SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

In the Matter of the Application of THE BANK OF NEW YORK MELLON, in its Capacity as Trustee or Indenture Trustee of 530 Countrywide Residential Mortgage-Backed Securitization Trusts, Petitioner, For Judicial Instructions under CPLR Article 77 on the Distribution of a Settlement Payment.	Index No. 150973/2016 IAS Part 39 Hon. Saliann Scarpulla

SUPPLEMENTAL BRIEF OF TILDEN PARK CAPITAL MANAGEMENT LP AND PROSIRIS CAPITAL MANAGEMENT LP

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August 26, 2016

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INTRODUCTION

A group of institutional investors – AEGON, AIG and Blackrock – ask this Court to re-write the terms of heavily negotiated commercial contracts because they do not like what they say. The 17 trusts at issue expressly compensate certificateholders ***with*** realized losses upon receipt of a "Subsequent Recovery," as opposed to paying more senior certificateholders ***without*** realized losses. This structure is common in structured finance and was employed here through the efforts of several leading structured finance underwriters advised by top deal lawyers. It encourages investors to buy AAA-rated Senior Support Certificates – near the top of the debt structure – that, as it turns out here, experienced losses. These institutional investors are attempting to deny the rights of the Senior Support Certificates set forth in the contracts.

The institutional investors stood silent while the Settlement Agreement was negotiated and through the extensive Article 77 proceeding that adjudicated its fairness. AEGON and Blackrock now seek to override the contracts' express language, contending that the trusts should not have been structured the way they were. AIG, in turn, looks to a third party software provider to support rewriting the contracts. Granting the institutional investors' request would give them a windfall and would harm the contractual certainty that is essential to the structured finance market. The Court should enforce the contracts as written.

First, *res judicata* bars their claim. The method of payment was ***already decided*** in the prior Article 77 proceeding.

Second, the institutional investors are estopped from challenging the Settlement's payment terms because they earlier argued that the prior proceeding had *res judicata* effect.

Third, the plain text of the contracts is unambiguous, and the institutional investors cannot show and have not shown the contracts are "absurd" or should be rewritten.

Fourth, the loss compensation structure, far from being "structurally unsound," is com-

mercially reasonable and consistent with the essential purposes of ***these*** contracts. In the words of industry expert James H. Aronoff: "In my experience, a payment priority that limits certain cash flow distributions to senior bonds, as is the case in the trusts at issue, is not at all unusual or unique. Such a waterfall, which distributes excess funds in any given month to the senior-most junior bonds with realized losses, may make those junior bonds more attractive investments."[1]

Fifth, the parol evidence – which is inadmissible because the contracts are unambiguous – refutes, rather than supports, the institutional investors' arguments.

In addition, another investor, Center Court LLC ("Center Court"), makes a textual argument that is barred by *res judicata*, opposed by the other senior investors, and wrong.

This Court should instruct the Trustee to implement the Settlement Agreement and the PSAs for these trusts as written. And, because the institutional investors delayed this proceeding to divert payments to themselves, the Court should make payments as of February 25, 2016.

BACKGROUND

I. THE POOLING AND SERVICING AGREEMENTS

Respondents Prosiris Capital Management LP ("Prosiris") and Tilden Park Capital Management LP ("Tilden Park") hold certificates in 14 trusts in this case.[2] Those trusts were underwritten between 2005 and 2007 by multiple global financial institutions advised by sophisticated Wall Street deal lawyers.[3] Prosiris and Tilden Park's bonds were defined (with one exception) as

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[1] Aronoff Aff. ¶ 9.

[2] The trusts are: CWALT 2005-61; CWALT 2005-69; CWALT 2005-72; CWALT 2005-76; CWALT 2005-IM1; CWALT 2006-OA3; CWALT 2006-OA7; CWALT 2006-OA8; CWALT 2006-OA10; CWALT 2006-OA14; CWALT 2007-OA3; CWALT 2007-0A8; CWMBS 2006-3; and CWMBS 2006-OA5. Dkt. #31 (answer) at 4-5.

[3] *See, e.g.*, Ellis Decl. Ex. A (CWALT 2005-61 Prospectus Supplement) at S-91 (UBS, Sidley Austin Brown & Wood, LLP, and McKee Nelson LLP); *id.* Ex. B (CWALT 2007-OA3 Prospectus Supplement) at S-111 (Banc of America); *id.* Ex. L (CWALT 2005-76 Prospectus Supplement) at 16 (Deutsche Bank); *id.* Ex. D (CWALT 2005-IM1 Prospectus Supplement) at S-92 (Thacher Proffitt & Wood LLP and Sidley Austin).

"Senior Support Certificates" and originally rated AAA.[4] As their name suggests, the "Senior Support Certificates" are far from junk bonds – for most trusts, they are the second-most-senior of all tranches and are the senior-most tranches that have suffered losses.[5]

Each of the Trusts has the same basic payment procedure (or "waterfall") – negotiated by bankers and lawyers, set forth in the contracts, and structured similar to other deals – that uses Subsequent Recoveries to compensate ***investors with losses***. Subsequent Recoveries are paid as "Available Funds."[6] The waterfall sets out a specific order for distributing "Available Funds:" They go first to pay interest; then to pay principal "up to" a defined "Principal Distribution Amount;" then any excess after principal is paid goes to ***certificates that have incurred losses***.[7] After paying down certificates, the Trustee "writes up" principal balances.[8]

The definition of "Principal Distribution Amount" expressly limits payments to the "Senior Certificates" held by AIG, AEGON, and Blackrock. If a Subsequent Recovery makes Available Funds exceed the Principal Distribution Amount, the excess goes to the most senior bonds ***with losses*** – here, the "Senior Support Certificates" held by Prosiris and Tilden Park.[9] Importantly, the "Principal Distribution Amount" is based on balances "***immediately prior***" to

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[4] Dkt. #31 (answer) ¶¶ 14-15. The exception is CWALT 2005-61, which is defined as a "Mezzanine Certificate" and originally rated AA+, one notch below AAA. *See id.* ¶ 14 n.1; Ellis Decl. Ex. A (CWALT 2005-61 Prospectus Supplement) at S-2.
[5] See Ellis Decl. Ex. J (CWALT 2005-69 PSA) at 8 (priority of A-2 bonds); *id.* Ex. M (CWALT 2005-IM1 PSA) at 9 (A-2 bonds); *id.* Ex. N (CWALT 2006-OA3 PSA) at 6 (1-A-2 bonds); *id.* Ex. P (CWALT 2006-OA8 PSA) at 6 (1-A-2 bonds); *id.* Ex. R (CWALT 2006-OA14 PSA) at 6 (1-A-2 bonds); *id.* Ex. S (CWALT 2007-OA3 PSA) at 6-7 (1-A-2 bonds); *id.* Ex. T (CWALT 2007-OA8 PSA) at 8 (1-A-2 bonds); *id.* Ex. U (CWMBS 2006-OA5 PSA) at 11-12 (1-A-2 bonds); *see, e.g.*, CWALT 2005-61 PSA § 4.02(a)(3)(B)(i) (Class 1-A-2 bonds receive principal pro rata with Class 1-A-1 bonds); Dkt. #31 (Prosiris / Tilden Park answer) at 4-5 (listing holdings); Smith Aff. ¶ 25.
[6] *See, e.g.*, Ellis Decl. Ex. E (CWALT 2005-61 PSA) art. I at 16 (defining "Available Funds" to "includ[e] any Subsequent Recoveries").
[7] *See, e.g.*, *id.* § 4.02(a).
[8] *See, e.g.*, *id.* § 4.02(j).
[9] Smith Aff. ¶ 25. Notably, if a "Senior Certificate" has incurred losses, that certificate gets its losses compensated ***before*** the "Senior Support Certificates." *See, e.g.*, Ellis Decl. Ex. E (CWALT 2005-61 PSA) at § 4.02(a)(4) (listing the order of priorities in which losses are compensated).

the Distribution Date, and thus excludes write-ups occurring ***on*** the Distribution Date.[10]

The structure of these 14 heavily-negotiated trusts is not – as the institutional investors paint it – an aberration. So-called "leakage" is, in fact, intentional loss compensation.[11] As explained in the affidavits of two leading structured-finance experts, other trusts have a similar waterfall in which less senior holders ***with*** losses are compensated before more senior holders ***without*** losses.[12] Underwriters design deals with loss compensation structures to encourage investors to buy less senior bonds.[13]

The Trustee has applied the loss-compensation methods of these trusts before. In October 2010, the Trustee paid out part of a Subsequent Recovery for the CWALT 2007-OA10 trust, ***owned by AIG***, to less senior classes – including one that had been entirely written off – instead of paying the senior-most holders.[14] A 2010 Credit Suisse analyst note reported this payout.[15]

II. THE SETTLEMENT AGREEMENT AND PRIOR ARTICLE 77 PROCEEDING

The Trustee signed the Settlement Agreement and sought its approval in June 2011.[16] That agreement laid out a clear "pay-first, write-up-second" method for paying Allocable Shares.[17] *First*, the Trustee "shall distribute" funds "***in accordance with the distribution provisions of the Governing Agreements*** . . . ***as though it was a Subsequent Recovery available for***

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[10] *See, e.g.,* Ellis Decl. Ex. E (CWALT 2005-61 PSA) art. I at 41-42.
[11] Aronoff Aff. ¶¶ 5-6.
[12] Aronoff Aff. ¶ 8; Smith Aff. ¶ 14.
[13] Smith Aff. ¶¶ 12, 19; *see* Aronoff Aff. ¶ 8 (describing how underwriters "craft[ ] the waterfall provision[s]" of PSAs to "meet the cash flow needs of a specific investor"). This deal structure is different from other Countrywide trusts in which the Principal Distribution Amount is defined by reference to an "Overcollateralization Amount" that prevents loss compensation. *See* Dkt. #34 (comparing deal structures for the trusts in this case).
[14] Smith Aff. ¶ 24. This disproves AEGON and Blackrock's claim that "Subsequent Recoveries have historically been included in full in the 'Principal Distribution Amount.' " Dkt. #96 at 8.
[15] Ellis Decl. Ex. W (analyst note).
[16] Dkt. #3 (Settlement Agreement); Verified Petition, *In re Bank of N.Y. Mellon*, at 10-13, No. 651786/2011, Dkt. #1 (Jun. 29, 2011).
[17] Dkt. #3 (Settlement Agreement) § 3(d).

distribution on that distribution date."[18] *Second*, "***after the distribution of the Allocable Share to Investors pursuant to Subparagraph 3(d)(i)***, the Trustee will allocate" the remainder to increase certificate balances.[19]

The original Article 77 proceeding was thoroughly litigated. *In re Bank of N.Y. Mellon*, 42 Misc. 3d 1237(A), 2014 WL 1057187, at *12-14 (Sup. Ct. N.Y. Cnty. Jan. 31, 2014) (recounting procedural history). Numerous investors intervened, including AIG, BlackRock, and AEGON.[20] No party objected to the Settlement Agreement's payment methods.

The trial court approved the Settlement Agreement in January 2014. *Bank of N.Y. Mellon*, 2014 WL 1057187, at *20-21. Numerous respondents, including AIG, Blackrock, and AEGON, took appeals.[21] Again, no one questioned the Settlement Agreement's payment terms. The First Department affirmed. *In re Bank of N.Y. Mellon*, 127 A.D.3d 120 (1st Dep't 2015).

III. THIS PROCEEDING

Final approval of the Settlement triggered a detailed process for making payments.[22] After experts calculated the "Allocable Shares" due on January 11, 2016, the Trustee was set to receive the Settlement funds on February 10, 2016.[23] The Trustee was then required to distribute Allocable Shares on the next Distribution Date: February 25, 2016.[24]

Rather than distribute payments, the Trustee filed this action seeking instructions on Feb-

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[18] *Id.* § 3(d)(i) (emphasis added). The Settlement Agreement also disclaimed amending the PSAs. *See id.* § 3(d)(v).
[19] *Id.* § 3(d)(ii) (emphasis added).
[20] *See* Verified Petition to Intervene, *In re Bank of N.Y. Mellon*, No. 651786/2011, Dkt. #131 (Sup. Ct. N.Y. Cnty. Aug. 10, 2011) (AIG); Verified Petition to Intervene, *In re Bank of N.Y. Mellon*, No. 651786/2011, Dkt. #14 (Sup. Ct. N.Y. Cnty. June 29, 2011) (intervention of BlackRock and AEGON entities, among others).
[21] *In re Bank of N.Y. Mellon*, No. 651786/2011, Dkt. #1103 (Sup. Ct. N.Y. Cnty. Mar. 21, 2014) (AIG notice of appeal); *In re Bank of N.Y. Mellon*, No. 651786/2011, Dkt. #1094 (Sup. Ct. N.Y. Cnty. Mar. 6, 2014) (Blackrock/AEGON notice of appeal). AIG ultimately withdrew its appeal. *See* Decision and Order, *In re Bank of N.Y. Mellon*, No. 651786/2011, Dkt. #1135 (Sup. Ct. N.Y. Cnty. Sept. 2, 2014) (granting withdrawal motion).
[22] Dkt. #1 (petition) ¶¶ 10-13.
[23] *Id.* ¶¶ 1, 13.
[24] *See* Dkt. #3 (Settlement Agreement) § 3(d)(i) (an Allocable Share should be distributed "as though it was a Subsequent Recovery ***available for distribution on that Distribution Date***" (emphasis added); *see, e.g.*, Ellis Decl. Ex. E (CWALT 2005-61 PSA) art. I at 22 (defining the "Distribution Date" as the 25th of each calendar month).

ruary 5, 2016.[25] The Trustee acknowledged that "the Settlement Agreement . . . specifies the ***order*** of operations – the Trustee is directed to pay the Allocable Share ***before*** writing up the Certificate Principal Balance."[26] But unnamed investors had apparently asked the Trustee to disregard the terms of the Settlement Agreement and the governing contracts (the "PSAs").[27] The Trustee also noted that Intex, a software provider, offered multiple models for predicting Settlement payments.[28]

Prosiris and Tilden Park answered the Trustee's petition, arguing that it should follow the Settlement Agreement's and PSAs' unambiguous terms.[29] Institutional investors, including AIG, Blackrock, and AEGON, did the same: They requested that the Trustee "distribute the settlement payment immediately to all 530 Covered Trusts under the 'pay first, write-up second' formulation set forth in the Settlement Agreement and Final Judgment."[30] By contrast, Center Court argued that, for one trust only, certificates should be written up first and paid out second.[31]

Significantly, the institutional investors argued that the Settlement Agreement was "*res judicata*" and "bars certificateholders from asserting any claim that was or could have been litigated in the CW Article 77 proceeding pertaining to the Settlement Agreement."[32] They also admitted that for "Overcollateralization Target Trusts" – including the 14 trusts at issue here – there is no risk of "temporary or illusory overcollateralization" as raised in the Trustee's peti-

[25] Dkt. #1.
[26] *Id.* ¶ 20.
[27] *Id.* ¶ 41 (stating investors had expressed "competing views" and had sent "conflicting investor correspondence" that "urge[d] the Trustee to follow different orders of operation").
[28] *Id.* ¶ 42.
[29] Dkt. #31; *see* Ellis Decl. Ex. E, J-V (PSAs for Prosiris / Tilden Park trusts).
[30] Dkt. #34 at 16.
[31] Dkt. #47 (Center Court memorandum of law) at 1-2.
[32] Dkt. #34 at 5.

tion.[33] In a later filing, they again urged the Court to "follow the 'pay first, write-up second' order of operations required under the Settlement Agreement."[34] The Court entered a partial final judgment ordering the Trustee to adhere to the Settlement Agreement, including the pay-first "order of operations."[35]

The Court set argument on the remaining trusts for July 13.[36] But in June, AIG, for the first time, asked for discovery into Intex, even though Intex had been mentioned months prior in the Trustee's petition.[37] The Court granted AIG's request but asked to "keep the July 13 date" and to complete discovery by July 8.[38] AIG's negotiations with Intex dragged out until July 25, when AIG again changed course and withdrew its subpoena in exchange for an affidavit from Intex.[39] This delay hardly seems coincidental: AIG earns roughly $400,000 on one trust alone at the expense of other certificateholders each month that this proceeding continues.[40]

On August 11, the institutional investors changed course again. Even though they had previously argued that *res judicata* barred challenging this settlement, AIG, Blackrock, and AEGON now all argue that the Court should ***rewrite*** the contracts, thus giving them millions of

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[33] The institutional investors identified 9 of the 14 trusts at issue as "Overcollateralization Target Trusts." Dkt. #39 (listing "Overcollateralization Target Trusts," including CWALT 2005-61, CWALT 2005-69, CWALT 2005-72, CWALT 2005-IM1, CWALT 2006-OA3, CWALT 2006-OA7, CWALT 2006-OA8, CWMBS 2006-3, and CWMBS 2006-OA5). For those trusts, overcollateralization "is not affected *at all* by the distribution of the Settlement Payment and certainly does not and cannot change *during* a distribution." Dkt. #34 (answer) at 12. The remaining five trusts at issue have identical language. *See* Ellis Decl. Ex. L (CWALT 2005-76 PSA) art. I at 32-33 (defining "Overcollateralization Target Amount" as a fixed percentage of the "Stated Principal Balance"); Ellis Decl. Ex. Q (CWALT 2006-OA10 PSA) art. I at 39 (same); Ellis Decl. Ex. R (CWALT 2006-OA14 PSA) art. I at 33-34 (same); Ellis Decl. Ex. S (CWALT 2007-OA3 PSA) art. I at 30 (same); Ellis Decl. Ex. T (CWALT 2007-OA8) art. I at 34 (same); *compare* Dkt. #1 (Petition) ¶ 26 (raising "temporary, and illusory, overcollateralization").
[34] Dkt. #60 at 3.
[35] Dkt. #78 at 7.
[36] *See* Ellis Decl. Ex. F (transcript of June 22, 2016 hearing) at 17.
[37] Dkt. #79 ("status update and request for discovery"); Dkt. #1 (petition) ¶ 42.
[38] Ellis Decl. Ex. F (transcript) at 17.
[39] Ellis Decl. Ex. G (Intex affidavit).
[40] Ellis Decl. Ex. F (transcript) at 15. Overall transfers are in the millions of dollars per month. *See* Smith Aff. ¶ 49.

dollars more than allowed under the PSAs' plain language.[41]

ARGUMENT

The Settlement Agreement disposes of this case. The order approving that Agreement is *res judicata* and requires, *first*, that the Trustee pay the Settlements before writing up balances and, *second*, that the Settlement be paid as a Subsequent Recovery ***per the terms of each PSA***. The institutional investors, which made that very argument in this case, are estopped from changing course. Further, the PSAs' unambiguous text should not be rewritten. Compensating the Senior Support Certificates for losses and not paying Senior Certificates without losses adheres to the PSA's plain, carefully-negotiated terms requiring loss compensation. Finally, the Court should also order payment as of February 25, 2016 to preserve the status quo and prevent a windfall to the parties bringing this challenge.

I. THE TRUSTEE SHOULD ENFORCE THE SETTLEMENT AGREEMENT

A. The Settlement Agreement is *Res Judicata*

A "party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter." *In re Hunter*, 4 N.Y.3d 260, 269 (2005). In particular, for "judicially settled accounting decrees" like instruction proceedings, the "decree is conclusive and binding with respect to all issues raised and as against all persons over whom [the court] obtained jurisdiction." *Id.* at 270; *see also In re Morgan Guaranty Tr. Co.*, 28 N.Y.2d 155, 161-64 (1971) (in Article 77 proceeding, granting preclusive effect to prior judgment). Preclusion covers all "issues that were decided as well as those that ***could have been raised*** in the accounting." *Hunter*, 4 N.Y.3d at 270 (emphasis added).

As the institutional investors have argued, these principles preclude any challenge to the

[41] Dkt. #103 (AIG brief) at 4; Dkt. #96 (AEGON/Blackrock brief) at 18; *see also* Dkt. #108 (Finkel Aff.) ¶ 10.

Settlement's payment methods.[42] They were parties to the prior proceeding. They could have objected then to the PSAs' loss-compensation structure or proposed alternatives; they did not. They chose not to, knowing that the Settlement was final and binding, even if facts or circumstances changed.[43] Center Court also could have objected; it did not. *Bank of N.Y. Mellon*, 2014 WL 1057187, at *2. Because they had "a full and fair opportunity to litigate [their] claim[s]," they "should not be allowed to do so again." *Hunter*, 4 N.Y.3d at 269.

Giving trust-instruction proceedings *res judicata* effect serves an important goal: The purpose of such proceedings is to "protect trustees" from "uncertainty" and future liability. *See City Bank Farmers' Tr. Co. v. Smith*, 263 N.Y. 292, 295-96 (1934). That "right to rely upon the finality of the results of previous litigation" is also a "core principle of *res judicata*." *People ex rel. Spitzer v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 124 (2008). The Settlement is final for ***all*** parties and protects both the Trustee and investors against needless future disputes. The other investors cannot re-litigate issues they chose not to raise in the first Article 77 proceeding.[44]

B. The Institutional Investors Are Estopped from Challenging the Payment Method

The institutional investors not only failed to challenge the Settlement Agreement or the PSAs in the Article 77 proceeding. They actually argued to this Court that certificateholders were ***precluded*** from challenging the Settlement's payment terms: "[T]he Final Judgment," they noted, "bars certificateholders from asserting any claim that was or could have been litigated in the CW Article 77 proceeding pertaining to the Settlement Agreement."[45] Yet that is ***exactly*** what they are doing now: They ask the Court to ignore the PSAs and use Intex's "Standard Intex

[42] *See* Answer of Certain Institutional Investors, Dkt. #34, at 6.
[43] *See* Dkt. #3 (Settlement Agreement) § 18.
[44] It is of no consequence that the prior judgment simply approved a settlement agreement. "[S]ettlement agreements [are] entitled to *res judicata* effect." *People ex rel. Spitzer v. Applied Card Sys.*, 11 N.Y.3d 105, 124 (2008).
[45] Dkt. #34 at 5.

Method" instead.[46] Having set out a position, the institutional investors are bound by it.

Judicial estoppel "precludes" a party "from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding." *Maas v. Cornell Univ.*, 253 A.D.2d 1, 5 (3d Dep't 1999); *Lorenzo v. Kahn*, 100 A.D.3d 1480, 1482-83 (4th Dep't 2012) (same). It precludes parties from "playing fast and loose with the courts" by changing their positions "simply because [their] interests have changed." *Tozzi v. Long Is. R.R. Co.*, 170 Misc. 2d 606, 612 (Sup. Ct. Nassau Cnty. 1996) (quotation marks omitted).

The institutional investors are doing just that here. In the prior Article 77 case, they did not object to the payment terms.[47] When the Trustee filed this petition, they ***again*** did not object. Instead, they urged that any challenge to those terms – as to ***any*** trust – was precluded by *res judicata*.[48] This Court agreed and ordered the Trustee to distribute funds to these "Initial Release Trusts,"[49] thereby benefitting the institutional investors holding bonds in those trusts.[50]

The institutional investors' answer advocating *res judicata* secured them a benefit – the partial final judgment. With that benefit, they are precluded from adopting a contrary position.

C. The Text and Structure of the Contracts Require Loss Compensation for the Senior Support Certificates

The unambiguous text of the PSAs and the Settlement Agreement control. "If a contract is complete, clear and unambiguous, it must be enforced according to its plain meaning." *Littleton Constr. Ltd. v. Huber Constr., Inc.*, 27 N.Y.3d 1081, 1081 (2016). This rule "applies with even greater force [in] commercial contract[s] negotiated at arm's length by sophisticated,

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[46] Dkt. #103 (AIG) at 25 (asking the Court to distribute Allocable Shares "pursuant to the Standard Intex Method"); Dkt. #96 (Blackrock / AEGON) at 15 (similar).
[47] *See* Dkt. #35 (affidavit of Robert Madden).
[48] Dkt. #34 at 5-7.
[49] Dkt. #77.
[50] *See* Dkt. #60 at 1.

counseled businesspeople." *Bank of N.Y. Mellon v. WMC Mortg., LLC*, 136 A.D.3d 1, 6 (1st Dep't 2015) (citation omitted). "Courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." *Id.* (citations omitted).

Central to the dispute is whether the PSAs' "Principal Distribution Amount" limits the amount due to Senior Certificates held by the institutional investors. It does – it requires that funds be paid according to the PSAs' terms.[51] The waterfalls of the PSAs limit principal payments to Senior Certificates by calculating the "Principal Distribution Amount" those certificates are owed before balances are written up.[52] As a result, any amount above the "Principal Distribution Amount" goes to bonds with losses – here, the "Senior Support Certificates" held by Prosiris and Tilden Park.[53] Importantly, the "Principal Distribution Amount" is based on balances "***immediately prior***" to the Distribution Date, and thus excludes write-ups occurring ***on*** the Distribution Date.[54] This means the Principal Distribution Amount is capped.

The institutional investors ignore the PSAs' text. Instead, they ask the Court to rewrite the PSAs to fit the "Standard Intex Method" under which the "Principal Distribution Amount" is calculated using ***post***-writeup balances.[55] Their arguments fail:

1. *The Principal Distribution Amount Definition Is Not "Out of Context"*

The institutional investors argue that the Principal Distribution Amount's cap on distribu-

[51] Dkt. #3 (settlement agreement) § 3(d)(i).
[52] Smith Aff. ¶ 21; *see, e.g.*, CWALT 2005-61 PSA § 4.02(a)(3)(A) (payment in an amount "up to the Principal Distribution Amount").
[53] Smith Aff. ¶ 25. Notably, if a "Senior Certificate" has incurred losses, that certificate gets its losses compensated ***before*** the "Senior Support Certificates." *See, e.g.*, CWALT 2005-61 PSA § 4.02(a)(3)(B)(4) (listing the order of priorities in which losses are compensated).
[54] *See, e.g., id.*
[55] *See* Dkt. #103 (AIG brief) at 25 n.20 (describing how the "Standard Intex Method" requires the Trustee to "calculate the Principal Distribution Amount based upon the 'written-up' certificate balances").

tions to Senior Certificates should not control when the PSAs are read in "context."[56] But that is not the law. "An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation." *Ruttenberg v. Davidge Data Sys. Corp.*, 215 A.D.2d 191, 196 (1st Dep't 1995); *see Laba v. Carey*, 29 N.Y.2d 302, 308 (1971) (similar).[57] None of the institutional investors actually cite a provision that conflicts with the definition of "Principal Distribution Amount." Instead, their "context" argument seeks, in effect, to impermissibly delete the Principal Distribution Amount definition from the contract.

2. *The Payment Terms May Not Be Rewritten*

AIG also cites part of the rule that "[t]o carry out the intention of a contract, words may be transposed, rejected, or supplied, to make its meaning more clear."[58] AIG leaves out the rest: "***Such an approach is appropriate only in those limited instances where some absurdity has been identified*** or the contract would otherwise be unenforceable either in whole or in part." *Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 547-48 (1995) (emphasis added); *see Jade Realty LLC v. Citigroup Commercial Mortg. Trust 2005-EMG*, 20 N.Y.3d 881, 884 (2012) (similar).

AIG cannot meet this test: It does not argue that the contracts are unenforceable, and it cannot prove that they are absurd. "[T]he Court of Appeals has set a high bar for declaring a contract absurd." *Warberg Opportunistic Trading Fund, L.P. v. GeoResources, Inc.*, 112 A.D.3d 78, 83-84 (1st Dep't 2013) (collecting cases). Even if the payment "terms might be 'novel or unconventional,' that, by itself, does not render the result here absurd." *Jade Realty LLC*, 20 N.Y.3d at 884. It is hardly "absurd" that, for Subsequent Recoveries, Senior Support Certificates

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[56] Dkt. #96 (AEGON/Blackrock) at 9; *see* Dkt. #103 (AIG) at 3-4.

[57] Blackrock cites a case that refers to a "holistic reading" of a PSA. Dkt. #96 at 10 (citing *Bank of N.Y. Mellon v. WMC Mortg., LLC*, No. 12 Civ. 7096, 2015 WL 4597540, at *8 (S.D.N.Y. July 30, 2015)). But Blackrock cites only ***part*** of that sentence: The court stated only that "[a] more holistic reading of [the PSA] ***that gives force and effect to all provisions*** contained in the three transaction documents is available." *Bank of N.Y. Mellon*, 2015 WL 4597540, at *8 (emphasis added). A "holistic" reading is no license to ***remove*** terms from a contract.

[58] Dkt. #103 (AIG) at 22 (citing *Castellano v. N.Y.*, 43 N.Y.2d 909, 911 (1978)).

with losses might get priority over Senior Certificates ***without losses***. While other contracts may have different terms, that does not make ***these*** contracts "absurd."

New York's limits on the absurdity doctrine "ha[ve] even greater force where, as here, the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length." *Jade Realty LLC v. Citigroup Commercial Mortg. Trust 2005-EMG*, 83 A.D.3d 567, 568 (1st Dep't 2011), *aff'd*, 20 N.Y.3d 881 (2012) (quotations omitted). The PSAs and the Settlement Agreements were negotiated between sophisticated global institutions.

In fact, where "there is no issue . . . of unequal bargaining power" or of "some unfair advantage," "***it is not for the court to save [a party] from the results of his own agreement—absurd or not***." *Crowman v. Wacholder*, 2 A.D.3d 140, 145 (1st Dep't 2003) (emphasis added); *U.S. Bank N.A. v. Fed. Home Loan Bank of Boston*, No. 652382/2014, Dkt. #593, slip op. at 32-33 (Sup. Ct. N.Y. Cnty. Aug. 12, 2016). *In U.S. Bank, N.A.*, another RMBS Article 77 proceeding, an investor complained that the waterfall was "inconsistent with the expectations of investors." Slip op. at 32. The Court disagreed. Because the "waterfall provision in [each] of the PSAs" dictates payment priorities, "[h]aving nonetheless decided to invest, [the objector] cannot now be heard to argue that the settlement deprives it of the benefit of its bargain." *Id.* at 33.

So too here. Each respondent bought these certificates freely; they are all sophisticated, counselled investors who had plenty of opportunity to read the PSAs. The Court should not save them from their own investment decisions.

D. The PSAs and Settlement Agreement Are Commercially Reasonable

AIG, AEGON/Blackrock, and Center Court all argue that, unless the Court rewrites the PSAs and Settlement Agreements to favor their position, those contracts are commercially

unreasonable.[59] That is not the law. "[A]n inquiry into commercial reasonableness is only warranted where a contract is ambiguous." *Fundamental Long Term Care Holdings, LLC v. Cammeby's Funding LLC*, 20 N.Y.3d 438, 445 (2013). Because the PSAs are unambiguous, arguments about "commercial reasonableness" all fail.

Regardless, there is nothing "commercially unreasonable" about enforcing the contracts. It is common to structure RMBS deals so that less senior holders with realized losses get paid in the event of a Subsequent Recovery.[60] Such payment structures are no fluke; the "waterfall" of each PSA is carefully negotiated to provide investors with the risk and returns that they seek.[61] Even if these trusts were "novel or unconventional, this does not warrant an excursion beyond the four corners of the document." *Wallace*, 86 N.Y.2d at 548.

AEGON and Blackrock claim that the PSAs are commercially unreasonable because they somehow "*increase* the risk of loss to the senior-most certificates."[62] They note that overcollateralization and subordination generally protect senior holders and assert that, if the PSAs are applied as written, senior certificates would suffer losses sooner than if the PSAs were rewritten.[63] AIG likewise argues that the contracts create an "unjust windfall" because they compensate realized losses before insuring the institutional investors against future losses.[64] And Center Court urges that "overcollateralized trusts are designed to insulate senior certificateholders from losses, and operate to afford payment to the most-senior classes before the less-senior classes."[65]

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[59] Dkt. #65 at 9-14; Dkt. #96 at 7-14; Dkt. #103 at 19-22.
[60] Smith Aff. ¶¶ 14, 19; *see also* Aronoff Aff. ¶ 8-9 ("In my experience, a payment priority that limits certain cash flow distributions to senior bonds, as is the case in the trusts at issue, is not at all unusual or unique. Such a waterfall, which distributes excess funds in any given month to the senior-most junior bonds with realized losses, may make those junior bonds more attractive investments.").
[61] Aronoff Aff. ¶¶ 5-6; Smith Aff. ¶ 11.
[62] Dkt. #96 at 7.
[63] Dkt. #96 at 13-14.
[64] Dkt. #103 at 19-20.
[65] Dkt. #65 at 10-11.

All that is beside the point. Whether or not overcollateralization and subordination are generally designed to protect senior holders, these PSAs do not insulate the institutional investors' bonds against ***all*** losses for all time. Rather, the contracts were designed to compensate holders with losses already incurred.[66] Tilden Park's and Prosiris' certificates are entitled to payments because they are the most senior holders who have ***already*** suffered losses.[67] The institutional investors are only entitled to the distributions and the overcollateralization and subordination provided by the contracts' plain text.

AIG also argues that the Court should apply the Intex Standard Method because doing so is more "commercially reasonable" than Intex's "After Distributions" model.[68] AIG claims that the "After Distributions" model could be "structurally unsound" because it would leave the trusts undercollateralized, while the "Standard Intex Method" would not do so.[69] So what? Intex's "After Distribution" model ***does not follow the PSAs***.[70] When the PSAs are modelled ***as written*** – including the proper calculation of balances – no undercollateralization results.[71] Regardless, undercollateralization is not fatal to these PSAs; each waterfall has explicit terms for adjusting certificate balances if undercollateralization occurs.[72]

E. The Institutional Investors' "Essential Purpose" Arguments Fail

AIG, AEGON, and Blackrock also argue for rewriting the PSAs to further the "essential

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[66] Smith Aff. ¶ 19.
[67] Smith Aff. ¶ 25.
[68] Dkt. #103 at 12-16.
[69] *Id.*; *see also* Finkel Aff. ¶¶ 27, 53.
[70] Ellis Decl. Ex. H (INTEX798); Smith Aff. ¶ 27.
[71] Smith Aff. ¶¶ 30-40, 47 .
[72] *See, e.g.*, Ellis Decl. Ex. Q (CWALT 2006-OA10 PSA) art. I at 18 (defining "Applied Realized Loss Amount[s]" as "the amount, if any, by which, the aggregate Class Certificate Balance . . . exceeds the aggregate Stated Principal Balance"); *id.* § 4.02(i) ("On each Distribution Date, the Trustee shall allocate any Applied Realized Loss Amount" to reduce certificate balances in a specified order).

purpose" of protecting senior holders from future losses.[73] They misstate the law. Frustration of purpose is a ***defense*** a contract party can raise to excuse nonperformance. *Jack Kelly Partners LLC v. Zegelstein*, 140 A.D.3d 79, 85 (1st Dep't 2016). It is ***not*** a license to "rewrite the parties' agreement and provide an affirmative" term "they never agreed to." *In re Dayton Seaside Assocs. No. 2, L.P.*, 257 B.R. 123, 139 (Bankr. S.D.N.Y. 2000) (applying New York law).

The institutional investors also cannot possibly prove a frustration of purpose. "The doctrine applies 'when a change in circumstances makes one party's performance ***virtually worthless*** to the other, frustrating his purpose in making the contract.'" *PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 85 A.D.3d 506, 508 (1st Dep't 2011) (emphasis added). "[T]he frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, ***the transaction would have made little sense***." *Warner v. Kaplan*, 71 A.D.3d 1, 6 (1st Dep't 2009) (emphasis added). A contract's purpose is ***not*** frustrated just because it has become "financially disadvantageous;" otherwise, "all commercial contracts" would be in "jeopardy." *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 282 (1968).

Applying the contracts' bargained-for payment methods do not render them "virtually worthless." The parties to the Settlement Agreement and the PSAs have received exactly what they bargained for – payment streams in a specified order. These multi-billion-dollar transactions hardly "ma[ke] little sense" just because senior holders with losses might receive relatively more Settlement funds than senior holders without losses. The institutional investors' complaint is, in essence, that they ***will receive less money*** than they want. That is not enough to scrap the contracts. *407 E. 61st Garage, Inc.*, 23 N.Y.2d at 282.

Their remedy – to rewrite the contracts in their favor – in fact threatens truly essential

[73] Dkt. #103 at 12 (AIG); Dkt. #96 at 9 (AEGON/Blackrock).

purposes of structured finance and the bond market generally: certainty and predictability.[74] Investors and underwriters cannot reliably bargain for the cash flows they desire if bondholders can later upend that structure later for purported "structural" reasons. Aronoff Aff. ¶ 11.[75]

F. Though Inadmissible, Parol Evidence Supports Loss Compensation

AIG, AEGON, and Blackrock also try to introduce parol evidence about Intex's modelling software and third parties who had run that software.[76] Those attempts fail as a matter of law. Because the contracts are unambiguous, extrinsic evidence "may not be considered." *Teitelbaum Holdings, Ltd. v. Gold*, 48 N.Y.2d 51, 56 (1979). In particular, when an "agreement is in plain and unambiguous language, there is no need to resort to consideration of the subsequent course of dealings of the parties." *In re Moyer*, 286 A.D.2d 611, 612 (1st Dep't 2001) (citing *Gottlieb v. 180 Hartsdale Assocs.*, 119 A.D.2d 542, 544 (2d Dep't 1986)).[77] Likewise, "it is a basic tenet of contract law that custom and practice cannot alter the unambiguous terms of a contract." *Singapore Recycle Ctr. Pte. Ltd. v. Kad Int'l Mktg., Inc.*, No. 06 Civ. 4997, 2009 WL 2424333, at *6 (E.D.N.Y. Aug. 6, 2009) (applying New York law).

In any event, the relevant parol evidence supports enforcing the PSAs as written. The Trustee has paid principal before writing up balances ***in these very trusts***, even when it would

[74] Aronoff Aff. ¶ 6; Smith Aff. ¶ 13; Jason Kravitt, *Securitization of Financial Assets* § 5.03 (2016 rev.) (describing the "ever present need for certainty and predictability . . . in securitization transactions").
[75] In a supplemental authority letter, AEGON and Blackrock cited the JPMorgan Article 77 case to imply that the "expectations of senior investors in the Trust" weighed more heavily than Tilden Park's and Prosiris' expectations. Dkt. #120 at 1 (citing *id.* at 32). They read that opinion out of context. There, the senior investors' expectations were that the ***waterfall should be followed as written***. *Id.* at 33 (describing how "the waterfall provision in section 6.01 of the PSAs memorializes the senior certificates' priority").
[76] Dkt. #103 (AIG) at 16-23; Dkt. #96 (AEGON/Blackrock) at 15-18.
[77] AIG cites an unpublished Second Circuit summary order to claim that course of dealing can modify an unambiguous contract. Dkt. #103 at 17 (citing *Ward v. Nat'l Geographic Soc'y*, 284 F. App'x 822, 2008 WL 2595181, at *2 (2d Cir. June 27, 2008)). That is not New York law. *See Moyer*, 286 A.D.2d at 612; *Gottlieb*, 119 A.D.2d at 544. *Moyer* and *Gottlieb* are binding on this Court, not unpublished decisions of a lower federal court. *McCabe v. St. Paul Fire & Marine Ins. Co.*, 25 Misc. 3d 726, 734 (Sup. Ct. Erie Cnty. 2009), *aff'd,* 79 A.D.3d 1612 (4th Dep't 2010) ("[W]hile the decisions of the lower Federal courts on questions of New York law are not without precedential value, they are not binding on this court, certainly not in the same sense and to the same extent as decisions of the Appellate Division").

cause losses to be repaid to less senior tranches. The Trustee followed the PSA as written and paid out part of a Subsequent Recovery in October 2010 for the CWALT 2007-OA10 trust to more junior holders to recoup their losses instead of paying the senior-most holders.[78] Likewise, while the institutional investors cite testimony from the Trustee's counsel, Jason Kravitt, who negotiated the Settlement, his testimony ***supports*** enforcing the PSAs: "The way we wrote the Settlement Agreement," he stated, "is that it's the tranches who are most senior ***who suffered losses who get the cash first***."[79] Prosiris and Tilden's bonds are the most senior with losses.[80]

AIG, AEGON, and Blackrock make much of parol evidence about how ***Intex*** might model the Settlement. They observe that, when users requested it for a given trust, Intex programmed its software to provide a toggle offering three options for modelling Subsequent Recoveries.[81] One of these models – the "Standard Intex Method" – pays the institutional investors more.[82] They claim this somehow proves that "market participants have generally understood the Settlement Payment to flow primarily or entirely to the super-senior bonds."[83] They then tack on evidence from two third parties that ran Intex to model the Settlement: (1) a retained expert, James Finkel; and (2) an analyst note written the same day this petition was filed.[84] According to the institutional investors, this shows that the Trustee should apply the "Standard Intex Method" instead of the PSAs.[85] Nonsense.

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[78] Smith Aff. ¶ 24; Dkt. #32 at 19.
[79] Dkt. #101 (excerpt of trial testimony) at 1878:2-16 (emphasis added).
[80] Smith Aff. ¶ 25. Notably, if the "Super Senior" certificates have incurred losses, ***they*** will have priority to Subsequent Recoveries over "Senior Support Certificates" like Tilden Park's and Prosiris' bonds. *See, e.g.*, CWALT 2005-61 PSA § 4.02(a)(3)(B)(4) (listing the priority different tranches have for loss compensation).
[81] Ellis Decl. Ex. G (Intex Aff.) ¶¶ 4-5.
[82] Dkt. #103 (AIG) at 20-21 (citing Finkel Aff. ¶ 10).
[83] Dkt. #103 (AIG) at 19 (citing Intex Aff. ¶ 5).
[84] Dkt. #108 (Finkel Aff.); Dkt. #109 (JPMorgan Chase analyst note).
[85] Dkt. #96 (AEGON/Blackrock) at 18-19; Dkt. #103 (AIG) at 25 & n.20. AIG also tries to paint Prosiris and Tilden Park as supporting Intex's "After Distributions model." Dkt. #103 at 12. That is wrong: Tilden Park and Prosiris ask the Court to apply ***the PSAs***. *See* Smith Aff. ¶ 27 (the "After Distributions" model does not reflect the PSAs).

First, Intex ***denies*** knowing how Subsequent Recoveries should be paid:

- Intex's models ***"did not reflect Intex's opinion or belief that either the 'Standard Intex Method' or one or the other models is the correct or best way to distribute the Settlement Payment***."[86]
- Intex .[87]
- Intex ***offers no "assurances as to how a trustee, securities administrator, or other relevant transaction party will or should pay any given deal***."[88]
- Intex admits

Second, "[a] party who seeks to use trade usage to define language or annex a term to a contract must show either that the other party ***was actually aware*** of the trade usage, or that the usage was so notorious in the industry that a person of ordinary prudence in the exercise of reasonable care would be aware of it." *Last Time Beverage Corp. v. F & V Distrib. Co., LLC*, 98 A.D.3d 947, 951-52 (2d Dep't 2012) (citing *Reuters Ltd. v. Dow Jones Telerate*, 231 A.D.2d 337, 343 (1st Dep't 1997)) (emphasis added). ***All*** parties must know of a trade usage for it to govern a contract: "That one party had knowledge of the usage, and supposed that it would enter into the contract, is not sufficient." *Reuters Ltd.*, 231 A.D.2d at 344 (citing *Schlanger v. Heyman*, 185 A.D. 599, 600 (1st Dep't 1918)).

There is no proof that ***all*** parties to the PSAs knew how Intex might model Subsequent Recoveries. Nor could they have known: Intex did not create the "Standard Intex Method" until an unknown client requested it in August 2011, ***after*** the Settlement Agreement and ***five years***

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[86] Ellis Decl. Ex. G (Intex Aff.) ¶ 6 (emphasis added).
[87] Ellis Decl. Ex. I (INTEX258) (client email stating that).
Ellis Decl. Ex. G (Intex Aff.) ¶ 3 (emphasis added).
[89] Ellis Decl. Ex. H (INTEX798).

after the PSAs.[90] One cannot interpret the contracts by a "trade usage" that did not yet exist.

Both AIG's expert and the analyst note are irrelevant because they merely run ***Intex***'s model; they do not actually model the PSAs.[91] In any event, Intex is plainly wrong: Its models fail to account for the PSAs' definition of "Principal Distribution Amount" that mandates loss compensation.[92] Intex can be a useful tool for modelling RMBS cash flows. It is ***not*** a substitute for the contracts' plain text. The Court should not rewrite the PSAs to conform to third-party software that contains mistakes and is subject to investor manipulation.[93]

G. Center Court's Write-Up-First Argument Fails

For the CWALT 2005-61 trust only, Center Court argues that the Trustee should write up first and pay second. Center Court, like all objectors, is barred by *res judicata*. Regardless, Center Court's arguments are at war with the Settlement Agreement's and PSA's text:

1. *Subsequent Recoveries Are Not "Amount[s] Held for Future Distribution"*

Center Court claims that Subsequent Recoveries for the CWALT 2005-61 trust are not "Available Funds," but rather "Amount[s] Held for Future Distribution" to be paid out the month ***after*** receipt.[94] That ignores the Settlement Agreement: The "Allocable Share" must be paid "as though it was a Subsequent Recovery available for distribution ***on that distribution date***."[95] The Settlement Agreement requires Allocable Shares to be paid out the month they are received.

Moreover, the Prospectus Supplement for that trust shows that write-ups do ***not*** occur before payment: Balances for a given Distribution Date are increased "by the amount of Subse-

[90] Ellis Decl. Ex. G (Intex Aff.) ¶ 5; Dkt. # 3 at 48 (execution date of June 28, 2011).
[91] Dkt. #108 (Finkel Aff.) ¶ 8 (Finkel's assignment was to model the Settlement "under the three scenarios laid out in the Trustee's February 5, 2016 Verified Petition, and modeled by Intex Solutions, Inc."); Dkt. #109 (analyst note) at 2-4 (comparing the three Intex scenarios).
[92] Smith Aff. ¶ 27.
[93] *See*, *e.g.*, Intex Aff. ¶ 5 (noting that Intex changes its models upon investor requests).
[94] Dkt. #65 at 5-9; *see, e.g.*, CWALT 2005-61 PSA art. I at 16-17 ("Available Funds" do not include the "Amount Held for Future Distribution").
[95] Dkt. #3 (Settlement Agreement) § 3(d)(i) (emphasis added).

quent Recoveries (if any) . . . collected during the period beginning on the second day of the calendar month ***preceding the calendar month in which such Distribution Date occurs***."[96]

2. *The Definition of "Certificate Balance" Does Not Support a Delayed Distribution Date*

Center Court argues that write-ups should happen first because "Principal Distribution Amounts" are a function of a "Certificate Balance," which reflects prior write-ups and which can be calculated "at any date."[97] Center Court reads the PSA out of context. The "Certificate Balance" only reflects "any increase to the Certificate Balance of such Certificate ***pursuant to Section 4.02*** due to the receipt of Subsequent Recoveries."[98] And write-ups pursuant to Section 4.02 happen, explicitly, "***[o]n each Distribution Date***."[99] The definition of "Certificate Balance" does not change the fact that write-ups occur ***on*** the Distribution Date, while the Principal Distribution Amount is calculated "***immediately prior***."[100] Likewise, that the Certificate Balance reflects the "maximum dollar amount of principal to which the Holder thereof is then entitled"[101] is irrelevant, because each holder is only entitled to what the waterfalls dictate.

3. *Paying First Does Not Render The Write-Up Provisions Meaningless*

Center Court asserts that paying first would render the write-up provision meaningless. They claim that, because the loss-compensation rules of the waterfall do not refer to certificate balances, if certificates were paid first, their balances could not be written up.[102] Not so. The

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[96] Ellis Decl. Ex. A (CWALT 2005-61 Prospectus Supplement) at S-52 (emphasis added); s*ee In re Trusteeship Created by Am. Home Mortg. Inv. Trust 2005-2*, No. 14 Civ. 2494, 2014 WL 3858506, at *20 (S.D.N.Y. July 24, 2014) (reading a RMBS indenture in light of a prospectus). In fact, writing up certificate balances as Center Court suggests would in fact make those certificates ***undercollateralized***, requiring Center Court's bonds to be written down. As a result, Center Court does not benefit even if its argument were correct.
[97] Dkt. #65 at 9-10 (citing CWALT 2005-61 PSA art. I at 17).
[98] CWALT 2005-61 PSA art. I at 17 (emphasis added).
[99] *See, e.g.*, CWALT 2005-61 PSA § 4.02(j) (emphasis added).
[100] CWALT 2005-61 PSA art. I at 40-41 (emphasis added).
[101] Dkt. #64 (Center Court) at 6-7.
[102] Dkt. #65 at 11-12.

decrease of balances is simply handled in a ***different*** part of the PSAs. By definition, ***any*** payment of principal to a certificate decreases its Certificate Balance.[103] Because "Subsequent Recoveries" are distributed as principal, paying Certificate Balances will by definition cause certificate balances to be written down.[104] The certificates are then written back up after distribution by "the amount of the Subsequent Recoveries, if any."[105] As a result, there is no conflict between writing up and paying down, and paying down first per the terms of the PSA does not render the write-up provision "meaningless."

4. *Center Court's "Anomaly" Argument Fails*

Center Court complains that a large Subsequent Recovery is a "one-time anomaly."[106] That is no reason to rewrite the PSA. "[P]resent dissatisfaction with the results of the deal" does not entitle a party to "rewrite the agreements" just because something "unforeseen" has happened. *RJE Corp. v. Northville Indus. Corp.*, 198 F. Supp. 2d 249, 269 (E.D.N.Y. 2002) (citing *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 902 (1987)). Center Court may not rewrite the PSAs because it did not expect the settlement to be as large as it turned out to be.

5. *Center Court's Absurdity Argument Fails*

Finally, Center Court claims that, for four trusts,[107] paying first would be absurd because it might "result in disproportionate payments" to junior "Subordinated Certificates."[108] Center Court notes that "Unpaid Realized Losses" for those four trusts are defined only "[f]or any Class

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[103] *See, e.g.*, CWALT 2005-61 PSA art. I at 17 ("Certificate Balance" is defined as "the amount of principal to which the Holder thereof is entitled . . . ***minus the sum of (i) all distributions of principal previously made with respect to that Certificate . . .***") (emphasis added).
[104] *See* CWALT 2005-61 PSA art. I at 16 ("Available Funds" include "Subsequent Recoveries").
[105] *See* CWALT 2005-61 PSA § 4.02(j).
[106] Dkt. #65 at 11.
[107] The trusts identified by Center Court are CWALT 2005-61, CWALT 2005-69, CWALT 2005-72, and CWALT 2005-76.
[108] Dkt. #65 at 12-13.

of Subordinated Certificates,"[109] even though, as Center Court admits, the PSAs require that "both Subordinated Certificates and Senior Certificates" be written up based on realized losses.[110] Center Court is wrong: The waterfalls clearly allocate realized losses to senior classes.[111] Further, the Prospectus Supplement explicitly states that "Unpaid Realized Loss Amounts" apply to "***any class of certificates***."[112] *See Am. Home Mortgage Inv. Trust 2005-2*, 2014 WL 3858506, at *20 (trust agreements should be read in light of a prospectus). Properly read in context, the PSAs offer no support for Center Court's claim.[113]

II. PAYMENTS SHOULD BE MADE AS OF FEBRUARY 25, 2016

The Court should fix February 25, 2016 as the Distribution Date. The Trustee received the Settlement funds on or about February 10, 2016.[114] The Agreement required the Trustee to distribute those funds on the next available Distribution Date – February 25, 2016.[115] Because the Trustee instead filed this proceeding, and because the accrual of realized losses changes the relative income each certificateholder receives, Prosiris and Tilden have lost money each month the case is pending.[116] The Court should undo that result and place Prosiris and Tilden in the same position as they would have been had this suit not been filed.

"The power of courts, whether of law or equity, to make entries of judgments or decrees *nunc pro tunc* in proper cases and in furtherance of the interests of justice, is one which has been

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[109] *Id.* (citing CWALT 2005-61 PSA art. I at 13).
[110] *Id.* at 13 (citing CWALT 2005-61 PSA § 4.02(j)).
[111] *See, e.g.*, CWALT 2005-61 PSA § 4.02(i) (requiring the Trustee to "allocate any Applied Realized Loss Amount" to classes 1-A-1 through 1-A-3); *id.* Art. I at 8 ("Senior Certificates" include classes 1-A-1 through 1-A-3).
[112] Ellis Decl. Ex. A (CWALT 2005-61 ProSupp) at S-66 (emphasis added)
[113] If Center Court finds the definition of "Unpaid Realized Losses" absurd because limited to "Subordinated Certificates," it can ask the Court to fix this supposed scrivener's error and state, as the Prospectus Supplement does, that "Unpaid Realized Losses" cover all certificates. *See Wallace v. 600 Partners Co.*, 205 A.D.2d 202, 210 (1st Dep't 1994), *aff'd*, 86 N.Y.2d 543 (1995) (courts can correct scrivener's errors to avoid absurd results). But there is no reason to rewrite ***other*** PSA terms to give Center Court higher priority than it would have otherwise.
[114] Dkt. #1 (Petition) ¶ 1.
[115] *See, e.g.*, CWALT 2005-61 PSA art. I at 21 (defining the "Distribution Date" as the 25th of each month).
[116] *See* Ellis Decl. Ex. F (transcript) at 15; Smith Aff. ¶ 49.

recognized and exercised for a long time as a part of their jurisdiction." *Jewett v. Schmidt*, 108 A.D. 322, 325 (1st Dep't 1905), *aff'd*, 184 N.Y. 608 (1906). In equitable proceedings like this one, courts "regard[] as done that which should have been done." *Simonds v. Simonds*, 45 N.Y.2d 233, 240 (1978); *In re Salkin*, 9 Misc. 2d 708, 710 (Sup. Ct. N.Y. Cnty. 1957), *aff'd*, 6 A.D.2d 1011 (1st Dep't 1958) (the "inherent nature" of an instruction proceeding "is in equity").

Courts do not hesitate to retroactively enforce judgments. For example, in *U.S. v. American Cyanamid Co.*, 598 F. Supp. 1516 (S.D.N.Y. 1984), after a defendant failed to comply with a judgment requiring it to buy a certain amount of chemicals annually from a competitor, the court ordered it to submit a purchase order equal to the amount it would have used in that year. *Id.* at 1523-1524. "Observ[ing] that equity deems done that which should have been done," the court ordered the defendant to "perform the Judgment fully through the date of its termination." *Id.* at 1525. Likewise, when the state failed to comply with a habeas judgment requiring a parole hearing, the Second Circuit cited the same maxim to deem that the prisoner was granted parole as of the prior judgment. *U.S. ex rel. Schuster v. Vincent*, 524 F.2d 153, 161 (2d Cir. 1975).

Retroactive relief is especially appropriate here because the same parties that caused delay in this case stand to gain from that delay. A party in litigation "may not profit from its own delay." *Heil Grinding & Mfg. Co. v. Glasgow, Inc.*, 236 A.D.2d 813, 814 (4th Dep't 1997). The only reason why the funds were not paid out on February 25 was the delay of this litigation – most notably, AIG's month-long effort to seek irrelevant discovery on Intex. That delay benefits the institutional investors: Each month a final payment is put off, AIG will earn more money from realized losses compared to Prosiris and Tilden Park.[117] AIG should not profit in that way.

AIG claims Allocable Shares should be delayed because they are treated "as though [they

[117] *See* Ellis Decl. Ex. F (transcript) at 17; Smith Aff. ¶ 49.

were] a Subsequent Recovery available for distribution on that distribution date."[118] AIG is wrong. The funds were "available for distribution" ***when the Trustee received them*** in February 2016. Likewise, AIG's argument that, in one PSA, the definition of "Certificate Balance" refers to the amount to which a "Holder thereof is then entitled,"[119] is irrelevant: It is the ***Settlement Agreement*** that should be enforced retroactively, not the PSAs. Regardless, because the Settlement Agreement required that funds be paid out on February 25, Tilden Park and Prosiris were entitled to those funds then.[120]

Finally, AIG blames Tilden Park and Prosiris, claiming that any delay is "caused by their decision to single out their Disputed Trusts as 'unique.'"[121] Not so. It is ***the contracts' text*** that is different. AIG wasted months trying to avoid that plain text from being applied. The Court should enforce the Settlement as of February 2016, when it should have been enforced.

CONCLUSION

This Court should grant the relief requested in Prosiris' and Tilden Park's Verified Answer and instruct the Trustee, *first*, to distribute Allocable Shares as Subsequent Recoveries before writing up certificate balances, *second*, to distribute Subsequent Recoveries according to the PSAs without any alteration or one-time adjustment, and, *third*, to distribute Allocable Shares as of February 25, 2016.

[118] Dkt. #103 at 24.
[119] Dkt. #60 (AIG brief) at 6 (citing CWALT 2006-OA10 PSA art I. at 17).
[120] In a supplemental authority letter, AEGON and Blackrock cite the JPMorgan Article 77 case to claim that the Court could not "roll back the clock." Dkt. #120 at 1. That case has no bearing here. In *U.S. Bank*, the funds had not yet been received by the Trustee, and there was no "provision in the Governing Agreements" supporting earlier payment. Dkt. #120 at 30. Here, by contrast, the Trustee ***already has*** the Settlement funds, and the Settlement Agreement would have required payment on February 25 but for this petition.
[121] Dkt. #103 at 25.

Dated: August 26, 2016
New York, New York

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