

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

In The Matter Of The Application Of

THE BANK OF NEW YORK MELLON, in its Capacity
as Trustee 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.

Index No. 150738/2019

IAS Part 60

Hon. Marcy S. Friedman

Mot. Seq. 001

**SILIAN VENTURES LLC'S REPLY TO
THE P&I INVESTORS' AND BNYM'S RESPONSE BRIEFS**

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I. THE PSAs UNAMBIGUOUSLY REQUIRE THE ORIGINAL RATE

In their response to Silian's textual arguments, the P&I Investors lean into their lay reading of "other evidence of indebtedness" as including modification agreements. P&I Resp. 2–5. But, as Silian has explained, an "evidence of indebtedness" is a term of art in the industry meaning a tradable instrument alternative to a note, like a bond—not any document evidencing indebtedness.¹ Silian Resp. 2–3. The P&I Investors also ignore that any "other evidence of indebtedness" must too be "original." *See id.* 3–4. For its part, BNYM argues again that "original" as used in Mortgage Note means "not a copy," BNYM Resp. 6–7, but cannot resolve the resulting redundancy where the PSAs separately require that the Mortgage Note be not a copy.² BNYM also argues that the "rate borne by" the first-in-time mortgage note after a modification is the Modified Rate. *Id.* at 6. This argument ignores that the modified note would not be "original" (*i.e.*, first-in-time) and is irreconcilable with the admission that the so-called Modified Rate works only if it excludes certain "specialized modifications" that equally would impact the current "rate borne." *See infra* p. 3.

Separately, the P&I Investors and BNYM assert that the phrase "time to time" in the term Mortgage Rate requires rate changes over time—changes they contend *must* be from modifications because most (but not all) Mortgage Loans have fixed rates. P&I Resp. 6–9; BNYM Resp. 3–5. Silian has already shown that the more natural reading of "time to time" in the term Mortgage Rate is "at intervals." Silian Resp. 6. Even accepting the less natural reading, the fact that the term can include rate changes over time says nothing about whether the drafters intended that it include modifications. Instead, it reflects the standardization of the term Mortgage Rate across

¹ This "term of art" explanation is further supported by the otherwise redundant phrase "other evidence of indebtedness evidencing the indebtedness" in the definition of Mortgage Note. PSA I-17.

² Nor does BNYM address where "original" is used to mean "as of the Closing Date." *See, e.g.*, PSA I-19 (defining "***Original*** Applicable Credit Support Percentage" as a one-time calculation made "as of the Closing Date"). (Emphasis indicated by both bold and italics is added throughout. All other emphasis is original.)

Countrywide RMBS trusts. For example, Exhibit A lists a random sample of 2007-vintage CWALT and CWHL trusts (many holding adjustable-rate mortgages) that all use the identical Mortgage Rate definition. The P&I Investors ask the Court to look past this undisputed reality, waving it away as the “lazy-drafters theory.” But they offer no reason to ignore the commercial context in which the PSAs were drafted, and New York law requires that that context be considered. *See Lehman Bros. Int’l (Eur.) v. AG Fin. Prods., Inc.*, 60 Misc. 3d 1214(A), at *10 (Sup. Ct. N.Y. Cty. July 2, 2018) (“[A]n agreement made in the context of a highly technical industry ... must be construed with reference to both the intention of the parties and *the known practices within the industry*.”). That the PSAs use standardized definitions is confirmed by the 18 terms listed in Exhibit B that are defined in the exemplar PSA but never referenced again. Finally, BNYM misrepresents the *AHMA* trial court as having “concluded” that “time to time” “unambiguous[ly]” included modifications, BNYM Resp. 5, when the Court makes no such finding in its decision. *Id.* Ex. B, at 19–21.

BNYM’s and the P&I Investors’ efforts to explain the inconsistencies in their approaches actually highlight the many ways that using the Modified Rate wreaks havoc on the plumbing of the Covered Trusts. *First*, their “one-time-calculation” explanation for using the Original Rate to classify Discount and Non-Discount Mortgage Loans and to calculate the PO and Non-PO Percentage is contradicted by the present-tense verbs used in those provisions. *See, e.g.*, PSA I-17 (“Non-Discount Mortgage Loan: Any Mortgage Loan ... with an Adjusted Net Mortgage Rate that *is* greater than”). The lack of language specifying calculation intervals supports *Silian’s* approach (where the determination never changes), as the PSAs expressly state when to perform *actual* one-time calculations. *Silian* Resp. 5. *Second*, they admit that calculating Allocable Share works only by using the Modified Rate “*just before*” any Relief Act or Debt Service Reduction,

P&I Resp. 17–18, but fail to reconcile that with the conflicting requirement that it be determined “[a]s to any Distribution Date.” PSA I-2. *Third*, they concede that any Modified Rate used to calculate the Pass-Through Rate must exclude Debt Service Reductions, P&I Resp. 18; BNYM Resp. 7–8, but offer no reason why court-ordered modifications are treated differently from agreed-upon modifications. *Fourth*, they acknowledge that a Substitute Mortgage Loan “takes the designation of the loan it replaces” as a Discount or Non-Discount Mortgage Loan, BNYM Resp. 11, but ignore that this result occurs only when using the Original Rate, Silian Resp. 6. *Fifth*, they contend that the Mortgage Loan Schedule’s use of the Original Rate is irrelevant because it reflects only the Mortgage Rate at Closing, BNYM Resp. 7, but cannot square this explanation with other required updates to the Mortgage Loan Schedule. *Sixth*, they do not reconcile the requirement that Mortgage Notes be in original form with the allowance for modifications to be kept as copies.

By contrast, the only two purported issues with Silian’s approach identified by the P&I Investors are easily addressed. *First*, the assertion that netting the cost of a Primary Insurance Policy out of the Mortgage Rate creates a dynamic rate, P&I Resp. 9–10, ignores that the only policies charged by lenders through an “interest premium,” PSA I-17, are fixed cost for the life of the loan and, even if the premiums varied, the Mortgage Rate is unchanged because it is “net” of them. Silian Resp. 9 & n.4. *Second*, the argument that using “Mortgage Rate” when referring to a Modified Mortgage Loan shows that it incorporates modifications, P&I Resp. 9, ignores that a Modified Mortgage Loan is a new Mortgage Loan with a new “original” mortgage note, *see* Silian Resp. 7–8. In any event, the required immediate repurchase of Modified Mortgage Loans means these modifications create none of the absurd results arising from use of the Modified Rate.

II. USING A MODIFIED RATE INVERTS THE SUBORDINATION STRUCTURE

BNYM and the P&I Investors concede that, by using the Modified Rate, the IO “Senior” certificates suffer the first loss on modifications. The P&I Investors try to defend this as consistent

with the concept of subordination by inventing “*three* cash flow streams from the mortgages.” P&I Resp. 11. Under this theory, only the IO certificates are paid “excess interest cash flows,” while only the P&I certificates are paid “interest generated ... *up to* the Required Coupon” and “principal payments.”³ *Id.* This “separate streams” theory renders the IO senior certificates’ seniority meaningless (as no other certificates are paid from that stream) and contradicts the PSAs’ plain language, which pools *all* interest and principal received—without regard to any “streams”—into Available Funds and pays them through the waterfall. PSA I-3-4; *id.* § 4.02(a)(1). Ironically, the P&I Investors’ approach violates their own theory by using the “excess interest cash flows” to cover shortfalls caused by modifications to the “interest generated ... *up to* the Required Coupon.”

Similarly, BNYM argues that seniority “says nothing about ... each holder’s *entitlement*.” BNYM Resp. 8. Yet, by construing the IO senior certificates’ “entitlement” as limited to the interest collected in excess of the Required Coupon, BNYM has also rendered the seniority of the IO senior certificates meaningless. BNYM tries to defend this by contending that “*no* class of certificates was notified of the risk of interest rate modifications.” *Id.* at 10. This ignores the Prospectus Supplement’s warning that the Subordinated Certificates’ recoveries could be reduced by a variety of losses including any “*other cash shortfalls in Available Funds*.” BNYM Resp. Ex. C, at S-134. This catchall—which has no analogue for the IO senior certificates—notified the Subordinated Certificates they were at risk of unanticipated shortfalls, such as from modifications. BNYM’s approach subverts this structure by allocating to the IO senior certificates the “other cash shortfalls in Available Funds” caused by modifications, which cannot be reconciled with the concept of subordination or the offering documents’ disclosures.

³ The P&I Investors omit a fourth stream for “excess principal” to the PO certificates—the logical corollary to the “excess interest cash flows” to the IO certificates. Tellingly, no one suggests, as they do for the IO senior certificates, that the PO certificates sit in a first-loss position for principal cash flows.

III. BNYM's PRIOR CONDUCT IS NOT CONTROLLING

BNYM gives its textual arguments short shrift, relying instead on its past conduct. BNYM Resp. 13–20. As Silian already explained, BNYM's past calculations raise more questions than answers: Was BNYM using the right provision when it crafted its IO payment calculations? Was BNYM aware of how its computer script treated interest-rate modifications before its discussions with Silian in 2018? Did BNYM understand these calculations when it incorrectly described them in the Petition? The scant curated record that BNYM submits does not answer these questions, and BNYM's consistent use of the Original Rate for other ratio-strip trusts and to calculate the Notional Amount in CWALT 2005-1CB (which BNYM sidesteps without addressing, *id.* at 8) suggests BNYM's conduct here was not deliberate. Even if BNYM could conjure answers, other extrinsic evidence of intent is relevant. *See LDIR, LLC v. DB Structured Prods., Inc.*, 172 A.D.3d 1, 5 (1st Dep't 2019). Though "course of performance" can be important evidence of intent, no case cited by BNYM suggests that such evidence is considered alone, without context or other extrinsic evidence like the drafters' statements. *See* BNYM Resp. 14 (asserting the affiliates of Countrywide, not BNYM, drafted the PSAs). BNYM should not be permitted to short-circuit discovery with self-serving and untested descriptions of its past practice.

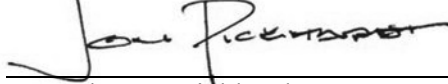
IV. A POOL-LEVEL APPROACH CANNOT BE USED WITH A MODIFIED RATE

BNYM concedes that using the pool-level approach with the Modified Rate would disrupt "the fundamental basis on which Non-Discount Mortgage Loans are distinguished from Discount Mortgage Loans," BNYM Resp. 16 n.1, and cause a breakdown in the proper functioning of the Covered Trusts. BNYM's position buttresses Silian's positions that using the pool-level approach and Modified Rate would be commercially unreasonable and that the Court should consider and resolve both issues together, rather than separately as the P&I Investors request.

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EXHIBIT A

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*Random Sample Of 2007-Vintage CWALT And CWHL Trusts
Showing Percentage Of Adjustable-Rate Mortgages And Definition Of Mortgage Rate*

Deal Name	Percentage Of Adjustable-Rate Mortgage Loans	Definition Of Mortgage Rate
1. CWALT 2007-13	0%	<u>Mortgage Rate</u> : The annual rate of interest borne by a Mortgage Note from time to time, net of any interest premium charged by the mortgagee to obtain or maintain any Primary Insurance Policy.
2. CWALT 2007-AL1	75%	<u>Mortgage Rate</u> : The annual rate of interest borne by a Mortgage Note from time to time, net of any interest premium charged by the mortgagee to obtain or maintain any Primary Insurance Policy.
3. CWALT 2007-10CB	0%	<u>Mortgage Rate</u> : The annual rate of interest borne by a Mortgage Note from time to time, net of any interest premium charged by the mortgagee to obtain or maintain any Primary Insurance Policy.
4. CWALT 2007-HY2	89%	<u>Mortgage Rate</u> : The annual rate of interest borne by a Mortgage Note from time to time, net of any interest premium charged by the mortgagee to obtain or maintain any Primary Insurance Policy.
5. CWALT 2007-HY7C	87%	<u>Mortgage Rate</u> : The annual rate of interest borne by a Mortgage Note from time to time, net of any interest premium charged by the mortgagee to obtain or maintain any Primary Insurance Policy.
6. CWALT 2007-J1	0%	<u>Mortgage Rate</u> : The annual rate of interest borne by a Mortgage Note from time to time, net of any interest premium charged by the mortgagee to obtain or maintain any Primary Insurance Policy.
7. CWALT 2007-OA10	99%	<u>Mortgage Rate</u> : The annual rate of interest borne by a Mortgage Note from time to time, net of any interest premium charged by the mortgagee to obtain or maintain any Primary Insurance Policy.
8. CWALT 2007-OH1	77%	<u>Mortgage Rate</u> : The annual rate of interest borne by a Mortgage Note from time to time, net of any interest premium charged by the mortgagee to obtain or maintain any Primary Insurance Policy.
9. CWALT 2007-11T1	0%	<u>Mortgage Rate</u> : The annual rate of interest borne by a Mortgage Note from time to time, net of any interest premium charged by the mortgagee to obtain or maintain any Primary Insurance Policy.
10. CWHL 2007-1	0%	<u>Mortgage Rate</u> : The annual rate of interest borne by a Mortgage Note from time to time, net of any interest premium charged by the mortgagee to obtain or maintain any Primary Insurance Policy.
11. CWHL 2007-HY1	82%	<u>Mortgage Rate</u> : The annual rate of interest borne by a Mortgage Note from time to time, net of any interest premium charged by the mortgagee to obtain or maintain any Primary Insurance Policy.
12. CWHL 2007-HYB1	75%	<u>Mortgage Rate</u> : The annual rate of interest borne by a Mortgage Note from time to time, net of any interest premium charged by the mortgagee to obtain or maintain any Primary Insurance Policy.
13. CWHL 2007-J1	0%	<u>Mortgage Rate</u> : The annual rate of interest borne by a Mortgage Note from time to time, net of any interest premium charged by the mortgagee to obtain or maintain any Primary Insurance Policy.

Sources: Data regarding the percentage of adjustable-rate mortgage loans was retrieved from the Intex database and rounded to the nearest percentage. The definitions of Mortgage Rate were retrieved from each trust's respective pooling and servicing agreement.

EXHIBIT B

EXHIBIT B*Examples Of Terms Defined But Not Used In CWALT 2006-6CB*

1. Aggregate Planned Balance.....	PSA I-2
2. Aggregate Targeted Balance	PSA I-2
3. COFI*	PSA I-6
4. COFI Certificates *	PSA I-6
5. Combined Certificates	PSA I-7
6. Expense Rate	PSA I-11
7. FIRREA	PSA I-11
8. Indirect Participant	PSA I-13
9. Loan Group Principal Balance	PSA I-14
10. Non-PO Pool Balance.....	PSA I-18
11. Planned Balance	PSA I-22
12. Planned Principal Classes.....	PSA I-22
13. Prepayment Charge Amount [†]	PSA I-23
14. Prepayment Shift Percentage.....	PSA I-24
15. REMIC Change of Law	PSA I-27
16. Scheduled Classes	PSA I-28
17. Targeted Balance	PSA I-33
18. Targeted Principal Classes	PSA I-33

* The defined terms COFI and COFI Certificates are used in Section 4.07 of the PSA (“Determination of Pass-Through Rates for COFI Certificates”), which is equally irrelevant because the PSA clearly states there are no COFI Certificates issued by the trust. See PSA 12 (listing COFI Certificates as “None”).

[†] The definition of Prepayment Charge Amount refers to “Section 3.19,” which does not exist in the PSA. See PSA i (Table of Contents listing Sections 3.01–.18 for Article III).