

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

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 In the matter of the application of :  
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 THE BANK OF NEW YORK MELLON, in its :  
 Capacity as Trustee for 278 Residential Mortgage- :  
 Backed Securitization Trusts, :  
 :  
 Petitioner, :  
 :  
 For Judicial Instructions under CPLR Article 77 :  
 Concerning the Proper Pass-Through Rate :  
 Calculation for CWALT Interest Only Senior :  
 Certificates, :  
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Index No. 150738/2019

Hon. Marcy S. Friedman

**INITIAL STATEMENT OF THE  
AIG INVESTORS CONCERNING  
THE PETITION**

## I. Introduction

The undersigned AIG entities (collectively, the “AIG Investors”) respectfully submit this initial statement of position with respect to the Petition<sup>1</sup> filed on January 24, 2019 by Petitioner The Bank of New York Mellon seeking this Court’s instruction confirming the Petitioner’s use of a current interest rate on the mortgage loans—rather than the original interest rate—to calculate the Pass-Through Rate under the PSAs for the Covered Trusts (the “Dynamic Method”). The AIG Investors are holders of certificates in 79 of the 278 Covered Trusts that are subject to this proceeding. The AIG Investors’ holdings are identified in Exhibit 1 hereto.

The PSAs for the Covered Trusts unambiguously mandate the use of the Dynamic Method. Accordingly, the Petitioner has correctly employed the Dynamic Method since the inception of the Covered Trusts and the Court should instruct the Petitioner to continue using the Dynamic Method. *See Schron v. Troutman Sanders LLP*, 986 N.E.2d 430, 433 (N.Y. 2013) (“Under New York law, written agreements are construed in accordance with the [contracting] parties’ intent and the best evidence of what parties to a written agreement intend is what they say in their writing. As such, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.”).

The AIG Investors respectfully request the opportunity to fully brief the issues raised in the Petition and to respond to positions taken by other Interested Persons. This initial statement does not include all points and authorities in support of the AIG Investors’ position. Once Interested Persons have made their appearances on or about March 8, we respectfully propose that the most efficient way forward is for the Court to order joint or coordinated briefing on the merits of the dispute from Interested Persons sharing a position.

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<sup>1</sup> Capitalized terms not otherwise defined herein have the meanings given to such terms in the Petition or in the Representative PSA.

## II. The PSAs for the Covered Trusts Unambiguously Require the Dynamic Method.

The Covered Trusts all have IO Certificates. (Petition ¶¶ 27-31). On each Distribution Date, the IO Certificates are entitled to receive an amount equal to the Class Optimal Distribution Amount, which is defined in relevant part as “one month’s interest accrued during the related Interest Accrual Period at the Pass-Through Rate for such Class on the related . . . Notional Amount . . .” (Representative PSA §§ 4.02(a)(1)(ii) and Definitions). Put simply, the IO Certificates are entitled to the product of the Pass-Through Rate and the Notional Amount.<sup>2</sup> For the IO Certificates, the Pass-Through Rate is “the excess of (a) the weighted average of the Adjusted Net Mortgage Rates of the Non-Discount Mortgage Loans . . . over (b) [a fixed rate].” (Representative PSA, Preliminary Statement Note 19).

The Dynamic Method is required because the Pass-Through Rate incorporates two defined terms that each contemplate a changing rather than static interest rate. *First*, the Adjusted Net Mortgage Rate is defined as “[a]s to each Mortgage Loan, **and at any time**, the per annum rate equal to the Mortgage Rate . . .” (Representative PSA Definitions) (emphasis added). The phrase “and at any time” plainly instructs that the Adjusted Net Mortgage Rate—and, in turn, the Pass-Through Rate—is calculated using the rate in effect at the point in time when the calculation is made. Ignoring this phrase would violate the command to give meaning to all words and provisions in a contract. *See Matter of Viking Pump, Inc.*, 52 N.E.3d 1144, 1154 (N.Y. 2016) ( a construction that rendered a contract clause surplusage “cannot be countenanced under our principles of contract interpretation”); *FCI Grp., Inc. v. City of N.Y.*, 54 A.D.3d 171, 177 (1st Dep’t 2008) (“[A] court should not adopt an interpretation which will operate to leave a

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<sup>2</sup> It is the AIG Investors understanding that there is no dispute regarding the Notional Amount and the Petition does not seek instructions related to the Notional Amount.

provision of a contract without force and effect.”) (internal quotation marks and citation omitted).

*Second*, the defined term “Mortgage Rate,” on which the Adjusted Net Mortgage Rate is based, also anticipates a changing interest rate. “Mortgage Rate” is defined as “[t]he annual rate of interest borne by a Mortgage Note *from time to time* . . .” (Representative PSA Definitions) (emphasis added). The phrase “from time to time” reveals an understanding and agreement that the interest rate forming the foundation of the Pass-Through Rate would change over time and this phrase would be rendered meaningless if the Pass-Through Rate were static.

The use of the defined term Mortgage Rate in the section of the Representative PSA delineating the parameters of loan modifications that may be made in lieu of a refinancing confirms the parties’ expectation that the interest rate on a Mortgage Loan can change as a result of a loan modification, as well as the parties’ unambiguous intent that the term “Mortgage Rate” means the interest rate on the loan, *as modified*. Section 3.11(b) of the Representative PSA provides that Countrywide may agree to a modification of any Mortgage Loan (the “Modified Mortgage Loan”) in lieu of a refinancing if “. . . the *Mortgage Rate on the Modified Mortgage Loan* is approximately a prevailing market rate for newly-originated mortgage loans having similar terms . . .” (Representative PSA § 3.11(b)) (emphasis added). This provision clearly contemplates loan modifications where the interest rate has changed and uses the term “Mortgage Rate”—the same term used to calculate the Pass-Through Rate—to describe this modified interest rate.

### **III. The Party Responsible for Calculating the Pass-Through Rate for Countrywide Trusts Has Correctly Interpreted The PSAs.**

Because the PSAs unambiguously require the Dynamic Method, the Court need not consider extrinsic evidence to resolve the Petition. *See Chelsea Piers L.P. v. Hudson River Park*

*Tr.*, 106 A.D.3d 410, 412 (1st Dep’t 2013) (a party “may not resort to extrinsic evidence” when interpreting an unambiguous contract). If the Court determines that there is an ambiguity, however, the most probative extrinsic evidence confirms that the drafters of the PSA intended to require the Dynamic Method: that is, the unchallenged application of the Dynamic Method that the Petitioner has been openly using to calculate the Pass-Through Rate throughout the life of the Covered Trusts. (Petition ¶ 49). “[T]he practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence.” *Fed. Ins. Co. v. Ams. Ins. Co.*, 258 A.D.2d 39, 44 (1st Dep’t 1999) (internal citation omitted); *see also Webster’s Red Seal Publ’ns, Inc. v. Gilberton World-Wide Publ’ns, Inc.*, 67 A.D.2d 339, 341, *aff’d* 53 N.Y.2d 643 (the parties’ course of performance is the “most persuasive evidence of the agreed intention of the parties”).<sup>3</sup>

#### IV. Conclusion

For these reasons, the Court should instruct and authorize the Petitioner to continue to use the Dynamic Method of calculating the Pass-Through Rate.

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<sup>3</sup> If the Court finds that the PSAs are ambiguous with respect to the issues raised in the Petition, the AIG Investors reserve the right to take discovery and submit extrinsic evidence in support of the Dynamic Method.

Dated: March 8, 2019  
New York, New York

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**Exhibit 1: Covered Trusts In Which The AIG Investors Hold Certificates**

CWALT 2004-13CB  
CWALT 2004-14T2  
CWALT 2004-22CB  
CWALT 2004-28CB  
CWALT 2004-29CB  
CWALT 2004-34T1  
CWALT 2004-35T2  
CWALT 2004-4CB  
CWALT 2004-9T1  
CWALT 2004-J10  
CWALT 2005-10CB  
CWALT 2005-20CB  
CWALT 2005-21CB  
CWALT 2005-23CB  
CWALT 2005-25T1  
CWALT 2005-33CB  
CWALT 2005-35CB  
CWALT 2005-3CB  
CWALT 2005-46CB  
CWALT 2005-54CB  
CWALT 2005-73CB  
CWALT 2005-74T1  
CWALT 2005-77T1  
CWALT 2005-7CB  
CWALT 2005-J8  
CWALT 2006-12CB  
CWALT 2006-26CB  
CWALT 2006-27CB  
CWALT 2006-33CB  
CWALT 2006-45T1  
CWALT 2006-4CB  
CWALT 2006-6CB  
CWALT 2006-9T1  
CWALT 2006-J1  
CWALT 2007-13  
CWALT 2007-17CB  
CWALT 2007-22  
CWALT 2007-23CB  
CWALT 2007-2CB  
CWALT 2007-4CB  
CWALT 2007-5CB  
CWALT 2007-6  
CWHL 2002-34  
CWHL 2002-39

CWHL 2003-44  
CWHL 2004-13  
CWHL 2004-21  
CWHL 2004-J3  
CWHL 2005-10  
CWHL 2005-12  
CWHL 2005-13  
CWHL 2005-18  
CWHL 2005-19  
CWHL 2005-20  
CWHL 2005-21  
CWHL 2005-24  
CWHL 2005-25  
CWHL 2005-26  
CWHL 2005-28  
CWHL 2005-29  
CWHL 2005-30  
CWHL 2005-5  
CWHL 2005-6  
CWHL 2005-J2  
CWHL 2005-J3  
CWHL 2006-13  
CWHL 2006-18  
CWHL 2006-19  
CWHL 2006-20  
CWHL 2006-J1  
CWHL 2006-J2  
CWHL 2007-15  
CWHL 2007-16  
CWHL 2007-17  
CWHL 2007-4  
CWHL 2007-5  
CWHL 2007-6  
CWHL 2007-7  
CWHL 2007-8