

# Exhibit 4

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

**In the matter of the MASTR Adjustable Rate  
Mortgages Trust 2006-OA2**

Case Type: Other  
Court File No. 62-tr-cv-18-48

**PETITION OF WELLS FARGO BANK, N.A., AS TRUST ADMINISTRATOR, FOR  
INSTRUCTIONS IN THE ADMINISTRATION OF A CERTAIN TRUST PURSUANT  
TO MINN. STAT. § 501C.0201, et seq.**

TO THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT:

1. Petitioner Wells Fargo Bank, N.A. ("Wells Fargo"), a national banking association, solely in its capacity as Trust Administrator (in such capacity, the "Trust Administrator") under the Pooling and Servicing Agreement dated as of October 1, 2006 (the "PSA") for the MASTR Adjustable Rate Mortgages Trust 2006-OA2 (the "Trust") files this petition (the "Petition") pursuant to Minn. Stat. § 501C.0201, et seq. seeking authorization and instruction concerning the implementation of the Settlement Agreement and the distribution of Subsequent Recoveries, including the Trust Settlement Payment (all as defined below).<sup>1</sup>

2. The Trust is governed by the PSA by and among Mortgage Asset Securitization Transactions, Inc., as Depositor; UBS Real Estate Securities Inc., as Transferor ("UBS RESI"); Wells Fargo, as Master Servicer, Trust Administrator, and Custodian; U.S. Bank National Association, as Trustee (the "Trustee"), and Clayton Fixed Income Services Inc., as Credit Risk

<sup>1</sup> Unless otherwise defined, capitalized terms used herein shall have the meaning ascribed to them in the PSA or the Settlement Agreement (as defined below), as applicable. Unless otherwise specified, section references herein are to the PSA.

Manager. A copy of the PSA (excluding exhibits) is attached as Exhibit 1. Pursuant to the terms of the PSA, the Trust issued mortgage-backed securities (the “Certificates”) that were sold to investors (the “Certificateholders”). Assured Guaranty Municipal Corp. (f/k/a Financial Security Assurance Inc.) serves as Certificate Insurer (“Assured” or the “Certificate Insurer”) for certain Classes of Certificates.

3. As discussed below, certain legal claims belonging to the Trust have been conditionally settled. Upon the satisfaction of certain conditions, this settlement will result in the Trust receiving the Trust Settlement Payment (as defined below). In this proceeding,<sup>2</sup> the Trust Administrator generally seeks authorization and instruction under the relevant Trust documents regarding:

- i. the order of operations to be followed by the Trust Administrator with respect to distribution of the Trust Settlement Payment, including (x) any increases in Certificate Principal Balances of Certificates relating to the Trust and related Certificate Group or subgroup as prescribed by the PSA; (y) any relevant overcollateralization-related calculations and triggers (including without limitation any overcollateralization release amounts) based on Certificate Principal Balances; and (z) any distribution of the Trust Settlement Payment in accordance with the PSA; and
- ii. the extent of any distribution of the Trust Settlement Payment to the Certificate Insurer, including through subrogation, by means of reimbursement, or both.<sup>3</sup>

The Trust Administrator also seeks confirmation that any instructions it receives from the Court regarding distribution matters will apply to the administration of the Trust going forward. The

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<sup>2</sup> The Trust Administrator has filed two additional petitions in this Court seeking authorization and instruction concerning the implementation of the Settlement Agreement in respect of the Allocable Share (defined below) of the Payment for the MASTR Adjustable Rate Mortgages Trust 2007-1 (the “2007-1 Trust”) and the MASTR Adjustable Rate Mortgages Trust 2007-3 (the “2007-3 Trust,” and along with the Trust and the 2007-1 Trust, the “Trusts”).

<sup>3</sup> See Settlement Agreement (defined below and attached as Exhibit 5), § 2(f) (discussing the “Trust Administrator Trust Instruction Proceeding”).

Trust Administrator anticipates that interested parties may take conflicting positions with respect to the matters set forth in this Petition.

## I. JURISDICTION AND VENUE

4. This Court has jurisdiction over this Petition for trust instruction pursuant to Minn. Stat. §§ 501C.0102, 501C.0201, 501C.0202(3) and (4), and 501C.0207(a)(2) because the PSA for the Trust is a corporate trust agreement; the Trust is a corporate trust; the Trustee is located in Minnesota and performs functions of trust administration for the Trust in this state; the Trustee has a corporate trust office in St. Paul, Minnesota; and Wells Fargo, in its capacities as Trust Administrator, Master Servicer, and Custodian, is an interested person. Pursuant to Minn. Stat. § 501C.0201(c), the Petitioner invokes the jurisdiction of this court as an *in rem* proceeding.

## II. BACKGROUND

5. The Certificates represent 100 percent of the beneficial interest in the Mortgage Loans and related assets of the Trust and entitle the Certificateholders, in accordance with the PSA's terms, to certain distributions. Distributions to Certificateholders, along with other amounts owed to various parties, are paid on a specified date each month (each, a "Distribution Date") from Available Funds, which generally consist of interest and principal received in respect of the Mortgage Loans and other assets of the Trust.<sup>4</sup>

6. Assured serves as Certificate Insurer for the Trust's Class 1-A-3, 2-A-3, and 4-A-2 Certificates (the "Insured Certificates")<sup>5</sup> pursuant to the Financial Guaranty Insurance Policy, Policy No. ■■■776-N (the "Policy"). A copy of the Policy is attached hereto as Exhibit 2. Assured

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<sup>4</sup> See PSA § 1.01, definitions of "Available Funds," "Interest Funds," and "Principal Funds."

<sup>5</sup> None of the Classes of Insured Certificates remain outstanding; all have paid off and have no remaining principal balance.

guarantees the payment of certain distributions of interest and principal to Certificateholders of the Insured Certificates under the terms of the PSA and the Policy.

**A. The Trustee's Litigation**

7. In 2012, in accordance with the PSA and at the direction of Assured, the Trustee commenced litigation for the Trust against UBS RESI in the United States District Court for the Southern District of New York, Case No. 1:12-CV-7322 (PKC) and styled *U.S. Bank National Ass'n, solely in its capacity as Trustee of the MASTR Adjustable Rate Mortgages Trust 2006-OA2, et al. v. UBS Real Estate Securities, Inc.* (the "Putback Action"). The Trustee alleged that UBS RESI breached representations and warranties under the PSA with respect to the Mortgage Loans.<sup>6</sup>

**1. Prior Correspondence from Assured Related to the Putback Action**

8. On May 6, 2013, Assured terminated its participation in the Putback Action via a letter to the Trustee. On May 16, 2013, Assured sent the Trustee a second letter (the "Assured 2013 Letter") stating:

[Assured] reiterates its direction to the Trustee to cease pursuing claims on behalf of [Assured] and to exclude from any award and/or settlement of the [Putback Action] any amounts owed to [Assured] as Certificate Insurer or in its capacity as a subrogated holder.

A copy of the Assured 2013 Letter is attached as Exhibit 3.

9. On May 20, 2013, the Trustee notified Certificateholders that Assured and UBS RESI had entered into a settlement agreement with respect to Assured's claims against UBS RESI in connection with the Trust and advised the Trustee that Assured should be excluded from any award and/or settlement of the Putback Action (the "May 2013 Notice").<sup>7</sup> A copy of the May 2013 Notice is attached as Exhibit 4.

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<sup>6</sup> The Trustee also brought the Putback Action on behalf of the 2007-1 Trust and the 2007-3 Trust. The Trustee made similar allegations regarding breach of representations and warranties for the 2007-1 Trust and the 2007-3 Trust.

<sup>7</sup> The May 2013 Notice also applied to the 2007-1 Trust and the 2007-3 Trust.

## 2. Trial of the Putback Action

10. Between April 18 and May 13, 2016, the Putback Action was tried before the Hon. P. Kevin Castel. On September 6, 2016, Judge Castel issued a Memorandum and Order (Putback Action, ECF No. 505) that resolved claims about certain Mortgage Loans and issues in dispute and established a post-trial process for generating proposed findings of fact and conclusions of law relating to all other Mortgage Loans at issue.<sup>8</sup>

## 3. Settlement of the Putback Action

11. On July 13, 2018, the Trustee executed an agreement with UBS RESI and Countrywide Home Loans, Inc. (“Countrywide”), which had originated certain Mortgage Loans in the Trust, to resolve the Putback Action for the Trusts (the “Settlement Agreement”). The Trust Administrator is also a party to certain provisions of the Settlement Agreement for the purpose of distributing the Payment (defined below), including the Trust Settlement Payment (defined below). The Settlement Agreement is attached as Exhibit 5.

12. The Settlement Agreement does not become effective, by its terms, until two conditions are satisfied: (i) Final Settlement Court Approval; and (ii) receipt and approval by the Trustee and Trust Administrator of an acceptable REMIC Tax Opinion.

13. Within 15 business days following the Effective Date (the date when both of the conditions identified above have been met to the Trustee’s satisfaction), UBS RESI must pay \$850 million (the “Payment”) to the Trustee on behalf of the three Trusts.

14. Section 5 of the Settlement Agreement sets forth how the Payment will be allocated between the Trusts (the amount to each Trust comprising each of the Trusts’ “Allocable Share”). Following the Payment, each Trusts’ Allocable Share will be held in an interest-bearing escrow

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<sup>8</sup> The Putback Action is further described in the Approval TIP (defined below) filed by the Trustee.

account, pursuant to an Interim Agent Escrow Agreement, pending the final resolution of the Approval TIP (as defined below) (the Trust's Allocable Share plus any interest thereon, the "Trust Settlement Payment").

15. The Settlement Agreement does not express a specific method for distributing the Trust Settlement Payment. Rather, it provides that such amounts will be treated as Subsequent Recoveries and distributed in accordance with and pursuant to the PSA and a Final Distribution Order (as defined in the Settlement Agreement).<sup>9</sup> Under the Settlement Agreement, the Trust Administrator must file this Petition seeking entry of a Distribution Order (as defined in the Settlement Agreement and which is a prerequisite to securing the Final Distribution Order) with respect to the Trust that shall set forth and approve the procedures by which the Trust Administrator shall distribute the Trust Settlement Payment pursuant to the PSA.

16. According to the Trustee, UBS RESI, Countrywide, and/or their affiliates have informed the Trustee that, as a result of their certificate holdings in one or more of the Trusts and/or the settlement with Assured, they expect to receive some portion of the Trust Settlement Payment when the Trust Administrator distributes it following this proceeding.

**B. The Trustee's Trust Instruction Proceeding**

17. Because the Settlement Agreement requires Final Settlement Court Approval, the Trustee filed its *Petition of U.S. Bank National Association, As Trustee, For Instructions In The Administration Of Trusts Pursuant To Minn. Stat. § 501C.0201 et seq.*, in the District Court for the Second Judicial District, Ramsey County, File No. 62-TR-CV-18-35, on July 25, 2018 (the "Approval TIP"). A copy of the Approval TIP petition (without exhibits) is attached as Exhibit 6.

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<sup>9</sup> See Settlement Agreement § 6(b); see also PSA § 1.01, definition of "Subsequent Recoveries."

18. In the Approval TIP, the Trustee seeks authorization and instructions approving the Trustee’s entry into the Settlement Agreement and authorizing and instructing the Trustee to implement the terms thereof. The Trustee also seeks authorization and instructions approving the Trustee’s and Trust Administrator’s treatment of the Trust Settlement Payment as a Subsequent Recovery, as set forth in the Settlement Agreement and in accordance with the terms of the PSA, and finding that such treatment complies with the Trustee’s and Trust Administrator’s duties under the PSA and applicable law.

**C. Prior Related Litigation**

19. This Petition seeks, among other things, instruction regarding the extent of any distribution of the Trust Settlement Payment to the Certificate Insurer (or any of its successors-in-interest or assigns). The rights of the Certificate Insurer under the PSA were the subject of a prior interpleader action styled *Wells Fargo Bank, N.A., solely in its capacity as Trust Administrator v. ESM Fund I, LP, et al.*, Case No. 1:10-CV-7332, in the United States District Court for the Southern District of New York (the “MARM 2006-OA2 Interpleader Action”). A copy of the Interpleader Complaint in the MARM 2006-OA2 Interpleader Action is attached as Exhibit 7.

20. The Trust Administrator filed the MARM 2006-OA2 Interpleader Action because it faced conflicting demands by Assured and certain investors (the “Certificateholder Defendants”) with respect to certain Available Funds of the Trust. Specifically, Assured and the Certificateholder Defendants disputed whether “Section 4.02(a)(3) of the PSA entitles [Assured] to reimbursement from Available Funds of amounts previously paid for claims in respect of Insured Certificates.”<sup>10</sup>

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<sup>10</sup> See Interpleader Complaint ¶ 32.



21. In its Memorandum & Order (the “MARM 2006-OA2 Interpleader Order,” attached as Exhibit 8), the court assessed the issue in connection with a motion for judgment on the pleadings. The court explained that the “case center[ed] around the interpretation of section 4.02(a)(3) of the payment waterfall,” which provides Assured with its first opportunity in the payment waterfall to receive a distribution up to the Aggregate Certificate Insurer Reimbursement Amount.<sup>11</sup> Assured argued that “it should be fully reimbursed under section 4.02(a)(3) before any certificateholder is paid principal under section 4.02(a)(5) because 4.02(a)(3) is higher in the waterfall than 4.02(a)(5) and thus has a higher priority.”<sup>12</sup> The Certificateholder Defendants countered that “the Trust documents only permit Assured to collect funds that arise from its subrogation to the certificates it insures, to wit, any amount that would otherwise be paid to the Senior Support certificateholders had they not given up their rights to it.”<sup>13</sup>

22. The court agreed with the Certificateholder Defendants in granting the motion for judgment on the pleadings, holding “that the PSA language is unambiguous and is properly interpreted in the manner suggested by Certificateholder Defendants, but only to the extent necessary to resolve the question pending before [the] Court.”<sup>14</sup> The court then explained the functions of the payment waterfall, concluding that Assured is not entitled to full repayment under Section 4.02(a)(3): “The Court holds that Assured is entitled only to subrogation of the rights of the Insured Certificates at each stage that the Certificate Insurer is identified in the payment waterfall.”<sup>15</sup> The court held that under the payment waterfall “Assured is entitled to whatever

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<sup>11</sup> See MARM 2006-OA2 Interpleader Order, No. 1:10-CV-7332, 785 F. Supp. 2d 188, 194 (S.D.N.Y. 2011).

<sup>12</sup> MARM 2006-OA2 Interpleader Order, 785 F. Supp. 2d at 194.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 198-99. In affirming the decision of the court, the Second Circuit stated that “[w]e agree with the district court’s conclusion that the PSA unambiguously entitles Assured only to the distribution of funds related to its

funds would otherwise be owed to the Senior Support holders, which it receives in the step immediately following the step at which the Senior Support holders would otherwise be paid,” and that “[t]his interpretation is clear from the face of the Contract and is also supported by the general structure of the Trust.”<sup>16</sup>

23. The Second Circuit Court of Appeals affirmed the MARM 2006-OA2 Interpleader Order. A copy of that opinion—*Wells Fargo Bank, N.A. v. Financial Servicing Assurance, Inc., et al.*, 504 F. App’x 38 (2d Cir. 2012)—is attached as Exhibit 9.

### **III. FIRST ISSUE FOR TRUST INSTRUCTION – Order of Operations for the Distribution of the Trust Settlement Payment**

24. The first issue for trust instruction concerns the order of certain operations that the Trust Administrator must perform in connection with distribution of the Trust Settlement Payment as a Subsequent Recovery. Specifically, the Trust Administrator seeks an order instructing it regarding whether it should distribute the Trust Settlement Payment in accordance with the “write up first” method (described below).

#### **A. Subsequent Recoveries**

25. From time to time in the servicing of mortgage loans, a servicer may recover unanticipated funds related to a defaulted mortgage loan after the loan has liquidated (*i.e.*, its balance reduced to zero) with a loss. These funds are generally referred to as “subsequent recoveries.” The PSA defines Subsequent Recoveries as “[u]nanticipated amounts received on a liquidated Mortgage Loan the absence of which resulted in a Realized Loss in a prior month.”<sup>17</sup>

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subrogation rights in the certificates it insures, rather than to reimbursement of all amounts it paid under the Insurance Policy.” *Wells Fargo Bank, N.A. v. Financial Servicing Assurance, Inc., et al.*, 504 F. App’x 38, 40 (2d Cir. 2012).

<sup>16</sup> MARM 2006-OA2 Interpleader Order, 785 F. Supp. 2d at 198-99.

<sup>17</sup> PSA § 1.01, definition of “Subsequent Recoveries.”

26. The Settlement Agreement states that “the Parties agree that the Trust Administrator shall treat each Trust’s Allocable Share of the Payment . . . as a Subsequent Recovery (as defined in the . . . MARM 2006-OA2 PSA . . . ) . . . available for distribution on the related Distribution Date . . . . The Parties agree that the Trust Administrator shall distribute each Trust’s Allocable Share of the Payment . . . in accordance with and pursuant to the related PSA and the Final Distribution Order applicable to each Trust.”<sup>18</sup>

27. In the Trust, the Mortgage Loans are segregated into four Loan Groups.<sup>19</sup> With some exceptions, collections on the Mortgage Loans in a specific Loan Group are allocated to the corresponding Certificates for that Loan Group. The Trust Administrator makes payments to Certificateholders from principal and interest collections on the underlying Mortgage Loans. The Trust Administrator calculates and distributes such payments in accordance with the waterfall provisions (PSA Article IV) and related definitions (PSA Article I).

28. Loan losses, referred to as Realized Losses in the PSA,<sup>20</sup> result in the reduction of loan balances without any corresponding receipt of principal cash. This causes the Stated Principal Balance of the Mortgage Loans to decrease faster than the Certificate Principal Balances of the Certificates decrease. Realized Losses are not directly allocated to the Certificates. Rather, the PSA allocates losses to the Certificates by calculating the amount by which (a) the aggregate Class Principal Balance of all Classes of Certificates exceeds (b) the aggregate Stated Principal Balance of the Mortgage Loans. This amount, referred to in the PSA as an Applied Realized Loss Amount,

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<sup>18</sup> Settlement Agreement § 6(b).

<sup>19</sup> PSA § 1.01, definition of “Loan Group.”

<sup>20</sup> PSA § 1.01, definition of “Realized Loss.”

is allocated as a loss to the Certificates in accordance with Section 4.02(c).<sup>21</sup> The allocation results in a decrease to the Certificate Principal Balance of such Certificates with no corresponding payment of principal cash. Thus, most of the Certificates have a Certificate Principal Balance that **decreases** over time as principal is paid and any Applied Realized Loss Amounts are allocated to those Certificates.

29. Processing a Subsequent Recovery for any Mortgage Loan involves reversing the prior loss incurred by such loan in the amount of the Subsequent Recovery. If a Class of Certificates was allocated an Applied Realized Loss Amount, then its balance was reduced by the Applied Realized Loss Amount without receiving any principal cash. A Subsequent Recovery reverses that loss by increasing, or “writing up,” the Certificate Principal Balances of certain Classes of Certificates and distributing the Subsequent Recovery cash as principal.

#### **B. Order of Operations for Subsequent Recoveries**

30. There are two components to processing Subsequent Recoveries: the application of the principal cash received and the reversal of prior losses to the relevant Classes of Certificates. The cash amount of the Subsequent Recovery is treated as principal and is distributed in accordance with the principal waterfall provisions in the PSA.<sup>22</sup> The PSA also sets forth specific instructions for reversing losses to Classes of Certificates by increasing, or “writing up,” Certificate Principal Balances by the amount of Subsequent Recoveries received by the Trust.<sup>23</sup>

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<sup>21</sup> PSA § 1.01, definition of “Applied Realized Loss Amount.”

<sup>22</sup> See PSA § 1.01, definition of “Principal Remittance Amount” (stating in pertinent part: “With respect to any Distribution Date, the sum of . . . (iii) the principal portion of all related Net Liquidation Proceeds, Insurance Proceeds **and Subsequent Recoveries** received during such Prepayment Period with respect to the Mortgage Loans . . . .”) (emphasis added).

<sup>23</sup> See PSA § 4.02(d).

31. In addition, at closing, the Certificates were overcollateralized, which means that the aggregate Stated Principal Balances of the Mortgage Loans at closing exceeded the aggregate Certificate Principal Balances of the Certificates. The transaction was originally designed to maintain a certain percentage of overcollateralization though, for many years, due to loan losses, there has been insufficient cash flow from the remaining Mortgage Loans to maintain the Overcollateralization Target Amount. Several of the PSA's principal-related provisions (e.g., Basic Principal Distribution Amount and the Principal Distribution Amount)<sup>24</sup> require various calculations designed to maintain a certain percentage of overcollateralization. Subsequent Recovery cash can affect the overcollateralization-related calculations because it is included in principal, and cash payments of principal reduce Certificate Principal Balances.

32. In this context, the phrase "order of operations" refers to the time order on any Distribution Date in which the Trust Administrator increases Certificate Principal Balances, performs overcollateralization-related calculations, distributes cash, and allocates Applied Realized Loss Amounts. The order in which these tasks are performed on any Distribution Date can affect other waterfall-related calculations.

33. Based on its interpretation of the PSA, the Trust Administrator would distribute the Trust Settlement Payment as a Subsequent Recovery in accordance with the "write up first" method. Using this method, the Trust Administrator would *first*, write up the Certificate Principal Balances of any Classes of Certificates to which Subsequent Recoveries will be allocated in accordance with Section 4.02(d); *second*, make the necessary overcollateralization-related calculations for that month; *third*, distribute the principal Subsequent Recovery cash (along with the related monthly Mortgage Loan collections) to the relevant Classes of Certificates in

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<sup>24</sup> See definitions of such terms in PSA § 1.01.

accordance with the PSA priorities and terms; and *fourth*, allocate Applied Realized Loss Amounts in accordance with Section 4.02(c).

34. The alternative order of operations—referred to as the “pay first” method—would be to reverse the order of the increase to Certificate Principal Balances and the distribution: *first*, make the necessary overcollateralization-related calculations for that month; *second*, distribute the principal Subsequent Recovery cash (along with the related monthly Mortgage Loan collections) to the relevant Classes of Certificates in accordance with the PSA priorities and terms; *third*, write up the Certificate Principal Balances of any Classes of Certificates to which Subsequent Recoveries will be allocated in accordance with Section 4.02(d); and *fourth*, allocate Applied Realized Loss Amounts in accordance with Section 4.02(c).

35. The issue of which method—“write up first” or “pay first”—should be applied has arisen in actions involving the distribution of proceeds from other RMBS settlements. As holders of certificates in those trusts and other interested parties have advocated for one or the other method, Certificateholders may seek to advocate for one or the other method here, regardless of the Trust Administrator’s interpretation of the proper order of operations based on the PSA.

### **C. PSA Support for the “Write Up First” Method of Order of Operations**

36. The Trust Administrator interprets the PSA to require the “write up first” method for the distribution of the Trust Settlement Payment. The defined terms “Certificate Principal Balance” and “Unpaid Realized Loss Amounts” used in the PSA’s “write up” provision at Section 4.02(d) (the “Write Up Provision”) support the “write up first” method. The Write Up Provision generally provides that, if a Class of Certificates has been allocated an Applied Realized Loss Amount, any Subsequent Recoveries are applied to increase the Class Principal Balance<sup>25</sup> of

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<sup>25</sup> The PSA defines “Class Principal Balance” as “the aggregate of the Certificate Principal Balances of all Certificates

certain Classes of Certificates, **but only to the extent of Unpaid Realized Loss Amounts applicable to that Class:**

On each Distribution Date, the Trust Administrator shall allocate the amount of the Subsequent Recoveries, if any, **to increase the Class Principal Balance** of the Classes of Certificates **to which Applied Realized Loss Amounts have been previously allocated**, *first*, pro rata based on the Applied Realized Loss Amounts previously allocated the Group 1 Certificates, Group 2 Certificates, Group 3 Certificates and Group 4 Certificates, (a) sequentially, to the Class 1-A-1, Class 1-A-2 and Class 1-A-3 Certificates, **in that order, in each case by not more than the amount of the Unpaid Realized Loss Amount for each such Class**, (b) sequentially, to the Class 2-A-1, Class 2-A-2 and Class 2-A-3 Certificates, **in that order, in each case by not more than the amount of the Unpaid Realized Loss Amount for each such Class**, (c) sequentially, to the Class 3-A-1 and Class 3-A-2 Certificates, **in that order, in each case by not more than the amount of the Unpaid Realized Loss Amount for each such Class** and (d) sequentially, *first*, to the Class 4-A-1A and Class 4-A-1B Certificates, pro rata based on Class Principal Balance and *second*, to the Class 4-A-2 Certificates, **in each case by not more than the amount of the Unpaid Realized Loss Amount for such Class**, and *second*, sequentially, to the Class M-1, Class M-2, Class M-3, Class M-4, Class M-5, Class M-6, Class M-7 and Class M-8 Certificates, in that order, in each case by not more than the amount of the Unpaid Realized Loss Amount of such Class.<sup>26</sup>

### 1. Definition of Certificate Principal Balance

37. The definition of Certificate Principal Balance supports the “write up first” method for processing Subsequent Recoveries.<sup>27</sup> It does so because the definition suggests a specific order

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of such Class as of such date.” PSA § 1.01, definition of “Class Principal Balance.”

<sup>26</sup> PSA § 4.02(d) (emphasis added).

<sup>27</sup> The PSA defines “Certificate Principal Balance” as:

With respect to any Certificate (other than the Interest Only Certificates and Class C Certificates) at any date, the maximum dollar amount of principal to which the Holder thereof is then entitled under this Agreement, such amount being equal to the Denomination of that Certificate **(A) plus any increase to the Certificate Principal Balance of such Certificate pursuant to Section 4.02 due to the receipt of Subsequent Recoveries and (B) minus the sum of (i) all distributions of principal previously made with respect to that Certificate; provided, however,** that solely for purposes of determining the Premium Distribution Amount payable to the Certificate Insurer and the Certificate Insurer's rights as subrogee to the Holders of the Insured Certificates, the Certificate Principal Balance of any Insured Certificate shall be deemed not to be reduced by any principal amounts paid to the Holder thereof from payments made by the Certificate Insurer under the Certificate Insurance Policy, unless such amounts have been reimbursed to the Certificate Insurer pursuant to Section 4.02, **and (ii) any Applied Realized Loss Amounts allocated to such Certificate on previous Distribution Dates pursuant to Section 4.02(c) without duplication; provided, however,** that to the extent that any Realized Loss was paid under the Certificate Insurance



to the steps for calculating a Certificate Principal Balance. The calculation begins by adding to the Denomination, or the initial principal balance, of the related Certificate any increases to the original balance resulting from the application of Subsequent Recoveries up to the amount of such Certificate’s Applied Realized Loss Amounts.<sup>28</sup> Then, the Trust Administrator **subtracts** from this increased balance (1) all principal **previously** paid to that Certificate, and (2) any Applied Realized Loss Amounts allocated to the Certificate on **previous** Distribution Dates.

38. Although the amount subtracted from the Certificate Principal Balance in clause (B) is limited to “distributions of principal **previously made**” and “Applied Realized Loss Amounts allocated . . . on **previous** Distribution Dates” (emphasis added), there is no such time limitation on the amount of Subsequent Recoveries added to the Denomination in clause (A) of the calculation.<sup>29</sup> Thus, the amount of Subsequent Recoveries included in the calculation encompasses Subsequent Recoveries applied in the current payment period, but not principal paid or Applied Realized Loss Amounts allocated in the current payment period. Accordingly, this provision appears to require the write up of Certificate Principal Balances before paying principal or allocating Applied Realized Loss Amounts for any given Distribution Date.

**2. Definition of Unpaid Realized Loss Amount**

39. The definition of Unpaid Realized Loss Amount,<sup>30</sup> which is used in the Write Up Provision to limit the amount by which a Certificate can be written up, effectively requires the

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Policy, any Subsequent Recoveries payable to the Class 1-A-3, Class 2-A-3 and Class 4-A-2 Certificates shall be payable to the Certificate Insurer . . . .

PSA § 1.01, definition of “Certificate Principal Balance” (emphasis added).

<sup>28</sup> PSA § 1.01, definition of “Denomination.”

<sup>29</sup> PSA § 1.01, definition of “Certificate Principal Balance.”

<sup>30</sup> The PSA defines “Unpaid Realized Loss Amount” as:

For any Class of Certificates, (x) the portion of the aggregate Applied Realized Loss Amount previously allocated to that Class **remaining unpaid from prior Distribution Dates** minus (y) any increase in the Class



“write up first” method. The Unpaid Realized Loss Amount is, essentially, the outstanding unreimbursed Applied Realized Loss Amounts allocated to any Certificate in prior payment periods. The Trust Administrator, therefore, must first determine the level of Unpaid Realized Loss Amounts outstanding for the relevant Classes of Certificates from prior payment periods before writing up the Certificate Principal Balances in the amount of any Subsequent Recoveries in accordance with the Write Up Provision.

40. The Unpaid Realized Loss Amount calculation starts with the aggregate outstanding Applied Realized Loss Amounts previously allocated to that Class **and remaining unpaid from prior Distribution Dates**. Thus, for any Distribution Date, the Unpaid Realized Loss Amount used to limit the allocation of the increased Certificate Principal Balance amounts in the Write Up Provision is calculated **only for prior payment periods**. The calculation does not include Applied Realized Loss Amounts for the **current** period because an Applied Realized Loss Amount in the current period has not yet become an Unpaid Realized Loss Amount. The only way to ensure that Unpaid Realized Loss Amounts relate to **prior periods only** is to first increase the Certificate Principal Balances for Subsequent Recoveries (per Section 4.02(d)) before paying principal (per Section 4.02(b)) and allocating Applied Realized Loss Amounts (per Section 4.02(c)).

**D. Request for Instruction Regarding Order of Operations for Distribution of Trust Settlement Payment**

41. Because of the PSA’s support for the “write up first” method, the Trust Administrator generally uses that method to process Subsequent Recoveries. Since the Trust

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Principal Balance of that Class due to the allocation of Subsequent Recoveries to the Class Principal Balance of that Class.

PSA § 1.01, definition of “Unpaid Realized Loss Amount” (emphasis added).

Settlement Payment will be treated as a Subsequent Recovery per the Settlement Agreement, it is appropriate to use the same method for processing the Trust Settlement Payment. In sum, using the “write up first” method to process the Trust Settlement Payment, the Trust Administrator would first increase the Certificate Principal Balances of the relevant Certificates in the manner set forth in Section 4.02(d) by the amount of Subsequent Recoveries received, including the Trust Settlement Payment. The Trust Administrator would then perform the overcollateralization calculations necessary to calculate principal payments, including the Trust Settlement Payment, for the Certificates. Next, the Trust Administrator would pay the interest and principal funds, including the Trust Settlement Payment, through the appropriate waterfalls. Finally, the Trust Administrator would allocate any Applied Realized Loss Amounts in accordance with Sections 4.02(c). Certificateholders and (depending on how the Court addresses the second and third issues for trust instruction discussed below) possibly the Certificate Insurer will receive the Trust Settlement Payment. If the Trust Settlement Payment is distributed in accordance with the “pay first” method, depending on how the Court addresses the second and third issues for trust instruction discussed below, it is probable that a significant amount of the Trust Settlement Payment will be distributed to the Certificate Insurer.

42. The Trust Administrator therefore seeks instruction from the Court that authorizes, approves, and instructs the Trust Administrator regarding the order of operations for the Trust Administrator to follow. Specifically, the Trust Administrator seeks an order that authorizes, approves, and instructs the Trust Administrator to use the “write up first” method to distribute Subsequent Recoveries, including the Trust Settlement Payment.

**IV. SECOND ISSUE FOR TRUST INSTRUCTION—Extent of Any Distribution of the Trust Settlement Payment to the Certificate Insurer Given the Assured 2013 Letter**

43. The second issue for trust instruction concerns whether the Certificate Insurer is entitled to any portion of the Trust Settlement Payment given the Assured 2013 Letter (Exhibit 3) in which the Certificate Insurer directed the Trustee “to exclude from any award and/or settlement of the [Putback Action] any amounts owed to [Assured] as Certificate Insurer or in its capacity as a subrogated holder.”

**A. Interest in the Certificate Insurer’s Rights**

44. Soon after the Assured 2013 Letter, Assured and Battenkill Insurance Company, LLC (“Battenkill”), a subsidiary of UBS RESI, entered into the Quota Share Reinsurance Agreement, dated July 11, 2013 (the “Reinsurance Agreement”). A copy of the Reinsurance Agreement is attached as Exhibit 10. Pursuant to the Reinsurance Agreement, the parties agreed that Battenkill will provide Assured with reinsurance for the several insurance policies that Assured had issued, including the Policy.<sup>31</sup> Battenkill agreed to indemnify Assured for 85 percent of the amount that Assured pays in satisfaction of claims under the Policy, subject to certain exclusions.

45. As further described below and as addressed in the 2006-OA2 Interpleader Order, the PSA grants the Certificate Insurer certain repayment rights via subrogation. The Certificate Insurer’s direction in the Assured 2013 Letter may affect these rights.

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<sup>31</sup> See Reinsurance Agreement, Schedule A.

**B. Request for Instruction**

46. The Trust Administrator therefore seeks instruction regarding whether Assured (or any of its successors-in-interest or assigns) is entitled to any portion of the Trust Settlement Payment given the Assured 2013 Letter.

**V. THIRD ISSUE FOR TRUST INSTRUCTION—The Certificate Insurer’s Rights with Respect to Subsequent Recoveries, Including the Trust Settlement Payment**

47. If the Court concludes that the Assured 2013 Letter does not preclude Assured (or any of its successors-in-interest or assigns) from receiving any portion of the Trust Settlement Payment, the Trust Administrator seeks instruction concerning the interpretation of certain Certificate Insurer provisions in the PSA. The interpretation of those provisions could materially impact which Classes of Certificates receive a portion of the Trust Settlement Payment and the amount of that portion that any such Classes receive.

**A. Background – Certificate Insurer Reimbursement and Subrogation Provisions Relevant to the Trust Settlement Payment**

**1. Certificate Insurer Reimbursement Amounts**

48. For each of the three Classes of Insured Certificates, the PSA defines a Certificate Insurer Reimbursement Amount term.<sup>32</sup> For example, the PSA defines the “Class 1-A-3 Certificate Insurer Reimbursement Amount” as:

With respect to any Distribution Date, any amount owing to the Certificate Insurer under Section 4.02 or 4.07 for reimbursement, with interest, for claims paid with respect to the Class 1-A-3 Certificates under the Certificate Insurance Policy and

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<sup>32</sup> The Class 1-A-3 Certificate Insurer Reimbursement Amount applies to claims paid on the Class 1-A-3 Certificates, the Class 2-A-3 Certificate Insurer Reimbursement Amount applies to claims paid on the Class 2-A-3 Certificates, and the Class 4-A-2 Certificate Insurer Reimbursement Amount applies to claims paid on the Class 4-A-2 Certificates. The PSA further defines the three terms together as the “Aggregate Certificate Insurer Reimbursement Amount.” See PSA § 1.01, definitions of “Class 1-A-3 Certificate Insurer Reimbursement Amount,” “Class 2-A-3 Certificate Insurer Reimbursement Amount,” “Class 4-A-2 Certificate Insurer Reimbursement Amount,” and “Aggregate Certificate Insurer Reimbursement Amount.”

any amounts with respect to the Class 1-A-3 Certificates owing to the Certificate Insurer and remaining unpaid for such Distribution Date.<sup>33</sup>

The definitions for the other Certificate Insurer Reimbursement Amount terms are similar.<sup>34</sup> This Petition collectively refers to the three Certificate Insurer Reimbursement Amount terms—Class 1-A-3 Certificate Insurer Reimbursement Amount, Class 2-A-3 Certificate Insurer Reimbursement Amount and Class 4-A-2 Certificate Insurer Reimbursement Amount (and the PSA’s term for all three such definitions, the Aggregate Certificate Insurer Reimbursement Amount)—as the “CIRA Definitions.”

49. The CIRA Definitions reflect, for each of the Insured Certificates and any Distribution Date: amounts owing to the Certificate Insurer under Sections 4.02 or 4.07 for reimbursement, with interest, for claims paid, and any amounts with respect to the related Insured Certificates owing to the Certificate Insurer and remaining unpaid for such Distribution Date. The CIRA Definitions do not distinguish between interest and principal claims paid by the Certificate Insurer. Rather, the CIRA Definitions include both interest and principal.

50. The CIRA Definitions appear in numerous points in the “waterfall” provisions.<sup>35</sup> There are thirteen points in the PSA waterfalls at which the CIRA Definitions appear (the “Waterfall CIRA Provisions”):

Section 4.02 – Waterfall CIRA Provisions	
§ 4.02(a)(3)	From Available Funds, after paying all interest to the Senior Certificates but before paying interest to the Mezzanine Certificates
§ 4.02(a)(5)(A)(1)(a)(ii)	From Available Funds, prior to the Stepdown Date, after paying the Group 1 Principal Distribution Amount to the Group 1 Certificates
§ 4.02(a)(5)(A)(1)(b)(ii)	From Available Funds, prior to the Stepdown Date, after paying the Group

<sup>33</sup> PSA § 1.01, definition of “Class 1-A-3 Certificate Insurer Reimbursement Amount.”

<sup>34</sup> See PSA § 1.01, definitions of “Class 2-A-3 Certificate Insurer Reimbursement Amount,” “Class 4-A-2 Certificate Insurer Reimbursement Amount,” and “Aggregate Certificate Insurer Reimbursement Amount.” The Certificate Insurer currently has outstanding unreimbursed claims for each of the three Classes of Insured Certificates.

<sup>35</sup> The interest waterfall is in Section 4.02(a)(1) and (2). The principal waterfalls are in Sections 4.02(a)(5)A and 4.02(a)(5)B.

<b>Section 4.02 – Waterfall CIRA Provisions</b>	
	2 Principal Distribution Amount to the Group 2 Certificates
§ 4.02(a)(5)(A)(1)(d)(ii)	From Available Funds, prior to the Stepdown Date, after paying the Group 4 Principal Distribution Amount to the Group 4 Certificates
§ 4.02(a)(5)(A)(2)	From Available Funds, prior to the Stepdown Date, after paying all principal amounts to each of the four Certificate Groups
§ 4.02(a)(5)(B)(1)(a)(ii)	From Available Funds, on or after to the Stepdown Date, after paying the Group 1 Senior Principal Distribution Amount to the Group 1 Certificates
§ 4.02(a)(5)(B)(1)(b)(ii)	From Available Funds, on or after to the Stepdown Date, after paying the Group 2 Senior Principal Distribution Amount to the Group 2 Certificates
§ 4.02(a)(5)(B)(1)(d)(ii)	From Available Funds, on or after the Stepdown Date, after paying the Group 4 Senior Principal Distribution Amount to the Group 4 Certificates
§ 4.02(a)(5)(B)(2)	From Available Funds, on or after the Stepdown Date, after paying all principal amounts to each of the four Certificate Groups
§ 4.02(a)(8)(a)	From Available Funds, after paying all interest and principal to the Senior and Mezzanine Certificates, the Class 1-A-3 Certificate Insurer Reimbursement Amount
§ 4.02(a)(8)(b)	From Available Funds, after paying all interest and principal to the Senior and Mezzanine Certificates, the Class 2-A-3 Certificate Insurer Reimbursement Amount
§ 4.02(a)(8)(d)	From Available Funds, after paying all interest and principal to the Senior and Mezzanine Certificates, the Class 4-A-2 Certificate Insurer Reimbursement Amount
§ 4.02(a)(9)	From Available Funds, after paying all interest and principal to the Senior and Mezzanine Certificates, the Aggregate Certificate Insurer Reimbursement Amount

In addition to the thirteen different Waterfall CIRA Provisions above, the CIRA Definitions are used in four more provisions of the PSA:

<b>Additional Occurrences of CIRA Definitions</b>	
§ 4.07(a), clause <i>third</i> , (a)	From the Cap Account
§ 4.07(a), clause <i>third</i> , (b)	From the Cap Account
§ 4.07(a), clause <i>third</i> , (d)	From the Cap Account
§ 4.07(a), clause <i>fourth</i>	From the Cap Account

These additional four PSA sections and the thirteen Waterfall CIRA Provisions are together referred to herein as the “CIRA Provisions” and constitute the numerous points in the waterfalls at which the Certificate Insurer is repaid.

51. In the MARM 2006-OA2 Interpleader Action, the court interpreted the use of the CIRA Definitions in the seventeen CIRA Provisions and noted that each CIRA Provision followed immediately after a step in the waterfall which provided for either the payment of interest or

principal to the Insured Certificates.<sup>36</sup> The court rejected Assured's argument that the CIRA Provisions contain a right of reimbursement separate from Assured's right to subrogation under Section 12.05. The court noted that "[t]he two terms are not mutually exclusive; Assured is to be repaid, 'but only from the sources and manner provided herein for the payment of such principal and interest,' PSA § 12.05, to wit, through subrogation."<sup>37</sup> The court went on to say that "[i]f the drafters had intended to provide Assured with a reimbursement right separate from its right of subrogation, it is implausible that they would use the waterfall to grant such a right and not include any mention of it in the section of the PSA expressly devoted to the rights of the Certificate Insurer, PSA 12.05 (mentioning only subrogation rights), nor in the Policy or Prospectus Supplement.... Furthermore, it is unlikely that the drafters would fail to expressly provide for the subrogation payments in the waterfall. The far more reasonable interpretation [of the PSA] is that the provisions of the waterfall that provide for payment to Assured refer to the subrogation rights granted at section 12.05."<sup>38</sup>

52. Thus, the court concluded in the MARM 2006-OA2 Interpleader Order that the CIRA Provisions provided for repayment to Assured through subrogation.

## 2. The Certificate Insurer's Rights to Certain Subsequent Recovery Cash

53. The Certificate Insurer may be entitled to certain Subsequent Recoveries per the PSA's definition of Certificate Principal Balance, which provides that "to the extent that any Realized Loss was paid under the Certificate Insurance Policy, any Subsequent Recoveries **payable to the Class 1-A-3, Class 2-A-3 and Class 4-A-2 Certificates** shall be payable to the

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<sup>36</sup> MARM 2006-OA2 Interpleader Order, 785 F. Supp. 2d at 196.

<sup>37</sup> *Id.* at 197.

<sup>38</sup> *Id.*

Certificate Insurer” (the “CISR Provision”).<sup>39</sup> That is, Subsequent Recovery cash that would be payable to the Insured Certificates may, instead, be payable to the Certificate Insurer if it had covered the related Realized Loss under the Policy. The Certificate Insurer is not, however, entitled to any Subsequent Recoveries received by the Trust that are not payable to the Insured Certificates.

### 3. Potential Rights of the Certificate Insurer Under the Write Up Provision

54. Each dollar of Subsequent Recovery cash received by any Class of Certificate also results in a corresponding increase to the Certificate Principal Balance of certain Classes of Certificates pursuant to the Write Up Provision in Section 4.02(d). The purpose of the dollar-for-dollar increase in Certificate Principal Balances is to reverse the reduction of such balances that occurred when Applied Realized Loss Amounts were allocated to the Certificates.

55. The Write Up Provision could be interpreted to imply that the Certificate Insurer can receive the benefit of any write up to the Certificate Principal Balance of the Insured Certificates. Section 4.02(d) provides:

*Application of Subsequent Recoveries.* On each Distribution Date, the Trust Administrator shall allocate the amount of the Subsequent Recoveries, if any, to increase the Class Principal Balance of the Classes of Certificates to which Applied Realized Loss Amounts have been previously allocated, *first*, pro rata based on the Applied Realized Loss Amounts previously allocated the Group 1 Certificates, Group 2 Certificates, Group 3 Certificates and Group 4 Certificates, (a) sequentially, to the Class 1-A-1, Class 1-A-2 and **Class 1-A-3 Certificates**, in that order, **in each case by not more than the amount of the Unpaid Realized Loss Amount for each such Class**, (b) sequentially, to the Class 2-A-1, Class 2-A-2 and **Class 2-A-3 Certificates**, in that order, **in each case by not more than the amount of the Unpaid Realized Loss Amount for each such Class**, (c) sequentially, to the Class 3-A-1 and Class 3-A-2 Certificates, in that order, in each case by not more than the amount of the Unpaid Realized Loss Amount for each such Class and (d) sequentially, *first*, to the Class 4-A-1A and Class 4-A-1B Certificates, pro rata

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<sup>39</sup> PSA § 1.01, definition of “Certificate Principal Balance” (emphasis added); *see also* footnote 27 for the entire Certificate Principal Balance definition. “CISR” is an acronym for Certificate Insurer Subsequent Recovery.



based on Class Principal Balance and *second*, to the **Class 4-A-2 Certificates**, in each case by not more than the amount of the Unpaid Realized Loss Amount for such Class, and *second*, sequentially, to the Class M-1, Class M-2, Class M-3, Class M-4, Class M-5, Class M-6, Class M-7 and Class M-8 Certificates, in that order, in each case by not more than the amount of the Unpaid Realized Loss Amount of such Class . . .<sup>40</sup>

The emphasized language in Section 4.02(d) excerpted above is referred to herein as the “CIWU Provision.”<sup>41</sup>

**4. PSA References to Subrogation**

56. Subrogation is “the principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy.”<sup>42</sup> The PSA discusses subrogation in several places.

57. Section 12.04(f) states “. . . to the extent the Certificate Insurer makes payments, directly or indirectly, on account of principal of or interest on any Insured Certificates, **the Certificate Insurer will be fully subrogated to the rights of the Holders of such Insured Certificates to receive such principal and interest from the Trust Fund . . .**”<sup>43</sup>

58. Section 12.05 states “. . . (i) to the extent the Certificate Insurer makes payments, directly or indirectly, on account of principal of or interest on any Insured Certificate to the Holder of such Certificate, **the Certificate Insurer will be fully subrogated to the rights of such Holder to receive such principal and interest from the Trust Fund and (ii) the Certificate Insurer**

<sup>40</sup> PSA § 4.02(f) (emphasis added).

<sup>41</sup> “CIWU” is an acronym for Certificate Insurer Write Up.

<sup>42</sup> Black’s Law Dictionary (10th ed. 2014).

<sup>43</sup> PSA § 12.04(f) (emphasis added).

shall be paid such principal and interest but only from the sources and in the manner provided herein for the payment of such principal and interest.”<sup>44</sup>

59. The definition of Certificate Principal Balance states “that solely for purposes of determining the . . . **Certificate Insurer’s rights as subrogee** to the Holders of the Insured Certificates, the Certificate Principal Balance of any Insured Certificate shall be deemed not to be reduced by any principal amounts paid to the Holder thereof from payments made by the Certificate Insurer under the Certificate Insurance Policy, unless such amounts have been reimbursed to the Certificate Insurer pursuant to Section 4.02 . . . .”<sup>45</sup>

60. Finally, Section 12.04(f) further states that, “solely for purposes of determining the Premium Distribution Amount payable to the Certificate Insurer and the Certificate Insurer’s rights, as applicable, **as subrogee for payments distributable pursuant to Section 4.02**, any payment with respect to distributions to the Insured Certificates which is made with funds received pursuant to the terms of the Certificate Insurance Policy, shall not be considered payment of the Insured Certificates from the Trust Fund and shall not result in the distribution or the provision for the distribution in reduction of the Class Certificate Balance of the Insured Certificates within the meaning of Article IV.”<sup>46</sup>

61. The PSA provisions described immediately above are referred to herein as the “PSA Subrogation Provisions.” The PSA does not further discuss how these subrogation provisions should be implemented and administered.

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<sup>44</sup> PSA § 12.05 (emphasis added).

<sup>45</sup> PSA § 1.01, definition of “Certificate Principal Balance” (emphasis added).

<sup>46</sup> PSA § 12.04(f) (emphasis added).

## B. Issues with the Relevant CI Provisions

62. As stated above, the Trust Administrator seeks instruction regarding various issues concerning the interpretation of the PSA Subrogation Provisions, the CIRA Provisions, the CISR Provision, and the CIWU Provisions (collectively, the “Relevant CI Provisions”). The Relevant CI Provisions raise a number of questions concerning whether (and how) the Trust Administrator should perform certain calculations in light of the Certificate Insurer’s rights. The resolution of these issues and the detailed items for instruction below will substantially affect the distribution of the Trust Settlement Payment and may result in significant distributions to the Certificate Insurer (or any of its successors-in-interest or assigns).

### 1. Issues with the CISR Provision

63. As discussed in Section V.A.2 above, the Certificate Insurer may be entitled to certain Subsequent Recoveries allocable to the Insured Certificates if the Certificate Insurer covered the related Applied Realized Loss Amount. This potential right is set forth in the CISR Provision, which states: “that to the extent that any Realized Loss was paid under the Certificate Insurance Policy, any Subsequent Recoveries **payable to any of the Insured Certificates** shall be payable to the Certificate Insurer.”<sup>47</sup> The CISR Provision presents several issues.

64. *First*, the phrase “payable to the Insured Certificates” in the CISR Provision is unclear in the context of directing Subsequent Recovery cash to the Certificate Insurer. Currently, all of the Insured Certificates have a Certificate Principal Balance of zero. Those Certificates were paid off by a combination of collections on the Mortgage Loans and payments by the Certificate Insurer under the Policy. The PSA directs distributions of principal, which include Subsequent

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<sup>47</sup> PSA § 1.01, definition of “Certificate Principal Balance” (emphasis added); *see also* paragraph 53 of this Petition and footnote 27 for the entire Certificate Principal Balance definition.

Recoveries (and, hence, the Trust Settlement Payment), until the Certificate Principal Balance of the relevant Class of Certificates is reduced to zero.<sup>48</sup> After a Class of Certificates' balance is reduced to zero, it is no longer entitled to receive funds through the waterfall—*i.e.*, no funds are **payable** to a Class of Insured Certificates with a zero balance.

65. Accordingly, one interpretation of the phrase “payable to the Insured Certificates” in the CISR Provision is that, if the Insured Certificates no longer exist because they have a zero balance, then no Subsequent Recoveries are “payable to” such Insured Certificates. In turn, no Subsequent Recoveries would be payable to the Certificate Insurer.

66. The PSA's definition of Certificate Principal Balance states in the proviso before the CISR Provision, “that solely for purposes of determining . . . the Certificate Insurer's rights as **subrogee** to the Holders of the Insured Certificates, the Certificate Principal Balance of any Insured Certificate shall be deemed not to be reduced by any principal amounts paid to the Holder thereof from payments made by the Certificate Insurer under the Certificate Insurance Policy.”<sup>49</sup> There are other PSA Subrogation Provisions that echo that general concept.<sup>50</sup> Thus an alternative interpretation of the CISR Provision would be to construe “payable to the Insured Certificates” in light of the proviso preceding the CISR Provision and not in light of the principal waterfall provisions (directing principal payments to various Classes of Certificates “until their respective

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<sup>48</sup> See, e.g., PSA § 4.02(a)(5) (directing principal payments to various Classes of Certificates “...until their respective Class Principal Balances are reduced to zero”).

<sup>49</sup> PSA § 1.01, definition of “Certificate Principal Balance” (emphasis added).

<sup>50</sup> See, e.g., PSA § 12.04(f) (“Anything herein to the contrary notwithstanding, solely for purposes of determining the Premium Distribution Amount payable to the Certificate Insurer and the Certificate Insurer's rights, as applicable, as subrogee for payments distributable pursuant to Section 4.02, any payment with respect to distributions to the Insured Certificates which is made with funds received pursuant to the terms of the Certificate Insurance Policy, shall not be considered payment of the Insured Certificates from the Trust Fund and shall not result in the distribution or the provision for the distribution in reduction of the Class Certificate Balance of the Insured Certificates within the meaning of Article IV”).

Certificate Principal Balances are reduced to zero”). Under such alternative interpretation of the CISR Provision, any past reductions in the Certificate Principal Balance of the Insured Certificates from unreimbursed payments of principal by the Certificate Insurer under the Policy would be disregarded for the purpose of determining such Certificates’ allocable share of such Subsequent Recoveries. This alternative interpretation, however, is not express and the PSA makes clear that the Trust Administrator has no duty to effectuate anything outside of the express provisions of the PSA.<sup>51</sup>

67. While the CISR Provision follows this proviso in the definition of “Certificate Principal Balance,” the CISR Provision does not expressly indicate that it is a right which the Certificate Insurer has **as a subrogee**, which would trigger the proviso’s directive to not reduce the Certificate Principal Balance of any Insured Certificate by amounts paid under the Policy. The PSA nowhere identifies the specific rights that the Certificate Insurer has as a subrogee which would be subject to such proviso. Although the PSA Subrogation Provisions suggest that the Certificate Insurer has general subrogation rights, nowhere does the PSA distinguish the Certificate Insurer’s specific rights to subrogation from its rights to reimbursement. As discussed above, the court in the MARM 2006-OA2 Interpleader Order found that the CIRA Provisions in the seventeen places in the PSA’s waterfall represent the Certificate Insurer’s subrogation rights and determined that there is no separate right to reimbursement.

68. This question is important for directing Subsequent Recoveries to the Certificate Insurer. For purposes of the Trust Settlement Payment, if the CISR Provision is interpreted so that

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<sup>51</sup> See PSA § 9.01(i) (“the duties and obligations of the Trust Administrator shall be determined solely by the **express** provisions of this Agreement, the Trust Administrator shall not be liable except for the performance of such duties and obligations as are specifically set forth in this Agreement, **no implied covenants or obligations shall be read into this Agreement against the Trust Administrator...**”) (emphasis added). See also PSA § 9.01 (“The Trust Administrator shall undertake to perform such duties and only such duties **as are specifically set forth in this Agreement**”) (emphasis added).

Subsequent Recoveries are allocable to an Insured Certificate even after the Insured Certificate's balance is reduced to zero, it is probable that substantial portions of the Trust Settlement Payment will be distributed to the Certificate Insurer. Certain Certificateholders may not anticipate this result or agree with this interpretation of the CISR Provision, which is one reason the Trust Administrator has initiated this action.

69. *Second*, if the CISR Provision is interpreted in such a manner as to disregard any past reductions in the Certificate Principal Balance of such Insured Certificates from unreimbursed payments of principal by the Certificate Insurer under the Policy for the purpose of determining such Certificates' allocable share of such Subsequent Recoveries, then several other issues arise:

- i. The Trust Administrator will need to maintain a separate balance for the Insured Certificates for the purpose of determining such Certificates' allocable share of Subsequent Recoveries equal to the Certificate Insurer Reimbursement Amount for the related Insured Certificate (for each Insured Certificate, the "Related CIRA Balance"), but there is no instruction in the PSA regarding how to calculate that balance.
- ii. Whether, since Subsequent Recoveries are recoveries of principal losses, the Related CIRA Balance is limited to outstanding principal claims paid by the Certificate Insurer or also includes outstanding interest claims paid by the Certificate Insurer.
- iii. Whether the Related CIRA Balance also includes the accrued interest on such outstanding principal and/or interest claim.<sup>52</sup>
- iv. Whether the Related CIRA Balance is reduced/increased as the outstanding claims comprising such balance increase/decrease.

None of these issues are addressed in the PSA. As a result, the Trust Administrator has been unable to apply the CISR Provision in such a manner as to disregard any past reductions in the Certificate Principal Balance of such Insured Certificates from payments of principal by the

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<sup>52</sup> The CIRA Definitions refer to accrued interest on amounts owed to the Certificate Insurer.

Certificate Insurer under the Policy for the purpose of determining such Certificates' allocable share of such Subsequent Recoveries.

70. *Third*, if Subsequent Recovery cash is payable to the Certificate Insurer under the CISR Provision, it is unclear whether such amounts should be paid at the same step in the principal waterfall at which the Insured Certificates would have received Subsequent Recovery principal cash had they not given up their right to such amounts (*i.e.*, Section 4.02(a)(5)(A)(1)(a)(i)), or whether the Certificate Insurer should be paid such amounts at the CIRA Provisions in the principal waterfall (*i.e.*, Section 4.02(a)(5)(A)(1)(a)(ii)). Because the CIRA Provision follows immediately after the point in the principal waterfall at which Subsequent Recoveries are paid to the Senior Certificates (as the court observed in the MARM 2006-OA2 Interpleader Order), and because the CIRA Provisions manifest the Certificate Insurer's subrogation rights (as the court determined in the MARM 2006-OA2 Interpleader Order), it follows that Subsequent Recovery cash payable to the Certificate Insurer should be paid at the CIRA Provision step in the waterfall.

71. *Fourth*, the Putback Action included claims for liquidated loans and active loans, but only past actual loan losses that caused Applied Realized Loss Amounts resulted in claims under the Policy that were paid by the Certificate Insurer. The Class 1-A-3, 2-A-3, and 4-A-2 Insured Certificates all have a current balance of zero. Accordingly, the Certificate Insurer will pay no further claims on those Classes. If the Certificate Insurer is entitled to receive any portion of the Trust Settlement Payment under the CISR Provision, the Trust Administrator will need instruction regarding whether the Certificate Insurer is entitled to receive the full amount of such portion of the Trust Settlement Payment or whether such portion should be reduced to account for the fact that the Certificate Insurer will pay no further claims on the Insured Certificates because they have a zero balance.

**2. Issues with the CIWU Provision**

72. As explained above, one possible interpretation of the CIWU Provision is that it provides that an increased balance of an Insured Certificate should be maintained for the Certificate Insurer in the amount of Subsequent Recoveries allocated to that Insured Certificate. Such Subsequent Recovery subrogation balance is referred to herein as an “SRS Balance.” There are numerous issues with implementing and administering this interpretation.

73. First, while the court in the MARM 2006-OA2 Interpleader Action did not analyze the CIWU Provision, it did determine that the “. . . provisions of the waterfall that provide for payment to Assured refer to the subrogation rights granted at Section 12.05 [of the PSA].”<sup>53</sup> Since the court’s ruling in that case could be read to mean that the subrogation rights of the Certificate Insurer are fully manifested in the CIRA Provisions in the waterfall and no other subrogation rights exist, there is a question whether the CIWU Provision creates any subrogation rights for the Certificate Insurer at all.

74. If this Court finds that the CIWU Provision should be interpreted to grant additional subrogation rights to the Certificate Insurer in the form of an SRS Balance, then several other issues and questions arise.

75. Under the PSA, when the Certificate Principal Balance of an uninsured Certificate is increased due to Subsequent Recoveries, that increase is accompanied by certain rights, including, but not limited to, accrued interest at the prescribed rate for the Certificate on the increased balance, the right to receive principal to pay down the increased balance, and additional voting rights. The increased balance is part of the issued security. The increase is also accompanied by certain future risks, including, but not limited to, the possibility of shortfalls of

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<sup>53</sup> MARM 2006-OA2 Interpleader Order, 785 F. Supp. 2d at 197.



accrued interest on the increased balance, allocated losses that reduce the increased balance, and potential tax liability. These rights and risks are well understood because the PSA specifically addresses them in various provisions.

76. In contrast, the PSA is silent about the rights and risks that would accompany an SRS Balance created under the CIWU Provisions for the Certificate Insurer. For example, for the SRS Balance to accrue and receive interest in the same manner as the increased balance of an uninsured Certificate, numerous issues would need to be resolved, including:

- i. The rate at which such SRS Balance interest should accrue—the Pass-Through Rate for the related Insured Certificate, the rate at which outstanding claims accrue interest under the Policy, or some other rate.
- ii. The accrual methodology to be used to calculate the interest.
- iii. The point in the waterfall priorities at which interest would be paid and, if it is at the same place at which current and past due interest is paid to the Certificates, the priority between the Certificate Insurer's interest on the SRS Balance and the current and past interest owed to Certificateholders.
- iv. Whether, if there are insufficient funds to pay interest on the SRS Balance in any month, the Certificate Insurer is entitled to such unpaid interest on future Distribution Dates.
- v. Whether interest on an SRS Balance is subject to any tax reporting.
- vi. Whether interest payments on the SRS Balance reduce the related Certificate Insurer Reimbursement Amount dollar for dollar. If they do not, the Certificate Insurer could double recover.
- vii. Whether interest payments on the SRS Balance can be netted against other claims paid by the Certificate Insurer on any Distribution Date.
- viii. Whether the monthly statement to Certificateholders should report the accrued interest on the SRS Balance.<sup>54</sup>

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<sup>54</sup> The PSA expressly sets forth information that must be included in the monthly statement to Certificateholders. This provision does not contemplate reporting any information related to an SRS Balance. *See* PSA § 4.04.

77. Similarly, for the SRS Balance to receive payments of principal in the same manner as the increased balance of an uninsured Certificate, even more issues would need to be resolved, including:

- i. The point in the waterfall priorities at which principal would be paid, and, if it is the same point at which current principal is paid to the Certificates, the priority between the Certificate Insurer's payments of principal to reduce the SRS Balance and the current and past principal owed to Certificateholders.
- ii. Whether the Trust Administrator should allocate Applied Realized Loss Amounts to the SRS Balance in the same manner as the increased balance of an uninsured Certificate. If so, whether the Certificate Insurer is then entitled to Subsequent Recoveries and related increases to principal balances on the Applied Realized Loss Amounts allocated to the SRS Balance.
- iii. Whether the principal payments on an SRS Balance are subject to any tax reporting.
- iv. Whether principal payments on the SRS Balance reduce the outstanding related Certificate Insurer Reimbursement Amount dollar for dollar. If they do not, then the Certificate Insurer could double recover.
- v. Whether principal payments on the SRS Balance can be netted against other claims paid by the Certificate Insurer on any Distribution Date.
- vi. Whether the monthly statement to Certificateholders should report the principal paid on the SRS Balance anywhere.

78. The concept of an SRS Balance leads to other issues as well. For example:

- i. Whether the Certificate Insurer has voting rights equal to the amount of the SRS Balance.
- ii. Whether the SRS Balance should be considered part of the Certificate Principal Balance for purposes of any other calculations.
- iii. Whether the Certificate Insurer can trade, assign, or pledge the SRS Balance to another party.
- iv. Whether the SRS Balance causes any adverse tax consequences to the REMIC treatment of the Trust.

79. Again, the PSA establishes that the Trust Administrator has no duty to effectuate anything outside of the express provisions of the PSA.<sup>55</sup> Because of the issues presented by the CIWU Provisions and the notion of an SRS Balance, along with the absence of any language in the PSA instructing the Trust Administrator how to implement those concepts, the Trust Administrator has been unable to give effect to the CIWU Provisions or maintain an SRS Balance. Thus, if the Court gives effect to the CIWU Provisions and determines that an SRS Balance should be maintained, instructions are needed to properly and fully address the issues discussed above.

**C. Request for Instruction**

80. If the Court concludes that it must address this third issue for trust instruction, the Trust Administrator seeks instruction regarding the following issues related to the Certificate Insurer’s rights with respect to Subsequent Recoveries, including the Trust Settlement Payment.

**1. Request for Instruction Regarding CISR Provision**

81. With respect to the CISR Provision, the Trust Administrator seeks instruction from the Court on several points.

82. *First*, the Trust Administrator seeks instruction from the Court regarding whether under the CISR Provision Subsequent Recoveries, including the Trust Settlement Payment, are considered “payable to” Insured Certificates that have Certificate Principal Balances of zero, for the purpose of directing such Subsequent Recoveries to the Certificate Insurer (to the extent the Certificate Insurer covered the Realized Loss associated with such Subsequent Recoveries).

83. *Second*, the Trust Administrator seeks instruction from the Court regarding whether the reductions to an Insured Certificate’s Certificate Principal Balance attributable to payments

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<sup>55</sup> See PSA § 9.01(i) (“the duties and obligations of the Trust Administrator shall be determined solely by the **express** provisions of this Agreement, the Trust Administrator shall not be liable except for the performance of such duties and obligations as are specifically set forth in this Agreement, **no implied covenants or obligations shall be read into this Agreement against the Trust Administrator...**”) (emphasis added).

under the Policy should be disregarded and a Related CIRA Balance maintained for the purpose of determining such Certificates' share of Subsequent Recovery cash, including the Trust Settlement Payment, and directing such cash to the Certificate Insurer per the CISR Provision. If so, the Trust Administrator seeks instruction from the Court regarding how to calculate the Related CIRA Balance and seeks further instruction as to the issues listed in paragraph 69.

84. *Third*, if the Court determines that the CISR Provision requires Subsequent Recovery cash to be paid to the Certificate Insurer and provides instructions to the Trust Administrator as described in *first* and *second* immediately above, the Trust Administrator seeks further instruction from the Court that such Subsequent Recovery cash, including the Trust Settlement Payment, should be paid to the Certificate Insurer at the CIRA Provision step in the principal waterfall.

85. *Fourth*, to extent that the Court determines that the Certificate Insurer is entitled to any portion of the Trust Settlement Payment under the CISR Provision, the Trust Administrator seeks instruction from the Court regarding whether the Certificate Insurer is entitled to receive the full amount of such portion of the Trust Settlement Payment or whether such portion should be reduced to account for the fact that the Certificate Insurer will pay no further claims on the Insured Certificates because they have a zero balance.

**2. Request for Instruction Regarding CIWU Provision**

86. Given the MARM 2006-OA2 Interpleader Order conclusion that the Certificate Insurer's subrogation rights are manifested in the CIRA Provisions, the Trust Administrator seeks instruction from the Court regarding whether the CIWU Provision in the PSA requires it to maintain an SRS Balance as an additional subrogation right for the Certificate Insurer. If the Court instructs the Trust Administrator to maintain an SRS Balance, the Trust Administrator seeks further instruction from the Court regarding the issues referred to in paragraphs 76 through 78.

**BASIS FOR RELIEF**

87. Section 501C.0202 of the Minnesota Statutes provides, in pertinent part, that the district court may issue an order “to determine the persons having an interest in the income or principal of the trust and the nature and extent of their interests,” Minn. Stat. § 501C.0202(3), and “to construe, interpret, or reform the terms of a trust,” Minn. Stat. § 501C.0202(4).

88. Here, the instruction sought by the Trust Administrator should be granted, and the Trust Administrator, the Trustee, and all other applicable persons or entities responsible under the Trust documents, should be permitted to follow, without liability, the instruction of the Court with respect to the processing and distribution of Subsequent Recoveries, including the Trust Settlement Payment.

**WHEREFORE**, pursuant to the provisions of Minn. Stat. §§ 501C.0202, 501C.0203, 501C.0204, and all other applicable law, the Trust Administrator respectfully requests that this Court:

- a. Take jurisdiction in this matter as a proceeding *in rem* and make and enter an order designating the time and place when the respective parties in interest may be heard upon the matters set forth in this Petition, and that notice of the hearing be served in the manner specified in the accompanying Order for Hearing and as provided by Minn. Stat. § 501C.0203, subd. 1;
- b. At such designated time and place make a further Order as follows:
  - i. determining that such Order is binding upon the Trustee, the Trust, the Certificateholders, the Certificate Insurer (and any of its successors-in-interest or assigns), the Trust Administrator, servicers, master servicer, all other parties

responsible for the administration of the Trust, and all interested persons in the Trust;

ii. determining that the Trust Administrator should use the “write up first” method to distribute any Subsequent Recovery to the Trust, including the Trust Settlement Payment;

iii. determining whether, given the Assured 2013 Letter, any of the Trust Settlement Payment should be distributed to the Certificate Insurer (or any of its successors-in-interest or assigns) and, if so, how the PSA should be interpreted and/or reformed to distribute appropriate portions of the Trust Settlement Payment and any future Subsequent Recovery payable to the Certificate Insurer or any of its successors-in-interest or assigns;

iv. instructing the Trust Administrator, and any other party responsible for the administration of the Trust, to apply the Trust Settlement Payment in accordance with the determination contemplated by the immediately preceding paragraphs;

v. determining that the actions of the Trust Administrator, and all other parties responsible for the administration of the Trust taken in connection with the implementation of Subsequent Recoveries, including the Settlement Agreement, and the processing and distribution of Subsequent Recoveries, including the Trust Settlement Payment as contemplated by the Court’s order, comply with all applicable duties and are fully authorized and protected by the PSA, and that Wells Fargo Bank, N.A., individually or as Trust Administrator, U.S. Bank National Association, individually or as Trustee, or any other party responsible for the

administration of the Trusts shall not be subject to any liability whatsoever in connection therewith;

vi. determining that Wells Fargo Bank, N.A., individually or as Trust Administrator, U.S. Bank National Association, individually or as Trustee, and all other parties responsible for administering the Trusts are entitled to exculpation from liability in connection with their implementation of the Settlement Agreement and processing and distribution of Subsequent Recoveries, including the Trust Settlement Payment;

vii. ordering that the Court’s order regarding the distribution method shall be binding upon the Trust, the Trust Administrator, the Certificate Insurer (and any of its successors-in-interest or assigns), all parties to the PSA and other Trust documents and all other parties involved in the administration of the Trust, all parties to the Settlement Agreement, and all persons or entities claiming a beneficial, ownership, or other interest in the Trust, vested or contingent, even though unascertained or not in being, including, without limitation, all past, present, or future Certificateholders and their successors-in-interest or assigns;

viii. directing that the Trust shall not be subject to the continuing supervision of the Court for the purposes of Minn. Stat. § 501C.0205 or General Rule of Practice 417.02; and

ix. granting such other and further relief as the Court may deem lawful, just, and proper.

Dated: September 11, 2018

FAEGRE BAKER DANIELS LLP

/s/ Julie R. Landy

Stephen M. Mertz, #212131  
Michael F. Doty, #0388303  
Julie R. Landy, #0391256  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, Minnesota 55402-3901  
Telephone: (612) 766-7000

ALSTON & BIRD LLP

Christopher A. Riley  
GA Attorney License No.: 605634  
*Pro Hac Vice Forthcoming*  
1201 West Peachtree Street  
Atlanta, Georgia 30309  
Telephone: (404) 881-7000

Jared M. Slade  
TX Attorney License No.: 24060618  
*Pro Hac Vice Forthcoming*  
2828 N. Harwood Street  
Suite 1800  
Dallas, Texas 75209  
Telephone: (214) 922-3424

*Attorneys for Wells Fargo Bank, N.A.,  
as Trust Administrator*



**ACKNOWLEDGMENT**

The undersigned hereby acknowledges that sanctions may be imposed under Minn. Stat. § 549.211.

Dated: September 11, 2018

FAEGRE BAKER DANIELS LLP

/s/ Julie R. Landy  
Stephen M. Mertz, #212131  
Julie R. Landy, #0391256  
Michael F. Doty, #0388303  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, Minnesota 55402-3901  
Telephone: (612) 766-7000

ALSTON & BIRD LLP

Christopher A. Riley  
GA Attorney License No.: 605634  
*Pro Hac Vice Forthcoming*  
1201 West Peachtree Street  
Atlanta, Georgia 30309  
Telephone: (404) 881-7000

Jared M. Slade  
TX Attorney License No.: 24060618  
*Pro Hac Vice Forthcoming*  
2828 N. Harwood Street  
Suite 1800  
Dallas, Texas 75209  
Telephone: (214) 922-3424

*Attorneys for Wells Fargo Bank, N.A.,  
as Trust Administrator*