

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

In the matter of the application of

U.S. BANK NATIONAL ASSOCIATION (as Trustee,  
 Securities Administrator, Paying Agent, and/or  
 Calculation Agent under various Pooling and Servicing  
 Agreements),

Petitioner,

for judicial instructions pursuant to CPLR Article 77.

Index No.

**PETITION**

Petitioner U.S. Bank National Association, solely in its capacities as trustee, securities administrator, paying agent, and/or calculation agent (as named in such role or as successor to the named party, the “**Petitioner**”) for the seventy-six residential mortgage-backed securitization trusts (“**RMBS**”) listed on Exhibit A hereto (the “**Subject Trusts**”), files this petition (the “**Petition**”) pursuant to Article 77 of the New York Civil Practice Law and Rules (“**CPLR**”) seeking instruction concerning the interpretation and application of certain provisions of the contracts governing the Subject Trusts (the “**Governing Agreements**”).

**INTRODUCTION**

1. In its respective roles for each of the Subject Trusts, Petitioner is responsible for calculating and distributing payments to investors, known as “**certificateholders**,” from the collections derived from the mortgage loans held in the Subject Trusts. Certificateholders own designated classes of “**certificates**” that are entitled to distributions in a specific order set forth in payment provisions in the Governing Agreements. These provisions are commonly referred to as “**waterfalls**,” and the Governing Agreements contain three distinct waterfalls that govern distributions: (i) the “**interest**” waterfall, (ii) the “**principal**” waterfall, and (iii) the “**Excess Cashflow**” waterfall.

2. This Petition concerns issues regarding (i) the manner in which distributions are calculated and applied under the waterfalls after the aggregate outstanding principal balances of the Class A, Class M, and/or Class B classes of certificates (the “**Primary Classes**”) are reduced to zero, and (ii) the treatment of borrower payments of deferred or forborne principal, interest, and/or other amounts on mortgages that have been subject to servicer modifications in connection with a default or a reasonably foreseeable default (as determined by servicers), which is a subsidiary issue that has the potential to impact issue (i).

***Issues Related to Distributions of Funds  
After Primary Classes’ Principal Balances Are Reduced to Zero***

3. Each of the Subject Trusts issued Class A, Class M, and/or Class B classes, *i.e.*, the Primary Classes. *See, e.g.*, Exhibit B (SACO I 2006-4 Pooling and Servicing Agreement (“**PSA**”), § 6.01.<sup>1</sup> These classes of certificates have priority payment rights at varying levels with respect to the funds collected over the life of the Subject Trusts. *See generally id.* § 5.04(a). The Subject Trusts also issued Class C, CE, or B-IO classes (referred to herein as the “**Class C Classes**” or “**Class C**”), which may be entitled to specified funds in certain circumstances. *See generally id.*

4. Distributions to the Primary Classes under the principal and interest waterfalls are calculated based upon the outstanding principal balances of each Primary Class. *See id.* § 5.04(a)(1)-(2).

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<sup>1</sup> Although certain of the Governing Agreements use varying terminology for particular concepts, they are materially similar with respect to the issues addressed in the Petition unless otherwise noted. To the extent this Petition cites particular definitions or provisions from the Governing Agreements, unless otherwise noted it uses SACO I 2006-4 as an exemplar, and the pooling and servicing agreement for this transaction, dated March 1, 2006, is attached hereto as Exhibit B. Because the total volume of the relevant contracts is many thousands of pages in length, Petitioner is prepared to provide the Court with electronic versions of each Subject Trust’s pooling and servicing agreement in a format to be specified by the Court.

5. Distributions to the Class C Classes are generally limited to certain amounts that may be distributable under the Excess Cashflow waterfall, and the economic interests of the Class C Classes are tied to the “**overcollateralization**” structure of the Subject Trusts. *See generally id.* § 5.04(a)(3).

6. Under the overcollateralization structure, the initial aggregate unpaid principal balance of the mortgage loans held in each Subject Trust exceeded the initial aggregate principal balance of the Subject Trust’s Primary Classes. *See Exhibit C (SACO I 2006-4 Remittance Report, Apr. 2006) at 2, 5; see also Exhibit D (SACO I 2006-4 Prospectus Supplement) (“Pro Supp”) at S-9.* At any given time, the current amount of overcollateralization is equal to the excess aggregate unpaid principal balance of the mortgage loans over the aggregate outstanding principal balance of the Primary Classes. *See PSA § 1.01 (Definition of Overcollateralization Amount).* This excess, if any, may fluctuate, and it is intended as a credit enhancement for the Primary Classes insofar as the collateral in the Subject Trusts was generally expected to generate more cashflow than needed to satisfy interest and principal amounts owed to the Primary Classes. *See Exhibit D (Pro Supp) at S-8 to S-9.* This feature was specifically intended to insulate the Primary Classes from incurring “**realized losses.**” *Id.* at S-17.

7. If on any payment date the level of overcollateralization in a Subject Trust exceeds the amount of overcollateralization required under the Governing Agreements, funds may be distributed under the Excess Cashflow waterfall (in addition to any required distributions made under the interest and principal waterfalls). *See PSA, §§ 1.01 (Definition of Excess Cashflow), 5.04(a)(3).* Excess Cashflow may be distributed to certain Primary Classes as reimbursement for prior realized losses or interest shortfalls incurred by such Primary Classes, and thereafter any

remaining funds constituting Excess Cashflow may be distributed to the Class C Classes, which are in a subordinate position in the Excess Cashflow waterfall. *See id.* § 5.04(a)(3).

8. As a result of defaults on the mortgage loans, the Primary Classes have incurred substantial realized losses, which have also eroded the overcollateralization in the Subject Trusts. *See Exhibit E (Selected Aggregate Subject Trust Data).* Indeed, the individual overcollateralization for each Subject Trust has generally not reached levels high enough to permit distributions under the Excess Cashflow waterfall, and such distributions have been very limited since issuance. *See id.* The Subject Trusts currently have \$188,501,643 in aggregate overcollateralization, and the amount of overcollateralization (which, for certain of the Subject Trusts, is determined with respect to particular loan groups) ranges from \$12,599 to \$19,614,369. *See id.*

9. Due to both principal payments and the application of realized losses, the Primary Classes' principal balances will eventually be reduced to zero and some already have been reduced to zero. *See id.* It is expected that when the aggregate outstanding principal balance of the Primary Classes for a Subject Trust is reduced to zero, there will be some amount of assets remaining in the Subject Trusts (or, for Subject Trusts where this has already occurred, there are in fact assets remaining). *See id.* It is also expected that certain of the Primary Classes will have outstanding unreimbursed realized losses and/or interest shortfalls at that time (or presently have losses and/or shortfalls for applicable Subject Trusts where the Primary Classes have already reached an aggregate principal balance of zero). *See id.*

10. The Governing Agreements, however, are unclear as to whether collections on the mortgage loans should be distributed under the principal or Excess Cashflow waterfalls when the Primary Classes' principal balances are reduced to zero ("**Post-Zero Balance Collections**"). This

gives rise to various questions concerning how Petitioner should administer the waterfalls here, which ultimately may impact whether, and to what extent, the Primary Classes or Class C Classes are entitled to distributions of Post-Zero Balance Collections.

11. In addition, the Governing Agreements include a “**Retired Class Provision**” that may arguably prohibit distributions to the Primary Classes after such classes’ principal balances have been reduced to zero. *See* PSA, § 5.04(a). As a result, the Retired Class Provision may prevent distributions of Post-Zero Balance Collections to the Primary Classes regardless of whether Post-Zero Balance Collections are construed to come within the principal or Excess Cashflow waterfalls. *See id.* This may potentially result in distributions to the Class C Classes, even though certain Primary Classes have substantial outstanding realized losses. *See id.* It is unclear whether the Retired Class Provision should have this effect given the structure of the Subject Trusts, and this particular provision is subject to an ongoing dispute among interested parties in a different matter concerning some of the Subject Trusts. Additionally, Petitioner has received correspondence from investors asserting that the Retired Class Provision should not be applied to prevent distributions of Excess Cashflow to Class A classes, and should also not be applied to prevent increases to the balances of such classes in certain circumstances.

***Issues Related to Treatment of Collections of Deferred Payments on Modified Mortgage Loans***

12. The servicers for the mortgage loans in the Subject Trusts periodically authorize loan modification agreements with borrowers under which borrowers may be permitted to defer scheduled payments of principal or payments of interest or other amounts.

13. Servicers typically include all amounts that are deferred under modification agreements in a non-interest-bearing component of the mortgage loan’s principal balance (“**Deferred Principal Amounts**”), and generally report and treat Deferred Principal Amounts as losses on the mortgage loans, *i.e.*, as a “**loan-level loss.**” It is a common industry practice for

servicers to treat such amounts as losses even though most of the Governing Agreements do not expressly call for treating Deferred Principal Amounts as losses. *See id.* § 1.01 (Definition of Realized Loss). This practice reflects the possibility that borrowers may ultimately not pay back Deferred Principal Amounts that are due on modified loans, and, at least in part, has been influenced by government guidance stemming from the 2008 financial crisis, as discussed *infra* ¶¶ 70-76.

14. In some instances, however, borrowers may eventually pay Deferred Principal Amounts according to a schedule set forth in the applicable modification agreement, which often provides that Deferred Principal Amounts are due at the end of the term of the loan or over some set period of time. When this happens, servicers reduce the non-interest-bearing principal balance associated with the modified loan in the amount of any borrower payments corresponding to Deferred Principal Amounts (“**Deferred Principal Collections**”).

15. With respect to the certificates, servicer treatment of Deferred Principal Amounts as loan-level losses may reduce overcollateralization and may result in the application of realized losses to the Primary Classes, if there is insufficient overcollateralization to provide a buffer for such realized losses when applied. *See id.* § 5.05(a); *see also id.* § 1.01 (Definition of Applied Realized Loss Amount). If a realized loss is applied to one or more Primary Classes, Petitioner is required to reduce, or write down, the certificate principal balance of the particular Primary Classes to which the loss is applied. *See id.* §§ 5.05(b), 1.01 (Definitions of Applied Realized Loss Amount, Certificate Principal Balance). Additionally, if Deferred Principal Collections are distributed to one or more Primary Classes, Petitioner is required to reduce the certificate principal balance of the particular Primary Classes that received such distributions to account for a principal payment. *See id.* §§ 1.01 (Definition of Certificate Principal Balance), 5.04(a)(2).

16. From time to time, servicers may also remit collections representing recoveries on previously recognized loan-level losses for loans subject to a liquidation or final disposition, as indicated in servicer reporting, and these types of recoveries are defined as “**Subsequent Recoveries.**” *See id.* § 1.01 (Definition of Subsequent Recoveries); *see also id.* § 3.04 (“The Master Servicer . . . shall account fully to the Trustee for any funds received by the Master Servicer or that otherwise are collected by the Master Servicer as . . . Subsequent Recoveries in respect of any such Mortgage Loan.”). The Governing Agreements require Petitioner to increase, or “**write-up,**” the balance of the Primary Classes in the amount of Subsequent Recoveries remitted by the Servicer. *See id.* § 5.04(b); *see also id.* § 1.01 (Definitions of Certificate Principal Balance, Subsequent Recoveries). This is done to account for the prior application of a realized loss to the certificates stemming from the underlying loan-level loss on liquidated or disposed-of loans.

17. But, the Governing Agreements for the vast majority of the Subject Trusts do *not* define Subsequent Recoveries to include amounts collected that relate to Deferred Principal Amounts or previously reported losses resulting from loan modifications. *See id.* And, Subsequent Recoveries are the only designated amounts for which write-ups may be applied under the Governing Agreements—*i.e.*, if an amount is not a Subsequent Recovery, there is no express mechanism requiring the application of a write-up for such amount. Consistent with these aspects of the Governing Agreements for such Subject Trusts, Petitioner does not treat Deferred Principal Collections as Subsequent Recoveries, and does not apply write-ups to the Primary Classes when Deferred Principal Collections are distributed. There are, however, four Subject Trusts where the Governing Agreements are slightly different with respect to this issue: (i) three of the Subject Trusts have a definition of Subsequent Recoveries that includes “amounts received” with respect to “a Mortgage Loan that has been modified which resulted in a Realized Loss,” and (ii) one

Subject Trust has no reference to Subsequent Recoveries. *See* Exhibit F (Subsequent Recovery Concepts for the Subject Trusts). In total, then, seventy-two of the seventy-six Subject Trusts do not define Subsequent Recoveries to include collections stemming from modification-related realized losses, such as Deferred Principal Collections. *See id.*

18. The treatment of Deferred Principal Collections may materially impact the amount of funds distributed to any particular class of certificates in the future. The aggregate mortgage loan balance for a Subject Trust, as reported by servicers each period, necessarily reflects a decrease for any Deferred Principal Amounts included in a non-interest-bearing balance for a modified loan, due to servicers treating such amounts as loan-level losses. Such losses decrease the aggregate mortgage loan balance at the time of modification. When Deferred Principal Collections are subsequently received and distributed to certificateholders in a later period, such amounts decrease the aggregate outstanding principal balance of the Primary Classes—because no write-up is applied. But, in the period of such distributions, servicers do not apply a downward adjustment to the collateral balance due to the fact that a loan-level loss was previously recognized for the related Deferred Principal Amounts. As a result, distributions of Deferred Principal Collections may increase the amount by which the aggregate principal balance of the mortgage loans (which, again, *are not reduced* for such amounts) exceeds the Primary Classes' aggregate outstanding principal balance (which, again, *are reduced* for such amounts). This necessarily may lead to increases in overcollateralization. Additionally, if Deferred Principal Collections do not result in the application of write-ups to the Primary Classes, such classes will approach a zero dollar principal balance more quickly than they otherwise would if write-ups were applied. *See* PSA § 1.01 (Definition of Certificate Principal Balance). All of this has the potential to increase



Post-Zero Balance Collections and may impact which classes of certificates receive future distributions.

19. Although Petitioner's practice is consistent with the terms of the Governing Agreements for the aforescribed seventy-two Subject Trusts, Petitioner anticipates that certain interested parties may argue that Deferred Principal Collections should be included in Subsequent Recoveries, or that write-ups should otherwise be applied for such amounts. Other interested parties may take the opposite view. Petitioner notes that in a different case concerning waterfall issues, certain investors recently filed a counter-petition opposing the inclusion of Deferred Principal Collections in Subsequent Recoveries, but asserting that Deferred Principal Collections should nevertheless result in the application of write-ups to certain classes of certificates. *See infra* ¶¶ 31-34.

20. Petitioner cannot predict the amount of Deferred Principal Collections servicers ultimately may remit to the Subject Trusts in the future. However, servicers have reported hundreds of millions of dollars in loan-level losses associated with Deferred Principal Amounts for active mortgage loans, and thus Deferred Principal Collections could potentially be substantial depending upon the rate at which borrowers repay Deferred Principal Amounts. The more substantial Deferred Principal Collections are, the more substantial the impact may be on Post-Zero Balance Collections.

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21. All of these issues expose Petitioner to potential conflicting claims concerning the proper method to distribute funds under the Subject Trusts' Governing Agreements, and Petitioner expects that these issues may ultimately impact distributions in excess of \$188 million in aggregate. *See Exhibit E.* Judicial instruction is necessary to ensure that Petitioner is able to make

distributions without the prospect of after-the-fact challenges that may encumber trust funds or result in claw-backs or disputes. This proceeding will provide all interested parties with the opportunity to appear and be heard, and will result in a resolution of all relevant issues such that Petitioner may distribute the funds at issue with finality.

### OTHER WATERFALL CASES

22. Although this Petition raises novel questions regarding the administration of waterfall provisions, courts have previously addressed, and continue to address, payment distribution issues with respect to hundreds of “legacy” era RMBS transactions, including many of the Subject Trusts.

23. Certain of the Subject Trusts have been included in both (i) court-approved settlements with respect to asserted or unasserted claims concerning alleged breaches of representations and warranties regarding mortgage loans and/or violations of loan servicing obligations under various provisions of the Governing Agreements, and (ii) post-settlement, follow-on judicial instruction proceedings concerning the administration and distribution of settlement payments for such court-approved settlements.

24. In the largest such proceeding concerning distribution issues (“**JPM II**”), U.S. Bank and other petitioners filed a petition under CPLR Article 77 for judicial instruction as to the administration and distribution of billions of dollars in settlement funds. *See In re Wells Fargo Bank et al.*, No. 657387/2017, Decision and Order at 1-2 (Sup. Ct. N.Y. Cnty. Feb. 13, 2020) (Dkt. No. 843).

25. On February 13, 2020, the court in JPM II issued a 46-page order (the “**JPM II Trial Court Order**”) providing judicial instruction as to the administration and distribution of the JPM II settlement funds. *Id.* Various parties in the JPM II proceeding appealed the JPM II Trial Court Order to the Supreme Court, Appellate Division, First Department. *See In re Wells Fargo*

*Bank et al.*, No. 2020-02716, Opinion at 1 (1st Dep't, Aug. 19, 2021) (Dkt. No. 111). The First Department issued an opinion affirming the JPM II Trial Court Order on August 19, 2021, *see id.* (the “**JPM II Appellate Opinion**”), and certain parties have subsequently filed a motion for reargument or for permission to appeal to the New York Court of Appeals. *See In re Wells Fargo Bank et al.*, No. 2020-02716, HBK Parties' Notice of Motion for Permission to Appeal to the Court of Appeals, Tilden Park's Notice of Motion for Reargument or for Permission to Appeal to the Court of Appeals (1st Dep't, Sept. 30, 2021) (Dkt. Nos. 114, 116).

26. Numerous RMBS trusts that were initially included in JPM II are no longer at issue in the proceeding, as appearing parties have mutually resolved the settlement payment administration and distribution issues for certain trusts with court approval. *See, e.g., In re Wells Fargo Bank et al.*, No. 657387/2017, Partial Severance Order and Partial Final Judgment (Sup. Ct. N.Y. Cnty. Mar. 30, 2020) (Dkt. No. 289). Nevertheless, as of the date of this Petition, sixty-nine trusts are still at issue in JPM II, including twenty-three of the Subject Trusts.

27. Certain issues raised in JPM II relate to issues raised in the present Petition. JPM II, however, involves only the administration and distribution of a particular settlement payment, including pursuant to the terms of the settlement agreement at issue, *see* JPM II Trial Court Order at 1-4, whereas the present Petition involves the administration and distribution of mortgage loan collections in the ordinary course (*i.e.*, outside of a settlement context) pursuant to the terms of the Governing Agreements.

28. Additionally, following the issuance of the JPM II Trial Court Order, Wells Fargo Bank, National Association (“**Wells Fargo**”), as payment administrator for certain RMBS trusts (other than the Subject Trusts), filed a petition under CPLR Article 77 seeking judicial instruction regarding waterfall administration issues for thirty-six RMBS trusts (the “**2021 Wells Fargo Art.**

77”). See *In re Wells Fargo Bank*, No. 154984/2021, Verified Petition (Sup. Ct. N.Y. Cnty. May 21, 2021) (Dkt. No. 1); see also *id.*, Second Amended Verified Petition (Sup. Ct. N.Y. Cnty. July 16, 2021) (Dkt. No. 55). The RMBS trusts at issue were issued around the same time as the Subject Trusts, and the trusts have the same sponsor as the Subject Trusts, *i.e.*, Bear Stearns. See *id.* ¶¶ 6-8 nn 4-6.

29. In the 2021 Wells Fargo Art. 77, the applicable contracts contain language that limits the application of write-ups to Class M and Class B classes. *Id.* ¶ 21. Notwithstanding this language, Wells Fargo has historically applied Subsequent Recovery write-ups to Class A classes, in addition to Class M and Class B classes. *Id.* ¶ 6. However, the JPM II Trial Court Order ruled that, in the context of the settlement at issue, such write-ups could only be applied to the Class M and Class B classes. *Id.* ¶ 4. As a result, Wells Fargo changed its practices to begin applying Subsequent Recovery write-ups to only the Class M and Class B classes. *Id.* ¶ 6, 9.

30. Following its practice change, Wells Fargo apparently received correspondence from certain investors demanding that it revert to its historical practice, and received correspondence from other investors demanding that it maintain its practice change consistent with the JPM II Trial Court Order. *Id.* ¶¶ 10, 37. Wells Fargo’s petition seeks instruction concerning whether it should follow the JPM II Trial Court Order with respect to this issue, or whether it should revert to its historical practice. See *id.* ¶¶ 37, 39.

31. That matter, however, goes beyond the above issues. Following the filing of the petition, certain investors filed a counter-petition regarding whether Deferred Principal Collections should be treated as Subsequent Recoveries for four RMBS trusts at issue. *In re Wells Fargo Bank*, No. 154984/2021, Amended Counter-Petition and Answer of Deer Park Road Management Co., LP and Related Funds (Sup. Ct. N.Y. Cnty. Aug. 25, 2021) (Dkt. No. 121) (the “**Deer Park**

**Counter-Petition**”). The counter-petition asserts that the treatment of Deferred Principal Collections may impact the core issues raised in Wells Fargo’s petition. *See id.*

32. At least nineteen interested parties have now appeared in the matter, in addition to Wells Fargo and counter-petitioners. These parties take various positions concerning the issues raised in the petition and counter-petition.

33. Some parties, including Wells Fargo, assert that Deferred Principal Collections should be treated as Subsequent Recoveries, which, under the logic of the JPM II Trial Court Order, would prevent Subsequent Recovery write-ups from being applied to the Class A classes. *See In re Wells Fargo Bank*, No. 154984/2021, Wells Fargo Answer to Deer Park Counter-Petition at 5-6 (Sup. Ct. N.Y. Cnty. Sept. 3, 2021) (Dkt. No 167).

34. Other parties, such as the counter-petitioners, assert that Deferred Principal Collections should not be treated as Subsequent Recoveries, but nevertheless argue that Deferred Principal Collections should result in the application of write-ups under the loss mechanics of the applicable contracts. *See, e.g.*, Deer Park Counter-Petition ¶¶ 56, 66-68. According to these parties, this would permit the application of write-ups to Class A classes for Deferred Principal Collections, and would be consistent with Wells Fargo’s long-standing course of performance, prior to its practice change. *Id.* ¶¶ 75-76. Some of these same parties, including counter-petitioners, also advance an alternative argument in the event the court holds that write-ups should not be applied under the loss mechanics of the applicable contracts. *See id.* ¶ 90. This argument posits that if the court holds as much, no write-ups could be applied for any Deferred Principal Collections because such amounts are not Subsequent Recoveries and thus cannot result in Subsequent Recovery write-ups. *Id.* Absent any write-ups under the loss mechanics or Subsequent Recovery provisions for the applicable contracts, these parties argue that Deferred Principal

Collections should be distributed without any corresponding write-ups and that doing so would increase overcollateralization in the deals. *See id.* ¶ 96-97. According to these parties, this would then lead to eventual Excess Cashflow distributions to reimburse Class A classes. *Id.* ¶ 102.

35. The above cases do not resolve the issues raised in the Petition, but relate to this matter. As a result, Petitioner has filed the Petition as related to both *In re Wells Fargo Bank et al.*, No. 657387/2017, and *In re Wells Fargo Bank*, No. 154984/2021.

### JURISDICTION AND VENUE

36. This Court has subject matter jurisdiction under CPLR Articles 4 and 77 to entertain a special proceeding to determine any matter relating to any express trust. The Subject Trusts are all express trusts within the meaning of CPLR Article 77.

37. The laws of the State of New York govern the rights and obligations of Petitioner and the certificateholders under the Governing Agreements. Additionally, upon information and belief, many certificateholders are citizens of New York.

38. Venue is proper in this Court under CPLR § 503 because, upon information and belief, certain of the certificateholders reside in New York County, or if no such holder resides in New York County, because Petitioner designates New York County as the place of trial.

### NOTICE PROGRAM

39. Concurrently with the filing of this Petition, Petitioner has sought an order from the Court approving a notice program that includes notice to all “Potentially Interested Persons,” as that term is defined in paragraph 4 of the Affirmation of Nidhi Nina Yadava, dated October 18, 2021 (the “**Yadava Affirmation**”), in support of this Petition and the contemporaneously filed proposed Order to Show Cause (the “**Order to Show Cause**”). This notice program is more fully described in paragraphs 4-5 of the Yadava Affirmation. Petitioner expects that following receipt

of the proposed notice, some certificateholders or other interested parties may seek to be heard with respect to the Petition.

## **BACKGROUND**

### ***Overview of the Subject Trusts' Structure***

40. Each Subject Trust holds or owns residential mortgage loans. *See* PSA at 1 (“Preliminary Statement”). On or around the dates the Subject Trusts were created, they issued various classes of certificates that were sold to investors to finance the purchase of such mortgage loans. *See id.* § 6.01.

41. The certificates represent an undivided interest in, or are otherwise secured by, the proceeds derived from the mortgage loans and any other assets in the Subject Trusts. *See, e.g., id.* at Exhibit A-1. The priority of a certificate’s entitlement to proceeds depends upon the class to which such certificate belongs. *See id.* § 5.04(a).

42. The classes of certificates issued by the Subject Trusts include, among others, two types of classes potentially at issue here:

- a. **Primary Classes.** The Class A, Class M, and/or Class B classes constitute the Primary Classes for the Subject Trusts. They have various levels of priority interests in the cashflow from borrower payments and other proceeds on the mortgage loans, and each Primary Class has a separate aggregate certificate principal balance equal to the amount of principal distributions such class is entitled to receive. *See id.* §§ 1.01 (Definition of Certificate Principal Balance), 5.04(a).
- b. **Class C Classes.** The Class C Classes represent qualified interests which may be entitled to excess proceeds from the Subject Trusts if certain conditions are satisfied. *See generally id.* § 5.04(a)(3). Each Class C Class has a notional

balance equal to the current aggregate balance of the mortgage loans, and a separate certificate principal balance equal to the amount of overcollateralization in the Subject Trust. *See id.* § 1.01 (Definitions of Certificate Notional Amount, Certificate Principal Balance, Uncertificated Principal Balance). Neither balance is representative of the actual distributions the Class C Classes may be entitled to receive. *See id.* § 5.04(a)(3).

43. The Subject Trusts also issued certain other classes that are not at issue here, such as Class IO, Class P, and/or Class PO classes.

44. The Governing Agreements describe how funds flow “into” and “out of” each Subject Trust. First, proceeds from the mortgage loans flow into the Subject Trusts via servicer remittances of collections from borrowers. *See id.* § 4.01. Second, funds flow out of the Subject Trusts as monthly distributions to certificateholders and other amounts to specified transaction parties, including Petitioner, to pay administrative and certain other expenses. *See id.* § 5.04(a). These distributions are governed by the waterfall provisions, and typically are made on or about the twenty-fifth day of each month as stated in the Governing Agreements. *See id.*; *see also id.* § 1.01 (Definition of Distribution Date).

#### ***Overcollateralization Structure***

45. The Subject Trusts each have an overcollateralization structure that provides credit enhancement to the Primary Classes. *See, e.g.,* Exhibit D (Pro Supp) at S-1, S-14 to S-15, S-17; JPM II Trial Court Order at 25.

46. The overcollateralization structure operates using three key concepts that appear in the Governing Agreements for each of the Subject Trusts: “**Overcollateralization Amount**,”



“Overcollateralization Target Amount,” and “Overcollateralization Release Amount.” *See* PSA, § 1.01 (defining terms).

47. The Overcollateralization Amount equals the excess, if any, of the outstanding principal balance of the mortgage loans (as reported by servicers) over the aggregate principal balance of the Primary Classes. *See id.* § 1.01 (Definition of Overcollateralization Amount). The Overcollateralization Amount for a Subject Trust functionally represents a surplus in mortgage assets beyond that which is needed to pay the principal amounts owed to the Primary Classes, which is one aspect of credit enhancement tied to overcollateralization. *See id.*; *see also* Exhibit D (Pro Supp) at S-1, S-17.

48. When each Subject Trust closed, it had an initial required Overcollateralization Amount (generally equal to the Overcollateralization Target Amount). *See* Exhibit C (SACO I 2006-4 Remittance Report, Apr. 2006) at 5; *see also* Exhibit D (Pro Supp) at S-9. The Overcollateralization Amounts for the Subject Trusts were intended to be maintained over time, through the waterfall payment structure described *infra* ¶¶ 52-62. However, the Overcollateralization Amounts for the Subject Trusts decreased as a result of loan-level losses, and also have experienced periodic increases. As an example, the Overcollateralization Amount for SACO I 2006-4 has fluctuated as follows: (i) the initial Overcollateralization Amount was \$25,955,332 (Exhibit C (SACO I 2006-4 Remittance Report, Apr. 2006) at 5); (ii) the Overcollateralization Amount reached \$0.00 by September 2011 (Exhibit G (SACO I 2006-4 Remittance Report, Sept. 2011) at 8); and (iii) the Overcollateralization Amount was \$3,231,291 as of September 2021 (Exhibit H (SACO I 2006-4 Remittance Report, Sept. 2021) at 6).

49. The Overcollateralization Target Amount is the Overcollateralization Amount that is expected to be maintained during the life of each Subject Trust—*i.e.*, it represents the targeted

amount of surplus mortgage assets over the principal amounts owed to the Primary Classes. *See* PSA § 1.01 (Definition of Overcollateralization Target Amount). It is equal to a specified percentage of the aggregate mortgage loan principal balances. *See id.* It may be reduced if collateral is performing in a manner sufficient to provide a specified level of credit enhancement to the Primary Classes, based on certain performance tests and other conditions. *See id.* If the collateral is not performing in such a manner, then the Overcollateralization Target Amount equals the target for the immediately prior payment period. *See id.* Many of the Subject Trusts fall into this latter category, and, as a result, the Overcollateralization Target Amounts of such Subject Trusts have been fixed for some time at an amount equal to the target from a prior period. SACO I 2006-4 is one such Subject Trust. It has an Overcollateralization Target Amount equal to \$25,954,290 (Exhibit H (SACO I 2006-4 Remittance Report, Sept. 2021) at 6), and this target has been fixed for approximately 10 years (*see* Exhibit G (SACO I 2006-4 Remittance Report, Sept. 2011) at 8).

50. The Overcollateralization Release Amount equals the amount, if any, by which the Overcollateralization Amount exceeds the Overcollateralization Target Amount. *See* PSA § 1.01 (Definition of Overcollateralization Release Amount). If there is any Overcollateralization Release Amount in a particular payment period, funds equal to the Overcollateralization Release Amount are distributed as certain excess proceeds under the waterfalls. *See id.* §§ 1.01 (Definition of Excess Cashflow), 5.04(a)(3). Distributions of the Overcollateralization Release Amount are intended to reduce overcollateralization to a level that matches the Overcollateralization Target Amount. *See id.* § 1.01 (Definition of Overcollateralization Release Amount). Such distributions, then, keep overcollateralization in line with the intended credit enhancement for the Subject Trusts. *See id.* However, for the Subject Trusts, the Overcollateralization Amounts have not exceeded the

Overcollateralization Target Amounts for many years, and thus there generally have been no (or limited) funds distributed as Overcollateralization Release Amounts for some time. SACO I 2006-4 is also an apt illustration of this issue—its current Overcollateralization Amount (\$3,231,291) is roughly \$22,723,000 below its Overcollateralization Target Amount (\$25,954,290), and it has not had Excess Cashflow distributions for approximately 10 years. *See supra* ¶¶ 48-49.

51. The Subject Trusts' overcollateralization structure is ultimately effectuated through various definitions and components of the waterfalls and is deeply intertwined with the manner in which funds are distributed to certificateholders.

#### *The Waterfalls*

52. The waterfall provisions set out rules for the order and priority of monthly payments to the various classes of certificates. *See generally* PSA, § 5.04(a). As noted *supra* ¶ 1, the waterfalls fall into three distinct groups appearing in sequential order in the Governing Agreements: (1) the interest waterfall; (2) the principal waterfall; and (3) the Excess Cashflow waterfall.

#### *Interest Waterfall*

53. Interest collected on the mortgage loans first goes to pay certain expenses, including servicing fees, and then is distributed through the interest waterfall to pay the interest amounts due to the Primary Classes, as well as unpaid interest shortfalls due to Class A classes, if any. *See* PSA §§ 1.01 (Definition of Interest Funds), 5.04(a)(1). In general, the amount of current interest due to be distributed to the respective Primary Classes is calculated by multiplying the applicable certificate principal balance by a specified pass-through interest rate. *See id.* §§ 1.01 (Definition of Current Interest), 5.04(a)(1). The Class C Classes do not receive distributions in the interest waterfall. *See id.* § 5.04(a)(1).

54. If interest collections, net of specified expenses, exceed the current interest due to the Primary Classes (in addition to previous interest shortfalls due to Class A classes) in a particular period, this excess is deemed to be “**Excess Spread**.” *See id.* § 1.01 (Definition of Excess Spread). Excess Spread is not distributed under the interest waterfall. *See id.* § 5.04(a)(1). Rather, until the Overcollateralization Amount equals the Overcollateralization Target Amount, Excess Spread constitutes “**Extra Principal Distribution Amount**” that is distributed under the principal waterfall in order to increase the Overcollateralization Amount for the Subject Trusts. *See id.* § 1.01 (Definition of Extra Principal Distribution Amount); *see also id.* § 5.04(a)(2). Specifically, applying such interest collections as principal payments causes the Primary Classes’ certificate principal balances to decrease without a corresponding reduction in the aggregate principal balance of the mortgage loans, thereby increasing overcollateralization. *See id.*; *see also* Exhibit D (Pro Supp) at S-17. Additionally, if the Overcollateralization Amount equals the Overcollateralization Target Amount in a particular period following the application of Excess Spread (through Extra Principal Distribution Amount), any “**Remaining Excess Spread**” is not distributed as Extra Principal Distribution Amount and is instead treated as Excess Cashflow. *See* PSA §§ 1.01 (Definition of Remaining Excess Spread), 5.04(a)(1). The Subject Trusts were intentionally structured to generate Excess Spread to support the overcollateralization structure.<sup>2</sup>

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<sup>2</sup> *See* Exhibit D (Pro Supp) at S-9 “(We expect the mortgage loans to generate more interest than is needed to pay interest on the Class A, Class M and Class B Certificates and . . . [i]nterest payments received in respect of the mortgage loans in excess of the amount that is needed to pay interest on the Class A, Class M and Class B Certificates . . . will be used to reduce the total principal balance of such certificates until a required level of overcollateralization has been achieved.”).

*Principal Waterfall*

55. The principal waterfall dictates the rules for distributing (i) principal collections on the mortgage loans, and (ii) any Extra Principal Distribution Amount derived from Excess Spread (to the extent needed to increase overcollateralization). *See* PSA § 5.04(a)(2). These amounts are used to pay principal owed to the Primary Classes based on their outstanding certificate principal balances and payment priority. *See id.* A Primary Class receives distributions only until the class's certificate principal balance is reduced to zero. *See id.* § 5.04(a)(2)(A)(i) (“To the Class A Certificates, the Principal Distribution Amount for such Distribution Date . . . until the Certificate Principal Balance thereof is reduced to zero.”).

56. Class A is the Primary Class with the most senior payment priority and thereby the first class entitled to principal distributions; Class M is junior in priority to Class A and is the next Primary Class entitled to principal distributions; and, where present, Class B is junior to Class M (and Class A) and is the next, and last, Primary Class entitled to principal distributions. *See id.* § 5.04(a)(2).

57. The operative provisions controlling which Primary Classes are entitled to receive principal distributions are contingent on certain performance “**triggers**”—there is typically a “**pre-trigger**” waterfall (in effect when a deal is performing as expected relative to certain specified metrics) and a “**post-trigger**” waterfall (in effect when a deal is underperforming relative to certain specified metrics). *See id.* § 5.04(a)(2)(A), (B).

58. For most of the Subject Trusts, the post-trigger principal waterfall is in effect. Under this waterfall, the classes constituting the Primary Classes are not entitled to principal distributions until the classes senior to them have had their principal paid in full—*i.e.*, Class A must be paid in full before Class M can receive any principal payments, and Class M must be paid

in full before Class B can receive any principal payments. *See id.* § 5.04(a)(2)(A). Some small number of Subject Trusts are under pre-trigger principal waterfalls, which generally permit specified concurrent principal distributions to the Class A, Class M, and/or Class B classes regardless of the whether the senior classes (*e.g.*, Class A classes) are paid in full. *See id.* § 5.04(a)(2)(B).

59. The Subject Trusts also typically have multiple classes comprising Class A, Class M, and Class B classes, such that there may be, for example, a Class A-1, Class A-2, Class M-1, Class M-2, and so forth. *See id.* at 5. The payment priority within these multiple classes varies depending on the specific Subject Trust. *See id.* § 5.04(a)(2).

60. The descriptions in the preceding paragraphs may slightly vary for certain of the Subject Trusts, *e.g.*, some Subject Trusts do not have any Class B classes (*see, e.g.*, Exhibit I (BSABS 2007-HE3 PSA)), but it is generally accurate for all Subject Trusts.

#### *Excess Cashflow Waterfall*

61. The last waterfall is the Excess Cashflow waterfall. *See PSA*, § 5.04(a)(3). Under the Governing Agreements, Excess Cashflow is defined as the sum of any Remaining Excess Spread and any Overcollateralization Release Amount. *See id.* § 1.01 (Definition of Excess Cashflow). No other amounts are included in the definition of Excess Cashflow. *See id.*

62. To the extent there is any available Excess Cashflow in a particular period, the Excess Cashflow waterfall provides for distributions to first reimburse realized losses and/or interest shortfalls for certain Primary Classes (among certain other distributions not at issue here). *See id.* § 5.04(a)(3). Thereafter it provides for specified distributions to Class C Classes, typically in the second-to-last position in the Excess Cashflow waterfall. *See id.* Due to the level of

historical losses on the collateral in the Subject Trusts, there have been very limited distributions of Excess Cashflow to date, as noted *supra* ¶ 8.

***Adjustments to Certificate Principal Balances as a Result of Realized Losses, Payments,  
and Subsequent Recoveries***

63. There are two mechanisms by which a Primary Class's certificate principal balance can be reduced:

- a. Each time a Primary Class receives a distribution of principal, the Governing Agreements require the corresponding certificate principal balance to be reduced in the amount of such principal payment. *See* PSA § 1.01 (Definition of Certificate Principal Balance).
- b. The Primary Classes may also incur realized losses when loan-level losses exceed current overcollateralization, thereby reducing the principal balances of the Primary Classes. *See id.* § 5.05. This is explained in detail in the following paragraphs. *See infra* ¶¶ 64-65.

64. If realized losses are incurred in a particular period, the Governing Agreements set out specific instructions for how such losses must be allocated to the various classes and interests. *See* PSA, § 5.05. Under these instructions, realized losses first are applied to reduce any Excess Spread, and then are allocated to the Class C Classes. *See id.* § 5.05(a). Functionally, this means that realized losses first reduce any existing Overcollateralization Amounts in the Subject Trusts. *See id.* Because the Class C certificate principal balance equals the Overcollateralization Amount, as explained *supra* ¶ 42(b), any reduction in the Overcollateralization Amount equates to a corresponding reduction in such Class C principal balance. In this way, the Overcollateralization Amount, and correspondingly the Class C Classes, functions as a first-loss position that absorbs realized losses before they reach the Primary Classes. *See* PSA, § 5.05(a); *see also* Exhibit D (Pro

Supp) at S-17. This is another way in which overcollateralization provides credit enhancement for the Primary Classes. *See id.*

65. However, if realized losses stemming from loan-level losses exceed the Overcollateralization Amount in a particular period, any excess losses are allocated to the Primary Classes. *See PSA*, § 5.05(a). To the extent realized losses are allocated to the Primary Classes, they are generally allocated in reverse order of payment priority such that Class B classes take losses first, then Class M classes take losses, and finally Class A classes take losses. *See id.* Realized losses, when applied, also reduce the principal balance for the applicable Primary Class, reducing the distributions such class would otherwise be entitled to under the principal waterfall. *See id.* §§ 1.01 (Definition of Certificate Principal Balance), 5.05(a)-(b).

66. In some instances, after a Subject Trust's certificates incur a realized loss, the trust may later recover amounts that are related to such losses. These recoveries, typically where a realized loss stems from a liquidated loan, are referred to as Subsequent Recoveries, as noted *supra* ¶ 16. *See PSA* § 1.01 (Definition of Subsequent Recoveries). For distribution purposes, the recovered amounts are usually characterized by servicers as principal collections. If any amounts qualify as a Subsequent Recovery, Petitioner is required to increase, or write-up, the certificate principal balance of the Primary Classes in the order of highest payment priority, up to the amount of outstanding realized losses incurred by such classes. *See id.* §§ 1.01 (Definitions of Realized Loss, Subsequent Recoveries, Certificate Principal Balance), 5.04(b). Subsequent Recoveries are the only amounts for which the Governing Agreements expressly require the application of write-ups.

67. Subsequent Recovery write-ups also reduce the amount of outstanding realized losses incurred by a particular class. *See id.* § 5.04(b). For example, consider a situation where



\$1 in Subsequent Recoveries is distributed, and a Class A class has \$1 in realized losses and a Class M class has \$1 in realized losses. In this scenario, the Class A class would be written up by \$1 to account for the Subsequent Recovery, as it has higher payment priority than the Class M class, and the Class A class would have \$0.00 in outstanding realized losses following the application of the write-up. *See id.*

68. Under the Governing Agreements, a Primary Class with an outstanding principal balance of zero may be ineligible to receive any further distributions, as follows:

- a. The waterfall provisions provide that the allocation of principal is made based upon, and only to the extent of, the current outstanding certificate principal balance. *See id.* § 5.04(a)(2); *see also supra* ¶ 55. If the certificate principal balance is zero, distributions may not be permitted pursuant to the terms of these waterfall provisions. *See PSA*, § 5.04(a)(2). Likewise, current interest is calculated based on the outstanding certificate principal balance, and thus any zero-balance Primary Classes cannot receive current interest payments. *See id.* § 1.01 (Definition of Current Interest); *see also supra* ¶ 53.
- b. For all of the Subject Trusts, the Governing Agreements also contain a separate Retired Class Provision that, on its face, prohibits distributions to zero-balance Primary Classes. *See PSA*, § 5.04(a). The Retired Class Provision states, in pertinent part, “[O]n any Distribution Date after the Distribution Date on which the Certificate Principal Balance of a Class of Class A, Class M or Class B Certificates has been reduced to zero, that Class of Certificates will be retired and will no longer be entitled to distributions . . . .” *Id.*

69. Distributions to the Class C Classes are generally contingent on whether there are available funds under the Excess Cashflow waterfall, and not based upon the current Class C notional balance or Class C certificate principal balance. *See id.* Additionally, the Retired Class Provision does not apply to Class C classes. *See id.*

***Treatment of Deferred Principal Amounts and Deferred Principal Collections***

70. From time to time, servicers of the mortgage loans held in the Subject Trusts may authorize loan modification agreements, under which borrowers are permitted to defer payment on certain amounts due under the terms of the mortgage note. These modifications often involve the following features (among other things): (i) the servicer agrees to defer payment on Deferred Principal Amounts according to a loan modification agreement that includes such amounts in a new non-interest-bearing principal balance associated with the loan; (ii) the borrower is required to repay Deferred Principal Amounts at the end of the term of the loan or over some set period of time, according to the terms of the modification agreement; and (iii) in some instances borrowers make payments on Deferred Principal Amounts and these payments constitute Deferred Principal Collections in reduction of the non-interest-bearing principal balance associated with the modified loans, though some borrowers may ultimately default and never pay back any Deferred Principal Amounts.<sup>3</sup>

71. The incidence of loan modifications significantly increased following the 2008 financial crisis, and they have continued to be a loss mitigation tool regularly used by servicers through the COVID-19 pandemic.

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<sup>3</sup> Under some modification agreements, deferred amounts may be reduced or forgiven depending upon the terms of the modification agreement (*e.g.*, amounts that may initially be deferred could be forgiven depending upon the value of the underlying property at maturity or other contingencies set forth in the agreement). This Petition does not concern forgiven amounts given that such amounts should generally not result in future collections for the Subject Trusts.

72. In 2009, the U.S. Department of Treasury implemented the “Home Affordable Modification Program,” or “HAMP,” in connection with the Troubled Asset Relief Program, 12 U.S.C. § 5211 *et seq.*

73. In 2010, Treasury issued Supplemental Directive 10-05 concerning HAMP. *See* Exhibit J (Supplemental Directive 10-05, *Home Affordable Modification Program – Modification of Loans with Principal Reduction Alternative* (June 3, 2010)) (“**Supplemental Directive 10-05**”). For any securitized loans, this directive provided that “the servicer must report to the trustee or securities administrator any forbore principal as a realized loss,” and “the trustee or securities administrator must allocate any such reported forbore principal as a realized loss to the trust.” *See id.* at 10.

74. Consistent with Supplemental Directive 10-05, servicers have generally treated Deferred Principal Amounts created through an authorized loan modification as losses on mortgage loans and this has resulted in Deferred Principal Amounts generally being passed through as realized losses to investors in RMBS trusts. Additionally, by law, the modification practices set forth in the Treasury guidance were deemed “standard industry practice” for the purposes of loans subject to government modification programs. *See id.* at 11; *see also* 15 U.S.C. § 1639a(c) (providing that such loss mitigation programs “shall constitute standard industry practice for purposes of all Federal and State laws”).

75. Beyond HAMP and other government programs, servicers may also authorize different types of loan modifications to reduce the potential of default—that is, servicers may authorize modifications not mandated or supported through any governmental program. These types of modifications increased substantially during the COVID-19 pandemic due to the economic pressure on certain borrowers. Servicers also generally report Deferred Principal

Amounts related to these types of modifications as loan-level losses, and these amounts likewise result in realized losses to investors.

76. For the Subject Trusts at issue, servicers have reported hundreds of millions of dollars in loan-level losses related to Deferred Principal Amounts in connection with loan modifications (consistent with the aforescribed industry practices), and these amounts have resulted in the application of realized losses to the Primary Classes.

77. The Governing Agreements themselves vary with respect to what amounts may be treated as losses, breaking down in three different ways (*see* Exhibit K (Realized Loss Concepts for the Subject Trusts)):

- a. For fifty-two of the Subject Trusts, realized losses are generally limited to loan-level losses tied to mortgage loans for which the servicer has made a “**Final Recovery Determination**” (and certain other losses not relevant here). *See, e.g.,* PSA, § 1.01 (Definition of Realized Loss). A Final Recovery Determination relates to a “defaulted Mortgage Loan” or “REO Property” for which the servicer has made a determination that it has collected all amounts that it “expects to be finally recoverable” in its “reasonable good faith judgment.” *See id.* § 1.01 (Definition of Final Recovery Determination). Realized losses, in turn, are equal to the outstanding amounts owed on the mortgage loan (principal, interest, and other amounts) less the “proceeds, if any, received . . . during the calendar month in which [the] Final Recovery Determination was made, net of [any servicer expenses].” *See id.* § 1.01 (Definition of Realized Loss).

- b. For four of the Subject Trusts, realized losses include loan-level losses tied to Final Recovery Determinations (and certain other losses not relevant here), as well as the “total amount of interest and principal which is forgiven with respect” to each mortgage loan “which is the subject of a Servicing Modification” and related servicing advances forgiven in connection with a modification. *See, e.g.*, Exhibit I (BSABS 2007-HE3 PSA), § 1.01 (Definition of Realized Loss).
- c. Finally, for twenty of the Subject Trusts, realized losses include (i) loan-level losses tied to Final Recovery Determinations (and certain other losses not relevant here); (ii) forgiven principal and interest (and related advances) for modified mortgage loans; and (iii) the amount by which principal and interest “was reduced” in connection with a servicing modification. *See, e.g.*, Exhibit L (SACO I 2006-10 PSA), § 1.01 (Definition of Realized Loss).

78. Under these terms, it appears that only the last cohort of Subject Trusts expressly includes Deferred Principal Amounts in the definition of realized losses, but, again, servicers generally report all newly created Deferred Principal Amounts as loan-level losses for the Subject Trusts and this is now a long-standing industry practice. *See* 15 U.S.C. § 1639a(c); Exhibit J (Supplemental Directive 10-05) at 11.

79. For some modified mortgage loans, the servicer may eventually collect Deferred Principal Collections with respect to Deferred Principal Amounts. Deferred Principal Collections reduce the non-interest-bearing principal balance associated with modified loans and are typically reported by servicers as unscheduled principal (and thus are included within principal distributable to certificateholders). To date, servicers have remitted tens of millions of dollars of Deferred

Principal Collections to the Subject Trusts, and additional amounts will likely be collected over the coming years.

80. While the Governing Agreements require that certain recoveries be treated as Subsequent Recoveries for purposes of administering distributions, Deferred Principal Collections generally do not fall within the definition of Subsequent Recoveries. The Governing Agreements break down in three different ways on this issue (*see* Exhibit F):

- a. For seventy-two of the Subject Trusts, Subsequent Recoveries are defined as “amounts received . . . specifically related to a Mortgage Loan that was the subject of a liquidation or final disposition of any REO Property prior to the related Prepayment Period that resulted in a Realized Loss.” *See, e.g.*, PSA, § 1.01 (Definition of Subsequent Recoveries).
- b. For three of the Subject Trusts, a Subsequent Recovery is more broadly defined to include “amounts received . . . specifically related to a Mortgage Loan that was the subject of a liquidation, a Mortgage Loan that has been modified which resulted in a Realized Loss or final disposition of any REO Property prior to the related calendar month that resulted in a Realized Loss.” *See, e.g.*, Exhibit M (BSABS 2007-HE7 PSA), § 1.01 (Definition of Subsequent Recoveries).
- c. And, for one Subject Trust, there is no concept of Subsequent Recoveries. *See* Exhibit N (BSABS 2003-HE1 PSA), § 1.01 (Definitions).

81. Given the above, Deferred Principal Collections do not constitute Subsequent Recoveries for the vast majority of the Subject Trusts. That is, for the seventy-two Subject Trusts referenced in paragraph 80(a) *supra*, Subsequent Recoveries only include subsequently collected amounts related to a mortgage subject to a “liquidation” or “final disposition,” and modified

mortgages do not fit that criterion. *See, e.g.* PSA, § 1.01 (Definition of Subsequent Recoveries). As a result, Petitioner does not treat Deferred Principal Collections as Subsequent Recoveries for these seventy-two Subject Trusts. The effect of this is that Deferred Principal Collections do not result in write-ups being applied to the certificate principal balances of Primary Classes, whereas recoveries related to liquidated loans or loans subject to a final disposition—*i.e.*, Subsequent Recoveries—do result in write-ups. *See id.* §§ 1.01 (Definitions of Realized Loss, Subsequent Recoveries), 5.04(b).

### *Current Economics of Subject Trusts*

82. Due to both the payment of principal and the application of realized losses, the Primary Classes' certificate principal balances have been reduced to or are nearing zero. *See* Exhibit E.

83. When the Primary Classes' aggregate outstanding certificate principal balance is equal to zero, the remaining mortgage loan balances in the Subject Trusts necessarily constitute Overcollateralization Amount. This is because Overcollateralization Amount, again, equals the current principal balance of the mortgage loans over the principal balance of the Primary Classes, and the second part of this equation is zero when the Primary Classes have a zero dollar principal balance. *See supra* ¶ 47. In this situation, to the extent principal or interest is collected on the remaining mortgage loans, this Petition refers to those collections as Post-Zero Balance Collections, as noted *supra* ¶ 10.

84. Although the certificates issued by the Subject Trusts have incurred substantial realized losses, they currently have outstanding Overcollateralization Amounts, totaling \$188,501,643 in overcollateralization across the Subject Trusts. *See* Exhibit E. The amount of overcollateralization is largely driven by the fact that there has been available Excess Spread to

build overcollateralization in the Subject Trusts. Not only were the Subject Trusts specifically structured to generate Excess Spread, but the substantial amount of realized losses incurred by the Primary Classes—including through Deferred Principal Amounts—has also likely generated Excess Spread. Such losses decrease the certificate principal balances of the Primary Classes, and, by extension, the amount of current interest due on the Primary Classes. *See supra* ¶¶ 53-54, 65. This necessarily leads to more Excess Spread insofar as the mortgage interest collections are more likely to exceed the current interest due on such classes. *See supra* ¶ 54.

85. Given the level of overcollateralization in the Subject Trusts, it is expected that there will be substantial Post-Zero Balance Collections for future periods after the Primary Classes are reduced to zero. Such amounts could be potentially in excess of \$188 million, *i.e.*, the aggregate amount of overcollateralization for the Subject Trusts.

86. The Petition categorizes the Subject Trusts into two groups based on their current economics (*see* Exhibit O (Subject Trust Group Designations)):

- a. “**Group I Subject Trusts**” have outstanding realized losses for Class A classes, Class M classes, and, to the extent applicable, Class B classes. *See* Exhibit E. There are twenty-six Group I Subject Trusts. *See id.* For all of the Group I Subject Trusts, the Class A classes currently have an outstanding certificate principal balance, and no distributions of Post-Zero Balance Collections have been made. *See id.*
- b. “**Group II Subject Trusts**” have outstanding realized losses for Class M classes and, to the extent applicable, Class B classes, but Class A classes have either been paid in full with no realized losses or currently have no outstanding realized losses. *See id.* For two of the Group II Subject Trusts (SACO I 2005-



WM1 and SACO I 2005-6), the Class A, Class M, and Class B classes currently have an aggregate certificate principal balance of zero, and some Post-Zero Balance Collections have been distributed for such Subject Trusts. *See id.* For the remaining Group II Subject Trusts, one or more of the Class A, Class M, or Class B classes currently have an outstanding certificate principal balance, and no Post-Zero Balance Collections have been distributed. *See id.*

87. Exhibit E hereto provides the following information for each Subject Trust: (i) the Overcollateralization Amount and Overcollateralization Target Amount; (ii) the aggregate certificate principal balances of the Primary Classes; (iii) the aggregate amount of outstanding realized losses of the Primary Classes; and (iv) the aggregate amount of outstanding interest shortfalls of the Primary Classes. This information is from the September 2021 payment period. Exhibit E also indicates whether a Subject Trust is a Group I Subject Trust or a Group II Subject Trust.

#### **ISSUES FOR JUDICIAL INSTRUCTION**

88. Due to the lack of clarity in the Governing Agreements and the potential for competing claims from interested parties, Petitioner seeks instructions for all of the Subject Trusts with respect to (1) (i) the proper allocation and distribution of Post-Zero Balance Collections under the waterfalls and (ii) the manner in which the Retired Class Provision should be applied. And, Petitioner seeks instruction for seventy-two of the Subject Trusts (2) confirming that Petitioner should continue its current practice of not treating Deferred Principal Collections as Subsequent Recoveries and not applying corresponding write-ups to the certificate principal balances of the Primary Classes in connection with such collections.

***It Is Unclear Which Waterfall Provisions Govern Post-Zero Balance Collections***

89. The vast majority of Post-Zero Balance Collections will be remitted by servicers to Petitioner as principal payments on the mortgage loans, and the remaining amounts will constitute interest collections. For both interest and principal amounts from Post-Zero Balance Collections, it is unclear which waterfall provisions should be applied.

*Post-Zero Balance Collections Do Not Clearly Fit  
Within the Principal or Excess Cashflow Waterfalls*

90. The Primary Classes' certificate principal balances will be zero when Post-Zero Balance Collections are available for distribution. *See supra* ¶¶ 10, 83. Because the interest due to the Primary Classes is calculated by multiplying the applicable certificate principal balances by a specified pass-through rate, the interest due to the Primary Classes will also be zero—*i.e.*, zero (each Primary Class's balance) multiplied by the specified rate will result in zero due in interest. *See supra* ¶ 53.

91. With no current period interest due on Primary Classes, the interest portion of Post-Zero Balance Collections will likely constitute Excess Spread.<sup>4</sup> This Excess Spread will qualify as Extra Principal Distribution Amount because the Overcollateralization Amounts in the Subject Trusts are not expected to exceed the Overcollateralization Target Amounts. *See* PSA, § 1.01 (Definition of Extra Principal Distribution Amount). Extra Principal Distribution Amount, in turn, is treated as principal, and thus it appears that interest amounts stemming from Post-Zero Balance Collections come under the principal waterfall. *See id.* § 5.04(a).

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<sup>4</sup> Under the interest waterfalls, these amounts would first be used to reimburse any interest shortfalls owed to Class A classes (the Class M and B classes are not entitled to interest shortfall payments in the interest waterfall), but it is unlikely that any interest shortfalls will actually be owed to Class A classes when Post-Zero Balance Collections are distributed. *See* PSA, § 5.04(a)(1); *see also* Exhibit E. Thus, all of the interest amounts tied to Post-Zero Balance Collections will likely be Excess Spread. *See id.* § 1.01 (Definition of Excess Spread).

92. Post-Zero Balance Collections constituting principal on the mortgage loans likewise appear to be treated as principal. *See id.* §§ 1.01 (Definition of Principal Funds), 5.04(a)(2). Accordingly, Post-Zero Balance Collections—both principal and interest amounts—facially come under the principal waterfall.

93. There is, however, no provision in the principal waterfall under which Post-Zero Balance Collections could actually be distributed. This is because the principal waterfall distributes funds to the Primary Classes only until each class's certificate principal balance is "reduced to zero." *Id.* § 5.04(a)(2); *supra* ¶ 55. Because the Primary Classes will have principal balances of zero, it appears that such classes cannot receive distributions of Post-Zero Balance Collections under the principal waterfall, even though all Post-Zero Balance Collections appear to constitute principal according to the terms of the Governing Agreements. *See* PSA, § 5.04(a)(2).

94. This outcome could, in theory, be avoided if the Primary Classes were written up from zero by an amount equal to Post-Zero Balance Collections for a particular period. Under the Governing Agreements, the only express mechanism for applying write-ups is through application of Subsequent Recoveries. *See id.* § 1.01 (Definition of Certificate Principal Balance). However, Subsequent Recoveries, as defined, generally relate to liquidated mortgage loans or other amounts, *see id.* § 1.01 (Definition of Subsequent Recoveries), whereas Post-Zero Balance Collections will be collections from performing mortgage loans that are active (or could potentially tie to Deferred Principal Collections that do not appear to qualify as Subsequent Recoveries, as discussed *infra* ¶¶ 121, 124-125). Post-Zero Balance Collections thus do not fit within the definition of Subsequent Recoveries, and will not, on their own, lead to increases in the balances of the Primary Classes.

95. This leaves the Excess Cashflow waterfall as the last possible distribution method, but it too does not clearly capture Post-Zero Balance Collections. *See* PSA, § 5.04(a)(3).

96. Excess Cashflow is comprised of only two components: Overcollateralization Release Amount and Remaining Excess Spread. *See id.* § 1.01 (Definition of Excess Cashflow). Overcollateralization Release Amount and Remaining Excess Spread exist only in periods where the Overcollateralization Amount exceeds the Overcollateralization Target Amount, but, as noted already, that is not expected to happen for any of the Subject Trusts with respect to Post-Zero Balance Collections. *See supra* ¶ 91. For this reason, it appears that Post-Zero Balance Collections may not meet the definition of Excess Cashflow.

97. Yet, this construction of the Excess Cashflow definition is potentially in tension with the “**Class C Distribution Amount**” in the Excess Cashflow waterfall, which is typically the second-to-last position therein. PSA, § 5.04(a)(3). The Class C Distribution Amount is defined as follows:

With respect to any Distribution Date, the sum of (i) the Current Interest for the Class C Interest for such Distribution Date, (ii) any Overcollateralization Release Amount for such Distribution Date and (iii) without duplication, any Subsequent Recoveries not distributed to the Class A, Class M and Class B Certificates on such Distribution Date; *provided, however that on any Distribution Date after the Distribution Date on which the Certificate Principal Balances of the Class A, Class M and Class B Certificates have been reduced to zero, the Class C Distribution Amount shall include the Overcollateralization Amount.*

*Id.* § 1.01 (Definition of Class C Distribution Amount) (emphasis added).

98. The above plainly states that the Class C Distribution Amount includes the entire Overcollateralization Amount—not just the amount exceeding the Overcollateralization Target Amount—for any periods after the Primary Classes are reduced to a zero dollar principal balance. *Id.* In such periods, the Overcollateralization Amount should generally be equal to the aggregate balance of the remaining mortgage loans in the Subject Trusts. *See id.* § 1.01 (Definition of

Overcollateralization Amount). Again, the Overcollateralization Amount is the excess of the mortgage loan principal balances over the aggregate principal balance of the Primary Classes—because the Primary Classes will have a zero principal balance, the Overcollateralization Amount must equal the remaining principal balance of the mortgage loans. *See id.* This asset-based determination does not reflect the amount of proceeds that may be collected from the mortgage loans in a particular period, but instead appears to be a catchall that simply requires the Class C Distribution Amount to equal the total principal value of remaining assets. *See id.* § 1.01 (Definitions of Overcollateralization Amount, Class C Distribution Amount). As a result, the Class C Distribution Amount should almost always exceed the amount of Post-Zero Balance Collections in a particular period insofar as collections from the assets generally should not exceed the total amount of the assets themselves. *See id.*

99. This does not end the issues around Excess Cashflow though. The Class C Distribution Amount does not, as defined, dictate what is actually Excess Cashflow. *See id.* § 1.01 (Definition of Class C Distribution Amount). It is just an amount that may be payable from available Excess Cashflow, and what Excess Cashflow means is defined by its own terms, *see supra* ¶¶ 61, 96. But, there plainly is some tension between Excess Cashflow and the Class C Distribution Amount—the former does not appear to include Post-Zero Balance Collections, but the latter appears to be large enough that it could receive distributions of Post-Zero Balance Collections if available in the Excess Cashflow waterfall. *See id.*

100. Taking all of this together, it is apparent that there is a lack of clarity in the Governing Agreements concerning whether Post-Zero Balance Collections should be distributed under the principal waterfalls or Excess Cashflow waterfalls.

*Whether the Principal or Excess Cashflow Waterfalls Are Used  
May Impact Which Certificateholders Ultimately Receive Post-Zero Balance Collections*

101. If Post-Zero Balance Collections were distributed under the principal waterfall, it appears that such amounts would largely flow to the Primary Classes. *See id.* § 5.04(a)(2). Indeed, the Primary Classes are generally the only classes that have a right to payment under the principal waterfalls, and certain of the Primary Classes have substantial outstanding losses that will likely exceed Post-Zero Balance Collections. *See id.*; *see also* Exhibit E. But, again, it appears that principal distributions to the Primary Classes could only happen if the certificate principal balances of the Primary Classes were written up after they reached zero and thereby made eligible to receive distributions of Post-Zero Balance Collections. *See supra* ¶¶ 93-94.

102. If Post-Zero Balance Collections were instead distributed under the Excess Cashflow waterfall, Post-Zero Balance Collections would be distributed in a very different manner. *See* PSA, § 5.04(a)(3).

103. The Excess Cashflow waterfall generally provides for reimbursement of outstanding realized losses to the Class A classes, and this position is near the top of the waterfall. *See id.*<sup>5</sup> For Group I Subject Trusts, the Class A classes have outstanding realized losses and thus the Class A classes may be entitled to receive Post-Zero Balance Collections as loss reimbursement under the Excess Cashflow waterfall. *See id.*; *see also* Exhibit E.

104. For the Group II Subject Trusts, the Class M and/or Class B classes are the only Primary Classes that have outstanding realized losses. *See* Exhibit E. But, the Excess Cashflow waterfalls do not provide for reimbursement of realized losses for such classes, and only provide

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<sup>5</sup> SACO I 2005-WM1 and SACO I 2005-6 do not provide for reimbursement of outstanding realized losses to the Class A classes under the Excess Cashflow waterfall. However, this difference in structure is immaterial because, as noted *supra* ¶ 86(b), the Class A classes for both of these Subject Trusts have already been paid in full.

them with reimbursement of interest shortfalls. *See* PSA, § 5.04(a)(3). As a result, these classes may be entitled to receive Post-Zero Balance Collections as reimbursement of interest shortfalls under the Excess Cashflow waterfall. *See id.* But, there appears to be no avenue for the Class M and/or Class B classes to receive reimbursement for realized losses through Excess Cashflow because the Excess Cashflow waterfall does not expressly provide for such reimbursement. *See id.*

105. Any Excess Cashflow that is not allocated to reimburse the Primary Classes' outstanding realized losses or interest shortfalls would largely proceed to the next steps in the Excess Cashflow waterfall, and may ultimately result in distributions to the Class C Classes. *See id.*

106. All of these possible distributions, however, may be impacted by the Retired Class Provision, and the impact of that provision may be substantial.

*The Retired Class Provision Presents Further  
Questions Regarding Post-Zero Balance Collections*

107. For the Subject Trusts, the Retired Class Provision facially appears to prohibit any distributions to a Primary Class once that class's certificate principal balance has been reduced to zero, and it may also prevent the application of write-ups to such classes. *See id.* § 5.04(a). It is, however, unclear if the Retired Class Provision should be applied in that manner.

*JPM II and Petitioner's Practice*

108. JPM II is instructive on this front. The JPM II settlement agreement specified that the settlement funds were to be treated as Subsequent Recoveries, which may result in a write-up of the Primary Classes' certificate principal balances. JPM II Trial Court Order at 7. The petitioners in JPM II, including U.S. Bank National Association, requested guidance with respect to whether the Retired Class Provision prevents both (i) distributions to zero-balance classes, and

(ii) the application of Subsequent Recovery write-ups to zero-balance classes. *Id.* at 36. This guidance was requested specifically with respect to the administration of the settlement funds at issue. *Id.* at 3.

109. The interested parties in JPM II took conflicting positions on this issue. One group of parties took the position that the Retired Class Provision should be applied to prevent both write-ups and distributions. *Id.* at 37. Another group of parties, in contrast, took the position that the Retired Class Provision should be applied such that it would not bar write-ups, and thus would allow “post-write-up distributions.” *Id.* The former position would potentially lead to the applicable settlement funds being paid to Class C classes instead of Class A, Class M, and Class B classes, whereas the latter position would generally result in the opposite.

110. The JPM II Trial Court Order ultimately held that the Retired Class Provision prevents distributions to zero-balance classes, but does not preclude the application of write-ups to such classes. *Id.* at 37-39. The court explained that this would either result in the distribution of settlement funds to zero-balance Class A, Class M, and Class B classes following the application of write-ups, or, for certain trusts, it would result in potential future distributions of routine collections to such classes following the application of any write-ups applied in connection with the settlement funds. *See id.*

111. The court also provided the following explanation to buttress its decision:

In so holding, the court notes that the Settlement Agreement compensates investors for losses in connection with the mortgage loans, as it settles all claims regarding the sale of mortgage loans to the Trusts and the servicing of those loans, including claims for breaches of representations and warranties and for failure to notify the Trustees of such breaches. The write-up provisions of the Trusts are consistent with the purpose of the Settlement Agreement, as they permit write-ups of zero balance certificates to the extent of previously allocated realized losses.

*Id.* at 39 (internal citation omitted).



112. The JPM II Appellate Opinion affirmed the JPM Trial Court Order, but provided slightly different reasoning with respect to this issue. It specifically stated the following concerning the Retired Class Provision:

The retired class provisions merely provide that once a certificate has been paid in full and formally retired, it is no longer entitled to receive distributions that it might have otherwise received under the waterfall. The zero-balance certificates here have neither been fully repaid nor withdrawn from the market pursuant to the procedures set forth in the relevant governing agreements; rather, they have outstanding losses and are still actively traded. The provisions make clear that certificates are only considered “retired” when the trustee has undertaken certain affirmative steps to accomplish that end—*e.g.*, paying off the certificates and withdrawing them from circulation; the mere reduction of the certificate balances to zero is insufficient.

JPM II Appellate Opinion at 8.

113. This seems to suggest that any classes that have outstanding realized losses are not subject to the strictures of the Retired Class Provision. *See id.* But, as noted *supra* ¶ 25, certain parties have filed motions for reargument with respect to the JPM II Appellate Opinion or for permission to appeal to the New York Court of Appeals. One of those parties specifically challenges the ruling on the Retired Class Provision, arguing that it should “prohibit[] *any* distributions after the balance has been reduced to zero” and “prohibit[] *any* distributions on *any* subsequent distribution date, not just on those dates where the balance is temporarily zero.” *In re Wells Fargo Bank et al.*, No. 2020-02716, HBK Parties’ Memorandum of Law in Support of Motion for Permission to Appeal to the Court of Appeals at 18 (1st Dep’t, Sept. 30, 2021) (Dkt. No. 114).

114. For routine distributions for the Subject Trusts, Petitioner’s practice is to apply the Retired Class Provision to prevent both distributions *and* write-ups to zero-balance Primary Classes. This practice differs from the JPM II Appellate Opinion and JPM Trial Court Order,

though appears to be consistent with the position of the aforementioned party seeking further review of the JPM II Appellate Opinion (and certain other parties in JPM II). *See id.*

115. Here, the manner in which the Retired Class Provision is applied has the potential to substantially impact Post-Zero Balance Collections and the treatment of such amounts.

*The Retired Class Provision and Possible  
Principal Distributions of Post-Zero Balance Collections*

116. As discussed *supra* ¶¶ 93-94, Post-Zero Balance Collections can only be distributed as principal if the certificate principal balances of the Primary Classes are increased when they reach zero, and the Governing Agreements do not appear to provide an express mechanism to accomplish this. But, even if there were a mechanism to accomplish this, Petitioner currently applies the Retired Class Provision to prohibit write-ups to zero-balance Primary Classes. The Retired Class Provision could thus operate as an additional barrier to any principal distributions, unless it is construed to permit write-ups. While such a construction would be consistent with the JPM II Trial Court Order and JPM II Appellate Opinion, those decisions may be subject to further review. And, they relate only to the administration of a one-time settlement payment, and run counter to Petitioner's course of performance.

*The Retired Class Provision and Possible  
Excess Cashflow Distributions of Post-Zero Balance Collections*

117. If Post-Zero Balance Collections are treated as Excess Cashflow, the Retired Class Provision could also alter the application of the Excess Cashflow waterfall.

118. For the Group I Subject Trusts, the Class A classes are ostensibly entitled to reimbursement for realized losses under the Excess Cashflow waterfall, *see supra* ¶ 103, but the Retired Class Provision facially prevents all distributions to zero-balance Primary Classes, *see* PSA, § 5.04(a). This arguably may prevent Class A classes from receiving reimbursement for realized losses from any Post-Zero Balance Collections that are treated as Excess Cashflow. If the

Retired Class Provision were applied in this manner (and Post-Zero Balance Collections were considered to be Excess Cashflow), then Post-Zero Balance Collections would flow further down the Excess Cashflow waterfall and would largely be distributed to the Class C Classes. *See id.* § 5.04(a)(3).

119. A similar issue exists with respect to the Group II Subject Trusts. Although the Group II Subject Trusts do not provide for reimbursement of realized losses for Class M and Class B classes, those classes are entitled to reimbursement for unpaid interest shortfalls and there are currently interest shortfall amounts outstanding for most of these Subject Trusts. *See id.* § 5.04(a)(3); *see also* Exhibit E. If the Retired Class Provision were applied in a manner that prevented such reimbursements (and, again, Post-Zero Balance Collections were considered to be Excess Cashflow), then most or all Post-Zero Balance Collections would flow to Class C Classes for the Group II Subject Trusts. *See* PSA, § 5.04(a)(3).

120. Notably, the reasoning of the JPM II Trial Court Order would appear to preclude Excess Cashflow distributions to zero-balance Primary Classes, as it held that the “Retired Class provisions . . . expressly prohibit distributions to zero balance classes.” JPM II Trial Court Order at 38. This would also be consistent with Petitioner’s course of performance. The JPM II Appellate Opinion, however, would seem to permit such distributions because it opined that the Retired Class Provision “merely provide[s] that once a certificate has been paid in full and formally retired, it is no longer entitled to receive distributions.” JPM II Appellate Opinion at 8. In other words, Excess Cashflow distributions would be available to Primary Classes if they were not paid in full—thus, such classes may not be “retired” under the logic of the JPM II Appellate Opinion. *See id.* But, this would be inconsistent with the manner in which Petitioner applies the Retired Class Provision, and, again, JPM II only concerns the administration of a one-time settlement

payment and the decisions rendered therein may be subject to further review, *see supra* ¶¶ 24-27, 108, 116.

***The Governing Agreements for Most of the Subject Trusts Do Not  
Include Deferred Principal Collections in Subsequent Recoveries, and  
This Treatment of Deferred Principal May Impact Post-Zero Balance Collections***

121. For the vast majority of the Subject Trusts, the Governing Agreements do not include Deferred Principal Collections in the definition of Subsequent Recoveries, the only designated amounts for which write-ups may be applied under the Governing Agreements. *See supra* ¶¶ 17, 66, 80-81, 94. Petitioner treats Deferred Principal Collections accordingly, and does not apply write-ups to the Primary Classes in connection with such collections.

122. This treatment of Deferred Principal Collections has the potential to materially increase the amount of overcollateralization in the Subject Trusts, and, correspondingly, the amount of Post-Zero Balance Collections. As a result, Petitioner expects certain certificateholders may argue that Deferred Principal Collections should be included in Subsequent Recoveries. Indeed, a group of investors recently filed a counter-petition concerning this issue in the 2021 Wells Fargo Art. 77. *See supra* ¶ 34. For these reasons, Petitioner requires judicial confirmation that it should continue its current practice of (i) not treating Deferred Principal Collections as Subsequent Recoveries and (ii) not applying corresponding write-ups to the certificate principal balances of the Primary Classes in connection with such collections.

***Petitioner's Treatment of Deferred Principal  
Collections Is Consistent with the Governing Agreements***

123. For three of the Subject Trusts, Subsequent Recoveries are defined to include: “amounts received by the Master Servicer . . . specifically related to a Mortgage Loan that was the subject of a liquidation, a *Mortgage Loan that has been modified which resulted in a Realized Loss* or final disposition of any REO Property prior to the related calendar month that resulted in a

Realized Loss.” *See, e.g.*, Exhibit M (BSABS 2007-HE7 PSA), § 1.01 (Definition of Subsequent Recoveries) (emphasis added). Under current industry practice, loan modifications generally result in loan-level losses for Deferred Principal Amounts, and, beyond this, at least one of the aforementioned Subject Trusts requires amounts related to loan modifications to be treated as losses. *See, e.g., id.* § 1.01 (Definition of Realized Loss); *see also* 15 U.S.C. § 1639a(c); Exhibit J (Supplemental Directive 10-05). Thus, Deferred Principal Collections appear to come within Subsequent Recoveries insofar as Deferred Principal Collections are amounts tied to a modification “which resulted in a Realized Loss.” *See, e.g.*, Exhibit M (BSABS 2007-HE7 PSA), § 1.01 (Definition of Subsequent Recoveries). Petitioner accordingly is not seeking guidance on these three Subject Trusts with respect to the treatment of Deferred Principal Collections. Additionally, there is one Subject Trust with no concept of Subsequent Recoveries, and Petitioner likewise is not seeking guidance on that Subject Trust. *See* Exhibit N (BSABS 2003-HE1 PSA), § 1.01 (“Definitions”).

124. For the remaining seventy-two Subject Trusts, the Governing Agreements contain different terminology concerning Subsequent Recoveries and Deferred Principal Collections (*see* Exhibit K):

- a. Twenty of the Subject Trusts contain language that expressly requires amounts related to modifications to be treated as losses. *See, e.g.* Exhibit L (SACO I 2006-10 PSA), § 1.01 (Definition of Realized Loss). Fifty-two do not include express language requiring such amounts to be treated as losses, *see, e.g.* SACO I 2006-4 PSA, § 1.01 (Definition of Realized Loss), but, again, industry practice is to treat Deferred Principal Amounts as loan-level losses.

b. However, all seventy-two of the remaining Subject Trusts contain Subsequent Recovery definitions that only narrowly include amounts “specifically related to a Mortgage Loan that was the subject of a liquidation or final disposition of any REO Property prior to the related Prepayment Period that resulted in a Realized Loss.” *See, e.g., id.* § 1.01 (Definition of Subsequent Recoveries). There is no reference to amounts collected in connection with realized losses resulting from loan modifications. *See, e.g., id.* As such, for these Subject Trusts, Subsequent Recoveries do not expressly include Deferred Principal Collections. *See, e.g., id.* And, Subsequent Recoveries are the only designated amounts that result in the application of write-ups under the Governing Agreements, meaning that there is no other express mechanism that would permit the application of write-ups for Deferred Principal Collections. *See supra* ¶¶ 17, 66, 94.

125. Consistent with the Governing Agreements for the above seventy-two Subject Trusts, Petitioner does not treat Deferred Principal Collections as Subsequent Recoveries, nor does Petitioner apply write-ups to Primary Classes in connection with such collections.

*Petitioner Expects Interested Parties May Take Conflicting  
Positions on Petitioner’s Treatment of Deferred Principal Collections  
Given the Impact on Post-Zero Balance Collections and Overcollateralization*

126. Whether future Deferred Principal Collections are not treated as Subsequent Recoveries under Petitioner’s current practice (the “**Non-SR Approach**”), or, alternatively, are treated as Subsequent Recoveries (the “**SR Approach**”) may have a significant impact on payments to all certificateholders.

127. These potential impacts can be illustrated as follows. Imagine a mortgage loan securitization with the following attributes: (i) an aggregate outstanding mortgage loan principal balance of \$100, (ii) \$100 in aggregate certificate principal balance for the Primary Classes, (iii) \$5 of current-period loan-level losses, and (iv) \$10 of new Deferred Principal Collections in the current period. Under standard servicer reporting, the ending aggregate mortgage loan principal balance reported by the servicer will always be \$95. While the servicer will reduce the aggregate mortgage loan principal balance by \$5 to account for the current-period loan-level loss, it will *not* further reduce the balance by the \$10 of Deferred Principal Collections. This is because it applied a loan-level loss for the associated Deferred Principal Amounts in a prior period.

128. If the Non-SR Approach were used, the \$10 in Deferred Principal Collections would reduce the certificate principal balance of the Primary Classes to \$90, to account for the distribution of principal to the Primary Classes. The principal balance of the mortgage loans would be reduced by the \$5 loan-level loss to \$95. The mortgage loan principal balance (\$95) would thus exceed the Primary Classes' principal balance (\$90) in the amount of \$5, meaning the deal would have \$5 in overcollateralization. Additionally, the \$5 loan-level loss would not be applied as a realized loss to the Primary Classes due to the overcollateralization.

129. If the SR Approach were used, the \$10 in Deferred Principal Collections would again reduce the certificate principal balance of the Primary Classes to \$90, to account for the distribution of principal to the Primary Classes. The principal balance of the mortgage loans would, again, be reduced by the \$5 loan-level loss to \$95. However, the Primary Classes would also receive a \$10 write-up of principal as a result of treating the Deferred Principal Collections as Subsequent Recoveries. Thus, their \$90 principal balance would be increased by \$10 to ultimately equal \$100. The Primary Classes' principal balance would then exceed the mortgage loan balance,

meaning there would be no overcollateralization. With no overcollateralization, the \$5 loan-level loss would be applied as a realized loss to the Primary Classes, reducing their principal balance to \$95. The Primary Classes' principal balance (\$95) would thus equal the mortgage loan principal balance (\$95), such that there would be no overcollateralization in the deal following the distribution and application of losses.

130. Taking this together, the Non-SR Approach would yield \$5 in overcollateralization and the Primary Classes' principal balance would be \$90, whereas the SR Approach would yield no overcollateralization and the Primary Classes' principal balance would be \$95. The former would cause the Primary Classes to move closer to a zero balance and increase overcollateralization—meaning that Post-Zero Balance Collections may ultimately be higher when the Primary Classes eventually reach zero. The latter would essentially do the opposite in that it would leave the Primary Classes with a higher principal balance that equals the principal balance of the mortgage loans, thereby decreasing the likelihood of any overcollateralization or Post-Zero Balance Collections.

131. Although this is just a hypothetical, it plainly illustrates that the Non-SR Approach may increase Post-Zero Balance Collections and overcollateralization in the Subject Trusts. This, in turn, could increase potential distributions to Class C Classes depending upon how the issues raised *supra* ¶¶ 89-120 are addressed, or, at the very least, it could increase the amount in controversy for such issues. Additionally, the Non-SR Approach may have other impacts beyond those in the hypothetical.

132. In light of the above, Petitioner expects that some certificateholders may argue that Deferred Principal Collections ought to be included in Subsequent Recoveries so that there is a symmetry between amounts treated as realized losses and the application of write-ups. This



interpretation would reduce Post-Zero Balance Collections and overcollateralization, and would prevent, or at least reduce, possible distributions to Class C Classes. Certificateholders may argue that overcollateralization—and possible Class C distributions—were never intended to result from the distribution of Deferred Principal Collections, and that this outcome must be prevented, especially given that there are substantial realized losses outstanding on the Primary Classes.

133. The opposite position may be taken by certificateholders that stand to benefit from increased Post-Zero Balance Collections and increased overcollateralization. These certificateholders would likely rely upon the definition of Subsequent Recoveries for support. In particular, they may point to the fact that many (though not all) of the Governing Agreements for the Subject Trusts expressly contemplate applying realized losses with respect to loan-level losses resulting from servicing modifications, while simultaneously omitting later collections related to such modifications from the definition of Subsequent Recoveries. Such interested certificateholders would also likely rely on Petitioner's long-standing course of performance for support.

134. All of this could potentially place Petitioner in the middle of certificateholders with competing claims—and this is not just an academic concern. The 2021 Wells Fargo Art. 77 illustrates as much. There, Wells Fargo is treating Deferred Principal Collections as Subsequent Recoveries and is advocating in favor of that approach. *See In re Wells Fargo Bank*, No. 154984/2021, Wells Fargo Answer to Deer Park Counter-Petition at 5-6 (Sup. Ct. N.Y. Cnty. Sept. 3, 2021) (Dkt. No. 167). Certain parties appear to be aligned with Wells Fargo's position, at least in some respects. *See id.*, Solula, LLC's and La Verdad Holdings, LLC's Verified Answer to Second Amended Petition and Amended Counter-Petition at 3-4 (Sup. Ct. N.Y. Cnty. Sept. 3, 2021) (Dkt. No. 157). Other parties, in contrast, assert that Deferred Principal Collections should

not be treated as Subsequent Recoveries, but should still result in write-ups under the applicable contracts. *See, e.g.*, Deer Park Counter-Petition ¶¶ 56, 66-68. Additionally, various parties advance an alternative argument in which they assert that Deferred Principal Collections should not result in any write-ups at all, and should instead increase overcollateralization and eventually cause Excess Cashflow distributions to reimburse losses of the Class A classes for the deals at issue. *See id.* ¶ 90. Some of these positions appear to align with the manner in which Petitioner treats Deferred Principal Collections, but there clearly are conflicting views among the parties. Here, Petitioner expects that certificateholders may take similar conflicting positions, especially considering the possible impacts on Post-Zero Balance Collections.

#### **NEED FOR JUDICIAL INSTRUCTION**

135. As explained herein, there are significant questions concerning the interpretation of the Governing Agreements with respect to (i) the manner in which distributions of Post-Zero Balance Collections should be applied under the waterfalls and (ii) the treatment of Deferred Principal Collections. The resolution of these issues will determine which certificateholders will receive distributions of the funds in question.

136. Petitioner expects that certificateholders—the direct economic beneficiaries of the transactions—may have opposing views concerning how these questions should be resolved. Accordingly, judicial instructions are necessary to address these questions and facilitate the administration of these aspects of the waterfalls.

137. An Article 77 proceeding in this Court is the most appropriate forum to permit all interested parties to appear and be heard in an orderly and efficient process and to facilitate and provide a resolution in the form of a uniform final judgment.

**NEED FOR ESCROW ARRANGEMENT PENDING OUTCOME OF PROCEEDING**

138. One of the primary purposes of this proceeding—to obtain instructions from this Court concerning the manner in which distributions with respect to Post-Zero Balance Collections are applied under the waterfalls—would be frustrated if such funds were distributed to certificateholders without the benefit of instructions from this Court. Distributing these funds under any of the mutually exclusive approaches described herein would be effectively irreversible. This is because it would be impractical if not impossible for Petitioner to claw-back distributed funds and then redistribute such funds according to whatever approach is ordered by the Court.

139. Petitioner thus requests that the Court issue an order providing that Petitioner cause Post-Zero Balance Collections,<sup>6</sup> net of any expenses and other fees payable under the Governing Agreements, to be maintained on deposit, escrowed in a subaccount of the distribution account associated with each Subject Trust, *i.e.*, segregated by Subject Trust, until the Court enters a final order concerning the appropriate distribution of these funds and directing such distributions in accordance therewith.

140. For each Subject Trust, Petitioner proposes that in the first period in which the aggregate certificate principal balance of the Class A, Class M, and, if applicable, Class B classes is equal to zero, any principal amounts or current interest owing to such classes shall be paid according to the Governing Agreements until each such class's principal balance is reduced to zero and any remaining funds shall be held in escrow. In all periods thereafter, any collections remitted

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<sup>6</sup> Deferred Principal Collections may be included within Post-Zero Balance Collections for a particular Subject Trust, and thus certain Deferred Principal Collections may be included in escrowed funds. However, Petitioner is not proposing to hold in escrow any Deferred Principal Collections that do not constitute Post-Zero Balance Collections—*i.e.*, with respect to any Deferred Principal Collections for Subject Trusts where the Class A, Class M, and/or Class B classes are outstanding, Petitioner intends to continue to apply and distribute such amounts consistent with its existing practices.

to Petitioner shall be held in escrow, net of any expenses and other fees payable under the Governing Agreements. Based on currently available information, Petitioner anticipates that, subject to an order of this Court, it will begin immediately escrowing funds for SACO I 2005-WM1 and SACO I 2005-6. As noted *supra* ¶ 86(b), for these two transactions, the aggregate certificate principal balance of the Class A, Class M, and Class B classes is equal to zero. Petitioner also anticipates that it may begin immediately escrowing funds for a limited number of additional transactions, to the extent they meet the aforementioned criteria and the Court issues Petitioner's proposed Order to Show Cause.

141. An order of this Court facilitating the escrow of these funds is appropriate in these circumstances because the Governing Agreements contain no express provision permitting Petitioner to retain funds that have been deposited into a distribution account. Generally, under the Governing Agreements, funds deposited in such accounts must be distributed to certificateholders on the applicable distribution date.

142. Petitioner seeks an order including a direction that amounts in the escrow accounts be held on an invested basis. Petitioner requests that the Court instruct it to use commercially reasonable efforts to cause escrowed funds to be invested and reinvested in the high quality money market fund described in the proposed Order to Show Cause filed contemporaneously herewith (the "**Approved Fund**").

143. The Approved Fund is a high rated money market fund. The fund is liquid, meaning that Petitioner will be able to redeem the investments for cash and make distributions promptly following entry by this Court of a final order concerning the correct approach for distributing the escrowed funds to certificateholders.

144. Under the Governing Agreements, earnings from the investment of any amounts held by Petitioner prior to distribution are payable as additional compensation to the servicer or other transaction parties, not to certificateholders. Petitioner, however, requests that this Court direct that any earnings generated from the investments held in escrow be reinvested and inure to the benefit of certificateholders. Petitioner will not receive any fees, interest, or other financial benefit generated from these investments under this arrangement.

145. Investment earnings accruing on the escrowed funds will be treated as principal amount received on the mortgage loans. Any issues concerning the distribution of investment earnings will be addressed in the Court's instructions issued at the conclusion of this proceeding.

**REQUEST FOR RELIEF**

**WHEREFORE**, pursuant to the provisions of CPLR Article 77 and all other applicable law, Petitioner respectfully requests that this Court:

146. Conclude that it has exclusive jurisdiction over the subject matter of this Article 77 proceeding, all parties to this proceeding, Petitioner, and all certificateholders and other parties claiming rights in the Subject Trusts, for the purposes of rendering any instructions as are necessary and/or appropriate in the administration of the Subject Trusts and, further, retain jurisdiction to enforce the terms of any judgment(s) or order(s) entered by the Court.

147. Direct, as an interim measure to permit the Court to provide instructions concerning the subject matter of this Article 77 proceeding, Petitioner to cause certain funds to be maintained on deposit in escrow (as invested and reinvested in an approved high quality money market fund) pursuant to the terms set forth in the proposed Order to Show Cause filed contemporaneously herewith, until such time as a final,

nonappealable order is entered in this proceeding directing the manner in which Petitioner shall administer and distribute the funds held in escrow.

148. Hold that Petitioner is entitled to exculpation from liability for placing, receiving, holding, investing, and/or reinvesting any funds held in escrow in accordance with the Court's direction.

149. At such designated time and place, make and enter an order providing the following (the "**Distribution Order**"):

a. with respect to each of the Subject Trusts, in any payment period in which the beginning aggregate principal balance of the Class A, Class M, and, if applicable, Class B classes, taken together, is equal to zero dollars (\$0.00) or the aggregate principal balance of the same classes is reduced to zero dollars (\$0.00) as a result of distributions made during the period (as such balances may be adjusted as a result of the application of any write-ups pursuant to the applicable contracts and any guidance provided by this Court), Petitioner shall administer the Subject Trusts pursuant to one of the following methods, as so ordered by the Court:

i. Petitioner shall treat as "Excess Cashflow" or a term of equivalent meaning, as that term is defined in the applicable governing contracts, any amounts available for distribution (as reduced by any distributions applied to the Class A, Class M, and, if applicable, Class B classes where the aggregate principal balance of such classes is reduced to zero dollars (\$0.00) in the relevant payment period), and shall allocate and distribute such amounts pursuant to the applicable contractual terms

concerning distributions of Excess Cashflow or a similar applicable term; or

- ii. Petitioner shall treat as “Principal Distribution Amount” or a term of equivalent meaning, as defined in the applicable governing contracts, any amounts available for distribution (as reduced by any distributions applied to the Class A, Class M, and, if applicable, Class B classes where the aggregate principal balance of such classes is reduced to zero dollars (\$0.00) in the relevant payment period), and, pursuant to instructions provided by this Court, Petitioner shall apply adjustments to the certificate principal balances of the Class A, Class M, and/or Class B classes, as may be applicable, to permit Petitioner to allocate and distribute such amounts pursuant to the applicable contractual terms concerning distributions of Principal Distribution Amount or a similar applicable term (*provided, however*, that additional guidance, pursuant to instructions of this Court, shall address (x) whether the aforescribed treatment of such amounts impacts or alters the “Current Interest” or a term of equivalent meaning, as defined in the applicable governing contracts, due on Class A, Class M, and/or Class B classes due to adjustments to the principal balances thereof, and (y) whether potential distributions of “Excess Cashflow” or a term of equivalent meaning, as that term is defined in the applicable governing contracts, may be appropriate in certain circumstances, such as following the full payment of all principal and interest due on the Class A, Class M, and/or

Class B classes (including without limitation any accrued amounts, shortfalls, and/or unreimbursed losses outstanding on such classes) or in any payment periods in which there is available “Overcollateralization Release Amount” or a term of equivalent meaning, as that term is defined in the applicable governing contracts); or

- iii. Petitioner shall apply a different method authorized by this Court to allocate and distribute any amounts available for distribution (as reduced by any distributions applied to the Class A, Class M, and, if applicable, Class B classes where the aggregate principal balance of such classes is reduced to zero dollars (\$0.00) in the relevant period, if applicable).
- b. with respect to each of the Subject Trusts, Petitioner shall apply the applicable contractual provision concerning whether Class A, Class M, or Class B classes with an aggregate certificate principal balance of zero dollars (\$0.00), on an individual class basis, are considered to be retired and no longer entitled to distributions (such provision typically appearing in Article V or a similar article of the applicable governing contracts) pursuant to one of the following methods, as so ordered by the Court:
  - i. Petitioner shall apply said provision in a manner that: (1) prevents the application of any increases, or write-ups, to the certificate principal balances of any Class A, Class M, or Class B classes with an aggregate certificate principal balance of zero dollars (\$0.00), on an individual



- class basis, at the beginning of any payment period, and (2) prevents distributions to any Class A, Class M, or Class B classes with an aggregate certificate principal balance of zero dollars (\$0.00), on an individual class basis, at the beginning of any payment period; or
- ii. Petitioner shall apply said provision in a manner that: (1) permits the application of increases, or write-ups, to the certificate principal balances of any Class A, Class M, or Class B classes with an aggregate certificate principal balance of zero dollars (\$0.00), on an individual class basis, at the beginning of any payment period, and (2) prevents distributions to any Class A, Class M, or Class B classes with an aggregate certificate principal balance of zero dollars (\$0.00), on an individual class basis, at the beginning of any payment period (as such beginning balances may be adjusted as a result of the application of any write-ups pursuant to the applicable contracts and any guidance provided by this Court); or
- iii. Petitioner shall apply said provision in a manner that: (1) permits the application of increases, or write-ups, to the certificate principal balances of any Class A, Class M, or Class B classes with an aggregate certificate principal balance of zero dollars (\$0.00), on an individual class basis, at the beginning of any payment period *so long as* all principal and interest due on such classes has not been paid in full as of the beginning of the applicable payment period (including without limitation any accrued amounts, shortfalls, and/or unreimbursed losses

outstanding on such classes), and (2) permits distributions to any Class A, Class M, or Class B classes with an aggregate certificate principal balance of zero dollars (\$0.00), on an individual class basis, at the beginning of any payment period *so long as* all principal and interest due on such classes has not been paid in full as of the beginning of the applicable payment period (including without limitation any accrued amounts, shortfalls, and/or unreimbursed losses outstanding on such classes); or

- iv. Petitioner shall apply said provision pursuant to a different method authorized by this Court.
- c. with respect to the seventy-two Subject Trusts identified on Exhibit F hereto, for any collections of borrower payments of deferred or forborne principal, interest, and/or other amounts on mortgages that have been subject to servicer modifications, Petitioner shall (i) continue to treat such deferred or forborne amounts as principal funds that do not constitute “Subsequent Recoveries” or a term of equivalent meaning, as defined in the applicable governing contracts, and (ii) continue to not apply increases, or write-ups, to any certificate principal balances of any classes of certificates with respect to any such deferred or forborne amounts; *provided, however*, that if the Court orders Petitioner to apply an alternative approach with respect to the foregoing, such alternative approach shall be limited to the prospective administration of the Subject Trusts and Petitioner’s historical treatment with respect to deferred or forborne amounts shall be deemed to constitute a good faith, reasonable application of

the terms of the applicable contracts in full discharge of Petitioner's contractual duties.

150. Instruct, authorize, and order Petitioner to distribute any applicable escrowed amounts subject to the Distribution Order as promptly as reasonably possible, and in accordance therewith, subject to any working or administrative time that may be necessary to administer and distribute such payments with any adjustments to effectuate the Court's instructions in the Distribution Order.
151. Order that certificateholders and any other parties claiming rights in the Subject Trusts are barred from asserting claims against Petitioner with respect to Petitioner's administration and distribution of any amounts subject to the Distribution Order, so long as such administration and distribution is consistent with the Distribution Order and any other orders of the Court.
152. Grant any other and/or additional relief this Court deems just and proper.

Dated: October 18, 2021  
New York, New York

JONES DAY

/s/ Nidhi Nina Yadava

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