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

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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>Petitioner,<br><br>For Judicial Instructions under CPLR Article 77 on the Distribution of a Settlement Payment. | Index No. 657387/2017<br><br>IAS Part 60<br><br>Hon. Marcy S. Friedman |

# MERITS BRIEF OF TILDEN PARK

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## INTRODUCTION[1]

In the face of the parties' fourteen conflicting and often internally inconsistent Answers, the Court must craft a reasoned framework for resolving the issues raised by the Petition.[2] Many Respondents invite the Court to do nothing of the sort. Some claim (or assume) that the Governing Agreements control the distribution of the Settlement Payment and the write-up of certificate balances in all respects. Others look to the Settlement Agreement to determine all such issues. Still other Respondents rely upon the Governing Agreements for some issues and the Settlement Agreement for others, without offering any clear rationale for these choices.

There is, however, one straightforward and consistent approach, and it is mandated by law: ***The Settlement Agreement controls all distribution and write-up issues to the extent it purports to do so.*** For some issues, the Settlement Agreement establishes a uniform rule for all Settlement Trusts, regardless of the terms of any Governing Agreement. For other issues, the Settlement Agreement instead incorporates the terms of the Governing Agreements, requiring the parties and Court to look to each Governing Agreement and proceed on a trust-by-trust basis.

The prior Article 77 proceeding approved this hybrid approach for good reason. The global settlement, resolving tens of thousands of repurchase claims held by hundreds of trusts, presented the settling parties and the Court with a situation that the Governing Agreements did not anticipate or comprehensively address. To address the issues raised by the $4.5 billion settlement payment, the parties agreed to supplement the distribution and write-up rules set forth in hundreds of Governing Agreements with a small number of uniform rules, applicable only to

[1] 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 ("Tilden Park") has coordinated with other Respondents that seek similar relief in whole or in part. As a result of these efforts, four other parties have adopted and incorporated by reference some or all of the arguments made in this brief: D.E. Shaw Refraction Portfolios, L.L.C. has adopted all of Tilden Park's arguments; Strategos Capital Management, LLC has adopted Points I, III.B.1 and III.B.2; and DW Partners LP and Ellington Management Group, LLC have adopted Points I and III.A.2.

[2] Capitalized, undefined terms herein have the meanings attributed to them in the Petition.

the global settlement and not otherwise affecting the trusts' future distributions.

The Court approved the Settlement Agreement after an international notice campaign, full opportunity for investors to object, and years of litigation. Pursuant to the Court's judgment, all objections that were not raised, including any argument that these rules are unlawful "amendments" of the Governing Agreements, are barred by *res judicata*.

Accordingly, the Settlement Agreement is the final word on the distribution and write-up of the Settlement Payment – both when it varies the Governing Agreements' mechanics and when it harnesses components of them. The Settlement Agreement's plain terms dictate the following outcomes:

- Order of Operations: The Settlement Agreement delegates this issue to the Governing Agreements, by employing the distribution provisions of those agreements applicable to "subsequent recoveries." As a result, a trust-by-trust determination of whether to use the Write-Up First or the Pay First Method is required. Some Governing Agreements clearly require Write-Up First, while others plainly require Pay First.

- Write-Up of Senior Classes: The Settlement Agreement contains an express write-up provision that controls which classes receive these benefits of the Settlement Agreement and preempts any potentially conflicting provisions of the Governing Agreements. Its plain language requires writing up senior classes that have experienced losses, rather than limiting write-ups to subordinate classes.

- Write-Up of Zero-Balance Certificates: The Settlement Agreement's write-up provision applies to all classes except REMIC residual interests. Because zero-balance certificates are not excluded from this directive, they are entitled to be written up regardless of any conflicting Governing Agreement provisions.[3]

- Redirection Provisions: Nothing in the Settlement Agreement limits the application of the redirection provisions contained in some Governing Agreements. These provisions should therefore be enforced as written.[4]

The Court should direct the Trustees to distribute the Settlement Payment and write up

[3] In addition, the specific write-up order required by the Settlement Agreement (i.e., "the reverse order of previously allocated losses") should be followed, including for Trusts listed on Exhibit F, regardless of any contrary provisions in the Governing Agreements.

[4] Tilden Park takes no position on one issue raised by the Petition: the treatment of Allocable Shares as interest collections or principal collections for the trusts listed in Exhibit H.

class certificate balances in accordance with these rules. Moreover, even if the Court were to conclude that the Governing Agreements control all of the issues noted above, a proper reading of those agreements nonetheless compels the same results.

## STATEMENT OF FACTS

### I. The $4.5 Billion J.P. Morgan Settlement Agreement

In 2014, J.P. Morgan entered into the Settlement Agreement, agreeing to pay up to $4.5 billion to resolve potential claims with respect to all liquidated and unliquidated loans held by 330 RMBS trusts. Dkt. 3 ("Settlement Agmt.") at 1; *see also In re U.S. Bank Nat'l Ass'n*, No. 652382/2014, 2016 WL 9110399, at *1 (Sup. Ct. N.Y. Cty. Aug. 12, 2016) ("*JPM I*").

In addition to addressing J.P. Morgan's rights and responsibilities and the allocation of the Settlement Payment among the participating trusts, the Settlement Agreement contains a number of provisions addressing the distribution of each trust's Allocable Share to the trust's investors and the corresponding write-up of certificate balances.

The Settlement Agreement provided for some of these issues to be determined on a trust-by-trust basis. Most notably, the Settlement Agreement provided that each trust's Allocable Share would be "distribut[ed] to Investors ***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 . . . ." Settlement Agmt. §3.06(a) (emphasis added).

For other issues, the Settlement Agreement established a uniform rule, applicable to all Settlement Trusts regardless of the provisions of any trust's Governing Agreement. Most relevant here, the Settlement Agreement provides specific instructions for writing up certificate balances to account for the Settlement Payment. Section 3.06(b) directs Trustees to apply each Trust's Allocable Share "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." Settlement Agmt. §3.06(b).

Other provisions of the Settlement Agreement similarly instruct the Trustees to apply distribution or write-up rules that differ from those in the Governing Agreements. For example:

- If, under the Governing Agreement for any Trust, "distribution of a Settlement Trust's Allocable Share would become payable to a class of REMIC residual interests," the Settlement Agreement instructs the Trustees to instead "maintain[]" the funds "in the collection or distribution account for distribution on the next distribution date." Settlement Agmt. §3.06(a).

- Regardless of any trust's Governing Agreement, the Settlement Payment "[i]n no event shall . . . be deemed to reduce the Net Losses experienced" by that trust, *id.* §3.06(c), nor shall it "be deemed to reverse the occurrence of any transaction-related trigger in any Settlement Trust," *id.* §3.07.

- Loan modifications performed "prior or subsequent to" the date the Trustees accept the Settlement Agreement "shall be deemed permissible loan modifications under the Governing Agreements." *Id.* §3.03.

## II. The Court Approves the Settlement Agreement, Overruling All Objections

The seven Trustees that were parties to the Settlement Agreement filed a proceeding under CPLR Article 77 seeking its judicial approval. *JPM I* at *1. That proceeding was thoroughly litigated. The Court "directed an international notice program to provide notice of the Proposed Settlement to investors in the affected Trusts." Several groups of investors appeared and objected to approval of the Settlement. *Id.* at *2 (recounting procedural history). The parties conducted discovery, and the Court then held four days of evidentiary hearings to consider the Settlement. *Id.* After this extensive judicial process lasting over two years, the Court approved the Settlement Agreement in December 2016. *Id.* at *16. This Court overruled all objections that had been raised, and ruled that "any objections that have not been raised . . .

***are waived***." Final Order and Judgment, *In re U.S. Bank Nat'l Ass'n*, No. 652382/2014, Dkt. 598, at 3 (Sup. Ct. N.Y. Cty. Aug. 23, 2016) (emphasis added).

## ARGUMENT

The Settlement Agreement's terms, which are *res judicata*, compel two clear outcomes. First, the ***order of operations*** by which the Trustees make payments and write up certificate balances is a matter left to each trust's Governing Agreement, to be determined "in accordance with the distribution provisions of the Governing Agreements . . . as though such Allocable Share was a 'subsequent recovery' . . . ." Settlement Agmt. §3.06(a). Some trusts' Governing Agreements provide for paying certificateholders first, while others provide for writing up certificate balances first. Those terms are unambiguous, commercially reasonable, and fair.

Second, by contrast, the Settlement Agreement establishes a uniform rule to govern the ***method*** by which the Trustees are to increase certificates' balances: It directs the Trustees to write up ***all*** certificates with losses (including senior bonds and bonds with zero balances) in the reverse order of previously-allocated losses. Settlement Agmt. §3.06(b). In both cases, the Court should direct the Trustees to apply the relevant agreements as written.

### I. The Settlement Agreement Must Be Enforced As Written

#### A. The Settlement Agreement Is *Res Judicata*

Any challenge to the Settlement Agreement's rules for handling Settlement funds is barred by *res judicata*. Under basic preclusion principles, a "party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter." *In re Hunter*, 4 N.Y.3d 260, 269 (2005). In particular, for "judicially settled accounting decrees" like instruction proceedings, the "decree is conclusive and binding with respect to all issues raised and as against all persons over whom [the court] obtained jurisdiction." *Id.* at 270; *see also In re Morgan Guar. Tr. Co.*, 28 N.Y.2d 155, 161-64 (1971) (in

Article 77 proceeding, granting preclusive effect to prior judgment). Preclusion covers all "issues that were decided as well as those that ***could have been raised*** in the accounting." *Hunter*, 4 N.Y.3d at 270 (emphasis added); *see also In re Bank of N.Y. Mellon*, 56 Misc. 3d 210, 217 (Sup. Ct. N.Y. Cty. 2017). Simply put, "a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again." *Hunter*, 4 N.Y.3d at 269.

Those principles now preclude any objection to the Settlement Agreement's terms. This Court exercised jurisdiction over "all Certificateholders" in the prior Article 77 proceeding. Final Order and Judgment, *supra*, at 3. Each certificateholder had notice of the Article 77 case and a chance to appear and argue that the Trustees should apply Settlement funds in a particular way. *JPM I*, at *8-12. Indeed, at least one party did object in the prior Article 77 proceeding, arguing that the Distribution Methodology in the Settlement Agreement "was inconsistent" with certain Governing Agreements and "fail[ed] to effectuate the purpose of the Settlement Agreement." *JPM I*, at *26. The Court overruled those objections, finding that it was not an abuse of the Trustees' discretion to accept the Settlement Agreement's distribution methodology (*i.e.*, treating Settlement Funds as Subsequent Recoveries) and that the Trustees' acceptance of the distribution methodology was not inconsistent with the expectations of investors. *Id.* at *32. Pursuant to the Court's Final Order and Judgment in that prior proceeding, "any objections that have not been raised are deemed waived." Moreover, "Certificateholders . . . are barred from asserting claims against any Trustee with respect to such Trustee's . . . implementation of the Settlement Agreement, so long as such implementation is in accordance with the terms of the Settlement Agreement" (notably, not "the Settlement Agreement and the Governing Agreements"). *In re U.S. Bank* Final Judgment and Order at ¶¶ 3, 5.

The second Countrywide Article 77 proceeding is precisely on point and demonstrates

that *res judicata* applies here. *In re Bank of N.Y. Mellon*, 56 Misc. 3d at 217. After the court in that case had already approved the settlement agreement, the trustee brought a second Article 77 petition to resolve investor disputes over payment methods. *See id.* at 213. One certificateholder, TIG, objected to the payment of the settlement funds as a "subsequent recovery." *Id.*at 215. The court found TIG's objection precluded: "Because 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 [second] proceeding is now barred by *res judicata*." *Id.* at 217. This Court should follow the Countrywide case and bar challenges to the Settlement Agreement's instructions for distributing Settlement funds and writing up certificate balances.

### B. The Settlement Agreement's Unambiguous Distribution and Write-Up Provisions Must Be Enforced as Written

Because this Court's judgment approving the Settlement Agreement is preclusive, the unambiguous text of the Settlement Agreement controls. Where, as here, "a contract is complete, clear and unambiguous, it must be enforced according to its plain meaning." *Littleton Constr. Ltd. v. Huber Constr., Inc.*, 27 N.Y.3d 1081, 1082 (2016). This rule "applies with even greater force [in] commercial contract[s]" – like the Settlement Agreement – that were "negotiated at arm's length by sophisticated, counseled businesspeople." *Bank of N.Y. Mellon v. WMC Mortg., LLC*, 136 A.D.3d 1, 1 (1st Dep't 2015). "Courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." *Id.* at 6 (citations omitted).

The Settlement Agreement's distribution and write-up provisions plainly adopt a hybrid approach, establishing a trust-by-trust approach for some issues and uniform rules for others. Thus, Section 3.06(a) mandates a trust-by-trust approach to order-of-operations issues. *See* Point II.A below. In contrast, Section 3.06(b) requires the Trustees to apply a uniform write-up

method, writing up the certificate balances of ***all*** classes (other than REMIC residual classes) to which losses have been allocated, including senior classes and classes of zero-balance certificates. *See* Points III.A and III.B below. Other Settlement Agreement provisions establish uniform rules to govern a variety of other distribution and write-up issues. *See* pp. 3-4 above. These unambiguous directives must be followed.

### C. Section 7.05 Does Not Nullify the Settlement Agreement's Distribution and Write-Up Rules

Certain Respondents ask the Court to require the Trustees to follow the Governing Agreements' distribution and write-up rules in all instances, even when the Settlement Agreement expressly supplies a different rule. *See, e.g.,* Dkt. 136 (Institutional Investors Answer) at 7-8; Dkt. 165 (Nover Answer) at 7, 9. These Respondents rely on Section 7.05 of the Settlement Agreement, which states that the Agreement "is not intended to, and shall not be argued or deemed to constitute, an amendment of any term of any Governing Agreement." *Id.*

This creative reading of Section 7.05 is defeated by the Settlement Agreement's plain text, as well as by fundamental principles of contract interpretation. As noted, clause after clause of the Settlement Agreement differs from the Governing Agreements' distribution and write-up rules, creating specific rules that apply regardless of what any Governing Agreement may provide. *See* pp. 3-4 above. Section 7.05 does not purport to nullify these substantive Settlement Agreement provisions. Quite the opposite: By providing that the Settlement Agreement "is not intended to, and shall not be argued or deemed to constitute, an ***amendment*** to any term of any Governing Agreement," Section 7.05 insulates the Settlement Agreement from a legal challenge on the ground that it amended the Governing Agreements but failed to follow the formalities for amending. *See, e.g.*, Vinogradov Affirmation ("Vinogradov Aff.") Ex. A (BSABS 2005-AQ2 PSA § 11.01) (setting forth PSA amendment requirements, including majority vote and opinion

of counsel). By directing that the Settlement Agreement not be "argued or deemed" to be an amendment, Section 7.05 anticipates and protects against any confusion that the formal amendment process was necessary where the Settlement Agreement differed from the PSAs. It makes clear the parties to the Settlement Agreement did not intend to amend the PSAs, but instead opted to seek approval from the Article 77 court for the Settlement Agreement in a judgment with preclusive effect – an approach that made eminent sense for this unanticipated, one-time mass settlement, which left the existing PSA mechanics for all subsequent payments unaltered.[5]

A contrary construction of Section 7.05 not only ignores the Settlement Agreement's plain terms; it also flies in the face of basic rules of contractual interpretation. ***First***, "[i]t is well settled that a contract must be read as a whole to give effect and meaning to every term . . . . Indeed, [a] contract should be interpreted in a way [that] reconciles all [of] its provisions, if possible." *O'Brien & Gere, Inc. of N. Am. v. G.M. McCrossin, Inc.*, 148 A.D.3d 1804, 1805 (4th Dep't 2017) (quotation omitted); *see also Ruttenberg v. Davidge Data Sys. Corp.*, 215 A.D.2d 191, 196 (1st Dep't 1995) (similar). To read Section 7.05 as prohibiting ***any*** variation from the Governing Agreements would nullify the numerous provisions of the Settlement Agreement that

[5] To the extent any party believed this approach was improper, *i.e.*, that particular Settlement Agreement provisions were unlawful to the extent they conflicted with or "amended" the Governing Agreements, the time and place to raise that objection was in the first Article 77 proceeding. Not having been raised in that case, the objection has been waived and is barred by *res judicata*. *See* Point I.A above.

In any event, any such objection would have lacked merit. The Settlement Agreement created distribution and write-up rules for the $4.5 billion global settlement payment, an asset not anticipated or addressed by the Governing Agreements. This settlement payment was a one-time event, and the Settlement Agreement did not change PSA procedures for ordinary course distributions and write-ups going forward. As courts have recognized, RMBS settlements are different from PSA amendments and do not require amendments to implement settlement terms that depart from normal PSA payment processes. For example, in the *ResCap* bankruptcy, investors objected to a settlement between the trustees and FGIC on the ground that "the FGIC Trustees cannot amend the terms of the Governing Agreements to provide for a commutation because the Governing Agreements strictly proscribe alterations by means of amendment or entry into a supplemental indenture." *In re Residential Capital, LLC,* 497 B.R. 720, 731 (Bankr. S.D.N.Y. 2013). The court rejected that argument and approved the settlement, holding that "the Settlement Agreement is not an amendment to the Governing Agreements; it is a resolution of a claim against an insurer in an insolvency proceeding." *Id.* at 748.

plainly displace the Governing Agreements' distribution and write-up rules. Those Settlement Agreement provisions are unambiguous; the only way to harmonize them with Section 7.05 is to reject this construction and instead adopt Section 7.05's plain meaning.

***Second***, reading Section 7.05 to bar the Settlement Agreement from ever diverging from the Governing Agreements would also flout the rule that, "in general, '[a] specific provision will not be set aside in favor of a catchall clause.'" *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 2018 WL 3129387, at *6 (N.Y. June 27, 2018) (citations omitted); *accord Vornado 40 E. 66th St. Member LLC v. Krizia SPA*, 135 A.D.3d 649, 649 (1st Dep't 2016) (if "there is 'an inconsistency between a specific provision and a general provision of a contract . . . the specific provision controls'") (quoting *Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46 (1956)). As noted, multiple specific provisions of the Settlement Agreement establish uniform rules which displace the Governing Agreements' terms. Because each of those terms is more specific than Section 7.05's general amendment provisions, each controls in the event of conflict.[6]

## II. The Governing Agreements Control the Order of Operations

### A. The Settlement Agreement Leaves the Order of Operations to the Governing Agreements

Section 3.06(a) requires "distribution" of the Settlement payment on a trust-by-trust basis "***in accordance with the distribution provisions of the Governing Agreements*** . . . as though such Allocable Share was a 'subsequent recovery'. . . ." Settlement Agmt. § 3.06(a) (emphasis added). These "distribution provisions" of the Governing Agreements necessarily include the provisions governing the order of operations because they expressly incorporate definitions that dictate the order of operations.

[6] Notwithstanding the controlling nature of the Settlement Agreement's provisions, there is no actual conflict between those provisions and the Governing Agreements. As demonstrated below, the uniform terms of the Settlement Agreement relevant to the Petition are in harmony with the Governing Agreements and are essential to ensure proper treatment of the Settlement Payment.

For instance, the BSABS 2005-AQ2 trust provides for distributions to various classes "until the Certificate Principal Balance thereof is reduced to zero." Vinogradov Aff. Ex. A (BSABS 2005-AQ2 PSA §5.04(a)). To implement this instruction, the trustee must determine what the Certificate Principal Balance for each class is. And to do that, the trustee must refer to its definition, which prescribes the order of operations. As demonstrated in Point II.C below, the Certificate Principal Balance definition in BSABS 2005-AQ2, and all of the other trusts listed in *Exhibit 2* of Tilden Park's answer, requires the Write-Up First Method. By contrast, as shown in Point II.D below, the definition of Certificate Principal Balance (or a similar term) in the Governing Agreements for trusts listed in *Exhibit 3* of Tilden Park's answer requires the trustees to use the Pay First Method. Thus, the distribution provisions of the Governing Agreements and the order of operations they follow are inextricably intertwined. Distribution of the Settlement Payment in accordance with the Governing Agreements' distribution provisions, as required by the Settlement Agreement, necessarily requires following the order of operations dictated by the Governing Agreements.

The Petition confirms the Trustees' understanding that the Settlement Agreement does not specify any particular order of operations but instead assigns treatment of that issue to the Governing Agreements. The Trustees acknowledge that the Settlement Agreement has "left unaddressed" whether to "apply the Settlement Payment Write-Up after distribution of the Settlement Payment to Certificateholders" or beforehand. Petition ¶21. They further acknowledge that the Governing Agreements' order of operations should control: Where "Governing Agreements . . . clearly specify a particular order of operations . . . [the Trustees] are required and intend to follow the provisions of the Governing Agreements." *Id.* ¶23. As key disinterested parties to both contracts, the Trustees' intent to follow the Governing Agreements

wherever they believed the Governing Agreements were clear – without requesting instruction from this Court – demonstrates that those agreements should control the order of operations here.

### B. The Arguments of Some Respondents That the Settlement Agreement Requires Either the Write-Up First or the Pay First Method Are Unfounded

Resisting the Settlement Agreement's plain text, two groups of respondents claim that the Settlement Agreement does in fact dictate an order of operations – each to its own benefit. Tellingly, these groups reach diametrically opposed conclusions about which order of operations the Settlement Agreement purportedly imposes. Both are wrong.

Nover and Ambac assert that the Trustees should write up bonds first because Section 3.06(b) of the Settlement Agreement "states that a write-up is to be applied '[a]fter the distribution of the Allocable Share ***to a Settlement Trust.***'" Dkt. 165 (Nover) at 4; Dkt. 76 (Ambac) at 6-7 (similar). Because Section 3.06(a) first requires distribution to a Settlement Trust's distribution or collection account, and then a further distribution to investors, they reason, write-ups "after the distribution . . . to a Settlement Trust['s]" collection account, Settlement Agmt. § 3.06(b), must come before payments that ***also*** occur after distribution to the collection account, Dkt. 165 (Nover) at 3; Dkt. 76 (Ambac) at 6-7. But that reasoning makes no sense: ***Both*** write-ups and payments necessarily come after payment of funds into a trust's collection account, because both occur on a distribution date that is required by the Governing Agreements to follow the date of the deposit of the funds. Such timing in no way implies that one of those functions comes before the other. Oddly, Nover admits as much by conceding that the "Settlement Agreement does not specify whether the Settlement Payment Write-Up should occur either after distribution of the Settlement Payment to: (a) Certificateholders [] or (b) the Petitioners [] but ***before*** distribution to Certificateholders []." Dkt. 165 (Nover) at 2.

Pointing to the exact same provision that Nover and Ambac say requires Write-Up First,

AIG and the Institutional Investors claim the Settlement Agreement requires Pay First (Dkt. 141 (AIG) at 2-3; Dkt. 136 (Institutional Investors) at 3-4.) Because Section 3.06(b) provides for writing up bonds "[a]fter the distribution of the Allocable Share ***to a Settlement Trust*** pursuant to Subsection 3.06(a)" (Settlement Agmt. §3.06(b) (emphasis added)), they argue that the bonds must be written up after payment ***to investors***. Dkt. 136 at 4; *see also* Dkt. 141 at 2-3. But that argument ignores the Settlement Agreement's plain text. Section 3.06(a) distinguishes between "[distribution] ***into the related Trust's collection or distribution account***" and "***further distribution to investors***." Settlement Agmt. § 3.06(a) (emphasis added). Had the drafters of the Settlement Agreement wished to indicate that the write-up could occur only after the payment ***to investors*****,** they knew exactly how to say that – but they chose not to.

AIG and the Institutional Investors also seek to turn a clarifying sentence, included in the Settlement Agreement only for the avoidance of doubt, into a mandate requiring Pay First. Dkt. 141 (AIG) at 3; Dkt. 136 (Institutional Investors) at 4. They rely on Section 3.06(b), which states that "***[f]or the avoidance of doubt***, this Subsection 3.06(b) is intended only to increase the balances 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)." Dkt. 141 (AIG) at 3 (citing Settlement Agmt. § 3.06(b)); Dkt. 136 (Institutional Investors) at 4 (same) (emphasis added). AIG and the Institutional Investors argue that this sentence requires paying first because writing up balances "would, by definition, 'affect the distribution' " of the Settlement Payment and violate Section 3.06(b). Dkt. 136 (Institutional Investors) at 4; Dkt. 141 (AIG) at 3. But the plain meaning of this sentence is that the write-up priorities spelled out in Section 3.06(b) are, for the avoidance of doubt, simply not intended to displace the distribution priorities set forth in the Governing Agreements. In other words, this language clarifies that, by setting forth a specific

waterfall for the write-up of certificates, the Settlement Agreement does not intend that the same waterfall be used for the distribution of the Settlement Payment.

In addition, this clarification also disclaims affecting "the distribution . . . ***provided for in Subsection 3.06(a)***." Settlement Agmt. § 3.06(b) (emphasis added). As explained in Section II.A *supra*, the distribution "provided for in Subsection 3.06(a)" incorporates the order of operations. Therefore, the priority dictated in Section 3.06(b) of ***how*** the Settlement funds should be applied to write up bonds does not "affect the distribution" terms "provided for in Subsection 3.06(a)" of ***when*** the bonds would be written up. AIG and the Institutional Investors have it backwards: It is ***their*** position (Pay First in every instance) that would "affect the distribution" under Subsection 3.06(a), thus violating Subsection 3.06(b) in those instances where the Pay First Method would contravene the order of operations provided for in the Governing Agreements. The Court should thus reject arguments that the Settlement Agreement always requires either Pay First or Write-Up First, and hold that, as the Petition indicates, the order of operations is left to the Governing Agreements.

### C. Some Governing Agreements Require the Write-Up First Method

The Governing Agreements of a majority of the trusts involved here unambiguously require that certificate balances be written up before certificates are paid down. In particular, the trusts listed in Exhibit 2 to Tilden Park's answer[7] require Write-Up First by distinguishing between "subsequent recoveries," which are added to bond balances ***before*** a distribution, and

[7] The unsevered Exhibit 2 trusts are: BALTA 2005-1, BALTA 2005-4, BALTA 2005-5, BALTA 2006-3, BALTA 2006-4, BALTA 2006-6, BALTA 2006-8, BSAAT 2007-1, BSABS 2005-AC1, BSABS 2005-AC2, BSABS 2005-AC6, BSABS 2005-AQ2, BSABS 2005-HE2, BSABS 2005-HE9, BSABS 2005-HE11, BSABS 2006-AC1, BSABS 2006-AC3, BSABS 2006-AQ1, BSABS 2006-HE6, BSABS 2006-HE10, BSABS 2006-PC1, BSABS 2007-AQ1, BSABS 2007-HE2, BSARM 2005-10, BSMF 2006-AR1, BSMF 2006-AR2, BSMF 2006-AR3, BSMF 2006-AR5, BSMF 2007-AR1, BSMF 2007-AR2, BSMF 2007-AR3, BSMF 2007-AR4, BSMF 2007-AR5, CFLX 2007-M1, GPMF 2005-AR1, GPMF 2005-AR2, GPMF 2005-AR3, GPMF 2005-AR4, GPMF 2006-AR1, GPMF 2006-AR2, GPMF 2006-AR3, LUM 2005-1, SAMI 2005-AR1, SAMI 2005-AR4, SAMI 2006-AR3 (Groups II and III), SAMI 2006-AR5, SAMI 2007-AR2 (Group II), and SAMI 2007-AR4.

"realized losses," which are applied to decrease balances ***after*** a distribution. Because the Settlement Agreement requires that the Settlement Payment be distributed as though it were a "subsequent recovery," Settlement Agmt. § 3.06(a); *JPM I*, at *16, the payment amount must be used to increase balances before distributions are made.

For each of the Exhibit 2 trusts, the definition of "Certificate Principal Balance" includes "***[a]s of any distribution date*** . . . any Subsequent Recoveries added . . . pursuant to Section 5.04(b)." *See, e.g.*, Vinogradov Aff. Ex. A (BSABS 2005-AQ2 PSA Art. I) (definition of "Certificate Principal Balance") (emphasis added). Section 5.04(b), in turn, states 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." *Id.* § 5.04(b). As a result, the amount of the Settlement Payment must be applied to write up certificate balances under Section 5.04(b) "as of any distribution date."

By contrast, the definition of "Certificate Principal Balance" in the Exhibit 2 Trusts requires that ***other*** elements of the certificate balance be applied on a delayed basis. When calculating Certificate Principal Balance, the PSA instructs the Trustee to subtract "***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***." Vinogradov Aff. Ex. A (BSABS 2005-AQ2 PSA Art. I) (definition of "Certificate Principal Balance") (emphasis added). As a result, principal distributions and realized loss amounts are deducted from certificate balances only if they occurred "on previous Distribution Dates."

The contrast between writing up balances "as of any distribution date," but accounting only for distributions made "on previous distribution dates," establishes that certificate balances

should be written up before distributions are made. Had the PSAs' drafters intended to delay writing up balances until after distributions, they could have implemented that delay explicitly as they did for principal distributions and realized losses. They did exactly that for a number of Pay First trusts cited in the next section; that they did not do so for these trusts is dispositive. *Expressio unius* compels the conclusion that the Exhibit 2 trusts are Write-Up First. *See A-Pix, Inc. v. SGE Entm't Corp.*, 222 A.D.2d 387, 389 (1st Dep't 1995); *Sally v. Sally*, 225 A.D.2d 816, 819 (3d Dep't 1995).

The Exhibit 2 trusts' treatment of "Realized Losses" further confirms the Write-Up First Method. The Governing Agreement for each of these trusts provides: "All 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." *See, e.g.,* Vinogradov Aff. Ex. A (BSABS 2005-AQ2 § 5.05(a)) (emphasis added). The drafters of these PSAs could have also provided for certificate balances to be written up "after the actual distributions to be made." That they did not do so confirms, pursuant to *expressio unius*, that certificate balances should be written up first, not "after the actual distributions." *See A-Pix, Inc.*, 222 A.D.2d at 389; *Sally*, 225 A.D.2d at 819. As a result, the Court should hold that the Exhibit 2 trusts – and any other Settlement Trusts with a similar definition of "Certificate Principal Balance" and "Realized Losses" – require use of the Write-Up First Method.

**D. Other Governing Agreements Require the Pay First Method**

The Governing Agreements for each of the Trusts listed in Exhibit 3 to Tilden Park's answer require the Trustee to pay certificateholders before writing up certificate balances. The Court should direct the Trustees to follow those Governing Agreements' plain text, including for

trusts that require a portion of the Settlement funds to be distributed as "excess cashflow."[8]

Each of the Exhibit 3 trusts require the Pay First Method in one of four separate ways:

1. One group of trusts[9] uses the definition of "Certificate Principal Balance" to require Pay First in a mirror image of the Write-Up First trusts described in Exhibit 2. Specifically, the "Certificate Principal Balance" "[a]s to any Certificate . . . as of any Distribution Date" reflects "any Subsequent Recoveries allocated to such Class ***on previous Distribution Dates*** pursuant to Section 5.04(a)." *See, e.g.*, Vinogradov Aff. Ex. B (BSABS 2005-SD2 PSA) art. I (definition of "Certificate Principal Balance"). For these trusts, the Certificate Principal Balance cannot be written up to account for a subsequent recovery on the day that it is distributed. As a result, a subsequent recovery must be paid before writing up any certificate balances.

2. A second group[10] of trusts requires paying first by instructing the Trustees to use the previous month's certificate balances to make distributions on the Distribution Date. For example, the JPALT 2007-A1 trust's definition of "Certificate Principal Amount" requires that "Certificate Principal Amounts shall be determined as of the close of business ***of the immediately preceding Distribution Date,*** after giving effect to all distributions made on such date." *See, e.g.*, Vinogradov Aff. Ex. C (JPALT 2007-A1 PSA) Art. I (emphasis added). Because the Trustee must use the prior month's certificate balances, no write-up occurring on the current Distribution Date can be considered. The write-up for the current Distribution Date will only be considered for the following month's distribution. Therefore, the order of operations can

[8] The Pay First OC Trusts listed in Exhibit 4 of Tilden Park's answer should distribute funds as excess cashflow to the extent required by the plain terms of their Governing Agreements.

[9] BSABS 2005-SD2, BSABS 2005-SD3, BSABS 2006-SD2, BSABS 2006-SD3, BSABS 2006-SD4, BSABS 2007-SD1.

[10] JPALT 2007-A1, JPMMT 2005-A5, JPMMT 2005-A6, JPMMT 2005-A7, and JPMMT 2006-A3.

only be pay first, write up second – the payment must be made without considering that write-up.

3. Other Governing Agreements require paying first by specifying that write-ups can only account for subsequent recoveries that have already been distributed.[11] For example, the JPALT 2006-A5 PSA requires that "the aggregate Certificate Principal Amount of each class of Certificates to which Realized Losses have been allocated shall be increased . . . ***by the amount of Subsequent Recoveries distributed as principal*** to any related class of Certificates . . . ." Vinogradov Aff. Ex. D (JPALT 2006-A5 PSA) art. I at 18 (emphasis added). Because subsequent recoveries cannot be used to write up funds until they have been first "distributed as principal," the Trustees are required to distribute subsequent recoveries before writing up bonds.

4. Finally, some PSAs effectively require a Pay First Method by omitting any explicit method for writing up certificate balances for subsequent recoveries.[12] For example, although the SAMI 2006-AR8 PSA provides for writing up balances "pursuant to" Section 6.02, Vinogradov Aff. Ex. E (SAMI 2006-AR8 PSA) art. I at 7 (defining "Certificate Principal Balance"), Section 6.02 provides no instruction to write up subsequent recoveries at all, *id.* § 6.02. Thus, the only way to account for the effect of the Settlement Payment on certificate balances is as a "negative realized loss" – and realized losses are "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." *Id.* § 6.02(d) (emphasis added). As a result, the need to treat subsequent recoveries as negative realized losses – and the requirement to allocate realized losses after distributions – requires that the Settlement payment, as a subsequent recovery, be paid first to certificateholders before being used to increase certificate balances.

[11] JPALT 2006-A5, JPMMT 2006-S2, and JPMMT 2007-S2.

[12] BSABS 2007-AC2, SAMI 2005-AR8, SAMI 2006-AR1, SAMI 2006-AR2, SAMI 2006-AR3 (Group I), SAMI 2006-AR4, SAMI 2006-AR8, SAMI 2007-AR1, SAMI 2007-AR2 (Group I), and SAMI 2007-AR3.

## III. The Settlement Agreement Imposes A Uniform Write-Up Methodology

While the Settlement Agreement refers the ***timing*** for writing up balances (*i.e.*, the order of operations) to the Governing Agreements, it explicitly specifies a clear ***method*** for those write-ups. Settlement Agmt. § 3.06(b). Section 3.06(b) dictates that "***each class of securities*** (other than any class of REMIC residual interests) to which such losses have been previously allocated" is to be written up "in the reverse order of previously allocated losses." *Id.* (emphasis added). The unequivocal command to write up "***each class***" requires that all bonds, including senior bonds and classes with zero balances, be written up despite any contrary provisions in the Governing Agreements.[13] The Court should direct the Trustees to apply the Settlement Agreement's write-up method as written.

### A. Senior Bonds With Losses Should be Written Up

#### 1. The Settlement Agreement Requires Senior Bonds To Be Written Up

As just noted, the Settlement Agreement directs that "each class of securities (other than any class of REMIC residual interests)" that has sustained losses be written up in the reverse order of those losses. Settlement Agmt. §3.06(b). Senior bonds are not excluded from this directive. Under the doctrine of *expressio unius*, the exclusion of REMIC residual interests but not senior bonds makes clear that senior bonds that have sustained losses are entitled to receive a write-up. *See Quadrant Structured Prod. Co. Vertin*, 23 N.Y.3d 549, 560 (2014) ("[I]f parties to a contract omit terms—particularly, terms that are readily found in other, similar contracts—the inescapable conclusion is that the parties intended the omission").

A number of investors ask the Court to disregard Section 3.06(b) in favor of provisions of

[13] In addition, the specific write-up order required by Section 3.06(b) – that classes be written up "in the reverse order of previously allocated losses" – should be followed regardless of any contrary provisions in the Governing Agreements, such as provisions calling for write-ups to occur in the order of payment priority or, alternatively, on a pro rata basis. *See* Petition, Exhibit F.

some Governing Agreements saying that, in some circumstances, only "subordinate" certificates should be written up. Applying Section 3.06(b), these investors claim, would "amend" the Governing Agreements, purportedly violating Section 7.05. Dkt. 165 (Nover) at 7-9; Dkt. 136 (Institutional Investors) at 7-8; Dkt. 144 (GMO) at 2-3.

As explained above, however, Section 7.05 does not purport to void Settlement Agreement provisions that conflict with particular Governing Agreements. *See* Point I.C above. To the extent any conflict exists between Section 7.05 and the Settlement Agreement's specific substantive provisions, such as Section 3.06(b), that conflict must be resolved in a manner that harmonizes these provisions (rather than nullifying the substantive provisions) and that favors specific provisions (such as Section 3.06(b)) over the more general Section 7.05. *See id.* Objections based on any such conflict are barred by *res judicata*. *See* Point I.A above.

**2. The Governing Agreements' Write-Up Provisions Do Not Apply By Their Terms**

In any event, there is no conflict between the Settlement Agreement's write-up instructions and the clauses in certain Governing Agreements calling for the write-up of only "subordinate" bonds. That is because these Governing Agreement write-up instructions apply only to Subsequent Recoveries ***that are received by the Master Servicer and reduce the Realized Loss for a specific loan***.[14]

These write-up instructions do not apply here, because the Settlement Payment will not be received by the Master Servicer and will not reduce the Realized Loss for any loans. For a

[14] For example, the BALTA 2006-8 PSA states that "***[i]f***, 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 Group I Certificates with the highest payment priority to which Applied Realized Loss Amounts have been allocated . . . ." *See* Vinogradov Aff. Ex. G (BALTA 2006-8 PSA) §6.03 (emphasis added). As noted below, the PSA further provides that a loan's Realized Loss is reduced only to the extent the Master Servicer has received subsequent recoveries with respect to that loan.

The Governing Agreements of all of the trusts held by Tilden Park that are listed on Exhibit E to the Petition contain substantially identical provisions.

loan's Realized Loss to be reduced, the relevant PSAs provide, the Master Servicer must have received Subsequent Recoveries with respect to that particular loan. *See, e.g.*, Vinogradov Aff. Ex. F (BALTA 2006-8 PSA art. I at 21) ("[T]o the extent the Master Servicer receives Subsequent Recoveries ***with respect to any Mortgage Loan***, the amount of the Realized Loss ***with respect to that Mortgage Loan*** will be reduced . . . .") (emphasis added).[15] The Settlement Payment does not satisfy these two requirements:

- The Settlement Payment is not something that the "Master Servicer receives." Rather, J.P. Morgan Chase sends funds directly to the Trustees and makes "distribution . . . the sole responsibility of the Accepting Trustees." Settlement Agmt. §3.01. The Master Servicer has no involvement in the flow of funds. *Id.*

- The Settlement Payment also will not be received "with respect to any Mortgage Loan." Rather, it is a compromise payment covering the entirety of each trust, and is not referable to any specific or identifiable mortgage loan. *See* Settlement Agmt. § 7.05. Because Realized Losses are defined at the loan level, *see, e.g.*, Vinogradov Aff. Ex. F (BALTA 2006-8 PSA Art. I) (defining "Realized Loss" "as to any Liquidated Mortgage Loan"), it is not even clear that the Settlement Payment *could* be used to reduce Realized Losses. The Governing Agreements provide no method for allocating any loss reduction with respect to the lump-sum Settlement Payment among the various loans and loan groups in a trust, whether *pro rata*, in the order losses were incurred, or by any other method.

Because the Settlement Payment is ***not*** a Subsequent Recovery that reduces the amount of a Realized Loss, the write-up clauses in the PSAs do not come into play.

Further, while the Settlement Agreement requires distribution of the Settlement Payment as though it were a Subsequent Recovery, it does so without permitting any corresponding reduction of *aggregate* Realized Loss for the trusts' loan collateral. On the contrary, the Settlement Agreement defines the *aggregate* loan losses at the trust level as "Net Losses" and clarifies in Section 3.06(c) that Net Losses shall *not* be deemed reduced by the arrival of the Settlement

[15] The Governing Agreements of all of the trusts held by Tilden Park that are listed on Exhibit E to the Petition contain substantially similar provisions. While some of these agreements use a term such as "Servicer" instead of "Master Servicer," this variation has no impact on Tilden Park's arguments.

Payment.[16] [17]

Thus, Realized Losses are not reduced by the Settlement Payment, and the PSAs do not require writing up only subordinate certificates. Accordingly, there is no conflict between the PSAs and the Settlement Agreement's requirement to write up "each class" of bonds in the reverse order of losses.

### B. Certificates With Zero Balances Should Be Written Up

#### 1. The Settlement Agreement Requires Certificates With Zero Balances To Be Written Up

Despite so-called "Retired Class Provisions" in certain Governing Agreements – stating that certificates with zero balances are "retired" and "no longer . . . entitled to distributions" (Pet.¶¶53-56) – the Settlement Agreement requires bonds with zero balances to be written up. As noted above, the Settlement Agreement directs that "each class of securities (other than any class of REMIC residual interests)" that has sustained losses be written up in reverse order of those losses. Settlement Agmt. §3.06(b). Section 3.06(b) draws no distinction between zero-balance bonds and other bonds entitled to a write-up. The exclusion of REMIC residual interests but not zero-balance bonds from this provision makes clear, under *expressio unius*, that zero-balance bonds that have sustained losses are entitled to be written up. *See Quadrant*, 23 N.Y.3d at 560.[18]

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[16] Section 3.06(c) provides that, "[i]n no event shall the deposit or distribution of any amount hereunder into any Settlement Trust be deemed to reduce the Net Losses experienced by such Settlement Trust." Settlement Agmt. §3.06(c). "Net Losses," in turn, are defined as "the amount of losses with respect to the Mortgage Loans held by such Trust that have been incurred and are estimated to be incurred from such Trust's inception to its expected termination date." *Id.* §1.16.

[17] While extrinsic evidence is unnecessary because the language of the Governing Agreements and the Settlement Agreement is unambiguous, it bears note that trustees administering the J.P. Morgan RMBS Settlement have ***not*** in fact reduced the aggregate Realized Losses reported upon receipt of settlement payments in settling trusts' remittance reports. *See* Vinogradov Aff. Ex. H.

[18] Several Respondents contend that allowing write-ups for zero-balance classes would improperly amend the Governing Agreements. *See* Dkt. 78 (HBK) at 13-14; Dkt. 202 (Prophet & Poetic) at 5-6; Dkt. 136 (Institutional Investors) at 7-8. This argument misconstrues the Settlement Agreement, as explained in Point I.C above. It also

### 2. The Governing Agreements' Retired Class Provisions Do Not Prohibit Write-Ups For Zero-Balance Certificates

Even if the Settlement Agreement did not override the Retired Class Provisions, zero balance certificates would nevertheless be written up because the plain text of the Retired Class Provisions does not prohibit ***writing up*** such certificates. Rather, as just noted, these provisions merely state that certificates are deemed "retired," and are "no longer . . . entitled to ***distributions***," when their balance is zero. As the Trustees have observed (Petition ¶ 57), nothing in these provisions, or anywhere else in the Governing Agreements, says that such certificates may not be written up on account of Subsequent Recoveries. Moreover, "[i]f the certificate principal balances of such classes are written up, they would then no longer have balances of zero," and consequently they would be entitled to resume receiving distributions. *Id.*; *see also, e.g.*, Vinogradov Aff. Ex. G (BSABS 2005-HE9 PSA §5.04(a)(2) (trustee must distribute principal to each successive class "until the Certificate Principal Balance thereof is reduced to zero").

A review of the operative provisions of the Governing Agreements reinforces this conclusion. The Retired Class Provisions are found in a subsection of the Governing Agreements that addresses distributions of interest, principal and excess cashflow, and that makes no mention of Subsequent Recoveries. *See, e.g.*, *id.*. By contrast, the very next subsection of the Governing Agreements is specifically devoted to the treatment of Subsequent Recoveries. *Id.*, § 5.04(b). This subsection provides for *all* classes of certificates to be written up on account of Subsequent Recoveries; there is no exclusion for zero-balance classes.

This conclusion is not altered by the Retired Class Provisions' characterization of zero-balance classes as "retired." The Governing Agreements draw a sharp distinction between

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fails for the independent reason that there is no inconsistency between the Settlement Agreement and the Governing Agreements.

"retired" and "cancelled." A bond that is merely "retired" remains "[o]utstanding" until it has been "cancelled." *See, e.g.*, Vinogradov Aff. Ex. G (BSABS 2005-HE9 PSA Art. I) (definition of "Outstanding": all bonds remain "[o]utstanding" until they are "cancelled," "delivered . . . for cancellation," or exchanged for new bonds). Thus, a "retired" but still "outstanding" bond does not somehow lose all rights; rather, it loses only those rights that the Governing Agreements say it loses – in this case, the right to receive distributions while its balance is zero.[19]

Given the Governing Agreements' lack of ambiguity on this issue, the Court need not resort to extrinsic evidence. But to the extent the Court wishes to consider it, there is plentiful extrinsic evidence that the parties intended no such prohibition:

- The Trustees of trusts in this settlement have not withdrawn zero-balance bonds from circulation. To the contrary, they have continued to report information for those bonds in remittance reports, confirming that the bonds are still outstanding. Vinogradov Aff. Ex. H (remittance report for BSABS 2007-HE6 reporting zero-balance bonds).

- In a recent state-court instruction proceeding concerning BSABS 2007-AQ2, which had a retired-class provision in its PSA, a trustee implementing a substantially similar settlement agreement wrote up bonds with zero balances. Dkt. 159 at 13 n.11; *see also* Dkt. 162 (trust-instruction order).

- Other non-JPM PSAs outside the scope of the Settlement Agreement ***do*** explicitly limit write-ups to bonds that are still "outstanding" and with a nonzero balance. *See, e.g.*, Vinogradov Aff. Ex. I (GE-WMC 2006-1 PSA §§1.01, 4.01(g)) (applying write-ups to bonds with the "Highest Priority," which is defined in turn as the most senior bonds "then ***outstanding with a Certificate Principal Balance greater than zero***") (emphasis added). The absence of such terms in the trusts at issue here shows that write-ups were meant to apply to all bonds, regardless of balance.

[19] HBK's contention that applying the Retired Class Provisions' plain text renders them meaningless (Dkt. 78 at 13) is simply untrue. It overlooks that these provisions bar zero-balance classes from receiving not only distributions of principal, but also distributions of excess cashflow, such as interest shortfall reimbursements and unpaid realized loss reimbursements – that is, distributions that their zero balance would not otherwise bar them from receiving. *See, e.g.*, Vinogradov Aff. Ex. G (BSABS 2005-HE9 PSA §5.04(a)) (specifying, in Retired Class Provision, that zero-balance bonds cannot receive interest-shortfall payments or basis risk shortfall carry forward amounts).

## IV. Class A Redirection Provisions Should Be Enforced

Certain trusts have complex redirection provisions, negotiated by sophisticated parties, which leave no guarantee or expectation that a payment associated with a particular loan group will be paid to its corresponding certificate group. Nothing in the Settlement Agreement limits the application of these provisions. Consequently, redirection provisions in the Governing Agreements should be enforced as written.

## CONCLUSION

The Court should grant the relief requested in Tilden Park's Answer, including: (a) directing the Trustees to apply the order of operations specified in each Trust's Governing Agreement; (b) directing the Trustees to apply the Write-Up First Method for the Trusts specified in Exhibit 2 to Tilden Park's answer; (c) directing the Trustees to apply the Pay First Method for the Trusts specified in Exhibit 3 to Tilden Park's answer, including where that method would result in distributing the Settlement payment as excess cashflow according to the terms of the Governing Agreements; (d) directing the Trustees to write up certificate balances pursuant to Section 3.06(b) of the Settlement Agreement, regardless of any Governing Agreement provisions calling for the write-up of only "subordinate" certificates or for a different write-up order (e.g., payment priority or *pro rata*); (e) directing the Trustees to write up certificates with a zero balance, and to subsequently make payments of principal to such certificates, regardless of any Retired Class Provision; and (f) directing the Trustees to enforce all Class A Redirection Provisions.

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