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

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| 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<br>Assigned to: Scarpulla, J. |
| Petitioner, | : | Mot. Seq. No. 2 |
| For Judicial Instructions under CPLR Article 77 On the Distribution of a Settlement Payment. | : | **ORAL ARGUMENT REQUESTED** |

**REPLY IN FURTHER SUPPORT OF MOTION FOR LEAVE TO REARGUE**

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## PRELIMINARY STATEMENT

The investors identified below ("Senior Holders") submit this Reply in further support of their motion for leave to reargue pursuant to CPLR § 2221(d) (Docket Nos. 231–243) ("Motion").

## SUMMARY OF ARGUMENT

The Junior Holders' and Trustee's Responses (the "Responses") to the Senior Holders' Motion lack merit for at least three reasons: (1) the Responses ignore the Court's reliance on, and extensive quotation of, Mr. Ware's baseless comments in reaching its key holdings; (2) the Senior Holders filed the Motion timely and in good faith; and (3) a single corporate representative deposition of the Trustee is reasonable, necessary, and would not significantly delay this proceeding.

## ARGUMENT

### 1. The Responses Ignore the Court's Reliance on Mr. Ware's Baseless Comments.

The unexpected and baseless commentary by Trustee counsel, Michael Ware, about the intent and meaning of the Settlement Agreement featured significantly in both the August 31, 2016 oral argument and this Court's subsequent April 4, 2017, decision and order ("Decision"). In its Decision, this Court adopted Mr. Ware's conclusions that (1) 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 prohibits funds being paid to the most junior class of certificates (the Residual Certificates); and (2) the Trustee had *in fact contemplated* that junior certificates might receive *more* of the Settlement Payment than the senior-most certificates. *See* Decision at 13-14 (quoting 8/31/2016 Hearing Trans. at 66:11–17; 67:11–21).

On its face, the Decision relied *exclusively* on Mr. Ware's incorrect and misleading comments—which the Court apparently admitted into evidence as "express[] admi[ssions]" of "Trustee's counsel" sufficient to override the general structure of the Governing Agreements (Decision at 13)—in reaching the following holding:

> I fully agree with AIG and the Institutional Investors that the overcollateralization and subordination features of the Governing Agreements are designed to protect senior investors and ensure they are paid their principal first. However, 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 (emphasis added). In so holding, the Court relied *solely* on the following exchange with Mr. Ware at the August 31, 2016 hearing:

> 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.

8/31/2016 Hearing Trans. at 66:9–25 (emphasis added). Likewise, the Court relied *exclusively* on Mr. Ware's baseless comments in reaching the following holding:

> *Accordingly,* 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 (emphasis added). In so holding, the Court relied *solely* on the following exchange with Mr. Ware at the August 31, 2016 hearing—including comments by Mr. Ware that were "seconded" by counsel to the Junior Holders (who clearly perceived the comments as supporting the Junior Holders' position), and which the Court stated it found "very helpful":

> 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 –
>
> THE COURT: Depending on whatever the PSA –
>
> MR. WARE: Whatever the PSA or the indenture said.
>
> THE COURT: Okay. So that is very helpful. Thank you.
>
> MR. MOLO: I second what Mr. Ware said.

8/31/2016 Hearing Trans. at 66:26–67:24 (emphasis added).

As explained in the Motion, Mr. Ware's comments were an improper basis for the Court's Decision because they were not based on his own personal knowledge of the events at issue, were unsworn, contradicted the Trustee's prior statements of purported neutrality, were without notice to the Senior Holders, and—most importantly—were inaccurate. In relying on and extensively quoting Mr. Ware's comments in the Decision, and supporting its Decision

based primarily (if not exclusively) on those comments, the Court overlooked and/or misapprehended the (in)admissibility of Mr. Ware's comments, the settlement parties' intentions, and the meaning and intent of the Settlement Agreement. CPLR § 2221(d) is designed to remedy precisely this kind of error.

Instead of acknowledging the Decision's *exclusive reliance* on Mr. Ware's comments in reaching the central holdings quoted above, the Responses attempt to minimize Mr. Ware's comments, and choose to ignore the key language from pages 13 and 14 of the Decision quoted above. *See* Junior Holders' Response at 5 ("On the law—the Court's decision did not rely on the parties' intent."); Trustee's Response at 2 ("The Court has decided that the Settlement Agreement is 'plain and unambiguous' on this issue (Decision at 14), rendering irrelevant any party's subjective intent."). But this Court clearly *did* rely on Mr. Ware's comments to support the Court's central holdings, and the Responses' conspicuous unwillingness to confront that suggests the Trustee and Junior Holders understand that leave to reargue is appropriate here.

For example, although both the Trustee and Junior Holders point to language at page 14 of the Decision stating 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," they both misleadingly fail to quote the first word in that sentence: "***Accordingly.***" That omitted word is key—because it ties the Court's holding directly to Mr. Ware's comments, which the Court quoted verbatim in the immediately preceding sentences of its Decision.

As shown above, the import of Mr. Ware's comments was that the Trustee had in fact contemplated that junior certificates might receive *more* of the Settlement Payment than the senior-most certificates. The Senior Holders expect that a corporate representative deposition of

a knowledgeable Trustee witness will demonstrate otherwise. Importantly, if that deposition demonstrates Mr. Ware's comments were inaccurate in this regard—*i.e.*, the Trustee did *not* contemplate that junior certificates would receive *more* of the settlement payment than the senior-most certificates—then the entire basis for the Court's holding would fall away.

**2. The Motion Was Made Timely and In Good Faith.**

Contrary to the suggestion in the Responses, the Senior Holders' motion for reargument was made timely and in good faith. The Trustee, which had previously described itself as a neutral party, made statements purportedly based on personal knowledge during the August 31, 2016 oral argument. Counsel for the Senior Holders immediately attempted to respond during the hearing, but were not permitted to do so by the Court. *See* 8/31/2016 Hearing Trans. at 78:4–6 (After counsel for the Senior Holders attempted to rise and respond to Mr. Ware's 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."). Further, the Senior Holders did not file formal objections to Ware's statements at that time, as the Court gave no indication until its April 4, 2017 Decision that it would credit the unsworn and improper statements of Trustee's counsel, much less *exclusively* rely on them in adopting key arguments made by the Junior Holders.

The Senior Holders have moved for reargument within the 30 days provided for under the CPLR and have sought a single deposition—without the benefit of additional document discovery—narrowly tailored to the error identified in the Motion. This is a reasonable, minimalist remedy that can readily be accomplished—if the Junior Holders and Trustee drop their objections—within a week. Unable to respond persuasively to the Senior Holders' arguments, the Junior Holders instead resort to name-calling, claiming that the Motion is an

"attempt to delay" motivated by "bad faith." *See* Junior Holders' Response at 1, 8-9. The Junior Holders are incorrect—the Motion is meritorious and is motivated solely by a desire to correct this Court's April 4 decision based on relevant factual information. Because the Senior Holders had no way of knowing, until April 4, 2017, that this Court would extensively rely on Mr. Ware's unexpected and improper statements at the August 31, 2016 hearing (during which the Court refused to hear the Senior Holders' objections to Mr. Ware's statements), there is no basis for accusing the Senior Holders of bad faith based upon their filing the instant Motion.

In any event, to the extent any delay has resulted, it has not been caused by the Motion, as the quickest resolution would be to schedule promptly the single Trustee deposition as requested, rather than burdening the Court with the Junior Holders' and Trustee's objections. Respectfully, as explained in the Motion, the Court's key error was *relying* on Mr. Ware's testimony in the Decision. Further, the Senior Holders' parallel appeals should come as no surprise; much to the contrary, the CPLR itself provides for such alternative relief, before a different forum, based on different grounds. *See* CPLR §5701(a).

Notably, the Senior Holders have *not* sought reargument with respect to all aspects of the Decision with which they respectfully disagree. Instead, they have narrowly tailored the Motion and their request for relief to one issue readily amenable to reconsideration by this Court: the Court's erroneous reliance on Mr. Ware's baseless comments concerning the intention and meaning of the Settlement Agreement. Trustee's counsel *put the Trustee's knowledge at issue* by volunteering his opinion about the meaning and intent of the Settlement Agreement, and the Trustee cannot be heard now to complain that the Senior Holders seek discovery based on the Trustee's improper comments.

Finally, the Senior Holders did not previously seek discovery from the Trustee for the simple reason that up until the August 31, 2016 hearing, the Trustee had purported to maintain "neutrality" on the merits of the dispute between the Junior Holders and the Senior Holders. Thus, the Senior Holders have not waived their right to seek reargument or a single deposition of a knowledgeable Trustee witness about matters *the Trustee itself* put at issue in this proceeding and whose relevance was confirmed by this Court's Decision.

**3. A Single Corporate Representative Deposition of the Trustee Is Reasonable, Necessary and Would Not Significantly Delay These Proceedings.**

A single corporate representative deposition of a knowledgeable Trustee witness is reasonable in scope, and necessary to provide the Court a proper factual and legal basis for the Decision. The deposition itself could be taken within a week if the Senior Holders and Trustee would drop their objections, and testimony could be submitted shortly thereafter to the Court concerning the Trustee's intentions and understanding of the meaning of the Settlement Agreement. In particular, the Senior Holders expect that such a deposition would establish, contrary to Mr. Ware's baseless comments, that the Trustee did *not* intend that *more* of the Settlement Payment would "leak" to Junior Holders than would be paid to the senior-most certificates, and that it is *not* the case that the *only* intended limitation on payments to junior certificates 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). Both of these admissions would critically undermine this Court's Decision. Notably, to expedite the deposition and minimize any delay to this proceeding, the Senior Holders have not sought any additional document discovery.

Further, the Junior Holders' complaints about delay ring hollow because the quickest way forward would be to permit the deposition to go ahead, rather than burdening the Court with the

Junior Holders' objections. Indeed, the Trustee has not yet even circulated a draft Judgment among the Parties conforming to the Court's Decision, as it stated it intended to do *over a month ago*. For their part, the Junior Holders have likewise failed to submit their preferred form of judgment to the Court, or even to circulate a draft Judgment conforming to the Decision. The requested deposition could easily occur on a *parallel* track to the finalization of the Court's Judgment, which would entirely eliminate any purported concern by the Junior Holders about delay.

## CONCLUSION

Because it erroneously relied on the comments by Trustee's counsel concerning the intent and meaning of the Settlement Agreement in reaching its key holdings, the Court overlooked and/or misapprehended the facts and/or the law. By granting the Motion, and permitting a single deposition of a knowledgeable Trustee witness to occur promptly, the Court could remedy that error and ensure that the record in this proceeding is complete and that its revised and/or reconsidered Decision relies on a proper factual and legal basis. For these reasons, and those further stated in the Senior Holders' Motion for Reargument, the undersigned respectfully submit that the Motion is meritorious, and request that a single Trustee deposition be ordered forthwith.

Dated: New York, New York
May 22, 2017

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