

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

In the matter of the application of

U.S. BANK NATIONAL ASSOCIATION, WELLS  
FARGO BANK, NATIONAL ASSOCIATION,  
WILMINGTON TRUST, NATIONAL ASSOCIATION,  
WILMINGTON TRUST COMPANY, AND CITIBANK,  
N.A. (as Trustees, Indenture Trustees, Securities  
Administrators, Paying Agents, and/or Calculation Agents  
of Certain Residential Mortgage-Backed Securitization  
Trusts),

Index No.

Petitioners,

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

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

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

### INTRODUCTION<sup>2</sup>

Certain of the Petitioners and other parties<sup>3</sup> (the “Accepting Trustees”), on behalf of certain residential mortgage-backed security trusts (the “Covered Loan Settlement Trusts”), accepted a settlement offer dated as of November 30, 2016 and modified as of March 17, 2017 (the “Covered Loan Settlement Agreement”) by and among a group of institutional investors and Lehman Brothers Holdings Inc. and other debtors (collectively, the “LBHI Debtors”) in the bankruptcy cases in the United States Bankruptcy Court for the Southern District of New York, styled or related to *In re Lehman Brothers Holdings Inc., et al.* Chapter 11 Case No. 08-13555.

For each Subject Settlement Trust, the applicable Governing Agreements designate a party with the role of being responsible for all aspects of calculation, administration, and distribution of any payments for Certificateholders (defined herein for reference as, the “Payment Administrator”). The Payment Administrator is therefore the party that will

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

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

<sup>3</sup>U.S. Bank, Wilmington Trust and Deutsche Bank National Trust Company, together with TMI Trust Company (“TMI”), as successor to Law Debenture Trust Company of New York (“Law Debenture”), as separate trustee for the trusts for which Wells Fargo acts as trustee, were parties to the Covered Loan Settlement Agreement.

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

On July 6, 2017, the Honorable Shelly C. Chapman, United States Bankruptcy Judge, approved the Covered Loan Settlement Agreement and found that “[e]ach of the Accepting Trustees acted within the bounds of its discretion, reasonably, and in good faith with respect to its evaluation and acceptance of the RMBS Settlement Agreement concerning the applicable Accepting Trust(s).” *In re Lehman Brothers Holdings Inc., et al.*, Dkt. # 55706, Order Approving RMBS Settlement Agreement and Including Certain Proposed Findings of Fact and Conclusions of Law (July 6, 2017), at 3-4 (Chapman, J.) (the “Settlement Order”).

On March 8, 2018, following an Estimation Proceeding, the Bankruptcy Court issued a decision, relating to trusts subject to the Covered Loan Settlement Agreement, estimating the at-issue claims at \$2.38 billion (the “Allowed Claim”). An allocable portion of the distributions on the Allowed Claim (the “Covered Loan Settlement Payment”)<sup>4</sup> is to be transferred to each Covered Loan Settlement Trust. The Covered Loan Settlement Payment is thereafter to be distributed to the holders of certificates, notes, or other securities<sup>5</sup> (the beneficial owners thereof, “Certificateholders”) issued by the Covered Loan Settlement Trusts pursuant to distribution

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<sup>4</sup> The Settlement Payment will be reduced by the amount of the Settlement Payment that would have been distributed to certain excluded trusts had they not been excluded from the Settlement Agreement. *See* Settlement Agreement, § 3.02(a).

<sup>5</sup> The term “certificates” is used in this Petition to refer to certificates, notes, or any other applicable securities.

provisions in the Covered Loan Settlement Agreement and the governing agreements for the Settlement Trusts.

The Accepting Trustees, on behalf of certain residential mortgage-backed security trusts (the “Transferor Loan Settlement Trusts”), some of which were also Covered Loan Trusts, also entered into a separate settlement agreement with the LBHI Debtors dated September 5, 2017 and executed on October 13, 2017 (the “Transferor Loan Settlement Agreement”). Pursuant to the Transferor Loan Settlement Agreement, the LBHI Debtors agreed to an allowed Class 7 General Unsecured claim against the LBHI Debtors in an amount equal to approximately \$13,000,000 (the distribution the LBHI Debtors will make on account of that claim is the “Transferor Loan Settlement Payment,” and collectively with the Covered Loan Settlement Payment, “the Settlement Payments”). The Transferor Loan Settlement Agreement and the Covered Loan Settlement Agreement are referred to collectively herein as the “Settlement Agreements.”

Upon receipt of the Settlement Payments, the Trustees must use their reasonable best efforts to distribute the Settlement Payments to the Subject Settlement Trusts as promptly as possible. *See* Settlement Agreement, § 3.01. The Petitioners have identified certain issues that may ultimately affect which Certificateholders receive the Settlement Payments and how much of the Settlement Payments they receive as well as the resulting certificate principal balances of the applicable certificates. The proper resolution of such issues is unclear, as they are subject to potentially competing interpretations under the Governing Agreements and the Settlement Agreements. Additionally, Certificateholders and other interested parties—the direct economic beneficiaries of the Settlement Payment—may have competing views concerning how the issues should be resolved.

As a result, the Petitioners have filed the Petition to seek judicial instruction concerning certain issues related to the Subject Settlement Trusts. The Petitioners are additionally seeking instructions to maintain the Settlement Payment as a deposit in escrow pending the outcome of this proceeding, and separate instructions to undertake a notice program to notify potentially interested parties of this proceeding.

### ARGUMENT

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

Pursuant to the Governing Agreements, the Subject Settlement Trusts are governed by the laws of the State of New York.<sup>6</sup> Many Certificateholders are New York citizens, and a Petitioner, Citibank, has its principal place of business in New York City. New York law permits bringing “a special proceeding . . . to determine a matter relating to any express trust.” CPLR 7701; *see also In re Greene v. Finley, Kumble, Wagner, Heine & Underberg*, 88 A.D.2d 547, 548 (1st Dep’t 1982) (observing that CPLR 7701 is “broadly construed to cover any matter of interest to trustees, beneficiaries or adverse claimants”). The Subject Settlement Trusts are all “express trusts” within the meaning of CPLR 7701.

The Subject Settlement Trusts are governed by the laws of the State of New York and are thus subject to the jurisdiction of this Court. *See* Restatement (Second) of Trusts, § 220 cmt. c (1959) (“Where a trust is administered under the supervision of the courts of a State, those courts have jurisdiction to determine the interests of all claimants, resident or non-resident, with respect to the administration of the trust.”). This Court has also previously provided instruction and direction in Article 77 proceedings related to other residential mortgage-backed securitization trusts. *See In re Bank of New York Mellon*, 127 A.D.3d 120, 123, 128 (2015) (affirming directions provided by the Court in an Article 77 proceeding related to residential mortgage-

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<sup>6</sup>*See, e.g.*, LMT 2006-1 (PSA Section 11.06); LXS 2006-5 (PSA Section 11.06); SASC 2005-10 (PSA Section 11.06)

backed securitization trusts); *see also BlackRock Fin. Mgmt. Inc., et al. v. Segregated Account of Ambac Assurance Corp., et al.*, 673 F.3d 169, 174 (2d Cir. 2012) (“Permissible uses of Article 77 are broadly construed to cover any matter of interest to trustees, beneficiaries or adverse claimants concerning the trust. . . . Such proceedings are used by trustees to obtain instruction as to whether a future course of conduct is proper, and . . . to obtain interpretations of the meaning of trust documents.”) (citations omitted).

In this case, the Petitioners seek construction of trust-related agreements, which is a long-standing remedy available through Article 77 proceedings. *See In re Trusteeship Created by American Home Mortg. Inv. Trust 2005-2*, No. 14 Civ. 2494 (AKH) 2014 WL 3858506 at ¶¶ 91, 179 (S.D.N.Y. July 24, 2014) (invoking “well-established procedure” of trust instruction proceedings to allow reformation of indenture due to scrivener’s error to “reflect[] the intent of the contracting parties”); *Petition of Percy*, 191 Misc. 1052, 1054 (Sup. Ct. N.Y. Cnty. 1948) (noting frequency with which courts have interpreted provisions in trust deeds); *see also* Restatement (Second) of Conflict of Laws § 267 cmt. a (1971) (“A proceeding may be brought by the trustee or by the beneficiaries for instructions as to his powers and duties. Application may be made to the court to direct or permit the trustee to deviate from the terms of the trust where unanticipated exigencies have arisen.”). Indeed, this Court recently granted a trustee’s request for instruction regarding the distribution of a settlement payment in similar circumstances. *In re Bank of New York Mellon*, No. 150973/2016, Decision and Order on Motion at 18 (Sup. Ct. N.Y. Cnty. Mar. 31, 2017) (“Final BNY Order”).

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

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

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

First, Section 3.06 of the Covered Loan Settlement Agreement and Section 3.05 of the Transferor Loan Settlement Agreement specify two operations that must be performed in connection with the Settlement Payments: (i) the distribution of the funds constituting Settlement Payments to Certificateholders, and (ii) the writing up of certificate principal balances in the amount of the Settlement Payment Write-Up. What is left unaddressed, however, is whether the instruction in Section 3.06(b) of the Covered Loan Settlement Agreement and Section 3.05(b) of the Transferor Loan Settlement Agreement, or the Governing Agreements themselves, require the Petitioners to apply the Settlement Payment Write-Up *after* making a distribution of the Settlement Payments to Certificateholders of those Subject Settlement Trusts, or *before* determining principal distribution amounts for each class of Certificateholders.

As a result, the Petitioners are faced with two different possible approaches to perform these operations: the Petitioners could first distribute funds constituting the Settlement Payments based on certificate principal balances that do not account for the Settlement Payment Write-Up and thereafter apply the Settlement Payment Write-Up to the pertinent certificate principal

balances (the “Pay First Method”); or, in the alternative, first apply the Settlement Payment Write-Up to the pertinent certificate principal balances and thereafter determine the distribution of the Settlement Payments based on the newly written up certificate principal balances (the “Write-Up First Method”).

Second, there is uncertainty related to classes of certificates or loan groups with current aggregate certificate principal balances of zero. For certain of the Subject Settlement Trusts, the applicable Governing Agreements contain a provision substantially similar to the following:

If on any Distribution Date the Class Principal Amount of the Class or Classes of Non-AP Senior Certificates related to any Mortgage Pool have been reduced to zero, the Senior Principal Distribution Amount for such Class or Classes of Non-AP Senior Certificates for such date (following such reduction) and each subsequent Distribution Date shall be zero.

*See, e.g.*, SASC 2004-12H, §1.01 (definition of Senior Principal Distribution Amount) (emphasis added). This is referred to for reference herein as the “Zero Distribution Provision.” The Zero Distribution Provision appears to preclude any further distributions to any Class or Classes of Non-AP Senior Certificates if the aggregate certificate principal balance of such class has been reduced to zero (“Zero Balance Classes”), no matter whether the Zero Balance Classes have been reduced to zero as a result of realized losses or because they have been paid in full as to their initial certificate principal balance.

The Zero Distribution Provision could arguably prevent Zero Balance Classes from receiving any distribution of the Settlement Payments or any application of the Settlement Payment Write-Up, but it is not clear whether or how such provision should apply in this circumstance.

The issues described herein and in the Petition present questions concerning the interpretation of the Governing Agreements and Settlement Agreements. How these issues are



resolved has the potential to affect which Certificateholders receive the Settlement Payments, the amount of the Settlement Payments that Certificateholders receive, and the manner in which certificate principal balances are written up in connection with the Settlement Payments. Accordingly, the issues presented in the Petition are precisely the type of issues that are appropriate for an Article 77 proceeding. See Final BNY Order; *BlackRock Fin. Mgmt. Inc.*, 673 F.3d at 174.<sup>7</sup>

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

The Trustees are requesting the Court immediately enter the proposed Order to Show Cause contemporaneously filed herewith (the “Order to Show Cause”). The Order to Show Cause would direct each Accepting Trustee to cause the Allocable Shares of the Settlement Payments for each Subject Settlement Trust for which such Accepting Trustee acts as trustee, indenture trustee, or successor trustee (such amounts, a “Trustee’s Share”) to be maintained as a deposit in escrow pursuant to the escrow agreements applicable to such Accepting Trustee (each, an “Escrow Agreement” and collectively, the “Escrow Agreements”) substantially in the forms attached as Exhibit 1 to the Affidavit of Robert L. Schnell, Jr. filed contemporaneously herewith until such time as this Court enters an order directing such Accepting Trustee to transfer the applicable Trustee’s Share into the collection or distribution accounts for the related Subject Settlement Trusts. Each Petitioner, solely in its individual, non-trustee capacity unrelated to any of the Subject Settlement Trusts, is designated as the “Escrow Agent” under the Escrow Agreement applicable to the Subject Settlement Trusts for which such Petitioner is trustee, indenture trustee, successor trustee, or paying agent (except that Citibank will act as Escrow Agent for the Subject Settlement Trusts for which Wilmington Trust Company is trustee). The Escrow Agents will not receive any fees, interest, or other monetary benefit under the Escrow

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<sup>7</sup>The Petition describes more fully the issues discussed in this section and should be referred to for further detail.

Agreements and neither will the trustees, servicers, securities administrators, or other administrators of the trust. The Accepting Trustees also request that the Court direct each of the Escrow Agents to use commercially reasonable efforts to cause the Settlement Payments for the Subject Settlement Trusts to be invested and reinvested in high quality money market funds, with any earnings thereon to accrue to the benefit of Certificateholders.

The Court has discretion to order the Accepting Trustees to hold and maintain the Settlement Payments in escrow “to maintain the status quo pending a hearing on the merits.” *See 630 West 11th LLC v. ACG Credit Co. II, LLC*, 46 A.D.3d 367, 367 (1st Dep’t 2007); *Ficus Invs. Inc. v. Private Capital Mgmt., LLC*, 61 A.D.3d 1, 11-12 (1st Dep’t 2009) (“The escrow order properly preserved the status quo [and] . . . [t]he equitable relief was appropriate because the assets constituted a specific res that is ‘the subject of the action’”) (internal citations omitted); *see also In re Bank of New York Mellon*, No. 150973/2016, Order to Show Cause at 2-3 (Sup. Ct. N.Y. Cnty. Feb. 5th, 2016,) (“BNY Order to Show Cause”) (instructing a trustee to hold a settlement payment in escrow pending the resolution of a similar proceeding).

Such an order is urgent and essential in this case. The Covered Loan Settlement Agreement requires the Accepting Trustees to “use their reasonable best efforts to distribute the Settlement Payment to the Settlement Trusts as promptly as possible.” Covered Loan Settlement Agreement § 3.01. The purpose of this proceeding—to obtain the Court’s instruction concerning the Settlement Payment Application Process—would be frustrated if the Petitioners immediately distributed the Settlement Payments to Certificateholders without this Court’s direction. Immediate distribution of the Settlement Payments would require the Petitioners to individually pick and choose between competing ways to address the issues described herein and in the Petition. These actions by the Petitioners, including the distribution of the Settlement Payments,

would irreversibly alter the status quo. It would be impracticable and potentially impossible for the Petitioners to claw back and redistribute the Settlement Payments, if a court later determined that the manner in which the Petitioners applied the Settlement Payment Application Process was inconsistent with the Governing Agreements or the Settlement Agreements.

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

The Order to Show Cause also sets forth a proposed notice (the "Notice") and accompanying notice program (the "Notice Program") to inform all Certificateholders and other interested parties of the filing of this Article 77 proceeding. The Notice Program provides that, within twenty-one (21) days of the entry of the Order to Show Cause, the Petitioners shall cause notice to be provided by: (a) mailing a copy of the Notice as well as the Order to Show Cause, the Petition, the Memo of Law, and all other papers filed contemporaneously with the Petition (other than the compact disc that will be provided to the Court containing electronic copies of the agreements governing the Subject Settlement Trusts) to all certificateholders listed on the certificate registry for each of the Subject Settlement Trusts and to any certificateholder in a Subject Settlement Trust (or its counsel) that has requested such papers from any Petitioner; (b) electronically transmitting the Notice to The Depository Trust Company, which will post the Notice in accordance with its established procedures; (c) electronically posting any of the following (or causing the related securities administrator, paying agent, or calculation agent to electronically post any of the following as such party may so choose): (x) a hyperlink on the investor reporting website for the applicable Subject Settlement Trusts to <http://www.lbhirmssettlement.com>; (y) a notice on the investor reporting website for the applicable Subject Settlement Trusts referring investors to <http://www.lbhirmssettlement.com> for information about this proceeding; or (z) the Notice on the investor reporting website for the applicable Subject Settlement Trusts; and (d) electronically posting the Notice as well as the

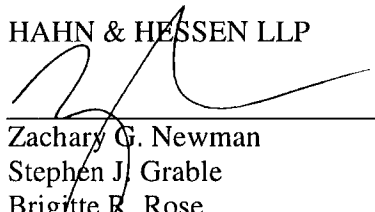
Order to Show Cause, the Petition, the Memo of Law, and all other papers filed contemporaneously with the Petition (other than the compact disc that will be provided to the Court containing electronic copies of the agreements governing the Subject Settlement Trusts) to <http://www.lbhirmssettlement.com>, the public settlement website created by the Petitioners, and subsequently electronically posting all papers filed in this proceeding to the same website.

The Notice Program uses multiple methods to notify potentially interested parties. It is more robust than the notice required for in the Governing Agreements, which is generally limited to notice through The Depository Trust Company. It is also very similar to notice programs recently approved in similar proceedings. *See In re Bank of New York Mellon (GE-WMC 2006-1)*, No. 653558/2015, Order to Show Cause at 1-2 (Sup. Ct. N.Y. Cnty. Oct. 27, 2015); BNY Order to Show Cause at 2-3. The Notice Program is therefore “reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections” and complies with due process. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Court should approve it in all respects.

**CONCLUSION**

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

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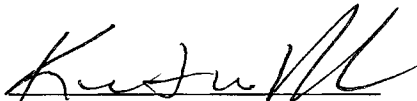
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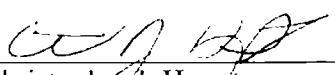
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