

E. PAGE ALLINSON

(Of the Bar of the State of California)

By Permission of the Court

(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),

**Appellate
Case No.:
2020-02716**

Petitioners,

(For Continuation of Caption See Inside Cover)

BRIEF FOR RESPONDENT D. E. SHAW REFRACTION PORTFOLIOS, L.L.C. (“D. E. SHAW”)

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Refraction Portfolios, L.L.C.
 (“D. E. Shaw”)*

For Judicial Instructions under CPLR Article 77
on the Distribution of a Settlement Payment

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”)

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PRELIMINARY STATEMENT

Pursuant to the Briefing Schedule Stipulation dated September 24, 2020, Nonparty-Respondent D. E. Shaw Refraction Portfolios, L.L.C. (“DESRP”), by its undersigned counsel, submits this Response Brief (“DESRP’s Response Brief”) in support of its opposition to the points raised in the Opening Briefs submitted by: (1) U.S. Bank National Association, solely in its capacity as Indenture Trustee for certain NIM Trusts holding direct interests in certain RMBS trusts and solely at the direction of HBK Master Fund L.P. (collectively, “HBK”), dated November 2, 2020 (the “HBK Brief”), and (2) U.S. Bank National Association, solely in its capacity as Indenture Trustee for certain NIM Trusts holding direct interests in certain RMBS trusts and solely at the direction of Poetic Holdings VI LLC, Poetic Holdings VII LLC, and Prophet Mortgage Opportunities LP (collectively, “Poetic and Prophet”), dated November 2, 2020 (the “Poetic and Prophet Brief”).¹

Specifically, the arguments made in DESRP’s Response Brief pertain to the SACO I Trust Mortgage-Backed Certificates, Series 2005-9 (the “SACO 2005-9 Trust”), in which DESRP holds an interest. The terms of the Governing Agreements for the SACO 2005-9 Trust are substantially identical to the relevant

¹ As the Court is aware from the Opening Briefs, the HBK Brief appeals from certain portions of the Decision and Order of the Supreme Court for the County of New York (Friedman, J.), entered February 13, 2020.

terms of the HBK Trusts² with respect to (1) the order of operations for distribution of the Settlement Payment and “writing up” certificates upon receipt of the Settlement Payment (the “Exhibit D Issue”)³; and (2) whether “zero balance” or “retired” certificates are entitled to be written-up upon receipt of the Settlement Payment (the “Exhibit G Issue”).

SUMMARY OF ARGUMENT

As the trial court recognized—and HBK agreed (*see* HBK Brief at 8)—Section 3.06(a) of the Settlement Agreement requires the Petitioners to follow the order of operations provided by each Trust’s Governing Agreements. A30-35. The trial court further held that if a Trust’s Governing Agreements lack an order of operations, the Settlement Agreement provides a “gap-filler” rule: that the relevant Petitioners should follow the Pay-First Method. A34. Thus, each Trust’s Governing Agreements individually determine whether the relevant Petitioner should apply the Pay-First Method or the Write-Up First Method when distributing the Allocable Shares of the settlement to such Trust, and there is no uniform rule that applies across the board to all Settlement Trusts.

² The terms “HBK Trusts” and “Poetic and Prophet Trusts” as used herein shall have the definitions ascribed to them in the HBK Brief and the Poetic and Prophet Brief, respectively.

³ HBK is the only party that submitted an appeal with respect to the trial court’s holding on the Exhibit D Issue.

The trial court correctly held that the Governing Agreements for the HBK Trusts and the SACO 2005-9 Trust addressed here require that write-ups occur before distributions. The HBK Brief fails to raise any arguments that call that holding into question or warrant its reversal; moreover, HBK has expressly limited its appeal on the Exhibit D Issue to the HBK Trusts, which do not include the SACO 2005-9 Trust. (*See* HBK Brief at 1 n. 1, Doc. 59.) As such, there has been no appeal of the Exhibit D Issue with respect to the SACO 2005-9 Trust and there is no basis to reverse the trial court's opinion with respect to the Exhibit D Issue as to the SACO 2005-9 Trust. In this regard, to the extent this Court reverses the trial court's holding with respect to the Exhibit D Issue, such reversal should be limited to the HBK Trusts only, as HBK, the only party to appeal such issue, has expressly limited its appeal to the HBK Trusts.

DESRP files this Response in an abundance of caution, both to note this fact and to make clear that—should the Court disagree and review the Exhibit D Issue as to Trusts other than the HBK Trusts—the Court still should affirm the trial court's opinion with respect to this Issue.

The trial court also correctly held that certificates with zero balances should be written up to reflect the Settlement Payment. The HBK Brief and the Poetic and Prophet Brief fail to raise any arguments that demonstrate that such holding was

incorrect or warrant its reversal. Thus, this Court should affirm the trial court's opinion with respect to the Exhibit G Issue, as well.

In support of same, DESRP joins in the arguments contained in Sections I and II of the response brief of Appellant-Respondent Tilden Park⁴ (filed December 2, 2020) ("Tilden's Response Brief"), setting forth the bases for this Court to affirm the trial court's opinion as to the Exhibit D Issue and the Exhibit G Issue.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

1. Whether the Governing Agreements for the HBK Trusts require the Petitioners to use the "Write-Up First Method" of applying the Settlement Payment to write up the at-issue Certificates' Principal Balances before distribution, given that those Governing Agreements' definition of "Certificate Principal Balance" requires write-ups to occur before the "Certificate Principal Balance" is calculated and used to make distributions?

Answer: The trial court correctly answered in the affirmative.

2. Whether "zero balance" or "retired" certificates for the HBK Trusts and the Poetic and Prophet Trusts are entitled to be written up, given that: (a) the Settlement Agreement explicitly requires all certificates to be written up

⁴ 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.

(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 do not prohibit such write-ups?

Answer: The trial court correctly answered in the affirmative.

COUNTERSTATEMENT OF THE CASE AND ARGUMENT

As stated above, in all aspects relevant to the Exhibit D Issue and Exhibit G Issue, the Governing Agreements for the SACO 2005-9 Trust are substantially similar to the Governing Agreements for the HBK Trusts and the Poetic and Prophet Trusts. As such, DESRP joins in all of the arguments raised in Tilden's Response Brief with respect to the Exhibit D Issue and the Exhibit G Issue and adopts by reference Tilden Park's Counterstatement of the Case with respect to such Issues.⁵

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

⁵ DESRP does not, however, join in footnote 2 of Tilden's Response Brief. As detailed in this Response Brief, HBK specifically limited its appeal to the HBK Trusts, and no party appealed the Exhibit D Issue with respect to any other Trusts. Thus, it is DESRP's position that to the extent this Court adopts the arguments advanced by HBK and reverses the trial court's holding with respect to the Exhibit D Issue, such holding would apply only to the HBK Trusts and no others. To wit, the Exhibit D Issue, which all parties and the trial court recognized was a Trust-specific issue dictated by a particular Trust's Governing Agreements (A30-35), has not been placed at issue with respect to any Trusts other than the HBK Trusts.

For the reasons stated in Tilden’s Response Brief, the trial court’s ruling with respect to the Exhibit D Issue should be affirmed. (*See* Tilden’s Response Brief, Section I at 11-21.) Namely, the trial court correctly ruled that the definition of “Certificate Principal Balance” in the HBK Trusts’ Governing Agreements requires the use of the write-up first method, as that definition requires that the Petitioners account for, and apply, write-ups before any distributions of principal occur. A55-56.

The Governing Agreements for the SACO 2005-9 Trust contain a substantially identical definition of the term “Certificate Principal Balance” as the definitions contained in the Governing Agreements for the HBK Trusts. In particular, the definition of Certificate Principal Balance in the PSA for the SACO 2005-9 Trust similarly dictates a write-up first order of operations. The full definition of Certificate Principal Balance provides that:

As to any Certificate (other than the Class C Certificates and 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, Class M, or Class B 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. . . .

A885, SACO 2005-9 Trust PSA § 1.01 (definition of “Certificate Principal Balance”). Because the allocation of Subsequent Recoveries must be applied to

calculate the Certificate Principal Balance of a certificate “as of” the Distribution Date, and thus before any distributions are made, the write-up first order of operations must apply.

To the extent this Court holds that the trial court’s ruling should be reversed with respect to the Exhibit D Issue, such holding should be limited to the HBK Trusts and not applied to any other Settlement Trusts, including without limitation the SACO 2005-9 Trust. Critically, the “HBK Trusts,” to which the HBK Brief explicitly limits its appeal, do not include the GPMF 2006-AR1 Trust. (*See* HBK Brief at 1 n. 1, Doc. 59.) Accordingly, the Exhibit D Issue has not been placed at issue in this appeal with respect to the GPMF 2006-AR1 Trust or any Settlement Trusts other than the “HBK Trusts” (HBK Brief at 1 n. 1, Doc. 59). *See Harabedian v. New York Hosp. Medical Center*, 35 A.D.3d 915, 916 (3rd Dep’t 2006) (holding the issues on appeal were limited by the appellant’s brief); *Ali Saleh Moshad Ali v. City of New York*, 122 A.D.3d 888, 889-890 (2nd Dep’t 2014) (holding plaintiffs appeal were limited only to those portions of the order raised in plaintiff’s brief); *Shakespeare v. Fine Arts Development Laboratories Co-op., Inc.*, 71 A.D.2d 592 (1st Dep’t 1979) (holding issues not argued in the brief are deemed waived and abandoned).

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

For the reasons stated in Tilden’s Response Brief, the trial court’s ruling with respect to the Exhibit G Issue should be affirmed. (*See* Tilden’s Response Brief, Section II at 22-36.) Namely, the trial court correctly held that certificates with zero balances should be written up to reflect the Settlement Payment, pursuant to the terms of the applicable Governing Agreements.

In the alternative, DESRP agrees with Tilden Park, and joins in Tilden Park’s position, that this Court should affirm the trial court’s holding on the basis that the Settlement Agreement controls write-ups and requires that the Trustees write up all certificates in the reverse order of previously applied losses, whether or not those certificates have zero balances or are purportedly “retired.” (*Id.* at 23-24.)

CONCLUSION

For the reasons set forth herein, and those set forth in Tilden’s Response Brief with respect to the Exhibit D Issue (Section I at 11-21) and the Exhibit G Issue (Section II at 22-36), which are adopted herein by reference, this Court should affirm the trial court’s rulings with respect to the Exhibit D Issue and the Exhibit G Issue. In the alternative, to the extent this Court agrees with HBK’s interpretation of the Exhibit D Issue for the HBK Trusts and determines that the Settlement Agreement pay first order of operations applies to the HBK Trusts, such holding should be limited to the HBK Trusts only, as no party has appealed the Exhibit D Issue with respect to any Settlement Trusts other than the HBK Trusts.

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PRINTING SPECIFICATION STATEMENT

DESRP hereby specifies pursuant to Rule 1250.8(j) of the Rules of Procedure for the Appellate Division of the Supreme Court, First Judicial Department, that this brief was prepared in Microsoft Word using a proportionally spaced typeface fourteen-point Times New Roman font. DESRP further specifies that, as calculated by Microsoft Word, this brief contains 1,985 words, excluding the table of contents, the tables of citations, and all addenda.