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

In the matter of the application of WELLS FARGO BANK, NATIONAL ASSOCIATION, U.S. BANK NATIONAL ASSOCIATION, THE BANK OF NEW YORK MELLON, THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., WILMINGTON TRUST, NATIONAL ASSOCIATION, HSBC BANK USA, N.A., and DEUTSCHE BANK NATIONAL TRUST COMPANY (as Trustees, Indenture Trustees, Securities Administrators, Paying Agents, and/or Calculation Agents of Certain Residential Mortgage-Backed Securitization Trusts), Petitioners, For Judicial Instructions under CPLR Article 77 on the Administration and Distribution of a Settlement Payment.	Index No. 657387/2017

OPPOSITION OF DW PARTNERS LP AND ELLINGTON MANAGEMENT GROUP, L.L.C. TO THE MERITS BRIEFS FILED BY (1) NOVER VENTURES LLC AND THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A. IN ITS CAPACITY AS THE INDENTURE TRUSTEE OF THE DUKE IX INDENTURE HOLDING INTEREST IN THE NOVER SETTLEMENT TRUSTS; (2) THE INSTITUTIONAL INVESTORS AND AIG PARTIES; (3) U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE OF THE NIM TRUSTS HOLDING INTEREST IN THE POET AND PROPHET AND HBK SETTLEMENT TRUSTS; AND (4) U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE OF THE NIM TRUSTS HOLDING INTERESTS IN THE HBK SETTLEMENT TRUSTS

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Respondents DW Partners LP ("DW") and Ellington Management Group, L.L.C. ("Ellington" and together with DW, "Respondents"), by and through their undersigned counsel, respectfully submit this Opposition Brief with respect to the Petition.[1] Herein, Respondents address primarily the Merits Briefs filed by (1) Nover Ventures, LLC and The Bank of New York Mellon Trust Company, N.A., as Indenture Trustee of the Duke IX Indenture (collectively, "Nover") (the "Nover Br.") as to Exs. E and F; (2) the Institutional Investors (the "II's") and the AIG Parties ("AIG" and, together with the II's, the "Opposing Respondents") (the "II Br.") as to Exs. D and G; (3) U.S. Bank National Association, as Trustee of the NIMs Trusts Holding Interest In the Poetic Holdings VI LLC and Poetic Holdings VII LLC Settlement Trusts and HBK Settlement Trusts (the "HBK Br.") as to Ex. G; and (4) U.S. Bank National Association, as Trustee of the NIMs Trusts Holding Interest In the HBK Settlement Trusts (the "HBK Write-Up Br.") as to Ex. D. As discussed below, none of the opposing arguments in the foregoing briefs justify altering the clear write-up instruction set forth in Section 3.06(b) of the SA (the "SA Write-Up Instruction"). Respondents ask the Court to order that Petitioners (1) follow the SA Write-Up Instruction as written, such that all certificates to which losses have been previously allocated are eligible for write-ups, and are written up in the reverse order to which losses were previously allocated; (2) ignore the Retired Class Provision so as to allow write-ups to the so-called "Zero Balance Classes"; and (3) apply the Write-Up First method.

[1] Unless otherwise noted, capitalized terms not otherwise defined herein shall have the meanings ascribed to them in Respondents' Merits Brief (Doc. 645) (the "Respondents Br.").

ARGUMENT

I. WRITING UP ALL CERTIFICATES THAT SUFFERED LOSSES IS CONSISTENT WITH THE EXPRESS TERMS OF BOTH THE SETTLEMENT AGREEMENT AND THE GOVERNING AGREEMENTS.

Respondents' Merits Brief makes clear that (a) the SA requires write up of *all* certificates with losses in the Settlement Trusts; (b) the Governing Agreements do not preclude or conflict with such write-ups; and (c) to the extent there is any conflict between the SA and the Governing Agreements, the SA should control. Nover, the only party in these proceedings to take a contrary position on the Exhibit E issue, has argued that Petitioners should not write up any senior certificates in the Exhibit E Trusts because the Governing Agreements of such Trusts "define exactly which classes are eligible for write-ups," whereas the SA "*does not* define precisely which certificate classes are to be written-up, nor does it specify that senior certificates must always be written up." Nover Br. at 9-10. Nover further argues that the Governing Agreements of the Exhibit E Trusts indicate a uniform intent to limit write-ups to subordinate certificates, and to hold otherwise would violate principles of contract interpretation. *Id.* at 8.

As set forth respectively in Subsections I.A., I.B. and I.C., *infra*, Nover's arguments and interpretation of the SA and the applicable Governing Agreements fail for three reasons. *First*, the Court must look first to the SA to determine which certificates are eligible to be written up on account of the Settlement Payment, and the SA Write-Up Instruction is clear that write ups should be applied in the reverse order of previously allocated losses to "each class of securities . . . to which such losses have been previously allocated . . . " SA § 3.06(b). Thus, contrary to Nover's assertion, the SA *does* explicitly define which classes of certificates are eligible to be written up when applying each Settlement Trust's Allocable Share.

Second, to the extent the terms of the Governing Agreements are relevant to the question of which certificates are eligible for write-ups when applying a Settlement Trust's Allocable

Share, the Governing Agreements do not contravene the SA Write-Up Instruction. Namely, the provisions of the applicable Governing Agreements that Petitioners identify under Exhibit E as potentially restricting write-ups of senior certificates (the "Subordinate Write-Up Provisions") do not apply here. While each Trust's Allocable Share is treated "as though [it] was a 'subsequent recovery'" for purposes of distribution, the SA does not instruct Petitioners to treat it as a subsequent recovery for purposes of write-ups. *See* SA §§ 3.06(a), (b). Further, even if each Trust's Allocable Share were treated as a subsequent recovery for purposes of write-ups, the Subordinate Write-Up Provisions still do not apply because the Allocable Share is not loan-specific and thus does not reduce the amount of any Mortgage Loan's Realized Loss.

Third, contrary to Nover's assertion that the Subordinate Write-Up Provisions are explicit and uniform across all Exhibit E Settlement Trusts, several of the Subordinate Write-Up Provisions explicitly provide for write-ups to senior certificates. The remainder of the Exhibit E Settlement Trusts' Governing Agreements either include provisions contemplating write-ups to senior certificates or do not restrict such write-ups. Far from indicating a uniform and cohesive intent to preclude senior certificate write-ups across these Trusts, this disparate language at most evidences ambiguity in that regard, and thus it would not violate fundamental principles of contract interpretation to permit write-ups to senior certificates when applying the Settlement Payment. Instead, this is the only result that is both logical and consistent with the purpose and intent of the parties to both the SA (reversing realized losses in the senior certificates first) and the Governing Agreements (preserving the senior-subordinate structure).

A. The Terms of the SA Dictate That the Petitioners Must Look to the SA When Determining the Appropriate Write-Up Procedures.[2]

1. The terms of the SA control and must be enforced as written.

Nover's insistence that this Court look to the terms of the Governing Agreements to determine which classes are eligible for write-ups is both misplaced and inconsistent with the purpose of the SA to reverse losses suffered by *any* certificates in the Settlement Trusts, starting with the most senior. *See* Respondents Br. at 15. To effectuate that purpose, the drafters of the SA included the separate and independent SA Write-Up Instruction, which was fully within their power. In further support of this proposition, Respondents adopt and incorporate herein by reference Point I of the Response Brief of Tilden Park Capital Management LP ("Tilden Park").

2. The SA specifies which classes of certificates are eligible for write-ups.

Nover contends that the SA "conversely, *does not* define precisely which certificates are eligible to be written-up, nor does it specify that senior certificates must always be written-up." Nover Br. at 9-10. This is inaccurate. The SA Write-Up Instruction provides:

> After the distribution of the Allocable Share to a Settlement Trust pursuant to Subsection 3.06(a), the Accepting Trustee for such Settlement Trust will apply . . . the amount of the Allocable Share for that Settlement Trust in the reverse order of previously allocated losses, to increase the balance of ***each class of securities*** . . . ***to which such losses have been previously allocated*** . . . (SA § 3.06(b) (emphasis added).)

There can be no dispute that the terms of the SA provide that ***each*** class of securities ***to which losses have been allocated*** must receive a write-up, which necessarily includes senior certificates if realized losses have been allocated to them. When quoting Section 3.06(b) in its

[2] Though the arguments in this Section I.A focus primarily on the Exhibit E issue, they apply with equal force to the Exhibit F issue. These arguments compel the finding that the unambiguous directive of the SA to write-up each class of certificates in the reverse order of previously allocated losses must control over any of the ostensibly conflicting provisions of the Governing Agreements identified in Exhibit E and Exhibit F to the Petition. Respondents set forth their initial arguments on behalf of Ellington as to the Exhibit F issue and the Settlement Trust BALTA 2006-3 in the Respondents Br., and Ellington designates this Section I.A. as its response to the II Br. and Nover Br. with respect to the Exhibit F issue.

brief, Nover conveniently omits, without ellipsis, the language, "to which such losses have been previously allocated" from the above-quoted section, opting to end the quote with a period after the language "each class of securities." *See* Nover Br. at 9. This is likely because such language eviscerates Nover's argument that the SA does not identify the classes eligible for write-up with specificity. Thus, the Court should enforce the SA Write-Up Instruction's express directive that any certificate to which losses have been previously allocated (including senior certificates in most of Respondents' Exhibit E Settlement Trusts) should be eligible to be written up.

3. The SA sets forth a uniform write-up methodology.

While SA Section 3.06(a) plainly incorporates a trust-by-trust approach to distributions (requiring "distribution to Investors in accordance with the distribution provisions of the Governing Agreements…as though such Allocable Share was a 'subsequent recovery'"), it is equally clear that the SA Write-Up Instruction prescribes a uniform write-up methodology across all Settlement Trusts. Indeed, SA Section 3.06(b) makes no reference to *either* the terms of the Governing Agreements *or* to treatment of the Allocable Share as though it was a subsequent recovery. This distinction is crucial and demonstrates that the drafters intended for the Petitioners to follow a single write-up methodology, rather than trying to conform write-ups to the varied and idiosyncratic write-up protocols set forth in the Governing Agreements. The disparate approach and language between SA Sections 3.06(a) and (b) shows that the drafters intended Petitioners to treat the Settlement Trusts' Allocable Share as a "Subsequent Recovery" only in the context of making ***distributions***, and not in the context of applying ***write-ups.*** As such, the Subordinate Write-Up Provisions at issue in Exhibit E—which by their terms apply only to Subsequent Recoveries—are inapplicable to write-ups related to the Allocable Shares.

Had the SA's drafters intended Governing Agreement provisions like the Subordinate Write-Up Provisions to modify the SA Write-Up Instruction, they could have directed that the

Allocable Share write-up be applied "pursuant to" or "subject to" the terms of the applicable Governing Agreements, as they did for distributions in subsection (a). Similarly, had the drafters intended that each Allocable Share be treated as though it was a subsequent recovery for write-up purposes, they could have said so, just as they did for distributions in subsection (a). Instead, subsection (b) is devoid of any reference to the Governing Agreements or their terms.

These omissions, particularly where such terms are included in the immediately prior subsection, should be interpreted as intentional. This is particularly true where the same sophisticated parties negotiated other settlements that elected to treat bulk settlement payments as subsequent recoveries for all purposes. *See Quadrant Structured Prods. Co. Ltd. v. Vertin*, 23 N.Y.3d 549, 560 (2014). To wit, the settlement agreement negotiated with ResCap by most of these same II's provided that, "[a]ll distributions from the Estate to a Trust on account of any Allocated Allowed Claim ***shall be treated as Subsequent Recoveries***, as that term is defined in the Governing Agreement for that trust." *See* II Br., Ex. 5 (the "ResCap Agreement") at 36 (emphasis added). Such definitive language is not present in the SA, which provides only that the Allocable Share shall be deposited "***for further distribution to Investors***…. ***as though*** such Allocable Share was a 'subsequent recovery' relating to principal proceeds ***available for distribution*** . . . ." SA § 3.06(a) (emphasis added). The conspicuous absence of any reference to subsequent recoveries in the SA Write-Up Instruction, particularly where such language was present in the prior subsection of the SA and prior agreements, demonstrates a conscious intent by its drafters that write-ups be applied separately, pursuant to the SA Write-Up Instruction. As such, any Subordinate Write-Up Provisions purporting to restrict senior write-ups are inapplicable, and the SA Write-Up Instruction's unequivocal direction to write up ***each*** class of certificates to which losses have been previously allocated should be enforced as written.

B. The Governing Agreements Do Not Affect the SA Write-Up Instruction.

Even if the Court determines that it must look to the Governing Agreements to ensure consistency with the SA Write-Up Instruction, it will reach the same result. Though Nover repeatedly appeals to the Subordinate Write-Up Provisions to argue they should limit the SA Write-Up Instruction (*see* Nover Br. at 6-10), these terms do not apply to the Settlement Payment, and thus any purported limitation is illusory.

As Respondents discussed in their Merits Brief (*see* Respondents' Br. § I.B.2), the drafters of the SA recognized that the Governing Agreements did not contemplate the receipt of bulk settlement payments intended to reverse billions of dollars of losses at the trust level. To wit, the term "Subsequent Recoveries" in the Governing Agreements generally refers only to amounts received "specifically related to ***a Liquidated Mortgage Loan***." *See, e.g.,* Kushner Aff. to Respondents Br. (Doc. 614) ("Kushner Aff."), Ex. A, Art. I (defining "Subsequent Recoveries") (emphasis added). Here, the Settlement Payment is not associated with any identifiable mortgage loans, let alone liquidated mortgage loans; it is a bulk settlement covering claims as to both liquidated and unliquidated mortgage loans, allocated across Settlement Trusts. *See generally* SA § 3.05. As such, the SA only directs the Petitioners to treat the Settlement Payment "as though" it was a subsequent recovery for the purposes of distributions (*see* SA § 3.06(a)), not for the purposes of write-ups. Section I.A.3, *supra*. The Subordinate Write-Up Provisions, which by their terms apply only to "Subsequent Recoveries," are inapplicable.

Further, as set forth in Point III.A.2 of Tilden Park's Merits Brief, which was incorporated by reference into the Respondents Br. at page 8, even if the Settlement Payment was to be treated as a subsequent recovery for write-up purposes, the Subordinate Write-Up Provisions are irrelevant because they apply only to Subsequent Recoveries that are received by the Master Servicer and reduce the Realized Loss for a specific loan. Indeed, no specific loans

are associated with the Settlement Payment, and such Payment is not applied to reverse loan-level losses. Instead, it is a bulk settlement of claims across all Settlement Trusts and, as the SA Write-Up Instruction makes clear, is intended to reverse trust losses applied at the Class or Certificate level. *See* SA § 3.06(b). Therefore, the SA Write-Up Instruction should still be enforced as written, as the Governing Agreements are silent as to trust-level recoveries.[3]

C. Writing Up Senior Certificates Is Consistent with the Letter and Intent of the SA and the Governing Agreements.

1. Several of the Subordinate Write-Up Provisions explicitly provide for write-ups to senior certificates.

Even if this Court finds that the Subordinate Write-Up Provisions do impact which certificates are entitled to write-ups, the Governing Agreements do not, as Nover suggests, uniformly restrict write-ups to subordinate certificates only. Nover Br. at 6 ("[t]he Governing Agreements for ***each*** Settlement Trust listed on Exhibit E specifically provides [*sic.*] that only a subset of the Certificates may be written up"; "Governing Agreements of the Exhibit E Settlement Trusts specifically set forth terms and conditions under which ***only*** subordinate certificates will be written up" (emphasis added)). In fact, several of the Subordinate Write-Up Provisions contain specific instructions to write up ***senior*** certificates. Those provisions are excerpted on Exhibit A to this Opposition Brief and demonstrate that the Subordinate Write-Up Provisions for three of Respondents' Exhibit E Settlement Trusts contain an explicit carve out that provides subsequent recoveries must *first* be applied to reverse losses previously *applied to senior certificates*. *See*, *e.g.* Supplemental Kushner Affirmation ("Suppl. Kushner Aff."), Ex. 3

[3] Contrary to Nover's argument that applying the Settlement Payment to write up senior certificates would "violate a fundamental principle of contract interpretation by failing to give effect to a defined term" (Nover Br. at 8 (internal quotations omitted)), the Subordinate Write-Up Provisions would not be rendered superfluous or ineffectual, simply because they were not applied in this circumstance. Instead, the Subordinate Write-Up Provisions would still be given effect in the situations in which they properly apply—namely, when the Settlement Trusts receive Subsequent Recoveries related to particular Liquidated Mortgage Loans.

(BALTA 2006-3 PSA) § 6.03(b) ("Notwithstanding the for[e]going, any Subsequent Recoveries will be allocated to the Group I Senior Certificates… before being applied to the Group I Subordinate Certificates."). Another Exhibit E Trust Governing Agreement provides that, "the Certificate Principal Balance ***of each class of Certificates that has been reduced by the allocation of a Realized Loss*** … ***will be increased, in order of seniority, by the amount of such Subsequent Recovery*** . . . ." *See* Kushner Aff., Ex. I at S-66.

While the Governing Agreements for Respondents' remaining Exhibit E Trusts do not include such explicit language, neither do those Agreements explicitly *prohibit* senior certificates from being written up. Thus, the omission of any discussion of writing up senior certificates was likely a scrivener's error. As Petitioner recognized in the Petition (Pet. ¶ 48, n. 21), there are certain Settlement Trusts known commonly as "implied write-down" trusts in which senior certificates are never allocated realized losses, so they are never written down. In the context of such trusts, it makes perfect sense that write-ups would be limited to subordinate certificates, as certificates that are never written down logically cannot, and should not, be written-up. It was also common in the RMBS industry during the years leading up to the financial crisis for Governing Agreements to be assembled quickly by copying and pasting provisions from other deals. The Subordinate Write-Up Provisions were likely borrowed from implied write-down trusts, but the drafters mistakenly omitted the corresponding carve-out shown on Exhibit A to address the fact that these were not implied write-down trusts. The result is an obvious anomaly.

A court may correct a scrivener's error when the agreement does not accurately express the parties' intentions as manifested by their prior agreements, course of performance, or practical interpretation of the contract. *See, e.g.*, *Warberg Opportunistic Trading Fund L.P. v. GeoResources, Inc.*, 151 A.D.3d 465, 470-71 (1st Dep't 2017). Thus, if the Court indeed finds a

conflict between the Governing Agreements and the SA on this issue, it should avoid an unworkable and erroneous result by directing Petitioners to follow the SA Write-Up Instruction.

2. Writing up senior certificates is consistent with the senior-subordinate structure and will avoid a commercially unworkable result.

The ambiguity discussed above pertaining to the Governing Agreements for the Exhibit E Settlement Trusts suggests their drafters had no uniform or cohesive intent to limit write-ups to subordinate certificates. As such, interpreting the Governing Agreements to allow write-ups to senior certificates would not, "violate[] a fundamental principle of contract interpretation" (Nover Br. at 8), but would rather preserve the intended senior-subordinate structure.[4]

Nover argues that the Governing Agreements indicated that "subordinate certificates would receive preferential treatment to the senior bonds for certain groups with respect to subsequent recoveries—a fact that investors relied upon when purchasing such tranches of certificates." Nover Br. at 6. This argument contradicts both the purpose of the SA and the principles of subordination underlying all RMBS trusts—that senior certificates are protected against losses by placing subordinate certificateholders in the first loss position. *See* Suppl. Kushner Aff., Ex. I (SAMI 2006-AR5 ProSupp) at 48 (defining "Subordinate Securities").[5]

The intent behind the SA was to preserve this senior-subordinate structure by ensuring that senior certificates would have their losses remedied first. Kushner Aff., Ex. D at 358:14-17 (testimony of Loretta Lundberg) (the goal of the SA was that "the distribution of [settlement]

[4] Nover itself sees no "fundamental" issue with urging the Court to follow the plain language of the SA Write-Up Instruction while disregarding certain provisions of the Governing Agreements, at least where the outcome favors its positions. Tellingly, with respect to the Exhibit G Issue, Nover correctly argues that Petitioners should disregard the Retired Class Provisions when applying the SA Write-Up Instruction. *See* Nover Br. at 10-13. Why "fundamental principles of contract interpretation" would permit this in the case of Retired Class Provisions but not in the case of the Subordinate Write-Up Provisions is left unaddressed.

[5] A more detailed discussion of the principles of credit enhancement is contained in Respondents Br. § I.B.3.

proceeds goes to senior Certificateholders first regardless of what caused their losses"). The SA Write-Up Instruction further confirms this intent by applying write-ups in the reverse order of previously allocated losses. Far from violating fundamental contractual principles, as Nover argues, enforcing the SA would fulfill the "cardinal rule of contract interpretation that a court must construe the terms of an agreement as a whole and in a manner that gives effect to the mutual intent of the parties." *McGraw-Hill Companies, Inc. v. Vanguard Index Trust,* 139 F.Supp.2d 544, 552 (S.D.N.Y. 2001); *accord Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002). As such, this Court should enforce the SA Write-Up Instruction and instruct Petitioners to write-up *any* certificates to which realized losses have been allocated.

II. DENYING DISTRIBUTIONS OR WRITE-UPS TO ZERO BALANCE CLASSES VIOLATES THE LETTER AND INTENT OF THE SA.

DW, along with Axonic, D.E. Shaw, Nover, the Olifant Funds, Strategos, GMO, and Tilden Park, have argued compellingly in their Merits Briefs that the plain language of the SA and Governing Agreements for the Exhibit G Settlement Trusts allows certificates with a Current Principal Balance of zero (each, a "Zero Balance Class") to be written up and receive distributions as a result of the Settlement Payment, and that the so-called "Retired Class Provisions" are meant only to clarify the unremarkable proposition that once certificates have been repaid in full, they will be retired and no longer entitled to distributions. Retired Class Provisions are *not* meant to restrict write-ups or, in turn, distributions to certificates whose current principal balances have been reduced to zero due to the application of realized losses.

The Opposing Respondents and HBK, by and through U.S. Bank, N.A., as Trustee for the NIM Trusts ("HBK") have taken the position that the Retired Class Provisions of the Governing Agreements for the Exhibit G Settlement Trusts should be read to prevent *any* write-ups or distributions to Zero Balance Classes. The Opposing Respondents argue that because the SA is

silent on the issue of the Retired Class Provision, the Petitioners should apply the "unambiguous" provisions of the Governing Agreements that purport to limit Zero Balance Classes from receiving the benefit of a write-up or distributions as a result of the Settlement Payment. Similarly, HBK has argued that the language of the Retired Class Provisions is "quite clear" that it "expresses a permanent condition" that once a certificate's principal balance has been reduced to zero it is no longer entitled to *any* distributions. HBK Br. at 5-6.

These arguments misinterpret the meaning of the Retired Class Provisions and would create a windfall for subordinate certificates, while senior certificates' losses remain unremedied. As such, DW asks the Court to find that Zero Balance Classes are eligible for write-ups.

A. Retired Class Provisions Do Not Bar Write-Ups to Zero Balance Classes.

HBK takes the position that, because there is language in the Governing Agreements that provides Zero Balance Classes "will be retired and will no longer be entitled to distributions . . . ," there is no circumstance in which a Zero Balance Class may receive the benefit of a write-up. *See* HBK Br. at 5. Opposing Respondents argue that because there is no conflict or ambiguity with the SA as to these provisions, the Petitioners must enforce them. II Br. at 25. These narrow views of the Retired Class Provisions ignore other relevant provisions of the Governing Agreements, thus failing to interpret those contracts as a whole.

First, there can be no dispute that the Retired Class Provisions make no mention of precluding write-ups or the reversal of realized losses. Indeed, the Retired Class Provisions are included in the section of the Governing Agreements pertaining to *distributions*. These principal and interest distribution provisions discuss that distributions should continue until the Certificate Principal Balance is reduced to zero. *See, e.g.* Kushner Aff., Ex. R (§ 6.04(a). In this context, it would make sense that the Governing Agreements would restrict future distributions to classes whose certificate principal balance had been reduced to zero as a result of principal payments, as

those certificates would have been paid the full amount to which they were owed. However, the provisions discussing the application of realized losses and the provisions discussing writing up certificates are generally found in entirely separate sections or subsections of the Governing Agreements that appear after the Retired Class Provisions. *E.g., id*. at §§ 6.04(b); 6.05. Thus, the "notwithstanding the foregoing" language in the Retired Class Provisions does not override the write-up provisions, which follow. *E.g., id.* at § 6.04(b).[6]

Moreover, these write-up provisions make clear that if Subsequent Recoveries reduce the amount of a Realized Loss, those Subsequent Recoveries "will be applied to increase the Certificate Principal Balance of the Class of Certificates with the highest payment priority to which Realized Losses have been allocated…" *Id.* Such provisions do not contain *any restrictions* on what classes of certificates may receive the benefit of a write-up—they refer only to those classes "to which Realized Losses have been allocated," which necessarily include any Zero Balance Classes to which Realized Losses have been allocated. The Governing Agreements do, therefore, contemplate that Zero Balance Classes may be written up or otherwise revived and there is no "bar" (HBK Br. at 12) on future distributions to Zero Balance Classes, as such Classes would no longer have a zero balance once they had been written up.

HBK argues that "[a] retired debt obligation is likewise one that has been satisfied or discharged" and cites to the definition of "retirement" in Black's Law Dictionary, which is: "1. The removal of any asset after its sale. 2. Forced or voluntary withdrawal from the job market. 3. Withdrawing a document from circulation. 4. The discharge or satisfaction of an obligation." HBK Br. at 6 (*quoting* Black's Law Dictionary, definition of "retirement"). None of those four definitions can apply to a certificate whose principal balance has been reduced to zero as a result

[6] Write-up provisions also generally provide that write-ups occur "***in addition to***," and thus separate from, "distributions." *Id.*

of the application of realized losses. HBK has not, and cannot, cite to any evidence that the Zero Balance Classes have been "satisfied" or "discharged", particularly where they have not received payment in full of their principal balance.

The Opposing Respondents admit in their brief that there should not be any restrictions on writing up certificates in any of the Settlement Trusts:

> The clear intent of the Governing Agreements was that senior certificates with losses are eligible for subsequent recovery write-ups. Absurd results would follow if they were not. Given that the Settlement Agreement expressly provides that ***all certificates*** are eligible to be written up, ***and that the Governing Agreements do not contravene this commonsense conclusion***, all senior certificates should be treated as eligible for write-ups.

II Br. at 3. While the Opposing Respondents made the above-quoted statements in the context of arguing that the SA and Governing Agreements should not limit write-ups to subordinate certificates, the same logic applies here. Both the SA and the Governing Agreements are explicit that *all certificates* are eligible to receive write-ups, which must include Zero Balance Classes.

The Opposing Respondents further acknowledge that if subsequent recoveries for the Settlement Trusts exceed the realized losses incurred by subordinate certificates, "an absurd result would follow if the senior certificates are not eligible for a subsequent recovery write-up; the trust would falsely *appear* to be overcollateralized (i.e. the trusts' assets would exceed its liabilities), even though it would not be." II Br. at 23. This same logic can be applied if Zero Balance Classes are not permitted to receive write-ups, as the write-up amount to be applied pursuant to the SA could exceed the realized losses incurred in the aggregate by classes of certificates that still have a principal balance. U.S. Bank has also acknowledged that this is an unacceptable result because there "needs an appropriate mechanism by which to apply the entire amount of the applicable settlement payment write-up" and that write-up restrictions could create a situation in which the only certificates that are purportedly eligible for write-up "do not have

sufficient losses to absorb the entire settlement payment write-up." *See* Kushner Aff., Ex. L (September 10, 2018 email from U.S. Bank Counsel) at 3.

Furthermore, if this Court were to apply the Retired Class Provision in the manner suggested by the Opposing Respondents and HBK, it would create an entirely inequitable and absurd result, as a class whose principal balance has been reduced by 99.99% would be eligible to receive the benefit of a write-up, while a class whose principal balance has been reduced by an additional one-one hundredth of a percent would not be. Put another way, the classes that had suffered the greatest losses would be placed beyond the reach of any remedy. Such an outcome is clearly not what the drafters of the Governing Agreements intended, as those agreements make clear that ***any*** class of certificate to which realized losses have been applied is entitled to be written up as the result of a Subsequent Recovery, whether that Recovery occurs while the Class still has a principal balance or not. To avoid the absurd outcome that would certainly result if the Retired Class Provisions were enforced, Zero Balance Classes must be able to receive the benefit of a write-up from the Settlement Trusts' Allocable Shares.

B. None of the Zero Balance Classes Have Been "Retired."

HBK maintains that this Court must apply the Retired Class provision because it is "clear, and nothing in the theoretical but unexpressed possibility of a write-up presents any reason to ignore its plain language." HBK Br. at 15. In doing so, HBK ignores the other "plain language" of the Governing Agreements pertaining to "retired certificates." Indeed, these Agreements set forth a formal process for retiring certificates that has not been invoked here.[7]

HBK admits that a "'retired' security, in well-established ordinary usage, is one that is extinguished and has no rights, to distributions or otherwise." HBK Br. at 5 (*quoting Zahn v.*

[7] *See* Respondents' Brief pages 18-19 and Kushner Aff., Ex. R at § 11.02(ii) in discussing the formal process by which certificates must be surrendered upon the "final distribution in retirement" of any such class.

Transamerica Corp., 63 F.Supp. 243, 246 (D. Del. 1945)). HBK does not, however, point to anything that would suggest any Zero Balance Classes have been "retired"—either under the terms of the Governing Agreements or pursuant to "well-established ordinary usage." In fact, as another respondent has pointed out, Zero Balance Classes are commonly traded on the secondary market, which "thereby indicat[es] that the market agrees that classes that have been reduced to zero due to increasing realized losses are not 'retired' . . ." Strategos Capital Management, LLC's Statement for Grounds for Appearance (Doc. 171) at 4.

DW has not received any notice that there will be a final distribution for its certificates that are part of a Zero Balance Class; nor has DW been asked to present or surrender its certificates for cancellation prior to a final distribution. *See* Honarvar Affirmation to Respondents' Br. (Doc. 635) ¶ 3, 4. DW's certificates remain "outstanding" as they have not been "canceled by the Securities Administrator or delivered to the Securities Administrator for cancellation," and are, therefore, still entitled to the same write-ups as any other outstanding certificate. Kushner Aff., Ex. T at 18 (defining "Outstanding").

HBK cannot ignore that the "plain" and unambiguous language of the Governing Agreements provide for a formal and explicit process to "retire" certificates. If, as HBK is arguing, this Court must adhere to the express terms of the Governing Agreements, this Court must instruct Petitioners to follow the plain text of the SA and write up any outstanding certificate in order of priority, regardless of whether they are Zero Balance Classes.

III. CONTRARY TO THE ARGUMENTS OF THE OPPOSING RESPONDENTS, BOTH THE SA AND THE GOVERNING AGREEMENTS FOR THE GPMF 2006-AR1 TRUST SUPPORT THE WRITE-UP FIRST METHOD.

A. The Plain Language of the SA Supports the Write-Up First Method.

HBK and the Opposing Respondents argue that the SA requires the Pay First method. They pose three basic arguments in support, each of which is incorrect and unpersuasive.[8]

1. The ordering of the Subsections of Section 3.06 is of no consequence.

HBK suggests that the SA requires Pay-First based on the mere fact that Section 3.06(a) (which discusses distribution of the Allocable Shares to investors pursuant to the Governing Agreements) comes before Section 3.06(b) (which discusses a methodology for write-ups). HBK Write-Up Br. at 3, 8, 9. But the mere order of these subsections means very little—one must look to the language of the SA to determine its intent. *See Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239, 244 (2014) ("the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the *language employed* . . . .") (emphasis added); *Rodolitz v. Neptune Paper Prods*., 22 N.Y.2d 383, 387 (1968) (courts are concerned "with what the parties intended, but only to the extent that they evidenced what they intended by what they wrote."). Indeed, despite being placed ahead of Section 3.06(b) in the SA, the language of Section 3.06(a) contains no mention of write-ups or how the timing of write-ups relates to the timing of distributions, let alone any indication that distributions proceed write-ups.

2. The plain language of Section 3.06(b) supports Write-Up First.

Conversely, Section 3.06(b) discusses *both* distributions and write-ups and *does* specify how write-ups should relate temporally to distributions—they should be applied after distribution of the Allocable Shares to the Settlement Trusts, but before distribution of the Allocable Shares to investors. Despite its plain language, the Opposing Respondents contend that the first

[8] This argument is made on behalf of Ellington only.

sentence of Paragraph 3.06(b)[9] requires write-ups to be applied after distribution of Settlement funds to investors. It requires no such thing. Instead, the plain meaning of that first sentence of Section 3.06(b) is that write ups are to be applied immediately following the distribution of the Allocable Share *to a Settlement Trust*, not after the distribution of such Allocable Share to investors—in other words, write-ups should occur after the Allocable Shares are deposited into the "related Trust's collection or distribution account," (SA § 3.06(a)), but *before* distributions to investors. This is precisely the Write-Up First Method.

If the Parties had intended the Pay-First Method, they could have made that intent clear by requiring distribution to investors "immediately after" the deposit of the Allocable Shares into the Trusts' collection or distribution accounts. Instead, Section 3.06(a) contains no language indicating the precise timing of the distribution to investors, stating instead that, "[e]ach Trust's Allocable Share shall be deposited into the related Trust's collection or distribution account pursuant to the terms of the Governing Agreements, ***for further distribution to Investors***…" SA § 3.06(a) (emphasis added). Similarly, in the first sentence of Section 3.06(b), the Parties could have required write-ups after the distribution of the Allocable Share *to investors*, but instead provided for write-ups "[a]fter the distribution of the Allocable Share to a Settlement Trust." SA § 3.06(b). Section 3.06(a) shows that the Parties contemplated two distribution steps and knew how to refer to distribution "to Investors" rather than to a Settlement Trust.

Indeed, this is exactly what the Institutional Investors did in a prior settlement agreement they negotiated. Namely, the settlement agreement negotiated with Countrywide Home Loans (II Br., Ex. 4 (the "Countrywide Agreement")), on which the SA was based, included clear

[9] "After the distribution of the Allocable Share to a Settlement Trust pursuant to Subsection 3.06(a), the Accepting Trustee for such Settlement Trust will apply…the amount of the Allocable Share for that Settlement Trust…to increase the balance of each class of securities…" SA at 3.06(b)

language requiring the Pay-First Method. Yet, contrary to the contention of the Opposing Respondents that such language was "virtually identical" to the language in the SA, the Countrywide Agreement contained several important and controlling differences. *First*, Section 3(d)(i) of the Countrywide Agreement—the distribution subsection analogous to Section 3.06(a) of the SA—included language indicating the precise timing of the distribution to investors, stating, "***[a]fter the Allocable Share for each Covered Trust has been deposited*** into the Certificate Account or Collection Account for each Covered Trust, ***the Trustee shall distribute*** it to Investors . . . ." Countrywide Agreement § 3(d)(i) (emphasis added). *Second*, Section 3(d)(ii) of the Countrywide Agreement—the write-up subsection analogous to Section 3.06(b) of the SA—stated: "***after*** the distribution of the Allocable Share ***to Investors*** pursuant to Subparagraph 3(d)(i), the Trustee will [write up the certificates] . . . ." *Id*. § 3(d)(ii) (emphasis added).

In the Article 77 proceeding related to the Countrywide Agreement, *In the Matter of the Application of The Bank of N.Y. Mellon*, No. 150973/2016 (N.Y. Sup. Ct. Feb. 5, 2016) ("*Countrywide*"), the parties did not dispute that this provision purported to direct the Trustees to implement the Pay-First Method. *Id.*, Doc. 193, (Decision/Order) at 8 (Apr. 4, 2017). The Court in *Countrywide* found that it was bound to enforce the clear terms of the Countrywide Agreement and that such language unequivocally directed the Trustee to distribute those Allocable Shares using the Pay-First Method. *Id*. at 16-17.

When the Institutional Investors negotiated the SA in this case, they chose to *alter* the above-quoted language, and instead provided that the Allocable Share would be "deposited into the related Trust's collection or distribution account . . . ***for further distribution*** in accordance with the distribution provisions of the Governing Agreements" and that write-ups would occur "[a]fter the distribution of the Allocable Share ***to a Settlement Trust***" SA §§ 3.06(a), (b)

(emphasis added to new language). These changes are significant: the first removed any temporal language dictating the timing of distribution to investors, opting instead to include the "for further distribution' language that is silent as to timing,[10] while the second specifically altered the timing of write-ups from after the distribution "to Investors" to after the distribution "to the Settlement Trusts." The Parties must accept the consequences of that language, which clearly supports implementation of the Write-Up First Method.

3. The IIs' other settlement agreements are inapposite.

In addition to the Countrywide Agreement, the Opposing Respondents argue that three other bulk RMBS settlement agreements that allegedly require the Pay-First Method contain distribution provisions that are "virtually identical" to those of the SA: those relating to ResCap, Citigroup, and Lehman settlements. A close look at the language of those settlement agreements and the resulting court orders—if any exist—reveals the speciousness of those claims. As an initial matter, in the chart that appears on pages 10-12 of their brief, the Opposing Respondents highlight language that is inconsequential to the determination as to whether the SA requires Write-Up First or Pay-First. For instance, the fact that distributions are to be treated as "subsequent recoveries" has no bearing on whether write-ups or distributions occur first. The "avoidance of doubt" clauses are also irrelevant. *See infra*, Section III.A.4.

Moreover, with respect to each of these global settlements, either the language in the settlement agreement differs from that in the SA, and thus compels a different result, or the judicial determinations rendered in those cases have no precedential value with respect to this

[10] In addition, whereas Section 3(d)(i) of the Countrywide Agreement contains a clear command to distribute, Section 3.06(a) of the SA lacks any command that would imply that distributions should be made immediately following deposit of the Allocable Shares into the Settlement Trusts, opting instead for the passive recitation that the Allocable Share should be "deposited into the related Trust's collection or distribution account . . . for further distribution…" *Compare* Countrywide Agreement § 3(d)(i) *with* SA § 3.06(b).

issue, because, in rendering such decisions, the courts did not consider or rule as to whether the settlement agreements required Write-Up First or Pay-First. As set forth in Section III.A.2, *supra*, the language in the Countrywide Agreement is significantly different (and it is certainly not "virtually identical") from the language in the SA, and thus proves nothing except that the II's knew how to draft provisions requiring Pay-First but chose not to do so here.

With respect to the Lehman settlement agreement, the language is also very different from the SA, as Section 3.06(c) expressly states that if the distribution or write-up processes called for in the prior two subsections do not conform to a particular trust's Governing Agreement, those processes "shall be modified…in conformance with the terms of the Governing Agreement…" II Br., Ex. 8 (the "Lehman Agreement") § 3.06(c). Further, the comments from Judge Chapman cited by the Opposing Respondents are pure *dicta*, as the issue of whether the Lehman Agreement required Write-Up First or Pay-First was not before her and she had no occasion to rule on it. Instead Judge Chapman only had occasion to rule whether the Article 77 filed in this Court should be enjoined, and held it should not. Thus, it is this Court that will determine how such agreement should be interpreted, and it has not yet done so.

With respect to the ResCap Agreement, aside from the fact that the language is also very different from the SA, the ResCap Chapter 11 Plan cited to by the Opposing Respondents (1) does not include "findings" of any court as to the Pay-First Method and (2) simply states that "Holders of Borrower Claims shall receive their allocated share of the Borrower Claims Trust Assets in accordance with the methodology and procedures set forth in the Borrower Claims Trust Agreement." *See* Article IX.c of the ResCap Chapter 11 Plan, *available at*: http://www.kccllc.net/documents/1212020/121202013121100000000009.pdf. In other words, the Opposing Respondents cite to no judicial determination interpreting the distribution

provisions of that agreement or finding that they require the Pay-First Method. Accordingly, the ResCap Agreement provides no guidance here at all.

While the language in the Citigroup settlement agreement does appear to be similar to that of the SA, the Opposing Respondents again point to no judicial determination interpreting this language to mean Pay-First.[11] A review of the Decision and Order entered in that Citigroup Article 77 proceeding reveals that the Court simply determined that "the Trustees exercised their discretionary power reasonably and in good faith in accepting the RMBS Trust Settlement Agreement." *In the Matter of the Application of U.S. Bank National Association*, No. 653902/2014, Doc. 152 (Decision/Order) at 16 (N.Y. Sup. Ct., Dec. 12, 2015). The Court thus had no opportunity to interpret the distribution provisions in that agreement and made no finding as to whether those provisions required Write-Up First or Pay-First.

Thus, where the other bulk settlement agreements cited by the Opposing Respondents contained similar language to the SA, no court has ruled definitively in favor of Pay First. Conversely, where courts did address this issue with respect to settlement agreements covering only a few Trusts, the majority have ordered the Petitioners to use the Write-Up First Method, rather than the Pay-First Method.[12] Accordingly, Opposing Respondents' arguments based on other RMBS settlement agreements are inapposite.

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[11] In fact, tellingly, they cite to no judicial decision whatsoever in connection with the Citigroup settlement.

[12] *Compare In the Matter of Loan Group I of the Bear Stearns Mortgage Funding Trust 2007-SL1 and Bear Stearns Asset Backed Securities I Trust 2007-AQ2*, No. 27-TR-CV-17-29, Order (Minn. Dist. Court, Hennepin County, Sept. 27, 2017) (instructing and authorizing trustee to "apply the 'write-up first method'" for the applicable settlement payment, pursuant to the corresponding settlement agreement and governing agreements); *In the Matter of Loan Group I of the Bear Stearns Mortgage Funding Trust 2007-SL1 and Bear Stearns Asset Backed Securities I Trust 2007-AQ2*, No. 27-TR-CV-17-29, Order (Minn. Dist. Court, Hennepin County, Sept. 11, 2017) (same); and *In the matter of the trusteeship created by Bear Stearns Asset Backed Securities I LLC relating to the issuance of certificates by SACO I Trust 2006-7 pursuant to a Pooling and Servicing Agreement dated as of June 1, 2006*, 27-TR-CV-15-309, Order (Minn. Dist. Court, Hennepin County, May 30, 2017) (instructing trustee to "apply the Settlement Payment in accordance with the 'write up first, pay second' method") *with In re Bank of New York Mellon*, No. 150973/2016, Doc. 193 (Decision/Order) (N.Y. Sup. Ct., April 4, 2017) (applicable settlement

4. The "avoidance of doubt" clause does not require pay-first.

Finally, the Opposing Respondents argue that the "avoidance of doubt" clause in Section 3.06(b) requires "Pay-First." That argument is unfounded. The relevant clause provides:

> For the avoidance of doubt, this Subsection 3.06(b) is intended only to increase the balances of the related classes of securities, as provided for herein, and shall not affect the distribution of the Settlement Payment provided for in Subsection 3.06(a).

The Opposing Respondents' strained reading of this clause is that it prevents use of the Write-Up First Method because write-ups will inevitably "affect the distribution of the Settlement Payment." They point out that the amount of the distributions to be made to investors will be "affected" if write-ups occur before distributions. However, the Opposing Respondents place far more weight on this "avoidance of doubt" clause than it will bear. *First*, the purpose of any "avoidance of doubt clause" is to reaffirm an existing obligation, not to create a new one. The Opposing Respondents would have this clause impose a new condition—that write-ups not affect distributions—that is not found anywhere else in the SA.

Second, the Opposing Respondents' interpretation would conflict with their own interpretation of the SA as mandating the Pay-First Method. Namely, even if the Pay-First Method were applied, write-ups could still "affect the distribution of the Settlement Payment provided for in Subsection 3.06(a)." SA § 3.06(b). For example, Section 3.06(a) provides that "[i]f distribution of a Settlement Trust's Allocable Share would become payable to a class of REMIC residual interests…***such payment shall be maintained in the collection or distribution account for distribution on the next distribution date according to the provisions of this Subsection 3.06(a).***" SA § 3.06(a) (emphasis added). In those cases, under the Pay-First

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agreement "directed the Trustee to pay out the Allocable Share first, and then to write up the certificates in the amount of the Allocable Share") (Notice of Appeal filed October 25, 2017).

Method, write-ups would occur after the initial distribution to investors, while some part of that distribution would be maintained in the Trust's accounts for distribution on the following distribution date. Thus, the write-ups would still affect the distribution, as the remaining funds would be distributed pursuant to the written-up certificate principal balances. Petitioners also identify several other situations in which funds might remain undistributed under the Pay-First Method after the initial distribution, presumably to be distributed on later distribution dates. *See* Petition ¶¶ 38-39, 61. Thus, the "avoidance of doubt" clause simply cannot mean that write-ups will not be permitted to affect the *amount* of the distributions, as the amount can be affected even under the Opposing Respondents' preferred Pay-First Method.

Instead, the prohibition against "affect[ing] the distribution of the Settlement Payment provided for in Subsection 3.06(a)," while not a model of clarity, is better understood as referring to the distribution *methodology* provided for in Section 3.06(a). Under this much less strained interpretation, which harmonizes the provisions of the SA and does not use an "avoidance of doubt" clause to add a new obligation, the last sentence of Section 3.06(b) simply reaffirms that the distribution methodology provided for in Section 3.06(a) (*i.e.*, follow the Governing Agreements) is different and separate from the write-up methodology provided for in Section 3.06(b) (*i.e.*, apply write-ups in the reverse order of losses), and the latter provision is "intended only to increase the balances of the related classes of securities," not to affect (or govern) distributions. Thus, the "avoidance of doubt" clause does not indicate any preference for the Pay-First Method over the Write-Up First Method.

B. The Governing Agreements for the GPMF 2006-AR1 Settlement Trust Clearly Require the Write-Up First Method

Contrary to the contention of the Opposing Respondents, the Governing Agreements are not "silent" on the issue of whether Write-Up First or Pay-First should apply. As set forth in

detail in Section III of Respondents Br., the Governing Agreements for the GPMF 2006-AR1 Settlement Trust also supports the Write-Up First Method and are thus consistent with the SA.

C. Res Judicata Does Not Bar Interpretation of the Clear Language of the SA.

The Opposing Respondents erroneously contend that interested parties should have raised their "objection(s) to the Pay First Method" in the first Article 77 proceeding and are now barred, by *res judicata*, from doing so. However, this argument incorrectly assumes that the SA indisputably provides for Pay-First, which it does not, or that this Court ruled as such in the first Article 77 proceeding, which it did not. As noted above, the natural reading of the language of the SA is that it requires Write-Up First, such that this Court's approval of Petitioners' entry into the SA would not have carried with it an endorsement of the Pay First Method. This question is only now before the Court, and is to be decided in this proceeding.[13]

IV. CONCLUSION

To properly reflect and honor the purpose of the SA and the Governing Agreements, Respondents respectfully request that this Court enter an order instructing the Petitioners to (1) follow the SA Write-Up Instruction and apply the Allocable Share to write-up the certificate principal balance of *any* certificate to which realized losses have been previously allocated; (2) apply the Settlement Payment to increase the certificate balance of all certificates without regard to whether any certificate has a certificate principal balance or amount of zero; (3) follow the "Write-Up First Method"; and (4) follow the SA Write-Up Instruction to write-up certificates in the reverse order of previously allocated losses.

[13] As argued in Respondents Br., Section I.B.1 (joining and adopting Point I of the merits brief of Tilden Park), *res judicata* does bar any argument that the terms of the SA should be disregarded or overridden due to conflict with the terms of the Governing Agreements, as such issue was before the Court previously and was decided.

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Respectfully submitted,

PERRY, JOHNSON, ANDERSON, MILLER & MOSKOWITZ, LLP

/s/ Isaac M. Gradman
Isaac M. Gradman, *pro hac vice*
Kristin A. Mattiske-Nicholls
E. Page Allinson, *pro hac vice*
438 First Street, 4th Floor
Santa Rosa, CA 95401
Tel: (707) 525-8800

Counsel for Respondents DW Partners LP and Ellington Management Group, L.L.C.

DAI & ASSOCIATES, P.C.

/s/ Amiad Kushner
Amiad Kushner
Times Square Plaza
1500 Broadway, 22nd Floor
New York, NY 10036
Tel: (212) 730-8880

Counsel for Respondents DW Partners LP and Ellington Management Group, L.L.C.