To be Argued by:
DANIELLE L. ROSE
(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

RESPONSIVE BRIEF FOR HBK PARTIES

Of Counsel:
DANIELLE L. ROSE
ZACHARY D. ROSENBAUM
DARRYL G. STEIN

KOBRE & KIM LLP
800 Third Avenue
New York, New York 10022
(212) 488-1200
danielle.rose@kobrekim.com

– and –

PERKINS COIE LLP
1155 Avenue of the Americas, 22nd Floor
New York, New York 10036
(212) 262-6900
mgilmore@perkinscoie.com

Of Counsel:
MARTIN GILMORE
SEAN CONNERY

Attorneys for Appellant-Respondent U.S. Bank N.A., solely in its capacity as NIM Trustee for the HBK Trusts (the "HBK Parties")

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 Parties")

– 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")

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

U.S. Bank, solely in its capacity as Indenture Trustee for certain NIM Trusts holding direct interests in the HBK Trusts and solely at the direction of HBK, by its undersigned counsel, respectfully submits this brief to oppose the appeal by Tilden Park Investment Master Fund LP, Tilden Park Management I LLC, and Tilden Park Capital Management LP (together, "Tilden Park"), Dkt. 58, from the Decision and Order of Supreme Court, entered February 13, 2020.[1]

PRELIMINARY STATEMENT

The Settlement Agreement did not alter or otherwise amend any trust governing agreements. Its drafters made clear that the Settlement Agreement "is not intended to, and shall not be argued or deemed to constitute, an amendment of any term of any Governing Agreement." Indeed, Tilden Park acknowledges that, in executing the Settlement Agreement, the RMBS trustees did not undertake to amend each governing agreement. Yet Tilden Park's appeal asks this Court to find that the

[1] All capitalized terms not defined herein shall have the meaning set forth in the HBK Parties' Opening Brief. *See* Dkt. 59. As explained in footnote 1 of the HBK Parties' Opening Brief (which footnote the HBK Parties incorporate here by reference), U.S. Bank, solely in its capacity as Indenture Trustee of the HBK NIM Trusts (the "NIM Trustee"), and solely at the direction of HBK, submits this memorandum reflecting the positions of HBK. Further, U.S. Bank's capacity in its role as NIM Trustee hereunder is a separate and distinct capacity from that of U.S. Bank in its role as Petitioner and Trustee of the RMBS trusts at issue in the underlying settlement.

Settlement Agreement does precisely what it states it does not: require the RMBS trustees to apply terms directly contrary to the governing agreements.

Tilden Park's argument is wrong and should be rejected. Requiring the RMBS trustees to apply the Settlement Agreement's "write-up" provision in contravention of a conflicting governing agreement write-up term would alter the order and manner for applying Subsequent Recoveries and increasing class Certificate Principal Balances. As Supreme Court correctly held, the Settlement Agreement could not—and explicitly did not—change the write-up provisions set forth in the governing agreements. Instead, the Settlement Agreement's "write-up" provision applies only where the trust governing agreements do not supply the applicable terms. Supreme Court's decision on this issue should be affirmed.

RELEVANT BACKGROUND

The Settlement Agreement provides that each trust's Allocable Share shall be (i) treated under the respective governing agreement as "a 'subsequent recovery' relating to principal proceeds available for distribution on the immediately following distribution date," and (ii) distributed "in accordance with the distribution provisions of the Governing Agreements." (R. 418 (Settlement Agreement § 3.06(a)).)

The Settlement Agreement also sets forth a procedure for increasing the class Certificate Principal Balances upon receipt of Subsequent Recoveries, as some governing agreements are silent on this process. (*See* R. 418-19 (Settlement

Agreement § 3.06(b)) (the "Settlement Agreement Write-Up Provision"); R. 43 (Order at 18) (discussing trusts that are silent regarding write-up methodology).) By its terms, the Settlement Agreement does not "amend[] . . . any term of any Governing Agreement." (R. 424 (Settlement Agreement § 7.05); *see also* R. 53 (Order at 28) ("[T]he Settlement Agreement does not supersede or override the Governing Agreements.").)

In the Article 77 proceeding, the RMBS trustees sought Supreme Court instruction on whether to apply the Settlement Agreement Write-Up Provision if it differs from the terms of a governing agreement's write-up provision. (R. 378 ¶41).) Supreme Court held that the Settlement Agreement Write-Up Provision—Section 3.06(b)—does not override conflicting governing agreement terms but rather applies only where "the relevant PSA is silent as to the write-up mechanics." (R. 53 (Order at 28).) It thus acts as "a 'gap filler.'" (*Id.*)

On appeal, Tilden Park argues that the Settlement Agreement Write-Up Provision requires that "[e]ach class's balance should be written up in the reverse order of previously allocated losses" regardless of the order specified in the governing agreements. (Tilden Park Br. at 1.) Tilden Park urges this Court to reverse Supreme Court's ruling as to "two distinct groups of trusts": (i) "trusts whose Governing Agreements contain write-up instructions that apply only to 'subordinate' (or Class M/B) certificates," and not to senior certificates; and

(ii) trusts that "require the recovery to be written up in order of 'payment priority' rather than in the reverse order of previously allocated losses" as provided by the Settlement Agreement. (Tilden Park Br. at 8.)

Tilden Park's appeal does not directly implicate the Retired Class Provision in the HBK Trust PSAs. That provision states that certain classes of certificates "will be retired and will no longer be entitled to distributions" on any "Distribution Date after the Distribution Date on which the Certificate Principal Balance . . . has been reduced to zero." (R. 36 (Order at 11 (discussing Petition)).)

As to the Retired Class Provision, Tilden Park argued below that the Settlement Agreement Write-Up First Provision supersedes any contrary terms in the governing agreements, including the Retired Class Provision. Supreme Court rejected that argument. But Supreme Court nevertheless ruled in Tilden Park's favor. It adopted Tilden Park's alternative argument, that "the Retired Class provisions of the Governing Agreements, even if not 'overridden' by the Settlement Agreement, do not preclude write-ups of zero balance certificates or distributions after such write-ups." (R. 62 (Order at 37).)

In its appeal here, Tilden Park does not seek to disturb Supreme Court's ruling on the HBK Trust PSAs' Retired Class Provision, as it prevailed on its alternative argument below. Yet by asking this Court to order that the Settlement Agreement Write-Up Provision supersedes any contrary provision in the governing agreements,

Tilden Park may be seeking relief that could bear on the Retired Class Provision. Thus, to the extent Tilden Park's appeal could be construed to argue that the Settlement Agreement's Write-Up Provision alters the Retired Class Provision or the application thereof, the HBK Parties oppose Tilden Park's appeal.[2]

ARGUMENT

THE RELIEF TILDEN PARK SEEKS WOULD REQUIRE THIS COURT TO IGNORE SETTLED NEW YORK LAW ON CONTRACT INTERPRETATION

This Court should reject Tilden Park's appeal, as it urges this Court to ignore settled law on contractual interpretation. Tilden Park argues that this Court can both give effect to the Settlement Agreement's term explicitly stating that it does not amend any governing agreements and, simultaneously, require the RMBS trustees to apply Settlement Agreement terms that directly conflict with those set forth in the governing agreements. This argument should be rejected.

---

[2] As shown in the HBK Parties' Opening Brief, the Retired Class Provision prohibits distributions to classes on any date after their Certificate Principal Balances have been reduced to zero, regardless of the write-up methodology applied. *See generally* HBK Parties' Opening Br. at 27-35. Consequently, even if Tilden Park were to prevail on its appeal here, Zero Balance Classes of the HBK Trusts should still not receive any distributions. Nevertheless, the HBK Parties submit this opposition in an abundance of caution.

Supreme Court correctly held that, where the governing agreements specify how to address a trust administration or distribution matter, the RMBS trustees should adhere to the governing agreements. Likewise, Supreme Court also correctly held that, where a governing agreement is silent as to an administration or distribution issue, the RMBS trustees should apply Settlement Agreement terms expressly addressing the relevant methodology.

Supreme Court's interpretation of the Settlement Agreement correctly applies New York law. Under New York law, contracts must be interpreted to give meaning to each term. *See Natixis Real Estate Capital Tr. 2007-HE2 v. Natixis Real Estate Holdings, L.L.C.*, 149 A.D.3d 127, 134 (1st Dep't 2017) (interpreting RMBS PSA based on the well-established principle that "contract provisions should be harmonized, if reasonably possible, so as not to leave any provision without force and effect . . . .") (internal citation and quotation marks omitted). Supreme Court's decision correctly applies this basic tenet. It gives effect to Section 7.05, which states that the Settlement Agreement does not amend any governing agreement term, and to the Settlement Agreement Write-Up Provision, by applying it only where the governing agreements are silent.

Tilden Park, by contrast, asks this Court to render Section 7.05 meaningless. Tilden Park concedes—as it must—that the Settlement Agreement "does not 'amend' the Governing Agreements." (Tilden Park Br. at 25.) Indeed, it

acknowledges that there is a "formal process set forth in each Governing Agreement by which the parties could alter those agreements' terms," and it further acknowledges that the RMBS trustees did not undertake to apply those processes by executing the Settlement Agreement. (*Id.* at 27.)

Tilden Park asserts, however, that applying the Settlement Agreement to implement new terms that conflict with the previously executed governing agreements does not amend the governing agreements. Tilden Park claims it is not an amendment because the Settlement Agreement administration and distribution is merely "a specific, non-recurring situation not contemplated by those prior agreements." (*Id.* at 28.) And Tilden Park points to other Settlement Agreement provisions—undisputed by any party to the Article 77 proceeding—to argue that these provisions also purportedly conflict with the governing agreements and, therefore, the Settlement Agreement must override the governing agreements. None of Tilden Park's arguments has any merit.

First, no matter what Tilden Park calls it, the relief Tilden Park asks this Court to grant is an amendment. Tilden Park asks that the RMBS trustees increase class Certificate Principal Balances based on terms set forth in a later executed contract (the Settlement Agreement) that conflict with the terms of earlier-executed governing agreements. This is a paradigmatic contractual amendment which the Settlement Agreement, on its face, forswears.

Second, there is no "just-one-time" exception to a binding agreement. And, in any event, the relief Tilden Park seeks is not limited to a one-time event. It has lasting consequences beyond the distribution of a trust's Allocable Share. An increase in class Certificate Principal Balances in one period can affect subsequent periods. Once a class Certificate Principal Balance is increased, it may be eligible to receive future trust distributions long after a trust's Allocable Share of the settlement is distributed. As a result, in subsequent periods, some classes of certificates may receive payments that they otherwise would not while other classes may not receive payments that they otherwise would have received.

Third, Tilden Park's other contractual interpretation arguments should be rejected. This is not a matter of construing a single agreement, where this Court must resolve "an inconsistency between a specific provision and a general provision," but of applying a later agreement that expressly preserves and relies on earlier agreements. (*See* Tilden Park Br. at 31 (*quoting Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46 (1956)).)[3]

---

[3] Tilden Park asserts in various footnotes that the Settlement Agreement supersedes "prior agreements" between the "Parties," seeming to imply that this would include the governing agreements. *See, e.g.*, Tilden Park Br. at 7 n.4, 11 n.5, & 29 n.9 (citing Settlement Agreement Section 7.13). But that provision is explicitly "subject to Section 7.05" and in any event the Parties to the Settlement Agreement (JPMorgan, certain investors, and the trustees) are not the same as the parties to each trust's governing agreement.

And as to the other, unrelated Settlement Agreement provisions, Tilden Park fails to establish that any of these supposedly conflicting provisions clash with the governing agreements. For instance, as Tilden Park acknowledges, the Settlement Agreement's requirement that residual interests will "be maintained in the collection or distribution account" for further distribution maintains the REMIC (or tax) status of the trusts. (*See* R. 418 (Settlement Agreement § 3.06(a)); Tilden Park Br. at 19 (discussing SEC regulations).) This is consistent with the governing agreements, which generally require that the affairs of the trust fund be conducted "at all times . . . so as to maintain the status of each REMIC formed [t]hereunder as a REMIC under the REMIC Provisions." (*See, e.g.*, R. 13159 (BSABS 2005-HE3 PSA § 9.12).)

By contrast, following the Settlement Agreement Write-Up Provision rather than the governing agreements' write-up provisions would impermissibly change the certificateholders' respective rights and obligations. The governing agreements establish these rights, including how certificate balances must be maintained, and those terms can only be altered by amending those agreements pursuant to the procedures set forth therein. Abandoning the procedure for adjusting those balances in favor of the procedure set out in a different agreement will help some certificateholders and disadvantage others. Such a change would require amending those contracts, which the Settlement Agreement cannot do.

CONCLUSION

For the foregoing reasons, this Court should affirm Supreme Court's holding that the Settlement Agreement Write-Up Provision does not override conflicting governing agreement provisions.

Dated: New York, New York
December 2, 2020

KOBRE & KIM LLP

By: _____
Danielle L. Rose
Zachary D. Rosenbaum
Darryl G. Stein
800 Third Avenue
New York, NY 10022
Tel: (212) 488-1200
E-mail: danielle.rose@kobrekim.com

PERKINS COIE LLP

By: _____
Martin Gilmore
Sean Connery
1155 Avenue of the Americas
22nd Floor
New York, NY 10036-2711
Tel: (212) 261-6823
E-mail: mgilmore@perkinscoie.com

Attorneys for Appellant-Respondent U.S. Bank N.A., solely in its capacity as NIM Trustee for the HBK Trusts

PRINTING SPECIFICATION STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

Type: A proportionally spaced typeface was used, as follows:

Name of Typeface: Times New Roman

Point Size: 14

Line Spacing: Double

Word Count: The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 2,100.

Dated: New York, New York
December 2, 2020

KOBRE & KIM LLP

By: _____

Danielle L. Rose
800 Third Avenue
New York, NY 10022
(212) 488-1200

Attorneys for Appellant-Respondent U.S. Bank N.A., solely in its capacity as NIM Trustee for the HBK Trusts