

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

In the matter of the application of

WELLS FARGO BANK, NATIONAL ASSOCIATION,  
U.S. BANK NATIONAL ASSOCIATION, THE BANK  
OF NEW YORK MELLON, THE BANK OF NEW  
YORK MELLON TRUST COMPANY, N.A.,  
WILMINGTON TRUST, NATIONAL ASSOCIATION,  
HSBC BANK USA, N.A., and DEUTSCHE BANK  
NATIONAL TRUST COMPANY (as Trustees, Indenture  
Trustees, Securities Administrators, Paying Agents,  
and/or Calculation Agents of Certain Residential  
Mortgage-Backed Securitization Trusts),

Index No.

Petitioners,

For Judicial Instructions under CPLR Article 77 on the  
Administration and Distribution of a Settlement Payment.

**MEMORANDUM OF LAW IN SUPPORT OF  
PETITION SEEKING JUDICIAL INSTRUCTIONS**

Petitioners Wells Fargo Bank, National Association; U.S. Bank National Association; The Bank of New York Mellon (“BNYM”); The Bank of New York Mellon Trust Company, N.A. (“BNYMTC”); Wilmington Trust, National Association; HSBC Bank U.S.A., N.A.; and Deutsche Bank National Trust Company, solely in their respective and various capacities as trustees, indenture trustees, successor trustees, securities administrators, paying agents, and/or calculation agents (collectively, the “Petitioners”) of the residential mortgage-backed securitization trusts (each a “Settlement Trust” and collectively, the “Settlement Trusts”) listed in Exhibit A to the Petition (the “Petition”), respectfully submit this memorandum of law (the “Memo of Law”) in support of their concurrently-filed Petition seeking judicial instruction.<sup>1</sup>

<sup>1</sup> Unless otherwise defined herein, capitalized terms have the meanings ascribed to them in the Petition.

## **PRELIMINARY STATEMENT**

In connection with a Settlement Agreement, the Petitioners expect to receive a Settlement Payment of up to \$4.5 billion as early as December 19, 2017 and no later than thirty days thereafter, which they are obligated to administer and distribute to Certificateholders. The Petitioners have identified certain issues that may ultimately have an impact on which Certificateholders receive the Settlement Payment and how much of the Settlement Payment they receive as well as the resulting certificate principal balances of the applicable certificates. The proper resolution of such issues is unclear, as they are subject to potentially competing interpretations under the Governing Agreements and the Settlement Agreement. Additionally, Certificateholders and other interested parties—the direct economic beneficiaries of the Settlement Payment—may have competing views concerning how the issues should be resolved. As a result, the Petitioners have initiated this proceeding to seek this Court’s instruction pursuant to CPLR Art. 77 concerning the administration and distribution of the Settlement Payment (the “Settlement Payment Application Process”) and to provide a forum for Certificateholders and other interested parties to be heard concerning the same.

## **BACKGROUND**<sup>2</sup>

Each Petitioner is the trustee, indenture trustee, or successor trustee (collectively, the “Trustees”) for certain of the Settlement Trusts. For each Settlement Trust, the applicable Governing Agreements designate a party with the role of being responsible for all aspects of calculation, administration, and distribution of any payments for Certificateholders (defined herein for reference as, the “Payment Administrator”). The Payment Administrator is therefore the party that will administer and distribute the Settlement Payment. For some Settlement Trusts, the

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<sup>2</sup> Additional background is provided in the Petition.

Payment Administrator role is included within the role of the Trustee and performed by the Trustee. For other Settlement Trusts, the Payment Administrator is a separate role performed by a securities administrator, paying agent, or calculation agent that is not the same party as the Trustee. Where the party performing the Payment Administrator role is different than the Trustee, the Petitioners are bringing this Petition in their respective and separate capacities as Payment Administrators and Trustees.

In 2014, the Trustees accepted the Settlement Agreement subject to judicial approval. After a proceeding pursuant to CPLR Art. 77, this Court approved the Settlement and found “[e]ach of the Trustees acted within the bounds of its discretion, reasonably, and in good faith with respect to its evaluation and acceptance of the Settlement Agreement.” *In re U.S. Bank Nat’l Ass’n, et al.*, Index. No. 652382/2014, Final Judgment and Order (Aug. 23, 2016), at 3 (Friedman, J.) (the “2016 Settlement Order”).

Following judicial approval, the Settlement Agreement provides that the Effective Date thereof is the date upon which the Trustees receive certain private letter rulings from the IRS applicable to all of the Settlement Trusts. *See* Settlement Agreement, § 1.08. On October 5, 2017, the Trustees notified Certificateholders that the Effective Date under the Settlement Agreement occurred on September 19, 2017.

In accordance with the Settlement Agreement, the Trustees engaged a professional firm to provide a report (the “Allocation Report”) calculating each Settlement Trust’s Allocable Share—that is, the portion of the Settlement Payment allocable to each Settlement Trust. *See* Settlement Agreement, § 3.05. The Trustees expect to receive the Allocation Report on or around December 18, 2017. Within thirty days thereof, JPMorgan must transfer the Settlement Payment to the Trustees. *See id.* § 3.01.

Upon receipt of the Settlement Payment, the Trustees must “use their reasonable best efforts to distribute the Settlement Payment to the Settlement Trusts as promptly as possible.” Settlement Agreement, § 3.01. The Petitioners have filed the Petition to seek judicial instruction concerning certain issues related to the Settlement Payment Application Process. The resolution of these issues concerns the interpretation of certain provisions in the various Governing Agreements and the Settlement Agreement and may impact Certificateholders and other interested parties. The Petitioners are additionally seeking instructions to maintain the Settlement Payment as a deposit in escrow pending the outcome of this proceeding, and separate instructions to undertake a notice program to notify potentially interested parties of this proceeding.<sup>3</sup>

### ARGUMENT

#### **I. The Court Is Authorized to Issue Judicial Instructions**

Pursuant to the Governing Agreements, the Settlement Trusts are governed by the laws of the State of New York.<sup>4</sup> Many Certificateholders are New York citizens, and a Petitioner, BNYM, has its principal place of business in New York City. New York law permits bringing “a special proceeding . . . to determine a matter relating to any express trust.” CPLR § 7701; *see also In re Greene v. Finley, Kumble, Wagner, Heine & Underberg*, 88 A.D.2d 547, 548 (1st Dep’t 1982) (observing that CPLR § 7701 is “broadly construed to cover any matter of interest to trustees,

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<sup>3</sup> The Settlement also covers certain residential mortgage-backed securitization trusts that are not subject to this Petition (the “Non-Covered Settlement Trusts”). For the Non-Covered Settlement Trusts, the applicable Petitioners individually and respectively determined that, at this time, there are no material issues concerning the administration and distribution of the Settlement Payment that warrant judicial instruction, and the relief sought in this Petition is not intended to apply to the Non-Covered Settlement Trusts.

<sup>4</sup> *See, e.g.*, BSABS 2006-HE3 PSA, § 12.03; BSARM 2007-5 PSA, § 12.06; BSMF 2007-AR1 PSA, § 11.06; BUMT 2005-1 PSA, § 12.06; CFLX 2006-1 PSA, § 12.06; CHASE 2006-S1 PSA, § 12.06; EMC 2005-B PSA, § 11.06; GPMF 2005-AR2 PSA, § 11.06; JPALT 2005-A2 PSA, § 11.06; JPMAC 2006-WMC2 PSA, § 11.04; JPMMT 2007-S2 PSA, § 12.06; LUM 2005-1 PSA, § 10.11; PRIME 2007-1 PSA, § 11.06; SACO 2005-2 PSA, § 11.03; SAMI 2005-AR5 PSA, § 12.06.

beneficiaries or adverse claimants”). The Settlement Trusts are all “express trusts” within the meaning of CPLR § 7701.

This Court assumed jurisdiction over the Settlement Trusts in the prior Article 77 proceeding approving the Trustees’ acceptance of the Settlement Agreement. *See* 2016 Settlement Order. As “the court first assuming jurisdiction over property,” this Court may further “maintain and exercise that jurisdiction to the exclusion of [other courts].” *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 477 (1936); *see also* Restatement (Second) of Trusts, § 220 cmt. c (1959) (“Where a trust is administered under the supervision of the courts of a State, those courts have jurisdiction to determine the interests of all claimants, resident or non-resident, with respect to the administration of the trust.”). This Court has also previously provided instruction and direction in Article 77 proceedings related to other residential mortgage-backed securitization trusts. *See In re Bank of New York Mellon*, 127 A.D.3d 120, 123, 128 (2015) (affirming directions provided by the Court in an Article 77 proceeding related to residential mortgage-backed securitization trusts); *see also BlackRock Fin. Mgmt. Inc., et al. v. Segregated Account of Ambac Assurance Corp., et al.*, 673 F.3d 169, 174 (2d Cir. 2012) (“Permissible uses of Article 77 are broadly construed to cover any matter of interest to trustees, beneficiaries or adverse claimants concerning the trust. . . . Such proceedings are used by trustees to obtain instruction as to whether a future course of conduct is proper, and . . . to obtain interpretations of the meaning of trust documents.”) (citations omitted).

In this case, the Petitioners seek construction of trust-related agreements, which is a long-standing remedy available through Article 77 proceedings. *See In re Trusteeship Created by American Home Mortg. Inv. Trust 2005-2*, No. 14 Civ. 2494 (AKH) 2014 WL 3858506 at ¶¶ 91, 179 (S.D.N.Y. July 24, 2014) (invoking “well-established procedure” of trust instruction

proceedings to allow reformation of indenture due to scrivener's error to "reflect[] the intent of the contracting parties"); *Petition of Percy*, 191 Misc. 1052, 1054 (Sup. Ct. N.Y. Cnty. 1948) (noting frequency with which courts have interpreted provisions in trust deeds); *see also* Restatement (Second) of Conflict of Laws § 267 cmt. a (1971) ("A proceeding may be brought by the trustee or by the beneficiaries for instructions as to his powers and duties. Application may be made to the court to direct or permit the trustee to deviate from the terms of the trust where unanticipated exigencies have arisen."). Indeed, this Court recently granted a trustee's request for instruction regarding the distribution of a settlement payment in similar circumstances. *In re Bank of New York Mellon*, No. 150973/2016, Decision and Order on Motion at 18 (Sup. Ct. N.Y. Cnty. Mar. 31, 2017) ("Final BNY Order").

The Court accordingly has jurisdiction over the subject matter and the parties to this proceeding.

## **II. Judicial Instruction is Necessary Concerning the Settlement Payment Application Process**

Section 3.06(a) of the Settlement Agreement provides that the Settlement Payment should be distributed "as though [it] was a 'subsequent recovery' relating to principal proceeds . . . (provided that if the Governing Agreement for a particular Settlement Trust does not include the concept of 'subsequent recovery,' the Allocable Share of such Settlement Trust shall be distributed as though it was unscheduled principal . . .)." The Petitioners have identified at least four distinct issues that concern the interpretation of the Governing Agreements and the Settlement Agreement in connection with the Settlement Payment Application Process.

First, the Settlement Payment Application Process requires the Petitioners to perform the following two operations with respect to the Settlement Payment (*i.e.*, "the subsequent recovery"): the Petitioners must distribute the Settlement Payment to Certificateholders and, separately, must

“write-up” or increase certificate principal balances in connection therewith. Both the Settlement Agreement and Governing Agreements contain provisions concerning these operations. But, the Settlement Agreement does not address whether certificate principal balances should be written up prior to or following the distribution of the Settlement Payment. *See* Settlement Agreement, § 3.06. Additionally, many of Governing Agreements for the Settlement Trusts do not clearly specify the order in which these operations should be performed.

Second, for many of the Settlement Trusts, there are issues concerning how the Petitioners should write-up certificate principal balances. Section 3.06(b) of the Settlement Agreement provides that certificates should be written-up in the reverse order of losses previously allocated to certificates. However, the Governing Agreements for many of the Settlement Trusts contain provisions which specify write-up instructions for subsequent recoveries that appear to differ from Section 3.06(b) of the Settlement Agreement. Where there is such a difference, the Settlement Agreement does not address which write-up instructions should apply.

Third, the Petitioners have identified issues with respect to the treatment of certain classes of certificates or loan groups with current aggregate certificate principal balances of zero. The Governing Agreements for some Settlement Trusts contain provisions that appear to “retire” classes with certificate principal balances of zero, which arguably could prevent distribution of payments or the application of write-ups to such “retired” classes. Some Governing Agreements also contain provisions that appear to require funds to be redirected from loan groups that correspond to zero balance classes of certificates to pay loan groups that currently correspond to certificates with at least some amount of outstanding certificate principal balances. It is unclear whether or how such provisions should be applied in the context of distributing settlement funds. Further, the Governing Agreements for certain Settlement Trusts simply lack express instructions

concerning the treatment of zero balance classes of certificates or loan groups in connection with the distribution of subsequent recoveries.

Finally, for a very small number of Settlement Trusts, the applicable Governing Agreements contain provisions that appear to suggest that subsequent recoveries are included in interest collections as opposed to principal collections. As discussed above, the Settlement Agreement provides that the Settlement Payment must be distributed as a “subsequent recovery” relating to *principal proceeds* . . . (provided that if the Governing Agreement for a particular Settlement Trust does not include the concept of ‘subsequent recovery,’ the Allocable Share of such Settlement Trust shall be distributed as though it was *unscheduled principal* . . .).” Settlement Agreement, § 3.06(a) (emphasis added). In the light of the foregoing references to “principal” in the Settlement Agreement, it is unclear whether the Settlement Payment can actually be included in interest collections and distributed as such.

The issues described herein and in the Petition present questions concerning the interpretation of the Governing Agreements and Settlement Agreement. How these issues are resolved has the potential to impact which Certificateholders receive the Settlement Payment, the amount of the Settlement Payment that Certificateholders receive, and the manner in which certificate principal balances are written up in connection with the Settlement Payment. Accordingly, the issues presented in the Petition are precisely the type of issues that are appropriate for an Article 77 proceeding. See Final BNY Order; *BlackRock Fin. Mgmt. Inc.*, 673 F.3d at 174.<sup>5</sup>

### **III. Holding of Settlement Payment in Escrow Is Necessary to Preserve the Status Quo**

The Trustees are requesting the Court immediately enter the proposed Order to Show Cause contemporaneously filed herewith (the “Order to Show Cause”). The Order to Show Cause would

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<sup>5</sup> The Petition describes more fully the issues discussed in this section and should be referred to for further detail.



direct each Trustee to cause the Allocable Shares of the Settlement Payment for each Settlement Trust for which such Trustee acts as trustee, indenture trustee, or successor trustee (such amounts, a “Trustee’s Share”) to be maintained as a deposit in escrow pursuant to the escrow agreements applicable to such Trustee (each, an “Escrow Agreement” and collectively, the “Escrow Agreements”) substantially in the forms attached as Exhibit 1 to the Affidavit of Robert L. Schnell, Jr. filed contemporaneously herewith until such time as this Court enters an order directing such Trustee to transfer the applicable Trustee’s Share into the collection or distribution accounts for the related Settlement Trusts. Each Petitioner, solely in its individual, non-trustee capacity unrelated to any of the Settlement Trusts, is designated as the “Escrow Agent” under the Escrow Agreement applicable to the Settlement Trusts for which such Petitioner is trustee, indenture trustee, or successor trustee (except that BNYM will act as Escrow Agent for both the Settlement Trusts for which BNYM is trustee and Settlement Trusts for which BNYMTC is trustee, under two separate Escrow Agreements). The Escrow Agents will not receive any fees, interest, or other monetary benefit under the Escrow Agreements and neither will the Trustees, servicers, securities administrators, or other administrators of the Trust. The Trustees are additionally requesting that the Court direct each of the Escrow Agents to use commercially reasonable efforts to cause the Settlement Payment for the Settlement Trusts to be invested and reinvested in high quality money market funds, with any earnings thereon to accrue to the benefit of Certificateholders.

The Court has discretion to order the Trustees to hold and maintain the Settlement Payment in escrow “to maintain the status quo pending a hearing on the merits.” *See 630 West 11th LLC v. ACG Credit Co. II, LLC*, 46 A.D.3d 367, 367 (1st Dep’t 2007); *Ficus Invs. Inc. v. Private Capital Mgmt., LLC*, 61 A.D.3d 1, 11-12 (1st Dep’t 2009) (“The escrow order properly preserved the status quo [and] . . . [t]he equitable relief was appropriate because the assets constituted a specific res

that is ‘the subject of the action’”) (internal citations omitted); *see also In re Bank of New York Mellon*, No. 150973/2016, Order to Show Cause at 2-3 (Sup. Ct. N.Y. Cnty. Feb. 5th, 2016,) (“BNY Order to Show Cause”) (instructing a trustee to hold a settlement payment in escrow pending the resolution of a similar proceeding).

Such an order is urgent and essential in this case. The Settlement Agreement requires the Trustees to “use their reasonable best efforts to distribute the Settlement Payment to the Settlement Trusts as promptly as possible.” Settlement Agreement, § 3.01. The purpose of this proceeding—to obtain the Court’s instruction concerning the Settlement Payment Application Process—would be frustrated if the Petitioners immediately distributed the Settlement Payment to Certificateholders without this Court’s direction. Immediate distribution of the Settlement Payment would require the Petitioners to individually pick and choose between competing ways to address the issues described herein and in the Petition. These actions by the Petitioners, including the distribution of the Settlement Payment, would irreversibly alter the status quo. It would be impracticable and potentially impossible for the Petitioners to claw back and redistribute the Settlement Payment, if a court later determined that the manner in which the Petitioners applied the Settlement Payment Application Process was inconsistent with the Governing Agreements and/or the Settlement Agreement.

#### **IV. The Petitioners’ Notice Program Satisfies Due Process**

The Order to Show Cause also sets forth a proposed notice (the “Notice”) and accompanying notice program (the “Notice Program”) to inform all Certificateholders and other interested parties of the filing of this Article 77 proceeding. The Notice Program provides that, within twenty-one (21) days of the entry of the Order to Show Cause, the Petitioners shall cause notice to be provided by: (a) mailing a copy of the Notice as well as the Order to Show Cause, the Petition, the Memo of Law, and all other papers filed contemporaneously with the Petition (other

than the compact disc that will be provided to the Court containing electronic copies of the agreements governing the Settlement Trusts) to all certificateholders listed on the certificate registry for each of the Settlement Trusts and Non-Covered Settlement Trusts and to any certificateholder in a Settlement Trust or Non-Covered Settlement Trust (or its counsel) that has requested such papers from any Petitioner; (b) electronically transmitting the Notice to The Depository Trust Company, which will post the Notice in accordance with its established procedures; (c) electronically posting any of the following (or causing the related securities administrator, paying agent, or calculation agent to electronically post any of the following as such party may so choose): (x) a hyperlink on the investor reporting website for the applicable Settlement Trusts to <http://www.rmbstrusteesettlement.com>; (y) a notice on the investor reporting website for the applicable Settlement Trusts referring investors to <http://www.rmbstrusteesettlement.com> for information about this proceeding; or (z) the Notice on the investor reporting website for the applicable Settlement Trusts; and (d) electronically posting the Notice as well as the Order to Show Cause, the Petition, the Memo of Law, and all other papers filed contemporaneously with the Petition (other than the compact disc that will be provided to the Court containing electronic copies of the agreements governing the Settlement Trusts) to <http://www.rmbstrusteesettlement.com>, the public settlement website created by the Petitioners, and subsequently electronically posting all papers filed in this proceeding to the same website.

The Notice Program uses multiple methods to notify potentially interested parties. It is more robust than the notice required for in the Governing Agreements, which is generally limited to notice through The Depository Trust Company. It is also very similar to notice programs recently approved in similar proceedings. *See In re Bank of New York Mellon (GE-WMC 2006-1)*, No. 653558/2015, Order to Show Cause at 1-2 (Sup. Ct. N.Y. Cnty. Oct. 27, 2015); BNY Order

to Show Cause at 2-3. The Notice Program is therefore “reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections” and complies with due process. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Court should approve it in all respects.

**CONCLUSION**

For all the foregoing reasons, the Petitioners request that the Court grant the relief requested in the Petition.

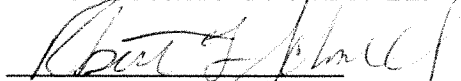
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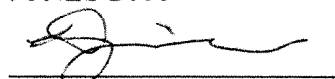
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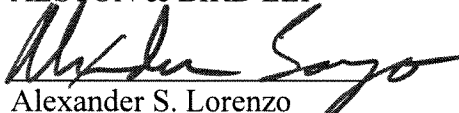
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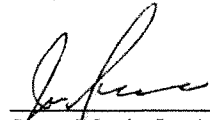
  
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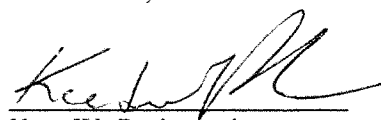
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