To be Argued by:
JONATHAN L. HOCHMAN
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

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, NA, 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 Distribution of a Settlement Payment

(For Continuation of Caption See Inside Cover)

Appellate Case No.: 2020-02716

RESPONSE BRIEF FOR TILDEN PARK

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New York County Clerk's Index No. 657387/17

Appellants-Respondents

AEGON USA INVESTMENT MANAGEMENT, LLC, BLACKROCK FINANCIAL MANAGEMENT, INC., CASCADE INVESTMENT, LLC, FEDERAL HOME LOAN BANK OF ATLANTA, FEDERAL HOME LOAN MORTGAGE CORP., FEDERAL NATIONAL MORTGAGE ASSOCIATION, GOLDMAN SACHS ASSET MGMT L.P., VOYA INVESTMENT MGMT LLC, INVESCO ADVISERS, INC., KORE ADVISORS, L.P., METROPOLITAN LIFE INS. CO., PACIFIC INVESTMENT MGMT COMPANY LLC, TEACHERS INS. AND ANNUITY ASSOC. OF AMERICA, TCW GROUP, INC., THRIVENT FINANCIAL FOR LUTHERANS and WESTERN ASSET MGMT. CO.
(the "Institutional Investors")

– and –

Appellants-Respondents

AMERICAN GENERAL LIFE INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK and THE VARIABLE ANNUITY LIFE INSURANCE COMPANY
(the "AIG Parties")

– and –

Appellants-Respondents

ELLINGTON MANAGEMENT GROUP, L.L.C. and DW PARTNERS LP
(the "Ellington and DW Parties")

– and –

Appellants-Respondents

TILDEN PARK INVESTMENT MASTER FUND LP on behalf of itself and its advisory clients, TILDEN PARK MANAGEMENT I LLC on behalf of itself and its advisory clients and TILDEN PARK CAPITAL MANAGEMENT LP on behalf of itself and its advisory clients
(the "Tilden Park")

– and –

Appellants-Respondents

PROPHET MORTGAGE OPPORTUNITIES LP, POETIC HOLDINGS VI LLC, POETIC HOLDINGS VII LLC and U.S. BANK NATIONAL ASSOCIATION, solely in its capacity as Indenture Trustee for the Prophet and Poetic Trusts
(the "Prophet and Poetic Parties")

– and –

Appellant-Respondent

AMBAC ASSURANCE CORPORATION
("Ambac")

– and –

Appellants-Respondents

U.S. BANK NATIONAL ASSOCIATION, as NIM Trustee, U.S. Bank, solely in its capacity as Indenture Trustee for the HBK Trusts
(the "HBK Parties")

– against –

Respondent

NOVER VENTURES, LLC
("Nover")

– and –

Respondent

D.E. SHAW REFRACTION PORTFOLIOS, L.L.C.
("D.E. Shaw")

– and –

Respondent

STRATEGOS CAPITAL MANAGEMENT, LLC
("Strategos")

– and –

Respondents

OLIFANT FUND, LTD., FFI FUND LTD. and FYI LTD.
(the "Olifant Parties")

– and –

Respondents

GMO OPPORTUNISTIC INCOME FUND
and GMO GLOBAL REAL RETURN
(the "GMO Parties")

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PRELIMINARY STATEMENT

In its opening brief, HBK[1] states the correct legal rule but fails to properly apply it: A contract "should as a rule be enforced according to its terms." *W.W.W. Assocs. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). The trial court correctly enforced the terms of the Governing Agreements for the HBK trusts[2] dictating the "order of operations" Trustees must follow when distributing the Settlement Payment and "writing up" certificates. As the trial court recognized, those Governing Agreements require that write-ups occur before distributions (*i.e.*, the "Write-Up First Method"). HBK fails to show any reason to deviate from the terms of those Governing Agreements so that distributions should go before write-ups instead.

HBK also fails to show that certificates with balances of zero cannot be written up to account for the Settlement Payment. By its terms, the Settlement Agreement controls that issue and mandates that all certificates may be written up,

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[1] For purposes of this brief, "HBK" refers to U.S. Bank, N.A., solely in its capacity as Indenture Trustee for certain NIM Trusts holding direct interests in certain RMBS trusts (the "HBK Trusts") and solely at the direction of HBK Master Fund L.P. ("HBK"). *See* HBK Br. 1.

[2] Arguments made in this brief regarding the "HBK trusts" include the "HBK Trusts" as defined in HBK's brief and trusts with materially identical terms in which the Poetic and Prophet parties hold interests. *See* Poetic and Prophet Br. 3-4 (representing that "[i]n all respects relevant to this appeal, the PSAs for the Poetic and Prophet Trusts are substantially identical to the PSAs for the 'HBK Trusts,'" and adopting HBK's arguments with respect to write-up of zero balance certificates).

including zero balance certificates. And even if the Settlement Agreement did not control, the trial court correctly recognized that the terms of the Governing Agreements for these trusts also mandate such write-ups. The Court should affirm the trial court's ruling on that issue as well.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Governing Agreements for the HBK trusts require the Trustees to use the "Write-Up First Method" of applying the amount of the Settlement Payment to write up the certificates' principal balances before distribution, given that those Agreements' definition of "Certificate Principal Balance" requires write-ups to occur before the "Certificate Principal Balance" is calculated and used to make distributions?

The trial court correctly answered in the affirmative.

2. Whether "zero balance" or "retired" certificates for the HBK trusts are entitled to be written up, given that (a) the Settlement Agreement explicitly requires all classes of certificates (except REMIC residual interests) to be written up regardless of certificate principal balance, (b) the Governing Agreements' write-up rules contain no exceptions for zero balance certificates, and (c) the clauses in the Governing Agreements that HBK cites as prohibiting such write-ups in fact say nothing about that issue?

The trial court correctly answered in the affirmative.

COUNTERSTATEMENT OF THE CASE

As explained in Tilden Park's[3] and HBK's opening briefs, this case involves the interpretation of a multibillion-dollar Settlement Agreement between JPMorgan Chase and the Trustees of various RMBS trusts. This brief addresses two of the issues raised in HBK's brief with respect to the HBK trusts: (1) what "order of operations" the Trustees should follow when making payments and "writing up" certificates; and (2) which certificates are entitled to be "written up" to reflect the Settlement Payment.

I. THE TRIAL COURT'S ORDER-OF-OPERATIONS RULING

As explained in Tilden Park's brief, two basic sets of terms affect how trustees make payments and apportion trust capital among different classes of investors. First, the "distribution" or "waterfall" provisions establish the priority and amount of distributions to various certificateholders. Am. Bar Ass'n, 7 Bus. & Com. Litig. Fed. Cts. § 77:19 (4th ed.); A361 ¶3. Second, each class of certificates has a "certificate principal balance" that determines the total amount of trust capital such class is entitled to receive at any given time. A361, A364-365 ¶¶3, 6-7. As a class of certificates receives distributions, its "certificate principal bal-

[3] As used here, "Tilden Park" means Tilden Park Investment Master Fund LP on behalf of itself and its advisory clients, Tilden Park Management I LLC on behalf of itself and its advisory clients, and Tilden Park Capital Management LP on behalf of itself and its advisory clients.

ance" is decreased. *See, e.g.*, A3532-3534, BSABS 2005-AQ2 PSA §5.04(a)(2) (providing for distributions in turn to each class of certificates "until the Certificate Principal Balance thereof is reduced to zero"). The "certificate principal balance" may also be decreased if the trust incurs any "realized losses" from borrowers' defaults. *See, e.g.*, A3530, 3539-40, BSABS 2005-AQ2 PSA, definition of "Certificate Principal Balance" and §5.05(a) (providing for allocating "Realized Losses" to certificates). By contrast, trust governing agreements also often instruct trustees to increase, or "write up," a certificate's principal balance to account for "subsequent recover[ies]" that the trust receives in compensation for past losses. A364 ¶7; *see also* A3537, BSABS 2005-AQ2 PSA §5.04(b). Writing up a certificate's principal balance makes that certificate eligible for additional distributions in the future. A376 ¶36.

A key question in the Article 77 proceeding was the "order of operations" between distribution and write-up of the Settlement Payment—that is, whether the Settlement Payment should be distributed to the certificateholders before certificates are written up (the "Pay First Method"), or whether certificates should be written up first and distributions then made based on the newly written-up principal balances (the "Write-Up First Method"). A369 ¶22.

As the trial court recognized—and HBK agreed—Section 3.06(a) of the Settlement Agreement requires the Trustees to follow the order of operations

dictated by each Governing Agreement. A30-35. Specifically, Section 3.06(a) requires the Trustee for each trust to distribute the settlement "in accordance with the distribution provisions of the Governing Agreements." A418. Because these distribution instructions "expressly defer[] to the distribution provisions of the Governing Agreements," the trial court recognized, "the Governing Agreements control where they specify the order of operations." A34. If a Governing Agreement lacks an order of operations, the trial court held, the Settlement Agreement provides a "gap-filler" rule: In that situation, the Trustees should follow the Pay-First Method. A34.

Under this framework, the trial court held that the definition of Certificate Principal Balance for the HBK trusts requires the Write-Up First Method. A37-38. The trial court noted that the Governing Agreements for those trusts define "Certificate Principal Balance" "as of any Distribution Date" as the sum of the initial certificate balance and, in the case of specified certificates, "any Subsequent Recoveries added to the Certificate Principal Balance of such Certificate[s] pursuant to Section 5.04(b)," less amounts distributed "in reduction of the Certificate Principal Balance thereof on previous Distribution Dates" and any

"Applied Realized Loss Amounts allocated to such Certificate[s] on previous Distribution Dates." A37-38; A3530.[4]

As the trial court observed, the date as of which the Trustee accounts for write-ups and distributions in those trusts requires that write-ups occur first. In those trusts, the Certificate Principal Balance is calculated "as of any Distribution Date" but deducts principal payments made "on previous Distribution Dates" and losses allocated "on previous Distribution Dates." A38. In contrast, the Certificate Principal Balance includes all subsequent recoveries "added to the Certificate Principal Balance" in any write-up "pursuant to Section 5.04(b)" and is not limited to write-ups that occurred on "previous Distribution Dates." *Id.*

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[4] The full definition of "Certificate Principal Balance" in one representative HBK trust reads:

> As to any Certificate (other than the Class CE Certificates or any Class R Certificate) and as of any Distribution Date, the Initial Certificate Principal Balance of such Certificate plus, in the case of a Class A Certificate and Class M Certificate, any Subsequent Recoveries added to the Certificate Principal Balance of such Certificate pursuant to Section 5.04(b), less the sum of (i) all amounts distributed with respect to such Certificate in reduction of the Certificate Principal Balance thereof on previous Distribution Dates pursuant to Section 5.04, and (ii) any Applied Realized Loss Amounts allocated to such Certificate on previous Distribution Dates. As to the Class CE Certificates and as of any Distribution Date, an amount equal to the Uncertificated Principal Balance of the Class CE Interest.

A3530, BSABS 2005-AQ2 PSA.

The trial court thus concluded that, because the Certificate Principal Balance as of a given distribution date accounts for only previous distributions and realized losses, but includes both past and current write-ups, and because a certificate's Certificate Principal Balance governs what payments that certificate receives on each distribution date, write-ups must occur before payments on each distribution date. A37-38. "Had the drafters intended to include only previous subsequent recoveries in the calculation of Certificate Principal Balance and thereby to delay the write-up of such subsequent recoveries," the trial court reasoned, "they could have done so, as they did for other principal distributions and losses." A38. In ruling that the HBK Trusts require the Write-Up First Method, the trial court rejected HBK's arguments that those trusts' Governing Agreements require the Pay-First Method instead. *See* A40-41.

II. THE TRIAL COURT'S RULING ON "ZERO BALANCE" CERTIFICATES

Certain trusts (identified in Exhibit G of the Trustees' Article 77 Petition) contain a term that limits which distributions are made to certificates whose Certificate Principal Balance has reached zero. A382-384 ¶¶53-62. The version of this provision contained in the HBK trusts reads:

> In addition, notwithstanding the foregoing, on any Distribution Date after the Distribution Date on which the Certificate Principal Balance of a Class of Class A Certificates or Class M Certificates has been reduced to zero, that Class of Certificates will be retired and will no longer be entitled to distributions[.]

A3536, BSABS 2005-AQ2 PSA §5.04(a). The Trustees noted that, although this provision "appears to preclude further distributions" to certain classes of certificates whose principal balance had been reduced to zero, "[n]othing on the face of the Retired Class Provision or in the applicable Governing Agreements appears to expressly preclude Zero Balance Classes from being written up in connection with subsequent recoveries." A382-383 ¶¶55, 57. If those "Zero Balance Classes" were written up in connection with the Settlement Payment, the Trustees pointed out, their balances would no longer be zero and they would be eligible to receive the Settlement Payment (if the Write-Up First Method was used), or future principal and interest distributions. A383 ¶57.

The trial court held, over HBK's objection, that zero balance certificates are entitled to be written up. The trial court noted that Section 3.06(b) of the Settlement Agreement "authorizes the write-up of 'each class of securities' to which losses have previously been allocated." A62. Tilden Park argued that Section 3.06(b) applies regardless of any contrary terms in a Governing Agreement and uniformly requires writing up all certificates, including zero balance certificates. *See* A2271, A2282-2284 (Tilden Park answer). However, the trial court held that that "the Settlement Agreement write-up provision controls regarding the

write-up of zero balance certificates only where a Governing Agreement lacks a write-up provision applicable to subsequent recoveries." A63.[5]

The trial court further held that the zero balance certificates for the Exhibit G trusts were entitled to write-ups under the terms of their Governing Agreements. The trial court recognized that the Retired Class provisions in the Governing Agreements of the Exhibit G trusts limit distributions but were silent about write-ups of certificate balances. A63. The write-up provisions for those Governing Agreements, moreover, do not restrict zero balance certificates from being written up by subsequent recoveries. *Id.* Therefore, the trial court held, the zero balance certificates in the Exhibit G trusts can be written up and, as a natural consequence, can subsequently receive distributions. *Id.*

In so ruling, the trial court also "note[d]" that the Settlement Agreement was designed to "compensate[ ] investors for losses in connection with the mortgage loans." A64. Given that zero balance certificates had zero balances precisely because they had incurred losses, writing up zero balance certificates to the extent of previously allocated losses is "consistent with" that design. *Id.* Importantly, while

[5] As explained in Tilden Park's opening brief, that holding was incorrect. However, as explained below, zero balance certificates are eligible to be written up whether or not the Settlement Agreements or the Governing Agreements control this issue. *See* pp. 22-24, *infra* (zero balance certificates are eligible to be written up under the Settlement Agreement); pp. 24-35, *infra* (zero-balance certificates are eligible to be written up under the Governing Agreements).

the trial court provided this context, its holding was based on the Governing Agreements' plain text, not policy considerations. A63-64.

STANDARD OF REVIEW

As explained in Tilden Park's opening brief, the standard of review in this Article 77 case involving contract interpretation is *de novo*. *MPEG LA, LLC v. Samsung Elecs. Co.*, 166 A.D.3d 13, 17 (1st Dep't 2018), *leave to appeal denied*, 32 N.Y.3d 912 (2018) (quoting *Duane Reade, Inc. v. Cardtronics, LP*, 54 A.D.3d 137, 140 (1st Dep't 2018)); *see, e.g.*, *U.S. Bank Nat'l Ass'n v. SMBC Holdings, LLC*, 177 A.D.3d 443 (1st Dep't 2019). Moreover, this Court "is not confined to the grounds assigned by the court below for its decision but may sustain a judgment on other grounds." 11 Carmody-Wait (2d) N.Y. Prac. §71:100 (2020 rev.) (collecting cases); *see, e.g.*, *4042 E. Tremont Café Corp v. Sodono*, 177 A.D.3d 456, 459 (1st Dep't 2019) (affirming order of Supreme Court on alternate grounds).

SUMMARY OF ARGUMENT

The trial court's rulings for the HBK trusts on the order of operations and on the write-up of "zero balance" certificates should be affirmed. For the order of operations, the trial court correctly found that the definition of "Certificate Principal Balance" in the HBK trusts' Governing Agreements requires the Trustees to use the Write-Up First Method. That definition requires the Trustees to account

for, and carry out, write-ups before distributions take place. The trial court correctly rejected HBK's contrary arguments below that the HBK trust Governing Agreements require the Pay-First Method. While HBK switches tack on appeal and now argues that the relevant Governing Agreements are silent on this issue, those arguments also fail because they disregard the agreements' plain text.

The trial court also reached the correct result on the write-up of zero balance classes. While the trial court incorrectly held that the Governing Agreements and not the Settlement Agreement control this issue, the trial court correctly recognized that the Settlement Agreement, if controlling, would require writing up all certificates with losses, including zero balance certificates. This Court should affirm on the alternate ground that the Settlement Agreement controls. But even if the Settlement Agreement did not control, the trial court also correctly held that the Governing Agreements for the HBK trusts likewise permit zero balance certificates to be written up. HBK's arguments to the contrary misunderstand the Governing Agreements for those trusts.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT THE HBK TRUSTS' GOVERNING AGREEMENTS REQUIRE THE WRITE-UP FIRST METHOD

On appeal, HBK has abandoned its argument that the Governing Agreements for the HBK trusts require the Pay First Method. Instead, HBK now argues that the Governing Agreements for those trusts are "[s]ilent" on the order of

operations. HBK Br. 22. "Consequently," HBK argues, "the Settlement Agreement's Pay First Method controls." *Id.* at 26 (capitalization altered). But HBK's new argument that the Governing Agreements are "silent" on the order of operations ignores those agreements' clear terms.

The trial court correctly concluded that the HBK trusts require the Write-Up First Method through the way that they define each class of certificates' "Certificate Principal Balance." Both those trusts' distribution terms and their write-up terms reference the defined term "Certificate Principal Balance." For distributions, Section 5.04(a) of those Governing Agreements requires that "[o]n each Distribution Date," the Trustee must distribute principal payments to each class of certificates in a certain order "until the Certificate Principal Balance" of each class "is reduced to zero." A3532-3535, BSABS 2005-AQ2 PSA §§ 5.04(a), (a)(2).[6] Thus, because each certificate's entitlement to distributions depends on its Certificate Principal Balance, the Trustee must calculate the Certificate Principal Balance to know how much to distribute.

The defined term "Certificate Principal Balance" also governs how the Trustees of these trusts write up certificates to account for "subsequent recoveries"

[6] The relevant terms of the Governing Agreements for the HBK trusts are materially identical to those of the PSA for the BSABS 2005-AQ2 trust. *See* A36; HBK Br. 8 n.2 (noting that the terms of the BSABS 2005-AQ2 PSA are "substantively identical" to those of the other HBK trusts "relevant to the questions presented here").

such as the Settlement Payment. Section 5.04(b) of each HBK trust Governing Agreement provides: "[W]ith respect to any Subsequent Recoveries . . . [i]f, after taking into account such Subsequent Recoveries, the amount of a Realized Loss is reduced, the amount of such 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." *See, e.g.*, A3537, BSABS 2005-AQ2 PSA § 5.04(b).[7]

[7] In its entirety, Section 5.04(b) states:

> In addition to the foregoing distributions, with respect to any Subsequent Recoveries, the Master Servicer shall deposit such funds into the Protected Account pursuant to Section 4.01(b)(iii). If, after taking into account such Subsequent Recoveries, the amount of a Realized Loss is reduced, the amount of such 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, but not by more than the amount of Realized Losses previously allocated to that Class of Certificates pursuant to Section 5.05; provided, however, to the extent that no reductions to a Certificate Principal Balance of any Class of Certificates currently exists as the result of a prior allocation of a Realized Loss, such Subsequent Recoveries will be applied as Excess Spread. The amount of any remaining Subsequent Recoveries will be applied to increase the Certificate Principal Balance of the Class of Certificates with the next highest payment priority, up to the amount of such Realized Losses previously allocated to that Class of Certificates pursuant to Section 5.05, and so on. Holders of such Certificates will not be entitled to any payment in respect of Current Interest on the amount of such increases for any Interest Accrual Period preceding the Distribution Date on which such increase occurs.

As the trial court noted, neither the distribution provisions nor the write-up provisions of the relevant Governing Agreements explicitly specify the order of operations between distributions and write-ups. A36-37. Instead, the order of operations is contained in the definition of "Certificate Principal Balance" itself. That definition establishes the order of operations by specifying exactly which distributions and write-ups are accounted for on any distribution date. Because the "Certificate Principal Balance" governs how much is paid to each class on each distribution date, whether the "Certificate Principal Balance" takes into account the current month's write-ups determines whether the Trustee should pay those distributions first or write them up first. For example, in the BSABS 2005-AQ2 trust, "Certificate Principal Balance" is defined as:

> As to any Certificate (other than the Class CE Certificates or any Class R Certificate) and as of any Distribution Date, the Initial Certificate Principal Balance of such Certificate plus, in the case of a Class A Certificate and Class M Certificate, any Subsequent Recoveries added to the Certificate Principal Balance of such Certificate pursuant to Section 5.04(b), less the sum of (i) all amounts distributed with respect to such Certificate in reduction of the Certificate Principal Balance thereof on previous Distribution Dates pursuant to Section 5.04, and (ii) any Applied Realized Loss Amounts allocated to such Certificate on previous Distribution Dates.

> Any such increases shall be applied to the Certificate Principal Balance of each Certificate of such Class in accordance with its respective Percentage Interest.

A3537, BSABS 2005-AQ2 PSA § 5.04(b).

A3530.

Thus, the Trustee calculates the Certificate Principal Balance for the relevant certificates according to the following formula:

- "as of any Distribution Date, the Initial Certificate Principal Balance of such Certificate,"
- plus "any Subsequent Recoveries added to the Certificate Principal Balance of such Certificate pursuant to Section 5.04(b)," without any distinction between prior and current write-ups;
- minus "all amounts distributed with respect to such Certificate in reduction of the Certificate Principal Balance thereof on previous Distribution Dates pursuant to Section 5.04,"
- and minus "any Applied Realized Loss Amounts allocated to such Certificate on previous Distribution Dates."

A3530. As the trial court observed, two components of the Certificate Principal Balance—the "amounts distributed . . . in reduction of the Certificate Principal Balance" and "any Applied Realized Loss Amounts"—are factored into the Certificate Principal Balance calculation only after they are paid or allocated on "previous Distribution Dates." A37-38. In contrast, the Certificate Principal Balance includes "any" subsequent recoveries "added to the Certificate Principal Balance," without any limitation based on when the write-up occurs. A3530.

The Certificate Principal Balance definition includes "any" write-ups without qualification, making it clear that the Certificate Principal Balance "as of any Distribution Date" includes both current and past subsequent recovery write-ups. The "unqualified word 'any'" should be given "its full significance as a general term." *Bath & Hammondsport R.R. Co. v. New York State Dep't of Env't Conservation*, 73 N.Y.2d 434, 438 (1989). And because the accounting for write-ups is not limited to "previous" distribution dates—in contrast to the accounting for distributions and applied realized losses—under the *expressio unius* canon of contract interpretation that distinction "must be assumed to have been intentional." *U.S. Fid. & Guar. Co. v. Annunziata*, 67 N.Y.2d 229, 233 (1986) (citation omitted). As the trial court recognized, "[h]ad the drafters intended to include only previous subsequent recoveries in the calculation of Certificate Principal Balance and thereby [] delay the write-up of such subsequent recoveries, they could have done so, as they did for other principal distributions and losses." A38. That they did not do so means that the Certificate Principal Balance accounts for "any" write-ups, whether past or current.

Given that conclusion, write-ups must occur before the Certificate Principal Balance is calculated on any given distribution date. To account for a write-up, that write-up must first be performed. And because the Trustees must know and use the "Certificate Principal Balance" on each distribution date to make

distributions, the "Certificate Principal Balance"—including the current month's write-ups—must be processed before any distributions are made. As a result, the only reasonable reading of the "Certificate Principal Balance" definition is that, on any given distribution date, the Trustees must first write up certificates, then account for the write-ups in calculating the Certificate Principal Balance, and finally use the Certificate Principal Balance to make distributions.

HBK argues that the definition of "Certificate Principal Balance" does not specify an order of operations because the reference to write-ups in that definition refers to write-ups "added . . . pursuant to Section 5.04(b)." HBK Br. 24-25; *see* A3530. As HBK observes, Section 5.04(b) does not by itself address the order of operations. HBK Br. 24. But it is hard to see why that matters. Neither Section 5.04(b) nor the reference to it in the "Certificate Principal Balance" definition purports to change the timing of how write-ups or distributions are accounted for. Instead, Section 5.04(b) serves to specify the method for performing write-ups. The "Certificate Principal Balance" definition alone specifies when write-ups and distributions are accounted for by instructing the Trustees to add "any" subsequent recoveries to the Certificate Principal Balance and to subtract distributions received and losses allocated on "previous Distribution Dates." A3265. HBK provides no coherent reason why "[t]he absence of an order of operations in Section 5.04(b) means that [the] Certificate Principal Balance definition is

necessarily silent on that issue as well." HBK Br. 25. The drafters of the Governing Agreements were free to specify an order of operations in any part of those agreements that they chose. HBK fails to discern an order of operations in those Governing Agreements simply because it is looking in the wrong place.

HBK next insists that, for the parties to the HBK trusts to specify an order of operations, they were required to "state[] so explicitly, as some RMBS trust governing agreements do." HBK Br. 25. In fact, the Governing Agreements do specify the order of operations explicitly in the formula for calculating the "Certificate Principal Balance." But there is also no rule that contract parties must state all terms of their contract "explicitly." Contract parties are free to specify contract terms by implication or cross-reference. 12 Williston on Contracts § 31:7 (4th ed.) ("The implied terms of a contract are just as much a part of the contract as express terms."); *Sacramento Nav. Co. v. Salz*, 273 U.S. 326, 329 (1927) ("[A] contract includes, not only the promises set forth in express words, but, in addition, all such implied provisions as are indispensable to effectuate the intention of the parties and as arise from the language of the contract and the circumstances under which it was made."). As the trial court correctly recognized, "the need for interpretation of these provisions does not mean that they are silent as to the order of operations." A39.

Likewise, even if HBK were right that there is some sort of trade usage for how the order of operations should be defined, RMBS deal parties are free to vary from that usage. *See* HBK Br. 24; *Gravenhorst v. Zimmerman*, 236 N.Y. 22, 34 (1923) (custom may not be used to "contradict[ ] the agreements which the parties have made"). One way they can do that is through their contractual definitions. Williston*, supra*, at § 34:11 ("[A] custom or usage may be excluded from the terms of the contract either expressly or by implication," including by "hav[ing] the contract define terms in a manner that is different from the industry or trade definitions for those terms"). Notably, there is nothing unique about how the HBK trusts specify an order of operations. As the trial court correctly held, other Governing Agreements similarly provide an order of operations through their definitions of certificate balances—for example, specifying the Pay-First Method by defining the "Certificate Principal Balance" to include Subsequent Recoveries "allocated to such Class on previous Distribution Dates." A42 (citing A3548, BSABS 2005-SD2 PSA).[8]

Finally, HBK observes that the Governing Agreements specify the time when "realized losses" are applied to the Certificate Principal Balance. HBK Br.

[8] *See also* A42 (holding that certain trusts require the Pay-First Method by specifying that the "Certificate Principal Amount" in some Trusts should be increased by "the amount of Subsequent Recoveries distributed as principal"); A3554 (JPALT 2006-A5 PSA definition of "Certificate Principal Amount").

25-26; *see, e.g.*, A3540, BSABS 2005-AQ2 PSA § 5.05(a). Alluding to *expressio unius*, HBK contends that that phrasing implies that the Governing Agreement's parties must have "decided not to address" the order of operations for write-ups and distributions. HBK Br. 26. But New York courts do not mechanistically apply that canon in the face of other clear indications of the parties' intent. *See, e.g.*, *Bath & Hammondsport R.R. Co.*, 73 N.Y.2d at 437-38 (canon could not defeat provision's "plain language"). The fact that the order of operations for write-ups versus distributions is phrased differently than the order of operations for distributions versus loss allocations does not imply that the parties decided not to address the former order of operations at all.

Moreover, "[t]he canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002). Realized losses, which decrease certificate balances, and write-ups, which increase them, do not go hand in hand because they are mutually exclusive. Given that write-ups cannot happen at the same time as the allocation of realized losses, there is no reason to think that write-ups and loss allocations should be performed in the same way. It thus does not make sense to infer that the timing of when realized losses are allocated implies anything about the timing of write-ups.

Thus, contrary to HBK's assertions, the HBK trust Governing Agreements are not "silent on the order of operations." HBK Br. 22 (capitalization altered). There is accordingly no need to impose the "gap-filling" order of operations that the trial court read the Settlement Agreement to have. *Cf.* HBK Br. 26. The Court should affirm the trial court's decision and hold that the HBK trusts' Governing Agreements specify the Write-Up First Method.[9]

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[9] Although Tilden Park disagrees that the HBK trusts are Pay First trusts, Tilden Park agrees with HBK that the trial court erred in rewriting the terms of certain Pay First Governing Agreements to avoid paying Settlement funds through those trusts' excess cashflow waterfall. *See* HBK. Br. 35-41; *see also* A49-51.

The relevant Governing Agreements require calculating the "Over-collateralization Amount" "[w]ith respect to any Distribution Date" only "after taking into account the payment of principal." *See, e.g.*, A10916. Because the Settlement Payment is treated as though it were a "'subsequent recovery' relating to principal proceeds," A418, the Settlement Payment must be included in the Over-collateralization Amount. And because distribution precedes write-up for Pay First Trusts, distribution of the Settlement Payment could cause those trusts to be over-collateralized and trigger what is sometimes called an "overcollaterization release"—that is, a payment of funds through the trusts' excess cashflow waterfall. *See* A372 ¶28.

Contrary to the plain terms of the Governing Agreements, the trial court held that, to avoid overcollateralization release, the Trustees must take into account "both a reduction of the balance in the amount of principal to be paid out, and an increase of the balance in the amount of Subsequent Recovery to be distributed" in calculating the Overcollateralization Amount. A49-50. The trial court reached this result because it wanted to avoid "diversion of distributions to junior certificate-holders as opposed to payment to senior certificateholders." A50-51. But courts may not ignore clear contractual terms in order to avoid supposedly undesirable results. *Greenfield v. Philles Records*, 98 N.Y.2d 562, 570-71 (2002) ("[I]f the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity.").

II. UNDER BOTH THE SETTLEMENT AGREEMENT AND THE RELEVANT GOVERNING AGREEMENTS, ZERO BALANCE CERTIFICATES ARE ELIGIBLE FOR WRITE-UPS AND DISTRIBUTIONS

The trial court also correctly held that certificates with zero balances should be written up to reflect the Settlement Payment. This Court should affirm that ruling on the alternate ground that the Settlement Agreement controls write-ups and requires that the Trustees write up all certificates in reverse order of previously allocated losses, whether or not those certificates have zero balances or are purportedly "retired." However, the Court may also affirm on the independent ground that, if the Governing Agreements control this issue, the trial court correctly interpreted the those agreements to permit writing up zero balance certificates as well.

A. Under the Settlement Agreement, "Each" Class of Certificates May Be Written Up

As Tilden Park explained in its opening brief, the Settlement Agreement imposes a clear, uniform rule for applying the amount of the Settlement Payment to write up the certificates' principal balances. Under Section 3.06(b) of the Settlement Agreement, the Trustee

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Tilden Park thus agrees with HBK that the relevant trusts' payment terms should be enforced as written. Should this Court side with HBK on this issue and reverse the trial court's ruling, Tilden Park respectfully requests that such reversal be applied across the board to all outstanding Tilden Park trusts with similar Governing Agreement language. *See* A2294 (list of trusts with similar language).

> 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 (other than any class of REMIC residual interests) to which such losses have previously been allocated, but in each case not more than the amount of such losses previously allocated to that class of securities pursuant to the Governing Agreements.

A418-419.

This straightforward rule leads to a straightforward result: "[E]ach class" of certificates to which "losses have previously been allocated" must be written up "in the reverse order of previously allocated losses." A419. "Each" means "every one." *See In re Turner's Will*, 208 N.Y. 261, 265 (1913). The only exception to that rule is that REMIC residual certificates are prohibited from receiving write-ups. A419. Under the plain terms of the Settlement Agreement, therefore, all "class[es] of securities" (apart from REMIC residual interests) "to which [ ] losses have previously been allocated"—including any classes in which the Certificate Principal Balance has been reduced to zero—are entitled to be written up. *Id.*

The trial court correctly recognized that Section 3.06(b) "authorizes the write-up of 'each class of securities' to which losses have previously been allocated." A62. The trial court erred, however, in holding that Section 3.06(b) applies "only where a Governing Agreement lacks a write-up provision applicable to subsequent recoveries." A63. That holding stemmed from the trial court's earlier incorrect conclusion that Section 3.06(b) is a mere "gap filler" which

"applies only where the Governing Agreement is silent as to the write-up mechanics." A53. And that conclusion, in turn, rested on the trial court's erroneous reasoning that Section 7.05 of the Settlement Agreement—which provides that the Settlement Agreement shall not be "deemed to constitute" an "amendment" of any Governing Agreement, A424—meant that the Governing Agreements must control in the event of conflict between those Agreements and the Settlement Agreement, A53-55.

For the reasons detailed in Tilden Park's opening brief, the trial court was wrong to read the Settlement Agreement write-up instruction as a mere "gap filler." Dkt. 58 at 15-40. Unlike many clauses of the Settlement Agreement that defer to the Governing Agreements, the Settlement Agreement's uniform write-up rule controls over any contrary Governing Agreement provisions. Accordingly, "each class of securities . . . to which [] losses have been previously allocated"—including those classes with zero balance certificates—is entitled to be written up, regardless of the write-up rules in the Governing Agreements. A418-419.

B. Under the Governing Agreements, Zero Balance Certificates Are Eligible To Be Written Up

1. *The Trial Court Correctly Held That the Governing Agreements Permit the Writing Up of Zero Balance Certificates*

Even if the trial court's interpretation of Section 3.06(b) were correct, zero balance certificates are still eligible to be written up and, as a natural consequence,

to receive subsequent distributions. While the trial court incorrectly concluded that the Governing Agreements control the Settlement write-up process, it correctly decided that those contracts, too, by their terms, "provide for the balance of all classes of certificates to be written up by subsequent recoveries." A63; *see also* A3537. Under those contracts, a certificate's entitlement to write-ups does not depend on that certificate's current balance. For example, Section 5.04(b) of the BSABS 2005-AQ2 PSA requires Trustees to write up certificates to account for subsequent recoveries based on the certificates' payment priority, not on their previous balance:

> If, after taking into account such Subsequent Recoveries, the amount of a Realized Loss is reduced, the amount of such 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, but not by more than the amount of Realized Losses previously allocated to that Class of Certificates pursuant to Section 5.05[.] . . . The amount of any remaining Subsequent Recoveries will be applied to increase the Certificate Principal Balance of the Class of Certificates with the next highest payment priority, up to the amount of such Realized Losses previously allocated to that Class of Certificates pursuant to Section 5.05, and so on.

A3537, BSABS 2005-AQ2 PSA § 5.04(b). That clause makes no exception for certificates with zero balances. Nor does it make any distinction between certificates that are "retired" and certificates that are not. Rather, all certificates, regardless of balance or "retired" status, must be written up. Because that clause is "complete, clear and unambiguous, it must be enforced according to its plain

meaning." *Littleton Constr. Ltd. v. Huber Constr. Inc.*, 27 N.Y.3d 1081, 1083 (2016). The trial court thus correctly concluded that those Governing Agreements' write-up terms require writing up certificates with current balances of zero.

The trial court also correctly held that clauses limiting distributions to "retired" certificates do not affect whether those certificates may be written up. Just as the write-up terms say nothing about retired certificates, it noted, the terms about retired certificates "do not address write-ups of certificate balances in connection with subsequent recoveries." A63. For example, Section 5.04(a) of the BSABS 2005-AQ2 PSA purports only to affect whether certificates receive distributions, not whether they receive write-ups:

> [O]n any Distribution Date after the Distribution Date on which the Certificate Principal Balance of a Class of Class A Certificates or Class M Certificates has been reduced to zero, that Class of Certificates will be retired and will no longer be entitled to distributions, including distributions in respect of Prepayment Interest Shortfalls or Basis Risk Shortfall Carry Forward Amounts.

A3536, BSABS 2005-AQ2 PSA § 5.04(a). While those Governing Agreements state that zero balance certificates "will be retired and will no longer be entitled to distributions," they say nothing about whether those certificate balances may later be increased. Under *expressio unius* principles, the Governing Agreements' choice to prohibit distributions, but not write-ups, "must be assumed to have been intentional." *U.S. Fid. & Guar. Co. v. Annunziata*, 67 N.Y.2d 229, 233 (1986) (citation omitted). Thus, even assuming the Governing Agreements control the

write-up process, the trial court correctly held that certificates with zero balances should be written up even if a given Governing Agreement has a clause limiting "distributions" to "retired" certificates.

As the trial court pointed out, this result makes sense in light of the Governing Agreements' overall purpose. Because "subsequent recoveries" like the Settlement Payment are "typically unexpected recoveries" from mortgage loans with losses, *In re Bank of N.Y. Mellon*, 56 Misc. 3d 210, 218 (Sup. Ct. N.Y. Cnty. 2017), those recoveries are generally used, as the trial court put it, to "compensate[ ] investors for losses in connection with the mortgage loans" in the Trusts. A64. And because the Governing Agreements apply "realized losses" to certificates to reduce their certificate balances, the reason those certificates balances are zero is that they have incurred losses in the past. *See, e.g.*, A3540, BSABS 2005-AQ2 PSA § 5.05(b) ("Any allocation of Realized Losses to a class of Certificates . . . shall be made by reducing the Certificate Principal Balance or Uncertificated Principal Balance thereof by the amount so allocated.").[10] Thus, writing up certif-

[10] Because certificate balances are also reduced via distributions, certificates often reach a balance of zero because they have been paid in full. (In that event, the certificates are not only retired; they must also be surrendered and cancelled. *See* p. 29*, infra*.) In this case, however, the reason certificate balances are zero is that each relevant trust has incurred cumulative realized losses greater than the balance of these certificates. *See, e.g.*, A3588-3589 (showing cumulative realized losses for the BSABS 2007-HE6 trust greater than the initial certificate balance for classes of certificates that are now zero balance).

icates with zero balances comports not only with the Governing Agreements' plain text, but also with those agreements' overall structure and purpose, by compensating certificates that have incurred losses.[11]

2. *HBK's Arguments About "Retired" Certificates Fail*

In the face of the Governing Agreements' plain text, HBK tries to argue that zero balance certificates may never be written up. HBK Br. 27-35. HBK does not claim that the Governing Agreements explicitly limit the write-up of such certificates (because they do not). Instead, HBK stakes its argument solely on the fact that the Governing Agreements say that a certificate whose balance is reduced to zero is "retired" and "no longer entitled to distributions." HBK Br. 28. But that single phrase cannot bear the weight that HBK seeks to place on it.

HBK asserts without citation to the Governing Agreements that a "retired" certificate "no longer has any rights, whether to distributions, write-ups, or anything else." HBK Br. 30. But that is not what the Governing Agreements say.

[11] HBK tries to cast the trial court's passing comments on this topic as an attempt to "rewrite" the Governing Agreements. HBK Br. 33-34. This misreads the opinion below. As the trial court held, the Governing Agreements' plain text unambiguously requires writing up zero balance certificates. *See* A62-63*;* pp. 24-27, *supra*. That the plain text also serves an important goal of both the Governing Agreements and the Settlement Agreement is more reason to enforce that plain text as written, not less. In any event, the trial court did not purport to rely on contractual purpose alone. *See* A64 ("not[ing]," but not relying on, the fact that "[t]he write-up provisions of the Trusts are consistent with the purpose of the Settlement Agreement").

Those agreements contain no definition of "retired" certificates, let alone a definition suggesting that those certificates permanently lose all rights. To the contrary, the Governing Agreements do supply a different label for certificates that have permanently lost their rights: Such certificates are "cancelled," rather than merely "retired."

For example, the Governing Agreements' terms for winding up these trusts describe how certificates will have no rights after the trust's termination because those certificates will be "surrender[ed] for . . . cancellation." *See, e.g.,* A14454, BSABS 2006-HE1 PSA § 10.02. Similarly, the Trustee must cancel lost or mutilated certificates to formally denote that those certificates no longer have any rights. *See, e.g.*, A14427, BSABS 2006-HE1 PSA § 6.03. And when a class of certificates has been paid in full—and thus no longer has rights to assert—certificateholders must surrender their certificates for cancellation when they receive their final distribution. *See, e.g.,* A14454, BSABS 2006-HE1 PSA § 10.02 (discussing mechanics of "surrender[ ] . . . for cancellation"). In each instance, "cancelled" certificates must be destroyed. *See e.g.*, A14421, BSABS 2006-HE1 PSA § 6.02(a) (providing that any certificates that are "surrendered for registration of Transfer or exchange shall be canceled and subsequently destroyed); A14427, BSABS 2006-HE1 PSA § 6.03 (destruction of lost or mutilated certificates).

The Governing Agreements further provide that all properly-executed certificates which have not been cancelled or exchanged are "Outstanding." *See*, *e.g.*, A14311, BSABS 2006-HE1 PSA (defining "Outstanding" certificates). It follows that a "retired" certificate, having been neither cancelled nor exchanged, is still "Outstanding." Such a certificate is not permanently stripped of all rights, as HBK suggests; rather, "retired" certificates lose the right to distributions so long as—and only so long as—their balance is zero. Principally, a retired certificate may not receive the distributions it would otherwise receive under the ordinary distribution waterfall by virtue of having a positive Certificate Principal Balance. *See, e.g.*, A3532-3537, BSABS 2005-AQ2 PSA § 5.04(a)(2) (distributions shall be made in turn to each class of certificates "until the Certificate Principal Balance thereof is reduced to zero"). A retired certificate is also barred from receiving certain additional types of distributions, to which it might otherwise be entitled despite its zero balance, such as "distributions in respect of Prepayment Interest Shortfalls or Basis Risk Shortfall Carry Forward Amounts." A3536.[12]

[12] Such payments may flow to zero balance certificates because they are not necessarily tied to the "Certificate Principal Balance." For example, payments in respect of the Basis Risk Shortfall Carry Forward Amount, which are distributed through the excess cashflow waterfall, are paid based on the amount available in the "Reserve Fund," not the "Certificate Principal Balance" of any class. *See, e.g.*, A3535-3536, BSABS 2005-AQ2 PSA § 5.04(a)(3).

Crucially, nothing in the Governing Agreements bars a retired certificate from regaining all of its rights to receive distributions if and when it ceases to have a zero balance. To the contrary, that is precisely what the Governing Agreements' write-up rules direct: Once a certificate has its Certificate Principal Balance increased, it is no longer "retired" and is thus once more entitled to distributions. *See* p. 30, *supra*. Thus, what it means for a certificate to be "retired" is nothing more or less than that such certificate is not entitled to certain distributions as long as—and only as long as—its Certificate Principal Balance is zero. The Court should reject HBK's contrary reading of "retired" because it fails to read the Governing Agreements as a whole and take the concept of "Certificate Principal Balances" into account.

HBK's argument also defies basic principles of interpretation. Drafters of both statutes and contracts are presumed not to "hide elephants in mouseholes." *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001); *Haar v. Nationwide Mut. Fire Ins. Co.*, 34 N.Y.3d 224, 231 (2019) (same); *see Gallo v. Moen, Inc.*, 813 F.3d 265, 269 (6th Cir. 2016) (applying this principle to contract interpretation). If the Governing Agreements' drafters meant to totally prohibit certificates with zero balances from being written up, it is not plausible that they would have done so through an oblique reference to the undefined term "retired" rather than saying so explicitly. HBK's reading of the term "retired" causes needless tension with the

rest of the Governing Agreements that the Court should avoid. *See Nat'l Conversion Corp. v. Cedar Bldg. Corp.*, 23 N.Y.2d 621, 625 (1969) ("All parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency.")

Moreover, if there is "an inconsistency between a specific provision and a general provision of a contract . . . the specific provision controls." *Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46 (1956). A statement that certificates with zero balances will be "retired"—without specifying what "retire[ment]" means—is far more general than the Governing Agreements' specific and uniform rules requiring the write-up of all certificates. If there were any conflict between the two clauses, the Governing Agreement's write-up rules would prevail.

HBK cites two cases from the first half of the 20th century discussing "retired" stock certificates. HBK Br. 30 (citing *Application of Silberkraus*, 250 N.Y. 245 (1929); *Zahn v. Transamerica Corp.*, 63 F. Supp. 243, 246 (D. Del. 1945)). But HBK fails to show how the meaning of "retired" corporate stock in the 1920s or 1940s sheds any light on the meaning of "retired" RMBS trust certificates almost a century later. *See Silberkraus*, 250 N.Y. at 243 (interpreting section 36 of New York's now-defunct Stock Corporation Law, which provided

rules for "retiring" stock);[13] *Zahn*, 162 F.2d at 45-46 (addressing the power of corporate directors under 1940s Kentucky law to rescind a call for the retirement of corporate stock). While the word may be the same, the context is entirely different. *See Walter A. Stanley & Son, Inc. v. Trustees of Hackley Sch.*, 42 N.Y.2d 436, 440 (1977) ("the same or similar words" do not "necessarily have the same meaning in another context").

HBK argues that the word "retired" must mean "ineligibility for write ups" to prevent that word from superfluity. HBK Br. 29. Because the same sentence says that zero balance certificates will be both "retired" and "no longer . . . entitled to distributions," HBK urges, the phrase "retired" must mean something other than being ineligible for distributions. *Id.* at 29-30. Even if that were correct, however, it does not follow that that something else must be what HBK wants it to be—*i.e.*, "no longer hav[ing] any rights." *Id.* at 30. HBK's logic is also backwards. If HBK were correct, and a "retired" certificate has no rights to distributions, write-ups, or anything else, it would be superfluous for the contract to go on and say that "retired" zero balance certificates are ineligible for distributions. The more natural way to reconcile the two phrases HBK invokes is simply that "retirement" means ineligibility for distributions so long as a certificate has a zero balance. That the

[13] The New York Legislature repealed the Stock Corporation Law in 1967 and replaced it with the modern Business Corporation Law. *See* 1966 N.Y. Laws, ch. 664, §§ 16, 17.

latter phrase explains the former's meaning does not make the former "superfluous." *See Levine v. Golub Corp.*, 21 A.D.2d 38, 42 (3d Dep't 1964), *aff'd*, 15 N.Y.2d 615 (1964).

HBK next observes that certain other Governing Agreements contain explicit language "purporting to override the retirement provision applicable to Zero Balance Classes." HBK Br. 31. HBK does not explain why the terms of separate contracts, with different drafters, are relevant to the meaning of the Governing Agreements at issue here. And HBK's examples are one-sided: As Tilden Park observed in the trial court, other trusts outside the Settlement Agreement explicitly limit write-ups to bonds that have a nonzero certificate balance. *See* A3601, 3619, GE-WMC 2006-1 PSA §§1.01, 4.01(g)) (applying write-ups to bonds with the "Highest Priority," which is defined in turn as the most senior bonds "then outstanding with a Certificate Principal Balance greater than zero"). The fact that other deal parties chose other ways to deal with zero balance certificates in other trusts does not change the plain text and structure of these contracts, which provide for writing up zero balance certificates in these trusts.

HBK also invokes the fact that, under the Governing Agreements' write-up terms, write-ups shall be applied in order of "'payment priority'" and "'in accordance with [each class of certificates'] respective Percentage Interest.'" HBK Br. 31 (quoting A3537, BSABS 2005-AQ2 PSA §5.04(b)). Urging that "a

Zero Balance Class has neither payment priority nor a percentage interest," HBK asserts that zero balance certificates cannot be written up. *Id.* But those arguments, too, ignore what the Governing Agreements actually say. "Payment priority" is an obvious reference to the order of payments among the classes of certificates set out in the Governing Agreements' distribution terms, not the specific entitlement of any given certificate to trust capital on a particular distribution date (a concept covered by the definition of "Certificate Principal Balance," *see* pp. 3-4, *supra*). *See* A3532, BSABS 2005-AQ2 PSA §5.04(a) (stating that funds will be distributed "in the following order of priority").

The "Percentage Interest" definition also has no bearing on this issue. That term is defined in the contract HBK cites as "the Percentage Interest set forth on the face [of the Certificate] or the percentage obtained by dividing the Denomination of such Certificate by the aggregate of the Denominations of all Certificates of such Class." A3275. "Denomination," in turn, is defined as "the amount set forth on the face [of each Certificate] as the 'Initial Principal Balance or Initial Notional Amount of this Certificate.'" A3270. The "face value" of a certificate and its "Certificate Principal Balance" are entirely distinct concepts. HBK does not explain how the face value of a given certificate could change in response to that certificate's principal balance being reduced to zero.

Finally, HBK argues that the use of the term "notwithstanding" in the Retired Class provision "'signals the drafter's intention'" to "'override conflicting provisions.'" HBK Br. 32-33 (quoting *CNH Diversified Opportunities Master Account, L.P. v. Cleveland Unlimited, Inc.*, —N.Y.3d—, 2020 WL 6163305, at *6 (Oct. 22, 2020). But as HBK acknowledges, the full phrase is "notwithstanding the foregoing." HBK Br. 32; A3536, BSABS 2005-AQ2 PSA § 5.04(a). The Section 5.04(b) write-up instructions appear in the Governing Agreements after the Section 5.04(a) Retired Class provision; they are subsequent, not "foregoing," provisions. The "notwithstanding" phrase thus does not affect the Governing Agreements' other terms that permit zero balance certificates to receive write ups.

CONCLUSION

This Court should affirm those parts of the trial court's decision and order holding that: (1) the HBK trusts are "Write-Up First" trusts, and (2) zero balance certificates are entitled to be written up.

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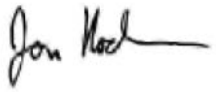
Respectfully submitted,



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