlement Agreement or Governing Agreements that requires or permits the Trustees to recognize "temporary" overcollateralization at some moment *during* the distribution of the settlement payment.

To the contrary, each of the Governing Agreements for the Exhibit D OC Trusts requires the Trustees or Paying Agents to calculate overcollateralization after giving effect to, or taking

[10] Petition at ¶ 28.

[11] Settlement Agreement at 3.06(a).

into account, the ***full*** distribution of principal proceeds to be distributed in a given distribution. Thus, there is no "temporary" overcollateralization permitted at some point ***during*** the distribution.

To assist the Court, the Institutional Investors have attached a compendium of trust language with respect to the Exhibit D OC Trusts.[12] The underlying Governing Agreements from which this compendium was extracted have been submitted by the Trustees to the Court in electronic form.[13] Though there are four variants in the definitions of overcollateralization in the Exhibit D OC Trusts, each variant requires the Trustees or Paying Agents to assess the level of overcollateralization only after giving effect to the entire distribution to be made—***not*** at some moment during the distribution itself, as the Petition suggests.[14]

Therefore, in employing the Pay First Method for the Exhibit D OC Trusts, the Trustees and Paying Agents should be instructed to assess overcollateralization only as of the ***end*** of the distribution—that is, after giving effect to both the write-down and write-up of certificate balances

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[12] A summary table of such language is attached as Exhibit A to the Affidavit of David M. Sheeren (the "Sheeren Affidavit"), filed herewith. Excerpts from each of the Exhibit D OC Trusts is attached as Exhibit B to the Sheeren Affidavit.

[13] *See* Petition at 3 n.8.

[14] As shown in Exhibits A and B to the Sheeren Affidavit, the definitions of overcollateralization in the Governing Agreements for the Exhibit D OC Trusts generally provide that overcollateralization is calculated as the trust's aggregate collateral balance, minus the trust's aggregate certificate balances "after taking into account" or "giving effect to" the payment of principal. *See, e.g.*, BSABS 2006-HE5 PSA, § 1.01 ("Overcollateralization Amount: With respect to any Distribution Date, the excess, if any, of the aggregate Stated Principal Balance of the Mortgage Loans as of the last day of the related Due Period (after giving effect to scheduled payments of principal due during the related Due Period, to the extent received or advanced, and unscheduled collections of principal received during the related Prepayment Period, and after reduction for Realized Losses incurred during the related Due Period) over the aggregate Certificate Principal Balance of the Certificates (other than the Class CE Certificates and Class P Certificates) on such Distribution Date (after taking into account the payment of principal . . . on such Certificates)."

In each of the Exhibit D OC Trusts, therefore, the Trustees and Paying Agents must take into account not only the write-down of the certificate balances by the amount of the Settlement Payment, but also the write-up of the certificate balances by the same amount—resulting in zero net impact on the level of overcollateralization in the Exhibit D OC Trusts as a result of the Settlement Payment.

by the amount of the Settlement Payment—and not in the middle of the distribution, as such mid-course adjustments have no basis in the Governing Agreements.[15]

Accordingly, the Institutional Investors respectfully request that the Court instruct the Trustees and Paying Agents to distribute the Settlement Payment to the Exhibit D OC Trusts in a manner that does not lead to "temporary" overcollateralization during the distribution itself.

IV. In the event of an actual conflict between the Settlement Agreement and the Governing Agreements, the Trustees and Paying Agents should follow the Governing Agreements (Exhibit E, F, G, and H Trusts).

With respect to the remaining issues identified in the Petition—including (a) how to perform the certificate balance "write-up" (Exhibit E and F Trusts); (b) how to address certain trusts with certain zero-balance certificates (Exhibit G Trusts); and (c) whether to characterize the settlement payment as a payment of interest, as opposed to a payment of principal in several trusts (Exhibit H Trusts), the Institutional Investors state the following:

The Settlement Agreement requires the Trustees and Paying Agents to distribute the settlement payment in accordance with the distribution provisions of the Governing Agreements, as though it were a subsequent recovery relating to principal proceeds.[16] The Settlement Agreement further requires that the certificate write-up be performed in reverse order of previously allocated realized losses.[17]

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[15] This approach is also consistent with Countrywide II, in which BNY Mellon was directed, by agreement among the parties, to distribute the Settlement Payment for the 512 Initial Release Trusts in a manner that avoided the appearance of "temporary" overcollateralization during the distribution itself. *See* Partial Severance Order and Partial Final Judgment, *In the Matter of the Application of The Bank of New York Mellon*, Index. No. 150973-2016, Docket No. 77, at pp. 7-8 (directing BNY Mellon to "account[] for both the pay down of certificate balances and the write up of certificate balances in an amount equal to such trust's Allocable Share" and further ordering BNY Mellon "not [to] measure such Overcollateralization Amount during the distribution between the pay down and write up steps as described in paragraph 26 of the Verified Petition").

[16] Settlement Agreement ¶ 3.06(a).

[17] *Id.* at ¶ 3.06(b).

In the event of an actual conflict between the Settlement Agreement and the Governing Agreements, however, the Settlement Agreement provides that it "is not intended to, and shall not be argued or deemed to constitute, an amendment of any term of any Governing Agreement."[18] Therefore, in the event of an actual conflict between the Settlement Agreement and the Governing Agreements, the Governing Agreements should control. The Trustees and Paying Agents have, for over a decade, received and distributed subsequent recoveries without incident; they can and should do so now, without further delay.

Furthermore, with respect to the Exhibit G Trusts, the Institutional Investors anticipate that the distribution of the Settlement Payment according to the Pay First Method may, at least partially, moot some of the issues raised by the Trustees and Paying Agents.

In any event, the Institutional Investors' hope is that the issues raised with respect to the Exhibit E, F, G, and H trusts can be resolved expeditiously and by agreement among investors with holdings in those trusts. In the event that disagreement on these issues cannot be avoided with respect to some of the trusts identified in Exhibits, E, F, G, or H, then the Institutional Investors will seek a fulsome opportunity to submit briefing on the merits of each area of such disagreement.

CONCLUSION

In sum, with respect to the Exhibit D Trusts, the Institutional Investors respectfully submit that the Trustees and Paying Agents should be instructed to employ the Pay First Methodology, and that they should further be instructed, with respect to the Exhibit D OC Trusts, to distribute

[18] *Id.* at ¶ 7.05.

the Settlement Payment in a manner that avoids "temporary" overcollateralization *during* the distribution.

With respect to the remaining issues raised in the Petition, in the event of an actual conflict between the Settlement Agreement and the Governing Agreements, the Governing Agreements should control. The Trustees and Paying Agents have, for over a decade, received and distributed subsequent recoveries without incident; they can and should do so now, without further delay.

Nonetheless, the Institutional Investors' hope is to reach agreement with other investors who have demonstrated standing in the trusts listed in Exhibits E, F, G, and H.

For any trusts where a disagreement among investors with holdings in such trusts remains, the Institutional Investors respectfully request a fulsome opportunity to submit merits briefing on such areas of disagreement.

Dated: New York, New York
January 29, 2018

WARNER PARTNERS, P.C.

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