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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

In the Matter of OWNIT Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2006-7

Case Type: Trust
File No.

PETITION OF CANVER LLC FOR INSTRUCTIONS IN THE ADMINISTRATION OF A TRUST PURSUANT TO MINN. STAT. § 501C.0201 *et seq*.

TO THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT:

I. INTRODUCTION

1. Petitioner Canver LLC ("Canver" or "Petitioner"), a holder of certificates issued by the OWNIT Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2006-7 (the "Trust"), files this petition (the "Petition") pursuant to Minn. Stat. § 501C.0201 *et seq*., seeking instruction regarding the administration of the Trust, namely, instruction to the Trustee to reject a patently unfair and prejudicial proposed settlement of valuable mortgage repurchase or "putback" claims.

2. The Trust is a residential mortgage-backed securities ("RMBS") trust backed by thousands of loans (the "Mortgage Loans") across two loan groups, Group One and Group Two.[1] The Mortgage Loans were originated or acquired by Ownit Mortgage Solutions Inc. ("Ownit"), which then sold the Mortgage Loans to Merrill Lynch Mortgage

[1] Capitalized terms not otherwise defined herein have the meaning ascribed to them in the Trust's Pooling and Servicing Agreement (Ex. 2 to this Petition) or the Trustee's September 2018 Notice to Trust Certificateholders (Ex. 6 to this Petition), as applicable.

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Lending, Inc. ("Merrill Lending," "Defendant," or the "Sponsor") pursuant to a Transfer Agreement. In the Transfer Agreement, Ownit made extensive representations and warranties about the quality and characteristics of the Mortgage Loans. Merrill Lending then sold the Mortgage Loans to its affiliate, Merrill Lynch Mortgage Investors, Inc. (the "Depositor"), which then sold such Mortgage Loans to the Trust pursuant to a Sale Agreement. In the Sale Agreement, Merrill Lending assumed liability for Ownit's representations and warranties, and made additional representations and warranties of its own. Through the various agreements underlying the Trust, U.S. Bank National Association, as Trustee of the Trust ("U.S. Bank" or the "Trustee"), was assigned the right to enforce any breaches of representations and warranties by Merrill Lending.

3. Following the revelation of widespread breaches of such representations and warranties throughout the Mortgage Loans in the Trust, the Trustee filed an action against the Sponsor in the Supreme Court of the State of New York, New York County, captioned *Ownit Mortgage Loan Trust, Series 2006-7 (OWNIT 2006-7), by U.S. Bank National Association, solely in its capacity as Trustee v. Merrill Lynch Mortgage Lending, Inc.*, Index No. 651373/2014 (Sup. Ct. N.Y., N.Y. Cnty.) (the "Putback Action"). Therein, the Trustee alleged that the Sponsor's representations and warranties regarding the Mortgage Loans were largely false, causing the Trust to incur substantial losses. A copy of the Complaint filed in the Putback Action is attached hereto as **Exhibit 1**. The Putback Action is now at an advanced stage, and expert reunderwriting and damages reports have been completed and submitted to the Sponsor by the Trustee.

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4. The Trustee is now considering resolving the Putback Action for a sum of $62.6 million (the "Proposed Settlement"), of which $43.43 million will be allocated to Certificates backed by the Trust's Group Two Mortgage Loans, while $19.2 million will be allocated to Certificates backed by the Trust's Group One Mortgage Loans. The Proposed Settlement is grossly inadequate in relation to the value of the claims in the Putback Action—which, based on the loan-by-loan review of the Mortgage Loans already conducted by the Trustee's reunderwriting expert in the Putback Action, exceeds $225 million before factoring in substantial prejudgment interest. The Proposed Settlement is also materially lower than settlements in comparable actions involving the same type of RMBS trusts, and at a comparable stage in the litigation.

5. Moreover, it is readily apparent that the Proposed Settlement—which appears to have been negotiated by the same Certificateholder who directed the Trustee to initiate the Putback Action (the "Directing Holder")—is designed to maximize the interests of the Directing Holder and an affiliate of the Defendant (the "Affiliated Holder") that are both senior Certificateholders, at the expense and prejudice of all other Certificateholders. Namely, the Proposed Settlement will compensate only senior Certificateholders (the majority of which are owned by the Directing Holder and the Affiliated Holder), while saving the Defendant Sponsor tens of millions of dollars in additional liability. Tellingly, ***the Proposed Settlement is structured to provide just enough compensation to the Trust to reverse the senior Certificateholders' losses, and not a penny more, while Defendant's expenses are minimized and an affiliate of Defendant (the Affiliated Holder) receives back a portion of the Proposed***

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Settlement. This settlement is thus a "win-win" for the Defendant and the Directing Holder but leaves all of the more junior and most adversely affected Certificateholders with zero recovery.

6. Moreover, the Trustee undertook a flawed voting process for the settlement that relied on an inappropriate voting metric to ensure approval, by excluding from the vote all Certificateholders likely to oppose it. Originally, after negotiating directly with the Directing Holder, the Sponsor submitted a proposed offer to the Trustee to resolve the Putback Action for a total of only $43.43 million, which was to be allocated entirely to senior Certificates backed by Group Two Mortgage Loans (the "Original Settlement"). These Group Two-backed senior Certificates are held almost entirely by the Directing Holder and the Affiliated Holder. In expressing support for the Original Settlement, the Directing Holder requested that the Trustee conduct "a voting process" of "all eligible Certificateholders." The Trustee elected to use the definition of Voting Rights set forth in the Trust's governing agreements to determine the pool of purported "eligible Certificateholders"; however, these governing agreements do not provide that such Voting Rights shall be used (or that a majority shall be sufficient) to approve a settlement of this nature. This is particularly true where, as here, 1) Certificateholders' Voting Rights have been distorted by the very losses over which the Sponsor is being sued and 2) Voting Rights are already skewed in favor of senior Certificateholders by the particular accounting methodology employed by the Trust's governing agreements.

7. *First*, since Voting Rights, as defined in such governing agreements for the certain limited purposes of voting contained therein, are based on the Current Principal

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Balance of Trust Certificates, and the Trust has absorbed over $293 million in collateral losses, most of the Trust's Certificateholders that have absorbed losses have lost all Voting Rights. Thus, using Voting Rights for purposes of this vote excluded the majority of the Trust's Certificateholders that the Proposed Settlement is intended to compensate from participating, despite the fact that these more junior Certificateholders are entitled to be made whole for any losses out of recoveries to the Trust, in the order of seniority, and are eligible to have their Current Principal Balances "written up" and their Voting Rights restored in the event of such recoveries. Rather than recognizing the ongoing interest of these junior Certificateholders in the Trust and the Putback Action, the voting process undertaken by the Trustee completely excluded the votes of such holders—the holders, like Petitioner,[2] who had suffered the greatest losses and were most likely to object to the Directing Holder's and Defendant's self-serving settlement—in order to create the appearance of unanimous support.

8. *Second*, because this Trust is a so-called "implied write-down" Trust, the Trust's governing agreements do not permit the Current Principal Balance of the senior Certificates to be written down ***at all***, even when they absorb losses. Such provisions were written at a time when it was not anticipated that losses in the Trust would ever be so great as to affect senior Certificates. However, the Sponsor's sale of Mortgage Loans with widespread defects has caused the Trust to suffer losses of such a magnitude that

[2] Petitioner owns bonds in the M1 Class, which are the most senior "mezzanine" class of Certificates, just below the Certificates held by the Directing holder. These Certificates would be entitled to receive any additional recoveries (and regain their Certificate Principal Balance and Voting Rights) if the settlement payment were increased, and ultimately to be made whole by a settlement at market rates.

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even senior Certificates have been impacted. As such, the use of the Voting Rights metric to determine support for the Proposed Settlement artificially skews the vote in favor of those senior Certificateholders, who are insulated from Voting Rights losses as an unintentional byproduct of this Trust's particular accounting methodology.

9. Nevertheless, in determining whether to accept the Original Settlement, the Trustee undertook a vote based only on the Voting Rights metric and, in a notice issued to all Certificateholders, claims to have received virtually unanimous support for the Original Settlement from Certificateholders. Having now received the purportedly improved Proposed Settlement, which increases the total payment to $62.6 million, the Trustee has indicated that it will not allow Certificateholders to vote anew, but will apply the results of the flawed and prejudicial voting process used to obtain approval for the Original Settlement to the new Proposed Settlement, again suggesting near unanimous support.

10. The Trustee should reject this unfair Proposed Settlement, notwithstanding the results of its skewed voting process. As an initial matter, the Proposed Settlement comes nowhere close to compensating Certificateholders in the Trust as a whole for the significant value of these claims, based on the expert findings in the Putback Action, the advanced stage of the case, and the market value of these claims as determined by the numerous public settlements of comparable cases, as detailed herein. The Proposed Settlement is particularly unfair to Certificates backed by Group One Mortgage Loans, including the "mezzanine" Certificates held by Petitioner, which are backed by both Loan Groups. While the Original Settlement provided no Group One Settlement Payment at

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all, under the Proposed Settlement, Certificates backed by Group One Mortgage Loans are still to recover a disproportionately low percentage of their losses compared to Certificates backed by Group Two Mortgage Loans.

11. Moreover, while the Proposed Settlement calls for an additional payment of $7 million to be used to reimburse the Trust and/or Trustee for costs and expenses incurred in connection with the Putback Action (the "Litigation Reimbursement Payment"), this payment will only be allocated to holders of Certificates backed by Group Two Mortgage Loans. This is despite the fact that cash flows from *both* Loan Groups have funded the Putback Action, as the Trustee has acknowledged. Thus, Certificateholders whose holdings are backed by Group One Mortgage Loans will have paid their full share of expenses to fund the Putback Action but will receive unequal compensation from the Proposed Settlement in exchange for releasing their claims, and no reimbursement for the litigation costs and expenses that they incurred. Meanwhile, Certificates backed by Group Two Mortgage Loans, which on information and belief include all of the Directing Holder's holdings, will receive a windfall on top of their larger proportionate recovery, as they also will be compensated for a portion of the litigation expenses incurred by Group One Certificateholders.

12. Petitioner seeks the Court's intervention and instruction to the Trustee to prevent the approval of an unfair and prejudicial settlement based on an exclusionary voting process that improperly favored senior Certificateholders' interests over those of junior Certificateholders, in violation of the Trust's governing agreements. In order to satisfy its common law duties to act in the best interests of all Certificateholders, and to

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ensure that the Directing Holder and Affiliated Holder are not using their Trust holdings to prejudice the rights of other Certificateholders, the Trustee cannot accept the inequitable Proposed Settlement, particularly without further investigation into and scrutiny of the voting process and the dual role of the Sponsor therein, as both Defendant and Affiliated Holder.

13. For all of these reasons, Petitioner seeks an Order instructing the Trustee to reject the Proposed Settlement and continue prosecuting the Putback Action for the Trust's benefit. Based on the advanced stage of the Putback Action, historical success of putback actions involving similar RMBS trusts and circumstances, and the Trustee's substantial experience litigating same, the likely recovery in the Putback Action will dwarf both the Proposed Settlement and the cost to the Trust of continuing to prosecute the Putback Action.

14. If the Court provides such an instruction to the Trustee, Petitioner also seeks an Order finding that the actions taken or to be taken by the Trustee with respect to such instruction are in good faith and reasonable under the circumstances and satisfy the duties of U.S. Bank as Trustee. Alternatively, if this Court is not inclined to instruct the Trustee to reject the Proposed Settlement at the outset, Petitioner respectfully requests that this Court enter an interim Order instructing the Trustee not to accept the Proposed Settlement or any further proposed settlement pending a final Order in this proceeding; and further instructing the Trustee to seek to lift the stay in the Putback Action and continue litigating the Putback Action until a judgment is obtained or an adequate settlement offer is received from the Defendant.

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II. JURISDICTION AND VENUE

15. Canver owns RMBS certificates issued by the Trust and is, therefore, a Trust beneficiary and an "interested person" within the meaning of Minn. Stat. §§ 501C.0201(a) and 501C.0201(b). Canver invokes the *in rem* jurisdiction of this Court pursuant to Minn. Stat. § 501C.0201(c).

16. The Trustee, which is the successor to the original trustee for the Trust, is a national banking association and has offices in St. Paul, Minnesota.

17. The Court has jurisdiction over this Petition under Minn. Stat. § 501C.0202(24) because Canver asks the Court to instruct the Trustee regarding matters involving the Trust's administration and the discharge of the Trustee's duties, and to provide a declaration of rights.

18. The Petition is properly venued in this Court pursuant to Minn. Stat. § 501C.0207(a)(2)(i).

III. BACKGROUND

19. The Trust is governed by a Pooling and Servicing Agreement (the "PSA") dated as of October 1, 2006 by and between the Depositor; Litton Loan Servicing LP, as Servicer ("Litton"); and LaSalle Bank National Association (predecessor to U.S. Bank), as Trustee ("LaSalle"). The PSA is governed by the laws of the state of New York. A copy of the PSA is attached hereto as **Exhibit 2**.

20. The Trust was created to securitize the Mortgage Loans, which were originated by Ownit. Ownit sold the Mortgage Loans to the Sponsor pursuant to a Master Mortgage Loan Purchase and Interim Servicing Agreement dated as of April 1,

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2005 (the "Transfer Agreement"); and a supplement to the Transfer Agreement dated as of November 3, 2006 (the "Bring Down Letter"). The Sponsor then sold the Mortgage Loans to the Depositor, pursuant to a Mortgage Loan Sale and Assignment Agreement dated as of October 1, 2006 (the "Sale and Assignment Agreement" and, collectively with the Transfer Agreement, the Bring Down Letter, and the PSA, the "Governing Agreements").

21. Through the PSA, the Depositor created the Trust, deposited the Mortgage Loans into the Trust, and sold all of the Depositor's rights, title and interests in the Mortgage Loans to the Trust for the benefit of the Trust's Certificateholders. *See* Ex. 2 at § 2.01. In exchange for the Depositor's sale of its rights, title and interests in the Mortgage Loans to the Trust, the Trust issued certificates to the Depositor, which represent beneficial ownership interests in the Trust and are backed by the Mortgage Loans. *Id.*; *see also id.* at § 1.01 (definition of "Certificate Owner"). After entering into the PSA, the Depositor sold the Trust certificates to the Sponsor's affiliated underwriter, Merrill Lynch, Pierce, Fenner & Smith Incorporated, which then marketed and sold the certificates to the Certificateholders.

22. The Mortgage Loans are separated into two separate loan groups: Group One and Group Two (each a "Loan Group" and together, the "Loan Groups"). *See* Ex. 2 at § 1.01 (definitions of "Group One" and "Group Two"); Prospectus Supplement, Ownit Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2006-7, dated Nov. 1, 2006, attached hereto as **Exhibit 3**, at S-31-S-32. Any distributions made to

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Certificateholders collected from the Mortgage Loans are "limited to collections from a designated portion of the Mortgage Loans in the related Mortgage Pool." Ex. 3 at 17.

23. The PSA originally appointed LaSalle as the Trustee. Bank of America acquired LaSalle in or about October 2007, and U.S. Bank purchased the trust administration segment of Bank of America's business in or about January 2011. U.S. Bank then succeeded to LaSalle's former position as Trustee pursuant to Section 8.10 of the PSA.

24. Under the terms of the Governing Agreements, the Sponsor made, or otherwise assumed liability for, representations and warranties concerning the Mortgage Loans backing the Trust. These representations and warranties included, *inter alia*, that:

(i) Each Mortgage Loan generally adhered to certain characteristics and Ownit's underwriting standards and guidelines, and satisfied other pertinent origination, collection and servicing practices;

(ii) No first lien Mortgage Loan had an excessive loan-to-value ("LTV") ratio, and no second lien Mortgage Loan had an excessive combined loan-to-value ("CLTV") ratio;

(iii) The Mortgage Loans were supported by qualified appraisals;

(iv) Each Mortgage Loan file contained any and all requisite documentation;

(v) That all of the information in the Mortgage Loan Schedule was true and correct; and

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(vi) The Mortgage Loans complied with all applicable state, federal and local lending laws.

See Ex. 2 at § 2.03.

25. Pursuant to Section 2.03(c) of the PSA, the Sponsor agreed that:

> Upon discovery by any of the Depositor, the Servicer, the NIMs Insurer or the Trustee of a breach of any of such representations and warranties that adversely and materially affects the value of the related Mortgage Loan, Prepayment Charges or the interests of the Certificateholders, the party discovering such breach shall give prompt written notice to the other parties. Within 90 days of the discovery of such breach of any representation or warranty, the Transferor or the Sponsor [Merrill Lending], as applicable, shall either (a) cure such breach in all material respects, (b) repurchase such Mortgage Loan or any property acquired in respect thereof from the Trustee at the Purchase Price or (c) within the two year period following the Closing Date, substitute a Replacement Mortgage Loan for the affected Mortgage Loan. *Id.*

26. Furthermore, the Trustee "agree[d] to hold the Trust Fund [including the Mortgage Loans] and exercise the rights referred to above for the benefit of all present and future" Certificateholders. *Id*. § 2.06.

27. In October 2012, the Trustee received a letter from a Certificateholder conveying the results of a Mortgage Loan re-underwriting analysis (the "First Review"). *See* Ex. 1 ¶ 40. The First Review revealed no fewer than 963 defective Mortgage Loans, with an aggregate principal balance of approximately $134,876,314.61. *Id.*

28. A second review was then conducted with respect to 2,313 Mortgage Loans, based on publicly available information and using an automated valuation model (the "Second Review" and, together with the "First Review," the "Loan Reviews"). *Id.* at ¶ 41. The Second Review showed indications of material breaches of the Governing

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Agreements in no fewer than 1,108 Mortgage Loans, having an aggregate principal balance of approximately $208,421,246, constituting 48% of the loans reviewed and approximately 28% of the total loans in the Trust. *Id.* at ¶¶ 41-42.

29. The original aggregate principal balance of the 3,953 loans originally sold to the Trust was approximately $685,334,867. *Id.* at ¶ 15. Since the closing date of the transaction, the Trust has suffered collateral losses of approximately $293,067,139.15, largely as a result of the defective Mortgage Loans sold to the Trust by the Sponsor. *See* Trust Remittance Report, dated September 25, 2019, a copy of which is attached hereto as **Exhibit 4**, at 4. As a result of the massive losses suffered by the Trust, the outstanding principal balances of all but the Class A Certificates (the most senior Trust Certificates) have been written down to zero. *See* Ex. 4 at 1.

A. Commencement of the Putback Action.

30. Based on the aforementioned Loan Reviews, on or about May 2, 2014, the Trustee, on behalf of the Trust, commenced the Putback Action against the Sponsor. On or about February 25, 2015 the Trustee filed its Complaint, alleging, among other things, that the Sponsor had breached the Governing Agreements by breaching its numerous representations and warranties with respect to the Mortgage Loans it sold to the Trust, and by failing to comply with its repurchase obligations.[3] *See* Ex. 1 ¶¶ 5-6; Notice to

[3] The Complaint sought: (1) an order for specific performance of Merrill Lending's obligations to cure or repurchase all Mortgage Loans in the Trust in breach of the representations and warranties; (2) alternatively, "an award of damages for each Mortgage Loan with respect to which specific performance is, or may become, impracticable, impossible or otherwise unavailable"; (3) indemnification; (4) prejudgment interest; and (5) "[a]ny other relief that the Court deem[ed] just and proper." Id. at p. 33.

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Holders dated February 25, 2015 (the "February 2015 Notice"), a copy of which is attached hereto as **Exhibit 5**. The February 2015 Notice stated, "the Trustee intends to use Trust assets to pay fees and expenses relating to the litigation to the extent permitted by the PSA." Ex. 5 at 2. In the Complaint, the Trustee noted that "[o]ne or more Trust certificateholders . . . directed the Trustee to pursue [the Putback Action] to enforce the Representations and [the Sponsor's] related Repurchase Obligations." Ex. 1 ¶ 7.[4]

31. In April 2015, the Sponsor moved to dismiss the Complaint and to consolidate its motion to dismiss in the Putback Action with motions to dismiss in three other RMBS putback actions. *See* Putback Action, Dkt. Nos. 6-7, 13-14.[5] The Court granted the motion to consolidate (*id*., Dkt. No. 48) and, by Decision and Order dated December 7, 2015, it denied, in large part, the Sponsor's motion to dismiss the Putback Action (*id*., Dkt. No. 134). Specifically, the Court granted the motion to dismiss only to the extent that it dismissed the claim for indemnification, including indemnification for attorneys' fees,[6] and the breach of contract action insofar as the Complaint pled a breach

[4] As set forth in paragraph 5, *supra*, the Certificateholders who directed the Trustee to take such action are commonly known, and are referred to herein, as the "Directing Holder."

[5] All Putback Action docket entries are available at the New York e-Courts website, Web Civil Supreme, at https://iapps.courts.state.ny.us/webcivil/FCASMain.

[6] Following this decision, the Appellate Division of the Supreme Court of New York, First Department, reversed several such orders dismissing claims for attorneys' fees, finding that that RMBS trustees may seek indemnification for legal fees and costs incurred in enforcing representation and warranty obligations. *See Deutsche Bank Nat'l Tr. Co. v. EquiFirst Corp*., 154 A.D.3d 605 (1st Dep't 2017); *Wilmington Tr. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 152 A.D.3d 421 (1st Dep't 2017); *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 140 A.D.3d 518 (1st Dep't 2016). Thus, if the stay of the Putback Action were lifted, it is likely that the Trustee, as Trustees have done in other RMBS actions, will be permitted by the Court (or by stipulation with Defendant) to revive its claim for indemnification of attorneys' fees.

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of an independent duty to repurchase defective loans. *Id*. The Trustee's cause of action for breach of the representations and warranties in the Governing Agreements—the primary claim in the Putback Action—survived, and discovery commenced.

B. The Original Settlement Agreement and the Consent Solicitation Conducted by the Trustee.

32. By notice dated September 28, 2018 (the "September 2018 Notice"), the Trustee informed Certificateholders that, on September 7, 2018, the Trustee received a letter from the National Credit Union Administration (the "NCUA") in its capacity as an Agency of the Executive Branch of the United States, as the guarantor of the NCUA 2011-R1 Trust. Such letter enclosed a copy of a proposed Trust Settlement Agreement (the "Original Settlement Agreement") that the NCUA had negotiated with Bank of America, National Association ("BANA"), as successor servicer to LaSalle, and parent of the Sponsor and the Depositor (BANA, the Sponsor and the Depositor are referred to, collectively, as the "Settlement Counterparties"). A copy of the Trustee's September 28, 2018 Notice is attached hereto as **Exhibit 6**. Upon information and belief, the NCUA is the Directing Holder that directed the Trustee to initiate the Putback Action. In its letter, the NCUA asked the Trustee to conduct a vote of eligible Certificateholders and to accept the Original Settlement Agreement if a majority of eligible Certificateholders approved. *See* Ex. 6 at 2.

33. The Original Settlement Agreement provided for an aggregate cash payment of $43,430,000 (the "Original Settlement Payment") plus an additional payment of $7,000,000 to reimburse the Trust and/or the Trustee for costs and expenses incurred

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and paid by the Trust and/or the Trustee in connection with the Putback Action (the "Original Litigation Reimbursement Payment"), to resolve *all* claims that were or could have been asserted in the Action. *Id*. at App'x I, Ex. A. Both the Original Settlement Payment and the Original Litigation Reimbursement Payment were to be allocated to Group Two Certificateholders *only*, leaving Group One Certificateholders with no recovery at all. *See id.*

34. The September 2018 Notice also informed all Certificateholders that, at the request of the NCUA, the Trustee would be soliciting a vote of Certificateholders as to whether they approved of the economic terms of the Original Settlement Agreement. *Id.* at 2-3. However, the Trustee informed holders that only the votes of Certificateholders who *currently* hold "Voting Rights" pursuant to the terms of the PSA—those with certificates having a Certificate Principal Balance greater than zero as of the Record Date—would be counted. *Id*. at 3. Conversely, "any responses received from Certificateholders who do not have any Voting Rights pursuant to the terms of the PSA [would] not be counted when tabulating results of the solicitation." *Id*. Consequently, holders of Certificates that once carried Voting Rights, but which had since suffered a complete loss of those rights due to the Sponsor's breaches of representations and warranties, had no ability to participate in the vote, and thus had no voice in the Trustee's evaluation of the Original Settlement Agreement.

35. In both the September 2018 Notice and a notice from the Trustee circulated on or about November 5, 2018 (the "November 2018 Notice"), a copy of which is attached hereto as **Exhibit 7**, the Trustee informed holders that an "Affiliated Holder," which is an

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affiliate of Defendant Merrill Lending, owns certain certificates issued by the Trust and certain Voting Rights under the PSA. Ex. 6 at 3; Ex. 7 at 2-3. In the November 2018 Notice, the Trustee informed holders that the Affiliated Holder had exercised those Voting Rights to vote in favor of the Original Settlement Agreement, but that such Voting Rights were to be excluded from the numerator and the denominator when tabulating the vote. *See* Ex. 7 at 2.

36. Specifically, the Trustee informed holders that, while 97.12% of the Trust's Voting Rights had responded to the solicitation and directed the Trustee to accept the Original Settlement Agreement, "if the Voting Rights held by the responding Affiliated Holder(s) are excluded from both the numerator and the denominator, then Certificateholders holding 96.13% of the Trust's Voting Rights as of the Record Date responded to the solicitation and voted in favor of the Trustee's acceptance of a settlement with respect to the Trust and the Action on the economic terms set forth in the [Original] Proposed Settlement Agreement." *Id*. The Trustee further informed holders "that Certificateholders holding 98.61% of the aggregate outstanding principal amount of Class A-2B, Class A-2C, and Class A-2D Certificates [which are the only Group Two certificates with current voting rights], including the Affiliated Holder(s), responded to the solicitation and all voted in favor of the proposed settlement." *Id*. The Trustee further stated that, "[i]f the Certificates owned by the Affiliated Holder(s) are excluded [but, notably, this did not state that such Certificates were excluded from both the numerator and the denominator], then Certificateholders holding 71.02% of the aggregate

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outstanding principal amount of Class A-2B, Class A-2C, and Class A-2D Certificates responded to the solicitation and all voted in favor of the proposed settlement." *Id*.

37. As will be discussed in greater detail below, while the results of the consent solicitation reported in the November 2018 Notice are vague and potentially misleading, the results appear to reveal that, as of the Record Date, the Affiliated Holder held over 25% of the Group Two Certificates in the Trust. Further, based on publicly available information, it appears likely that the Affiliated Holder also holds 100% of the Group One Certificates in the Trust.[7] Of the remaining Group Two Certificates in the Trust not held by the Affiliated Holder, publicly available information about the holdings of the NCUA 2011-R1 Trust guaranteed by the Directing Holder shows that ***the Directing Holder owns or controls the overwhelming majority (71.02%), and all such Group Two Certificates (other than those held by the Affiliated Holder) that voted in favor of the Original Settlement***. *See* NCUA Guaranteed Notes 2011-R1 Trust Investor Report dated October 7, 2019, a copy of which is attached hereto as **Exhibit 8**, at S3 (identifying the Directing Holder's holdings in the Trust). Thus, the overwhelming majority, if not all, of the votes cast in favor of this settlement appear to have come from either the Directing Holder or the Affiliated Holder.

[7] A settlement between, among others, the Federal Housing Finance Agency ("FHFA") and Bank of America Corporation, Bank of America, N.A., NB Holdings Corporation, Asset Backed Funding Corporation, Banc of America Mortgage Securities, Inc., and Banc of America Funding Corporation (collectively, the "Bank of America Defendants"), reveals that, in exchange for a $9.3 billion payment, an affiliate of the Bank of America Defendants obtained the entirety of the Group One Certificates. *See* Settlement Agreement between, *inter alia*, FHFA and the Bank of America Defendants, Ex. A at 5, *available at*: https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/FHFABACSettlementAgreement.pdf. Upon information and belief, the Affiliated Holder still owns these Group One Certificates.

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C. The Putback Action Is Stayed for Nearly One Year While the Trustee Evaluates the Original Settlement and Proposed Settlement.

38. Pursuant to a Stipulation filed in the Putback Action on October 9, 2018—following the conclusion of fact discovery, and well into expert discovery, with the Trustee's initial expert reports having been completed (*see* Putback Action, Dkt. Nos. 263-264, 269-270)—the Trustee and the Defendant (the "Parties") requested that the Court stay the Putback Action for an indefinite period. (*Id.*, Dkt. No. 274.) The reasoning the Parties provided for this request was that the Trustee had received the Original Settlement Agreement and wished to evaluate it, including soliciting feedback from Certificateholders as to whether it should accept or reject the Original Settlement Agreement. (*See id.*) On or about October 25, 2018, the Court So-Ordered the Stipulation, but noted that, "[t]he approval of the stay is subject to reconsideration by the court, if appropriate." (*Id.*, Dkt. No. 275.)

39. On or about January 11, 2019, the Parties (along with the parties from two other stayed actions) jointly filed a letter to the Court, "to update the Court on the status of the stay[ ] in the [Putback Action[ ]." A copy of the Parties' January 11, 2019 letter to the Court is attached hereto as **Exhibit 9**. Therein, the Parties stated that, "[a]s part of its evaluation of the [Original] Settlement[ ], the Trustee has conducted a solicitation of the certificateholders in [the Trust] and retained Compass Lexecon to assist it in evaluating the [Original] Settlement[ ]. The expert evaluation work is ongoing." Ex. 9. The Parties thus requested that, "the stay remain in place and that the parties report to the Court regarding the status of the Trustee's evaluation by April 15, 2019." *Id.*

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40. On or about April 15, 2019, the Parties jointly filed another letter, a copy of which is attached hereto as **Exhibit 10**, purportedly to update the Court once again on the status of the Trustee's evaluation of the Original Settlement Agreement, but very little had changed. *See* Ex. 10. To wit, the Parties stated that the Trustee's expert "continues to evaluate the [Original] Settlement[ ]. The Trustee expects to commence trust instruction proceedings with respect to the [Original] Settlement[ ] when such expert evaluation is completed." *Id*. The only other change from the prior letter was that the Parties were now requesting that the Court keep the stay in place, subject to a further report by the Parties, until at least July 15, 2019. *See id.*

41. On or about July 15, 2019, the Parties filed *yet another* joint letter, a copy of which is attached hereto as **Exhibit 11**, to update the Court regarding the status of the Original Settlement Agreement, but again virtually nothing had changed. *See* Ex. 11. The Parties stated only that, "[t]he Trustee continues to evaluate the proposed settlement[ ]." *Id.* On that basis alone, the Parties further requested that the Court keep the stay in place, subject to a further report by the Parties, until at least October 14, 2019. *See id.*

42. On or about August 9, 2019, the Trustee issued a new notice to Certificateholders (the "August 2019 Notice"), a copy of which is attached hereto as **Exhibit 12,** informing them of the terms of the Proposed Settlement and attaching a copy of an updated settlement agreement (the "New Settlement Agreement"). *See* Ex. 12 at 2, App'x. I. The New Settlement Agreement featured the same payment to Certificates backed by Group Two Mortgage Loans as the Original Settlement Agreement ($43,430,000), but now also featured a payment to Certificates backed by Group One

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Mortgage Loans of $19,255,455. Ex. 12 at 2. However, the Trustee also noted that the Litigation Reimbursement Payment would remain the same as the Original Litigation Reimbursement Payment and would continue to be allocated entirely to Certificates backed by Group Two Mortgage Loans. *Id.* The Trustee specifically noted that, "[a]lthough costs and expenses incurred in connection with the Action were paid from funds collected from both Group One and Group Two Mortgage Loans, the New Settlement Agreement does not provide for an additional litigation reimbursement payment to be allocated to Certificates backed by Group One Mortgage Loans." *Id.* at 2-3. The August 2019 Notice also revealed that, based on the Mortgage Loans containing material breaches that the Trustee's own underwriting expert has identified, the estimated lifetime loss to the Trust from the Sponsor's breaching loans is at least $225,630,000. *See* Ex. 12 at 2.

43. The August 2019 Notice states that, other than the updated financial terms, the New Settlement Agreement "contains the same basic terms as the [Original] Proposed Settlement Agreement originally presented to the Trustee . . . ." *Id.* The Trustee further states that it does not intend to conduct another vote to approve the New Settlement Agreement "[b]ecause the New Settlement Agreement does not modify the payment terms with respect to Certificates backed by Group Two Mortgage Loans and provides for a larger overall payment to the Trust than the [O]riginal Proposed Settlement, which was approved by the holders of approximately 97% of the Trust's Voting Rights (including the votes of the Affiliated Holder) . . . ." *Id.* at 3. The Trustee thus has indicated that it would continue to exclude the votes of Certificateholders who had suffered a total loss (such loss

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occurring due to the Sponsor's breaches of representations and warranties, and which loss stood to be remedied and recovered via the Putback Action), while giving significant weight to the votes of Affiliated Holders, who were clearly conflicted by their affiliation with the Defendant, and the votes of the Directing Holder, which had structured a settlement that covered only its own losses and those of the Affiliated Holder without providing a penny for any other Trust Certificateholders.[8]

44. On or about October 9, 2019, the Trustee issued another notice (the "October 2019 Notice"), a copy of which is attached hereto as **Exhibit 13**, indicating it "has retained an expert to review the terms of the New Settlement Agreement and advise the Trustee as to their reasonableness" and still intends to commence a Trust Instruction Proceeding in this Court to seek instruction regarding the Trustee's ultimate decision with respect to the New Settlement Agreement. Ex. 13 at 2. The October 2019 Notice also invites any Certificateholders wishing to express their views regarding the New Settlement Agreement to contact the Trustee in writing by no later than November 8, 2019 even though the Trustee had previously requested feedback from Certificateholders by September 9, 2019.

45. On or about October 11, 2019, the Parties filed *another* joint letter, a copy of which is attached hereto as **Exhibit 14**, to update the Court on the Trustee's evaluation of

[8] Based on publicly available information, as discussed above, Petitioner is informed and believes that the Affiliated Holder owns 100% of the Group One Certificates, and that the Affiliated Holder and the Directing Holder own the overwhelming majority of the Group Two Certificates. Thus, on information and belief, the Directing Holder and the Affiliated Holder own almost the entirety of the Certificates that stand to benefit from the Proposed Settlement.

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the Proposed Settlement and to ask that the stay of the Putback Action remain in place until at least January 9, 2020. Remarkably, however, in requesting that the stay remain in place for another *three months*, the Parties make no mention of the fact that the Trustee is now evaluating a *new* settlement—only that the "Trustee continues to evaluate the proposed settlement[ ]." Ex. 14. With over thirteen months having now elapsed since the Trustee first informed Certificateholders of the Original Settlement, and still no indication from the Trustee of any timeline for action, Petitioner has filed the instant Petition.

IV. DISCUSSION

46. The Proposed Settlement is inadequate and unfairly structured on its face, and the process the Trustee has undertaken to solicit Certificateholders' views is fundamentally flawed and unnecessarily protracted. As such, and for the reasons more fully set out below, Canver respectfully requests that this Court issue an Order instructing the Trustee to reject the Proposed Settlement, request that the Court lift the stay of the Putback Action, and continue prosecuting the Putback Action until a judgment is obtained or an adequate settlement offer is received from the Defendant. In the alternative, if the Court is not yet prepared to issue such an Order, Canver respectfully requests that the Court issue an interim Order instructing the Trustee not to accept the Proposed Settlement or any further proposed settlement, and to continue prosecuting the Putback Action, pending a final Order in this proceeding, in order to give Petitioner the opportunity to conduct discovery relating to the issues raised herein.

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A. The Proposed Settlement Is Inequitable and Inadequate, and Not Subject to Reasonable Acceptance by the Trustee.

47. The Proposed Settlement is unfairly structured and inequitable on its face, such that the Trustee's acceptance of same would be unreasonable and an abuse of its discretion under the Governing Agreements and New York law. In evaluating a trustee's acceptance of a settlement under New York law, which governs the Trust (Ex. 2 § 10.03), courts evaluate whether a trustee abused its discretion or acted unreasonably or in bad faith. *In re Bank of New York Mellon,* 127 A.D.3d 120, 126 (1st Dep't 2015). A trustee abuses its discretion if it acts in its own self-interest, in the interest of the other party to the settlement, or in the interest of any subgroup of Certificateholders, "rather than in the interests of the investors generally." *In re U.S. Bank Nat. Ass'n,* 27 N.Y.S.3d 797, 805 (Sup. Ct. N.Y. Cnty. Dec. 18, 2015).

48. Here, the Proposed Settlement and the Litigation Reimbursement Payment furthers the interests of only a subgroup of Certificateholders, one of which is the affiliate of the Defendant responsible for making payment of the Proposed Settlement. Even though the New Settlement Agreement now provides a small amount of compensation to Group One Certificateholders, it does not come close to adequately compensating all Certificateholders, or the Trust as a whole, for the value of the claims pending in the Putback Action. If the New Settlement Agreement is approved, the Settlement Counterparties will be released from *all* liability related to this Trust in exchange for a payment of approximately $62.6 million, despite the fact that the Trustee's own expert has already identified, as a result of material breaches by the Sponsor, real, recoverable

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lifetime losses to the Trust totaling at least $225,630,000. *See* Ex. 12, App'x. I, § 4; *see also id.* at 2. Given that current cumulative realized losses on the Mortgage Loans in the Trust total approximately $293 million, this means that the Trustee's own expert has already determined that the Sponsor is responsible for, at a minimum, 77% of the Trust's losses to date. This is even *before* taking into consideration future losses or the substantial prejudgment interest that has accrued on that amount since the date the Sponsor should have repurchased the breaching loans nearly seven years ago (which interest amount could easily double the base damages claim and bring it up to more than $400 million[9]).

49. The Sponsor is seeking to settle the claims in the Putback Action for approximately 16% of total, recoverable damages (i.e., over $400mm, including pre-judgment interest) and only 21% of the Trust's current cumulative realized losses—a rate far below that of comparable RMBS settlements, particularly given the advanced stage of the Putback Action.[10] This also means that the Proposed Settlement will only compensate

[9] Prejudgment interest in putback cases accrues in New York at 9% per annum (CPLR § 5004) from the repurchase date—the date that the defendant was first obligated to repurchase defective loans, after notice or discovery that a substantial number of identified loans were in breach. *See U.S. Bank N.A. v. DLJ Mtge. Capital, Inc.*, 2019 NY Slip Op 07327, *1, ___ AD3d ___ [1st Dept 2019]. This calculation of the damages claim does not include any recovery for attorneys' fees incurred by the Trust in prosecuting the Litigation, even though it appears the Trustee preserved such a claim by pleading its entitlement to indemnification in the Complaint. While the court in the Putback Action initially dismissed the Trustee's indemnification claim (which the Court deemed a request for attorneys' fees), recent decisions from the First Department confirm that RMBS trustees can recover legal fees and costs incurred in enforcing representation and warranty obligations, and that such claim could be reinstated if the Putback Action were to proceed. *See Deutsche Bank Nat'l Tr. Co. v. EquiFirst Corp.*, 154 A.D.3d 605 (1st Dep't 2017); *Wilmington Tr. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 152 A.D.3d 421 (1st Dep't 2017); *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 140 A.D.3d 518 (1st Dep't 2016).

[10] The value of the Proposed Settlement pales in comparison with the value of other RMBS repurchase claim settlements, made at the comparable stage of put-back litigation. For example, U.S. Bank obtained a settlement on behalf of the GPMFT 2006-HE1 Trust for 58% of collateral losses; U.S. Bank settled mortgage repurchase claims on behalf of three trusts in the "MARM" shelf for approximately 39% of collateral losses;

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holders of the senior Certificates in the Trust, consisting primarily of the Directing Holder and the Affiliated Holder, while holders of junior Certificates will receive nothing. If the Sponsor were to provide an increased settlement payment in line with market levels for comparable RMBS settlements, the most senior mezzanine Certificateholders, like Canver, would have their losses reversed almost entirely (*i.e.* the Certificate Principal Balance of their Certificates would be increased or "written-up"), would have their Voting Rights restored, and ultimately would receive a full recovery on the value of their Certificates.

50. For example, a settlement of 30% of Trust losses would constitute a payment of approximately $88 million, which would result in full write-ups to the Class M1 Certificates, while a settlement of 40% of Trust losses would constitute a payment of approximately $117 million, which would result in full write-ups to the Class M1 and M2 Certificates, entitling those Certificates to Voting Rights and full future cash distributions from the Trust. However, as discussed in more detail in the following section, if only Certificates with "Voting Rights" are allowed to weigh in on the Proposed Settlement, the Trustee has no incentive to take junior Certificateholders' interests into account, which may require maximizing recoveries by pursuing the Putback Action to judgment or negotiating a fair settlement of the Putback Action at market levels. Under the law, the Trustee is not permitted to disregard the interests of junior Certificateholders in this

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and U.S. Bank settled repurchase claims on behalf of the HVMLT 2005-10 Trust for 25% of collateral losses. *See In the Matter of Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-3*, Ct. File No. 62-TR-CV-19-7, Submission of Canton Investments LLC (Minn. Dist. Ct. May 6, 2019), a copy of which is attached hereto as **Exhibit 15**, at 4 and App'x. A (compiling sources).

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manner but must take the interests of all Certificateholders into account. *See In re U.S. Bank Nat. Ass'n*, 27 N.Y.S.3d at 805.

51. The Trustee's August 2019 Notice also purports to assert that the Proposed Settlement represents the same rate of recovery (applied now to both Mortgage Loan Groups) as the recovery for Group Two Mortgage Loans in the Original Settlement (27.8%), but the Group One payment actually represents a lower recovery percentage. The recovery on Group One Mortgage Loans in the Proposed Settlement represents 19.47% of Group One losses while the recovery on Group Two Mortgage Loans represents 22.37% of Group Two losses (both figures calculated based on data from the September 2019 remittance report). *See* Ex. 4. There is no discernible basis to treat the two Loan Groups disparately for settlement purposes. Further, for both Loan Groups, such a low rate of recovery at such an advanced stage of litigation, especially considering the actual and identified material breaches in both Groups by the Trustee's own reunderwriting expert, comes nowhere close to adequately compensating the Trust for the losses resulting from the Sponsor's widespread breaches of representations and warranties. *See* fns. 9, 10, *supra*.

52. Perhaps most egregiously, Group One Certificateholders will receive no portion of the Litigation Reimbursement Payment despite the fact that, as the Trustee has acknowledged, Trust funds from both Loan Groups have been used to pay the Trustee's expenses, both in the Putback Action and in connection with the Trustee's approval process for the Original Proposed Settlement Agreement (including expenses incurred by the Trustee in conducting its flawed voting process and in connection with its planned

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filing of a trust instruction proceeding in Minnesota state court). *See* Ex. 6 at 4; Ex. 7 at 3; Ex. 12 at 2-3; *see also* U.S. Bank Notice to Holders, dated July 18, 2018 (the "July 2018 Notice"), attached hereto as **Exhibit 16** at 2 ("As indicated in Prior Notices, fees and expenses incurred by the Trustee in connection with the Putback Action are paid from the Trust pursuant to the terms of the PSA.").

53. Conversely, under the Proposed Settlement, Certificates backed by Group Two Mortgage Loans, such as those held by the Directing Holder and Affiliated Holder, will obtain a windfall by receiving the entire Litigation Reimbursement Payment (*see* Ex. 12 at 2-3; *see also* Ex. 6, App. I, Ex. A ¶ 3), even though it is provided explicitly, "to reimburse the Trust and/or the Trustee for costs and expenses incurred and paid by the Trust and/or the Trustee in connection with the Action" (*see* Ex. 6 at 2). Accordingly, the structure of the Proposed Settlement, including the Litigation Reimbursement Payment, will leave Certificates backed by Group One Mortgage Loans in particular (including mezzanine Certificates, like those held by Canver, which are effectively backed by both Loan Groups), with unequal and inadequate consideration, and no recourse. Acceptance of such a lopsided and clearly compromised settlement by the Trustee would fall far short of the Trustee's duty to act in the interests of all investors generally. *In re U.S. Bank Nat. Ass'n,* 27 N.Y.S.3d at 805.

B. The Trustee Has Undertaken a Flawed Voting Process to Obtain Approval for the Inadequate Proposed Settlement.

54. As discussed above, the Trustee, has undertaken a voting process for the Original Settlement Agreement that excluded the very Certificateholders that suffered the

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greatest harm as a result of the Sponsor's contractual breaches and stand to have all of their claims released for zero recovery.[11] The principal balances of all but the Class A Certificates in the Trust were long ago written down to zero, based on the heavy losses suffered by the Trust due, in large part, to the defective loans originated or sponsored by the Sponsor. In addition, pursuant to the Trust's PSA, the Class A Certificates do not incur write-downs when they would otherwise suffer a realized loss, but instead bear an "implied write-down," in which they become undercollateralized but do not lose Voting Rights. Thus, the use of Voting Rights to determine Certificateholder preferences inherently skews the results in favor of the senior Certificateholders whose Voting Rights are never diminished, due to the terms of the PSA.

55. Notably, however, the full principal write-downs of the non-Class A Certificates do not imply that such Classes no longer have any interest in the Trust. To the contrary, if the Trust receives Subsequent Recoveries,[12] these Certificates stand to be written up—that is, their Certificate Principal Balances and Voting Rights would be restored—and such Certificateholders would thereafter stand to receive full distributions of their unpaid balances. Thus, it is illogical and inequitable that these Certificateholders with quite possibly the greatest stake in the outcome of the Putback Action and any settlement thereof, and which receive no recovery under the biased Proposed Settlement

[11] The Trust Certificates held by Canver have incurred a total write-down, thus wiping out their Voting Rights.

[12] As with most settlements in RMBS repurchase actions, the Proposed Settlement Agreement calls for settlement funds to be distributed as Subsequent Recoveries. *See* Ex. 6, App. I, Ex. A at 5 ¶ 4.

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negotiated by the Directing Holder, would not be allowed to participate in the voting process.

56. Nevertheless, the Trustee elected to conduct a vote regarding the Original Settlement (and apply the same results to the Proposed Settlement) using only the skewed Voting Rights metric to determine Certificateholder support. This meant that only the Class A Certificates (consisting of the Group One Certificates and Group Two Certificates held primarily by the Directing Holder and the Affiliated Holder), which were the only Certificates to have retained their Voting Rights, would be permitted to vote. Not coincidentally, the settlement payment provided under the Proposed Settlement is just enough to make the Class A Certificates virtually whole for any losses, and not a penny more. Namely, Class A Certificateholders are currently undercollateralized by approximately $65 million, so the settlement payment of $62.6 million is just enough to reverse their implied losses almost entirely. The result is that a settlement that favors only one group of Certificateholders was put to a vote by the Trustee in a manner that provides votes only to those same Certificateholders, resulting in the appearance of virtually unanimous approval. However, junior Certificateholders do not, and would have no reason to, support this settlement, as they would be releasing all of their claims and potential recoveries for zero benefit.

57. A fair solicitation process would seek to obtain and consider the votes of Certificateholders with unpaid balances, including those who would have had Voting Rights but for their Certificate Principal Balances being reduced to zero as a result of the massive losses incurred by the Trust. Likely recognizing this issue, in at least one prior

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solicitation regarding an RMBS settlement involving BANA (i.e., the Sponsor and Defendant) and its affiliates, U.S. Bank used a solicitation process that tabulated holders' votes based on metrics other than the "Voting Rights" construct in the relevant governing agreements. *See, e.g.*, U.S. Bank Notice Regarding Solicitation Responses Received by the Trustee to Holders of Harborview Mortgage Loan Trust 2005-10 Mortgage Loan Pass-Through Certificates, Series 2005-10, dated Apr. 21, 2017, at 2, a copy of which is attached hereto as **Exhibit 17**; *see also In the Matter of HarborView Mortgage Loan Trust 2005-10*, File no. 27-TR-CV-17-32 (Dist. Ct. of MN, Hennepin Cnty.), Second Amended Petition of U.S. Bank National Association (filed Sept. 6, 2018) ¶¶ 26, 30 (tabulating votes from all Certificateholders based on original Class Certificate Principal Balances). U.S. Bank thus clearly understands the logic and fairness inherent in such a process, and that it would be nonsensical to exclude all junior Certificateholders from the voting process in such a situation. Yet, that is exactly what U.S. Bank has done here.

58. The Trustee cannot reasonably accept a settlement that so blatantly favors the Certificateholders that negotiated it, and that was insulated by an approval process that excluded the votes of everyone else, without breaching its duties of good faith and fairness to all investors. Thus, Canver respectfully requests that this Court direct the Trustee to reject the Proposed Settlement.

C. The Trustee Failed to Address the Prospect of the Sponsor's and its Affiliates' Undue Influence over the Approval Process.

59. As stated above, the September 2018 Notice and the November 2018 Notice informed holders that an affiliate of the Sponsor owned certain Certificates issued by the

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Trust and certain Voting Rights under the PSA. *See* Ex. 6 at 3; Ex. 7 at 2-3. The results of that vote revealed the alarming fact that, in actuality, ***the Sponsor and/or its affiliates owned a substantial portion of the Trust's Voting Rights*** as of the Record Date.[13] Ex. 7 at 2-3. Based on publicly available information about the holdings of the Directing Holder and the Affiliated Holder, and the solicitation results provided by the Trustee, it appears that ***nearly all of the Trust's Group Two Voting Rights, including all that were cast in the voting process, are held by either the Directing Holder or the Affiliated Holder, and that all of the Trust's Group One Voting Rights, upon information and belief, are held by the Affiliated Holder***. *See* paragraph 37, *supra*.

60. The Trustee's November 2018 Notice uses a number of disparate and poorly defined terms and denominators to present the various results of the vote, which appear designed to create the appearance of nearly universal approval for the Original Settlement Agreement by Trust Certificateholders. However, the reality is that the Proposed Settlement has been arranged and negotiated by the Sponsor and the Directing Holder, and primarily serves to benefit those parties. While the Settlement Payment will serve to compensate the Directing Holder for nearly all of the losses it suffered as a result of the Defendant's misconduct, and a portion of the Settlement Payment will even flow back to the Defendant (through its affiliate) to compensate its own bond losses, not even a dollar

[13] The information included in the November 2018 Notice by the Trustee is limited and does not provide all of the data necessary to calculate the precise holdings of the Affiliated Holder. However, the information that is provided regarding the results of the voting process indicates that the Affiliated Holder beneficially owns at least 25% of the Group Two Certificate in the Trust. Additional discovery would be necessary to determine precisely which parties participated in the voting process, and the extent of their Voting Rights.

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of the Settlement Payment will flow to the Mezzanine Certificateholders that incurred the most substantial losses as a result of Defendant's contractual breaches. Yet, those very same Mezzanine Certificateholders were specifically excluded from expressing a vote on the Proposed Settlement. These types of actions by the Affiliated Holder—availing itself of the provisions of the Governing Agreements to prejudice other Certificateholders—are explicitly prohibited by the PSA. *See* Ex. 2 at § 10.08. [14]

61. The Proposed Settlement represents the epitome of a prejudicial action by a minority of Certificateholders at the expense of other Certificateholders that the drafters of the PSA were attempting to guard against. In particular, it appears that the Affiliated Holder has abused its dual role as Defendant and Trust Certificateholder to prejudice other Trust Certificateholders, in violation of common law and the Trust's Governing Agreements, and has paid the Trust just enough to secure the support of the Directing Holder in these efforts. On its face, the Proposed Settlement and its concomitant voting process were designed for one purpose: to allow the Sponsor and its

[14] PSA § 10.08 provides, in relevant part:

> No Certificateholder shall have any right to vote (except as provided herein) or in any manner otherwise control the operation and management of the Trust Fund, or the obligations of the parties hereto... it being understood and intended, and being expressly covenanted by each Certificateholder with every other Certificateholder and the Trustee, that ***no one or more Holders of Certificates shall have any right in any manner whatever by virtue or by availing itself or themselves of any provisions of this Agreement to affect, disturb or prejudice the rights of the Holders of any other of the Certificates and/or the NIMs Insurer, or to obtain or seek to obtain priority over or preference to any other such Holder and/or the NIMs Insurer or to enforce any right under this Agreement, except in the manner herein provided and for the common benefit of all Certificateholders***. (Ex. 2 § 10.08 (emphasis added).)

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affiliates to pay less than fair value to settle the claims in the Putback Action, and allow the Directing Holder to receive the precise amount necessary to maximize its recoveries and obtain its support, while creating the false appearance of unanimous support for this below-market Proposed Settlement.

D. The Trustee Should Be Instructed to Reject the Proposed Settlement, Given Its Numerous Issues, or Discovery Should Be Permitted into Such Issues.

62. In order to satisfy the Trustee's common law duties to act in the best interests of all Certificateholders,[15] and to ensure that no other person or entity (including the Directing Holder and the Affiliated Holder) is permitted to prejudice the rights of other Certificateholders (in breach of, among others, PSA § 10.08), Petitioner respectfully requests that the Trustee be instructed by this Court to reject the Proposed Settlement, seek to lift the stay of the Putback Action, and litigate that action to its conclusion or until an adequate settlement offer is received from the Defendant. The Trustee cannot accept a grossly inequitable settlement that benefits certain Certificateholders at the expense of others, and/or institute an inequitable process that disenfranchises the majority of the Trust's Certificateholder classes, while still honoring its duties under the Trust's Governing Agreements and common law. *See, e.g.*, *In re Bank of New York Mellon*, 127 A.D.3d at 126; *In re U.S. Bank Nat. Ass'n*, 27 N.Y.S.3d at 805.

[15] *See In re U.S. Bank Nat. Ass'n,* 27 N.Y.S.3d 797, 805 (Sup. Ct. N.Y. Cnty. Dec. 18, 2015) (A trustee abuses its discretion if it acts in the interest of the other party to the settlement, or in the interest of any subgroup of Certificateholders, "rather than in the interests of the investors generally.").

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63. Nevertheless, despite all of the significant flaws with the Proposed Settlement, the Trustee appears primed to accept it, which would be inconsistent with the Trustee's duties and obligations under the Governing Agreements and common law. Because the Proposed Settlement 1) fails to provide adequate value to Certificateholders as a whole, and particularly to those Certificates backed by Group One Mortgage Loans, with no recovery whatsoever going to the junior Certificates that suffered the greatest losses as a result of the Sponsor's contractual breaches; 2) was not fairly voted upon, denying due process to the Certificateholders with the most at stake in the Putback Action; and 3) appears to benefit Class A Certificateholders only (including Defendant's affiliate and the Directing Holder) at the expense of the other Certificateholders; the Proposed Settlement is not subject to reasonable acceptance by the Trustee. Petitioner respectfully requests that the Court instruct the Trustee to reject it.

64. If this Court is not inclined to instruct the Trustee to reject the Proposed Settlement at the outset, Petitioner respectfully requests that the Court enter an interim Order instructing the Trustee not to accept the Proposed Settlement or any further proposed settlement pending a final Order in this proceeding; and further instructing the Trustee to seek to lift the stay in the Putback Action and continue litigating the Putback Action until a judgment is obtained or an adequate settlement offer is received from the Defendant. Were this proceeding to continue, Petitioner would seek to conduct discovery regarding the circumstances surrounding 1) the negotiations of the Original Settlement and the Proposed Settlement, 2) the voting process for same, 3) the Trust holdings of the Affiliated Holder and Directing Holder, and 4) whether the Defendant

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entered into any agreements with any other holders that may have impacted the Voting Rights, the voting process, or the Proposed Settlement. Tellingly, in neither the September 2018 Notice nor the November 2018 Notice did the Trustee state whether it took any steps to investigate these matters or whether they resulted in prejudice to the interests of the most adversely-affected Certificateholders.

V. CONCLUSION

65. For all of the foregoing reasons, Canver respectfully requests that the Court issue an Order instructing the Trustee to reject the Proposed Settlement. In the alternative, if the Court is not prepared at this point to issue such instruction, Petitioner requests that this Court enter an Order instructing the Trustee not to accept the Proposed Settlement or any further proposed settlement pending a final Order in this proceeding. In either case, in light of the excessive delays already incurred, the Petitioner requests that the Court issue an Order instructing the Trustee to seek to lift the stay in the Putback Action and continue litigating the Putback Action until a judgment is obtained or an adequate settlement offer is received from the Defendant.

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REQUEST FOR RELIEF

WHEREFORE, pursuant to the provisions of Minn. Stat. § 501C.0201 *et seq.* and all other applicable law, Petitioner respectfully requests that this Court:

a. Make and enter herein an Order designating the time and place when the respective parties in interest may be heard upon the matters set forth in this Petition, and that notice of the hearing be served by the Trustee in the manner specified in the accompanying Order and as provided by Minn. Stat. § 501C.0203, subd. 1;

b. Undertake to represent all parties in interest who are unascertained or not in being, or who are minors or incapacitated, pursuant to the provisions of Minn. State § 501C.0304;

c. At such designated time and place, make a further Order as follows:

    i. Instructing the Trustee to reject the Proposed Settlement, seek to lift the stay in the Putback Action, and continue litigating the Putback Action until a judgment is obtained or an adequate settlement offer is received from the Defendant;

    ii. In the alternative, enter an interim Order instructing the Trustee not to accept the Proposed Settlement or any further proposed settlement pending a final Order in this proceeding; and further instructing the Trustee to seek to lift the stay in the Putback Action and continue litigating the Putback Action until a judgment is

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obtained or an adequate settlement offer is received from the Defendant;

iii. Finding that the actions taken or to be taken by the Trustee with respect to the Order and as set forth in this Petition are in good faith and reasonable under the circumstances and satisfy the duties of U.S. Bank in its capacity as Trustee;

iv. Directing that the Trust and the Trustee shall not be subject to the continuing supervision of the Court for the purposes of Minn. Stat. §§ 501C.0201(c)(c), 501C.0205(b) or General Rule of Practice 417.02; and

v. Granting such other and further relief as the Court may deem lawful, just, and proper.

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Respectfully submitted,

Dated: October 30, 2019

GREENE ESPEL PLLP

s/ Virginia R. McCalmont

John B. Orenstein, Reg. No. 020903X
Virginia R. McCalmont, Reg. No. 0399496
222 S. Ninth Street, Suite 2200
Minneapolis, MN 55402
jorenstein@greeneespel.com
vmccalmont@greeneespel.com
(612) 373-0830

and

Isaac M. Gradman (*pro hac vice forthcoming)*
Perry, Johnson, Anderson, Miller & Moskowitz LLP
438 First Street, 4th Floor
Santa Rosa, CA 95401
Gradman@perrylaw.net
(707) 535-1002

Attorneys for Petitioner Canver, LLC

ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.211, subdivision 2, to the party against whom the allegations in this pleading are asserted.

s/ Virginia R. McCalmont
Virginia R. McCalmont