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 # 150973/2016 IAS Part 39 Honorable Saliann Scarpulla

PROSIRIS CAPITAL MANAGEMENT LP'S AND TILDEN PARK CAPITAL MANAGEMENT LP'S RESPONSE TO THE OPENING SUBMISSIONS

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Respondents Prosiris Capital Management LP ("Prosiris") and Tilden Park Capital Management LP ("Tilden Park" and together with Prosiris, "Respondents") respectfully submit this response in further support of their Verified Answer ("Answer") to the verified petition for judicial instructions ("Petition") filed by Petitioner The Bank of New York Mellon ("BNY Mellon" or "Petitioner"), in its capacity as Trustee or Indenture Trustee of 530 Countrywide residential mortgage-backed securitization trusts ("Covered Trusts").[1]

PRELIMINARY STATEMENT

Respondents acquired interests in 14 of the Covered Trusts (the "14 Trusts") precisely because they are clear and unambiguous as to payment and waterfall mechanics. They filed their Answer and Memorandum only after the Petitioner listed the 14 Trusts (and the specific PSA provisions) as among those where unintended "leakage" might occur without the Court's intervention.[2] Respondents seek only to establish that their Certificates are not implicated by the questions raised by the Trustee in the Petition and therefore should not be subject to any extra-contractual revisions imposed in the guise of "fairness". Respondents accordingly request that the Court instruct the Trustee to follow the plain and unambiguous language of the PSAs for the 14 Trusts, the Settlement Agreement, and the Trustee's past practice in connection with the distribution of Subsequent Recoveries, thus ensuring that Respondents receive the payments to which they are entitled as certificateholders.

It is notable that the Trustee has not stepped forward to dispute Respondents' assertion that the relief requested will not impact the 14 Trusts or said that Respondents have incorrectly

[1] To the extent not defined herein, defined terms have the same meaning assigned to them in Respondents' Memorandum.

[2] Respondents note that all of the Certificates they own were originally rated AAA and are in fact *pari passu* to the Super Senior Certificates in respect of distributions of principal up to the Principal Distribution Amount.

characterized how the distribution waterfall works for any of the 14 Trusts. As discussed in Respondents' opening submission, the PSAs for the 14 Trusts have certain features that render the Trustee's proposals inapplicable:

First, in the 14 Trusts, the Principal Distribution Amount is calculated by reference to the "Certificate Balance immediately prior to the Distribution Date". Therefore whether the Trustee writes up first or pays first has no impact on the Principal Distribution Amount, which is calculated in terms of the certificate principal balance *before* the Distribution Date and therefore *before* any write up.

Second, the possibility of "temporary and illusory overcollateralization" is not an issue that arises in the 14 Trusts, and the "adjustment . . . described in the Verified Petition" would have no impact on "the overcollateralization calculation". (Dkt. No. 1 at ¶ 39(a).) As the Trustee explains in the Petition, in the typical overcollateralization trust, principal distributions are not made to less senior certificateholders if the "Overcollateralization Amount" is less than the "Overcollateralization Target Amount." (Dkt. No. 1 at ¶ 23.) As a result, if the Overcollateralization Amount is written up at the same time that the Allocable Shares are distributed, there will be a "temporary or illusory" satisfaction of this condition such that Available Funds will flow to the less senior classes of certificateholders. This concern does not apply to the 14 Trusts, because overcollateralization operates differently in them. Indeed, the PSAs for 9 of the 14 Trusts do not even contain an "Overcollateralization Amount", and in the 5 PSAs that do contain the term, it does not operate as a limit on the distribution of Available Funds to less senior classes of certificates. For the 14 Trusts, all senior classes receive principal distributions on a pro rata basis each month, and while there is an Overcollateralization Target Amount, it is a fixed number at this point in the life of the trusts and does not depend on the

certificate principal balance or Subsequent Recoveries.

Third, as explained in Respondents' Memorandum, the PSAs for the 14 Trusts expressly require the distribution of Subsequent Recoveries not just to pay down the principal balance of the senior-most certificates, but also to pay unpaid realized losses suffered by certificateholders such as Respondents.

Respondents therefore repeat their request that the Court instruct the Trustee to follow the Settlement Agreement, the plain and unambiguous language of the PSAs for the 14 Trusts, and the Trustee's past practice in connection with the distribution of Subsequent Recoveries, regardless of whether it results in payment to less senior classes of certificates. The Trustee should be ordered to distribute the settlement funds to the 14 Trusts without further delay, regardless what disputes may exist with respect to other Covered Trusts.

Respondents also reiterate their request that the funds be distributed as they would have been in February 25, 2016. The relative position of the certificateholders should not change based on the Trustee's decision to file this Petition and the ensuing delay in the distribution of funds.

I. Institutional Investors

The Institutional Investors echo Respondents' request for an instruction that the Trustee follow the Settlement Agreement and the relevant Governing Agreements. Further, the Institutional Investors agree that the concern identified by the Trustee of "illusory and temporary overcollateralization" (Dkt. No. 1 at 26) is unfounded with respect to the 14 Trusts held by

Respondents and that the way overcollateralization is calculated will not result in "leakage". (Dkt. No. 34 at 10-12.)[3]

A. Respondents Agree with the Institutional Investors that the Trustee Should Pay First, Write Up Second

Respondents and Institutional Investors agree that the Settlement Agreement requires the "pay first, write up second" order of operations, and both quote the provision in the Settlement Agreement that states "the write up certificate balances in the Covered Trusts shall occur '*after* the distribution of the Allocable Share to Investors . . . .'" (*See* Dkt. No. 34 at 4 n.8 (quoting Settlement Agreement § 3(d)(ii)).)

As Respondents detail in their Answer and Memorandum, *both* the Settlement Agreement *and* the PSAs for the 14 Trusts specify the "pay first, write up second" order of operations. The PSAs for the 14 Trusts provide that "Subsequent Recoveries" are distributed as "Available Funds", which are distributed, *first*, to pay interest (coupon payments) on the certificates in a specified sequence, *second*, to reduce the principal balance of the certificates in a specified order up to a specified amount, and *third*, to compensate certificates for unpaid realized losses in a specified sequence. In the PSAs for the 14 Trusts, the write-up provision is the very last subparagraph of the section that addresses the "Priorities of Distribution", indicating that it occurs after the distribution is made. Ex. A at 85–92.[4] In addition, the PSAs for the 14 Trusts define the Principal Distribution Amount by reference to the certificate principal balance "immediately prior to the Distribution Date." Ex. A at 81–84 (excerpting the provisions of the

[3] While the Institutional Investors do not highlight the 14 Trusts specifically, they broadly state that the concern of "temporary and illusory overcollateralization" does not apply to any of the 175 overcollateralization trusts.

[4] All citations to exhibits herein refer to the exhibits to the Declaration of Jaime D. Sneider that was filed in support of Respondents' Memorandum (Dkt. No. 33).

PSAs for the 14 Trusts specifying that Principal Distribution Amount must be calculated based on certificate principal balance "immediately prior to such Distribution Date"). So even if the Trustee were to determine the order of operations *on the Distribution Date* differed, the certificate principal balance for the purposes of calculating the Principal Distribution Amount would nonetheless be calculated *immediately prior* to such Distribution Date and would be unaffected by the write-up. The remaining Available Funds would thus still flow through the third part of the waterfall, to classes with unpaid losses, including subordinate classes.

B. Respondents Agree that the PSAs for the 14 Trusts Would Not Result in Temporary or Illusory Overcollateralization If Applied As Written

With respect to overcollateralization, the Institutional Investors contend that "the PSAs for the OC Trusts do not permit or create 'temporary and illusory overcollateralization'" during the distribution process and, accordingly, the adjustment the Trustee proposes to the overcollateralization calculation is unnecessary.[5] (Dkt. No. 34 at 9.) Respondents agree with respect to the 14 Trusts. Overcollateralization as defined in the Petition is completely irrelevant to the distribution of Available Funds (and hence the Allocable Share) in all 14 Trusts.

The Institutional Investors break the Overcollateralization Trusts into three categories. The first, according to the Institutional Investors, calculates overcollateralization *after* giving effect to the distribution to be made on that date. The second calculates overcollateralization before giving effect to the distribution being made on that date. Finally, the third ("Category Three") calculates overcollateralization as a fixed amount that "is not affected *at all* by the distribution of the Settlement Payment and certainly does not and cannot change *during* a distribution". (Dkt. No. 34 at 12 (emphasis in the original).) According to the Institutional

[5] While the proposals found in ¶ 39(a) and ¶ 39(b) of the Petition would have no bearing on the 14 Trusts, the proposal found in ¶ 39(c) of the Petition would actually push cashflow distribution further down the waterfall for the 14 Trusts.

Investors, only 12 of the 175 Overcollateralization Trusts covered by the Settlement Agreement fall into Category Three. Appended as Appendix 1 is a copy of how the Institutional Investors classify each of the 14 Trusts.

With respect to 9 of the 14 Trusts, the Institutional Investors state that "overcollateralization is defined as a fixed, dollar amount" and that "it is not affected *at all* by the distribution of the Settlement Payment". (Dkt. No. 34 at 12.) For these 9 of the 14 Trusts, Respondents and the Institutional Investors agree: whether overcollateralization is calculated before or after the certificate principal balance is written up is irrelevant since overcollateralization amount is absent from these PSAs and is handled instead with clearer concepts. It is not a coincidence that so many of the 14 Trusts have this feature, as Respondents sought out trusts with this overcollateralization structure, which defined the Principal Distribution Amount in terms of "Overcollateralization Target Amounts" as opposed to more complex "Overcollateralization Amounts" or "Overcollateralized Amounts" whose definitions are the source of the possible "temporary and illusory overcollateralization" described in the Petition.

Respondents believe that the Institutional Investors have misclassified the other 5 of the 14 Trusts. Unlike the 9 Trusts for which Respondents and the Institutional Investors agree, in addition to an "Overcollateralization Target Amount", the PSAs for these 5 Trusts also contain an "Overcollateralization Amount". This additional defined term is the source of the misclassification. Consider, for example, the PSA for CWALT 2006-OA10 Trust, 1 of the 5 Trusts that the Institutional Investors classify in the other two categories. "Overcollateralization Amount" is present in the list of defined terms, but the term itself appears nowhere else in the PSA. In fact, defined terms "Overcollateralization Amount" or "Overcollateralized Amount"

have no impact on the distribution of Available Funds for all 5 of the 14 Trusts that the Institutional Investors chose not to classify in Category Three. As a result, for all 14 of the 14 Trusts, the choice the Trustee presented to the Court—whether to write up the certificate principal balance for purposes of calculating overcollateralization—is inapplicable.

Respondents agree with the Institutional Investors' assertion that the PSAs for the 14 Trusts do not create "temporary or illusory overcollateralization", which would result in what the Trustee refers to as "leakage". However, Respondents note that the PSAs for the 14 Trusts do permit less senior certificateholders to be paid for unpaid realized losses in the event that available funds exceed both the principal distribution amount and any unpaid realized loss amount accumulated by the related Super Senior certificate.

C. Trustee Should Not Charge any Trustee Fee on the Escrowed Proceeds

Respondents did not address whether the Trustee should charge any trustee fee on the escrowed proceeds in their Memorandum, but they agree with the Institutional Investors that the Trustee should not charge such a fee.

D. The Institutional Investors Have Not Demonstrated Any Need for Further Briefing with Respect to any of the 14 Trusts

Despite the fact that none of the original submissions disagree with Respondents as to how Allocable Shares should be distributed for the 14 Trusts, the Institutional Investors have told Respondents they intend to ask this Court to permit further briefing and delay the distribution of the Allocable Shares only with respect to the 14 Trusts. The Institutional Investors have declined to confirm which of the 14 Trusts they own and have admitted in the course of conferring with Respondents that they do not own them all. Yet even though they do not necessarily own all of the 14 Trusts, or dispute Respondents' assertion that the relief BNY Mellon has requested would not impact any of the 14 Trusts, the Institutional Investors still insist on delay. The Court should

reject this obstructionism and grant the relief requested in Respondents' Answer without further delay.

Respondents have also learned, within the past three days, that the Institutional Investors are preparing a proposed judgment that would cover all 516 of the Covered Trusts other than the 14 Trusts. Despite Respondents' repeated requests, they were only provided a copy of a draft of this proposed judgment at 10:32 P.M. on the date of this filing, and have accordingly not had time to review it. To the extent the proposed judgment affects the distribution of funds to any of the Covered Trusts in which Respondents are certificateholders—whether the 14 Trusts or any of the approximately 100 other Trusts in which Respondents have an interest—Respondents expressly reserve their right to review and respond in full to the proposed judgment, including by requesting leave to submit further briefing regarding the issues presented by the judgment.

II. Center Court

Respondents and Center Court own only 1 Trust (CWALT 2005-61) in common, and Center Court does not quote from that PSA in its submission. Respondents do not believe Center Court's position on writing up first or adjusting the overcollateralization calculation as proposed by the Verified Petition will impact the Principal Distribution Amount for that 1 Trust.

A. Center Court's Assertion that the PSAs Require the Trustee to Write Up First and Pay Second Is Incorrect with Respect to the 14 Trusts

Center Court says the PSAs for its trusts require the Trustee to write up first and pay second. While this may or may not be the correct view with respect to the Governing Agreements for the two trusts Center Court quotes from, it disregards (1) the Settlement Agreement's instruction to "pay first, write up second", (2) fundamental distinctions between the trusts Center Court discusses in its submission and the 14 Trusts, and (3) the historic practice of the Trustee with respect to trusts like the 14 Trusts.

Respondents and Center Court both hold an interest in the CWALT 2005-61, and the PSA for that one Trust is not "congruous" with its characterization of the other trusts it owns. (Dkt. 47 at 9.) As discussed earlier, the question of when to write up the certificate principal balance does not actually impact the Principal Distribution Amount for any of the 14 Trusts, including the CWALT 2005-61. The PSAs for the 14 Trusts provide that any write up occur on the Distribution Date (see Exhibit A at 85–92), but the Principal Distribution Amount is defined in relation to the certificate principal balance "immediately prior to the Distribution Date" (see Exhibit A at 81–84). Therefore the Principal Distribution Amount will be based on the prior month's certificate principal balance regardless of when on the Distribution Date it is written up. Likewise, as discussed *infra*, when the Trustee writes up the certificate principal balance has no impact on overcollateralization for the 14 Trusts and whether Available Funds will flow to less senior classes of certificates.

B. Center Court's Invitation to Rewrite the Overcollateralization Calculations in the Governing Agreements Has No Application for the 14 Trusts

Barring the Court's acceptance of Center Court's reading of the Governing Agreements, Center Court invites the Court to rewrite the Governing Agreements "to apply a one-time adjustment to any applicable overcollateralization calculations." (Dkt. 47 at 12.) This argument is inapplicable to the 14 Trusts because of the unique way the 14 Trusts handle overcollateralization. Further, it should be rejected generally because the Court's equitable powers do not extend to rewriting contracts except under extraordinary circumstances not present here.

Center Court echoes the Trustee's proposal for "a one-time adjustment to the relevant overcollateralization calculations in order to distribute the Allocable Shares in a manner that avoids undue leakage to junior certificates". (Dkt. No. 47 at 14.) This proposal may make sense

with respect to certain trusts that define overcollateralization in terms of certificate principal balance. However, as Respondents noted in their memorandum and *infra*, the PSAs for the 14 Trusts, including the CWALT 2005-61, utilize an "Overcollateralization Target Amount", which is now a fixed amount disconnected from the certificate principal balance and Subsequent Recoveries. Therefore adjusting the certificate principal balance for purposes of calculating overcollateralization, as one of the Trustee's three proposals would do, has no application in the 14 Trusts.

To the extent Center Court's submission suggests the Court may "set aside the language of individual PSAs" (Dkt. No. 47 at 14), Respondents disagree. Neither Center Court nor the Trustee cite a single Article 77 proceeding in which the Court rewrote a contract. (*Id.* at 12-14.) While Center Court cites *Stellar Sutton LLC v. Dushey*, 82 A.D.3d 485 (1st Dep't 2011) for the proposition that trial courts have discretion to grant equitable relief, it neglects to mention that the issue in that case was whether the Court could grant specific performance to enforce the terms of a contract. *Id.* at 486 (holding the Court had the right to grant injunctive relief to enforce the terms of a lease). To the extent the Trustee's Petition is read as asking for equitable relief to alter the terms of the contract, New York courts have repeatedly held that "a court cannot compel the parties to enter into a contract, much less rewrite or impose additional terms which the parties themselves have not mutually agreed upon." *Wells Fargo Bank, N.A. v. Ruggiero*, 2013 N.Y. Slip Op. 50871(U), at *6 (Supreme Court, Kings County 2013); *see also Wells Fargo Bank, N.A. v. Meyers*, 966 N.Y.S.2d 108, 117 (2d Dep't 2013) ("[T]he court's role is limited to interpretation and enforcement of the terms agreed to by the parties, and the court may not rewrite the contract or impose additional terms which the parties failed to insert") (quoting *Maser Consulting, P.A. v. Viola Park Realty, LLC*, 936 N.Y.S.2d 693 (2d Dep't 2012)).

The investors in this proceeding are among the most sophisticated commercial parties in the world, and altering the Governing Agreements would be an inequitable outcome.

III. Blue Mountain

Respondents and Blue Mountain hold one trust (CWALT 2007-OA3) in common. Respondents agree with all of Blue Mountain's assertions about this trust. In particular, Respondents agree that the PSA for this trust "does not contain a separate Excess Cashflow Waterfall," that "the 'Principal Distribution Amount' does not allow for inclusion of Subsequent Recoveries above the Target Overcollateralization Amount", and that "such recoveries flow through the waterfall provided in Section 4.02 until exhausted". (Dkt. No. 51 at 2.) Finally, Respondents concur with Blue Mountain's statement that when the certificate principal balance is written up and when overcollateralization is calculated has "no bearing" on how the Allocable Share for this trust is distributed and that BNY Mellon should distribute the Allocable Share consist with this trust's PSA. (*Id.* at 3.)

IV. Federal Home Loan Mortgage Corporation

Respondents and Federal Home Loan Mortgage Corporation ("Freddie Mac") own no trusts in common. As a general matter, Respondents agree with Freddie Mac's assertion that the Settlement Agreement and Governing Agreements control how the Trustee must distribute the Allocable Shares. Freddie Mac is focused on trusts in which overcollateralization is calculated by reference to the certificate principal balance. For these trusts, according to Freddie Mac, this could result in "temporary and illusory overcollateralization" depending on whether the Trustee uses the written up certificate principal balance. This issue is irrelevant with respect to the 14 Trusts, because at this point, overcollateralization target is a fixed amount and does not change based on the certificate principal balance or subsequent recoveries.

V. TIG Securitized Asset Master Fund LP

Respondents and TIG Securitized Asset Master Fund LP ("TIG") own no trusts in common, and Respondents express no view as to TIG's Statement, which appears to be unrelated to the operation of the PSAs for the 14 Trusts.

CONCLUSION

For all the foregoing reasons, Respondents request that the Court grant the relief requested in their Verified Answer.

Dated: New York, New York
March 14, 2016

Respectfully submitted,

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Appendix 1

According to the Institutional Investors, the 14 Trusts fall into the three categories as follows:

Prosiris/Tilden Trusts	Institutional Investors	Category
CWALT 2005-61	Overcollateralization Target Amount is Defined	3
CWALT 2005-69	Overcollateralization Target Amount is Defined	3
CWALT 2005-72	Overcollateralization Target Amount is Defined	3
CWALT 2005-IM1	Overcollateralization Target Amount is Defined	3
CWALT 2006-OA3	Overcollateralization Target Amount is Defined	3
CWALT 2006-OA7	Overcollateralization Target Amount is Defined	3
CWALT 2006-OA8	Overcollateralization Target Amount is Defined	3
CWMBS 2006-3	Overcollateralization Target Amount is Defined	3
CWMBS 2006-OA5	Overcollateralization Target Amount is Defined	3
CWALT 2005-76	Overcollateralization is Calculated After The Distribution	1
CWALT 2006-OA14	Overcollateralization is Calculated After The Distribution	1
CWALT 2007-OA3	Overcollateralization is Calculated After The Distribution	1
CWALT 2007-OA8	Overcollateralization is Calculated After The Distribution	1
CWALT 2006-OA10	Overcollateralization is Calculated Before The Distribution	2