

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

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

Hon. Saliann Scarpulla  
Part 39

Motion Sequence No. 1

**CENTER COURT, LLC'S RESPONSE TO  
PROSIRUS AND TILDEN PARK'S OPENING SUBMISSION**

McKool Smith PC  
One Bryant Park, 47<sup>th</sup> Floor  
New York, NY 10016

*Attorneys for Center Court, LLC*

Dated: March 14, 2016

## TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION .....	1
ARGUMENT .....	2
I. The Text And Structure Of The PSAs For The Fourteen Trusts Compel A Write-Up Prior To Any Distribution Of Subsequent Recoveries.....	2
A. Subsequent Recoveries Are Held For Future Distribution Pending Write-Up Prior To Being Distributed As “Available Funds.”.....	2
B. Writing Up The Certificate Balance Prior To Distribution Is Supported By The Language Of CWALT 2005-61.....	6
C. Using Subsequent Recoveries To Pay Unpaid Realized Losses Renders A Provision Of The Distribution Waterfall Meaningless. ....	8
II. Respondents’ Proposed Interpretation Of The PSAs Leads To Absurd, Commercially Unreasonable Results That Are Contrary To The Reasonable Expectations Of Investors.....	9
III. Alternatively, The Court Should Find The PSAs Are Ambiguous And Afford Limited Discovery And Set A Trial On The Merits. ....	14
CONCLUSION.....	15

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Atwater &amp; Co. v. Panama R.R. Co.</i> , 246 N.Y. 519 (1927) .....	14
<i>Cole v. Macklowe</i> , 99 A.D.3d 595 (1st Dept. 2012).....	10
<i>Columbus Park Corp. v. Department of Housing Preservation &amp; Dev.</i> , 80 N.Y.2d 19 (N.Y. 1992) .....	9
<i>Kass v. Kass</i> , 91 N.Y.2d 554 (N.Y. 1998) .....	14
<i>Natt v. White Sands Condo.</i> , 95 A.D.3d 848 (2d Dept. 2012) .....	14
<i>Nostrom v. A.W. Chesterton Co.</i> , 15 N.Y.3d 502 (N.Y. 2010) .....	9

## INTRODUCTION

Center Court, LLC (“Certificateholder”) has joined in the Response of Certain Investors to Opening Submissions (the “Joint Response”). As is noted therein, Prosirius Capital Management LP and Tilden Park Capital Management LP (collectively, “Respondents”) introduced certain issues in their Answer to the Verified Petition and memorandum of law in support thereof (Dkt. 31, 32) that raise a triable issue of fact as to the fourteen trusts in which Respondents are certificateholders. Certificateholder, therefore, files this response to address certain of the arguments raised by Respondents.<sup>1</sup>

Respondents’ tortured interpretations of the PSAs not only are contrary to the plain language thereof but also results in absurd, commercially unreasonable distributions that are contrary to the reasonable expectations of investors. Indeed, Respondents’ memorandum of law makes clear that the “leakage” to Senior Support Certificates that they propose is heavily dependent on the unusually large amount of Subsequent Recoveries *and* the timing of when those funds are received by the fourteen trusts. Under Respondents’ theories, the mere passage of time significantly affects the funds received by classes of certificateholders. Such wild swings in recovery are not contemplated by the Settlement Agreement or the Governing Documents. Accordingly, the Court should reject Respondents’ contention and order distribution of the Allocable Shares pursuant to the unambiguous terms of the PSAs and the Settlement Agreement.

---

<sup>1</sup> As is noted in the Joint Response, Respondents have raised an issue that was not raised in the Trustee’s Verified Petition. (Joint Response at 5.) Certificateholder therefore supports the request in the Joint Response for additional time in which to brief Respondents’ issue and reserves the right to amend or supplement this response should the Court grant that request.

## ARGUMENT

### I. The Text And Structure Of The PSAs For The Fourteen Trusts Compel A Write-Up Prior To Any Distribution Of Subsequent Recoveries.

Respondents argue that the text and structure of the PSAs compel the distribution of funds prior to any write-up. (*See* Memorandum of Law in Support of Respondents' Verified Answer to the Verified Petition, Dkt. 32 ("Resp. Mem. of Law"), at 13-17.) However, in so arguing, Respondents selectively cite to a few sentences in certain provisions of the PSAs. A review of the PSAs that gives meaning and effect to *all* of the relevant sections and sentences reveals that write-up prior to any distribution is mandated by the fourteen PSAs.

#### A. Subsequent Recoveries Are Held For Future Distribution Pending Write-Up Prior To Being Distributed As "Available Funds."

Respondents contend that because "Subsequent Recoveries" are distributed as "Available Funds," the PSAs require payment of Subsequent Recoveries prior to any write-up. They are wrong. Certificateholder agrees that Subsequent Recoveries are distributed as Available Funds under the PSAs for the fourteen trusts identified by Respondents. (Resp. Mem. of Law at 8.) However, a careful reading of the definition of Available Funds, related definitions, and the section delineating priorities of distribution of funds supports that Subsequent Recoveries must be used to write-up the Certificate Principal Balances *before* distribution.

Importantly, Available Funds does not include all funds in a trust's Certificate Account.

Available Funds is more limited and is defined in the PSAs as follows:

Available Funds: As to any Distribution Date and each Loan Group, the sum of (a) the aggregate amount held in the Certificate Account at the close of business on the related Determination Date, including any Subsequent Recoveries, in respect of such Mortgage Loans *net of the related Amount Held for Future Distribution* and net of Prepayment Charges and amounts permitted to be withdrawn from the Certificate Account pursuant to clauses (i) - (viii) of Section 3.08(a) in respect of such Mortgage Loans and amounts permitted to be withdrawn from the Distribution Account pursuant to clauses (i) - (iii) of Section 3.08(b) in respect of such Mortgage Loans, (b) the amount of the related Advance

and (c) in connection with Defective Mortgage Loans in such Loan Group, as applicable, the aggregate of the Purchase Prices and Substitution Adjustment Amounts deposited on the related Distribution Account Deposit Date.

(*See, e.g.*, CWALT 2005-61 PSA at p. 2; CWALT 2006-OA3 PSA at p. 2 (emphasis added).)<sup>2</sup>

Therefore, calculating Available Funds begins with all funds in the trust's Certificate Account as of the 22<sup>nd</sup> of a month, but it *excludes* any Amount Held for Future Distribution.

Subsequent Recoveries that are received in the same month as a Distribution Date are excluded from Available Funds because they are included in the Amount Held for Future Distribution. The PSAs define "Amount Held for Future Distribution" as follows:

Amount Held for Future Distribution: As to any Distribution Date and each Loan Group, the aggregate amount held in the Certificate Account at the close of business on the related Determination Date on account of (i) Principal Prepayments received after the related Prepayment Period and Liquidation Proceeds and Subsequent Recoveries received in the month of such Distribution Date relating to such Loan Group and (ii) all Scheduled Payments due after the related Due Date relating to such Loan Group.

(*See, e.g.*, CWALT 2005-61 PSA at p. 1; CWALT 2006-OA3 PSA at p. 1 (emphasis added).)

Therefore, although Respondents are correct that Subsequent Recoveries are not segregated into a separate account for distribution, they are not distributed as Available Funds if they are received the same month as the Distribution Date. Rather, the only way to give meaning and effect to both definitions of Available Funds and Amount Held for Future Distributions is to hold back Subsequent Recoveries from distribution on the Distribution Date in the month in which they are received, and then distribute them in the immediately *following* month. In the month following receipt, Subsequent Recoveries no longer qualify as an Amount Held for Future Distributions by definition, and instead are included as Available Funds for distribution.

---

<sup>2</sup> The Distribution Date is defined as the 25<sup>th</sup> of each month (*see, e.g.*, CWALT 2005-61 PSA at p. 7), and the related Determination Date is generally the 22<sup>nd</sup> of each month (*see, e.g., id.*).

Despite the fact that Subsequent Recoveries are not Available Funds during the month in which they are received (and thus are not distributed in the month of receipt), the PSAs nonetheless require Subsequent Recoveries to be allocated to increase certificate principal balances on the Distribution Date *in the month in which they are received*. Section 4.02 states that “on each Distribution Date, the Trustee shall allocate the amount of the Subsequent Recoveries for [each Loan Group], if any, to increase the Class Certificate Balance of the [respective Loan Group’s Certificates] to which Applied Realize Loss Amounts have been previously allocated, sequentially,” to the senior certificates and then to the junior certificates. (See, e.g., CWALT 2005-61 PSA § 4.02(j); CWALT 2006-OA3 PSA § 4.02(i).)<sup>3</sup> “Subsequent Recoveries” are defined as *all* unexpected amounts on any Distribution Date received by the Master Servicer, including Subsequent Recoveries received that month:

Subsequent Recoveries. As to any Distribution Date and Loan Group, with respect to a Liquidated Mortgage Loan in that Loan Group that resulted in a Realized Loss in a prior calendar month, unexpected amounts received by the Master Servicer (net of any related expenses permitted to be reimbursed pursuant to Section 3.08) specifically related to such Liquidated Mortgage Loan after the classification of such Mortgage Loan as a Liquidated Mortgage Loan.

---

<sup>3</sup> The CWALT 2006-OA3 PSA provides: “Application of Subsequent Recoveries. On each Distribution Date, the Trustee shall allocate the amount of the Subsequent Recoveries, if any, to increase the Class Certificate 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 Senior Certificates and Group 2 Senior 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 such Class and (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 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 and Class M-7 Certificates, in that order, in each case by not more than the amount of the Unpaid Realized Loss Amount of such Class.” (CWALT 2006-OA3 PSA § 4.02(i) (emphasis added).)

(*See, e.g.*, CWALT 2005-61 PSA at p. 33; CWALT 2006-OA3 PSA at p. 34) (emphasis added). Consequently, these PSAs require a write-up to Certificate Balances before distributing the corresponding Subsequent Recoveries.

For example, assuming that the Court renders a decision the last week of this month and that the Allocable Share for CWALT 2005-61 is deposited into the Certificate Account on April 1, 2016, the Trustee must write-up the Certificate Balances relating to the receipt of those Subsequent Recoveries on April 25, 2016, which is the Distribution Date for the month in which those funds were received. But those same Subsequent Recoveries should be held for future distribution until May 25, 2016, which is the Distribution Date for the month after the receipt of those funds. (*Id.*; *see also id.* at pp. 17 (definition of “Amount Held for Future Distribution”), 18 (definition of “Available Funds”).)

In this manner, the PSAs maintain the purpose of the overcollateralization and subordination inherent in the structure of the trusts: the protection of the senior certificates. First, on the April 25 Distribution Date, the Allocable Share is a Subsequent Recovery received that month, and thus is an Amount Held for Future Distribution. On April 25, the Allocable Share is applied to write up the Certificate Balances of the Certificates that have Applied Realized Loss Amounts. On the May 25 Distribution Date, the Allocable Share is included in Available Funds as it is no longer an Amount Held for Future Distribution. Available Funds, as Respondents describe, are used to pay Current Interest first, and then the Principal Distribution Amount, and then are used to pay Unpaid Realized Loss Amounts. *However*—and this is where Respondents’ analysis falls short—the Principal Distribution Amount *includes* the Allocable Share. (*See, e.g.*, CWALT 2005-61 PSA at p. 11.) The Principal Distribution Amount equals the aggregate Class Certificate Balances minus the excess of the Stated Principal Balance of the



Mortgage Loans over the Overcollateralization Target Amount. As Respondents state, the Allocable Share does not alter the Stated Principal or the Overcollateralization Target Amount; these remain static. But the Class Certificate Balances have increased by the amount of the Allocable Share because Subsequent Recoveries (including the Allocable Share) were required to be applied on the April 25 Distribution Date to increase Class Certificate Balances by the amount of Applied Realized Loss Amounts. Thus, the Principal Distribution Amount is larger because the difference between the Class Certificate Balance and the excess of the Stated Principal Balance of the Mortgage Loans is now larger. This omission from Respondents' analysis is critical, because the Principal Distribution Amount (including the Allocable Share) is used to pay the senior certificates, pro rate, until the senior certificates' balances are reduced to zero.

**B. Writing Up The Certificate Balance Prior To Distribution Is Supported By The Language Of CWALT 2005-61.**

Respondents also argue that, because the distribution of principal in the waterfall is based upon the Principal Distribution Amount, which is calculated immediately prior to the Distribution Date, the order of operations must be pay first, write-up second. (Resp. Mem. of Law at 11.) In so arguing, Respondents contend that, because the Principal Distribution Amount is calculated based upon the certificate principal balance, and because the certificate principal balance is calculated "as of the Distribution Date," the certificate principal balance used must be that balance as of the previous Distribution Date. Respondents' position, however, is belied by the language of the PSA for CWALT 2005-61, the trust in which Respondents and Certificateholder both own certificates.

Pursuant to the PSA, the Certificate Balance is not limited to calculation on a Distribution Date; it can be calculated at *any* date:

With respect to any Certificate (other than the 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, with respect to the Subordinated Certificates, any increase to the Certificate 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 and (ii) with respect to the Subordinated Certificates, any Applied Realized Loss Amounts allocated to such Certificate on previous Distribution Dates pursuant to Section 4.02 without duplication.

(CWALT 2005-61 PSA at p. 3 (emphasis added).)

Further, the definition of Certificate Balance makes clear that it is intended to represent “the *maximum* dollar amount of principal to which the Holder thereof is then entitled under this Agreement.” (*Id.* (emphasis added).) Thus, to the extent that any Subsequent Recoveries were received in any period that could increase the amount of principal to which the certificateholder is entitled, it must be included in the Certificate Balance and, therefore, the Principal Distribution Amount.

Finally, the plain language of the definition of Certificate Balance supports that all Subsequent Recoveries received as of any date should be included in that balance, subtracting only payments of principal and realized losses previously received or allocated. Certificate Balance is calculated at any date as:

- The Denomination of each Certificate, meaning the Principal Balance of the Certificate at the beginning of the trust;
- Plus any increase to the Certificate Balance due to the receipt of Subsequent Recoveries;
- Minus all distributions of principal *previously* made; and
- Minus Applied Realized Loss Amounts allocated to the Certificate on previous Distribution Dates.

Thus, the Certificate Balance may be calculated “at any date,” and not just on a Distribution Date or immediately prior thereto. Moreover, in calculating the Certificate Balance,

the Trustee must start with the original balance of the certificate and then add *any* Subsequent Recoveries that have been received to date *before* subtracting distributions of principal that were previously made or any Applied Realized Loss Amounts. Therefore, the Certificate Balance used in calculating the Principal Distribution Amount must take into account Subsequent Recoveries from the current period, regardless the date on which the Principal Distribution Amount is calculated, and the order of operations therefore is write up first, pay second.

**C. Using Subsequent Recoveries To Pay Unpaid Realized Losses Renders A Provision Of The Distribution Waterfall Meaningless.**

Respondents agree that “the key feature” of the distribution waterfall is the distribution of Available Funds to reduce the principal balances of the certificates. (Resp. Mem. of Law at 9.) Respondents go on to argue that a substantial portion of the Allocable Shares should be distributed to compensate their certificates for Unpaid Realized Losses. (*See id.* at 10; Declaration of Jaime D. Sneider, Dkt. 32, Ex. C.) But when principal distributions are made to compensate for Unpaid Realized Losses in this way, there is no corresponding decrease in the Certificate Balances of the affected certificates. (*See, e.g.*, CWALT 2005-61 PSA § 4.02(a)(4) (indicating when Available Funds are paid in an amount equal to the Unpaid Realized Loss Amount for a class, without reference to Certificate Balances).)

At the same time, the unambiguous language of the PSAs provides that the entire amount of Subsequent Recoveries received is applied to increase the Class Certificate Balances, without exception. For example, Section 4.02(j) of CWALT 2005-61 PSA provides, in part:

Application of Subsequent Recoveries. On each Distribution Date, the Trustee shall allocate *the amount* of the Subsequent Recoveries for Loan Group 1, if any, to increase the Class Certificate Balance of the Group 1 Certificates to which Applied Realized Loss Amounts have been previously allocated, sequentially, to the Class 1-A-1, Class 2-A-1, Class 1-A-3, Class 1-M-1, Class 1-M-2, Class 1-M-3, Class 1-M-4, Class 1-M-5 and Class 1-M-6 Certificates, in that order, in each case by not more than the amount of the Unpaid Realized Loss Amount of such Class.

(CWALT 2005-61 PSA at p. 71 (emphasis added); *see also* CWALT 2006-OA3 PSA § 4.02(i) (“On each Distribution Date, the Trustee shall allocate the amount of the Subsequent Recoveries, if any, to increase the Class Certificate Balance of the Classes of Certificates to which Applied Realized Loss Amounts have been previously allocated...” (emphasis added)).) Under these circumstances, it cannot be that Subsequent Recoveries are used to pay Unpaid Realized Losses because, in that event, they are not used to increase Certificate Balances as required by the PSAs.

Such an interpretation of the PSAs renders a provision of the distribution waterfall meaningless and, therefore, is untenable under New York law. *See, e.g., Nostrom v. A.W. Chesterton Co.*, 15 N.Y.3d 502, 508 (N.Y. 2010) (holding that a construction that renders one part of a contract meaningless should be avoided); *Columbus Park Corp. v. Department of Housing Preservation & Dev.*, 80 N.Y.2d 19, 30-31 (N.Y. 1992) (stating that a construction which makes a contract provision meaningless is contrary to basic principles of contract interpretation). Instead, the Certificate Balances must first be increased (written-up), which then increases the Principal Distribution Amount. This prevents leakage to the more junior certificateholders, as intended by the overcollateralized trust structure.

Respondents’ contention that only a portion of amounts received as Subsequent Recoveries need increase the Certificate Balances is contrary to the plain and unambiguous terms of the PSAs and would render the section of the distribution waterfall regarding the write-up of Subsequent Recoveries meaningless. Respondents’ argument, therefore, fails as a matter of law.

**II. Respondents’ Proposed Interpretation Of The PSAs Leads To Absurd, Commercially Unreasonable Results That Are Contrary To The Reasonable Expectations Of Investors.**

As described above, Respondents’ proposed payment methodology is unsupported by the unambiguous language of the PSAs. Additionally, the Court should reject Respondents’ proposed interpretation of the PSAs because a “contract should not be interpreted to produce an

absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties.” *Cole v. Macklowe*, 99 A.D.3d 595, 596 (1st Dept. 2012). Respondents’ position can lead to an absurd result in a multitude of ways. Below are but three examples.

*First*, Respondents advocate for a different result than the other 516 Covered Trusts because their fourteen trusts are structured in a “fundamentally different way,” are “designed to afford only limited protection of principal after which distributions are made to certificates in order of seniority for any unpaid realized losses,” and would ensure that certificateholders below the Super Senior Certificates “would recover some of their realized losses in the event of a sufficiently large Subsequent Recovery.” (Resp. Mem. of Law at 15-17.) Respondents have presented zero evidence to support their theory and, in fact, it is untrue.

Apart from some slight definitional differences, these fourteen trusts are overcollateralized trusts that operate similarly to the other OC Trusts. Indeed, the Trustee (*see* Verified Petition ¶ 32, Dkt. 1),<sup>4</sup> the Institutional Investors (*see* Answer of Certain Institutional Investors to the Verified Petition at 3, Dkt. 34),<sup>5</sup> Federal Home Loan Mortgage Corporation (*see* Answer of Federal Home Loan Mortgage Corp. to the Verified petition at 2, Dkt. 40),<sup>6</sup> and economic theorists<sup>7</sup> agree: overcollateralized trusts are designed to insulate senior

---

<sup>4</sup> “An [overcollateralized trust] is designed to create credit enhancement, or protection, for more senior Certificateholders through a concept called overcollateralization.”

<sup>5</sup> The Institutional Investors state that the “sole purpose” of overcollateralization is “protecting the senior certificateholders against the risk of loss”.

<sup>6</sup> “The purpose of overcollateralization is to provide a cushion of protection in the form of extra assets. . . . Only if the trust is at or above OC Target on the relevant distribution date are collections not required to be distributed sequentially and in order of propriety to the senior classes.” (footnote omitted)

<sup>7</sup> *See, e.g.*, *Securitization of Financial Assets* § 8.02[B], at 8-10 (Jason H.P. Kravitt ed., 3d ed. 2012); Brian P. Lancaster, Glenn M. Schultz, & Frank J. Fabozzi, *Structured Products and Related Credit Derivatives: A Comprehensive Guide for Investors* 183 (2008) (the

certificateholders from losses, and operate to afford payment to the most-senior classes before the less-senior classes. Respondents have identified no real differences and cited no authority that would indicate that these trusts were designed to compensate certificateholders per some other intended result from a different, one-off overcollateralization structure than the other OC Trusts.

*Second*, by Respondents' admission, the only method by which their proposed "leakage" downstream to the Senior Support Certificates is the unusual, coincidental collision of a "sufficiently large Subsequent Recovery" and the timing of when the funds are received by the fourteen trusts. (Resp. Mem. of Law at 17, 20-22.) No one who participated in the creation of these trusts foresaw a massive one-time event of Subsequent Recoveries such as is proposed here. Indeed, as the Trustee notes, Subsequent Recoveries were thought of as funds received by a trust unexpectedly in connection with a single mortgage loan that previously had been written off. (See Trustee Mem. of Law, Dkt. 10, at 4.) See also CWALT 2005-61 PSA at p. 31 (defining Subsequent Recoveries as, "with respect to a Liquidated Mortgage Loan in that Loan Group . . . , unexpected amounts received by the Master Servicer . . . specifically related to such Liquidated Mortgage Loan"). Subsequent Recoveries are typically limited to funds such as property tax rebates received after foreclosure and adjustments to payment on private mortgage insurance claims. (*Id.*) As such, historical Subsequent Recoveries for the Covered Trusts have been modest and often offset in the same losses incurred by the trust. (*Id.*) Therefore, the "sufficiently large" Subsequent Recoveries described by Respondents is a one-time anomaly.

Additionally, Respondents admit that the level of their recovery would be highly variable depending on when the settlement proceeds were distributed. (See Resp. Mem. of Law at 20-

---

overcollateralization test is "structured to protect the senior classes in the event of default or poor management").

22.) Respondents argue that as each month passes and the Super Senior Certificates realize losses, Respondents' recovery will decrease. Under Respondents' theory of distribution, had the Settlement Payment been allocated (or a "record date" set) as of the date the Settlement Agreement was executed, or even as of the date of the filing of the original Article 77 proceeding seeking approval of same, Respondents' portion of the distribution would be radically different.

Indeed, the Allocable Shares are consideration for the trusts' release of claims against the mortgage loan sellers for breaches of their representations and warranties. If those breaches had been remedied timely—*i.e.* if the sellers had repurchased defective mortgage loans promptly after loans defaulted or breaches were otherwise discovered—those Subsequent Recoveries would have been paid to the trusts years ago, and the certificates held by Respondents would not under any contract interpretation be situated to receive a disproportionate windfall. Thus, while Respondents seemingly agree that no certificateholder should benefit merely from the timing of the distribution of the Allocable Shares (*see* Resp. Mem. of Law at 21), that is *precisely* what they seek to do. Such a result that could occur only under a one-time circumstance that the drafters of the Governing Agreements could not have foreseen is absurd, commercially unreasonable, and contrary to the expectations of the certificateholders with respect to both the PSAs and the Settlement.

*Third*, Respondents' proposed method of distribution is absurd because paying funds to mezzanine and junior certificateholders without first taking into account an attendant write-up of Certificate Balances would result in disproportionate payments to junior certificateholders even lower in the intended order of priority than the Senior Support Certificates. Under Respondents' reading of the PSAs and Settlement Agreement, any amounts "in excess of the Principal Distribution Amount flow to subordinate classes of securities for unpaid realized losses." (*Id.* at

19.) But in some of the fourteen trusts at issue, Unpaid Realized Losses are not allocated to reduce the Certificate Balance of any class of Senior Certificates (including Senior Support Certificates).<sup>8</sup> Rather, Unpaid Realized Losses are recognized only by the Subordinated Certificates:

Unpaid Realized Loss Amount: For any Class of Subordinated 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 Certificate Balance of that Class due to the receipt of Subsequent Recoveries to the Class Certificate Balance of that Class pursuant to Section 4.02(g).

(CWALT 2005-61 PSA at p. 35 (emphasis added).) But Subsequent Recoveries in those trusts get allocated to increase Certificate Balances for both Subordinated Certificates *and Senior Certificates* that have suffered previous losses, starting with the most senior:

Application of Subsequent Recoveries. On each Distribution Date, the Trustee shall allocate the amount of the Subsequent Recoveries for Loan Group 1, if any, to increase the Class Certificate Balance of the Group 1 Certificates to which Applied Realized Loss Amounts have been previously allocated, sequentially, to the Class 1-A-1, Class 2-A-1, Class 1-A-3, Class 1-M-1, Class 1-M-2, Class 1-M-3, Class 1-M-4, Class 1-M-5 and Class 1-M-6 Certificates, in that order, in each case by not more than the amount of the Unpaid Realized Loss Amount of such Class. . . .

(*See, e.g.*, CWALT 2005-61 § 4.02(j).) Therefore, Respondents' theory could result in a windfall to the Subordinated Certificates because the lion's share of Subsequent Recoveries over the Principal Distribution Amount would skip Senior Certificateholders—including both Super Senior and Senior Support Certificateholders—and flow straight to Subordinated Certificates. Such a result makes no economic sense, is commercially unreasonable and is unfair under any contract interpretation. This lopsided result can be avoided simply by following the plain

---

<sup>8</sup> These trusts are CWALT 2005-61, CWALT 2005-69, CWALT 2005-72 and CWALT 2005-76.



language of the Governing Documents of these fourteen trusts and performing a write-up of the Certificate Balances before distributing Subsequent Recoveries.

**III. Alternatively, The Court Should Find The PSAs Are Ambiguous And Afford Limited Discovery And Set A Trial On The Merits.**

Finally, if the Court does not agree with Certificateholder that the PSAs unambiguously require write-up first and payment second, Certificateholder requests in the alternative that the Court find them ambiguous and afford Certificateholder the opportunity to conduct limited discovery of the drafters of the PSAs and present evidence regarding the appropriate interpretation.

A contract is ambiguous if it is reasonably susceptible to more than one interpretation. *See Natt v. White Sands Condo.*, 95 A.D.3d 848, 849 (2d Dept. 2012) (“Contract language is ambiguous when it is reasonable susceptible of more than one interpretation and there is nothing to indicate which meaning is intended, or where there is contradictory or necessarily inconsistent language in different portions of the instrument.” (quotations and citations omitted)). The existence of ambiguity is determined by examining the “entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed,” with the wording viewed “in the light of the obligation as a whole and the intention of the parties as manifested thereby.” *Kass v. Kass*, 91 N.Y.2d 554, 566 (N.Y. 1998) (quoting *Atwater & Co. v. Panama R.R. Co.*, 246 N.Y. 519, 524 (N.Y. 1927)). Certificateholder believes that the PSAs are unambiguous as to the order of operation and the distribution of Subsequent Recoveries through the applicable principal distribution waterfalls. However, if the Court disagrees, then Certificateholder requests it find the PSAs ambiguous and allow Certificateholder the opportunity to prove by parol evidence that the PSAs require an order of operation of write-up first and pay second.

## CONCLUSION

For the foregoing reasons, Certificateholder respectfully requests the Court to instruct the Trustee to distribute the Allocable Shares for the Subject Trusts in a manner that is consistent with the terms, meaning, and intent of the PSAs, either by adopting the order of operations described therein or by applying a one-time adjustment to any overcollateralized Covered Trusts to prevent leakage. Certificateholder also requests all other relief, at law or in equity, to which it may be justly entitled.

DATED: March 14, 2016  
New York, New York

Respectfully submitted,

MCKOOL SMITH, P.C.

By: /s/ Gayle R. Klein  
Gayle R. Klein  
Robert W. Scheef  
Matthew P. Rand  
Melody McGowin

One Bryant Park, 47th Floor  
New York, New York 10036  
gklein@mckoolsmith.com  
rscheef@mckoolsmith.com  
mrand@mckoolsmith.com  
mmcgowin@mckoolsmith.com  
(t) (212) 402-9400  
(f) (212) 402-9444

*Attorneys for Center Court, LLC*