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),	:	INDEX NO. 657387/2017
Petitioners,	:	
For Judicial Instructions under CPLR Article 77 on the Administration and Distribution of a Settlement Payment.	:	

STRATEGOS CAPITAL MANAGEMENT, LLC'S
STATEMENT OF GROUNDS FOR APPEARANCE

Respondent Strategos Capital Management, LLC ("Strategos"), by and through its undersigned counsel, respectfully submits this Statement of Grounds for Appearance ("Statement") in response to the Petition dated December 15, 2017 (the "Petition") filed by Petitioners 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 U.S.A., N.A., and Deutsche Bank National Trust Company.

Investment funds managed by Strategos own certificates issued by Bear Stearns Asset Backed Securities I Trust 2005-HE9 ("BSABS 2005-HE9"), a Settlement Trust[1] that is subject to the Settlement Agreement dated as of November 15, 2013 and modified as of July 29, 2014, by and among JPMorgan Chase & Co. and its direct and indirect subsidiaries and a group of

[1] Capitalized terms not defined herein shall have the meaning ascribed to them in the Petition.

institutional investors (the "Settlement Agreement"). BSABS 2005-HE9 is also a Settlement Trust that is the subject of the Petition. U.S. Bank National Association is the securitization trustee of BSABS 2005-HE9 (the "Trustee"). Accordingly, Strategos is an Interested Person under the Court's Order, dated December 15, 2017, and, as an Interested Person, intends on participating in this proceeding and at the Final Hearing with regard to the issues raised by the Petition concerning the distribution of the Settlement Payments to certificateholders of BSABS 2005-HE9 ("Certificateholders"). Its preliminary grounds for seeking to participate in this proceeding and at the Final Hearing are set forth below.

The Petition states that certain Settlement Trusts, including BSABS 2005-HE9, appear to have realized loss allocation methods that differ from the subsequent recovery write-up methods, which may cause the Settlement Agreement Write-Up Instruction to be "different than the subsequent recovery write-up instructions in the Governing Agreements." (Pet. at 24). To the extent the Settlement Agreement Write-Up Instructions differ from the subsequent recovery provisions in the PSA, Strategos respectfully requests that the Court direct the Trustee to use the subsequent recovery methodology that the parties to the PSA agreed upon and that most clearly reflects the intent of the parties.

The Petition also seeks guidance with regard to how the Petitioners should interpret the Retired Class Provisions in the Settlement Trusts, which generally provide that certificate classes whose principal balance have been reduced to zero "'*will no longer be entitled to distributions . . .*'" (Pet. at 24 (emphasis in original)).

As an initial matter, Strategos contends that classes of certificates whose principal balance has been reduced to zero only because of increasing amounts of realized losses should not be considered "Retired Classes." That designation should be construed to be limited to those

certificate classes whose principal balance has been reduced to zero because of the repayment of principal in the ordinary course. For the Trustee to treat classes of certificates whose principal balance has been reduced to zero only because of realized losses as "retired" and not allow them to receive the benefits of the Settlement Agreement is simply inconsistent with the provisions of the PSA and the intent of the parties to the PSA and the Settlement Agreement.

In addition to the illogic of treating classes of certificates that were never paid off as "retired", the PSA itself supports Strategos' position. For example, the PSA provisions that state that a certificate whose principal balance has been reduced to zero should be "retired" are only contained within the cash distribution sections of the PSA (Section 5.04(a)) and therefore were intended to be applied only to certificates whose principal balance has been reduced to zero as a result of actual principal distributions. Notably, within the provisions of the PSA regarding the allocation of realized losses (Section 5.05), there is no corresponding provision to "retire" certificates whose principal balance has been reduced to zero.

In fact, if the parties to the PSA intended to preclude classes whose principal balances had been reduced to zero from ever receiving write-ups as a result of subsequent recoveries, Section 5.04(b) of the PSA, which governs to what extent, and how, subsequent recoveries will write-up certificate classes, would have explicitly precluded that from occurring. It does not. On the contrary, the plain and ordinary reading of Section 5.04(b) illustrates that the PSA contemplates that subsequent recoveries should indeed be applied to write-up multiple certificate classes with zero balances.

Specifically, Section 5.04(b) states, among other things, that "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" and that the "amount of

any remaining Subsequent Recoveries will be applied to increase the Certificate Principal Balance of the Class of Certificates *with the next highest payment priority, up to the amount of such Realized Losses previously allocated to that Class of Certificates pursuant to Section 5.05, and so on*." (emphasis added). A plain reading of Section 5.04(b) requires the Trustee to apply Subsequent Recoveries to a class if it is a class with "the highest payment priority" or the "next highest payment priority . . . and so on."

The fact that Section 5.04(b) contemplates that there could be more than one class of certificates with a zero balance further supports the contention that the parties to the PSA never intended for classes whose certificate balance was reduced to zero due to allocation of realized losses to be "retired" classes. Indeed, if they truly intended for such classes to be considered "retired," *there would have been no need for the PSA to refer to more than one class of certificates that could be "written up,"* as all classes junior to the most senior class with a principal write down would have had zero balances and been "retired." In sum, if classes with zero balances due to realized losses were intended to be viewed as "retired," Section 5.04(b) would not have stated that subsequent recoveries should be applied to classes with the "highest payment priority . . . and so on."

Strategos' construction of the PSA is buttressed by the market's assessment of the classes of certificates whose principal balance have been reduced to zero due to the allocation of losses (as opposed to the actual payment of principal in the ordinary course). Notably, the certificate classes in BSABS 2005-HE9 and in other securitization trusts that have been reduced to zero due to realized losses continue to be actively traded on the secondary market, thereby indicating that the market agrees that classes that have been reduced to zero due to increasing realized losses are not "retired" but are in fact eligible for write-ups and distributions in the event of subsequent

recoveries like this Settlement Agreement. If that were not the case, those certificate classes would not have any economic value. The Trustee and the other parties to this transaction have been well aware of the active trading of these classes and have not taken any steps to curtail those transactions or to correct any apparent misperception by the market with respect to such certificate classes.

Moreover, PSA Section 10.02 "Final Distribution on the Certificates" requires that "[i]f on any Determination Date, … (ii) the Trustee determines that a Class of Certificates shall be retired after a final distribution on such Class, *the Trustee shall notify the Certificateholders (and the Certificate Insurer with respect to the Class II-A-2 Certificates) 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*." (*emphasis added*). This provision clearly infers that "retirement" is a result of a final cash distribution (as opposed to a final reduction to zero balance as a result of allocation of losses). In addition, Strategos is unaware of the Trustee having sent out any such required notice with respect to its certificates, which would further demonstrate that the Trustee has not previously viewed these certificates as "retired."

In the alternative, in the event the Court concludes that certificate classes whose principal balances have been reduced to zero due to the allocation of realized losses are properly construed as "retired," such classes should nonetheless be entitled to be written up as there is nothing in the PSA that expressly precludes "retired" classes from benefitting from the Settlement Agreement. In fact, Petitioners concede that "[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."

Moreover, because the Settlement Agreement is intended to compensate Certificateholders for past losses that should have been remedied earlier, not permitting "retired" certificate classes that have been written down to zero because of those losses to receive the benefits of the Settlement Agreement deprives Certificateholders that have been harmed the most of a remedy. For instance, if the Trustee were to disallow certificate classes that are "retired" due to realized losses from receiving write-ups, it could create the absurd situation where classes of certificates that have been written down to one percent of their principal balances, and thus not yet zero, are entitled to receive the benefits of the Settlement Agreement, but classes of certificates that have, as a result of the alleged breaches, incurred larger losses and had their principal balances reduced to zero, are deprived of any of the benefits of the Settlement Agreement. Depriving these certificate classes with the benefit that the Settlement Agreement was intended to provide may ultimately result in recoveries flowing to the equity certificate class, which should not receive those to the detriment of the Certificateholders.

CONCLUSION

For the foregoing reasons, Strategos respectfully requests the Court to instruct the Trustee to (i) use the subsequent recovery methodology that the parties to the PSA agreed upon, which most clearly reflects the intent of the parties; and (ii) distribute the Settlement Payment and write up, as necessary, to the certificate classes in BSABS 2005-HE9 whose principal balances were reduced to zero because of realized losses.

DATED: New York, New York
January 29, 2018

Respectfully submitted,

HOFFNER PLLC

By: /s/ David S. Hoffner
David S. Hoffner
800 Third Avenue, 13th Floor
New York, New York 10022
Tel: 212-471-6203
Attorneys for Respondent
Strategos Capital Management, LLC