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	:	Index No. 150973/2016 Assigned to: Scarpulla, J.
Petitioner,	:	Mot. Seq. No. 1
For Judicial Instructions under C.P.L.R. Article 77 On the Distribution of a Settlement Payment.	:	**ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW
IN SUPPORT OF
MOTION FOR LEAVE TO REARGUE

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PRELIMINARY STATEMENT

The investors identified as signatories below ("Senior Holders") submit this Memorandum of Law in support of their motion for leave to reargue pursuant to C.P.L.R. § 2221(d). This motion is made only with respect to the portion of the Court's Decision and Order (Docket No. 193) ("Decision") dated April 4, 2017 and entered April 5, 2017[1] addressing the Fourteen Disputed Trusts identified in footnote 4 to the Decision ("Disputed Trusts"). Reargument is not sought with respect to the portions of the Decision addressing CWABS 2006-12 or correctly holding that "there is no support in the Governing Agreements for a distribution to relate back to a prior set of certificate balances." Dkt. 193 at 17.[2]

SUMMARY OF ARGUMENT

The Court should hear reargument, and reconsider and revise the Decision, because it was improperly based on unsworn statements made by Trustee's counsel, Michael Ware, at oral argument, concerning the intent and meaning of the Settlement Agreement.

The comments by Trustee's counsel were an improper basis for the Court's Decision because they were not based on personal knowledge of the events at issue, were unsworn, were without notice to the Senior Holders, and—most importantly—were inaccurate. Further, the statements by Trustee's counsel were flatly inconsistent with the Trustee's prior position up to that point in the litigation that it was "neutral" and held no view as to how the Settlement Agreement and PSAs should be interpreted as to the issues before the Court.

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[1] The Decision is attached as Exhibit 1 to the annexed Affidavit of David Sheeren ("Sheeren Affidavit"). References to Exhibits or "Ex." shall refer to exhibits to the Sheeren Affidavit.

[2] The Fourteen Trusts at issue in this Memorandum of Law are: CWALT 2005-61, CWALT 2005-69, CWALT 2005-72, CWALT 2005-76, CWALT 2005-IM1, CWALT 2006-OA10, CWALT 2006-OA14, CWALT 2006-OA3, CWALT 2006-OA7, CWALT 2006-OA8, CWALT 2007-OA3, CWALT 2007-OA8, CWMBS 2006-3, and CWMBS 2006-OA5.

In fact, Trustee counsel's *ad hoc*, speculative comments so favored Blue Mountain, Tilden Park, and Prosiris (the "Junior Holders") that Tilden Park's counsel "second[ed]" them at oral argument. August 31, 2016 Hearing Transcript at 67:24 (Ex. 2). Not only did Mr. Ware's comments immediately change the tenor of the oral argument, they ultimately featured prominently in the Court's Decision, which characterized them as *express admissions* from Trustee's counsel favoring the Junior Holders' positions. Decision at 13. But "admissions" of the Trustee's counsel, with no knowledge of the facts and a prior *disclaimer* of having such knowledge, were not entitled to any weight. The Court erred by permitting Mr. Ware to, in effect, testify to matters about which he had no personal knowledge, by refusing to permit the Senior Holders any opportunity to refute Mr. Ware's unsupported statements, and by extensively quoting and relying on these statements in the Decision.

Moreover, because the Trustee had repeatedly claimed neutrality and lack of knowledge on the merits of interpreting the disputed provisions, the Senior Holders had not previously sought any discovery from the Trustee regarding its knowledge of the meaning and intent of the Settlement Agreement. Had the Senior Holders known that Trustee's counsel would ultimately purport to have knowledge it previously disclaimed, and endorse arguments made by the Junior Holders at the eleventh hour despite its claim of neutrality, the Senior Holders would have sought discovery from the Trustee concerning the intent and meaning of the Settlement Agreement. As Mr. Ware himself indicated at the hearing, <u>he was not personally involved in the settlement negotiations, nor did he appear in the Article 77 settlement approval proceeding</u>. Therefore, his comments amounted to nothing more than unreliable and inadmissible speculation and hearsay. Further, his comments were not subject to cross-examination (which would have

demonstrated their baselessness), and the Court did not permit the Senior Holders an opportunity to respond to them.

For these reasons, the Senior Holders respectfully submit that the Decision, which relied on and extensively quoted Mr. Ware's comments at oral argument, overlooked and/or misapprehended the facts and law concerning the inadmissibility of Mr. Ware's comments, and the Trustee's understanding of the intent and meaning of the Settlement Agreement. On that basis, the Senior Holders respectfully move for leave to reargue pursuant to C.P.L.R. § 2221(d), and further respectfully request an opportunity to take a single deposition of a corporate representative of the Trustee with personal knowledge of the intent and meaning of the Settlement Agreement. Once that deposition is conducted, and the testimony is submitted to the Court, the Senior Holders respectfully request that the Court reconsider and revise its Decision.[3]

STANDARD OF REVIEW

"[T]he decision whether to entertain reargument is committed to the sound discretion of the court." *Rostant v. Swersky*, 79 A.D.3d 456, 457 (1st Dep't 2010).

ARGUMENT

I. THE TRUSTEE REPEATEDLY CLAIMED NEUTRALITY ON THE MERITS.

Starting with the Verified Petition, the Trustee repeatedly claimed to be neutral on the merits of the distribution dispute between the Junior Holders and the Senior Holders.

For example, in Paragraph 45 of the Verified Petition (Dkt. No. 1), the Trustee stated that "judicial instructions are necessary where, as here, there is reasonable doubt about the powers or duties of the trusteeship or about the proper interpretation of trust provisions. The Trustee has no economic stake in the resolution of this question, but recognizes that investors holding different

[3] The Senior Holders respectfully disagree with other aspects of the Decision, and reserve all rights to pursue an appeal of the Decision.

classes of Certificates may have different interests and therefore different interpretations of the Governing Agreements." (Emphasis added.)

Likewise, in its Memorandum of Law in Support of the Verified Petition, the Trustee stated that it "has no economic interest in the outcome of this action. It merely requests judicial instruction in order to discharge its obligation to distribute the Settlement Payment fairly and equitably, in the face of competing interpretations and interests, and to allow Certificateholders the opportunity to be heard." *See* Docket No. 10 at p. 3 (emphasis added).

At hearings prior to the August 31, 2016 oral argument, the Trustee also maintained its neutrality "on the merits." For example, during a March 15, 2016 hearing, Mr. Ware stated:

> I want to cover [] a couple of procedural pieces and process pieces. We collaborated with Ms. Patrick and would do the same for Prosiris. She came to us and said, if the deal is 'X,' what do you guys need to make it work. If Prosiris wants machinery like that from us, we'll give it to them …. But as to the concerns, we really would prefer that the investors—we want to be neutral on the merits ….

March 15, 2016 Hearing Transcript at 26:13-19; 22-24 (emphasis added) (Ex. 3).

As these statements in the Trustee's Verified Petition, briefing, and previous hearings show, prior to the August 31, 2016 oral argument, the Trustee had repeatedly taken no position on the merits. At no time prior to the August 31, 2016 oral argument did the Trustee endorse the Junior Holders' position that the settlement parties intended and expected that large sums of the Settlement Payment would "leak" to the junior certificateholders. It was therefore a complete surprise to the Senior Holders when the Trustee suddenly changed tack in the middle of the August 31, 2016 oral argument.

II. A KEY FACTUAL QUESTION RAISED IN THE VERIFIED PETITION IS THE MEANING AND INTENT OF THE SETTLEMENT AGREEMENT.

Prior to the August 31, 2016 argument, the Trustee consistently took the position that the proper interpretation of the Settlement Agreement and PSAs was *unclear* and subject to

competing interpretations. Indeed, that was the *core premise* of the Trustee's request for judicial instructions pursuant to Article 77.

For example, in Paragraph 16 of the Verified Petition, the Trustee stated that "the questions presented in this proceeding concern the interpretation of the distribution provisions of the Governing Agreements. These contractual issues are subject to competing interpretations and their resolution will dictate how—and to whom—the Allocable Shares of the Covered Trusts are distributed. They therefore present the classic case for judicial instructions." (Emphasis added.)

Additionally, in Paragraph 41 of the Verified Petition, the Trustee stated: "For several reasons, these issues compel the Trustee to seek judicial instruction. First, there are competing views on these issues as they relate to the OC Trusts. The Trustee has received conflicting investor correspondence on this point, urging the Trustee to follow different orders of operation in light of, or notwithstanding, the overcollateralization issue." (Emphasis added.) Finally, in the Memorandum of Law in support of the Verified Petition, the Trustee stated that "Judicial instructions are particularly necessary where, as here, there is reasonable doubt about the powers or duties of the trusteeship or about the proper interpretation of trust provisions." *See* Dkt. 10 at p. 12 (emphasis added).

Again, prior to the August 31, 2016 oral argument, the Trustee took *no position* as to the meaning and intent of the Settlement Agreement, and did not endorse the arguments made by the Junior Holders. Much to the contrary, the Trustee filed its Verified Petition in part *because* it believed that the Junior Holders' proposed methodology "could be viewed as contrary to an essential purpose of the overcollateralization structure—protecting more senior Certificateholders from risk of loss." Verified Petition at ¶ 28.

III. MR. WARE'S STATEMENTS AT THE FINAL HEARING WERE NOT NEUTRAL, WERE NOT BASED ON PERSONAL KNOWLEDGE, WERE NOT SUBJECT TO CROSS-EXAMINATION, AND CONFLICTED WITH PRIOR POSITIONS TAKEN BY THE TRUSTEE IN THIS PROCEEDING.

A. Mr. Ware's Comments Were Not Neutral.

Mr. Ware's comments at the August 31, 2016 hearing abruptly broke with the Trustee's previous neutrality, and featured prominently in the Court's acceptance of the Junior Holders' arguments. Mr. Ware's comments, however, were not based on his personal knowledge, were not subject to cross-examination, and conflicted with prior positions taken by the Trustee in this proceeding. Nonetheless, the Court relied on and extensively quoted Mr. Ware's comments in adopting the Junior Holders' arguments. The Senior Holders respectfully submit that in relying on Mr. Ware's comments, the Court overlooked and/or misapprehended the facts concerning the Trustee's understanding of the intent and meaning of the Settlement Agreement.

First, the Court held in the Decision that "the parties [*i.e.*, the Trustee and the Institutional Investors] plainly understood when they negotiated the Settlement Agreement that there could be instances where the Governing Agreements' general subordination scheme may not apply." Decision at 13. For this statement, the Court relied *exclusively* on the following comments by Mr. Ware during the August 31, 2016 hearing, which the Court characterized as "express[] admi[ssions]":

> MR. WARE: … Let me answer the question put to me: I wasn't there at every day of the trial and partners of mine tried the case, but I know the answer. Section 3(d)(1) of the settlement agreement provides that, "once the allocable shares has hit those accounts, the trustee shall distribute it to investors in accordance with the distribution provisions of the governing agreements." So that it was our understanding, then and now, that there could be different results obtaining a [sic] different trusts.
>
> THE COURT: So there could be—and that was the understanding at the time, that some senior bondholders were not going to get paid under the junior bond, whatever the trusts were?

> MR. WARE: The only break that was put on that in the settlement agreement is at the very bottom of Section 3(d)(1), which does specify a class of securities so low, that no matter what, they get nothing.

August 31, 2016 Hearing Transcript at 66:9-25 (emphasis added) (Ex. 2).

Second, the Court held in the Decision that "the general intent of the Governing Agreements to protect senior certificateholders over junior certificateholders does not operate to override the plain and unambiguous terms of the Settlement Agreement, which directs that the Allocable Share must be distributed as a Subsequent Recovery." Decision at 14. Once again, the Court relied *exclusively* on the below comments by Mr. Ware at the August 31, 2016 hearing, which the Court found "helpful," and which were "second[ed]" by Tilden Park's counsel at oral argument:

> THE COURT: So at the time, you're saying that people anticipated that the senior-most bondholders do not get paid first.
>
> MR. WARE: I won't put it that way. But the last sentence of Section 3(d)(1) provides that, blahdee blah, blah, skipping words, "distribution of allocable shares in a particular covered trust governed would result"—skip, skip, "in money being payable to class of REMIC residual interest," then there's a fix to stop that. So those are the lowest.
>
> These are—with these common law PSAs are basically all equity rather than debt, but most of them look like debt. This is the one that looks like equity. And so the settlement agreement does contemplate what classes other than the highest most might get some. And it draws the line below which they won't go –
>
> THE COURT: Will get some or will get more
>
> MR. WARE: I –
>
> MR. WARE: Depending on whatever the PSA or indenture said.
>
> THE COURT: Okay. So that is very helpful. Thank you.
>
> MR. MOLO: I second what Mr. Ware said.

August 31, 2016 Hearing Transcript at 66:25-67:24 (emphasis added) (Ex. 2).

Through each of these exchanges with the Court, Mr. Ware upended the Trustee's previous neutrality and contradicted the Trustee's prior disclaimers of knowledge regarding the proper interpretation by suggesting that the *only* intended restriction on payment of the Settlement Funds to Junior Holders was set out in Section 3(d)(1) of the Settlement Agreement, which prohibited funds being paid to the *most junior* class of Certificates—the Residual Certificates. These comments further departed from the Trustee's prior statements of neutrality and disclaimers because they suggested that the framers of the Settlement Agreement had contemplated that junior certificates might get *more* of the Settlement Payment than the senior-most certificates. As characterized by the Court in the Decision, the import of Mr. Ware's comments was that the settlement parties *did not* intend to prevent large sums of the Settlement Payment from leaking to the certificates held by the Junior Holders, which were more senior than the Residual Certificates, but junior to the super-senior certificates held by the Senior Holders.

Because Mr. Ware's comments endorsed some of the Junior Holders' arguments, Tilden Park's counsel "second[ed]" them. August 31, 2016 Hearing Transcript at 67:24 (Ex. 2). For its part, the Court described Mr. Ware's comments as "very helpful." For the reasons below, however, the Senior Holders respectfully submit that the Court's reliance in the Decision on Mr. Ware's comments was in error.

B. Mr. Ware's Comments Were Not Based on Personal Knowledge.

Mr. Ware was *not* involved in the negotiation of the Settlement Agreement, and he did *not* even make an appearance in the prior Article 77 settlement approval proceeding. Mr. Ware's attendance in that 36-day proceeding was sparse, at best, and even if he attended every day he could at best only recite selective hearsay from that trial on the contested issue, rather than his own personal knowledge. Other attorneys from Mayer Brown LLP negotiated the Settlement

Agreement and tried the Article 77 case, and numerous in-house Trustee businesspeople and attorneys personally participated in both. In contrast to Mr. Ware, the individuals who actually participated in the settlement negotiations have personal knowledge concerning the meaning and intent of the Settlement Agreement.

C. Mr. Ware's Comments Were Not Subject to Cross-Examination or Challenge.

Because the Trustee consistently and emphatically professed neutrality on the merits, the Senior Holders did not seek, and were not afforded, any discovery from the Trustee concerning its understanding of the meaning and intent of the Settlement Agreement. Had the Senior Holders known the Trustee would reverse course and adopt arguments made by the Junior Holders at the final merits hearing, the Senior Holders would have previously sought discovery from the Trustee. At minimum, they would have sought a corporate-representative deposition from a Trustee witness who had personal knowledge concerning the meaning and intent of the Settlement Agreement, and who could testify under oath about those matters.

In addition to improperly permitting Mr. Ware to testify at the August 31, 2016 hearing, the Court further abused its discretion by not affording the Senior Holders the opportunity to respond to Mr. Ware's comments. After counsel to the Senior Holders rose to object and respond to Mr. Ware's surprising comments, the Court stated: "I've heard from everyone. If I start with the rebuttals and sur-rebuttals and other rebuttals, we will be here till next Thursday." August 31, 2016 Hearing Transcript at 78:4-6 (Ex. 2). The Senior Holders were not permitted to respond to Mr. Ware's unexpected comments.

For these reasons, the Senior Holders respectfully submit that the Court's reliance on Mr. Ware's comments at the August 31, 2016 hearing, which were presented without the benefit of cross-examination or even a response from the Senior Holders, was in error.

D. Mr. Ware's Comments Conflicted With Prior Positions Taken By the Trustee in This Proceeding.

The Senior Holders also respectfully submit that the Court's reliance on Mr. Ware's comments at the hearing overlooked that those comments conflicted with the previous positions taken by the Trustee in this proceeding. Indeed, according to its Verified Petition, one of the *core reasons* the Trustee filed this proceeding was that the "payment to less senior, subordinated Certificateholders at the expense of more senior Certificateholders could be viewed as contrary to an essential purpose of the overcollateralization structure—protecting more senior Certificateholders from risk of loss." Verified Petition at ¶ 28.

The Court's reliance on Mr. Ware's comments during the August 31, 2016 hearing in its Decision that "the parties [*i.e.*, the Trustee and the Institutional Investors] plainly understood when they negotiated the Settlement Agreement that there could be instances where the Governing Agreements' general subordination scheme may not apply," Decision at 13, overlooked that Mr. Ware's comments *directly conflicted* with the Trustee's previous position that the Junior Holders' methodology "could be viewed as contrary to an essential purpose of the overcollateralization structure." Verified Petition at ¶ 28. The Court should not have permitted such contradictory testimony by the Trustee to have influenced the Decision.

IV. CONCLUSION

Though the Trustee repeatedly claimed in this proceeding that it was "neutral on the merits," Mr. Ware's comments during the August 31, 2016 oral argument were far from neutral. In those comments, Mr. Ware effectively *testified* on a contested issue of fact in a way that favored the Junior Holders' position, as reflected in comments from Tilden Park's counsel and the Court during the hearing. The Court ultimately relied on Mr. Ware's statements to the Senior Holders' detriment, quoting him verbatim. Indeed, Mr. Ware's comments were the *only* support

the Court cited in holding that "the parties plainly understood when they negotiated the Settlement Agreement that there could be instances where the Governing Agreements' general subordination scheme may not apply." Decision at 13.

Because Mr. Ware was not involved in the settlement negotiationshis comments were not based on personal knowledge and were not reliable. Because of the Trustee's previous purported commitment to neutrality on the merits, the Senior Holders did not previously seek discovery from the Trustee. Mr. Ware's comments at oral argument, however, and the Court's reliance on them in its Decision, put at issue the Trustee's knowledge concerning the intent of the Settlement Agreement.

The Senior Holders therefore respectfully request the opportunity to take a single, corporate-representative deposition of the Trustee concerning the Trustee's knowledge and understanding with respect to the Settlement Agreement's intent. The Senior Holders hope and expect that deposition will change the Court's conclusion that "the parties plainly understood when they negotiated the Settlement Agreement that there could be instances where the Governing Agreements' general subordination scheme may not apply." Decision at 13. Following that deposition, the Senior Holders respectfully request that the Court reconsider its Decision in light of the *sworn* testimony of a Trustee witness *with personal knowledge* of these issues.

Dated: New York, New York
May 4, 2017

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